Superior Court of New Jersey

Appellate Division

Docket No. A-002854-24

TREVOR MILTON, *Plaintiff-Respondent,* vs. CNBC, INC., *Defendants,* NATHAN ANDERSON and HINDENBURG RESEARCH, LLC, *Defendants-Appellants*.	:	CIVIL ACTION ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DOCKET NO. BER-L-532-25 Sat Below: HON. ANTHONY R. SUAREZ, J.S.C.

BRIEF FOR DEFENDANTS-APPELLANTS

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Nathan Anderson and Hindenburg Research LLC ("Hindenburg Defendants") appeal as of right pursuant to New Jersey's Uniform Public Expression Protection Act ("UPEPA"), N.J.S.A. §§ 2A:53A-57 *et seq.*, from a May 5, 2025, decision and order of the Bergen County Superior Court (the "Decision") denying their motion seeking: (1) dismissal of Count II of the complaint filed by convicted securities fraudster Trevor Milton ("Milton") alleging aiding-and-abetting trade libel; and (2) an award of court costs, reasonable attorneys' fees, and reasonable litigation expenses.

PRELIMINARY STATEMENT

This action is Milton's latest, baseless effort to blame others for the consequences of his own duplicitous conduct that destroyed the once-high-flying, but now bankrupt, Nikola Corporation ("Nikola"), and victimized its investors through false statements touting the company's purportedly groundbreaking technology for manufacturing hydrogen trucks. Milton was no doubt enraged at the Hindenburg Defendants for exposing his brazen fraud in the September 10, 2020 investigative report: *Nikola: How to Parlay an Ocean of Lies into a Partnership with the Largest Auto OEM in America* (the "Report"). Unable to sue the Hindenburg Defendants for the Report's non-actionable, constitutionally protected opinions (that were subsequently proven true), the Complaint seeks to punish the Hindenburg Defendants by suing them for aiding

and abetting trade libel allegedly committed by CNBC, Inc. when it broadcast the October 4, 2022, "*Chasing Tesla*" episode of its docuseries American Greed, which was "based largely on allegations made by prosecutors in Milton's criminal trial and SEC filings."

The Complaint implausibly alleges, on information and belief, that prior to broadcasting the *Chasing Tesla*, CNBC sought and obtained the Hindenburg Defendants' confirmation of the Report's accuracy despite two years having elapsed since its publication, during which time a tsunami of post-publication evidence confirmed the Report's accuracy—including Milton's criminal indictment and conviction for securities fraud (which included the charge "Milton made false claims regarding nearly all aspects of Nikola's business"), civil charges brought by the SEC resulting in $125 million in fines (97% of which Milton was found personally liable for), and admissions by Nikola itself that "Hindenburg is correct in describing a number of statements by Trevor Milton as misleading or false." Thus, this case is precisely the type of meritless lawsuit brought solely to punish defendants for exercising their rights to free speech that UPEPA is meant to stop.

But despite concluding that the UPEPA applies to all of Milton's causes of action, the trial court erroneously declined to dismiss Milton's claims that CNBC committed trade libel, aided and abetted by the Hindenburg Defendants.

The court first erroneously held that Milton had adequately alleged the underlying tort of trade libel against CNBC, despite CNBC's demonstration that: (1) all of Milton's claims were time-barred claims for defamation; and (2) even if timely, Milton failed to plead actual malice and the required special damages. Those deficiencies mandated dismissal of Milton's trade libel count in its entirety, and also the dismissal of Milton's aiding and abetting claim against the Hindenburg Defendants.

The court compounded its errors by failing to dismiss the vast majority of the CNBC statements alleged in the Complaint despite concluding that they were privileged—and thus inactionable—because they "fairly summarize documents filed by or published by the federal government or parties in court filings." Given that the only statements that the court found to be actionable as trade libel were not even in the Report, Milton's aiding and abetting claim against the Hindenburg Defendants also should have been dismissed in its entirety on that basis. It was impossible for the Hindenburg Defendants to have substantially assisted CNBC with respect to allegedly libelous statements not made in the Report. Moreover, aiding and abetting libel requires a higher pleading standard and far more active participation by defendants than the minimal conduct conclusorily alleged in the Complaint that the trial court erroneously found sufficient to plead "substantial assistance."

PROCEDURAL HISTORY

On January 23, 2025, Milton commenced this action against CNBC and the Hindenburg Defendants in the Superior Court of New Jersey, Bergen County. (Da24).[1] Milton alleged that CNBC had committed trade libel (Count I) and prima facie tort (Count III) against him by broadcasting *Chasing Tesla* more than two years earlier. (Da26 at ¶ 6, Da45 at ¶ 82, Da46-53 at ¶¶ 88-113, Da56 at ¶¶ 123-28, Da57-58 at ¶¶ 137-42). Milton further alleged that the Hindenburg Defendants had also committed prima facie tort (Count III) and had aided and abetted CNBC in its alleged commission of trade libel (Count II) by: (1) allowing CNBC to use the Hindenburg logo and materials from the Report in *Chasing Tesla*; and (2) verifying to CNBC the accuracy of various allegedly false statements about Milton and Nikola that had been published in the Report. (Da34-39 at ¶¶ 41-57, Da47-48 at ¶¶ 92-94, Da56-57 at ¶¶ 129-136). The Complaint sought "compensation for the billions of dollars in damages" Milton allegedly suffered as a result of "damage to [his] professional reputation [and] relationships with existing and prospective investors and partners." (Da26 at ¶ 8, Da53-55 at ¶¶ 114-122, Da56 at ¶ 127, Da58 at ¶ 141).

[1] Pages in the Hindenburg Defendants' Appendix are cited as Da__.

The Superior Court's Decisions on Defendants' Orders to Show Cause

The Hindenburg Defendants and CNBC timely moved, by orders to show cause, to dismiss Milton's complaint pursuant to the UPEPA, N.J.S.A § 2A:53A-2. (Da389, Da329). The court held oral argument on Defendants' motions on April 23, 2025. See T 1:1-107:16.[2] On May 5, 2025, the court issued two inter-related decisions on the defendants' respective motions. (Da9, Da910). In both decisions, the court found that the UPEPA applies to Milton's causes of action against all defendants. (Da9, Da13-15, Da910, Da917-919). The court dismissed with prejudice Milton's prima facie tort causes of action against all defendants as having been asserted improperly as a substitute for other recognized causes of action. (Da10, Da23, Da911, Da952-955).

The court incorporated into the Decision that is the subject of this appeal its separate decision denying CNBC's motion to dismiss Milton's trade libel cause of action and for an award of court costs, reasonable attorneys' fees, and reasonable litigation expenses pursuant to N.J.S.A. § 2A:53A-58 (the "CNBC Decision"). (Da13, Da910-11, Da952). In the CNBC Decision, the court rejected CNBC's argument that Milton's purported trade libel cause of action is, in reality, a time-barred cause of action for defamation. (Da922-924, Da925-

[2] "T [page]:[line]" refers to the page and line of the Hearing Transcript, dated April 23, 2025.

926). The court also rejected CNBC's argument that the complaint does not sufficiently plead the special damages element of a trade libel cause of action. (Da927-931). The court further rejected CNBC's argument that the complaint fails to allege sufficient facts to plead that CNBC had acted with actual malice: that is, with knowledge that the allegedly libelous statements on matters of public concern were false, or with reckless disregard for their truth. (Da934-938).

The court did accept CNBC's argument that the vast majority of the statements challenged in the complaint constitute privileged fair reporting of the contents of civil complaints filed by and against Milton and companies affiliated with him, and of the charges set forth in the U.S. government's indictment and superseding indictment of Milton. (Da948; Da967-971[3]). Indeed, the court identified only the following allegations as identifying statements by CNBC that are not protected by the fair reporting privilege: (1) "the false and misleading depiction of Milton's early business venture, St. George Security, as fraudulent and criminal, alleging personal diversion of company funds" (Da948 citing

[3] CNBC's chart at Da967-971, which compares statements that Milton alleges to be libelous with statements in the criminal indictments and in various civil complaints, including the SEC's complaint against Milton, is properly included in the Appendix because the CNBC Decision, which is incorporated into the Decision under appeal (Da13) explicitly referenced it. *See* Da939; Rule 2:6-1(a)(2) (portions of briefs submitted to the trial court may be included in the appendix if referred to in the decision under appeal).

¶¶ 95-97 (at Da49)); and (2) "the overall portrayal of Milton as a 'corporate conman' who allegedly 'scammed business partners' and orchestrated a 'pump-and-dump' scheme." (Da948 (citing ¶¶ 89-90, 112 (at Da46, Da53)).[4] Significantly, the Report does not contain any statements that Milton diverted funds from St. George Security or that the venture was "fraudulent and criminal," nor does it include any of the statements the trial court listed in quotation marks. *See infra* at p.20. Despite concluding that the vast majority of allegedly libelous statements in *Chasing Tesla* were privileged fair reporting, the court erroneously declined to dismiss those parts of Milton's trade libel cause of action. (Da948a).

On May 8, 2025, CNBC timely appealed the CNBC Decision pursuant to N.J.S.A. § 2A:53A-57, which appeal is currently pending in this Court as Docket No. A-002791-24.

In its other May 5, 2025, Decision, which is appealed here, the court denied the Hindenburg Defendants' motion pursuant to N.J.S.A. § 2A:53A-55 to dismiss Milton's cause of action against them for aiding and abetting CNBC's alleged trade libel, and pursuant to N.J.S.A. § 2A:53A-58 for an award of court

[4] The other four paragraphs of the Complaint cited by the court set forth Milton's characterizations of the overall impression of Milton conveyed by *Chasing Tesla*, but identify no specific statements made in the documentary. (Da948 (citing ¶¶ 89-90 (at Da46), ¶¶ 95-97 (at Da49), and ¶ 112 (at Da53))).

costs, reasonable attorneys' fees, and reasonable litigation expenses. (Da9, 23a). The court incorporated its conclusions from the CNBC Decision that "Plaintiff has properly pled a case of trade libel [against CNBC] and…that the 'fair comment' and 'fair report' privileges did not prevent this Court from denying the [order to show cause] as to the trade libel claims at this stage of the proceedings." (Da13). The court rejected the Hindenburg Defendants' argument that the Complaint fails to sufficiently allege the substantial assistance element of aiding and abetting liability. (Da15-23). Despite concluding that "substantial assistance in aiding and abetting liability in New Jersey requires active, knowing, and significant involvement in the wrongful act" (Da21), the court found sufficient Milton's implausible, information and belief allegations that "in response to CNBC's request, the Hindenburg Defendants confirmed the accuracy of the Hindenburg Report, and permitted CNBC to use the Report and the Hindenburg logo in connection with the CNBC Broadcast." (Da15). In so doing, the court took "a liberal and generous approach" to the complaint, noting that "[d]ismissal is [rarely] appropriate [and] only if it is clear that the complaint states no basis for relief and that discovery would not provide one." (Da22)

On May 13, 2025, the Hindenburg Defendants timely appealed, as of right pursuant to N.J.S.A § 2A:53A-57, the court's denial of their motion to dismiss

Milton's aiding and abetting claim against them and for an award of court costs, reasonable attorneys' fees, and reasonable litigation expenses. (Da1).

On June 26, 2025, this Court granted defendants' motions pursuant to N.J.S.A. § 2A:53A-52 to stay proceedings in the court below and expedited this appeal.

STATEMENT OF MATERIAL FACTS

The Hindenburg Defendants

Hindenburg Research LLC ("Hindenburg") was a firm founded by Nathan Anderson to specialize in investigative and forensic financial research on public companies, which it made available to the public at no cost. (Da13, Da396-397, Da912). Hindenburg had a long track record of exposing corporate fraud that often led to the filing of federal civil charges against public companies and/or their officers, and, as is the case with Milton, to the filing of criminal charges. (Da33 ¶ 38, Da397-415). Indeed, even the Complaint acknowledges Hindenburg's "success in attacking its targets." (Da32-33 at ¶ 37). Demonstrating a belief in their convictions, the Hindenburg Defendants financed their comprehensive investigative reports not by charging for their work, but by taking short positions in the companies that they exposed as frauds, convinced that once the truth was known those companies and their share prices would falter. (Da336, Da387).

The Hindenburg Defendants' Report

On September 10, 2020, Hindenburg published the Report (Da335-388, Da912), which is a 54-page exposition with meticulous citations supporting its opinion that "we believe Nikola is an intricate fraud built on dozens of lies over the course of its Founder and Executive Chairman Trevor Milton's career." (Da335). The Report details numerous misleading and false statements Milton and Nikola made about Nikola's core business. (Da335-336, Da347-382). The day after the Report was released, Nikola reported its publication to the SEC and federal law enforcement investigations began. (Da69-71, Da913). On September 21, 2020, just 10 days after the Report was published, Milton resigned as executive chairman of Nikola. (Da44 at ¶ 78, Da87 at ¶ 5). Shortly thereafter, Nikola confirmed to the SEC and the U.S. Department of Justice ("DOJ") that "Hindenburg is correct in describing a number of statements by Trevor Milton as misleading and/or false." (Da67).

The Criminal and Civil Proceedings Against Trevor Milton

On July 29, 2021, the United States 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. (Da74, Da83-132, Da913). The 49-page indictment included a host of damning

allegations against Milton—many of which mirrored or corroborated allegations in the Report—and charged Milton with two counts of securities fraud and one count of wire fraud. (Da83-132, Da913). A press release by the DOJ summarized the indictment as follows:

- 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." (Da75). 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." (Da75).
- Milton "took advantage of the fact that Nikola went public by merging with a Special Purpose Acquisition Company or 'SPAC,' rather than through a traditional IPO [*i.e.*, Initial Public Offering], 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." (Da75).
- "***MILTON made false claims regarding nearly all aspects of Nikola's business***," including false and misleading 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." (Da75-65 (emphasis added)).

On the same day that Milton was indicted, the SEC charged him with violating anti-fraud provisions of the federal securities laws by "repeatedly disseminating false and misleading information – typically by speaking directly to investors through social media – about Nikola's products and technological accomplishments." (Da207, Da913). The SEC's complaint largely mirrored the factual allegations set forth in the indictment but focused on Milton's false and misleading communications with investors. (Da141-205, Da913). Two months

after Milton resigned, on December 21, 2021, the SEC announced that Nikola would pay $125 million to settle charges that it had defrauded investors, and had agreed to continue cooperating with the SEC's ongoing litigation against, and investigation of, Milton. (Da211-212, Da913). An arbitration panel subsequently found Milton liable for 97% of the $125 million penalty paid by Nikola, and ordered Milton to pay the company a total of $167 million. (Da914). That award was upheld by a federal judge. (Da914).

Milton's criminal trial began on September 12, 2022, and received widespread media coverage. (Da913).

CNBC's *Chasing Tesla* Episode

On October 4, 2022, CNBC broadcast *Chasing Tesla*, which recounts the criminal allegations set forth in Milton's indictments and other civil actions that were pending against him—including a class action brought by Nikola investors (Da237-261, Da914)—along with reporting about Milton's previous business ventures and related lawsuits. (Da213-236, Da301-312, Da913-914). As the trial court in this action subsequently found, *Chasing Tesla* "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." (Da914).

