UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE ASSAD, directly on behalf of himself and all others similarly situated, and derivatively on behalf of E.MERGE TECHNOLOGY ACQUISITION CORP.,

Plaintiff,

- v -

E.MERGE TECHNOLOGY ACQUISITION CORP.,

Nominal Defendant,

- v -

E.MERGE TECHNOLOGY SPONSOR LLC, S. STEVEN SINGH, JEFF CLARKE, GUY GECHT, SHUO ZHANG, DAVID IBNALE, CURTIS FEENY, ALEX VIEUX AND STEVEN FLETCHER,

Defendants.

21-cv-07072 (JPO)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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Defendants E.Merge Technology Acquisition Corp. ("E.Merge"), E.Merge Technology Sponsor LLC (the "Sponsor"), S. Steven Singh, Jeff Clarke, Guy Gecht, Shuo Zhang, David ibnAle and Curtis Feeny (together, the "Director Defendants") and Alex Vieux and Steven Fletcher (together, the "Advisor Defendants," and together with E.Merge, Sponsor and Director Defendants, the "Defendants") respectfully submit this memorandum in support of their motion to dismiss the Verified Direct and Derivative Complaint for Breach of the Investment Company Act of 1940 and the Investment Advisers Act of 1940 (ECF No. 1) (the "Complaint" or "Compl.") with prejudice pursuant to Rules 8(a), 12(b)(1), 12(b)(6) and 23.1.[1]

PRELIMINARY STATEMENT

E.Merge is a typical Special Purpose Acquisition Company ("SPAC").[2] More than 1,000 SPACs have completed an initial public offering ("IPO") in the United States, including more than 650 over the past two years alone. Here, Plaintiff purports to have discovered suddenly that, notwithstanding decades of learning to the contrary, SPACs are "investment companies" within the meaning of the Investment Company Act of 1940 (the "ICA"), and that the Advisor Defendants are "investment advisors" within the meaning of the Investment Advisers Act of 1940 (the "IAA") and the ICA. Plaintiff's claims—errant as they are as a matter of law—risk disrupting the United States capital markets and aim to derail the franchise of investors who signed on to express their vote, for or against, a hoped-for transaction.

While this frontal attack on the structure of SPACs wholly lacks merit, as an initial matter, the Complaint suffers from several threshold defects. It is untimely and barred by the one-year

[1] Unless otherwise noted, all emphasis in case and record citations is added and all citations are omitted.

[2] As explained by the Securities and Exchange Commission (the "SEC") "SPACs are essentially shell companies that raise capital in IPOs, with the purpose of purchasing operating companies or assets within a certain time frame." SEC Release No. 34-58228.

statute of limitations. (*See infra* at 13.) Plaintiff also lacks standing to assert his claims, and failed to comply with Rule 23.1 as to contemporaneous ownership and pleading demand futility with particularity. (*See infra* at 14-15.) The Court need go no further to dismiss the Complaint.

In addition to these threshold issues, the very foundation of the Complaint is defective. Plaintiff's claims are premised on his conclusion that E.Merge (and all SPACs) are "investment companies" because government securities are held in a trust account until such time as the contemplated transaction (the "Initial Business Combination") is completed. But Plaintiff's effort to recast the temporary holding of governmental securities in trust for capital preservation purposes until the funds are needed to complete an Initial Business Combination as the work of an investment company stretches the ICA well beyond its breaking point.

The starting point for any analysis must be the language of the ICA itself. In relevant part, the ICA defines an investment company as an issuer that "is or holds itself out as being engaged ***primarily***, or proposes to engage ***primarily***, in the business of investing, reinvesting or trading in securities." 15 U.S.C. § 80a-3(a)(1)(A). E.Merge's foundational documents, as well as the documents relied upon throughout the Complaint, establish conclusively that E.Merge is not "engaged primarily . . . in the business of investing, reinvesting or trading in securities." Rather, the entire purpose of E.Merge (as it informed shareholders repeatedly) is to complete an Initial Business Combination. The SEC has expressly recognized that SPACs "raise capital in IPOs, ***with the purpose of purchasing operating companies***." SEC Release No. 34-58228.

E.Merge's Certificate of Incorporation – a foundational document that constitutes a "contract between [a] corporation[] and its stockholders"[3] – provides that the purpose of E.Merge

[3] *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 957 (Del. Ch. 2013).

is to complete an Initial Business Combination. (*See* Ex. A (COI), Art. II.)[4] The first paragraph of E.Merge's Prospectus, issued in connection with its IPO, discloses that E.Merge was "formed for the purpose of effecting a merger, capital stock exchange, asset acquisition, stock purchase, reorganization or similar business combination with one or more businesses." (Ex. B (Prospectus) at Cover Page.) The Complaint reluctantly concedes as much, acknowledging that E.Merge planned to "eventually complete what the Company's foundational documents defined to be an 'Initial Business Combination.'" (Compl. ¶ 38.)[5]

Ignored too by the Complaint is the Prospectus's clear-cut warning that investors who were seeking a return on their investments in government securities or investment securities ought to look elsewhere: "[t]his offering is not intended for persons who are seeking a return on investments in government securities or investment securities." (Ex. B (Prospectus) at 39.) E.Merge's Form 10-K likewise explained that it is "not presently engaged in, and we will not engage in, any operations other than the pursuit of [its] initial business combination." (Ex. C (10-K/A) at 7.) In fact, the de minimis interest earned on the trust account was not even sufficient to pay E.Merge's taxes and operating expenses. No reasonable investor who was interested in a return on their investment from government securities should have been investing in E.Merge. To the contrary, an investment in E.Merge is for the purpose of obtaining the opportunity to participate in the Initial Business Combination – the ultimate goal of E.Merge. That E.Merge is engaged primarily in completing an Initial Business Combination is demonstrated by the fact that *if E.Merge fails to complete an Initial Business Combination within two years, the entity will liquidate and cease to*

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[4] References to "Ex. [ ]" are to the exhibits listed in the Declaration of Susan L. Saltzstein.

[5] Plaintiff substitutes "eventually" for the precisely defined two-years within which E.Merge must complete its Initial Business Combination. Plaintiffs often chide defendants for *not* disclosing material information. Here, Plaintiff takes the opposite approach – ignoring the plain language of the Prospectus and urging the Court to do the same.

exist. Moreover, *if E.Merge fails to complete an Initial Business Combination within two years and E.Merge liquidates, the Sponsor will be left with more than $10 million in losses (and shareholders with no gain for their two years of investment)*.[6] The notion that E.Merge is engaged primarily in such a self-defeating exercise is implausible on its face.

SPACs have not operated in a regulatory vacuum. Almost weekly, the SEC has guided market participants regarding the SEC's well-publicized SPAC views. Among the topics addressed by regulators in speeches, conferences and rule-making sessions are SPAC structure, warrant accounting, and accounting for permanent equity. The SEC is directly authorized to enforce the ICA and IAA (including under one of the very sections Plaintiff seeks to enforce (*see* 15 U.S.C. § 80a-35)). The SEC – charged as it is with enforcement over SPACs – is well aware of the structure and operation of SPACs; the SEC has reviewed and declared effective hundreds of SPAC registration statements (including that of E.Merge). Not once has the SEC suggested that SPACs like E.Merge ought to register as an Investment Company. To the contrary, the SEC specifically approved listing regulations for the New York Stock Exchange and NASDAQ *requiring* SPACs to maintain their IPO proceeds in trust accounts pending completion of an Initial Business Combination in order to be listed on the exchanges.

In the final analysis, Plaintiff's claims fail to survive scrutiny. E.Merge is not "engaged primarily" in investing in securities and, as such, is not an investment company and is not subject to the ICA. For the same reason, the Advisor Defendants are not subject to the IAA, and the claims against them also must be dismissed. Because the pendency of this litigation (and the two others

[6] Sponsor will only receive a repayment of certain loans made to the SPAC, and an affiliate will receive $15,000 per month "for office space, utilities and secretarial and administrative support." (Ex. B (Prospectus) at 26.)

this same Plaintiff has commenced seeking essentially the same relief against other SPACs)[7] threatens significant harm not only to E.Merge, but also to the hundreds of publicly traded SPACs actively seeking transaction partners, we respectfully request that the Court dismiss the Complaint as promptly as practicable. As no amendment could cure the defects in the Complaint, dismissal ought to be with prejudice.[8]

STATEMENT OF FACTS

A. Overview of SPACs

SPACs are companies that IPO with the purpose of completing an Initial Business Combination, using the cash raised in the IPO to fund the Initial Business Combination. "Unlike an operating company that becomes public through a traditional IPO . . . a SPAC is a shell company when it becomes public. This means it does not have an underlying operating business and does not have assets other than cash and limited investments, including the proceeds from the IPO." SEC's Office of Investor Education and Advocacy, *What You Need to Know About SPACs – Updated Investor Bulletin* (May 25, 2021), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/what-you (the "Investor Bulletin").

