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Case No. 2022-0629-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ANNE D. GRAZIANO, TRUSTEE, ANNE D. GRAZIANO REVOCABLE LIVING TRUST, derivatively on behalf of PLUG POWER, INCORPORATED,	)	Civil Action No. 2022-0629-
Plaintiff,	)	
v.	)	
ANDREW MARSH, GEORGE C. MCNAMEE, GARY K. WILLIS, MAUREEN O. HELMER, JOHANNES M. ROTH, GREGORY L. KENAUSIS, LUKE SCHNEIDER, JONATHAN SILVER, PAUL B. MIDDLETON, GERARD L. CONWAY, JR., and KEITH SCHMID,	)	
Defendants,	)	
and	)	
PLUG POWER, INCORPORATED,	)	
Nominal Defendant.	)	

VERIFIED STOCKHOLDER DERIVATIVE COMPLAINT

Anne D. Graziano, Trustee, Anne D. Graziano Revocable Living Trust ("Plaintiff"), by and through her attorneys, alleges the following upon information and belief, except as to those allegations concerning herself, which are alleged upon personal knowledge. Plaintiff's information and belief as to all other matters is based upon her counsel's investigation, which includes a review and analysis of: (i) documents produced to Plaintiff by Plug Power, Incorporated ("Plug Power" or the "Company") in response to a books and records inspection demand made pursuant to 8 *Del. C.* § 220 ("Section 220"); (ii) filings in various proceedings, including a class action lawsuit alleging violations of federal securities laws captioned *In re Plug Power Securities Litigation*, Case No. 21-cv-02004 (S.D.N.Y.) (the "Securities Action"); (iii) Plug Power's filings with the U.S. Securities and Exchange Commission ("SEC"); (iv) Plug Power's press releases, website, corporate governance documents, presentations, and conference calls; and (v) analyst reports and other publicly available information concerning Plug Power.

NATURE OF THE ACTION

1. This stockholder derivative action is brought on behalf of Plug Power against certain current and former members of the Company's Board of Directors (the "Board") and other Plug Power executives (collectively, the "Individual Defendants")[1] for: (i) making and/or authorizing false and misleading statements and material omissions regarding the Company's business, finances, and accounting; (ii) selling Plug Power stock at artificially inflated rates while in possession of

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[1] The Individual Defendants are Andrew Marsh ("Marsh"), George C. McNamee ("McNamee"), Gary K. Willis ("Willis"), Maureen O. Helmer ("Helmer"), Johannes M. Roth ("Roth"), Gregory L. Kenausis ("Kenausis"), Luke Schneider ("Schneider"), Jonathan Silver ("Silver"), Paul B. Middleton ("Middleton"), Gerard L. Conway, Jr. ("Conway"), and Keith Schmid ("Schmid").

material, non-public Company information; and (iii) failing to establish and/or oversee reasonable information, oversight and reporting systems, and internal controls.

2. Plug Power is a pre-revenue fuel cell manufacturer that has sought to develop hydrogen-powered fuel cells for use in motor vehicles. Since 2018, the Company has raised approximately $3.5 billion in pursuit of this goal.

3. Unbeknownst to the public, the Company was significantly overstating its financials by, among other things: (i) manipulating the accounting for its leases and "right of use" assets; and (ii) misclassifying fuel delivery expenses as research and development costs, which had the effect of artificially enhancing gross profits and other key financial results.

4. On March 16, 2021, Plug Power announced that the Company needed to restate its prior financial results (the "Restatement") for the full year ("FY") 2018, FY 2019, and each of its quarterly filings in 2019 and 2020 (the "Restated Financials"). By correcting the Company's reported positive profits to losses with negative EBITDAs, the Restatement admitted that the Company's representations concerning its gross profit and EBITDA, among other things, were materially false when made.

5. As a result of the foregoing, the Forms 10-K for 2018 and 2019, signed

by the Director Defendants[2] and Defendant Middleton, were materially false and misleading as were the interim 10-Q Reports in those years.

6. On news of the Restatement, Plug Power's stock fell to $36.36 per share on March 18, 2021 – a 50% drop from its all-time high less than two months earlier.