Milton's Conviction and Aborted Lawsuit Against Nikola Executives

On October 14, 2022—ten days after *Chasing Tesla* aired—a jury convicted Milton of two counts of wire fraud and one count of securities fraud. (Da914). He was sentenced to four years in prison and three years of supervised release, ordered to forfeit property and pay a $1 million fine. (Da914). The trial court denied his motions for a new trial and a judgment of acquittal. (Da914).

In June 2024, Milton filed a $1 billion lawsuit against former Nikola executives, blaming them for his criminal conviction and economic losses resulting from the decline in the value of his Nikola stock. (Da914). Milton withdrew that lawsuit weeks later. (Da914).

The Purportedly Libelous Statements Alleged in The Complaint

The Complaint makes numerous conclusory assertions that statements in the Report and *Chasing Tesla* are "false and misleading." (Da34-37 at ¶¶ 43-50, Da37-38 at ¶ 52, Da38 at ¶ 54, Da40-41 at ¶ 64, Da41-42 at ¶ 67, Da43 at ¶¶ 75-76, Da50-51 at ¶¶ 102-103). The Complaint's feeble attempts to demonstrate the falsity of those statements, however, are little more than spin that—when parsed—actually confirm the veracity of the Report and *Chasing Tesla*. (Da35 at ¶ 45, Da36 at ¶ 47, Da36-37 at ¶ 49, Da37 at ¶ 51, Da37-38 at ¶ 53, Da38 at ¶ 55, Da41 at ¶ 65, Da41-42 at ¶ 67).

The "Nikola One" at the 2016 Trade Show

One of Milton's biggest lies was that the "Nikola One" truck was a "'fully functioning vehicle.'" (Da348). For example, a Nikola May 9, 2016 press release quoted Milton stating: "'This Truck [the Nikola One] is by far the most state of the art truck ever built in history. . . . This thing fully functions and works . . . This is a real truck – This is not a pusher.'" (Da347). The Complaint alleges that the Report falsely states that the "Nikola One" truck displayed at a trade show in December 2016 was not a working vehicle. (Da36 at ¶¶ 48-49, Da347-351.) However, far from demonstrating the falsity of this statement, the Complaint merely quibbles over the meaning of the colloquial expression "'pusher,'" and effectively concedes that the Nikola One was inoperable at the time of the 2016 trade show. (Da36-37 at ¶ 49 ("[The Nikola One prototype] ***could have been driven with a few weeks or months*** of testing and safety validation…[and was] designed and built ***to be powered and driven*** on its own propulsion.") (emphases added)).

The Report's accurate statement that the Nikola One was "not a real [working] truck and was, in fact, a pusher" (Da347) was subsequently confirmed when Milton was indicted for making "false and misleading statements that [Nikola] had early success in creating a 'fully functioning' semi-truck prototype

known as the 'Nikola One,' ***when MILTON knew that the prototype was inoperable***." (Da85 at ¶ 2 (emphasis added)).

The "Nicola One in Motion" Video

Similarly, the Complaint alleges that it was "false and misleading" for the Report to describe a 2017 video titled "'Nikola One in Motion'" as a "'ruse.'" (Da35-36 at ¶¶ 45-47 (referencing Da335, Da357-360), *see also* Da50-51 at ¶¶ 102-103). The Complaint, however, does not dispute the Report's and *Chasing Tesla's* statements concerning the video: namely, that "[t]his video appeared to show the truck driving on a level road at a high rate of speed [but it] was simply the result of Nikola towing the truck to the top of a hill and rolling it down. . . . There were no features in the shot that would betray the slope [of the hill], so the camera could be positioned at an angle that would make the road appear fairly level, or at times, even uphill." (Da358-359, Da231-32). Instead, the Complaint focuses on the literal meaning of "'in motion'" and quotes Nikola's mealy-mouthed September 14, 2020, press release to the effect that, despite how it was made to appear, the truck in the video "'was never described as 'under its own propulsion' or 'powertrain driven.'" (Da41 at ¶ 65; *see also* Da36 at ¶ 47).

The prosecutor was apparently unpersuaded by Nikola's press release. Milton's criminal indictment includes the "in motion" video as one of Milton's

"false and misleading claims concerning the Nikola One" (Da96); describes the circumstances of its creation in even greater detail than does the Report (Da100 at ¶ 35); and states that "[i]n the video, the Nikola One appears to be driving down a road with no incline … [and] driving on its own power, ***notwithstanding that the Nikola One could not do so and has never done so***." (Da101 at ¶ 36 (emphasis added)).

Nikola's Purported Production of Cheap Hydrogen

The Complaint alleges in general terms that the Report's assertion that Milton overstated Nikola's hydrogen production capabilities and cost reductions is false (Da37 at ¶ 52, Da41-42 at ¶ 67, Da43 at ¶ 75), but makes no attempt to provide verification for Milton's brazen lie that, as of 2020, Nikola had already succeeded in producing hydrogen for less than $3 per kilogram. (Da368-370). As the Report notes, "[t]he high cost of hydrogen . . . has prevented it from becoming a mainstream fuel source for alternative energy vehicles. . . . Low-cost hydrogen production is critical to Nikola's financial viability. . . ." (Da368). If true, Milton's claim that Nikola "'has been able to 'chop the cost of hydrogen from $16/kg down to . . . below $3/kg'" (Da369 (quoting Milton on a July 17, 2020 TeslaCharts podcast)) would have been "81% cheaper than the rest of the world, [and] a major breakthrough." (Da368). Yet, rather than alleging that Milton's statement was true—which it was not—the Complaint merely quotes a

forward-looking statement in Nikola's September 14, 2020, press release to the effect that Nikola "continues to ***believe*** that its ***planned*** hydrogen station network, and the production and distribution of hydrogen, ***will*** provide key competitive advantages that drive sustained profitability and shareholder value over the long term." (Da41-42 at ¶ 67 (emphases added)).

Milton's criminal indictment confirms that Milton was lying about Nikola's hydrogen production capabilities and cost reductions: "[a]t all times relevant to this Indictment, ***Nikola had never . . . produced any hydrogen***." (Da115 at ¶ 63 (emphasis added); *see generally*, Da77-78 (SDNY U.S. Attorney's Office July 29, 2021 Press Release), Da114-120 at ¶¶ 62-69).

Hindenburg Defendants' Statements That Were Not Repeated in Chasing Tesla

The Complaint also focusses on five allegedly false statements of opinion in the Report that were not included in *Chasing Tesla*. Specifically, statements that: (1) Nikola's purportedly revolutionary battery technology "'never existed'"(Da35 at ¶ 44); (2) Nikola had "'abandoned its supposedly revolutionary compressed natural gas (CNG) technology with no explanation'" (Da37-38 at ¶ 52 (quoting Da351)); (3) Nikola was passing-off third-party components in its prototypes as its own proprietary technology, including an inverter used in the Nikola Two truck that had a sticker placed over its manufacturer's name (Da34-35 at ¶¶ 43-45, Da40-41 at ¶ 64, Da43 at ¶ 76); (4)

a spokesperson for Nikola's manufacturing partner Bosch had contradicted Milton's July 2020 claim that the partnership had five "Tre" trucks "'coming off the assembly line right now'" (Da37 at ¶ 50 (referencing Da336, 377-378)); and (5) in 2012, Milton misrepresented the value of a $16 million contract between his company dHybrid, Inc. and Swift Transportation as being worth $250-$300 million. (Da38 at ¶ 54 (referencing Da338-340)). The Complaint fails to allege how any of these statements—none of which was repeated in *Chasing Tesla*—could have aided-and-abetted the trade libel purportedly committed by CNBC.

In any event, as with all of the Hindenburg Defendants' other statements, the Complaint fails to allege that any of these five statements was false. (Da35 at ¶ 45, Da37 at ¶ 51, Da37-38 at ¶ 53, Da38 at ¶ 55). For example, far from substantiating the existence of Nikola's revolutionary battery technology, the Complaint merely refers to Nikola's "battery program . . . discussed in the Company's press release on September 14, 2020" without further explanation. (Da35 at ¶ 45). Milton's criminal indictment confirms that Nikola never developed proprietary battery technology. (Da78, Da123 at ¶ 75). Similarly, the Complaint effectively concedes that Nikola did not have proprietary inverter technology, alleging that "Nikola has been 'designing, engineering and working on [but not manufacturing] its own inverters for some time'" and that the name of the inverter's manufacturer had been obscured deliberately so that investors

would not "assume that the third-party supplier will be used in production when . . . Nikola . . . intended to use its own [then non-existent] inverter in its production vehicles." (Da40-41 at ¶ 64; *see also* Da78, Da123 (Indictment) at ¶ 75 ("At all times relevant to this Indictment, Nikola also had not produced an inverter in-house and the inverters it planned to use in its semi-trucks were developed and manufactured by third parties.")).

The Complaint merely asserts that the Bosch spokesperson's statement in 2020 that "'[we] haven't made any [Tre] trucks yet'" "was taken wildly out of context," without explaining the alleged "context" that could have made Milton's statement about five Tre trucks "'coming off the assembly line right now'" accurate. (Da37 at ¶¶ 50-51). The Complaint also concedes that the agreement between dHybrid and Swift Transportation was only worth $16 million, but included an option for Swift to purchase additional systems worth a maximum of $234 million. (Da38 at ¶ 55; *see also* Da302-303 at ¶¶ 10-12 (First Amended Complaint in *Swift Transportation v. dHybrid* alleging that the value of the contract was $16 million)).

Statements Not Made in the Report

Beyond the foregoing, the only other libelous statements alleged to have been made in *Chasing Tesla* concern matters that were not even addressed in the Report. (Da46 at ¶ 90, Da49 at ¶¶ 95-97, Da50 at ¶¶ 100-101, Da51-52 at ¶¶ 104-

109). Most significantly, the Complaint alleged the following statements to be libelous: (1) "Milton 'targets young, naïve investors'" (Da46 at ¶ 90); (2) a statement concerning the amount of Nikola stock Milton sold in the immediate aftermath of his indictment in 2021 (Da52 at ¶ 108); and (3) a statement to the effect that when a company founded by Milton—St. George Security & Alarms—was sold, its books reflected as accounts receivable some amounts that Milton had already collected. (Da49 at ¶ 96). The Complaint fails to allege how the Hindenburg Defendants aided and abetted the publication of any of these statements by CNBC.

The Aiding and Abetting Allegations Against the Hindenburg Defendants

The Complaint's aiding and abetting allegations against the Hindenburg Defendants are comprised of only two conclusory paragraphs alleged on information and belief, as follows:

> 93. Upon information and belief, Anderson and Hindenburg knowingly and maliciously granted CNBC permission to use [Hindenburg's] logo and materials from the Hindenburg Report for Chasing Tesla, intending that such materials would enhance the salaciousness of the Episode and gravely harm Milton.
>
> 94. 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, [Nikola's September 14, 2020] Press Release, Anderson and Hindenburg maliciously failed to

> correct, modify, or clarify these assertions before Chasing Tesla aired.

(Da48 at ¶¶ 93-94, reiterated at Da57 at ¶¶ 133-135).

LEGAL ARGUMENT

I. 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. New Jersey*, 476 N.J. Super. 377, 389 (Super. Ct. App. Div. 2023) (quoting *McNellis-Wallace v. Hoffman*, 464 N.J. Super. 409, 415 (App. Div. 2020)).

II. THE TRIAL COURT CORRECTLY DECIDED THAT NEW JERSEY'S UPEPA APPLIES TO MILTON'S CLAIMS AGAINST THE HINDENBURG DEFENDANTS (Da9, Da13-15)

The trial court correctly found that New Jersey's UPEPA, also known as the "anti-SLAPP" law, applies to Milton's claims against the Hindenburg Defendants. (Da9, Da13-15). That unappealed determination is the law of this case. *See, e.g., Burbridge v. Paschal*, 239 N.J. Super. 139, 151 (Super. Ct. App. Div. 1990) ("A party may not attack the judgment under review without having appealed.").

III. THE TRIAL COURT ERRED IN DECLINING TO DISMISS THE AIDING AND ABETTING CLAIM AGAINST THE HINDENBURG DEFENDANTS (Da15-23)

To establish civil liability as an aider or abettor "a plaintiff must show that '(1) the party whom the defendant aids must perform a wrongful act that causes

an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.'" *Tarr v. Ciasulli*, 181 N.J. 70, 84 (2004) (quoting *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 127 (3d Cir.1999)); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 28 (2020) (same).

A. The Aiding and Abetting Claim Against the Hindenburg Defendants Should Have Been Dismissed Because the Complaint Fails to Sufficiently Allege the Underlying Tort of Trade Libel (Da13 (incorporating Da919-952))

In the CNBC Decision, which is incorporated into the decision on appeal (Da11, Da13) the trial court erroneously concluded that the Complaint states a cause of action for trade libel against CNBC. (Da919-952). For the reasons set forth by CNBC in the brief it is filing in the appeal currently pending in this Court as Docket No. A-002791-24, the trial court should have dismissed virtually all of Milton's trade libel allegations because they pertain to CNBC's reporting about statements made in criminal and civil pleadings and government publications that is subject to the fair reporting privilege. To the limited extent that the Complaint alleges statements made in *Chasing Tesla* that are not protected by the fair reporting privilege, the trial court should have dismissed those allegations: (a) because they are time-barred, either because Milton's purported trade libel cause of action is, in reality, a time-barred cause of action

for defamation, or because the statute of limitations for trade libel under New Jersey law is one year; and (b) because the Complaint fails to allege actual malice and the special damages element of trade libel.

Without a sufficiently pled cause of action against CNBC for trade libel, Milton's aiding and abetting claim against the Hindenburg Defendants cannot stand. *See, e.g., New Jersey Dep't of Treasury v. Qwest Commc'ns Int'l., Inc*., 387 N.J. Super. 469, 484 (Super. Ct. App. Div. 2006) (holding that claim for aiding commission of tort requires proof of underlying tort); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 28(a) (2020) (an aiding and abetting claim requires that "a tort was committed against the plaintiff by another party.").

B. Even if Plaintiff Had Adequately Alleged the Underlying Tort, the Aiding and Abetting Claim Against the Hindenburg Defendants Should Have Been Dismissed for Failure To Sufficiently Allege That Statements in the Report Were False (Da22)

The Complaint sets forth only conclusory allegations that the three statements in the Report concerning matters also addressed in *Chasing Tesla* are false and/or misleading. (Da36 at ¶¶ 48-49, Da35-36 at ¶¶ 45-47, Da37 at ¶ 52, Da41-42 at ¶ 67, Da43 at ¶ 75, Da50-51 at ¶¶ 102-103). As explained above, as to each such statement, the Complaint fails to allege any facts demonstrating actual falsity. *See supra* at pp. 14-17. Instead, the Complaint raises meritless

quibbles, but otherwise confirms that the statements at issue are substantially true and, hence, not libelous. Even if the Report contained minor inaccuracies—which the Complaint has not demonstrated—it was not defamatory. *See, e.g., G.D. v. Kenny*, 205 N.J. 275, 294 (2011) ("The law of defamation overlooks minor inaccuracies, focusing instead on 'substantial truth.' . . . 'Minor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting, of the libelous charge can be justified."'") (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516, 517 (1991)); *Dendrite International, Inc. v. Doe No. 3*, 342 N.J. Super. 134, 158, (Super Ct. App. Div. 2001) ("A plaintiff does not make a prima facie claim of defamation if the contested statement is essentially true.").