An investor in a SPAC at the IPO stage is "relying on the management team that formed the SPAC . . . as the SPAC looks to acquire or combine with an operating company." (*Id.*) It may take "many months or more than a year" for management to locate a transaction partner, and

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[7] *See Assad v. Pershing Square Tontine Holdings, Ltd.*, No. 1:21-cv-06907-AT (S.D.N.Y., filed Aug. 17, 2021); *Assad v. Go Acquisition Corp.*, No. 1:21-cv-07076-JPC-JLC (S.D.N.Y., filed Aug. 20, 2021).

[8] To the extent this complaint is motivated by a general dislike of the economic terms of a SPAC, there is no allegation that such terms were undisclosed. To the contrary, by purchasing shares in E.Merge, Plaintiff expressly *agreed* to these terms, which were publicly disclosed and readily available. *Rothschild Int'l Corp. v. Liggett Grp.*, Inc., 463 A.2d 642, 646 (Del. Ch. 1983) ("[S]hareholders were necessarily charged with knowledge of ["certificate of incorporation" terms] at the time that they acquired their shares."), *aff'd*, 474 A.2d 133 (Del. 1984).

SPACs typically provide a two-year period in which to complete an Initial Business Combination, after which time, the SPAC will liquidate. (*Id.*)

Provided they meet certain requirements, SPACs may be listed on the major stock exchanges. *See* NASDAQ Rule IM-5101-2(a); NYSE Listed Company Manual 102.06. Among other things, these rules require at least 90% of the IPO proceeds be "deposited in a trust account maintained by an independent trustee, an escrow account . . . or in a separate bank account established by a registered broker dealer." NASDAQ Rule IM-5101-2(a). In addition, the SPAC must complete a business combination within 36 months, "or such shorter period that the company specifies in its registration statement." NASDAQ Rule IM-5101-2(b). In approving these exchange listing rules, the SEC explained that it "believes that these safeguards should help to ensure that SPACs that list securities on NASDAQ will have taken certain additional steps to address investor protection and other matters." SEC Release No. 34-58228.

B. Background of E.Merge

E.Merge is a NASDAQ-listed, Delaware formed SPAC. (Compl. ¶¶ 22, 25.) It has a board of directors and a management team tasked with operating E.Merge on a day-to-day basis. (Ex. B (Prospectus) at 77, 79.)

E.Merge's foundational documents, including its Certificate of Incorporation, provide unequivocally that the "purpose" of the Company includes "effecting a merger, capital stock exchange, asset acquisition, stock purchase, reorganization or similar business combination, involving the Corporation and one or more businesses" (Ex. A (COI), Art. II), and a significant portion of the Certificate of Incorporation is devoted to the steps incidental to E.Merge's ultimate effectuation of a business combination. (*See id.* Art. IX.)

The Prospectus – the document oft-cited by the plaintiffs' bar as the investor's bible – speaks to the primary business of E.Merge. The first version of E.Merge's registration statement

was filed on July 13, 2020 for all potential shareholders to see. The very first paragraph on the cover of that document discloses:

> [E.Merge] is a newly organized blank check company **formed for the purpose of effecting a merger, capital stock exchange, asset acquisition, stock purchase, reorganization or similar business combination with one or more businesses, which we refer to as our initial business combination**. . . . **While we may pursue an initial business combination in any business or industry, we intend to focus our search on companies in the software and internet technology industries**.

(Ex. D (July 13 R.S.) at Cover Page.) That same language was included in the final form of the registration statement filed on July 29, 2020 (Ex. E (July 29 R.S.) at Cover Page), and in the final prospectus filed on August 3, 2020 (the "Prospectus"). (Ex. B (Prospectus) at Cover Page.) E.Merge further informs investors in the Prospectus of the basis for its belief that the targeted industries were ripe for a successful business combination, including that "[t]he convergence of technology disruption and abundant capital has led to what we believe are many opportunities for wealth creation." (Ex. B (Prospectus) at 2.) The Prospectus explains that its "management team is comprised of industry experts, whom we believe are well-positioned to identify and evaluate businesses within the technology sector that would benefit from their experience of leading public companies" and that the "management team offers extensive experience in growing and operating companies, as well as a deep network of contacts in the technology sector." (*Id.* at 3.) Not one word is devoted to management's skill or expertise in investing in securities of the nature that would be held in the Trust Account.

The Prospectus also clearly describes E.Merge's mission: "to consummate an initial business combination with a high-performing technology company valued between $1 billion and $3 billion." (*Id.* at 5.) E.Merge also explains to its potential investors how it plans to effectuate its business plan through a "thorough due diligence review process" including utilizing "the expertise of our management team in analyzing software and internet technology companies and

evaluating operating projections, financial projections and determining the appropriate return expectations given the risk profile of the target business." (*Id*. at 7.) In addition, E.Merge explains the criteria it plans to employ when evaluating potential target businesses, including the size and focus of the potential target, management and operational maturity of the target, the target's growth, how the target would benefit from becoming a public company, its reputation and market acceptance and whether the transaction would be at an appropriate valuation. (*Id.* at 80.)

As is typical of SPACs, E.Merge has two years to complete an initial business combination and if it does not, 100% of the public shares will be redeemed for cash. (Ex. B (Prospectus) at Cover Page.) Similarly, if an investor is dissatisfied with the Initial Business Combination proposed by management, it may elect to redeem its shares in E.Merge and receive its pro rata share of the Trust Account (discussed further below), rather than become a shareholder in the post-transaction company. (*Id.* at 20-21.)

C. E.Merge's Board of Directors and Advisors

Consistent with E.Merge's stated business plan, the Director Defendants are "executive operators and seasoned investors" with specific expertise in the technology industry in which E.Merge intends to locate a transaction partner. (Ex. B (Prospectus) at 4-5.) Messrs. Feeny and ibnAle and Ms. Zhang are independent directors under the applicable NASDAQ listing standards and SEC rules. (*Id.* at 107.)

Likewise, the Advisor Defendants also are experienced professionals in the technology sector. The Prospectus specifically explains the services provided by the Advisor Defendants:

> We currently expect our advisors to (i) assist us in sourcing and negotiating with potential business combination targets, (ii) provide their business insights when we assess potential business combination targets and (iii) upon our request, provide their business insights as we work to create additional value in the businesses that we acquire. In this regard, they will fulfill some of the same functions as our board members.

(*Id.* at 107.) There is no suggestion that the Director Defendants or the Advisor Defendants were chosen to assist in selecting or investing in securities. Rather, the manner in which E.Merge would hold its funds pending its Initial Business Combination was preordained. Thus, consistent with the SEC's explanation of how SPACs operate, E.Merge's investors are "relying on the management team that formed the SPAC . . . as the SPAC looks to acquire or combine with an operating company." Investor Bulletin, at 1.

The Director Defendants and Advisor Defendants receive no compensation. They do, however, own interests in Sponsor, which acquired an interest in E.Merge in exchange for a payment of $25,000. (Compl. ¶¶ 50, 59-62.) Unlike shareholders who will be entitled to receive a pro rata share of the money raised in the IPO in the event of a liquidation, Sponsor and the Directors will get nothing from E.Merge if it does not accomplish its primary (and only) purpose: to complete a business combination within the requisite time period. (Ex. B (Prospectus) at 121.)

D. E.Merge's IPO

After receiving comments from the SEC (none of which suggest that E.Merge might be an investment company),[9] E.Merge's registration statement was declared effective on July 30, 2020. Tellingly, E.Merge's registration statement was submitted on a Form S-1, not on the form required for an investment company. *Compare* 17 C.F.R. § 274.11A. On August 4, 2020, E.Merge completed its IPO, issuing 52,200,000 shares and raising $522 million. (Compl. ¶ 42.) Thereafter, it sold an additional 7.8 million shares pursuant to its underwriters' exercise of their over-allotment option, and sold an additional 1.2 million private placement units to Sponsor. (*Id.* ¶¶ 43-43.) Sponsor paid $12 million to acquire the private placement units, which will expire if E.Merge does

[9] *See* E.Merge Tech. Acquisition Corp., SEC Staff Comment, S-1/A (July 8, 2020); E.Merge Tech. Acquisition Corp., SEC Staff Comment, DRS (July 29, 2020).

not complete an acquisition within 24 months. (Ex. B (Prospectus) at 1, 116.) E.Merge incurred more than $22 million in deferred underwriting fees in connection with its IPO, which are to be paid when E.Merge completes a business combination. The willingness of the underwriters to defer such substantial fees pending completion of the Initial Business Combination is consistent with the well-understood fact that E.Merge's business purpose always was the completion of an Initial Business Combination.

In total, E.Merge raised approximately $600 million in connection with its IPO. (Compl. ¶ 43.) Having raised this sum, E.Merge needed to securely maintain these funds while it carried out its business strategy of identifying and completing an Initial Business Combination.