7. On January 19, 2021 – one week before Plug Power stock hit its all-time high, and two months before it dropped by more than 50% – Defendant Marsh, the Company's President, Chief Executive Officer ("CEO"), and a member of the Board, ***sold 43% of his Plug Power holdings for approximately $37.7 million***. At the time of the sale, Plug Power stock was trading at artificially inflated prices due to the false and misleading statements alleged herein and Defendant Marsh was in possession of material, non-public Company information. Notably, Defendant Marsh had not sold any shares of Company stock from 2008 to 2020 and made $23 million more than he would have had he sold just three months later.[3]

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[2] The Director Defendants are Defendants Marsh, McNamee, Willis, Helmer, Roth, Kenausis, Schneider, and Silver.

[3] *The Wall Street Journal* recently published a scathing article concerning Defendant Marsh's fraudulent stock sales, which began:

> As Plug Power Inc. shares soared to a 15-year high in January 2021, longtime Chief Executive Andrew Marsh unloaded some of his stock in a well-timed sale. In his biggest-ever payday from selling the company's shares, Mr. Marsh netted $36 million by selling about 40% of his holdings under an automatic trading plan. ***The plan, it turned out, had been set up only the month before. And shortly after he sold,***

(footnote continued)

[redacted]

9. On June 7, 2021, Plaintiff, through her counsel, served a books and records demand on the Company (the "Demand"). On August 16, 2021, the Company produced documents in response to the Demand. Thereafter, counsel for Plaintiff informed the Company that they had identified a series of deficiencies with the production and requested a series of additional documents. On February 23, 2022, after numerous additional discussions, the Company made a second production of documents to Plaintiff (collectively with the August 16, 2021 production, the "Books and Records Production"). Plaintiff's counsel have reviewed the Books and Records Production and determined that it contains significant evidence supporting the claims set forth herein.

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> ***a string of negative company announcements sent the fuel-cell maker's shares plunging -- down 60% over three months***.

Tom McGinty and Mark Maremont, *CEO Stock Sales Raise Questions About Insider Trading*, Wall St. J., June 29, 2022, at 1 (emphasis added).

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14. The Board, including each of the Director Defendants, either failed to institute an oversight system concerning these critical accounting considerations, and regarding the adequacy of the Company's public reports, or consciously disregarded a series of red flags that warned the Company had misclassified and misreported key accounting considerations, and maintained deficient internal controls. Despite these red flags, the Board failed to act.

15. Plaintiff did not make a demand on the Board because, as further detailed herein, the Books and Records Production and publicly available information confirm that such a demand would be a futile and useless act.

THE PARTIES

Plaintiff

16. Plaintiff holds shares of Plug Power and has been a continuous holder of the Company's common shares since June 4, 2020.

Nominal Defendant

17. Nominal Defendant Plug Power is a Delaware corporation with its principal executive offices located in Latham, New York. The Company's common

stock trades on the Nasdaq Capital Market ("NASDAQ") under the ticker symbol "PLUG."

Director Defendants

18. Defendant Marsh is the Company's CEO, President, and a member of the Board. Defendant Marsh has been CEO of the Company since April 2008 and signed the Company's Annual Reports on Form 10-K for the fiscal years 2016-2019, Quarterly Report on Form 10-Q for the third quarter of FY2020, and letters to shareholders dated November 9, 2020 and February 25, 2021, which reported Plug Power's financial results for the third and fourth quarters of FY2020, respectively. According to the Company's Proxy Statement filed with the SEC on July 9, 2021 (the "2021 Proxy"), Plug Power paid Marsh $13,630,072 in 2020. Defendant Marsh is named as a defendant in the Securities Action.

19. Defendant McNamee serves as Chairman of the Board and has served as a Company director since 1997. Defendant McNamee is a member of the Compensation Committee and attended numerous Audit Committee meetings in 2018, 2019, and 2020. According to the 2021 Proxy, Plug Power paid McNamee $188,645 in 2020.

20. Defendant Willis has been a Company director since 2003. Defendant Willis is the Chair of the Compensation Committee and has been a member of the

Audit Committee since 2018. According to the 2021 Proxy, Plug Power paid Willis $168,645 in 2020.