Specifically, the Complaint asserts that the Nikola One truck displayed at a 2016 trade show was not a "'pusher'" and the "Nikola One in Motion" video "was not a ruse," but it also concedes the gist of the Report's statements about the Nikola One, which was that it could not be "'powered and driven on its own propulsion.'" (Da37 at ¶ 47, Da36-37 at ¶ 49, Da41 at ¶ 66). Likewise, the Complaint alleges that the Report "made false claims about Nikola's hydrogen production capabilities," but effectively concedes that Nikola had never produced any hydrogen at all, contrary to Milton's statements. (Da 37 at ¶ 52, Da41-42 at ¶ 67). Hence the trial court erred in concluding that the Complaint

sufficiently alleged that the Hindenburg Defendants knowingly participated in CNBC's alleged trade libel by "intentionally reaffirm[ing] false and misleading statements from [the R]eport directly to CNBC, explicitly authorizing CNBC to use their allegedly proprietary defamatory content . . . in the Chasing Tesla broadcast." (Da22). The Hindenburg Defendants could not have knowingly participated in CNBC's alleged trade libel by authorizing CNBC's use of substantially true statements. *A fortiori*, they could not have knowingly participated in CNBC's alleged trade libel by authorizing CNBC's use of other statements that CNBC did not use. *See supra* at pp. 18-20.

C. Even if Plaintiff Had Adequately Alleged an Underlying Tort and False Statements in the Report, the Aiding and Abetting Claim Against the Hindenburg Defendants Should Have Been Dismissed for Failure To Sufficiently Allege Knowing and Substantial Assistance (Da15-23)

The Complaint's aiding and abetting allegations are conclusory statements made on "information and belief" claiming only that: (1) in response to an alleged CNBC inquiry, the Hindenburg Defendants either "failed to correct" the allegedly false assertions in the Report (Da48 at ¶ 94) or "falsely confirmed to CNBC that the claims in the Report were true and accurate" (Da57 at ¶ 134); and (2) "Hindenburg, at the direction of Anderson, granted CNBC permission to use its proprietary materials" in *Chasing Tesla*, including its logo. (Da 48 at ¶ 93, Da57 at ¶ 135). Those allegations fall far short of alleging the type of

"affirmative[] help[]" and "active participation" that this Court has deemed necessary to plead the substantial assistance element of aiding and abetting liability. *See, e.g., New Jersey Dep't of Treasury v. Qwest Communications*, 387 N.J. Super. at 476 (discussed below); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 28, comment d.

In the trial court, Milton did not cite a single case in which merely allowing one's allegedly defamatory statements to be re-published was held to constitute aiding and abetting defamation. *Cf. Doe v. Brandeis University*, 177 F. Supp. 3d 561, 616 (D. Mass. 2016) (University's failure to correct defamatory public statements by one former student about another did "not rise to the level of active participation or substantial assistance required under Massachusetts law for aiding and abetting liability to attach"). Indeed, demonstrating the extraordinary difficulty in meeting the requirements for pleading aiding and abetting defamation and libel, Milton cited only a single case from anywhere in the country in which allegations of aiding and abetting defamation survived a motion to dismiss. (Da19 referencing Milton's citation of *Russell v. Marboro Books*, 183 N.Y.S.2d 8 (Sup. Ct., N.Y. County 1959)). That 66-year-old case from a foreign jurisdiction is easily distinguishable.

In *Russell v. Marboro Books*, the New York trial court concluded that, Marboro, the owner of a photograph of the plaintiff, had provided "substantial

assistance" to its co-defendant, Springs, who had used an altered version of that photograph to libel the plaintiff, because "Marboro, in selling the photograph … to Springs performed an act which, in its turn, was ***a prerequisite to the tort of libel***. If Marboro had not sold the photograph, Springs could not have altered it and used it to libel the plaintiff. Marboro's act was thus, in my view, 'substantial assistance' to Springs." 183 N.Y.S.2d at 32 (emphasis added) (citing RESTATEMENT (FIRST) OF TORTS § 876 (1939)); *see also Halberstam v. Welch*, 705 F.2d 472, 482 (D.C. Cir. 1983)) ("[T]he court [in *Russell v. Marboro Books*] reasoned that acquisition of the photograph was an ***indispensable prerequisite*** to the libel.") (emphasis added). Here, the Complaint does not—and cannot—allege that the Report and the Hindenburg logo were indispensable prerequisites to CNBC's alleged trade libel of Milton. Indeed, they were only given passing reference in *Chasing Tesla*, and the Hindenburg Defendants were neither interviewed for, nor appeared in, the broadcast. (*See* Da213-236).

Moreover, as the trial court found, *Chasing Tesla* was "based largely on allegations made by prosecutors in Milton's criminal trial and SEC filings" during the more than two years after the Report was published. (Da914). During that time, Milton was indicted for securities fraud and charged by the SEC (resulting in a huge fine and attorneys' fees that Milton was required to pay) for largely the same misconduct outlined in the Report (Da74, Da83-132, Da207,

Da211-212, Da141-205, Da913-914); the U.S. Attorney's Office and the Grand Jury's Indictment had proclaimed that "Milton made false claims regarding nearly all aspects of Nikola's business" (Da75, Da84-85 at ¶ 2); and the Company itself disclosed that "Hindenburg [Research] [wa]s correct in describing a number of statements by Trevor Milton as misleading and/or false." (Da67). Thus, at the time *Chasing Tesla* aired, the two-year old Report was hardly indispensable as source material for the broadcast. In other words, unlike in *Russell*, here it cannot rationally be said that but for the Hindenburg Defendants' alleged verification of the accuracy of their two-year old Report, the allegedly defamatory CNBC episode could not have aired.

None of the three other "substantial assistance" cases Milton cited below involved allegations of aiding and abetting defamation, and all of them involved not only active participation by the alleged aiders and abettors but also their prior agreement to act in concert with the primary violator—which has not been alleged here. (Da16-17, Da20). The operative complaint in *New Jersey Dep't of Treasury v. Qwest Communications*—which included 31 paragraphs detailing the conduct by which Arthur Andersen, LLP had "purposefully designed [a fraudulent accounting scheme] for Qwest with the sole objective of inflating … [Qwest's] corporate balance sheet"—was found to sufficiently allege claims against Andersen for both aiding and abetting fraud and civil conspiracy. *See*

387 N.J. Super. at 476. *See also id.* at 484 ("Andersen … was an active participant and helped perpetrate the fraud.").

The other two cases upon which Milton relied—both non-precedential—likewise involved allegations of active participation by co-conspirators: in one case, in a teacher's battery of a student,[5] and in the other, in a breach of fiduciary duty.[6] Here, the allegations made solely on information and belief that that the Hindenburg Defendants confirmed the accuracy of their already-existing Report, and permitted CNBC to use the Report and the Hindenburg logo in connection with the *Chasing Tesla* are not remotely comparable to the allegations in these cases, even if Milton has alleged a cognizable claim of trade libel against CNBC, which he has not. Moreover, it is simply implausible for Milton to argue that use of the Hindenburg logo was "crucial" to the "credibility and authenticity" of

[5] *Lawson v. E. Orange Sch. Dist.*, No. CV16-2704, 2017 WL 751425, at *1, 3 (D.N.J. Feb. 27, 2017) (Not for Publication) (aiding and abetting battery and civil conspiracy were sufficiently pled against school security personnel alleged to have observed assault by teacher without intervening to protect plaintiff student, and then to have falsely reported to police that plaintiff had been aggressor).

[6] *PJSC Armada v. Kuzovkin*, No. A-1893-19, 2021 WL 4026177, at *2, 7-9 (N.J. Super. Ct. App. Div. Sept. 3, 2021) (Unpublished Opinion) (aiding and abetting breach of fiduciary duty and civil conspiracy were sufficiently pled against sellers of luxury Moscow apartment who, in order to assist purchaser in laundering funds he had embezzled, intentionally understated purchase price of apartment in sales agreement and accepted payment for apartment in cash delivered to safe deposit box).

Chasing Tesla. (Da17, Da20-21). CNBC is an award-winning national news network. The Hindenburg Defendants are merely one of literally tens of thousands of research analysts who cover publicly traded companies. More importantly, by the time *Chasing Tesla* aired, the allegations of fraud against Milton bore the imprimatur of the U.S. Attorney's Office, a Federal Grand Jury, and the SEC—sources far more "crucial" to the broadcast's "credibility and authenticity" than the opinions of a purportedly self-interested activist investor.

Milton's conclusory allegations on information and belief that "Hindenburg, at the direction of Anderson, granted CNBC permission to use its proprietary materials" in the CNBC episode, including its logo (Da48 at ¶93, Da57 at ¶ 135) is further belied by the record here. The Hindenburg Defendants published the Report "for free on an interactive public website" and "anyone can read, link to, or share Hindenburg reports." (Da13, Da21). Hindenburg's website also belies Milton's illogical claim that CNBC needed Hindenburg's permission to reference the Report and the Hindenburg logo. On the bottom of the Report's web page there are 2,016 "pingbacks" showing that literally thousands of articles have referenced the on-line Report, often including its logo, without obtaining permission. (Da21).

The trial court acknowledged that Milton failed to cite a single case in New Jersey upholding a claim for aiding and abetting libel or defamation.

(Da19). The trial court also understandably declined to rely on the 66-year old *Russell* case, the lone case Milton cited from *any* jurisdiction upholding an aiding and abetting defamation claim on a motion to dismiss, which has not been cited in any reported decision by a New Jersey court. (Da21-23). Nor did the Court rely on the other non-defamation aiding and abetting cases Milton cited, all of which the Hindenburg Defendants readily distinguished. (Da167-17, Da20).

Instead, the trial court erred by *sua sponte* relying on an inapposite employment discrimination case, *Cowher v. Carson & Roberts*, 425 N.J. Super. 285 (Super. Ct. App. Div. 2012), as the basis for denying Defendants' motion. (Da21). *Cowher* is an employment discrimination case whose facts are not even remotely similar to this case. Defendants' conduct there was overwhelmingly more substantial and egregious than the alleged minimal conduct of the Hindenburg Defendants here. The defendants in *Cowher*, who were accused of aiding and abetting their company's creation of a hostile work environment, were the plaintiff's two supervisors, both of whom actually carried out the company's wrongful conduct—hurling repeated anti-Semitic insults at plaintiff—that formed the basis of plaintiff's hostile work environment claims against the company. 425 N.J. Super. at 304. Thus, the *Cowher* plaintiff's primary claim of a hostile work environment against the company could not have

existed but for the individual defendants' wrongful conduct. The Hindenburg Defendant's minimal alleged conduct here pales in comparison.

D. The Trial Court Applied the Wrong Standard in Assessing the Adequacy of Plaintiff's Aiding and Abetting Trade Libel Claim (Da22-23)

The trial court applied the wrong standard for assessing the adequacy of Milton's aiding and abetting trade libel claim under UPEPA. The court held that "[d]ismissal is appropriate only if it is clear that the complaint states no basis for relief and that discovery would not provide one." (Da22). That ruling, however, ignores that "[i]n defamation actions, which by their nature implicate the potential curtailment of cherished freedoms of expression, a plaintiff must plead its cause of action with a greater level of specificity." *Foxtons, Inc. v. Cirri Germain Realty*, No. A-6120-05T3, 2008 WL 465653, at *5 (N.J. Super. Ct. App. Div. Feb. 22, 2008) (citing *Darakjian v. Hanna,* 366 N.J. Super. 238, 248-49 (Super. Ct. App. Div. 2004)). "It is not enough for plaintiffs to assert . . . that any essential facts that the court may find lacking can be dredged up in discovery. A plaintiff can 'bolster a defamation cause of action through discovery, but not . . . file a conclusory complaint to find out if one exists.'" *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 768 (1989) (quoting *Zoneraich v. Overlook Hosp.,* 212 N.J. Super. 83, 101–02 (Super. Ct. App. Div. 1986)). "In a defamation case, '[a] vague conclusory allegation is not

enough. ... [A] conclusory complaint ... must be dismissed.'" *Neuwirth v. New Jersey*, 476 N.J. Super. at 390 (quoting Zoneraich, 212 N.J. Super. at 101-102 and citing *Rocci v. Ecole Secondaire Macdonald-Cartier*, 165 N.J. 149, 155 (2000) as "noting [that] courts in defamation cases must achieve the proper balance between protecting reputation and protecting free speech" (internal quotation omitted)).

Moreover, having concluded that New Jersey's UPEPA applies to Milton's aiding and abetting cause of action, the trial court was obliged to apply it "to protect the exercise of the right of freedom of speech and of the press . . . guaranteed by the United States Constitution [and] the New Jersey Constitution." NJSA § 2A:53A-59.

The Complaint's sparse conclusory allegations made solely on information and belief do not entitle Milton to burden the Hindenburg Defendants with costly discovery in an effort to dredge up sufficient facts to plead a claim of aiding and abetting. *See J.S. v. L.M.S.*, No. A-2332-20, 2022 WL 4242308, at *6 (N.J. Super. Ct. App. Div. Aug. 31, 2022) (reversing trial court's denial of dismissal of defamation claim where plaintiff's "information and belief" allegation that defamatory material was disclosed to members of community was unsupported by any allegation specifying identity of any third

party to whom disclosure was made, and noting trial court's refusal to dismiss would enable "impermissible fishing expedition").

While the trial court correctly acknowledged that the UPEPA required Plaintiff to plead a *prima facie* case of aiding and abetting liability (Da13, Da919), it erroneously concluded that the Complaint's implausible conclusory allegations on information and belief are sufficient to do so. *See e.g., New Jersey v. Cummings*, 321 N.J. Super. 154, 170 (Super. Ct. App. Div. 1999) (a *prima facie* case requires more than "bald assertions"); *Voorhees v. Preferred Mut. Ins. Co*., 246 N.J. Super. 564, 570, 588 A.2d 417, 420 (Super. Ct. App. Div. 1991) ("vague conclusory allegation" is insufficient to plead defamation), *aff'd*, 128 N.J. 165 (1992); *Smythe v. Westinghouse Redevelopment Act, Inc*., No. A-1694-16T2, 2018 WL 1021260, at *2 (N.J. Super. Ct. App. Div. Feb. 23, 2018) (to establish a *prima facie* case plaintiff must "demonstrate[] some evidence to support each of the [] elements of her [] claim");[7] *see also Dendrite*

[7] Even outside the context of defamation claims implicating a defendants' First Amendment rights, federal courts have noted the insufficiency of "information and belief" pleadings unaccompanied by alleged facts to make such pleadings plausible. *See, e.g.*, *McDermott v. Clondalkin Grp., Inc.*, 649 F. App'x 263, 267-68 (3d Cir. 2016) ("[P]leading upon information and belief is permissible '[w]here it can be shown that the requisite factual information is peculiarly within the defendant's knowledge or control'—so long as there are no 'boilerplate and conclusory allegations' and '[p]laintiffs . . . accompany their legal theory with factual allegations that make their theoretically viable claim plausible.'") (quoting *In re Rockefeller Ctr. Props., Inc. Sec. Litig.,* 311 F.3d 198, 216 (3d Cir. 2002)); *Wright v. Lehigh Valley Hosp. & Health Network*, No.