E. The Trust Account

Because E.Merge's business plan has been (and remains) to engage in an Initial Business Combination, it was required to comply with NASDAQ Rule IM-5101-2(a), which requires 90% of IPO proceeds to be placed into a trust account (the "Trust Account"). Consistent with this requirement, E.Merge explained that it would deposit the proceeds of its IPO into a trust account that "will be invested only in U.S. government treasury bills with a maturity of 185 days or less or in money market funds meeting certain conditions under Rule 2a-7 under the Investment Company Act which invest only in direct U.S. government treasury obligations" and that "***[w]e estimate that the pre-tax interest earned on the trust account will be approximately $2,610,000 per year, assuming an interest rate of 0.5% per year;*** however, we can provide no assurance regarding this amount." (Ex. B (Prospectus) at 63.) E.Merge went on to explain that the funds would be held in the trust account until completion of the Initial Business Combination, or liquidation. (*Id.*) By proceeding in this fashion, E.Merge complied with the NASDAQ listing requirements, *see* NASDAQ Rule IM-5101-2(a), and ensured the preservation of its assets pending completion of the Initial Business Combination.

Consistent with its disclosure, E.Merge entered into an Investment Management Trust Agreement (the "Trust Agreement") with Continental Stock Transfer & Trust Company ("Continental"), pursuant to which Continental agreed to serve as Trustee of the Trust Account. In that capacity, the Trustee agreed to "[m]anage, supervise and administer the Trust Account." (Ex. F (Trust Agreement) at 1.)

While the funds were required to be held in the Trust Account pending the Initial Business Combination pursuant to NASDAQ rules, E.Merge explained that it was not in the business of investing, and that "[t]his offering is not intended for persons who are seeking a return on investments in government securities or investment securities." (Ex. B (Prospectus) at 39.) E.Merge further disclosed that "[t]he trust account is intended as a holding place for funds pending" completion of the Initial Business Combination or liquidation. (*Id.*) Thus, E.Merge explained in the clearest possible terms that if an investor's goal was a return on investments in government securities, said investor should look elsewhere.

E.Merge's structure and disclosures comport with the SEC's view and understanding of SPAC trust accounts. As the SEC recently explained to investors:

> **Trust account.** Typically, SPAC IPO proceeds, less proceeds used for certain fees and expenses, are held in a *trust account*. Similar to an escrow arrangement when buying a house, this money is held by a third party until the transaction is consummated—in the case of a SPAC, the initial business combination—or the SPAC is liquidated for not having completed an initial business combination within a certain period of time. ***SPACs generally invest the proceeds in relatively safe, interest-bearing instruments***, but you should carefully review the specific terms of an offering as there is no rule requiring that the proceeds only be invested in those types of instruments. SPACs often use the interest on trust account investments to pay taxes.

Investor Bulletin, at 1 (first emphasis original).

F. E.Merge Post-IPO

During the past year, E.Merge has explored various transactions but has not, as of yet,

announced a business combination. In its Form 10-K for the year ended December 31, 2020, E.Merge reiterated its business purpose: "We are an[] early stage blank check company formed as a Delaware corporation for the purpose of effecting an initial business combination. Since our initial public offering (as described below), we have focused our search for an initial business combination on businesses that may provide significant opportunities for attractive investor returns." (Ex. C (10-K/A) at 1.) E.Merge further reaffirmed its mission and plan with respect to a business combination. (*Id.* at 1-7.) E.Merge specifically represented that it is "not presently engaged in, and [it] will not engage in, any operations other than the pursuit of [its] initial business combination" and that it "intend[s] to effectuate [its] initial business combination using cash from the proceeds of our [IPO]" and related transactions. (*Id.* at 7.)

E.Merge's financial statements for the year ended December 31, 2020 reflected $600,119,309 held in the Trust Account. (*Id.* at F-3.) The financial statements further reflected a loss from operations of $587,861 – far exceeding the nominal interest earned on the Trust Account of just $119,309 (a mere fraction of a percent). (*Id.* at F-4.) E.Merge's most recent Form 10-Q, filed on August 13, 2021, tells the same story. As of June 30, 2021, the value of the Trust Account had declined to $600,077,921. E.Merge's general and administrative expenses for the six months ended June 30, 2021 were $434,301, and the interest earned on the Trust Account was just $77,428. (Ex. G (10-Q) at 1-2.)

ARGUMENT

While a court must accept well-pleaded factual allegations as true, it need not accept conclusory allegations or legal conclusions as true. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Lynch v. City of New York*, 952 F.3d 67, 74–75 (2d Cir. 2020). Moreover, the Court need not accept allegations that are contradicted by the documents relied upon by the Plaintiff. *See Davila v. Lang*, 343 F. Supp. 3d 254, 267 (S.D.N.Y. 2018). At a minimum, a plaintiff

must plead claims that are "plausible," meaning that the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *See Twombly*, 550 U.S. at 555. The Complaint fails to meet even the base "plausibility" standard required by Rule 8(a), and dismissal is required.

A. Plaintiff's Claims are Time-Barred as a Matter of Law

As a threshold matter, all of Plaintiff's claims are subject to a one year statute of limitations and, therefore are untimely as a matter of law. *See* 15 U.S.C. § 80a-35(b)(3); *In re Gartenberg*, 636 F.2d 16, 18 n.4 (2d Cir. 1980) (Section 36(b) claims); *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837(HB), 2006 WL 399396, at *6-7 (S.D.N.Y. Feb. 21, 2006) (Section 47(b) claims); *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1039 (2d Cir. 1992) (Section 215 of the IAA).[10] The same limitations periods apply to the declaratory judgment claims. *See Kermanshah v. Kermanshah*, 580 F. Supp. 2d 247, 268-69 (S.D.N.Y. 2008).

This action was commenced on August 20, 2021, and all of the conduct underlying Plaintiff's claims occurred more than one year prior—in June and July 2020, when E.Merge disclosed it would passively hold preordained investments in the Trust Account. (*See*, *e.g.*, Compl. ¶ 59 (Class B shares issued to the Sponsor pursuant to subscription agreement dated ***June 8, 2020***);

[10] We expect Plaintiff to argue that the applicable statute of limitations is the two-year statute of limitations set forth in 28 U.S.C. § 1658(b) ("Sarbanes-Oxley"). But on its face, that provision applies only to "a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws." 28 U.S.C. § 1658(b); *see also Phoenix Four*, *Inc.*, 2006 WL 399396, at *6 (refusing to apply the Sarbanes-Oxley statute of limitations to ICA claims); *STM Inv. S.a.r.l. v. 3P Equity Partners, LLC*, No CV 19-1764, 2019 WL 1960278, at *2 n.8 (C.D. Cal. Mar. 27, 2019) (Sarbanes-Oxley limitations period does not apply to IAA rescission claims); *Alonso v. Weiss*, 958 F. Supp. 2d 922, 928 (N.D. Ill. 2013) (one-year limitation period applies to IAA claim). To the extent the Court determines to apply the Sarbanes-Oxley limitations period, the Complaint should also be subjected to the heightened pleading requirements under Rule 9(b). *Matsumura v. Benihana Nat'l Corp.*, 542 F. Supp. 2d 245, 251 (S.D.N.Y. 2008) (Rule 9(b) applies "to any claim that 'sounds in fraud,' regardless of whether fraud is an element of the claim.").

¶ 60 (stock dividend for the Class B shares issued in ***July 2020***); ¶¶ 39, 82 (Certificate of Incorporation filed on ***July 30, 2020***).)[11]

Moreover, all of these actions were fully disclosed to the public more than one year ago. (*See* Compl. ¶¶ 38-39, 59-60; Ex. B (Prospectus).) In these circumstances, there can be no dispute that Plaintiff was on notice of the purported claims more than one year prior to filing this lawsuit. in connection with the Prospectus that was filed publicly more than a year before Plaintiff commenced this action. *See Menowitz v. Brown*, 991 F.2d 36, 42 (2d Cir. 1993) ("[P]laintiffs were placed on inquiry notice of their claims by the very SEC-mandated disclosure documents they rely upon."). Plaintiff's claims all accrued more than one year before the Complaint was filed and therefore are untimely as a matter of law. *See Phoenix Four*, 2006 WL 399396, at *6 (rescission claim accrues at time contract is executed); *In re AllianceBernstein Mut. Fund Excess. Fee Litig.*, No. 04 Civ. 4885 (SWK), 2006 WL 74439, at *2 (no advisory fees received in the one year prior to lawsuit); *Kahn*, 970 F.2d at 1040 ("Since the plaintiffs allege that the contract violated the IAA at the moment it was entered into, the claim accrued at that time.").

B. Plaintiff's Derivative Claims Fail Under Rule 23.1

Plaintiff's derivative claims under Section 47(b) of the ICA and Section 215 of the IAA fail because he lacks standing to bring them.[12]

First, Plaintiff lacks standing because he did not own E.Merge shares at the time of the challenged conduct, a threshold requirement for any derivative claim. *See In re Facebook, Inc.*,

[11] Any effort by Plaintiff to rely on the so-called continuing wrong doctrine would be misplaced because "performance under the contract merely affects damages and does not give rise to a new cause of action." *Kahn*, 970 F.2d at 1041; *see also Fioranelli v. CBS Broad. Inc*., No. 15-CV-0952 (VSB), 2021 WL 3372695, at *40 (S.D.N.Y. July 28, 2021) (continuing wrong doctrine "is narrow, and only extends the statute of limitations when"—unlike here—"a contract imposes a continuing duty that is repeatedly breached").

