IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
Nikola Corp., *et al.*,[1]	)	Case No. 25-10258 (TMH)
	)	(Jointly Administered)
	)	
	)	Obj. Deadline: Aug. 26, 2025 at 4:00 p.m. (ET)
	)	(extended for the SEC)
	)	Hearing Date: Sept. 5, 2025 at 10:00 a.m. (ET)
Debtors.	)	
	)	**Ref. ECF Nos. 774 and 796**

OBJECTION BY THE U.S. SECURITIES AND EXCHANGE COMMISSION TO FIRST AMENDED COMBINED DISCLOSURE STATEMENT AND CHAPTER 11 PLAN OF LIQUIDATION OF NIKOLA CORPORATION AND ITS DEBTOR AFFILIATES

The U.S. Securities and Exchange Commission ("**SEC**") objects to the *First Amended Combined Disclosure Statement and Chapter 11 Plan of Liquidation of Nikola Corporation and its Debtor Affiliates* (ECF No. 774, the "**Plan**") because the Plan improperly seeks to subordinate the SEC's outstanding $80 million civil penalty claim as a claim "for damages" under Section 510(b) of the Bankruptcy Code. The Debtors' arguments in support of subordination under Section 510(b) are set forth in their Memorandum of Law filed on July 25, 2025 (ECF No. 796, the "**Debtors' MOL**").

[1] The Debtors and the last four digits of their respective federal tax identification numbers 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 (0139); 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' mailing address is PO Box 27028, Tempe, AZ 85285.

TABLE OF CONTENTS

PRELIMINARY STATEMENT

1. In December 2021, Debtor Nikola Corporation consented to a $125 million civil penalty imposed by the SEC to settle numerous violations of the federal securities laws. Since that time, Nikola has paid only $45 million, even though it agreed to pay the penalty in full by the end of 2023. When Nikola filed Chapter 11 in early 2025, it scheduled the roughly $80 million outstanding balance as a general unsecured claim (making the SEC the largest scheduled creditor), and did not dispute the SEC's claim or assert any right of offset.

2. The Debtors' Plan, however, characterizes the SEC's claim as one "for damages arising from the purchase or sale" of a security, subject to subordination under Section 510(b) of the Bankruptcy Code. This characterization is meritless on its face because a civil penalty is not a claim for damages. Moreover, the securities laws violations giving rise to the civil penalty involved more than just violations requiring the purchase or sale of a security as an element of proof. As discussed below, the case law interpreting Section 510(b), the statutes authorizing the SEC to impose civil penalties upon securities law violators, and the language of the underlying SEC Order, all make clear that the civil penalty is not a claim for damages within the scope of Section 510(b).

3. The Debtors seem to concede that point. So instead, they pivot from the plain text of Section 510(b) and focus their argument almost entirely on the fact that the SEC has created a Fair Fund to hold, and ultimately distribute to harmed investors, the penalties that the SEC collects. Under the Debtors' logic, if the SEC were to simply turnover its collections to the U.S. Treasury, then Section 510(b) would not apply. But because the SEC exercised an option given to it by Congress in 2002 to instead distribute collected penalties to harmed investors, the nature of the SEC's claim is fundamentally changed, they argue, and now requires subordination.

4. As an initial matter, the Debtors have not proven the facts which they presume. The SEC has neither submitted nor approved a plan of distribution which identifies who will receive any Fair Fund distributions. Moreover, the SEC controls the Fair Fund process, and third parties (including harmed investors) have no interest in the penalties that the SEC collects nor any right to challenge the SEC's distribution decisions in administrative proceedings. Indeed, even if a Fair Fund is created, the SEC has the discretion to terminate it, and transmit the monies to the Treasury, if the SEC "is of the opinion" that a distribution plan would not be feasible.

5. The SEC's decision to distribute collected penalties to harmed investors, outside of bankruptcy and as part of its own regulatory process, does not convert its general unsecured claim into a subordinated one. Courts routinely hold that the SEC and other regulatory agencies have standing to enforce their own judgments, even if the agency will not be the ultimate recipient of the money. There simply is no precedent in bankruptcy for diminishing a federal agency's rights as a creditor based on the identity of the individuals to whom that agency has the lawful right to distribute its recoveries.

6. The Debtors' remaining arguments – that paying the SEC as a general unsecured creditor violates the absolute priority rule and the "best interests of creditors" test – are equally unpersuasive. Neither test is legally relevant to the actual question at issue, *i.e.*, whether the SEC's civil penalty claim is subject to subordination under Section 510(b). Further, the absolute priority rule is not implicated because, by its terms, it only applies to distributions made "under the plan." Any money distributed by the SEC from the Fair Fund will not be distributed under the Plan. The "best interests of creditors" test likewise provides no basis to subordinate the SEC's claim under Section 510(b) because, as a procedural matter, the test cannot be applied to object to otherwise valid claims. Instead, the Debtors must demonstrate that their Plan, as

proposed, satisfies this and the other confirmation requirements in Section 1129 of the Bankruptcy Code.

