

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

NIKOLA CORPORATION, et al.<sup>1</sup>

Debtors.

Chapter 11

Case No. 25-10258 (TMH)

Jointly Administered

**Related Docket No. 15**

**LIMITED OBJECTION TO DEBTORS' MOTION TO  
APPROVE SALE OF THE DEBTORS' ASSETS FREE AND CLEAR**

The United States of America, on behalf of the United States Department of Transportation and its operating administration, the National Highway Traffic Safety Administration (“NHTSA” and collectively, the “United States”) files this limited objection to the motion by above-named debtors (the “Debtors”) to approve the sale of the Debtors’ assets free and clear of liens, claims, interests and encumbrances (the “Sale Motion”) [Dkt. No. 15]. In support of this objection, the United States respectfully states as follows:

**A. Introduction**

1. Nikola designs and manufactures heavy-duty commercial battery-electric (“BEV”) and hydrogen fuel cell (“FCEV”) electric trucks. NHTSA administers the National Traffic and Motor Vehicle Safety Act (“Safety Act”), 49 U.S.C. Chapter 301, and, among other things, regulates aspects of the Debtors’ business. Under the Safety Act, upon deciding in good faith that its vehicles fail to comply with NHTSA-issued Federal Motor Vehicle Standards or its vehicles contain a motor vehicle related safety defect, a manufacturer must institute the Safety Acts’ notice

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<sup>1</sup> The Debtors in these chapter 11 cases, together with the last four digits of each Debtor’s federal tax identification number, are: Nikola Corporation (registered to do business in California as Nikola Truck Manufacturing Corporation) (1153); Nikola Properties, LLC (3648); Nikola Subsidiary Corporation (1876); Nikola Motor Company LLC (0193); Nikola Energy Company LLC (0706); Nikola Powersports LLC (6771); Free Form Factory Inc. (2510); Nikola H2 2081 W Placentia Lane LLC (N/A); 4141 E Broadway Road LLC (N/A); and Nikola Desert Logistics LLC (N/A). The Debtors’ headquarters are located at 4141 East Broadway Road, Phoenix, AZ 85040.

and remedy measures, also known as a recall. 49 U.S.C. §§ 30118-30120. The Safety Act defines a manufacturer as a person (A) manufacturing or assembling motor vehicles or motor vehicle equipment; or (B) importing motor vehicles or motor vehicles for resale. *Id.* § 30102(a)(5). The Safety Act prohibits selling or offering for sale new vehicles subject to a recall. *Id.* § 30112(a)(1). Debtors remains subject to the Safety Act—including all recall obligations—notwithstanding the filing of a bankruptcy petition. *See id.* § 30120A (“a manufacturer’s filing of a petition in bankruptcy under chapter 7 or chapter 11 does not negate the manufacturer’s duty to comply” with the Safety Act.)

2. Through the Sale Motion, the Debtors seek to sell substantially all of their assets, including a number of BEV and FCEV commercial electric trucks, in a court-approved sale. Certain of these vehicles are subject to pending vehicle safety recalls. But the Debtors’ Sale Motion ostensibly seeks approval to sell those vehicles without first completing the recalls, and without obligating a purchaser (who may intend to resell the vehicles to consumers or otherwise introduce them into interstate commerce) to do so. *See* 49 U.S.C. § 30120A (creating priority claim of the United States “to ensure that consumers are adequately protected from any safety defect or noncompliance determined to exist in the manufacturer’s products.”). The United States objects to any sale of affected vehicles without previous compliance with the Debtors’ recall obligations under federal law or express assumption of those obligations by a purchaser.

3. In addition, the United States objects to the Sale Motion to the extent that the contemplated sale would relieve a purchaser from further potential federal vehicle safety obligations. The Debtors’ form of asset purchase agreement (the “Form APA”), (Proposed Order, Dkt. 15-1, Exhibit 2), purports to shield any Purchaser<sup>2</sup> from “liabilities,” which would ostensibly

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<sup>2</sup> Capitalized terms are used as in the Sale Motion and the Form APA unless otherwise indicated.

prevent the United States from enforcing the Safety Act and compelling a Purchaser to comply with vehicle safety obligations before reselling any affected vehicles to the public. The United States' hands cannot be so tied through a section 363 sale.