[12] Dilution or overpayment claims are derivative claims under Delaware law. *See Brookfield Asset Mgmt. v. Rosson*, 2021 WL 4260639, at *11 (Del. Sept. 20, 2021).

Initial Pub. Offering Derivative Litig., 797 F.3d 148, 155 (2d Cir. 2015). Plaintiff nowhere alleges that he owned E.Merge stock at the time the challenged contracts were entered into—*i.e.*, June and July 2020, *before* E.Merge's August 2020 IPO. (*See* Compl. ¶¶ 39, 42, 59-60, 62); *see also In re Smiledirectclub, Inc. Derivative Litig.*, No. CV 2019-0940, 2021 WL 2182827, at *8 (Del. Ch. May 28, 2021) ("Where the plaintiff complains of the transaction's ***terms*** . . . ***the 'time of the challenged transaction' is the time when the transaction's terms were established."***). Instead, Plaintiff vaguely asserts that he "has held shares of E.Merge ***at all times relevant herein***." (Compl ¶ 114.) But as the Second Circuit has held, a "formulaic recitation of the derivative standing requirement[] will not suffice." *In re Facebook, Inc.*, 797 F.3d at 159. Accordingly, Plaintiff's derivative claims fail as a matter of law for lack of standing. *See In re Smiledirectclub, Inc.*, 2021 WL 2182827, at *8; *In re Facebook, Inc.,* 797 F.3d at 159.

Second, Plaintiff's derivative claims fail for the independent reason that he has not pled demand futility with particularity. *See White v. Panic*, 783 A.2d 543, 550 (Del. 2001); *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000). Rather than plead particularized facts, Plaintiff merely concludes that "[d]emand upon the Board would be . . . futile and useless" because the "Board is personally conflicted with respect to the institution of this suit" "because of their interest in the Class B shares via their membership interests in the Sponsor Defendant." (Compl. ¶¶ 119-20.) But it is well-settled that "Rule 23.1 is not satisfied by conclusory statements." *In re Am. Int'l Grp., Inc. Derivative Litig.*, 700 F. Supp. 2d 419, 430 (S.D.N.Y. 2010), *aff'd*, 415 F. App'x 285 (2d Cir. 2011). Plaintiff pleads "nothing close to the fact-intensive, director-by-director analysis required to plead demand futility." *LVI Grp. Invs., LLC v. NCM Grp. Holdings, LLC*, No. 12067-VCG, 2017 WL 1174438, at *9 (Del. Ch. Mar. 29, 2017); *see also United Food & Com. Workers Union v. Zuckerberg*, No. 404 2020, 2021 WL 4344361, at *6 (Del. Sept. 23, 2021) (pleading demand

futility requires "particularized allegations raising a reasonable doubt that a majority of the Demand Board received a material personal benefit from the [challenged transaction]"). Indeed, Plaintiffs do not and cannot allege all of the Defendants were involved in the issuance of the Class B Shares. (*See* Compl. ¶ 59 (alleging that "the Individual Defendants or a subgroup thereof used their control over the Company to cause the Company to issue [the Class B Shares].").) In the same vein, courts have held that unadorned allegations regarding director compensation are insufficient as a matter of law. *In re Evergreen Mut. Funds Fee Litig.*, 423 F. Supp. 2d 249, 263 (S.D.N.Y. 2006); *In re Goldman Sachs Mut. Funds*, No. 04 Civ. 2567 (NRB), 2006 WL 126772, at *11 (S.D.N.Y. Jan. 17, 2006).

C. Neither the ICA Nor the IAA Confer a Private Right of Action for the Relief Sought

Plaintiff's key contention – that E.Merge, and every other SPAC, are "orthodox" investment companies – is a matter for the SEC. Indeed, Plaintiff's first cause of action for declaratory relief cites no statute or other authority supporting the notion that there is a private right of action to declare an entity an investment company (or individuals as investment advisors).[13] The Investment Company Act delegates enforcement powers to the SEC. *See* 15 U.S.C. § 80a-41. Only limited private rights of action have been recognized under the Investment Company Act, and only where it appears that Congress intended that a private right of action exist. *See Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co.*, 677 F.3d 178 (3d Cir. 2012).[14] Plaintiff should not be permitted to undertake his own regulatory campaign, particularly where the SEC has determined not to undertake its own.

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[13] "[P]rivate rights of action to enforce federal law must be created by Congress," *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), and "[w]ithout a showing of congressional intent" a private right of action should not be implied. *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116 (2d Cir. 2007).

[14] All but one of the bases for liability cited by Plaintiff apply only to companies registered as investment companies under the ICA. (*See* Compl. ¶ 127 (alleging violation of section 36(b)); ¶ 138 (alleging violations of "sections 7(a)(1),

Moreover, although the Second Circuit has held that a private right of action exists under Section 47(b),[15] the Third Circuit has reached a contrary conclusion. *See Santomenno ex rel. John Hancock Tr.*, 677 F.3d 178 (3d Cir. 2012). To the extent the claims are not otherwise dismissed, E.Merge submits that Third Circuit law should apply given the forum selection provision in the Certificate of Incorporation or, in the alternative, that the derivative claims asserted under Section 47(b) and the IAA (both of which provide for concurrent state and federal jurisdiction *see* 15 U.S.C. §§ 80a-43, 80b-14) be severed and dismissed as violative of the forum selection provision. *See Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020); *KDH Consulting Grp. LLC v. Iterative Cap. Mgmt. L.P.*, 20 Civ. 3274, 2020 WL 7251172, at *10 (S.D.N.Y. June 29, 2020) (declining to consider forum selection as relating to IAA claim because plaintiff failed to state a claim).

D. The ICA Claims Fail Because E.Merge Is Not an Investment Company

Because Plaintiff's claims pursuant to Sections 36(b) and 47(b) of the ICA apply only to "investment companies," the starting (and ending) point for any analysis of Plaintiff's claims is a single threshold question: whether E.Merge is an "investment company" within the meaning of

15, 22(a) or 23(b), and 22(g) or 23(a) of the ICA.").) The one section that does apply to unregistered companies governs the offering and sale of securities and nowhere provides the right to rescind all contracts to which that unregistered company is a party. 15 U.S.C. § 80a-7(a)(1).

[15] Defendants acknowledge that the Second Circuit has held that Section 47(b) of the ICA "creates an implied private right of action for a party to a contract that violates the ICA to seek rescission of that violative contract." *Oxford Univ. Bank*, 933 F.3d at 109 (2d Cir. 2019). However, *Oxford* is contrary to the weight of authority that suggests that there is no private right of action under Section 47(b) of the ICA. *See, e.g.*, *Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co.*, 677 F.3d 178, 187 (3d Cir. 2012); *UFCW Loc. 1500 Pension Fund v. Mayer*, 895 F.3d 695, 700–01 (9th Cir. 2018); *Stegall v. Ladner*, 394 F. Supp. 2d 358, 378 (D. Mass. 2005) (parties concede that "ICA § 47(b) provides a remedy rather than a distinct cause of action or basis of liability"); *see also See Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116 (2d Cir. 2007) (finding no private right of action for damages under various provisions of the ICA because "[t]he express provision of one method of enforcing a substantive rule"—by SEC enforcement—"suggests that Congress intended to preclude others"). Accordingly, Defendants do not argue in this memorandum that Plaintiff lacks a private right of action to pursue its claim of rescission under Second Circuit law, but expressly reserve their rights to raise that argument later in the case (including on appeal).

the ICA. (*See* Compl. Counts II, III.)[16] *See also* 15 U.S.C. § 80a-35(b) (addressing "the investment adviser of a registered investment company"); 15 U.S.C. § 80a-46(b) (allowing rescission of a contract that is in "violation of this [title], or of any rule, regulation, or order thereunder.")

The ICA defines Investment Company as:

> [A]ny issuer which –
>
> (A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities; . . . .
>
> (C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

15 U.S.C. § 80a-3(a)(1).[17] Section 3(a)(1)(A) "has been said . . . [to] describe[] the 'orthodox investment company,' *i.e.*, a company that knows that it is an investment company and does not claim to be anything else." *Moses v. Black*, No. 78 Civ. 1913, 1981 WL 1599, at *5 (S.D.N.Y. Feb. 3, 1981). Section 3(a)(1)(C), on the other hand, is said to "'catch[] the inadvertent investment company', *i.e.*, a company which does something else but suddenly comes up against the 40 per cent test." *Id.*

There are important differences between the language in Section 3(a)(1)(A) and Section 3(a)(1)(C). First, the "inadvertent" investment company test specifically carves out Government securities of the type held by the Trust Account. *See* 15 U.S.C. § 80a-3(a)(1)(C). For this reason Plaintiff does not – and cannot – allege that E.Merge is an "inadvertent" investment company subject to § 3(a)(1)(C), the ordinary course for concluding an entity inadvertently has become an

[16] Plaintiff's first count seeks a declaration that E.Merge is an investment company, and that the Advisor Defendants are investment advisers. (*See* Compl. ¶¶ 123-24.) Setting aside that there is no private right of action to support such a declaration, the claim fails for the same reasons set forth herein.