21. Defendant Helmer has been a Company director since 2004. Defendant Helmer is a member of the Audit Committee and the Corporate Governance and Nominating Committee Chair. According to the 2021 Proxy, Plug Power paid Helmer $163,645 in 2020.

22. Defendant Roth has been a Company director since April 2013. Defendant Roth is a member of the Compensation Committee and Corporate Governance and Nominating Committee. According to the 2021 Proxy, Plug Power paid Roth $148,645 in 2020.

23. Defendant Kenausis has been a Company director since October 2013 and has been a member of the Audit Committee since 2018. According to the 2021 Proxy, Plug Power paid Kenausis $158,645 in 2020.

24. Defendant Schneider has served as a Company director since March 2017. Defendant Schneider is a member of the Corporate Governance and Nominating Committee and attended numerous meetings of Plug Power's Audit Committee in 2018, 2019, and 2020. According to the 2021 Proxy, Plug Power paid Schneider in $143,645 in 2020.

25. Defendant Silver has served as a Company director since June 2018. Defendant Silver is a member of the Nominating and Corporate Governance Committee. According to the 2021 Proxy, Plug Power paid Silver $143,645 in 2020.

26. Defendants McNamee, Willis, Helmer, Marsh, Roth, Kenausis, Schneider, and Silver are herein referred to as "Director Defendants." As further detailed below, all of the Director Defendants sold Plug Power stock while in possession of material non-public information.

Officer Defendants

27. Defendant Middleton is the Company's Chief Financial Officer ("CFO"). Defendant Middleton has been the CFO of the Company since 2014. Defendant Middleton signed the Company's Annual Reports on Form 10-K for the fiscal years 2016-2019, Quarterly Report on Form 10-Q for the third quarter of FY2020, and letters to shareholders, dated November 9, 2020 and February 25, 2021, which reported Plug Power's financial results for the third and fourth quarters of FY2020, respectively. According to the 2021 Proxy, Plug Power paid Middleton $5,342,043 in 2020. Defendant Middleton is named as a defendant in the Securities Action.

28. Defendant Conway served as Plug Power's General Counsel in 2019, 2020, and 2021.

29. Defendant Schmid was Plug Power's Chief Operating Officer during the relevant period.

30. Defendants Middleton, Conway, and Schmid sold Plug Power stock while in possession of material non-public information.

31. The Director Defendants and Defendants Middleton, Conway, and Schmid are collectively referred to herein as the "Individual Defendants."

32. Nominal Defendant Plug Power and the Individual Defendants are collectively referred to as "Defendants."

Non-Parties

33. Non-Parties Kimberly Harriman ("Harriman"), Kyungyeol Song ("Song"), Jean Bua ("Bua"), and Kavita Mahtani ("Mahtani") are current members of the Board but were not appointed until mid-2021 or after. Accordingly, they are not named as defendants.

THE INDIVIDUAL DEFENDANTS' FIDUCIARY DUTIES

34. By reason of their positions as officers, directors, and/or fiduciaries of Plug Power, and because of their ability to control the business and corporate affairs of the Company, at all relevant times, the Individual Defendants owed Plug Power and its shareholders fiduciary obligations of good faith, loyalty, and candor, and were required to use their utmost ability to control and manage the Company in a fair, just, honest, and equitable manner.

35. The Individual Defendants were required to act in furtherance of the best interests of Plug Power and its shareholders so as to benefit all shareholders equally and not in furtherance of their own personal interest or benefit.

36. Each director and officer of the Company owes to Plug Power and its shareholders a fiduciary duty to exercise good faith and diligence in the administration of the affairs of the Company and in the use and preservation of its property and assets, and the highest obligations of fair dealing.

37. The Individual Defendants, because of their positions of control and authority as directors and/or officers of Plug Power, were able to and did, directly and/or indirectly, exercise control over the wrongful acts complained of herein. Because of their advisory, executive, managerial, and directorial positions with Plug Power, each of the Individual Defendants had knowledge of material non-public information regarding the Company. To discharge their duties, the officers and directors of Plug Power were required to exercise reasonable and prudent supervision over the management, policies, practices, and controls of the Company. By virtue of such duties, the officers and directors of Plug Power were required to, among other things:

(a) Exercise good faith to ensure that the affairs of the Company were conducted in an efficient, business-like manner so as to make it possible to provide the highest quality performance of their business;

(b) Exercise good faith to ensure that the Company was operated in a diligent, honest, and prudent manner and complied with all applicable district and state laws, rules, regulations and requirements, and all contractual obligations, including acting only within the scope of its legal authority;

(c) Exercise good faith to ensure that the Company's communications with the public and with shareholders are made with due candor in a timely and complete fashion; and

(d) When put on notice of problems with the Company's business practices and operations, exercise good faith in taking appropriate action to correct the misconduct and prevent its recurrence.