International, 342 N.J. Super. at 141 (plaintiff seeking third-party discovery to identify defendants who allegedly defamed plaintiff, must set forth *prima facie* cause of action against anonymous defendants by "produc[ing] sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant"); *A.Z. v. Doe*, No. A-5060-08T3, 2010 WL 816647, at *4 (N.J. Super. Ct. App. Div. Mar. 8, 2010) ("To establish a prima facie case of defamation, a plaintiff must present proof tending to establish each of the . . . elements" of that tort).

CONCLUSION

For the reasons set forth above, the Hindenburg Defendants respectfully request this Court to: (1) reverse the Decision of the Bergen County Superior Court to the extent that it denied the Hindenburg Defendants' motion (a) to dismiss Count II of the Complaint alleging aiding and abetting trade libel; and (b) for an award of court costs, reasonable attorneys' fees, and reasonable

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CIV.A. 10-431, 2011 WL 2550361, at *3 (E.D. Pa. June 23, 2011) ("Court will not dismiss Plaintiff's complaint based on the allegations being pled upon information and belief, so long as there is a proper factual basis asserted to support the beliefs pled."). Here, Milton's speculation that CNBC would have asked the Hindenburg Defendants to verify the accuracy of their two-year old Report is not plausible, especially given that the Report's accuracy in all relevant respects had been confirmed by a Federal Grand Jury, the United States Attorney's Office, the SEC, and Nikola itself.

litigation expenses related to Hindenburg Defendants' order to show cause; (2) award the costs of this appeal to the Hindenburg Defendants, as the prevailing parties, pursuant to Rule 4:42-8(a); and (3) remand this case to the Bergen County Superior Court to determine the Hindenburg Defendants' court costs, reasonable attorneys' fees, and reasonable litigation expenses related to their order to show cause, and to enter judgment in the Hindenburg Defendants' favor for same.

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Nathan Anderson and Hindenburg Research LLC

/s/ Patrick L. Rocco
PATRICK L. ROCCO

Dated: July 28, 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-002854-24 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 TREVOR MILTON'S BRIEF

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PRELIMINARY STATEMENT

Hindenburg Research, LLC ("Hindenburg") calls itself an investigator. The record shows otherwise. Hindenburg and its founder, Nathan Anderson, are market actors who profit when their targets fall—and they treated Trevor Milton as a target to be taken down, not as the subject of any objective analysis. After taking its largest short position ever, Hindenburg published a sensational report (the "Hindenburg Report") on Nikola Corporation ("Nikola" or the "Company") designed to move the market, leaning on paid, biased sources and ignoring publicly verifiable facts. When Nikola answered days later with a detailed, point-by-point rebuttal, Hindenburg doubled down. Fairness or accuracy was never the objective. Money and impact were.

The final act came two years later. In the middle of Milton's criminal trial, CNBC aired *Chasing Tesla*. That program recycled much of Hindenburg's narrative—and did so with Hindenburg's help. Before the broadcast, CNBC contacted Hindenburg and Anderson (the "Hindenburg Defendants"), who re-endorsed the same disproved claims and granted permission to use Hindenburg's logo, imagery, and branding—so CNBC could present those claims as "verified." The episode then opened by declaring that Hindenburg was "taking aim" at Milton's "high-flying hydrogen-powered greed," and repackaging the core lies as if they were settled truths.

That is aiding and abetting trade libel. New Jersey law does not require a backstage collaborator to be on set when the libel airs; it requires substantial assistance, which the Hindenburg Defendants supplied. Their pre-air confirmation and brand-lending were affirmative acts that fueled CNBC's trade libel and maximized its impact. They provided the narrative scaffolding and the credibility of a branded "research firm" to a national broadcast timed for maximum prejudice. The consequences were immediate. Within hours, social media echoed the program's lies. Within days, the value of Milton's holdings plunged. Business relationships and banking arrangements unraveled. The real-world impact of a sucker-punch broadcast landed harder because Hindenburg loaded the glove.

The Hindenburg Defendants now insist that none of this matters because, despite the Hindenburg Report's litany of lies, it was "substantially true." It was not, but that is a fact question for another day. At this stage, this Court's role is not to adjudicate the accuracy of every line of the 2020 report; it is to determine whether the Hindenburg Defendants aided what aired in October 2022 by lending their imprimatur. The facts fit the law: a primary tort by CNBC, knowledge of the tortious conduct, and substantial assistance that enabled the trade libel and magnified its harm.

There are independent reasons to affirm as well. New Jersey's anti-SLAPP law does not extend to speech tied to a person's business of selling or leasing goods or services when the claim arises from related communications. The Hindenburg Defendants are professional short sellers—their business centers on taking short positions, waging a negative campaign, and profiting from the fall in price. Their communications were not detached commentary or public service; they were market-moving messages crafted and timed to influence investor behavior. The pre-air re-endorsement to CNBC and the authorization to use Hindenburg's branding served the same purpose: to keep the narrative alive and enhance Hindenburg's prominence and credibility as a short seller. That is the kind of commercial speech the statute excludes.

This case is not a referendum on Hindenburg's brand or its fantastical self-image as a watchdog. It is about what Hindenburg did. It took a massive short position in Nikola; published a hit piece filled with lies about Milton; refused to correct course in the face of clear contrary evidence from the Company; and then re-endorsed its false narrative so CNBC could sell it again—this time to millions of viewers—while Milton stood trial. That is not oversight or journalism. It is obsession and opportunism. This Court should not reward it.

PROCEDURAL HISTORY

On January 23, 2025, Plaintiff, Trevor Milton, commenced this action against CNBC, Nathan Anderson, and Hindenburg. (Da59.) Against the Hindenburg Defendants, Milton asserted claims for aiding and abetting trade libel and prima facie tort arising from CNBC's broadcast of its "American Greed" episode titled *Chasing Tesla*. (Da56–58.) The Hindenburg Defendants formally appeared in the action on March 19, 2025 and acknowledged valid service of process. (Pa21.)

On March 21, 2025, Defendant 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* Da62.) On April 4, 2025, the Hindenburg Defendants submitted their own application for an order to show cause seeking dismissal under UPEPA, raising many of the same arguments as CNBC. (*See* Da333.) The trial court issued the OSCs, setting a hearing for April 25, 2025, directed Milton to file his opposition by April 17, 2025, and granted the Hindenburg Defendants leave to reply by April 21, 2025. (Da329, Da389.) By agreement, the hearing was moved to April 23, 2025. (Pa22.)

In their OSC papers, the Hindenburg Defendants incorporated CNBC's arguments that the Complaint failed to state a claim for trade libel because:

(1) Milton's trade libel claim was a defamation claim 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* Da9–13.) In addition, the Hindenburg Defendants argued that Milton did not allege that the Hindenburg Defendants substantially assisted CNBC's conduct. (Da15–22.) They further contended that New Jersey law did not recognize Milton's claim for prima facie tort. (*See* Da23.)

On April 18, 2025, Milton filed his opposition to both motions. (*See* Pa22–23.) With respect to the Hindenburg Defendants, Milton argued first that the Hindenburg Defendants were not entitled to protection under UPEPA because their conduct falls within the statute's commercial speech exemption. (*See* Da13–15.) Specifically, Milton argued that based on the uncontroverted record evidence, (*see* Da395–417), the Hindenburg Defendants were primarily engaged in commercial activity—specifically, short-selling—and that their communications were related to this activity (*see id.*). Milton further argued that, even if the court reached the merits, the Complaint sufficiently alleged that the Hindenburg Defendants had provided substantial assistance to CNBC's broadcast, demonstrating their active role in the dissemination of false and misleading statements to the public. (*See* Da15–23.) Finally, Milton 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 both motions. (*See* Da11–23.) The court granted dismissal of the separate prima facie tort count as an impermissible substitute for traditional tort theories. (Da46.)

On May 7, 2025, the Hindenburg Defendants moved the trial court to stay all proceedings pending appeal. (*See* Pa24.) They noticed an interlocutory appeal approximately a week later. (*See* Pa24.) On May 23, 2025, after additional briefing, the court denied a stay. (*See id*.) The court found no presumptive stay under UPEPA, that any costs could be recovered if it ultimately prevailed, and held that the Hindenburg Defendants were unlikely to succeed on appeal. (*Id.*) Weighing the equities, the court concluded that the balance of hardships and the public interest in expeditious litigation favored allowing the case to proceed to discovery during appeal. (*Id.*)

After the trial court denied a stay, the Hindenburg Defendants sought relief in this Court; Milton opposed, filing his brief on June 13, 2025. On June 26, 2025, Part I granted the Hindenburg Defendants motion for a stay and accelerated the appeal. That same day, the Clerk issued a peremptory scheduling order setting July 28, 2025 for the Hindenburg Defendants' brief

and appendix, August 18, 2025 for Milton's brief and appendix, and August 25, 2025 for reply. On August 18, 2025, Milton filed a brief extension of the deadline until August 22, 2025. On August 19, 2025, the motion for extension was scheduled, and Milton was instructed to file his brief by August 22, 2025.

COUNTERSTATEMENT OF FACTS

This case arises from the Hindenburg Defendants' calculated, relentless, and unscrupulous pursuit of massive financial gain at the expense of Trevor Milton's career. For more than fifteen years, Milton established himself as a successful entrepreneur whose professional reputation was inseparable from Nikola, the innovative transportation company he founded. That changed when the Hindenburg Defendants launched their campaign in September 2020, publicly issuing a salacious market-shaking report they readily admit was designed to drive Nikola's stock price downward. Despite Nikola's swift rebuttal and refutation of many of the lies contained in the report, the Hindenburg Defendants were undeterred and continued, with reckless abandon, on a profit-driven quest for the destruction of Milton's professional standing. This culminated on October 4, 2022—in the middle of Milton's federal criminal trial—when CNBC aired its *Chasing Tesla* episode of the program "American Greed," prominently featuring the Hindenburg Defendants' discredited accusations, spotlighting their continued pursuit of

Milton, and even adding additional, gratuitous lies of their own. Together, the Hindenburg Defendants and CNBC inflicted immediate, lasting, and substantial harm on Milton's business interests, professional credibility, and financial well-being.

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

1. Early Successes

Milton's entrepreneurial journey began in earnest in 2004. (Da28, 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"). (Da27–28, Compl. ¶¶ 16, 18.) He quickly scaled this startup, eventually selling it for approximately $800,000. (Da58, Compl. ¶ 18.) In 2009, he launched Upillar, an e-commerce marketplace that blended features of Craigslist and Amazon. (Da28, Compl. ¶ 19.) The Upillar platform eventually reached millions of monthly visitors and drew national attention. (*Id.*)

Milton then turned to sustainable transportation. (Da29, 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. (Da29, 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. (Da29, 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. (Da29, 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. (Da3, Compl. ¶ 7; Da32, 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. (Da29–30, 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. (Da30, 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. (Da30, 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. (*Id.*) 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. (Da30, 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. (Da30, Compl. ¶ 28.)

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

In August 2020, the Hindenburg Defendants targeted Nikola and Trevor Milton after establishing what Hindenburg described as its largest short position ever. (Da32–33, 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. (Da26, Compl. ¶ 7; Da32, 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." (Da36–37, Compl. ¶¶ 5–6; Da34, 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. (Da34–38, 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. (Da36, Compl. ¶¶ 46–49; Da41, 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. (Da34, Compl. ¶ 43; Da40–41, 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. (Da37–38, Compl. ¶¶ 52–53; Da41–42, Compl ¶ 67; Da41, 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. (Da37, Compl. ¶¶ 50–51; Da40, Compl. ¶ 63.)

- The Hindenburg Report falsely described the Nikola One as a non-functional "pusher," directly contradicting clear evidence of its capabilities and purpose. (Da36–37, 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. (Da38–39, 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 libel 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. (Da38, Compl. ¶¶ 54–55.)

C. Nikola Swiftly Rebuts Hindenburg's False Claims

Nikola quickly and authoritatively responded to the false allegations in the Hindenburg Report. (Da39–43, 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. (Da39, 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. (Da40, 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. (Da40, 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. (Da40, 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. (Da40, Compl. ¶ 63.)

Nikola also corrected Hindenburg's false and misleading claim regarding obscured supplier labels on prototype components. (Da40–41, 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. (Da41, Compl. ¶¶ 65–66.) Indeed, Milton had 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. (Da41–42, 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. (Da42, 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. (Da42–43, Compl. ¶¶ 68–71.)

D. The Hindenburg Defendants Stubbornly Double Down on Their Falsehoods

Rather than retract their false statements or reassess their damaging positions after Nikola's scathing rebuttal, the Hindenburg Defendants doubled down, escalating their libelous campaign. They cynically dismissed Nikola's substantive corrections and explanations—such as Nikola's clear clarification of the context of the "Nikola One in Motion" video—as implicit admissions of wrongdoing and securities fraud, thereby deliberately misleading investors and the public. (Da20, Compl. ¶¶ 72–74.) Ignoring publicly available evidence, the Hindenburg Defendants continued to propagate already discredited claims regarding Nikola's hydrogen-production infrastructure, despite Nikola's publicly documented and substantial investments in hydrogen fueling stations and electrolyzer equipment, and its active participation in global hydrogen standards groups. (Da41–42, Compl. ¶ 67; Da48, Compl. ¶¶ 75–76.)

When Milton resigned as Executive Chairman in September 2020, the Hindenburg Defendants falsely proclaimed that the resignation validated their

allegations, despite knowing it was largely unrelated to their accusations. (Da44, Compl. ¶ 78.) Furthermore, when Milton was indicted on federal securities charges—charges distinctly different from Hindenburg's original allegations—the Hindenburg Defendants misleadingly presented the indictment as further confirmation of their false claims, capitalizing on the moment to further their malicious narrative, and invoking its co-defendant CNBC for added legitimacy. (Da44, Compl. ¶ 79.)

In short, through persistent and willful disregard for clear evidence and established facts, the Hindenburg Defendants have made it abundantly clear that their objective was never accuracy or investor protection, but rather the deliberate and strategic destruction of Milton's professional reputation and Nikola's business standing, all to further their own financial gain. (Db34, Compl. ¶ 41; Db45, Compl. ¶ 81.)

E. The Hindenburg Defendants' Central Role in CNBC's Libelous Broadcast

On October 4, 2022—near the time Milton's criminal trial would be handed over to the jury—CNBC aired *Chasing Tesla*, prominently showcasing the discredited claims from Hindenburg's earlier campaign. (Da46, Compl. ¶ 88.) The episode visually and narratively framed Hindenburg as a credible authority, explicitly stating that Hindenburg was actively "taking aim" at

Milton's so-called "high-flying hydrogen-powered greed." (Da46–47, Compl. ¶¶ 90–92.)