[17] Section 3(a)(1)(B) is not relevant here, and will not be discussed further.

investment company despite its expressed intent. Instead, Plaintiff is left trying to define E.Merge as an "orthodox" investment company – a square peg, that plainly does not fit.

Another important difference between the language of Section 3(a)(1)(A) and Section 3(a)(1)(C) is that Section 3(a)(1)(A) applies to companies "in the business of investing, reinvesting, or trading in securities," while Section 3(a)(1)(C) sweeps more broadly, capturing companies "in the business of investing, reinvesting, owning, holding, or trading in securities." *Compare* 15 U.S.C. § 80a-3(a)(1)(A) *with* 15 U.S.C. § 80a-3(a)(1)(C). Plainly, Congress intended the forty percent test set forth in § 3(a)(1)(C) applicable to inadvertent investment companies to capture more passive activities – such as "owning" and "holding" that are not the hallmarks of a company "primarily . . . in the business of investing, reinvesting, or trading in securities."

Finally, and perhaps most importantly, Section 3(a)(1)(A) requires that the company be engaged "***primarily*** . . . in the business of investing, reinvesting, or trading in securities." 15 U.S.C. § 80a-3(a)(1)(A). "The key word is 'primarily.' To determine whether a company is engaged primarily in the business of investing, its total activities of all sorts must be considered." *SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3, 28 (S.D.N.Y. 1968), *aff'd*, 435 F.2d 510 (2d Cir. 1970).[18] "Primarily engaged" is not defined in the statute, and instead must be given the "meaning attached . . . in common parlance." *Moses*, 1981 WL 1599, at *4. Every relevant metric reflects that E.Merge is not "primarily" engaged in the business of investing. Rather, E.Merge is, and always has been, focused on its ultimate objective – completing an Initial Business

[18] In *Fifth Avenue Coach Lines*, the court concluded that the entity subject to the SEC enforcement action was an "investment company" within the meaning of the ICA where it operated bus lines, several of which were condemned by the City of New York, resulting in it receiving a condemnation award. Prior to receiving the award, the entity disclosed an intention to invest the funds upon receipt, and after receipt of the award increasingly invested its cash in securities, while conducting no other business. *Fifth Ave.* 289 F. Supp. at 29-30. The Court noted that the word "invest" means "to put out money at risk in the hope of [future] gain," and that was the business that the company was then operating. *Id.* at 30. These facts easily can be contrasted with E.Merge, where the Trust Account holds cash not for purposes of "put[ting] out money at risk in the hope of [future] gain," but instead for capital preservation while E.Merge conducts its primary business of locating an Initial Business Combination.

Combination – and any holding of securities in the Trust Account is for purposes of capital preservation until an Initial Business Combination can be completed. In no sense of "common parlance" (or otherwise), does this make E.Merge "primarily" engaged in the business of investing and, as such, E.Merge is not an investment company subject to the ICA.

1. E.Merge Is Not Engaged "Primarily" in the Business of Investing

A certificate of incorporation is a "contract[] among a corporation's stockholders" and "stockholder-approved charter amendments should be respected as a matter of policy." *Salzberg*, 227 A.3d at 116. Here, E.Merge's Certificate of Incorporation – which Plaintiff "is a party to . . . by virtue of his status as a [share]holder" (Compl. ¶ 148) – confirms that the "primary" (and only) purpose of E.Merge is to complete an Initial Business Combination. (*See supra* at 3.) This stated purpose is deemed critical when determining whether an issuer is an investment company. *See In re Tonopah Mining Co. of Nev.*, 26 S.E.C. 426, 1947 WL 26116, at *3 (July 21, 1947) (looking to issuer's statement of purpose in its certificate of incorporation). Moreover, as "a party to the Certificate of Incorporation" (Compl. ¶ 148), Plaintiff not only had knowledge of its terms, but he *specifically agreed to them*, (including E.Merge's primary purpose) when he acquired his shares. *See Boilermakers Local 154 Ret. Fund*, 73 A.3d at 958 ("[O]ur Supreme Court has long noted that bylaws, together with the certificate of incorporation and the broader DGCL, form part of a flexible contract between corporations and stockholders."); *Rothschild Int'l Corp.*, 463 A.2d at 646 ("[S]hareholders were necessarily charged with knowledge of ["certificate of incorporation" terms] at the time that they acquired their shares.").[19]

E.Merge's other public statements confirm that investors bought shares with the knowledge

[19] E.Merge's specific reference to its purpose in the Certificate of Incorporation is notable in that Delaware law allows corporations to define their purpose far more generically. *See* 8 Del. C. § 102(a)(3).

and expectation that E.Merge would carry out its primary purpose – to consummate an Initial Business Combination. E.Merge's Prospectus not only repeatedly stated that the purpose of the entity was to complete an Initial Business Combination, it specifically informed investors that "***[o]ur business will be to identify and complete an initial business combination***" and warned that "***[t]his offering is not intended for persons who are seeking a return on investments in government securities or investment securities***." (*See* Ex. B (Prospectus) at 39.) E.Merge reiterated its primary business purpose on an ongoing basis, explaining in its Form 10-K that it is "***not presently engaged in, and [it] will not engage in, any operations other than the pursuit of [its] initial business combination***" and that it "intend[s] to effectuate [its] initial business combination using cash from the proceeds of our [IPO]" and related transactions. (Ex. C (10-K/A) at 7.) These are the types of statements that are critical to evaluating an entity's primary purpose under the ICA. *See In re Tonopah*, 1947 WL 26116, at *3-4 (looking to application for registration and public filings); *SEC v. Nat'l Presto Indus., Inc.*, 486 F.3d 305, 313 (7th Cir. 2007) ("Presto presents itself to the public (and to investors) as an operating company. That's how its web site, its annual reports, and its publicity all depict it.").

Notwithstanding Plaintiff's conclusory refrain that investing "is all E.Merge has ever done with its assets" (Compl. ¶ 4), the reality is far different. To be sure, the Trust Account holds government securities. The Trust Account itself is a requirement of the NASDAQ listing requirements (approved by the SEC), and it holds governmental securities for the purpose of capital preservation. As investors were advised, "[t]he trust account is intended as a holding place for funds pending the earliest to occur of" an Initial Business Combination or liquidation. (Ex. B (Prospectus) at 39.) E.Merge's Form 10-K further reaffirms that, at all times, E.Merge's sole purpose has been to complete an Initial Business Combination, not to earn a return on investment.

Indeed, the de minimis income projected to be earned (*id.* at 17) and actually earned (Ex. C (10-K/A) at F.4); Ex. G (10-Q) at 1-2), do not even cover E.Merge's modest taxes and operating expenses. "[M]erely putting one's money in the bank," on a short-term basis, "even though one thereby obtains some interest, in and of itself is [not] 'investing, reinvesting or trading in securities' within the meaning of Section 3(a)(1)." *Fifth Ave.*, 289 F. Supp. at 28.

Much as the Seventh Circuit concluded in *Presto*, "[a]n investor in the market for a mutual fund, a hedge fund, or any other investment pool would not dream of turning to [E.Merge], whose net income [may] increase or decrease substantially as a result of business successes or reverses." *Presto*, 486 F.3d at 313. E.Merge's purpose and value are based in its expected Initial Business Combination, not in any de minimis interest earned on the Trust Account. These undisputed facts alone are more than sufficient to conclude that E.Merge is not an investment company. Indeed, more than 60 law firms have joined a public statement explaining that "the assertion that SPACs are investment companies [is] without factual or legal basis." *Over 60 of the Nation's Leading Law Firms Respond to Investment Company Act Lawsuits Targeting the SPAC Industry,* Skadden (Sept. 2, 2021).

2. E.Merge's Structure Confirms It Is Not an Investment Company

A review of the structure of the Defendants' interests—which Plaintiff misleadingly touts as compensation that "could exceed $100,000,000" (Compl. ¶ 65)—only confirms that E.Merge's "primary" purpose is to effectuate an Initial Business Combination. Indeed, if E.Merge fails to achieve this primary purpose Defendants will receive ***no compensation at all***, and Sponsor will lose its investment.

Plaintiff concedes, as he must, that the Individual Defendants "do not take any compensation from [E.Merge] directly, instead taking their compensation indirectly by virtue of their ownership interest in the Sponsor" and that E.Merge "compensates the Individual Defendants

by first paying the Sponsor and then letting the Sponsor divide the payments among the Individual Defendants via their membership interests in the Sponsor." (Compl. ¶ 50.) Plaintiff identifies two sources of potential "payments" to the Sponsor that he alleges constitute "indirect compensation." First, Plaintiff points to the Class B shares, which the Sponsor acquired for $25,000, and will be convertible into Class A shares equal to at least 25% of all Class A shares *only* "*[u]pon completion of the Initial Business Combination*." (Compl ¶¶ 63-66.) If there is no Initial Business Combination, however, these Class B shares "will be worthless." (Ex. B (Prospectus) at 48) Second, Plaintiff points to the 1.2 million Private Placement Units (PPUs) Sponsor paid $12 million to acquire. These PPUs will also "be worthless if [SPAC] does not complete an initial business combination." (*Id.*)

Thus, the supposed "compensation scheme" (Compl. ¶ 2) Plaintiff disputes (and misrepresents), unequivocally demonstrates that, contrary to Plaintiff's conclusory assertion that E.Merge's "primary business is investing in securities" (*id.* ¶ 4) there is only one scenario where Defendants will be compensated: a successful Initial Business Combination. If E.Merge's primary business was investing in securities, this "compensation scheme" would leave Defendants with (i) ***no compensation whatsoever*** and (ii) a $12 million loss by the Sponsor entity in which the Individual Defendants have ownership interests.