**B. The Debtors' Open NHTSA Recalls.**

4. Under the Safety Act, once a manufacturer learns of a noncompliance or defect related to motor vehicle safety, the manufacturer must provide NHTSA with a report that, among other things: (i) identifies the vehicles containing the defect or noncompliance, including the total number of potentially affected vehicles; (ii) describes the defect or noncompliance; (iii) provides a chronology of important events and test results considered in confirming the defect or noncompliance; and (iv) describes the manufacturer's program for remedying the defect or noncompliance. 49 C.F.R. § 573.6; *see also* 49 U.S.C. §§ 30119(a), 30120(d). Manufacturers are responsible for initiating recalls when they decide in good faith that a defect or noncompliance exists that is related to motor vehicle safety. 49 U.S.C. § 30118(c). Once it has filed a recall, a manufacturer must submit quarterly reports to NHTSA detailing the manufacturer's progress on the recall. 49 C.F.R. § 573.7.

5. After timely notifying NHTSA, the manufacturer must notify the owners, purchasers, and dealers of the affected vehicles of the defect or noncompliance in the manner prescribed under the Safety Act. *See* 49 U.S.C. §§ 30118(c) & (d); *see also* 49 C.F.R. §§ 573.6 & 577.5-6. The United States can assess civil penalties upon manufacturers that fail comply with the Safety Act's notification procedures for defects and noncompliance. 49 U.S.C. § 30165.

6. In addition to manufacturer-initiated recalls, NHTSA may order a recall if it decides that a vehicle does not comply with safety standards or a safety-related defect after notifying the manufacturer of the defect or noncompliance and providing the manufacturer an opportunity to be heard. *See* 49 U.S.C. § 30118(b). No matter who initiates the recall, the manufacturer must

provide notice to owners, purchasers, and dealers and must remedy the defect or noncompliance. *See* 49 U.S.C. § 30118(b).

7. The manufacturer must remedy the defective or noncompliant vehicle without charge. *See* 49 U.S.C. § 30120(a)(1). It may choose: (1) to repair the vehicle; (2) replace the vehicle with an identical or reasonably equivalent vehicle; or (3) refund the purchase price, less reasonable depreciation. *Id.* If the repair is not accomplished adequately and within a reasonable time, then the manufacturer must replace the vehicle or refund the purchase price to the owner. 49 U.S.C. § 30120(c)(1)-(2). The manufacturer must also reimburse owners who, within a reasonable time in advance of the manufacturer's notification, incurred costs associated with the defect or noncompliance. 49 U.S.C. § 30120(d). NHTSA monitors the manufacturer's corrective action—including the adequacy of any recall repairs—to ensure successful completion of the recall campaign.

8. Based on information provided to, and filed with, NHTSA by the Debtors, three open NHTSA recalls currently affect certain of the Debtors' vehicles:

- **Recall 23V-580.** (“Battery Recall”). Components of the battery cooling system inside the battery pack of battery electric vehicle (BEV) trucks may leak, causing coolant to accumulate inside the battery pack and cause an electrical short, increasing the risk of fire. (Number of potentially affected vehicles: 209).
- **Recall 24V-844.** (“Instrument Recall”). The instrument cluster display goes black on some BEV trucks. The temporary or permanent failure of the display prevents a driver from seeing certain gauges instruments. (Number of potentially affected vehicles: 72).
- **Recall 25V-073.** (“Tank Recall”). Incorrect hydrogen tank mounting block bolts may be installed in certain fuel cell electric vehicle (FCEV) trucks, which could contact the hydrogen tank, potentially causing damage and potential leaks which could increase the risk of a fire. (Number of potentially affected vehicles: 95).

9. The safety issues addressed in these recalls may affect vehicles sold through the Sale Motion. The Debtors have indicated that the Battery Recall affects at least 43 vehicles potentially included in the sale, and that repairs of those vehicles are not yet complete.

Additionally, the United States is unaware of whether other vehicles the Debtors seek to sell are affected by any of these open recalls or suffer from other undiscovered noncompliance or safety defects.

**C. The Debtors' Proposed Asset Purchase Agreement.**

10. With its Sale Motion, the Debtor has submitted a proposed Sale Order attaching the Form APA. *See* Proposed Order, Dkt. 15-1, Exhibit 2.

11. The Form APA contemplates a purchaser taking vehicles from the Debtors “free and clear” of prior vehicle safety issues and associated recall obligations. The Form APA outlines the “Excluded Liabilities” in connection with the proposed sales. *See* Form APA, ¶ 2.4. Paragraph 2.4(l) explicitly excludes from liabilities assumed by a purchaser:

all Liabilities to the extent arising out of or otherwise related to any failure of the Business or any Product or any Product Inventory, to comply with any applicable Laws on or prior to the Closing Date regardless of when such non-compliance becomes the subject of an enforcement Action, *product recall*, or third-party claim. . .

*Id.* (emphasis added).