7. The Debtors criticize the SEC for continuing to enforce its rights as a creditor, believing instead that the SEC should walk away from further enforcement of its lawful Order. Among other things, Nikola complains that the original $125 million penalty amount (to which Nikola consented) is excessive, is based on the actions of one individual, and that, seeking further payment "penalizes" its other creditors. The first two points are not subject to collateral attack in this case. As to the final point, the SEC notes that the $125 million penalty was imposed and publicly disclosed nearly four years ago in December 2021. Thus, most if not all unsecured creditors affected by the SEC's claim had clear notice of its existence when they began their business relationships with the Debtors.

I. FACTUAL BACKGROUND

A. Nikola's Fundraising and Merger History.[2]

8. Nikola Corporation was originally formed by Trevor Milton ("**Milton**") in 2015 as Bluegentech LLC. In July 2017, Bluegentech converted to a Delaware corporation and changed its name to Nikola Corporation ("**Legacy Nikola**"). Legacy Nikola was privately held, and Milton served as its Chief Executive Officer and Chairman of the Board.

9. VectoIQ Acquisition Corp. ("**VectoIQ**"), a Delaware corporation, was formed in January 2018 as a special purpose acquisition corporation, or SPAC. VectoIQ completed an

[2] The facts contained in this subsection are set forth in the SEC's Administrative Proceeding Order, the entry to which Nikola consented, as discussed below.

initial public offering in May 2018, at which time its securities began to be quoted on The Nasdaq Capital Market.

10. On March 2, 2020, VectoIQ and Legacy Nikola entered into various agreements to merge Legacy Nikola with a VectoIQ subsidiary, with Legacy Nikola remaining as the surviving company and a wholly-owned subsidiary of VectoIQ. The merger was consummated on June 3, 2020, and VectoIQ then changed its name to Nikola Corporation ("**Nikola**"). Beginning on June 4, 2020, Nikola's common stock and warrants traded on the Nasdaq Global Select Market.

11. Prior to the merger, Legacy Nikola raised capital to finance the development and manufacturing of trucks and station infrastructure. From 2015 through March 2020, Legacy Nikola raised over $500 million through private offerings, mostly from institutional investors. In connection with the merger, VectoIQ raised approximately $525 million in a private investment in public equity (PIPE) offering.

B. Nikola Consents to a $125 Million Civil Penalty.

12. From March 2020 through September 2020, Nikola made numerous material misrepresentations through Milton, Nikola's Chief Executive Office and Executive Chairman, and in its securities offering materials and other filings (including Form S-1 and Form S-4 Registration Statements, Prospectuses and Proxy Statements) and company press releases. In addition, Nikola's disclosure controls and procedures were deficient (or non-existent) during the period from June 3, 2020 through September 30, 2020. These failures prevented Nikola from monitoring and reviewing Milton's television and podcast interviews, as well as his social media activity, and from correcting misstatements that Milton made while serving as an officer and director of the company. (OIP at ¶¶ 17-19).

13. On December 21, 2021, Nikola made an Offer of Settlement to the SEC to resolve these matters. The Offer of Settlement was accepted by the SEC, and Nikola consented to the entry of an *Order Instituting Cease-and-Desist Proceedings* ("**OIP**"), which the SEC issued on December 21, 2021. A copy of the OIP is attached to the Debtors' MOL as Exhibit B.

14. In the OIP, the SEC found that Nikola's conduct violated multiple provisions of the federal securities laws, including: (i) Section 10(b) of the Securities Exchange Act of 1934 (the "**Exchange Act**"), and Rule 10b-5 thereunder, which generally prohibit fraud and deceit in connection with the purchase or sale of securities; (ii) Section 17(a) of the Securities Act of 1933 (the "**Securities Act**"), which generally prohibits fraud and deceit in the offer or sale of securities; and (iii) Rule 13a-15(a) of the Exchange Act, which requires reporting companies to establish and maintain disclosure controls and procedures designed to ensure that proper and timely reports are filed with the SEC. (OIP at ¶¶ 41-43).

15. Based on these violations, Nikola offered to pay a $125 million civil penalty, payable in five equal $25 million payments over a two-year period. Although Nikola agreed to complete the payments by the end of 2023, the company had only paid approximately $45 million as of its bankruptcy filing in February 2025. The OIP created a "Fair Fund" under Section 308(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7246) for the penalties paid by Nikola. (OIP at p.13, ¶ C.). The OIP also prohibited Nikola from offsetting amounts Nikola pays under the OIP against any damages claims brought by investors in any private litigation. (Id.).

16. The SEC issued a press release announcing the OIP on December 21, 2021. (SEC.gov | Nikola Corporation to Pay $125 Million to Resolve Fraud Charges). The following day, on December 22, 2021, Nikola also reported the OIP in a Form 8-K filed publicly with the SEC. (EDGAR Filing Documents for 0001193125-21-364159).