38. The Individual Defendants, because of their positions of control and authority, were able to and did, directly or indirectly, exercise control over the wrongful acts complained of herein, as well as the contents of the various public statements issued by Plug Power.

39. Each of the Individual Defendants breached his or her fiduciary duties as alleged herein, both individually and in concert with the other Defendants.

CONSPIRACY, AIDING AND ABETTING, AND CONCERTED ACTION

40. In committing the wrongful acts alleged herein, the Individual Defendants have pursued, or joined in the pursuit of, a common course of conduct, and have acted in concert with and conspired with one another in furtherance of their wrongdoing. The Individual Defendants caused the Company to conceal the true facts as alleged herein. The Individual Defendants further aided and abetted and/or assisted each other in breaching their respective duties.

41. The purpose and effect of the conspiracy, common enterprise, and/or common course of conduct was, among other things, to facilitate and disguise the

Individual Defendants' violations of law, including breaches of fiduciary duty and unjust enrichment.

42. The Individual Defendants accomplished their conspiracy, common enterprise, and/or common course of conduct by causing the Company purposefully, recklessly, or negligently to conceal material facts, fail to correct such misrepresentations, and violate applicable laws.

43. In furtherance of this plan, conspiracy, and course of conduct, the Individual Defendants collectively and individually took the actions set forth herein. Because the actions described herein occurred under the authority of the Board, each of the Individual Defendants, who are directors or officers of Plug Power, was a direct, necessary, and substantial participant in the conspiracy, common enterprise, and/or common course of conduct complained of herein.

44. Each of the Individual Defendants aided and abetted and rendered substantial assistance in the wrongs complained of herein. In taking such actions to substantially assist the commission of the wrongdoing complained of herein, each Individual Defendant acted with actual or constructive knowledge of the primary wrongdoing, either took direct part in, or substantially assisted the accomplishment of that wrongdoing, and was or should have been aware of his or her overall contribution to and furtherance of the wrongdoing.

45. At all times relevant hereto, each of the Individual Defendants was the agent of each of the other Individual Defendants and of Plug Power and at all times acted within the course and scope of such agency.

PLUG POWER'S CODE OF BUSINESS CONDUCT

46. Plug Power maintains a Code of Business Conduct and Ethics, revised August 4, 2020 (the "Code of Conduct"). The Code of Conduct states:

> As a publicly traded Company, our organization must also comply with a variety of regulations that promote transparency in financial markets and the accuracy of information shared with the investment community. The reports and documents that we file with or furnish to the Securities and Exchange Commission, and our earnings releases and similar public communications made by our organization, must include fair, timely and understandable disclosure. It is therefore critical that the information shared with the public is managed by authorized members of the Company.

47. Under the section titled, "Conflicts of Interest," the Code of Conduct states:

> Plug Power recognizes and respects the right of its directors, officers and employees to engage in outside activities that they may deem proper and desirable, provided that these activities do not impair or interfere with the performance of their duties to the Company or their ability to act in Plug Power's best interests. In most, if not all, cases, this will mean that our directors, officers and employees must avoid situations that present a potential or actual conflict between their personal interests and Plug Power's interests.

48. Notably, the Code of Conduct provides that "Conflicts of interest can arise from a variety of circumstances including, but not limited to . . . Utilizing Company proprietary or confidential information for personal gain." Further, "[a]ny

transaction or relationship that reasonably could be expected to give rise to a conflict of interest should be reported promptly to your direct supervisor and Human Resources. Actual or potential conflicts of interest involving a director, executive officer or member of the Legal Department should be disclosed directly to the Chairman of the Board of Directors."