12. The Debtors have confirmed that this provision is intended to permit conveyance of vehicles to a Purchaser without the Debtors completing outstanding recall obligations, and without the purchaser assuming any obligation to complete existing recalls or any further recalls that may arise relating to the vehicles.

**OBJECTIONS**

**A. The Debtors Cannot Transfer Vehicles Without Completing Pending Recall Obligations.**

13. The Safety Act requires vehicle manufacturers to certify compliance with Federal Motor Vehicle Safety Standards and, in general, prohibits the sale of any motor vehicle without complying with those standards. *See* 49 U.S.C. §§ 30112(a)(1), 30115. Additionally, the Debtors

cannot sell a motor vehicle if the vehicle contains a defect for which there is a recall notice or recall order under 49 U.S.C. § 30118. *See* 49 U.S.C. § 30112. A vehicle manufacturer also has a continuing obligation, even after a vehicle is sold, to fulfill the Safety Act's requirements for a recall upon learning of a vehicle's noncompliance or safety defect. *See* 49 U.S.C. 30118(c).

14. The Debtors propose to sell vehicles included in open recalls free and clear of recall obligations, including the obligation to remedy the vehicles. The Debtors have indicated that approximately 43 vehicles subject to the Battery Recall may be sold. However, the Safety Act squarely prohibits a manufacturer from selling any vehicle subject to active recall notices except under narrow enumerated circumstances not applicable here. *See* 49 U.S.C. § 30112(a)(3) and 49 C.F.R. § 573.11.

15. Unless the Debtors fulfill all recall obligations and otherwise comply with all applicable provisions of the Safety Act, they are prohibited from selling the affected vehicles, and the United States objects to any sale in which vehicles remaining subject to open recalls are transferred.

**B. A Free and Clear Sale Cannot Shield a Purchaser from Future Recall Obligations.**

16. In addition, the United States objects to any provision in a sale agreement or order purporting to sell vehicles free and clear of vehicle safety obligations generally. The Form APA ostensibly permits a Purchasers to take vehicles free from liabilities based on "failure . . . to comply with any applicable Laws," including those which "become[ ] the subject of an enforcement Action, *product recall*, or third-party claim. . . ." Form APA, ¶ 2.4 (emphasis added). This broad provision seemingly allows a Purchaser to acquire the Debtors' vehicles free of any existing or future recall obligations.

17. Section 363 of the Bankruptcy Code is not a loophole for a Purchasers to avoid statutory vehicle safety obligations. *See In re CCX, Inc.*, 654 B.R. 680, 703 (D. Del. 2023) (finding that a bankruptcy court order approving the sale of a debtor’s assets “free and clear” of liabilities cannot be used as a “bankruptcy loophole” to shield the purchaser from successor liability arising out of its post-sale conduct). *See also, e.g., Dearden v. FCA US LLC (In re Old Carco LLC)*, 582 B.R. 838, 842 (Bankr. S.D.N.Y. 2018). For example, in *Dearden*, through a bankruptcy sale, a purchaser of vehicles from the debtor agreed to assume the debtor’s obligation to correct defects related to motor vehicle safety or non-compliance with applicable motor vehicle safety standards prescribed under the Safety Act. The bankruptcy court held that the purchaser was responsible for such obligations because they pertained to the post-closing actions of the purchaser in using or selling the vehicle, and that such liability could not be removed through a section 363 sale. *See id.*; *see also Matter of Motors Liquidation Co.*, 829 F.3d 135 (2d Cir. 2016) (confirming a purchaser’s liability for switch defect in vehicles acquired through bankruptcy sale and marketed thereafter).

18. The United States objects to the Sale Motion to the extent the Debtors seek to enjoin any post-sale actions by NHTSA that it would be otherwise entitled to take under applicable non-bankruptcy law. Future recall and noncompliance and safety defect notification obligations cannot be precluded by a sale free and clear of these interests because such obligations are entirely unknown and depend on future occurrences. The Debtors cannot insulate a Purchaser from future liability to Governmental Units through injunctive language in the Sale Order or elsewhere. *See In re CCX, Inc.*, 654 B.R. at 703.

Accordingly, the United States objects to any sale of affected vehicles without previous compliance with the Debtors’ recall obligations under the Safety Act or express assumption of those obligations by a purchaser, and respectfully requests that the Sale Motion be denied, or in

the alternative, that any sale be subject to the fullest extent of the United States' rights under the Safety Act, and other applicable law, as set as set forth in this objection.

Dated: April 8, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victor S. Leung, hereby attest that on April 8, 2025, I caused to be served a copy of this Limited Objection by electronic service on the registered parties via the Court's CM/ECF system:

/s/ Victor S. Leung  
Victor S. Leung