Before the broadcast, CNBC contacted the Hindenburg Defendants as part of their source-checking protocols and sought authorization to use Hindenburg's proprietary branding materials—including their logo—to bolster the episode's perceived credibility and legitimacy. (Da48, Compl. ¶¶ 93–94.) More importantly, the Hindenburg Defendants did not just authorize CNBC's use of their branding, they reaffirmed their long-debunked litany of falsehoods to CNBC. (Da48, Compl. ¶ 94.)

Chasing Tesla then regurgitated lie after lie directly from the Hindenburg Report. These included, among others, the false assertion that Nikola staged its promotional "Nikola One in Motion" video (Da50–51, Compl. ¶¶ 102–03), the entirely false claim that the Nikola Badger was a conceptual sketch rather than a tangible prototype (Da51, Compl. ¶¶ 104–05), and the false narrative that Nikola lacked legitimate hydrogen-production infrastructure and inverter technology (Da37–38, Compl. ¶¶ 52–53; Da41–42, Compl. ¶ 67, Da43, Compl. ¶ 75).

Far from being passive bystanders, the Hindenburg Defendants' strategic and deliberate actions directly facilitated CNBC's libelous broadcast, ensuring

maximum damage to Milton precisely when he was most vulnerable. (Da46–53, Compl. ¶¶ 98, 113.) And damage it did inflict.

F. The Damage: Immediate, Lasting and Continuing

The reputational and economic harm inflicted by *Chasing Tesla* was immediate, severe, and undeniable. (Da53–55, Compl. ¶ 114–22.) Within hours of the broadcast, social media was flooded with posts maligning Milton and echoing the episode's themes. (Da53–54, Compl. ¶ 115.) Even a juror initially convinced of Milton's innocence abruptly reversed her position after watching the broadcast. (Da32; Compl. ¶¶ 120–21.) The false narrative, lasting less than forty-five minutes, had wiped away weeks of trial testimony and exhibits. (*See* Da55, 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* Da54, Compl. ¶¶ 117–18.) Milton was blocked from purchasing the Badger program and the Powersports Division from Nikola. (Da54, 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 Milton received a presidential pardon in March 2025, eliminating the criminal consequences of his conviction, *see United States v. Milton*, No. 21-cr-478, ECF No. 366

(S.D.N.Y. Mar. 27, 2025) (Executive Grant of Clemency—Presidential pardon), the damage inflicted by CNBC's broadcast persisted.

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 Banco Popular N. America v. Gandi,* 184 N.J. 161, 165–66 (2005); *Printing Mart-Morristown v. Sharp Elecs. Corp*., 116 N.J. 739, 746 (1989). 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 *Banco Popular*, 184 N.J. at 165). Dismissal is appropriate "only in the rarest of instances," and a court's role at this stage is not to evaluate whether plaintiffs ultimately can prove their allegations but solely to determine whether the allegations plausibly suggest a legally sufficient claim. *See Banco Popular*, 184 N.J. at 165–66.

UPEPA provides the threshold framework for Defendants' application. The statute—codified at N.J.S.A. 2A:53A-49, *et seq*.—creates expedited procedures for resolving claims arising from speech involving matters of public concern. Under UPEPA, filing an order to show cause presumptively stays proceedings, although

narrowly tailored discovery may be permitted upon a showing of good cause. N.J.S.A. 2A:53A-52(d); N.J.S.A. 2A:53A-53(b).

The statute mandates a three-step analysis for dismissal motions:

1. The movant first bears the initial burden of demonstrating that UPEPA applies. N.J.S.A. 2A:53A-55(a)(1).

2. The respondent then may rebut by establishing that the Act does not apply, including by demonstrating the applicability of UPEPA's explicit exemption for persons primarily engaged in selling or leasing goods or services when the cause of action arises from related communications. N.J.S.A. 2A:53A-50(c)(3); N.J.S.A. 2A:53A-55(a)(2). The commercial speech exemption operates as a threshold inquiry that, if applicable, ends the analysis without reaching the merits.

3. Only if the court determines that UPEPA applies does it then evaluate whether dismissal is warranted. At this stage, dismissal is appropriate only if either (i) the responding party fails to establish a prima facie case for each essential element of the cause of action, or (ii) the moving party demonstrates the responding party has failed to state a claim upon which relief may be granted. N.J.S.A. 2A:53A-55(a)(3).

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. THIS COURT SHOULD AFFIRM THE LOWER COURT'S HOLDING THAT THE COMPLAINT ADEQUATELY PLEADS A CLAIM FOR AIDING AND ABETTING TRADE LIBEL. (Da15–22.)

To state an aiding-and-abetting claim under New Jersey law, a plaintiff must allege: (1) the commission of a tort by a primary actor; (2) that the aider knew the conduct was tortious; and (3) that the aider provided "substantial assistance or encouragement" to the commission of that tort. *See, e.g.*, *State Dep't of Treasury v. Qwest Commc'ns Int'l, Inc.*, 387 N.J. Super. 469, 481–84 (App. Div. 2006). Here, the trial court correctly determined that Milton's Complaint met all three criteria at the pleading stage.

First, the Complaint sufficiently alleges the underlying tort of trade libel committed by CNBC, detailing the publication of false and misleading statements intended to damage Milton's economic and professional interests.

Second, the Complaint pleads sufficient factual allegations demonstrating that the Hindenburg Defendants knowingly assisted and facilitated CNBC's libelous broadcast through strategic reaffirmations of their previously discredited accusations and authorization of proprietary branding materials.

Finally, the Complaint adequately establishes the substantiality of this assistance, including the nature and extent of the harm encouraged, Hindenburg's instrumental role in shaping and amplifying CNBC's tortious conduct, their

mutually beneficial relationship with CNBC, and their clear financial motive driving persistent targeting of Milton.

A. The trial court correctly held that Milton adequately pleaded the underlying tort of trade libel against CNBC. (Da13.)

The Hindenburg Defendants begin their brief by repeating CNBC's unsuccessful arguments, asserting the Complaint fails to plead the underlying tort of trade libel because: (1) the fair report privilege purportedly applies, (2) Milton's claims are time-barred under a one-year statute of limitations, and (3) Milton failed to plead actual malice and special damages. (Db23–24.) These arguments are without merit and were thoroughly and correctly rejected by the trial court.

The trial court carefully considered and rejected each of these defenses when denying the motions to dismiss. (Da9–24.) As detailed in Milton's opposition brief in the companion appeal (Docket No. A-002791-24), which Milton incorporates here by reference, the fair report privilege does not apply because *Chasing Tesla* was neither a report of official proceedings nor a fair and accurate summary, but rather a dramatization containing fabricated accusations, misleading omissions, and motive-laden commentary. *See* Brief for Plaintiff-Respondent Trevor Milton at 31-35, 38-43, *Milton v. CNBC Inc.*, No. A-002791-24 (N.J. Super Ct. App. Div. Aug. 18, 2025). Specifically, the episode falsely indicated that Milton's criminal trial had not commenced, omitting critical exculpatory context—including the testimony of Milton's expert, Dr. Allen Ferrell. (*See* Da417–909.)

Moreover, the Complaint is timely under the six-year statute of limitations governing trade libel claims, which New Jersey law recognizes as distinct from defamation because of its requirement of special damages. *See, e.g.*, *Henry V.Vaccaro Constr. Co. v. A.J. DePace, Inc.*, 137 N.J. Super. 512, 518 (Law Div. 1975). Finally, the Complaint adequately pleads actual malice and special damages, detailing a sharp decline in Milton's stock holdings, lost business opportunities, terminated financial relationships, and the direct influence of the broadcast on juror perceptions. (Da45–58, Compl. ¶¶ 82–122.)

In short, the trial court's careful reasoning thoroughly addressed and correctly rejected the defenses now re-argued by CNBC and the Hindenburg Defendants. There is no reason to disturb that decision, and this Court should affirm.

B. The trial court correctly held that Milton adequately pleaded that the Hindenburg Defendants provided substantial assistance and encouragement to CNBC for its trade libel. (Da15-22.)

The Hindenburg Defendants argue that, even if Milton has adequately pleaded CNBC's trade libel, the aiding-and-abetting claim against them must be dismissed because Milton did not allege sufficient "affirmative help" or "active participation." (Db27.) According to the Hindenburg Defendants, Milton's allegations concerning their failure to correct false assertions and their authorization of CNBC's use of proprietary materials are insufficient as a matter of

law. (Db26–27.) As discussed below, their argument fundamentally misstates both the applicable standard under New Jersey law and Milton's specific allegations.

New Jersey courts do not apply a rigid or narrow formula when evaluating substantial assistance. Instead, substantial assistance is a flexible, fact-sensitive inquiry guided by five factors from the Restatement (Second) of Torts § 876, which have been expressly adopted by New Jersey courts. Those five factors are: (1) the nature of the act encouraged; (2) the amount of assistance provided; (3) the presence or absence at the time of the tort; (4) the relationship to the primary tortfeasor; and (5) the aider's state of mind. *See Tarr v. Ciasulli*, 181 N.J. 70, 84 (2004); *Kubert v. Best*, 432 N.J. Super. 495, 510–11 (App. Div. 2013); *Podias v. Mairs*, 394 N.J. Super. 338, 353 (App. Div. 2007). Importantly, no single factor is dispositive, and courts carefully weigh the facts particular to each case. *Podias*, 394 N.J. Super. at 355 ("We formulate today no rule of general application since the question . . . *remains one of judicial balancing of the mix of factors peculiar to each case*.") (emphasis added).

Milton's Complaint comfortably meets this standard, alleging multiple detailed acts by the Hindenburg Defendants that, taken together, satisfy these factors at the pleading stage and establish substantial assistance.

1. The nature of the tort encouraged by the Hindenburg Defendants strongly favors substantial assistance.

The seriousness of the underlying tort in this case—trade libel—is a significant factor weighing heavily in favor of substantial assistance. The Complaint describes CNBC's *Chasing Tesla* broadcast not as a minor transgression, but as a calculated, nationally aired dramatization targeting Trevor Milton personally. CNBC positioned Milton as "front and center," falsely portraying him as deliberately exploiting "young, naïve investors," and accusing him of orchestrating multiple fraudulent schemes involving Nikola, St. George Security, and dHybrid. (Da46, Compl. ¶ 90; Da47, Compl. ¶ 92; Da49–50, Compl. ¶¶ 96–99.) Among other falsehoods, the broadcast depicted Nikola's promotional video of the Nikola One prototype as staged "corporate flimflam," asserted falsely that the Nikola Badger prototype never existed, and claimed that Milton dumped hundreds of millions of dollars in Nikola stock in the three months following his indictment. (Da50, Compl. ¶¶ 102–04; Da52, Compl. ¶ 109.) These allegations severely harmed Milton's reputation, led directly to collapsed business relationships and transactions, substantially damaged his financial standing, and caused a juror to reverse her previously positive view of Milton. (Da53–55, Compl. ¶¶ 115–21.)

This Court's decision in *Podias v. Mairs* underscores the significance of a defendant's role in amplifying further harm. 394 N.J. Super. at 356. In *Podias*,

defendants who were passengers in a car that struck a motorcyclist became liable, not for the initial collision itself, but because their subsequent actions significantly increased the risk of further injury to the victim. *Id.* at 356.

Similarly, here, the Hindenburg Defendants played a pivotal role in amplifying and enabling CNBC's libelous broadcast. By reaffirming false allegations to CNBC (Da39–42, Compl. ¶¶ 58–68; Da48, Compl. ¶ 94), and explicitly authorizing CNBC's use of their proprietary materials—including Hindenburg's logo and imagery (Da47–49, Compl. ¶¶ 92–93)—the Hindenburg Defendants provided instrumentalities and encouragement that substantially magnified CNBC's libelous narrative. These deliberate actions significantly escalated the broadcast's damaging impact on Milton's professional reputation, business interests, and financial position. (Da53–54, Compl. ¶¶ 115–18.) Such conduct precisely aligns with the type of substantial assistance recognized as actionable under *Podias*.

2. Hindenburg provided substantial affirmative assistance and encouragement to CNBC.

As this Court has recognized, substantial assistance can include inaction, words of encouragement, or even moral support that facilitates or enhances the effectiveness of a tortious act. *Podias*, 394 N.J. Super. at 353–54. The Complaint readily satisfies this standard, alleging specific and affirmative acts by the Hindenburg Defendants. They not only reaffirmed the accuracy of their

accusations when CNBC contacted them during pre-broadcast source verification (Da48, Compl. ¶¶ 93–94), but also explicitly authorized CNBC to use their proprietary branding materials—including the Hindenburg logo, imagery, and report—to bolster the credibility and perceived legitimacy of the *Chasing Tesla* episode (Da47–48, Compl. ¶¶ 92–93). Indeed, the episode explicitly portrayed the Hindenburg Defendants as a reputable authority actively "taking aim" at Milton's alleged "high-flying hydrogen-powered greed." (Da46, Compl. ¶ 90; Da47, Compl. 92.) These deliberate, pre-broadcast actions significantly enhanced the credibility, framing, and libelous impact of CNBC's broadcast—precisely the type of substantial assistance the Restatement and New Jersey courts recognize as actionable. *See Podias*, 394 N.J. Super. at 354–55.

The Hindenburg Defendants misconstrue Milton's prior citation to *Russell v. Marboro Books*, 183 N.Y.S.2d 8 (Sup. Ct. 1959), by suggesting that it imposes a requirement that substantial assistance must be an "indispensable prerequisite" to the primary tort. (Db27.) But neither New Jersey law nor the Restatement imposes such rigid requirements. *See, e.g.*, *Podias*, 394 N.J. Super. at 355. Rather, substantial assistance can encompass a broad range of conduct—including acts that facilitate or make the tort easier to commit, or that enhance its harmful impact indirectly. *See id.* at 353–54 (acknowledging that substantial assistance includes moral support and suggestive encouragement); *Shepherd v. Hunterdon*

Developmental Ctr., 336 N.J. Super. 395, 424 (App. Div. 2001) (substantial assistance can include actions that "help make the act succeed"). Indeed, the Complaint plainly alleges that Hindenburg provided exactly this kind of facilitative support by reinforcing CNBC's libelous narrative, implicitly endorsing the falsehoods, and providing crucial credibility and branding materials. (Da47–48, Compl. ¶¶ 92–94.)