17. When Nikola filed this Chapter 11, it listed the SEC as its largest unsecured creditor with a claim of $80.2 million (ECF No. 1 at p. 18). Likewise, Nikola's Bankruptcy Schedule F listed the SEC with an $80.2 million unsecured claim. (ECF No. 203 at p. 131). Nikola did not classify the claim as contingent, unliquidated or disputed, and further, Nikola asserted no right to offset against the claim. (Id.).

C. Nikola's Plan Seeks to Subordinate the SEC's Penalty Claim Under Section 510(b) of the Bankruptcy Code.

18. The Plan contains eight (8) classes of claims and interests. Class 3 of the Plan contains general unsecured claims, which the Debtors estimate will total between $213 million and $246 million, and which the Debtors project will receive a recovery between 23.1% and 77.3% under the Plan. Class 7 of the Plan contains claims that are purportedly subject to subordination under Section 510(b) of the Bankruptcy Code. The Plan's definition of "Section 510(b) Claims" includes "the SEC Claim," which is defined as the $80.2 million outstanding portion of the civil penalty imposed under the OIP.[3]

19. On July 25, 2025, the Debtors filed the Debtors' MOL setting forth their arguments in support of subordinating the SEC's claim under Section 510(b) of the Bankruptcy Code.

20. Of their five arguments, only two apply the standard for subordination under Section 510(b). The Debtors argue that (i) the SEC's civil penalty claim is a claim "for damages" arising from the purchase or sale of a security, and (ii) Section 308(a) of the Sarbanes-Oxley Act – which authorizes the SEC to establish a Fair Fund for harmed investors – does not

[3] The SEC believes that the correct amount of its claim, adding in post-judgment, pre-petition interest, is $83,052,974.90. The SEC is filing a proof of claim to reflect the correct amount of its claim.

convert an otherwise subordinated claim to a non-subordinated claim. The Debtors' other arguments do not address the Section 510(b) standard for subordination, but instead, raise unrelated and/or policy-based arguments for why the SEC should receive no recovery under the Plan: (i) the civil penalty no longer serves a deterrence purpose because the Debtors have liquidated their assets; (ii) treating the SEC's claim as a general unsecured claim violates the absolute priority rule under Section 1129(b)(2) of the Bankruptcy Code; and (iii) the "best interests of creditors" rule embodied in Section 1129(a)(7) of the Bankruptcy Code requires subordination of the SEC's claim under Section 724(a)(4) of the Bankruptcy Code.

21. The Debtors' arguments fail to support subordinating the SEC's penalty claim under Section 510(b). Accordingly, the Plan, which fails to treat the SEC's claim as a general unsecured claim, cannot be confirmed.

II. LEGAL DISCUSSION

A. Section 510(b) Does Not Apply to a Civil Penalty Imposed by the SEC.

22. Section 510(b) of the Bankruptcy Code generally subordinates two types of claims: (i) a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor; and (ii) a claim for damages arising from the purchase or sale of such a security.[4] 11 U.S.C. § 510(b). The Debtors contend that the civil penalty imposed under the OIP is a "claim for damages arising from the purchase or sale" of a security. (Debtors' MOL at ¶ 2). As discussed below, the civil penalty is not compensatory so as to constitute a claim for damages, but is instead directly tied to the nature and number of securities laws violations. And,

[4] Section 510(b) also applies to claims for reimbursement or contribution arising from these two types of claims.

the fact that the SEC decided to create a Fair Fund, pursuant to authority it received from Congress in 2002, rather than send the money to the U.S. Treasury, does not convert the SEC's penalty claim into a claim for damages.

1. The Civil Penalty is not a Claim for Damages.

23. The Bankruptcy Code does not define "damages." However, in the context of Section 510(b), a claim for "damages" is a claim seeking compensation or some recovery other than the simple recovery of an unpaid debt due upon an instrument. French v. Linn Energy, L.L.C. (In re Linn Energy, L.L.C.), 936 F.3d 334, 342 (5th Cir. 2019). A claim can be for "damages" regardless of whether the underlying cause of action is fraud, breach of fiduciary duty, or breach of contract. Id. Thus, "damages" are compensatory in nature and measured by the amount of the plaintiff's loss. Nat'l Rural Telecomm. Coop. v. DirectTV, Inc., 319 F.Supp.2d. 1059, 1081 (C.D. Cal. 2003) ("Dobbs explains that 'restitution measures the remedy by the defendant's gain,' whereas 'damages' 'measures the plaintiff's loss.'") (quoting 1 D. Dobbs, Dobbs Law of Remedies § 4.1(1), at 555 (West 1993)). The Third Circuit has described Section 510(b) in a manner consistent with this approach. See Baroda Hill Investment, Ltd. v. Telegroup, Inc. (In re Telegroup, Inc.), 281 F.2d 133, 142 (3d Cir. 2002) ("Congress enacted § 510(b) to prevent disappointed shareholders ***from recovering their investment loss*** by using fraud and other securities claims to bootstrap their way to parity with general unsecured creditors in a bankruptcy proceeding.") (emphasis added). The SEC's claim seeks payment of an unpaid debt under the OIP, not the recovery of an investment loss.