Moreover, the Class B shares are subject to transfer restrictions, inexorably tying their value to the performance of the entity *after* the Initial Business Combination – not any supposed investment income. (Ex. B (Prospectus) at 15).[20] If there is no *successful* Initial Business

[20] The Class A shares Sponsor received after conversion of the Class B shares into Class A shares cannot be sold until the later of (i) the expiration of one year after the Initial Business Combination; (ii) the shares trade for $12 or more for a sustained period of time; or (iii) the completion of a transaction that results in all stockholders having the right to exchange their shares. (Ex. B (Prospectus) at 15.)

Combination, there is no compensation to the Defendants. Accordingly, Plaintiff's entire theory of the case—that E.Merge's primary business is investing in securities—is implausible on its face. *See Twombly*, 550 U.S. at 555, 570.

3. Other Factors Further Support the Conclusion that E.Merge Is Not an Investment Company

The SEC has developed a series of factors for use in determining whether an entity is "primarily" engaged in the business of "investing, reinvesting or trading in securities": "1) the company's historical development; 2) its public representations of policy; 3) the activities of its officers and directors; and, most important, 4) the nature of its present assets; and 5) the sources of its present income." *Tonopah*, 1947 WL 26116, at *1. Each of these factors further supports the conclusion that E.Merge is not an investment company.

E.Merge's Historical Development. E.Merge's short history confirms it is not an investment company. Unlike companies whose primary purpose is—or later becomes—the "investing, reinvesting or trading in securities," E.Merge has from its inception made clear that it is ***not*** "engage[d] in, any operations other than the pursuit of our initial business combination" and that it "intend[s] to effectuate [its] initial business combination using cash from the proceeds of [its] [IPO]" within two years. (Ex. B (Prospectus) at Cover Page; Ex. C (10-K/A) at 7).

Representations of Policy. Plaintiff does even attempt to allege that E.Merge held itself out as an investment company. This factor weighs strongly in favor of a conclusion that E.Merge is not an investment company. *Presto*, 486 F.3d at 315 (holding that because "[r]easonable investors would treat Presto as an operating company" and plaintiff "has not tried to demonstrate anything different," it "follows that Presto is not an investment company"). As explained above (*see supra* at 2-3), E.Merge uniformly has represented that its business objective is to complete an Initial Business Combination, not to invest in securities.

Activities of Officers and Directors. Unlike in *Tonopah*, the officers and directors of E.Merge are not expected to spend *any* time on investing. To the contrary and as explained in E.Merge's public filings, the Individual Defendants are experts in the technology sphere, and are tasked with working towards an Initial Business Combination, *not* with managing investments in preordained asset-preservation accounts.[21] Plaintiff does not (and cannot) allege that any of the Individual Defendants devote any meaningful time to managing investments in securities. *See Presto*, 486 F.3d at 313 (noting that "Presto estimates that 95% of its managers' time is devoted to running its consumer-products and military-ordnance businesses"); *see also First Nat'l Bank & Tr. Co. v. Beach*, 301 U.S. 435, 439 (1937) (An individual is "'primarily engaged' in farming" under the Bankruptcy Code if he devotes "the major portion of his time" to farming.).

Nature of Assets and Sources of Income. At present, E.Merge's quantifiable assets consist principally of the assets in the Trust Account. E.Merge's income, which is far outstripped by its expenses, consists of de minimis interest on the Trust Account. But, as the Seventh Circuit has explained, "***what principally matters is the beliefs the company is likely to induce in investors. Will its portfolio and activities lead investors to treat a firm as an investment vehicle or as an operating enterprise?***" *Presto*, 486 F.3d at 315. Indeed, the SEC has acknowledged that an inflexible, formalistic approach to the "nature of assets" test is inappropriate under certain circumstances including where, as here, "the company invests in securities in a manner consistent

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[21] (*See, e.g.,* Ex. C (10-K/A) at 28-31 (explaining: (i) Mr. Singh's "extensive operational and board experience in the technology industry"; (ii) Mr. Clarke's "extensive public and private company operational and board experience"; (iii) Mr. Gecht's roles as CEO of a "digital printing technology provider," various roles in the technology industry and as lead director of a public information technology company; (iv) Ms. Zhang's "extensive operational and board experience in the technology, software and internet sectors"; (v) Mr. ibnAle's "extensive investment experience in the technology, software and internet sectors"; (vi) Mr. Feeny's "extensive investment and venture experience in the technology, software and internet sectors"; (vii) Mr. Vieux's roles as a director of public and private companies, and co-founder of technology companies; and (viii) Mr. Fletcher's experience as an investment banker in the technology sector).)

with the preservation of its assets until needed to finance operations." *See, e.g.*, *In re ICOS Corp.*, 53 S.E.C. Docket 1812, 1993 WL 78892 (Mar. 16, 1993) (applying a modified *Tonopah* test for research and development companies); *In re PacifiCare of Ariz. Inc.*, 84 S.E.C. Docket 859, 2004 WL 2674268, at *4 (Nov. 22, 2004) (eliminating the nature of assets test for HMOs that "maintain and invest larger portfolios and cash positions").

There can be no legitimate doubt that investors reviewing E.Merge's financial statements would not place any weight on the tiny amount of interest income currently received on its asset accounts—particularly because E.Merge advised potential investors not to invest for such a purpose. Rather, the value of E.Merge is solely in the anticipated Initial Business Combination. *See Presto*, 486 F.3d at 314 (noting that, while Presto's "total receipts from investment securities . . . were $4.2 million," its ultimate "stock returns would . . . depend on its operating profits and losses"). Moreover, E.Merge's fully disclosed plan to enter into an Initial Business Combination in the foreseeable future confirms it is not an investment company. In *Tonopah*, the SEC concluded that a company was operating as an investment company not just because its "only source of net income consists of interest, dividends and profits on the sale of securities," but also because there was "***nothing to indicate that this situation will be changed substantially in the foreseeable future***." *In re Tonopah*, 1947 WL 26116, at *6. Here, unlike in *Tonopah*, E.Merge has repeatedly disclosed its singular plan to enter into an Initial Business Combination in the foreseeable future, confirming that its temporary investment in short-term government securities "*will* be changed substantially in the foreseeable future." *Id.* E.Merge's value to investors is not the assets in the Trust Account, but rather the experience and expertise it offers in locating and selecting a target for its Initial Business Combination in furtherance of its primary purpose.

4. The SEC's Long-Standing Approach to SPACs Confirms that E.Merge Is Not an Investment Company

According to Plaintiff's theory, SPACs have operated illegally as unregistered investment companies for over two decades. This theory assumes, however, that despite having declared effective the registration statements for hundreds of SPAC IPOs, the SEC did not notice that SPACs are investment companies under the ICA. As to E.Merge specifically, the SEC (and every investor) had specific knowledge beginning in June 2020 of E.Merge's plan to temporarily "invest[] in U.S. government treasury bills" before "complet[ing] an Initial Business Combination within two years." (Compl. ¶¶ 38, 45, 54 (citing Ex. B (Prospectus), Ex. C (10-K/A)).) Despite this knowledge, the SEC has taken no action. The inference Plaintiff asks this Court to draw, then, is that a purportedly "illegal" "scheme" has gone unnoticed by the SEC. (Compl. ¶¶ 2, 82.) The implausibility of this theory is underscored by the fact that the SEC specifically approved NYSE and NASDAQ rules requiring that funds raised in a SPAC IPO be placed into a trust account. In approving this arrangement it is simply implausible that the SEC, NYSE and NASDAQ anticipated that such trust accounts would hold anything other than secure government securities.[22] Indeed, the SEC acknowledged in March of this year that trust account funds typically are held in "relatively safe interest-bearing instruments." (*See infra* at 13.)

Instead, while "[i]t is ***possible*** for an entire industry to be in violation of [a statute] for a long time without the [Agency] noticing," the "more ***plausible*** hypothesis is that the . . . industry has been left alone because the character of its . . . system has been recognized for what it is—a bona fide . . . system." *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510-11 (7th Cir. 2007); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 132 (2012) ("[D]espite the

[22] Indeed, E.Merge may well have found itself subject to a different type of lawsuit had it opted to hold the more than $600 million raised in the IPO in anything other than secure government securities, as is customary for SPACs.

industry's decades-long practice, the [Department of Labor] never initiated any enforcement actions with respect to [defendant's conduct] or otherwise suggested that it thought the industry was acting unlawfully. ***The only plausible explanation for the DOL's inaction is acquiescence***.").