49. Under the section titled "Compliance with Laws, Rules and Regulations," the Code of Conduct states: "Plug Power seeks to conduct its business in compliance with both the letter and the spirit of applicable laws, rules and regulations. No director, officer or employee shall engage in any unlawful activity in conducting Plug Power's business or in performing his or her day-to-day Company duties, nor shall any director, officer or employee instruct others to do so."

PLUG POWER'S AUDIT COMMITTEE CHARTER

50. Plug Power's Audit Committee Charter, adopted by the Board on August 5, 2020, and reconfirmed on October 20, 2021, states that the three purposes of the Committee are to:

- oversee the accounting and financial reporting processes of the Company and the audits of the Company's financial statements;
- take, or recommend that the Board [ ] take, appropriate action to oversee the qualifications, independence and performance of the Company's independent auditors…; and
- prepare the report required by the rules of the [ ] SEC to be included in the Company's annual proxy statement.

51. The Company's Audit Committee Charter also provides that members "may not, other than in his or her capacity as a member of the Audit Committee, the Board or any other committee established by the Board, receive directly or indirectly from the Company any consulting, advisory or other compensatory fee from the Company."

52. The Audit Committee Charter provides that the Committee shall annually "evaluate its own performance and report the results of such evaluation to the Board."

53. With respect to the Company's independent auditors, the Charter provides that the "Audit Committee shall be directly responsible for oversight of the work of the Independent Auditors (including resolution of disagreements between management and the Independent Auditors regarding financial reporting)."

54. Under the section titled "Audited Financial Statements and Annual Audit," the Charter provides that the Committee shall:

> review the overall audit plan with the Independent Auditors and the members of management who are responsible for preparing the Company's financial statements, including the Company's Chief Financial Officer and/or principal accounting officer or principal financial officer (the Chief Financial Officer and such other officer or officers are referred to herein collectively as the "Senior Accounting Executive").
>
> review and discuss with management (including the Company's Senior Accounting Executive) and with the Independent Auditors the Company's annual audited financial statements, including (a) all critical accounting policies and practices used or to be used by the

> Company, (b) the Company's disclosures under "Management's Discussion and Analysis of Financial Condition and Results of Operations" prior to the filing of the Company's Annual Report on Form 10-K, and (c) any significant financial reporting issues that have arisen in connection with the preparation of such audited financial statements.

55. The Audit Committee Charter provides further that the Committee must review:

(i) any analyses prepared by management and/or the Independent Auditors setting forth significant financial reporting issues and judgments made in connection with the preparation of the financial statements, including analyses of the effects of alternative GAAP methods on the financial statements. The Audit Committee may consider the ramifications of the use of such alternative disclosures and treatments on the financial statements, and the treatment preferred by the Independent Auditors. The Audit Committee may also consider other material written communications between the Independent Auditors and management, such as any management letter or schedule of unadjusted differences;

(ii) major issues as to the adequacy of the Company's internal controls including any special audit steps adopted in light of material control deficiencies;

(iii) major issues regarding accounting principles and procedures and financial statement presentations, including any significant changes in the Company's selection or application of accounting principles; and

(iv) the effects of regulatory and accounting initiatives, as well as off balance sheet transactions and structures, on the financial statements of the Company.

56. The Audit Committee Charter states that the Committee shall also "review and discuss with the Independent Auditors any audit problems or difficulties and management's response thereto. This review shall include (1) any difficulties encountered by the Independent Auditors in the course of performing its audit work,

including any restrictions on the scope of its activities or its access to information, (2) any significant disagreements with management and (3) a discussion of the responsibilities, budget and staffing of the Company's internal audit function." The Audit Committee's review "may also include: (i) any accounting adjustments that were noted or proposed by the Independent Auditors but were "passed" (as immaterial or otherwise); (ii) any communications between the audit team and the audit firm's national office regarding auditing or accounting issues presented by the engagement; and (iii) any management or internal control letter issued, or proposed to be issued, by the Independent Auditors."