24. The SEC's civil penalty is neither compensatory in nature nor measured by investor loss. In proceedings under the Securities Act and Exchange Act,[5] Congress authorized the SEC to impose civil penalties, 15 U.S.C. § 77h-1(g); 15 U.S.C. § 78u-2(a)(2), if *inter alia*, doing so "is in the public interest." 15 U.S.C. § 77h-1(g)(1)(B); 15 U.S.C. § 78u-2(c). Here, the SEC imposed "third tier" penalties because the underlying conduct (i) involved fraud or the reckless disregard of a regulatory requirement, and (ii) resulted in substantial losses (or significant risk of loss) to others, or substantial pecuniary gain to Nikola. 15 U.S.C. § 77h-1(g)(2)(C); 15 U.S.C. § 78u-2(b)(3). At the time of the OIP, the applicable third tier penalty was $1,046,373 and $1,182,251 per act or omission, which violated the Securities Act or Exchange Act, respectively.[6] Because the SEC's penalty claim is determined by the nature and number of acts and omissions giving rise to the violations, and not by the amount needed to compensate harmed investors, the penalty is not a claim for damages.

25. Two other factors demonstrate that an SEC civil penalty is not a claim for damages under Section 510(b). First, in the securities laws, Congress expressly authorized the SEC to "impose money penalties." 15 U.S.C. § 77h-1(g); 15 U.S.C. § 78u-2(a). In contrast, in other areas of the securities laws when describing the remedies available for civil plaintiffs in private litigation, Congress used the term "damages."[7] Under principles of statutory

---

[5] Section 8A of the Securities Act authorizes the SEC to institute proceedings for violations of the Securities Act. See 15 U.S.C. § 77h-1. Likewise, Section 21C of the Exchange Act authorizes the SEC to institute proceedings for violations of the Exchange Act. See 15 U.S.C. § 78u-3. The OIP was issued pursuant to proceedings under Section 8A and Section 21C. (OIP at Art. I).

[6] SEC.gov | Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of January 15, 2025). The OIP details numerous acts and omissions which gave rise to each of the three violations set forth therein.

[7] See e.g., Section 11 of the Securities Act ("Civil Liabilities on Account of False Registration Statement") [15 U.S.C. § 77k]; Section 12 of the Securities Act ("Civil Liabilities Arising in Connection with Prospectuses and Communications.") [15 U.S.C. § 77l]; Section 9 of the

construction, Congress intends for different words and terms in the securities laws (for example "application" and "action") to have different meanings. See SEC v. McCarthy, 322 F.3d 650, 656 (9th Cir. 2003); See also 11 U.S.C. § 523(a)(19)(B)(iii) (listing "damages" separately from a "penalty" in describing nondischargeable securities law-related claims). Thus, when the government enforces the securities laws, it imposes "penalties," whereas private plaintiffs recover "damages."

26. Second, the Related Investor Action provision of the OIP demonstrates that the civil penalty imposed against Nikola is separate and distinct from investor damages claims. This provision states that, in any private damages action brought against Nikola by investors, Nikola will not argue that amounts paid towards the civil penalty should reduce any award of compensatory damages in the investor action. (OIP at p.13, ¶ C). Moreover, if Nikola were nonetheless given such a reduction, the OIP requires Nikola to pay that amount to the SEC, and that payment will not be deemed an additional civil penalty and will not change the amount of the civil penalty imposed under the OIP. (Id.). This provision makes clear that the SEC's penalty cannot be discharged by Nikola separately making harmed investors whole, consistent with the penalty's non-compensatory purpose. See SEC v. Jarkesy, 603 U.S. 109, 125 (2024) ("In sum, the civil penalties in this case are designed to punish and deter, not to compensate.").

2. The SEC's Decision to Establish a Fair Fund Does Not Convert the SEC's Penalty Claim into a Claim for Damages.

27. Prior to 2002, any civil penalty paid to the SEC was sent to the U.S. Treasury. Official Comm. Of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 82 (2d Cir.

Exchange Act ("Prohibition Against Manipulation of Security Prices.") [15 U.S.C. § 78i]; Section 18 of the Exchange Act ("Liability for Misleading Statements.") [15 U.S.C. § 78r]; and Section 20A of the Exchange Act ("Private Rights of Action Based on Contemporaneous Trading.") [15 U.S.C. § 78t-1].