5. Similar Entities Have Been Held Not to Be Investment Companies

The ICA's "Congressional purpose [is] to reach companies ***actually in the investment company business***, and to protect investors in those funds." *Moses*, 1981 WL 1599, at *4.[23]

This Court's seminal decision in *Moses v. Black* is on point and instructive. There, the plaintiff, a shareholder of a fast food operating company, Chock Full O'Nuts ("Chock"), claimed Chock was an investment company engaged in "the business of investing" because it purchased $10 million in "marketable securities" to hold on its balance sheet while it "investigate[d] . . . potential acquisitions." The Court rejected the argument, concluding that "[t]here is no evidence before the court which would indicate that historically or in the statements of policy appearing in annual reports and public filings, Chock either considered itself or was known to the public as anything but primarily a fast food business . . . . The pattern of acquisitions further confirms that Chock ***intended*** to continue its development along similar lines." *Id.* at *2, 4.

The Seventh Circuit reached a similar conclusion in *Presto*, where it rejected a proposed construction of Section 3(a)(1) that would extend its reach to a company that unequivocally "present[ed] itself to the public (and to investors) as an operating company," including on its "web site, its annual reports, and its publicity." *Presto*, 486 F.3d at 313. In concluding that "[r]easonable investors would treat Presto as an operating company rather than a competitor with a closed-end mutual fund," the Court looked to Presto's public disclosures and website, which contained "nary

[23] To that end, the Act exempts issuers "primarily engaged . . . in a business . . . other than that of investing . . . in securities," no matter what portion of their assets are held in securities. 15 U.S.C. § 80a-3(b)(1).

a hint that someone would want to buy Presto's stock as a means to own a derivative interest in . . . bonds." *Id.* at 312, 315. A similar conclusion is warranted here, where Plaintiff does not (and cannot) allege that E.Merge has *ever* held itself out as an investment company or that any investor reasonably could have believed E.Merge to be an investment company.

In the same vein, the SEC has concluded that an issuer may temporarily and passively hold securities on its balance sheet without becoming an investment company under the ICA. In one no-action letter, *Fla. First Equities Corp.*, SEC No-Action Letter, 1980 WL 14869 (Sept. 11, 1980), the SEC declined to take action against an issuer who, like E.Merge, "***following receipt of the proceeds of a securities offering which are to be invested in a non-investment company business*** . . . ***temporarily invests such proceeds, in order to preserve their value pending their investment in a non-investment . . . business***." (concluding that "a period of up to one year" is permissible and considering "[w]hether a longer period would also be deemed temporary").[24] Likewise, the SEC has concluded that an entity that plans to passively hold, ***but not actively trade***, securities and "to operate as a holding company through the acquisition of privately held

[24] Similarly, the SEC has recognized the importance of having "a source of ["liquid"] capital for purchase of an operating company" and that temporarily holding stable, liquid securities "to maintain ready cash reserves for . . . business expenses" and to "purchas[e] . . . an operating company" does not transform an issuer into an investment company. *See, e.g.*, *Willkie Farr & Gallagher*, SEC No-Action Letter, 2000 WL 1585635, at *3 ("[T]hese uses of the issuer's assets usually are not determinative of whether the issuer is an investment company, because issuers generally need easily accessible funds to cover expenses incurred in their business operations."); *see also In re Warner Bros.*, 11 S.E.C. Docket 2214, 1977 WL 175217, at *1 (Apr. 5, 1977), *In re Warner Bros.*, 12 S.E.C. Docket 327, 1977 WL 175511 (May 2, 1977) (granting ICA exemption where company represented that its portfolio was "a source of capital for purchase of an operating company or companies . . . or for major investment in its current businesses should new opportunities arise" and that marketable securities were treated as a cash item, "readily available but not immediately needed for working capital"); *In re George W. Helme Co.*, 9 S.E.C. 16, 1941 WL 37265, at *2 (Apr. 11, 1941) (substantially similar). The same conclusion is warranted here, where the Trust Accounts are intended as a temporary "holding place" for E.Merge's IPO proceeds until they are either employed in connection with an Initial Business Combination, or returned to investors upon redemption or liquidation. (Ex. B (Prospectus) at 39); *see also In re Snowflake, Inc.*, Release No. IC – 34049 (Oct. 9, 2020) (request for exemption based on representations to public; officers and directors devote substantially all time to non-investment business and funds invested in short-term investments for capital preservation purposes); Release No. IC – 34085 (granting exemption); *Lyft, Inc.*, Release No. IC – 33399 (Mar. 14, 2019) (similar request for exemption); Release No. IC – 33442, 2019 WL 1529627 (Apr. 8, 2019) (granting exemption).

investment management firms" is not an investment company because "***its primary business will be owning or holding securities rather than 'investing, reinvesting, or trading'*** [.]" *United Asset Mgmt. Corp*., S.E.C. No-Action Letter, 1981 WL 26656 (Nov. 2, 1981); *Cf. Fifth Ave*., 289 F. Supp. at 28. So too here, where Plaintiff nowhere alleges that E.Merge has, or plans to, actively "invest[], reinvest[], or trad[e] . . . securities." *Id.*[25]

Exemptions under the ICA further demonstrate that the transitory deposits in trust accounts by SPACs are not intended to convert the primary SPAC business into one of investing. Rule 419 under the Securities Act of 1933 governs offerings by blank check companies issuing penny stock and (like the NASDAQ rules applicable to SPACs) requires offering proceeds to be placed into a trust account. 17 C.F.R. § 230.419. The SEC's adopting release expressly states that "in light of [1] the ***purposes served*** by the regulatory requirement to establish such an account, [2] the ***limited nature of the investments***, and [3] the ***limited duration of the account***, such an account will neither be required to register as an investment company nor regulated as [such]." Blank Check Offerings, Securities Act Release No. 6932, Exchange Act Release No. 30,577, 51 S.E.C. Docket 284, 288 (Apr. 13, 1992). The SEC also has adopted a rule exempting certain bona fide research and development ("R&D") companies from the definition of "investment company" under the ICA.

[25] The authority Plaintiff cites is not to the contrary. (*See, e.g.,* Compl. ¶ 73, n.27 (citing *Ariz. Prop. Inv., Ltd.*, S.E.C. No-Action Letter, 1979 WL 14220, at *1 (Aug. 9, 1979) (noting that "a company, pending investment of its assets in an intended business, may temporarily invest its assets in bank deposits and short term Government securities without . . . requir[ing] the company to register under the Act"); *In re J.D. Gillespie, Tr. for Cleo George*, 13 S.E.C. 470, 475 n.4 (1943) (applying the ICA to issuer taking an "***extreme leverage position***" by engaging in the business of issuing "to banks and individuals senior and junior classes of certificates of participation in a profit-sharing agreement relating to government obligations"); *S.E.C. v. Am. Bd. of Trade, Inc.*, 593 F. Supp. 335, 337 (S.D.N.Y. 1984), *rev'd*, 751 F.2d 529 (2d Cir. 1984) (applying the ICA to a "self-described alternative securities exchange" that directly "***marketed two investment programs***" to investors); *See also Baker, Watts, Co.*, S.E.C. No-Action Letter, 1982 WL 29238, at *1 (May 6, 1982) (noting without deciding that "an issuer could invest exclusively in Government securities . . . and yet be an investment company" but emphasizing that "[e]ach transaction must be analyzed and evaluated on the basis of . . . the purposes intended to be served, and the factual setting as a whole"); *Credit Suisse First Bos. Corp.*, S.E.C. No-Action Letter, 1998 WL 799305, at *1 (Sept. 9, 1998) (a banking trust whose sole purpose is to "hold U.S. Treasury inflation-indexed notes or bonds" is an investment company).)

17 C.F.R. § 270.3a-8. According to the SEC, R&D companies "often raise large amounts of capital, invest the proceeds and use the principal and return on these investments to fund their operations" and "also may purchase a non-controlling equity stake in another company as part of a strategic alliance." Certain Research and Development Companies, Investment Company Act Release No. 26077, 80 S.E.C. Docket 1448, 1449 (June 17, 2013). The SEC determined that R&D companies will not be deemed investment companies if certain requirements are met that demonstrate the company's engagement in a non-investment business. In adopting this rule, the SEC acknowledged that "the asset and income factors of the traditional primary business test may not appropriately reflect these companies' non-investment business." *Id.* at 1450. The principles underlying these exemptions supports the conclusion that SPACs are not investment companies.

E. The Advisor Claims Fail Because Defendants Are Not Investment Advisors

Plaintiff also requests "a declaration that the Advisor Defendants are investment advisers within the meaning of the IAA and the ICA" (Compl. ¶ 124) and asserts a claim for breach of Section 215(b) of the Investment Advisers Act (*id.* ¶¶ 141-49).