57. According to the Audit Committee Charter, the Committee is also charged with reviewing and discussing:

- matters brought to the attention of the Audit Committee by the Independent Auditors pursuant to Statement of Auditing Standards No. 61, as amended ("SAS 61") or other professional standards relevant to required communications between independent auditors and the audit committees.
- with the Independent Auditors the report required to be delivered by such auditors pursuant to Section 10A(k) of the Exchange Act including financial statements and related footnoted as a whole.
- with the CEO and CFO of the Company (1) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the Company's ability to record, process, summarize and report financial information required to be disclosed by the Company in the reports that it files or submits under the Exchange Act, within the time periods specified in the SEC's rules and forms, and (2) any fraud involving management

> or other employees who have a significant role in the Company's internal control over financial reporting.

58. The Audit Committee Charter provides further that:

> Based on the Audit Committee's review and discussions (1) with management of the audited financial statements, (2) with the Independent Auditors of the matters required to be discussed by SAS 61 or other professional standards relevant to required communications between independent auditors and audit committees, and (3) with the Independent Auditors concerning the Independent Auditors' independence, the Audit Committee shall make a recommendation to the Board as to whether the Company's audited financial statements should be included in the Company's Annual Report on Form 10-K for the last fiscal year.

59. With respect to unaudited quarterly financial statements and earnings press releases, respectively, the Audit Committee Charter provides:

> The Audit Committee shall discuss with management and the Independent Auditor, prior to the filing of the Company's Quarterly Reports on Form 10-Q, (1) the Company's quarterly financial statements and the Company's related disclosures under "Management's Discussion and Analysis of Financial Condition and Results of Operations," (2) any such issues as may be brought to the Audit Committee's attention by the Independent Auditors pursuant to Statement on Auditing Standards No. 100, and (3) any significant financial reporting issues that have arisen in connection with the preparation of such financial statements.
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> * * *
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> The Audit Committee shall discuss the Company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies, including, in general, the types of information to be disclosed and the types of presentations to be made (paying particular attention to the use of "pro forma" or "adjusted" non-GAAP information).

60. Under the section titled "Risk Assessment and Management," the Audit Committee Charter provides:

- The Audit Committee shall discuss the guidelines and policies that govern the process by which the Company's exposure to risk is assessed and managed by management.
- In connection with the Audit Committee's discussion of the Company's risk assessment and management guidelines, the Audit Committee may discuss or consider the Company's major financial risk exposures and the steps that the Company's management has taken to monitor and control such exposures.

61. The Audit Committee Charter also requires the Committee to "regularly report to and review with the Board any issues that arise with respect to the quality or integrity of the Company's financial statements, the Company's compliance with legal or regulatory requirements, the performance and independence of the Independent Auditors, the performance of the internal audit function and any other matters that the Audit Committee deems appropriate or is requested to review for the benefit of the Board."

62. The Audit Committee Charter provides further that it "may discuss with management legal matters (including pending or threatened litigation) that may have a material effect on the Company's financial statements or its compliance policies and procedures."

63. As to delegation of its authority, the Audit Committee Charter provides that it "may form and delegate authority to subcommittees consisting of one or more

of its members as the Audit Committee deems appropriate to carry out its responsibilities and exercise its powers."

64. The Audit Committee Charter concludes with the following proviso:

> Notwithstanding the responsibilities and powers of the Audit Committee set forth in this Charter, the Audit Committee does not have the responsibility of planning or conducting audits of the Company's financial statements, determining whether the Company's financial statements are complete, accurate and in accordance with GAAP or planning or conducting internal control assessments or monitoring. Such responsibilities are the duty of management and, to the extent of the Independent Auditors' audit responsibilities, the Independent Auditors. In addition, it is not the duty of the Audit Committee to conduct investigations or to ensure compliance with laws and regulations.

SUBSTANTIVE ALLEGATIONS

65. Formed in 1997, Plug Power develops hydrogen fuel cells solutions used to power electric motors.

66. Plug Power created the first commercially viable market for hydrogen fuel cell technology and has deployed over 40,000 fuel cell systems, more than any other company in the world. Plug Power has also become the largest buyer of liquid hydrogen.

67. Over time, Plug Power's business evolved into developing and selling hydrogen and fuel cell product solutions to large retail-distributors and manufacturers, such as Amazon, Walmart, and Home Depot.