2006). In 2002, Congress amended the securities laws to allow the SEC to add penalties to "a disgorgement fund or other fund established for the benefit of the victims" of the violation. 15 U.S.C. § 7246 (the "**Fair Fund Provision**"). Congress does not mandate the creation of a Fair Fund; rather it left that decision to the SEC, which could either seek one by motion (if the penalty were imposed in district court) or create a Fair Fund on its own (if, as here, the penalty is imposed in an administrative proceeding). Id.; 17 C.F.R. § 201.1100 ("the Commission…***may*** order that the amount…of the civil penalty…be used to create a fund for the benefit of investors who were harmed by the violation.") (emphasis added); WorldCom, 467 F.3d at 83 ("[E]ven after the enactment of the Fair Fund provision, the decision remains in the hands of the SEC whether to distribute civil penalties to victims *at all*.") (emphasis in original) (citations omitted).

28. Once a Fair Fund is created in an administrative proceeding, the SEC maintains control of the money and has adopted administrative rules governing the submission, modification and approval of a plan of distribution.[8] 17 C.F.R. § 201.1101; § 201.1104. A plan of distribution must specify the categories of persons potentially eligible to receive distributions, procedures for providing notice of the fund's existence to such persons, and procedures for making and approving claims. 17 C.F.R. § 201.1101(b). If, after creating a Fair Fund, the SEC "is of the opinion" that the cost of administering a distribution plan relative to the value of the available funds and the number of potential claimants would not justify a distribution to investors, then the SEC must pay the money to the general fund of the U.S. Treasury. 17 C.F.R. § 201.1102(b). Significantly, investors and other potential participants in a Fair Fund have no right to intervene, participate, or otherwise appear in any SEC proceeding or to challenge the

---

[8] In a district court case, the court has control of the money and will approve a distribution plan that is "fair and reasonable." SEC v. Wang, 944 F.2d 80, 85 (2d Cir. 1991).

creation of a Fair Fund or any determination by the SEC as to who is eligible to participate in the fund. 17 C.F.R. § 201.1106. In short, the SEC has extensive control and discretion over the creation, termination and distribution of a Fair Fund.

29. The Debtors rely almost exclusively on the provision of the OIP creating a Fair Fund as the basis for subordinating the civil penalty under Section 510(b). According to the Debtors, when a Fair Fund is created, the Court should no longer view the SEC as the creditor seeking to collect a civil penalty. Rather, the Debtors argue that the Court should treat any investors participating in the Fair Fund as the actual creditors. (Debtors' MOL at ¶ 24) ("[T]he Debtors view the SEC Claim essentially as a disguised Claim for certain Holders of Equity Interests."). The Debtors would like for the Court to ignore what the SEC's claim is, and instead, consider only how the claim might be used.

30. As an initial matter, a plan of distribution has not yet been submitted in this matter, let alone approved. The Debtors nevertheless presume, without any evidence, that the individuals who ultimately will share in the Fair Fund would each have a claim that is subject to subordination under Section 510(b). In any event, the Fair Fund is controlled by the SEC and is completely independent of the bankruptcy process and the Debtors' Plan. Whether Fair Fund distributions are feasible and which investors should receive which amounts are subject to the SEC's discretion (and not the jurisdiction of this Court) and are not known at this time.

31. Moreover, the Debtors cite no authority in support of their argument,[9] and nothing in the plain text of Section 510(b) invites the bankruptcy court to do what the Debtors ask –

[9] The Debtors do note that, in In re Adelphia Commc'ns Corp., 327 B.R. 143 (Bankr. S.D.N.Y. 2005), in which the court was asked to approve a settlement involving the allowance of an SEC claim, the court noted that the question of whether the SEC's claim would be subject to subordination under Section 510(b) "is a matter of fair debate." (Debtors' MOL at ¶ 27) (quoting Id. at 169). In a similar settlement context, a bankruptcy court in this Circuit opined on the issue in a less neutral way, stating "[t]he Court agrees with the Trustee and others,

ignore whether the SEC's claim is one "for damages" and instead ask how the SEC intends to use plan distributions outside of the bankruptcy process. Indeed, case law instructs that, when a matter can be resolved by a statute's unambiguous text (which it can here), the Court's inquiry must end. In re Telegroup, 281 F.3d at 137 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)).[10]

32. The Debtors' approach of treating the Fair Fund participants as the real creditors for purposes of Section 510(b) is inconsistent with how courts treat the SEC in bankruptcy cases. In In re Bilzerian, No. 93-486-Civ-T-24A, 1995 WL 934184 (M.D. Fla. May 15, 1995), the SEC appealed a bankruptcy court order dismissing its nondischargeability complaint for lack of standing. Id. at *1. The debt at issue was a $33 million order of disgorgement that the SEC had obtained against the debtor in a federal district court action. Id. The bankruptcy court ruled that the SEC lacked standing because "defrauded investors could have brought a securities fraud action in their own right…." Id. at *2. But on appeal, the district court reversed because the Supreme Court recognizes "a government agency's ability to enforce a debt as a creditor in a bankruptcy case even though the agency will not be the ultimate recipient of the money." Id. (citing Nathanson v. N.L.R.B, 344 U.S. 25 (1952)). Thus, the district court held that the SEC was the creditor with standing to oppose the debtor's discharge. Id. at *4.