In short, Hindenburg's deliberate pre-publication reaffirmations and provision of proprietary branding materials constitute substantial assistance under New Jersey law, and the Complaint easily satisfies this element of aiding-and-abetting liability at the pleading stage.[1]

3. Hindenburg's pivotal presence and role in shaping the broadcast supports the inference of substantial assistance.

When a tort involves strategic planning or deliberate deception, the critical inquiry is not whether the defendant was physically present at the moment of

[1] The Hindenburg Defendants repeatedly characterize Milton's allegations as "conclusory" because they are pleaded, in some small part, upon information and belief. (Db30.) This makes no difference whatsoever. As this Court has recognized, "prior to discovery in any meaningful sense, [the plaintiff] is hardly able to plead the precise culpable conduct of [the aider and abettor]." *Qwest*, 387 N.J. Super. at 485. Moreover, the allegation that CNBC communicated with the Hindenburg Defendants prior to the *Chasing Tesla* broadcast regarding the use of proprietary intellectual property is consistent not only with common sense, but also with CNBC's documented practice of contacting third parties to secure permission to use their intellectual property in American Greed broadcasts, as demonstrated in prior litigation. *See Incarcerated Ent., LLC v. CNBC LLC*, No. 1:18-cv-00480-MAK, Compl. ¶¶ 35–40 (D. Del. Mar. 29, 2018).

execution, but whether it was involved in the preparation, creation, or facilitation of the tortious act. This Court's decision in *Qwest*, 387 N.J. Super. 469, underscores this principle. In *Qwest*, this Court reversed a dismissal under Rule 4:6-2(e) and held that auditors could be liable for aiding and abetting fraud despite not being physical present when the fraudulent public financial disclosures were published. *Id.* at 484. It found that the complaint's allegations that the auditors provided pre-fraud strategic guidance and detailed transaction structuring advice, significantly shaping and enabling the fraudulent conduct, were sufficient to plead substantial assistance. *Id.*

The Complaint in this case alleges comparably significant pre-broadcast assistance by the Hindenburg Defendants. They reaffirmed—or deliberately failed to correct—key false allegations about Milton when CNBC contacted them for source verification prior to airing *Chasing Tesla.* (Da48–49, Compl. ¶¶ 92–94.) Moreover, they explicitly authorized CNBC to incorporate their proprietary branding materials, including the Hindenburg logo, report, and visual imagery, lending credibility and shaping the narrative framework of the broadcast. (*Id*.) These intentional acts significantly influenced both the substance and perceived legitimacy of CNBC's libelous program, thereby amplifying the harm inflicted upon Milton. *Cf. Qwest*, 387 N.J. Super. 482–84 (defendant provided substantial

assistance in the form of strategic guidance which contributed to success of fraudulent scheme).

Thus, just as the auditors' behind-the-scenes involvement in *Qwest* significantly shaped the fraudulent financial disclosures, the Hindenburg Defendants' strategic input and authorizations significantly shaped CNBC's false and libelous narrative. Though not physically present in the CNBC control room on October 4, 2022 (at least to Milton's knowledge), their deliberate pre-broadcast contributions clearly facilitated and enhanced the libelous harm Milton suffered. Such purposeful, strategic involvement strongly supports the trial court's finding of substantial assistance at the pleading stage.

4. CNBC and the Hindenburg Defendants had a mutually reinforcing relationship that also supports an inference of trade libel.

Under New Jersey law, a mutually reinforcing relationship—where defendants amplify and strengthen each other's wrongful conduct—is a powerful indicator of substantial assistance. *See Cowher v. Carson & Roberts*, 425 N.J. Super. 285, 303–04 (App. Div. 2012) (finding substantial assistance where defendants "fed off each other" in committing tortious conduct).

Here, the Complaint clearly sets forth precisely this type of mutually reinforcing relationship. The Hindenburg Defendants—activist short-sellers that profit from declines in targeted stocks—launched an aggressive, market-moving

campaign against Nikola, employing sensational allegations designed to influence investors and harm Nikola's stock price. (Da32–34, Compl. ¶¶ 34–40; Da38, Compl. ¶ 57.) At the time of CNBC's broadcast, Hindenburg remained actively committed to targeting Milton, publicly touting CNBC's decision to broadcast its allegations as confirmation of the success of its short-selling campaign. (*See* Da44, Compl. ¶ 79; Da47–48, Compl. ¶ 92–93.)

CNBC, in turn, sought to maximize viewer ratings by leveraging a high-profile, sensationalized narrative. To achieve this, CNBC directly integrated the Hindenburg Defendants' proprietary branding materials—including logos and imagery—prominently into the broadcast, framing Hindenburg as an authoritative and independent validator of its claims. (Da25, Compl. ¶ 5; Da47–48, Compl. ¶¶ 92–93.) CNBC explicitly highlighted Hindenburg's mission and active targeting of Milton, reinforcing the apparent legitimacy of Hindenburg's accusations. (Da47, Compl. ¶ 92.)

Each defendant thus reinforced the other's credibility and impact—Hindenburg provided CNBC with essential accusations, branding, and credibility, while CNBC validated and amplified Hindenburg's false narrative through a national broadcast. (Da44, Compl. ¶ 79, Da45–53, Compl. ¶¶ 82–113.) Together, they created a powerful synergy, significantly escalating the libelous harm to Milton's professional reputation, business interests, and financial standing. (*See*

Da53, Compl. 114–22.) As in *Cowher*, the alignment and mutual reinforcement between the Hindenburg Defendants and CNBC strongly supports the inference that the Hindenburg Defendants substantially assisted CNBC's tortious conduct.

5. Hindenburg's financial motive and persistent targeting support a strong inference of purposeful assistance.

The importance of the final factor—the state of mind of the Hindenburg Defendants—cannot be understated in this case. This is not a scenario where the alleged aider-and-abettor was merely a passive bystander or indifferent third party. Rather, the Hindenburg Defendants were a for-profit short-selling firm whose entire business model revolved around taking aggressive financial positions against targeted companies, publishing incendiary and disparaging allegations to drive down stock prices, and profiting from the resulting market reactions. (Da32–34, Compl. ¶¶ 34–40.) The Hindenburg Defendants took their largest-ever short position against Nikola and thus had a direct and substantial economic incentive to maximize reputational damage to both Nikola and its founder, Milton. (Da32–33, Compl. ¶¶ 36–37.) Indeed, they were so intent on achieving their objective that they paid a source approximately $600,000 and concealed this critical information from the investing public. (Da34, Compl. ¶ 41.)

That financial motive persisted even after Nikola issued a detailed, lawyer-vetted rebuttal refuting Hindenburg's core allegations. (Da39–42, Compl. ¶¶ 58–67.) The Hindenburg Defendants ignored this contrary evidence in its entirety and

escalated their defamatory campaign by publicly reaffirming their claims and amplifying their efforts to undermine Milton. (Da43–44, Compl. ¶¶ 72–79.) Notably, they highlighted CNBC's republication of their allegations in public forums, continued to frame Milton as the embodiment of corporate greed, and persisted in targeting Milton for financial gain more than two years after publishing the initial Hindenburg Report. (Da38–39, Compl. ¶ 57; Da43–45, Compl. ¶¶ 72–81; Da47–48, Compl. ¶¶ 92–94.)

These allegations support a compelling inference that Hindenburg acted with a purposeful intent to encourage CNBC's trade libel—not merely through passive information sharing, but through proactive endorsement and reinforcement of defamatory claims that directly served their financial interests. The Hindenburg Defendants' persistent targeting and knowing disregard for publicly available rebuttals demonstrates not mere indifference, but deliberate, strategic action designed specifically to facilitate Milton's professional destruction. At the pleading stage, this is more than sufficient to infer the type of knowing encouragement that "substantial assistance" requires under New Jersey law. *See, Qwest*, 387 N.J. Super. at 485.

C. The Hindenburg Defendants' substantial truth defense is waived, premature, and baseless. (Issue not raised below.)

Following the lead of its co-defendant CNBC, the Hindenburg Defendants now raise, for the first time on appeal, the defense of the alleged "substantial truth"

of its report as a basis for dismissal. (*Compare* Db26 (arguing they "could not have knowingly participate in trade libel by authorizing CNBC's use of substantially true statements) *with* Pa1–4 (Table of Contents of the Hindenburg Defendants' briefs below which omit arguments regarding substantial truth) and Da9-23 (decision below on Hindenburg Defendants' motion which does not mention substantial truth).) This argument has very clearly been waived. *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).

Beyond waiver, the argument ignores well-settled law that questions of substantial truth are inherently fact-intensive inquiries that are inappropriate at the pleading stage. *See Printing Mart-Morristown v. Sharp Elecs. Corp***.**, 116 N.J. 739, 746 (1989) (liberal pleading standards preclude evidentiary weighing at dismissal); *Hotaling & Co., LLC v. Berry Sols., Inc***.**, No. 20-18718, 2022 WL 4550145, at *6 (D.N.J. Sept. 29, 2022) (substantial truth is not a proper argument for motion to dismiss). Indeed, the lone substantial truth case the Hindenburg

Defendants cite, *G.D. v. Kenny*, 205 N.J. 275 (2011), involved a developed summary judgment record, not a motion to dismiss.[2]

In any event, the Complaint identifies a host of statements in the Hindenburg Report and amplified in *Chasing Tesla* that are completely false. This includes, among others, the utterly false claim that the "Nikola One in Motion" was "corporate flimflam" (Da50–51, Compl. ¶¶ 102–03); the utterly false claim that the Nikola Badger was "never a truck" despite existing prototypes inspected during trial (Da51, Compl. ¶¶ 104–05); and the utterly false claim that Nikola had no proprietary technology (*id.*). These claims were not substantially true, nor could they be shown to be so at this stage solely through the Hindenburg Defendants' citations to public filings. *See, e.g.*, *Laffey v. City of Jersey City*, 289 N.J. Super. 292, 308 (App. Div. 1996) (trial court could take judicial notice of fact that court documents were filed but, "could not take notice of the truth of the contents of [the documents] merely because they were part of a court proceeding"); (*see also*

[2] The other case the Hindenburg Defendants cite is *Dendrite Int'l, Inc. v. Doe No. 3*, 342 N.J. Super. 134 (App. Div. 2001), (Db24–26), but that case is not germane. The case did not arise on a motion to dismiss and it did not decide "substantial truth." *Id.* Rather, this Court was addressing the procedures for unmasking an anonymous internet speaker in a case where a plaintiff was seeking expedited discovery. *Id*. at 140–42, 151–58. It affirmed the denial of disclosure because the plaintiff failed to show harm; it did not apply or resolve any question of "substantial truth." *Id*.

Db14–18, 24 (citing allegations in criminal indictment in support of substantial truth).)

But more importantly, Milton's aiding and abetting claim does not turn on whether any particular line in the Hindenburg Report is or is not substantially true. Aider and abettor liability attaches when a defendant substantially assists in the commission of a tort; and Milton's aider and abettor claim turns on whether the Hindenburg Defendants substantially assisted in CNBC's libelous broadcast. *See, e.g.*, *Qwest*, 387 N.J. Super. at 484 (evaluating whether defendant substantially assisted the underlying fraud, not whether their own statements were false). It does not matter if the Hindenburg Defendants can find something in the Hindenburg Report that may happen to be substantially true. It matters that the Hindenburg Defendants provided substantial assistance to CNBC by providing a false narrative from a seemingly credible and independent source. It matters that the Hindenburg Defendants stood by their lies in the face of an onslaught of contrary facts. In this context, "substantial truth" is a deflection that is irrelevant to the analysis at the pleading stage.

II. THIS COURT SHOULD AFFIRM ON THE ALTERNATIVE GROUND THAT THE HINDENBURG DEFENDANTS' CONDUCT FALLS WITHIN UPEPA'S COMMERCIAL SPEECH EXEMPTION. (Da13-15.)

As a threshold matter, UPEPA explicitly excludes from its protections speech made by individuals or entities primarily engaged in selling or leasing

goods or services, provided the cause of action directly relates to those commercial interests. N.J.S.A. 2A:53A-50(c)(3). Although New Jersey courts have not yet interpreted this exemption, other jurisdictions interpreting analogous exemptions have held that statements disseminated for commercial purposes constitute commercial speech that is outside of anti-SLAPP protections.

Although the court below denied the motion to dismiss on other grounds, Milton renews his argument that the Hindenburg Defendants' UPEPA motion was appropriated denied because that their conduct fits squarely within UPEPA's commercial exemption. (*See* Da13-15.) As outlined below, this argument is an appropriate alternative ground for affirming the trial court's decision. Moreover, the undisputed record establishes that the Hindenburg Defendants, as professional short sellers, were clearly and primarily engaged in commercial activities—buying and selling securities for profit—such that their statements and actions fall comfortably within the commercial speech exemption. The communications at issue, including the Hindenburg Defendants' reaffirmations of allegations to CNBC and authorization of CNBC's use of proprietary branding materials, were very clearly related to their short-selling activities. (Db48, Compl. ¶¶ 93–94.) They had no other purpose. They were designed to influence investors' decisions and market transactions, and to further the commercial strategy and financial interests of the Hindenburg Defendants. (Da395–417.)

A. This Court can affirm the trial court's decision based on the commercial speech exemption, even though Milton did not cross appeal.

The Hindenburg Defendants suggest in their brief that Milton cannot raise the commercial speech exemption because he did not file a cross-appeal (*see* Db41), but that argument fundamentally misunderstands appellate procedure. Under well-settled New Jersey law, "appeals are taken from judgments, not opinions," and respondents may "raise alternative arguments in support of the trial court's judgment without filing a cross-appeal." *Lippman v. Ethicon, Inc.*, 432 N.J. Super. 378, 381 n.1 (App. Div. 2013), *aff'd as modified*, 222 N.J. 362 (2015); *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."). The Supreme Court has recently reaffirmed this longstanding principle, explaining that a respondent may defend the judgment below on any record-supported ground—even those rejected or not reached by the trial court—without the necessity of a cross-appeal. *See State v. Watson*, 254 N.J. 558, 609 (2023); *Jersey City United Against the New Ward Map v. Jersey City Ward Comm'n*, 261 N.J. 30, 71 (2025) (concurrence) ("A respondent who is merely seeking to maintain his judgment may brief and argue on appeal any points that will sustain his judgment."). In other words, as long as a respondent is not "seeking to expand the substantive relief granted by the lower court," he need

not file a cross appeal. *State v. Eldakroury*, 439 N.J. Super. 304, 307 n.2 (App. Div. 2015) (citing *Jennings v. Stephen*s, 574 U.S. 271, 276 (2015)).

Here, Milton is not seeking to modify or enlarge the judgment of the trial court in any way. Rather, he is simply raising an alternative legal basis upon which the trial court's decision can be affirmed. The trial court explicitly noted that Milton had raised the commercial speech exemption but ruled against him on that ground. (*See* Da22–23.) This alternative argument is precisely the kind Milton is entitled to assert to support the trial court's order denying the motion dismiss. This Court can, and should, affirm the trial court's order on this alternative ground.[3]

B. The Hindenburg Defendants engaged in commercial speech because they were primarily engaged in the business of selling or leasing goods or services and their challenged communications related directly to that commercial activity.

UPEPA explicitly exempts from its protections speech made by persons primarily engaged in selling goods or services, provided the cause of action relates

[3] The sole case the Hindenburg Defendants cite—*Burbridge v. Paschal*, 39 N.J. Super. 139 (App Div. 1990)—is wholly inapposite. They quote it for the truism that "a party may not attack the [order] under review without having appealed," (*see id.*), but Milton is not *attacking* the order below. He is offering an additional record-supported ground on which to *sustain* it. *Burbridge* is also factually distinct as the plaintiff's failure there to cross appeal from the trial court's dismissal of a defamation count on the merits was "fatal" to his attempts to revise the dismissed claim on remand. *Id*. at 142. Milton, by contrast, *prevailed below* and seeks no modification or enlargement of the order here—only affirmance on an alternative ground.

directly to those commercial interests. N.J.S.A. 2A:53A-50(c)(3). Although New Jersey courts have not yet interpreted this statutory exemption, courts in other jurisdictions interpreting analogous anti-SLAPP provisions have held that disparaging communications aimed at undermining third parties for financial benefit constitute commercial speech, falling outside statutory protections. *See, e.g.*, *Hieber v. Percheron Holdings*, *LLC*, 591 S.W.3d 208, 211–14 (Tex. App. 2019) (applying the commercial-speech exemption to an employer's claims against a former employee and recognizing the exemption can reach individual employees acting in sales on a company's behalf); *Neuman v. Anesthesia Assocs. of Kan. City, P.A., Neuman v. Anesthesia Assocs. of Kansas City, P.A.*, 2025 WL 2177353, at *9–*11 (Kan. Ct. App. Aug. 1, 2025) (affirming denial of a KPSPA anti-SLAPP motion because a clinic's message to existing patients about a physician's departure constituted commercial speech by a "person engaged in the business of selling … services" and arose from the sale of services).