68. In order to bring its technology to market, however, the Company required significant cash infusions. As such, Plug Power's ability to compete is heavily dependent on its ability to raise capital, and to ensure a continual flow of competitive products, services, and technologies to the marketplace.

69. According to Plug Power's 2020 Annual Report filed with the SEC on Form 10-K, the Company stated that it must "continue to develop new products and technologies and to enhance existing products in the areas of cost, size, weight, and in supporting service solutions in order to drive further commercialization." The Company also stated that:

> [r]esearch and development expense includes: materials to build development and prototype units, cash and non-cash compensation and benefits for the engineering and related staff, expenses for contract engineers, fees paid to consultants for services provided, materials and supplies consumed, facility related costs such as computer and network services, and other general overhead costs associated with our research and development activities.

70. The Individual Defendants knew or recklessly disregarded that research and development expenses did not include the costs of fuel delivered to customers, which are reported separately.

71. According to the Company's FY2018 10-K:

> [the] [c]ost of revenue from fuel delivered to customers for the year ended December 31, 2018 increased $5.7 million, or 25.9%, to $27.7 million from $22.0 million for the year ended December 31, 2017. The increase is due primarily to higher volume of liquid hydrogen delivered to customer sites as a result of an increase in the number of hydrogen

> installations completed under GenKey agreements and higher fuel costs.

Because the cost of fuel delivered was a major drag on the Company's revenues, the Company tracked and reported the cost of fuel delivered in the Company's financial statements.

72. Increases in cost of fuel negatively impacted the Company's EBITDA because that increased the loss accruals required for Plug Power's extended maintenance contracts, which directly reduced the Company's operating income.

73. Despite having not generated gross profit in consecutive years over the prior decade, the Company was able to generate gross profits of $2.62 million and $27.97 million in 2018 and 2019, respectively.

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83. For FY2020, the Company stated that Plug Power relied on "Adjusted EBITDA" as "a basis for evaluating the Company's performance as well as for forecasting future periods."

84. On January 30, 2020, Defendant Marsh stated publicly that "2019 was really a breakout year for Plug Power, EBITDA-positive for the year." Defendant Middleton added that the Company "has now crossed a milestone in breaking into breakeven to positive EBITDAs and projecting that this year we're going to be moving in directionally north in the right way. That gets investors and the debt providers excited." Defendant Marsh also provided a financial target for 2020 of "adjusted EBITDA of $20 million, a $20 million improvement over our 2019 goal" and reiterated the Company's goals of $1 billion in gross billings, $200 million in EBITDA, and $170 million in operating income by 2024.

85. In a letter to shareholders, dated March 5, 2020, the Company previewed its year-end results for FY2019, which it described as the "best year in the Company's history – setting the stage for meaningful growth in 2020 and beyond." The Company purportedly achieved this "milestone breakthrough year with [its] first positive adjusted EBITDA" in the Company's history. Specifically,

the Company netted an adjusted EBITDA of $10.9 million. During the Company's earnings call that same day, Defendant Marsh described FY2019 as a "record year."

86. The letter also stated that for the first quarter of 2020, the Company noted that it had achieved a $6.1 million Adjusted EBITDA, a "30% improvement" from the first quarter of FY2019. During the Company's earnings call that same day, Defendant Marsh reiterated the Company's "guidance of $300 million in gross bookings for the year and $20 million in EBITDA" and the Company's 2024 goals of $200 million in EBITDA and $170 million in operating income.

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101. The following day, August 6, 2020, during Plug Power's earnings call for the second quarter of 2020, Defendant Marsh stated that the Company "had a record quarter in the middle of the pandemic, achieving over $72 million in gross billings and $1 million in EBITDA." Defendant Marsh added that with the Company's "success this year with rapid growth in gross billings and EBITDA, a move into green hydrogen, that's provided us a clear path to achieve $1.2 billion in revenue and $250 million in EBITDA in 2024."

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106. On November 9, 2020, the beginning of the Class Period in the Securities Action, Plug Power reported its third quarter 2020 financial results in a letter to shareholders signed by Defendants Marsh and Middleton, which was posted on Plug Power's website and attached to a Current Report on Form 8-K filed with the SEC on that same day (the "3Q2020 Letter to Shareholders"). Therein, the Company falsely stated, in relevant part: "We . . . report that the proforma Adjusted EBITDA margin in Q3 2020 of 19% . . . ."