33. The court in In re Maio, 176 B.R. 170 (Bankr. S.D. Ind. 1994) reached a similar conclusion. The debtor there objected to the SEC's standing to except from discharge a

---

however, that the better view is that the provisions of 11 U.S.C. § 510(b) do not apply to the allowance of a disgorgement claim to the SEC." In re Covenant Partners, L.P., 541 B.R. 804, 811 (Bankr. E.D. Pa. 2015).

[10] In Telegroup, the Third Circuit found that the phrase "arising from" in Section 510(b) was ambiguous in the context of determining whether shareholder claims for the debtor's breach of a stock purchase agreement "arose from" their stock purchases when the actionable conduct occurred after the sale transaction was completed. That issue is not implicated here.

disgorgement and civil penalty judgment in its favor. Id. at 170-71. The court disagreed, and held that the rights of private investors do not somehow deprive the SEC of its standing as a creditor to enforce its judgments in bankruptcy:

> "The Court agrees that a private right of action does not strip the Commission of standing to enforce the federal securities laws through nondischargeability actions. Indeed, the private individual's claim is fundamentally different from that of the Commission, and bears different elements of proof. The Court finds that to deny the Commission the right of a creditor to bring a nondischargeability complaint would unduly hinder enforcement of the Securities Act and would be contrary to legislative intent."

Id. at 171-72. And when an SEC judgment provides for payment to the district court and/or the U.S. Treasury, the SEC is still the proper creditor for bankruptcy purposes. In re Hodge, 216 B.R. 932, 936 (Bankr. S.D. Ohio 1998) ("Payment of the disgorgement and civil penalty judgments were to be made to the U.S. District Court and U.S. Treasury, respectively. Accordingly, this Court finds that the SEC, as the public agent responsible for enforcing the securities laws comes within the ambit of a creditor to whom the disgorgement judgment is owed."); compare In re Cross, 203 B.R. 456 (Bankr. S.D. Cal. 1996) (when disgorgement order requires payment to the district court receiver, and not the SEC, the SEC does not have a claim).

34. Here, the Debtors scheduled the SEC as a creditor and the holder of the penalty claim under the OIP. Moreover, the OIP expressly requires Nikola to pay the civil penalty "to the Securities and Exchange Commission." (OIP at p. 12, ¶ B). As such, the penalty claim belongs to the SEC, and its decision to create a Fair Fund does not change its creditor status.

35. The Debtors argue that when Congress passed the Fair Fund Provision, it did not intend to override Section 510(b) of the Bankruptcy Code. (Debtors' MOL at pp.13-15). They contend that, prior to 2002, shareholder claims were subject to Section 510(b) and the Fair Fund Provision does not change that. The Debtors are correct that the Fair Fund Provision does not

override Section 510(b), but they misapply that principle here. As noted above, before 2002, an SEC civil penalty would be paid to the U.S. Treasury. Thus, it would not be subordinated under Section 510(b) because the penalty did not go to the debtor's shareholders. Passage of the Fair Fund Provision – which merely gives the SEC discretion to disburse penalties as it deems appropriate and makes no reference to the Bankruptcy Code – should not be interpreted as an indication of Congressional intent to now subordinate SEC claims under Section 510(b) when it chooses to exercise that option. WorldCom, 467 F.3d at 83 (explaining that Fair Fund Provision does not make compensation the primary purpose of the SEC's distribution).

3. Even if the SEC's Civil Penalty Could be Viewed as a Claim for Damages, it is Based, in Part, on Violations that Do Not Require the Purchase or Sale of a Security.

36. A threshold requirement for subordination under Section 510(b) is a claim for damages "arising from the purchase or sale" of a security. 11 U.S.C. § 510(b). Only one of the three violations charged in the OIP requires a "purchase or sale" of a security as an element of proof – the Section 10(b)/Rule 10b-5 violations under the Exchange Act. Section 17(a) of the Securities Act applies to fraud in the "offer or sale" of a security, and many of the violations outlined in the OIP relate to misstatements and material omissions contained in Nikola's offering materials and other SEC filings (OIP at ¶¶ 11-13). The third violation – Rule 13a-15(a) of the Exchange Act – was based on Nikola's lack of adequate disclosure controls and procedures.

37. The OIP does not allocate portions of the overall penalty to each of these three violations. But it is clear that the entire penalty cannot be said to arise from the purchase or sale of the Debtors' securities. The Debtors' MOL makes no effort to quantify the penalty in this way, but nevertheless seeks to subordinate the SEC's entire claim. Assuming the Debtors could establish that the penalty is a claim for damages (which, as discussed above, it is not), they have

failed to explain why the entire penalty arises solely from the purchase or sale of a security (and not the other securities law violations), as required by Section 510(b).

B. The Debtors' Argument That the SEC's Claim No Longer Serves its Purpose is Both Legally Irrelevant to Section 510(b) and Factually Incorrect.