Here, the Hindenburg Defendants attempt to portray their report and subsequent assistance to CNBC as protected public commentary, but the record contains evidence that unambiguously demonstrates their commercial motivations. (Da395–416.) The Hindenburg Defendants admit that they strategically timed and executed their campaign to manipulate Nikola's stock price and directly benefited from financial positions taken against Nikola. (*See id.*) Indeed, even CNBC's

Chasing Tesla broadcast explicitly emphasized that Hindenburg remained actively engaged in targeting Milton's "high-flying hydrogen-powered greed," demonstrating that Milton remained in Hindenburg's commercial crosshairs even two years after the initial publication. (Da215.) Such calculated, financially driven conduct squarely constitutes commercial speech, clearly distinguishable from genuine acts of protected public discourse. *See* Unif. Public Expression Protection Act § 2 cmt. 13 (Unif. L. Comm'n 2020) (false statements in a corporate advertising not protected under model statute).

1. The Hindenburg Defendants were primarily engaged in commercial activities because their core business involves profiting from disparaging statements designed to influence markets.

The first prong of UPEPA's commercial speech exemption requires the defendant to be primarily engaged in the business of selling or leasing goods or services. N.J.S.A. 2A:53A-50(c)(3). Courts interpreting analogous anti-SLAPP statutes hold that entities principally engaged in commercial activities—particularly those providing financial, consulting, or professional services—squarely meet this standard. *See, e.g.*, *Xu v. Huang*, 288 Cal. Rptr. 3d 558, 567–70 (Cal. Ct. App. 2021) (defendants providing financial advisory services, insurance, and wealth management qualified as commercial actors under analogous exemption); *Miller Weisbrod LLP v. Llamas-Soforo*, 511 S.W.3d 181, 188–91 (Tex. App. 2014) (law firm's communications promoting its services were

commercial speech beyond anti-SLAPP protections because they were directed at consumers and meant to attract clients).

The record demonstrates that the Hindenburg Defendants engage in precisely this kind of commercial activity. Their core business model involves short selling, a fundamentally and quintessentially commercial endeavor in which financial gain hinges directly on influencing investor decisions and market movements. (Da395–417.) To further their efforts, Hindenburg Defendants disseminated disparaging inflammatory research reports to depress stock prices of targeted companies for their own profit. (*Id.*) Rather than acting as neutral public commentators, they acted with quintessentially commercial motives when they targeted Nikola and Milton, and disseminated false and misleading information about them. (*Id*.)

As highlighted explicitly in *Chasing Tesla* itself, this commercial targeting of Milton was ongoing as of the October 4, 2022 broadcast. (Da215 (Hindenburg Research will "take aim Milton's high-flying hydrogen-powered greed").) Thus, the Hindenburg Defendants continuous disparaging communications were in service of a purely commercial financial strategy: profiting by damaging their targets. Their actions place them precisely within the category of commercial actors that UPEPA intended to exclude from protection.

In its contrary holding, the court below reasoned that the commercial speech exemption was inapplicable primarily because the Hindenburg Defendants "did not sell [their] research reports to the public." (Da13.) Respectfully, this interpretation misreads UPEPA's statutory text. The exemption does not hinge on whether a defendant sells the specific communication at issue, but rather whether the defendant who made the communication is "primarily engaged in the business of selling or leasing goods or services." N.J.S.A. 2A:53A-50(c)(3). Here, the record contains uncontested evidence that the Hindenburg Defendants' business model is centered around short-selling securities—a quintessentially commercial activity involving the buying and selling securities for profit based on market-moving reports. (Da395–416.) Whether Hindenburg offers its reports for free is a red herring. Its objective was profit. It profited by buying and selling securities. (*See id.*; *see also* Da32–33, Compl. ¶¶ 34–40.) As a short seller, the Hindenburg Defendants were engaged in an activity that is squarely within the ambit of UPEPA.[4]

[4] The Hindenburg Defendants may attempt to rely on *Muddy Waters, LLC v. Superior Court*, 277 Cal. Rptr. 3d 204 (Cal. Ct. App. 2021), for the proposition that short-seller activity is generally protected speech under anti-SLAPP statutes. Such reliance would be misplaced. *Muddy Waters* applied California's commercial speech exemption, which explicitly requires the defendant and the plaintiff to be direct business competitors for the exemption to apply. *Id*. at 216–17. New Jersey's UPEPA, in contrast, contains no such competitive requirement, instead broadly exempting speech "related to the person's sale or lease of goods or services," regardless of whether the defendant and plaintiff directly compete.

2. The Hindenburg Defendants' communications were related to their commercial activity because they sought to influence investors' decisions and market transactions.

The second prong of UPEPA's commercial exemption requires that the challenged communication directly relate to the defendant's sale or lease of goods or services. N.J.S.A. 2A:53A-50(c)(3). Courts interpreting analogous exemptions consistently hold that statements are related to commercial activities when their primary purpose is to influence market participants or facilitate commercial transactions. *See, e.g., Miller Weisbrod*, 511 S.W.3d at 188–91 (communications intended to affect commercial consumer choices and attract business fell within exemption); *Demetriades v. Yelp, Inc*., 175 Cal. Rptr. 3d 131, 141–43 (Cal. Ct. App. 2014) (statements made to influence consumer behavior and market perceptions were commercial in nature and thus excluded from statutory protection). Indeed, the commentary to the model statute underlying UPEPA clarifies that statements aimed directly at furthering commercial objectives are exempt. *See* Unif. Public Expression Protection Act § 2 cmt. 13 (Unif. L. Comm'n 2020) (commercial exemption would apply to false statements in advertising by mattress seller).

N.J.S.A. 2A:53A-50(c)(3). That is a key distinction that renders *Muddy Waters* irrelevant to the analysis here.

Here, the record establishes that the Hindenburg Defendants are short sellers whose core business model involves taking short positions and then strategically issuing negative commentary aimed at depressing the target company's stock price. (Da395–416.) Their original report concerning Nikola exemplified this model: by releasing highly inflammatory and negative allegations, Hindenburg sought to persuade investors to sell Nikola stock, thus driving the price downward and directly increasing the profits from their short positions. (*See id*.)

Moreover, the record further confirms the direct commercial nature of the Hindenburg Defendants' subsequent communications with CNBC. By reaffirming their prior negative allegations to CNBC and authorizing CNBC to incorporate Hindenburg's proprietary research and branding into the *Chasing Tesla* broadcast, the Hindenburg Defendants actively facilitated CNBC's dissemination of their narrative, thereby furthering their explicit commercial interest in maintaining downward pressure on Nikola's stock. (Da395–416.) Indeed, the *Chasing Tesla* broadcast itself explicitly highlighted Hindenburg's ongoing short-selling strategy and emphasized their continued targeting of Milton's alleged "high-flying hydrogen-powered greed" two years after the original publication of their report. (Da47, Compl. ¶ 92.)

Thus, the record clearly demonstrates that the Hindenburg Defendants' communications were directly related to their commercial activity as a firm that

profits by short selling, a strategy that involves the buying and selling of securities. (Da395–416.) Those are, of course, quintessentially commercial activities. This Court should affirm the order below because the Hindenburg Defendants were engaged in commercial activities and their communications with CNBC were directly related to that activity.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the order below denying the Hindenburg Defendants' motion to dismiss.

Respectfully submitted,

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By: */s/ Jamie Hoxie Solano*
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Dated: August 22, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-002854-24

TREVOR MILTON, *Plaintiff-Respondent,* vs. CNBC, INC., *Defendant,* NATHAN ANDERSON and HINDENBURG RESEARCH, LLC, *Defendants-Appellants*.	:	CIVIL ACTION ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DOCKET NO. BER-L-532-25 Sat Below: HON. ANTHONY R. SUAREZ, J.S.C.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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ARGUMENT

Milton's Opposition concedes by its silence many of the arguments in the Hindenburg Defendants' opening brief that demonstrate the inadequacy of Milton's claims. The Opposition fails to identify a single allegedly defamatory statement in *Chasing Tesla* that was based on any statement made in the Hindenburg Report, making it impossible for the Hindenburg Defendants to have aided and abetted CNBC's alleged libel by allegedly confirming the accuracy of their Report. *See* Br. 18-21.[1]

Rather than respond to the Hindenburg Defendants' detailed demonstration of the Complaint's inadequate allegations of falsity (Br. 14-18), the Opposition recycles those deficient allegations dressed up with more spin. OB 11-15. Indeed, the Opposition is filled with hyperbolic adverbs and adjectives that are unsupported by any facts alleged in the Complaint. For example, it refers to Nikola's anemic September 14, 2020 press release as a "quick[]," "authoritative[]," "scathing," and "comprehensive[]" rebuttal of the Hindenburg Report (OB 12-13, 15); yet, as demonstrated in Appellants' opening brief, that document failed to rebut ***any*** of the material opinions or supporting facts expressed in the Report. Br. 16-20. After Milton was no

[1] "Br. __" refers to Appellants' opening brief filed July 28, 2025. "OB __" refers to Respondent's brief in opposition filed August 22, 2025 (the "Opposition"). "Dra__ refers to Appellants' Reply Appendix, filed herewith.

longer in control of Nikola (Da44 at ¶78), the company admitted that "Hindenburg is correct in describing a number of statements by Trevor Milton as misleading and/or false." Da67.

The Opposition's argument about the Report's statements concerning Milton's false claims about Nikola's hydrogen production is a prime example of Milton's sleight-of-hand. The Report called out Milton's lie that Nikola was already producing hydrogen at $3 per kilogram—81% below the market rate—when in reality, ***Nikola never produced any hydrogen at any price***. Da368-369, Da115 at ¶63. While Milton accuses the Hindenburg Defendants of "'false and misleading claims about Nikola's hydrogen production capabilities'" (Da41 at ¶67; OB 14, 15), nowhere does the Complaint allege that Nikola actually produced any hydrogen. Instead, it quotes statements in Nikola's obfuscatory September 14, 2020 press release concerning the company's future "'***planned*** hydrogen station network;'" its membership in hydrogen standards organizations; and its installation of a single "'hydrogen storage and dispensing [demonstration] station'"—none of which indicates that Nikola was ***producing*** any hydrogen. Da41-42 at ¶67 (emphasis added); OB 14-15. Far from a "scathing rebuttal," this contradicts Milton's false claims by conceding that Nikola had yet to produce any hydrogen, as was also alleged in Milton's criminal indictment. More importantly, the Complaint makes no

claim that *Chasing Tesla* included false statements about Nikola's hydrogen production, so the Hindenburg Defendants' alleged verification of the Report's statements on that topic could not have provided substantial assistance to any libel in the broadcast.[2]

I. THE AIDING AND ABETTING CLAIMS FAIL BECAUSE THE COMPLAINT DOES NOT STATE A CLAIM AGAINST CNBC FOR TRADE LIBEL (Da13)

For the reasons stated in CNBC's briefs in the companion appeal Docket No. A-2791-24 (incorporated herein by reference), Milton has failed to state a timely claim for trade libel against CNBC, which necessarily dooms his claim for aiding and abetting against the Hindenburg Defendants. *See* Br. 23-24.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE COMPLAINT SUFFICIENTLY ALLEGES THAT THE HINDENBURG DEFENDANTS SUBSTANTIALLY ASSISTED CNBC'S ALLEGED TRADE LIBEL (Da15-23)

Milton's Opposition fantastically characterizes the Hindenburg Defendants as having a "pivotal presence" (Br. 28) and "central role" (*id.* at 16) in *Chasing Tesla*, despite the Complaint alleging only ***a single communication, initiated by CNBC***, in which the Hindenburg Defendants

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[2] Unable to rebut Appellants' demonstration that the Complaint fails adequately to allege the falsity of any statements in the Report, the Opposition falsely claims that this argument is "now raise[d], for the first time on appeal." OB 33. Appellants expressly argued Milton's failure to allege falsity to the trial court. *See* Dra2; Dra3 (citing *G.D. v. Kenny*, 205 N.J. 275 (2011) and noting "'The law of defamation overlooks minor inaccuracies, focusing instead on substantial truth … so long as the substance, the gist, the sting, of the libelous charge be justified.'"); Dra3 at n.9; and Dra5 (noting Milton's failure adequately to plead falsity).

"verif[ied] various assertions in the Hindenburg Report"—but not any of the statements by which Milton alleges CNBC libeled him (*see infra*, Point II.A)—and "granted CNBC permission to utilize [their] logo." Da48 at ¶¶93-94. *Accord* OB 3, 17, 21, 26, 26-27, 29. Even if Milton had alleged a single libelous statement in *Chasing Tesla* that originated in the Hindenburg Report—which he has not (*see* OB 17, 25, 35)—the Opposition's hyperbolic spin could not convert the limited conduct alleged in the Complaint into the "affirmative[] help" and "active participation" necessary to plead aiding-and-abetting. *New Jersey Dep't of Treasury v. Qwest Commc'ns Int'l., Inc.*, 387 N.J. Super. 469, 476 (App. Div. 2006). The five "substantial assistance" factors that Milton urges this Court to consider (*see* OB 24-33) only confirm the insufficiency of his aiding-and-abetting allegations.

A. The Hindenburg Defendants Cannot Have Substantially Assisted Allegedly Libelous Statements in *Chasing Tesla* That Are Not Found in the Hindenburg Report (Da21-22)

Despite flamboyantly asserting that *Chasing Tesla* "regurgitated lie after lie directly from the Hindenburg Report" (OB 17), Milton's Opposition identifies ***only three*** instances of supposed regurgitation (*see id.* at 17, 25, 35), ***none of which actually involved a statement that appeared in the Hindenburg Report***.[3] The Report, which was published ***more than 10 months***

[3] The Opposition identifies a fourth allegedly "regurgitated" statement—"that Nikola lacked legitimate hydrogen-production infrastructure and inverter

before Milton was indicted (Da335-388, Da74-80), could not have provided the basis for *Chasing Tesla's* statement "that Milton dumped hundreds of millions of dollars in Nikola stock ***in the three months following*** his indictment." OB 25 (emphasis added) (citing Da52 at ¶109). *See* Br. 21.