The IAA defines an "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. . . ." 15 U.S.C. § 80b-2(a)(11). The SEC considers "whether such person (1) provides advice . . . regarding securities; (2) is in the business of providing such services; and (3) provides such services for compensation." Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons, Investment Advisers Act Release No. 1092, 39 S.E.C. Docket 494, 1987 WL 112702, at *3 (Oct. 8, 1987), *superseded in part by* Commission Interpretation, Investment Advisers Act Release No. 5249, 2019 WL 2417616 (June 5, 2019). Courts in this Circuit have consistently "required plaintiffs to allege that the parties entered into an investment

advisory contract in order for the Advisers Act to apply." *Kassover v. UBS AG*, 619 F. Supp. 2d 28, 32, 33 (S.D.N.Y. 2008) (dismissing IAA claim where plaintiffs failed to identify investment advisory agreement).[26] "'[I]nvestment advisers,' for purposes of the Advisers Act, are those who receive consideration for rendering investment advice." *Clark v. Nevis Cap. Mgmt., LLC*, No. 04 Civ. 2702(RWS), 2005 WL 488641, at *13 (S.D.N.Y. Mar. 2, 2005).

The ICA similarly defines an "investment adviser" as "any person (other than a bona fide officer, director, trustee, member of an advisory board, or employee of such company, as such) who ***pursuant to [a] contract with such company*** regularly furnishes advice to such company with respect to the desirability of investing in, purchasing or selling securities or . . . any other person who . . . regularly performs substantially all of the duties undertaken by such person." 15 U.S.C. § 80a-2(a)(20).[27] At bottom, "[i]n return for a management fee, the adviser ***selects the company's investment portfolio and supervises most aspects of its business***." *Bd. of Governors of Fed. Rsrv. Sys. v. Inv. Co. Inst.*, 450 U.S. 46, 50-51 (1981).

Here, Plaintiff vaguely asserts that Vieux and Fletcher are investment advisers under the IAA and ICA because the Company relies on them for investment advice. (Compl. ¶¶ 74, 77.) But other than these conclusions, Plaintiff is unable to identify ***any*** facts suggesting Vieux or

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[26] *See also, e.g.*, *Welch v. TD Ameritrade Holding Corp.*, No. 07 Civ. 6904(RJS), 2009 WL 2356131, at *27 (S.D.N.Y. July 27, 2009) (same); *Clark v. Nevis Cap. Mgmt.*, LLC, No. 04 Civ. 2702(RWS), 2005 WL 488641, at *13 (S.D.N.Y. Mar. 2, 2005) (dismissing IAA claim because "[o]nly parties to an investment advisory contract may sue for rescission"); *Valentini v. Citigroup, Inc.*, 837 F. Supp. 2d 304, 325 (S.D.N.Y. 2011) (dismissing IAA claim because "[p]laintiffs have not alleged, nor provided any evidence, to demonstrate that [d]efendants contracted with them specifically to provide investment advice."); *Bogart v. Shearson Lehman Bros., Inc.*, No. 91 Civ. 1036(LBS)(NG), 1993 WL 33643, at *3 (S.D.N.Y. Feb. 3, 1993) (dismissing IAA claim where plaintiff failed to allege investment advisory agreement or separate investment adviser's fee). Even where there are agreements between parties, "it does not necessarily follow that the agreements in question provided for investment advisory services covered by the IAA." *DeBlasio v. Merrill Lynch & Co.*, No. 07 Civ. 318(RJS), 2009 WL 2242605, at *16-17 (S.D.N.Y. July 27, 2009) (dismissing IAA claims where no defendant "undertook to provide investment advisory services").

[27] To the extent Plaintiff contends that the Advisor Defendants are investment advisers under the ICA (*see* Compl. ¶ 124), such claim fails because E.Merge is not an "investment company." *See* 15 U.S.C. § 80a-2(a)(20).

Fletcher "select[] the company's investment portfolio" or provide advice regarding securities. Instead, Plaintiff cherry picks disclosures noting that Vieux and Fletcher "(i) assist [E.Merge] in sourcing and negotiating with potential business combination targets, [and] (ii) provide their business insights when [E.Merge] assess[es] potential business combination targets." (Compl. ¶ 78 (citing Prospectus at 107).) These unsupported allegations fail for multiple reasons.

First, as a threshold matter, Plaintiff's Advisor Claims under the IAA fail because Plaintiff is not in an advisor-client relationship with Defendants, and thus has no standing to bring the claims. *See DeBlasio*, 2009 WL 2242605, at *16 (no claim where "[p]laintiffs do not allege that they received investment advisory services from Defendants, and they have not identified investment advisory contracts to which they were parties"); *Welch*, 2009 WL 2356131, at *28 ("[Plaintiffs] have not identified investment advisory contracts to which they were parties . . . and in the absence of a voidable investment advisory contract, the relief sought by Plaintiffs is unavailable . . . under the IAA.").

Second, Plaintiff's failure to identify the required "contractual arrangement" whereby Vieux and Fletcher are compensated for "select[ing]" E.Merge's "investment portfolio" is fatal to his Advisor Claims.[28] *See Bd. of Governors*, 450 U.S. at 50; *Clark*, 2005 WL 488641, at *14 (dismissing IAA claim for lack of "factual allegations from which it might be inferred that [plaintiff] was a party to an investment advisory contract with [defendant]").[29]

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[28] Plaintiff vaguely asserts that Vieux and Fletcher are compensated "indirectly" pursuant to an "understanding" where Vieux and Fletcher supply investment advice and "benefit from the profits generated on the Class B shares issued . . . to the Sponsor." (Compl. ¶ 79.) But absent any well-pled facts, this bare assertion is "too conclusory to support a finding that any Defendant acted as an investment adviser." *KDH Consulting Grp.*, 2020 WL 7251172, at *10. In any event, merely standing to "benefit from the profits generated" by a company cannot transform a businessperson into an investment advisor. *See Bd. of Governors of Fed. Res. Sys. v. Inv. Co. Inst.*, 450 U.S. 46, 50-51 (1981); *DeBlasio*, 2009 WL 2242605, at *17 (no defendant "undertook to provide investment advisory services").

[29] Plaintiff's IAA claim also fails because "the only relief available to a private litigant under the IAA is rescission and 'restitution of the consideration given under the contract.'" *DeBlasio*, 2009 WL 2242605, at *16; *see also Kassover v. UBS AG*, 619 F. Supp. 2d 28, 34 (S.D.N.Y. 2008).

In the same vein, the Advisor Claims fail because Plaintiff provides ***no facts*** to suggest Vieux and Fletcher advise E.Merge as to its "investing in, purchasing, or selling securities" (Compl. ¶ 78) or otherwise engage in the business of providing securities advice. In reality, Advisor Defendants are analogous to board members, who are excepted from the meaning of "investment adviser" under the ICA. *See* 15 U.S.C. § 80a-2(a)(20); (Ex. B (Prospectus) at 107 (Advisors "will fulfill some of the same functions as our board members.").) Moreover, Plaintiff simply ignores that the Trust Accounts passively hold preordained investments that are not "select[ed]," "organize[d]" or "manage[d]" by Vieux or Fletcher. *Bd. of Governors*, 450 U.S. at 50-51. Indeed, Plaintiff's strained attempt to conflate the responsibilities of Vieux and Fletcher with those of an investment advisor does not survive scrutiny and should be rejected. (*Compare* Ex. B (Prospectus) at 107 (noting Vieux and Fletcher "assist . . . in sourcing and negotiating with potential . . . targets" and "provide their business insights when we assess . . . targets")); *with Bd. of Governors*, 450 U.S. at 50-51 (Investment Advisors "select[] the company's *investment portfolio*" and advise as to "investing in, purchasing or selling securities").

F. Plaintiff Has Failed To Allege a Violation of the ICA

Plaintiff asserts the existence of several supposed predicate violations under the ICA (*see* Compl. ¶¶ 83-89), but none withstands scrutiny. The Section 7(a)(1) claim fails because that section allows rescission of the contract of sale pursuant to which plaintiff acquired its shares, not the unrelated agreements challenged by Plaintiff. *See Oxford Univ. Bank*, 933 F.3d at 109. The Sections 22 and 23 claims fails because, as Plaintiff acknowledges, the Class B shares were issued in exchange for a cash payment of $25,000, and were issued at a time when E.Merge had no assets (pre-IPO). (*See* Compl. ¶ 59.) And, Plaintiff's assertion that the challenged contracts were not approved by the Class A shareholders under Section 15 of the ICA ignores that the Class A shares were not outstanding at the time the Class B shares were granted, and sidesteps the fact that

Plaintiff appears to argue simultaneously that there was no written advisory contract and that the "Illegal Contracts" set forth the compensation payable for advisory services. (*See id.* ¶¶ 40-42.)

The Section 36(b) claim likewise fails. That section allows claims to be brought only against investment advisers or directors who have "a fiduciary duty concerning such compensation." 15 U.S.C. § 80a-35(b). But Plaintiff fails to plead facts demonstrating which Defendants were directors at the time the Class B shares were issued. (*See* Compl. ¶ 59 (alleging that "the Individual Defendants or a subgroup thereof used their control over the Company to cause the Company to issue [the Class B Shares].").) This claim also fails because Plaintiff have not pled facts (rather than sheer speculation) that the compensation "bore no relationship to the services rendered." *Bellikoff*, 481 F.3d at 118.

CONCLUSION

For each of the foregoing reasons (which cannot be cured), Defendants respectfully request that the Complaint be dismissed in its entirety with prejudice.

Dated: New York, New York
October 12, 2021

Respectfully submitted,

*/s/Susan L. Saltzstein*__________________

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