38. The Debtors argue that the civil penalty imposed under the OIP no longer serves its purpose of deterrence because the Debtors are liquidating. (Debtors' MOL at ¶¶ 28-29). The Debtors fail to explain how, even if that is true, this would warrant subordination under Section 510(b).

39. But the Debtors are mistaken. A civil penalty does not lose its deterrent effect simply because the violator becomes insolvent. Civil penalties are imposed when the SEC determines it is in the public interest, and one factor is the need to deter the violator "and other persons" from committing such acts or omissions. 15 U.S.C. § 78u-2(c)(5). Even if the civil penalty may no longer deter Nikola from further securities law violations, it still has a general deterrent effect.

C. Treating the SEC Claim as a General Unsecured Claim Does Not Violate the Absolute Priority Rule.

40. The Debtors argue that the "absolute priority rule" will be violated if the SEC's claim is not subordinated because the SEC will distribute value it receives under the Plan to harmed investors through the Fair Fund, before the Debtors' unsecured creditors are paid in full. However, neither the cases the Debtors cite, nor Section 1129(b)(2) of the Bankruptcy Code, support their argument. (Debtors' MOL at p.12) (<u>citing</u> <u>In re DBSD North America, Inc.</u>, 634 F.3d 79, 88 (2d Cir. 2011) (holding senior creditors "gift" of property to shareholders *under the plan* violated the absolute priority rule); <u>Adelphia</u>, 327 B.R. at 168-169 (approving DOJ and SEC settlement which was "removed" from a situation where equity holders were trying to share

assets of the estate in the bankruptcy court because, among other things, harmed investors would be sharing in a fund to be created and owned by the government).

41. Here, treating the SEC's claim as a general unsecured claim is not a distribution to equity *under the Plan*. As discussed, the SEC's claim stems from its statutory authority as enforcer of the federal securities laws. The SEC has broad discretion to decide what to do with the funds it collects and does so outside of the bankruptcy context. See In re Covenant Partners, L.P., *supra* (approving SEC settlement, and distinguishing payments made by the government outside the plan context from payments made by the trustee). Any suggestion that this Court should be able to determine what the SEC does with the funds it collects outside the bankruptcy context should be rejected. See Ad Hoc Adelphia Trade Claims Comm. v. Adelphia, 337 B.R. 475, 478 (S.D.N.Y. 2006) ("Appellants' unhappiness at the idea of a substantial distribution of assets that originated in the estate to equity holders who would have been subordinate to them had the assets been distributed as part of a plan of reorganization is entirely understandable. The proper focus for any complaint, however, is Congress, which alone is empowered to alter the terms of the Code to achieve the end that appellants desire.").

42. And, under Section 1129(b)(2) of the Bankruptcy Code, to the extent the Plan does not comply with the absolute priority rule, the result is that the Plan cannot be confirmed over a dissenting class of creditors—it is not a basis to subordinate the SEC's claim. See In re Armstrong World Indus., Inc., 432 F.3d 507 (3d Cir. 2005) (affirming denial of confirmation for a gifting plan that violated the absolute priority rule).[11]

[11] Moreover, the absolute priority rule applies only to an impaired class of creditors that has not accepted that the plan. 11 U.S.C. § 1129(a)(8). If Class 3 (the only voting class) votes to accept the plan, that argument will no longer be available.

D. Section 1129(a)(7) Cannot Be Used to Subordinate the SEC's Claim.

43. Finally, the Debtors seek to subordinate the SEC's penalty claim through the so-called "best-interests of creditors" rule, by arguing that Section 726(a)(4) of the Bankruptcy Code, which provides for the subordination of penalty claims in Chapter 7 proceedings, should be made applicable to this Chapter 11 plan through Section 1129(a)(7) of the Bankruptcy Code. (Debtors' MOL at pp. 15-16).

44. As a preliminary matter, Section 726(a)(4) applies to liquidations under Chapter 7 of the Bankruptcy Code, not reorganizations under Chapter 11. Section 103(b) provides that "Subchapters I and II of chapter 7 of this title apply only in a case under such chapter." Section 726 is in Subchapter II of chapter 7. Thus, the Bankruptcy Code on its face excludes the application of Section 726(a)(4) in Chapter 11. See U.S. v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 228 (1996) (declining to decide whether Section 726(a)(4) applies to Chapter 11, as it was not ruled on below).

45. A number of bankruptcy courts have rejected applying Section 726(a)(4) in Chapter 11 proceedings. See In re Colin, 44 B.R. 806, 808 (S.D.N.Y. 1984) ("Found in subchapter II of Chapter 7, this section, pursuant to § 103(b) of the Code, is directly applicable only to cases under that chapter."); In re A.H. Robbins Co., Inc., 89 B.R. 555, 560 (E.D. Va. 1988) ("What the Claimants Committee overlooks or ignores is that Section 726 is not applicable to a Chapter 11 case). But see Owens Corning v. Credit Suisse First Boston, 322 B.R. 719 (D. Del. 2005) (suggesting in dicta that Section 726 applies to a Chapter 11 plan).[12] In any event, the failure to satisfy the best interests of creditors rule "would merely result in the inability to

---

[12] Even if Section 726(a)(4) allows for subordination of a claim in Chapter 11, there should only be subordination of the amount needed to make distributions to creditors equal to the amount that they would have received in a liquidation, not subordination of the full claim.

confirm a plan – not subordination or disallowance of the claim in question in the chapter 11 case." In re Adelphia Commc'ns Corp., 327 B.R. at 170.