Likewise, the Report could not have provided the basis for the statements concerning the non-existence of the Nikola Badger (*see* OB 17, 25 and 35 (all citing Da51 at ¶¶104-105)), because the Report contains no discussion whatsoever concerning the Nikola Badger. *See* Da335-388. CNBC can only have based those statements on the SEC's complaint against Milton (*see* Da75, Da76, Da77, Da173-180 at ¶¶89-103) or his criminal indictment (Da85 at ¶ 2, Da103-114 at ¶¶41-61) (*see* Da970-71 (CNBC Chart)), which is what the Complaint actually alleges. *See* Da51 at ¶104 (quoting the *Chasing Tesla* narrator stating: "'***[a]ccording to the government***, the Badger was nothing more than a drawing'") (emphasis added). This privileged, fair reporting by CNBC was entirely unassisted by the Hindenburg Defendants.

Milton's only complaint about *Chasing Tesla's* statements concerning the "Nikola One in Motion" video is the narrator's description of it as

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technology." OB 17 (citing Da37-38 at ¶¶52-53, Da41-42 at ¶67, Da43 at ¶75 (all discussing the Hindenburg Report, not *Chasing Tesla*)). Because the Complaint does not allege that this statement was repeated in *Chasing Tesla*, it cannot have assisted CNBC's alleged trade libel. *See* Br. 6-7, 18-19.

"'corporate flimflam.'" OB 25, 35. The Report does not use the expression "flimflam" to describe the video, or at all. Da357-360. Like the non-existence of the Nikola Badger, the circumstances surrounding the creation of the video and the fact that it misled investors, were addressed at length in the SEC's complaint (Da143 at ¶4(a), Da159-161 at ¶¶59-65) and Milton's indictment (Da76, Da100-102 at ¶¶35-36), which CNBC has identified as the sources for *Chasing Tesla*. *See, e.g.,* Da969-970 (CNBC Chart). Moreover, the Complaint fails to allege that the Report's actual statement that the "Nikola One" truck was a "not a real truck" (Da347) was false, a pleading deficiency the Opposition fails to address. OB 16-17. Thus, allegedly verifying the accuracy of the Hindenburg Report could not have aided and abetted libel. *See e.g.*, *Hyman v. Rosenbaum Yeshiva of N.J.*, 258 N.J. 208, 236 (2024) ("The elements of a defamation claim" include "the assertion of a false and defamatory statement concerning another").

In sum, it is now clear that Milton has not identified a single allegedly libelous statement in *Chasing Tesla* that originated in the Hindenburg Report.

B. The Restatement's Five Factors Confirm That Milton's Allegations Fall Far Short of Substantial Assistance (Not raised below)

For the first time in this case, the Opposition argues that Milton's allegations must be evaluated pursuant to the following five factors from the RESTATEMENT (SECOND) OF TORTS § 876(b), comment d:

> (1) the nature of the act encouraged, (2) the amount of assistance given, (3) the alleged aider and abettor's presence or absence at the time of the tort, (4) his relation to the primary tortfeasor, and (5) his state of mind.

See OB 24. Even if this argument had not been waived—*see, e.g., Fuhrman v. Mailander*, 466 N.J. Super. 572, 596 (App. Div. 2021)—the Restatement factors confirm that Appellants' alleged assistance to CNBC was not "substantial."

Here, the act allegedly encouraged is trade libel. Yet, Milton fails to cite a single New Jersey case in which a claim of aiding and abetting trade libel or defamation was sustained. Because the tort of trade libel requires proof of the publication of statements "derogatory to the plaintiff's property or business," *Patel v. Soriano*, 369 N.J. Super. 192, 246 (App. Div. 2004), the assistance given by an aider and abettor should relate to the allegedly derogatory statements. Here, Milton cannot connect the Hindenburg Defendants to ***any*** of the allegedly libelous statements in *Chasing Tesla*. *See* Point II.A, *supra*.

Having apparently recognizing this defect in his pleadings, Milton now argues that the Hindenburg Defendants provided substantial assistance merely by allowing CNBC to use their name and logo in *Chasing Tesla*, which Milton claims bolstered the "credibility" and "perceived legitimacy" of CNBC's broadcast. *See* OB 2, 26, 27, 28, 29, 31, 36. This incredible argument fails for a host of reasons. Not only is the Complaint barren of any allegations that the Hindenburg Defendants provided intangible assistance in the form of

credibility and legitimacy (Da24-61), the Complaint contradicts Milton's current characterization of the Hindenburg Defendants as having "the credibility of a branded 'research firm'" and being a "seemingly credible and independent source" (OB 2, 36), by describing them as, among other things, "a short seller with a vested financial interest in Nikola's failure." Da26 at ¶6. *See also, e.g.*, Da39 at ¶59 ("'an activist short-seller whose motivation is to manipulate the market and profit from a manufactured decline in [Nikola's] stock price'") (quoting Nikola press release).

Contrary to the Opposition, *Chasing Tesla* did not "portray[] the Hindenburg Defendants as "a reputable authority" (OB 27) but instead prominently disclosed that: "HINDENBURG, WHICH ALLUDES TO HIGH-FLYING DISASTERS IN THE MAKING, IS A SHORT SELLER THAT WOULD PROFIT IF NIKOLA'S STOCK DROPS." Da229.

Most importantly, Milton does not—and cannot—cite a single case in which allegedly bolstering a libeler's credibility and legitimacy was held sufficient to plead substantial assistance giving rise to liability for aiding-and-abetting. The Opposition's related argument that conduct that "amplif[ies]" or "enhance[s]" the harm caused by a primary violator can constitute substantial assistance finds no support in the case upon which it purports to rely. OB 25-27 (citing *Podias v. Mairs*, 394 N.J. Super. 338, 353-54, 354-55, 355, 356

(App. Div. 2007)). The issue in *Podias* was whether the passengers of a drunk driver could be found to have aided and abetted the driver's breach of his duty to assist a motorcyclist whom he had struck and injured. 394 N.J. Super. at 352. The court concluded that a jury could reasonably find that the passengers' conduct—whereby "at the very least [they] collaborated in, verbally supported, or approved [the driver's] decision to leave the scene [without summoning help for the injured cyclist], and at most actively convinced [the driver] to flee"—provided "assistance substantial enough to justify civil liability … on an aiding and abetting theory." *Id.* at 355. The opinion in *Podias* did not characterize the passengers' conduct as having "amplif[ied]" the harm suffered by the plaintiff. *Contra* OB 25-27. Indeed, the opinion makes clear that it was the breach of duty by the primary tortfeasor—the driver whose actions placed the cyclist in jeopardy—that resulted in "further harm to the victim" when he was struck by another vehicle. 394 N.J. Super. at 345, 355.

As to the Restatement's second factor, here the amount of assistance given is none at all because Milton has not identified a single allegedly libelous statement in *Chasing Tesla* that originated in the Hindenburg Report. *See* Point II.A, *supra*. But even assuming that by responding to CNBC's alleged request that they verify their two-year old Report and permit CNBC to

use their logo (Da48 at ¶¶93-94) the Hindenburg Defendants somehow helped CNBC to publish entirely unrelated statements, Milton does not—and cannot—cite a case in which such minimal participation in a principal violator's conduct constituted "substantial assistance."[4]

As to the third factor, the Hindenburg Defendants are not alleged to have been present at CNBC at the time of the broadcast (*see* OB 30) and did not appear in *Chasing Tesla*. Da213-36. Nor do they feature "prominently" in the broadcast. *Contra* OB 31. They are mentioned on only three pages of the 22-page transcription of the broadcast. Da215, Da229, Da231. Milton's attempt to minimize their absence, by analogy to the auditors in *Qwest*, is risible. OB 29. Milton's two-paragraph information-and-belief allegation concerning the Hindenburg Defendants' single pre-broadcast communication with CNBC pales in comparison to the thirty-one paragraphs detailing how—over a period of two-and-a-half years—auditor Arthur Andersen LLP "purposefully designed

[4] *See* OB 24, 27, 30 (citing *Kubert v. Best*, 432 N.J. Super. 495, 513 (App. Div.) ("The evidence in this case is not sufficient for a jury to conclude that [defendant] took affirmative steps and gave substantial assistance to [the driver] in violating the law" by texting him while he was driving); *Shepherd v. Hunterdon Developmental Ctr.*, 336 N.J. Super. 395, 425 (App. Div. 2001) (aiders and abettors were the actual perpetrators of the conduct that created the hostile work environment for which plaintiffs sued their employer); *Cowher v. Carson & Roberts*, 425 N.J. Super. 285, 304 (App. Div. 2012) (same); *Tarr v. Ciasulli*, 181 N.J. 70, 84 (2004) (manager's negligent supervision of employee who sexually harassed plaintiff did not constitute substantial assistance)).

[a fraudulent accounting scheme] for Qwest." *Qwest*, 387 N.J. Super. at 475-77. Arthur Anderson's conduct did not occur "pre-fraud," and the accounting firm was indeed "physically present when the fraudulent public financial disclosures were published." *Contra* OB 29. As Qwest's independent auditor, Arthur Anderson certified the company's fraudulent Forms 10-K for two years in a row. 387 N.J. Super. at 477. Unlike Appellants, Arthur Anderson "was an active participant and helped perpetrate the [underlying tort]." *Id*. at 484.

As to the fourth factor, Appellants are not alleged to have had any relationship with CNBC, let alone the "mutually reinforcing relationship" the Opposition posits. OB 30-32. Once again, the Opposition draws a preposterous analogy, this time between Appellants' non-relationship with CNBC and the close relationship between the supervisors alleged to have aided-and-abetted each other in creating a hostile work environment in *Cowher*, 425 N.J. Super. 285. Those two individuals—who described themselves as "'bookends, partners'" (*id.* at 290)—"occupied the same small office[,] … to a large extent shared duties, [and] fed off each other in creating … the 'locker room atmosphere' in which comments denigrating plaintiff[] … were encouraged." *Id*. at 304. *See also* Br. 32-33 (distinguishing *Cowher*).

As to Appellants' alleged state of mind, the Opposition's argument that their motivation to increase the profitability of their short position in Nikola

stock "support[s] a compelling inference that [they] acted with a purposeful intent to encourage CNBC's trade libel" is dead in the water. OB 33. According to the Complaint, Appellants had closed out their short position—and taken their profits—***two years before they were allegedly contacted by CNBC, in October 2022***. Da39 at ¶57 and n.8 (citing Dra10), Da57 at ¶133.

III. THE TRIAL COURT CORRECTLY DETERMINED THAT THE UPEPA APPLIES TO MILTON'S CLAIMS AGAINST THE HINDENBURG DEFENDANTS (Da13-15)

Milton argues for the first time on this appeal that "courts in other jurisdictions … have held that disparaging communications aimed at undermining third parties for financial benefit constitute commercial speech, falling outside [anti-SLAPP] statutory protections." OB 40 (citing *Hieber v. Percheron Holdings, LLC*, 591 S.W.3d 208 (Tex. Ct. App. 2019) and *Neuman v. Anesthesia Assocs. of Kansas City, P.A.*, 2025 WL 2177353 (Kan. Ct. App. Aug. 1, 2025)). Even if Milton had not already waived this meritless argument by failing to raise it below, he cannot attack the judgment under review without having appealed. *See* Br. 22.

A. Milton's Failure to Cross-Appeal Precludes Him From Attacking the Trial Court's Correct Determination That the UPEPA Applies to His Claims Against the Hindenburg Defendants (Not raised below)

Milton's argument that the UPEPA's commercial speech exemption applies to his aiding-and-abetting claims is not "an alternative legal basis upon which the trial court's decision [to sustain those claims] can be affirmed." OB

39. Rather, it is an attack on a separate aspect of the trial court's order, that was decided adversely to Milton. Da9, Da11-15. Milton is not now seeking to "'support'" or "'sustain'" the trial court's determination that the UPEPA applies to his claims. *Contra* OB 38 (quoting cases). *See also State v. Eldakroury*, 439 N.J. Super. 304, 307 n.2 (App. Div. 2015) (*cited in* OB 38-39) ("Without cross-appealing, a party may argue points the trial court either rejected or did not address, so long as those arguments are in support of the trial court's order.").

Whether or not the UPEPA applies to Milton's claims, the issue presented on this appeal will be the same: that is, whether the trial court erred in applying the ordinary motion to dismiss standard to Milton's aiding and abetting claims. Da1; Br. 22. That is because, in ruling on the Hindenburg Defendants' order to show cause, the trial court applied the ordinary motion to dismiss standard set forth in N.J.S.A. § 2A:53-55(a)(3)(b)(i), not the UPEPA's alternative, summary-judgment-like standards that are only available for claims that fall within the anti-SLAPP statute. *See* N.J.S.A. § 2A:53-55(a)(3)(a) and (a)(3)(b)(ii). Hence, Milton's argument that the UPEPA does not apply is not an alternative ground for affirming the trial court's decision.

Furthermore, "an appellee who [has] not cross-appeal[ed] may not 'attack the decree with a view either to enlarging his own rights thereunder or

of lessening the rights of his adversary.'" *Jennings v. Stephens*, 574 U.S. 271, 276 (2015) (*cited in* OB 39) (quoting *U.S. v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)). Here, Milton ***seeks to lessen the Hindenburg Defendants' rights*** by depriving them of the protections they currently enjoy under the UPEPA as a consequence of the Decision. Hence, Milton is in the same position as the non-appealing respondents whose arguments were not considered in two of the cases the Opposition cites.[5]

B. Milton's Latest Argument for Engrafting Language Onto UPEPA's Exemption Is Meritless (Not raised below)

The two out-of-state cases the Opposition cites provide no support for Milton's new argument "that disparaging communications aimed at undermining third parties for financial benefit constitute commercial speech." OB 40. The claims at issue in *Hieber*, 591 S.W.3d 208 did not even involve "disparaging communications." The defendant was sued for breach of contract. *Id.* at 210. Both *Hieber* and *Neuman*, 2025 WL 2177353 involved ***claims against defendants who were primarily in the business of selling services***. *See* 591 S.W.3d at 212 (surveying services); 2025 WL 2177353 at

[5] *See* OB 38-39 (citing *Jersey City United Against the New Ward Map v. Jersey City Ward Comm'n*, 261 N.J. 30, 71-72 (2025) (declining to consider non-appealing respondents' argument seeking outright dismissal of a claim the Appellate Division had remanded); *Eldakroury*, 439 N.J. Super at 306 n.2 (declining to consider argument by which non-appealing defendant sought to expand trial court's dismissal of his indictment from "without prejudice" to "with prejudice")).

*10 (healthcare services). Here, Milton's concession that "the Hindenburg Defendants engaged in neither the sale nor leasing of goods or services" (Decision at Da13) distinguishes this case from *Hieber* and *Neuman*.

With this current argument, Milton once again seeks "to expand the scope" of the UPEPA's commercial speech exemption based on language that "appear[s] nowhere in the … exemption"—a strategy the trial court correctly rejected as "contravene[ing] our Supreme Court's and Legislature's mandate that words of a statute must be given their plain meaning." Da14. Even if Milton's latest attempt to evade the UPEPA were not precluded by his failure to appeal the Decision, and had not already been waived, it would fail.

CONCLUSION

Wherefore, the Hindenburg Defendants respectfully request this Court to reverse the denial of their motion to dismiss Count II of the Complaint, and award them their costs, attorneys' fees, and expenses pursuant to N.J.S.A. § 2A:53A-58.

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