46. In the end, the Debtors' "best interests test" argument fails to provide a basis for subordination under ***Section 510(b)*** – which is the relevant Code section subordinating the SEC's claim under the Plan.[13] Nor does the test provide a legal basis for reducing or disallowing a creditors' claim. The best interests test is one of multiple requirements that the Debtors must satisfy to confirm their plan. See 11 U.S.C. § 1129. It is not a weapon that debtors may deploy to reduce or disallow any claim that would otherwise create an obstacle to plan confirmation.

E. The SEC's Claim is Improperly Classified in Class 7 of the Plan.

47. Section 1122(a) of the Bankruptcy Code permits a plan proponent to place a claim in a particular class only if that claim is substantially similar to the other claims in the class. 11

---

[13] To the extent the Debtors intend to rely on Section 510(c)(1) to argue for categorical subordination of a penalty claim in a chapter 11 liquidation, (Debtors' MOL at p.16 n.4) ("Where a debtor is liquidating all its assets and payment to the holder of a penalty claim will reduce the amount allowed unsecured creditors will receive on account of their claims, subordination is authorized under section 510(c)(1)"), such an argument is also meritless. The Supreme Court has rejected outright the categorical subordination of government claims based on the alleged general unfairness of satisfying a governmental penalty claim before satisfying the claims of other creditors. See United States v. Noland, 517 U.S. 535, 540 (1996); United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 229 (1996) ("The principle is simply that categorical reordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority to order equitable subordination under section 510(c)"). Any argument that the SEC's claim should be subordinated under Section 510(c) based solely on its character as a penalty simply does not withstand scrutiny under Noland and CF&I. The Debtors also complain that "[b]ecause Holders of Equity Interests are entitled to distributions under the Liquidating Plan after General Unsecured Claims are paid in full, it is at least possible that payment on account of the SEC Claim would allow certain shareholders to "double-dip," both through the Fair Fund and through Class 5." Debtors' MOL at p. 17, n5. However, the only way that equity interest holders would be able to "double dip" under this scenario is if unsecured creditors are paid in full and there are funds left over to distribute to equity, which would moot any remaining arguments about the best interests of creditors test.

U.S.C. § 1122(a). Class 7 of the Plan consists of all Section 510(b) Claims, which is defined as "any Claim subject to subordination under Section 510(b) of the Bankruptcy Code…." (Plan at p.14). Because the SEC's claim is not subject to subordination under Section 510(b), its claim is not substantially similar to the other claims in Class 7, and thus, is improperly classified.

III. CONCLUSION

48. The Debtors have failed to provide a sufficient legal and factual basis for subordinating the SEC's outstanding penalty claim under Section 510(b) of the Bankruptcy Code or classifying the claim in Class 7 pursuant to Section 1122(a) of the Bankruptcy Code. Because that is precisely what the Plan provides, the Plan cannot be confirmed.

Dated: August 26, 2025
Wilmington, Delaware

/s/ David W. Baddley
U.S. SECURITIES & EXCHANGE COMMISSION
David W. Baddley
950 East Paces Ferry Road, N.E., Suite 900
Atlanta, GA 30326-1382
Telephone: (404) 842-7625
baddleyd@sec.gov

Therese A. Scheuer (No. 5699)
One Penn Center
1617 John F. Kennedy Blvd, Suite 520
Philadelphia, PA 19103-1844
Telephone: (202) 551-6029
scheuert@sec.gov

Counsel for U.S. Securities and Exchange Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon all ECF Participants through the CM/ECF system on this date of filing, and in addition, was served by email upon the following parties on August 26, 2025:

Counsel for the Debtors
Joshua D. Morse (joshua.morse@pillsburylaw.com)
Andrew Alfano (andrew.alfano@pillsburylaw.com)
M. Blake Cleary (bcleary@potteranderson.com)
Brett M. Haywood (bhaywood@potteranderson.com)
Maria Kotsiras (mkotsiras@potteranderson.com)
Shannon A. Forshay (sforshay@potteranderson.com)

Counsel for the Official Committee of Unsecured Creditors
Lorenzo Marinuzzi (lmarinuzzi@mofo.com)
Douglas Mannal (dmannal@mofo.com)
Raff Ferraioli (rferraioli@mofo.com)
Eric J. Monzo (emonzo@morrisjames.com)
Byra M. Keilson (bkeilson@morrisjames.com)

Counsel for the United States Trustee
Timothy J. Fox Jr. (timothy.fox@usdoj.gov)

/s/ David W. Baddley
David W. Baddley