107. The 3Q2020 Letter to Shareholders falsely stated that the Company had achieved a proforma Adjusted EBITDA of $24 million during that quarter.

108. The same day, November 9, 2020, Plug Power filed its Quarterly Report on Form 10-Q for the third quarter of FY2020 ("3Q2020 Form 10-Q"), which was signed by Defendants Marsh and Middleton. The 3Q2020 Form 10-Q falsely stated that: (i) research and development expenses were $11.96 million; (ii) the Company's provision for loss contracts related to service was $4.31 million for cost of revenue; and (iii) the Company incurred a gross (loss) profit of ($1.29) million and an operating (loss) income of ($27.53) million. The Company later admitted these financial metrics were materially false when restating these metrics.

109. The financial metrics above were materially false and misleading when made because the Individual Defendants knew or recklessly disregarded that: (i) material amounts of the Company's fuel delivery costs were being reported as

research and development expenses in violation of the Company's accounting policy and thereby inflating reported gross profits; and (ii) booking fuel delivery costs as research and development expenses allowed the Company to understate the loss accrual related to its extended maintenance contracts, thereby inflating reported gross profits and EBITDA. The 3Q2020 Form 10-Q also falsely claimed that the Company's "disclosure controls and procedures are effective[.]" In particular, the 3Q2020 Form 10-Q stated, in relevant part:

> **Item 4 — Controls and Procedures**
>
> (a) Disclosure Controls and Procedures
>
> The chief executive officer and chief financial officer, based on their evaluation of disclosure controls and procedures (as defined in Exchange Act Rules 13a-15€ and 15d-15(e)) as of the end of the period covered by this Quarterly Report on Form 10-Q, have concluded that the Company's disclosure controls and procedures are effective for ensuring that information required to be disclosed in the reports that it files or submits under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in the Commission's rules and forms. Disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed in filed or submitted reports is accumulated and communicated to the Company's management, including its principal executive officer and principal financial officer as appropriate, to allow timely decisions regarding required disclosure.

110. The representations that the Company's disclosure controls and procedures were effective were materially false and misleading when made because the Individual Defendants knew or recklessly disregarded that: (i) material amounts of the Company's fuel delivery costs were being reported as research and

development expenses in violation of the Company's accounting policy and thereby inflating reported gross profits; and (ii) booking fuel delivery costs as research and development expenses allowed the Company to understate the loss accrual related to its extended maintenance contracts thereby inflating reported gross profits and EBITDA. The Company later admitted its financial reporting was materially false when restating its financial results.

111. The Individual Defendants also admitted that there were material weaknesses in its internal controls over financial reporting, including, *inter alia*, specifically that Plug Power "did not maintain a sufficient complement of trained, knowledgeable resources to execute their responsibilities with respect to internal control over financial reporting for certain financial statement accounts and disclosures" and "[a]s a consequence, the Company did not conduct an effective risk assessment process that was responsive to changes in the Company's operating environment and did not design and implement effective process-level controls activities" in connection with "presentation of operating expenses" and "loss-contract accrual." The Company admitted that, as a result of the foregoing, it could not timely file its Form 10-K and needed to restate its Restated Financials, including the quarterly report for the third quarter of FY2020.

112. The same day, November 9, 2020, during an earnings call, Defendant Marsh commended the Company's "operational performance" and highlighted that

it "achieved 19% EBITDA on an adjusted basis this past quarter, generating $21.2 million of adjusted EBITDA." Defendant Marsh stated the Company's adjusted EBITDA for 2021 "will definitely be higher [than 2020]" and that the Company is "very confident that we'll continue to be accretive and go up." Defendant Marsh stated they would be in a better position to provide guidance during the Company's January business update call.

113. On November 18, 2020, Plug Power filed a prospectus (the "November Prospectus"), which falsely stated that for FY2017, the Company: (i) netted a gross (loss) profit of ($28.09) million and incurred $28.69 million in research and development expenses; (ii) netted a gross profit of $2.62 million and incurred $27.71 million in costs related to fuel delivered to customers and $33.91 million in research and development expenses; and (iii) netted a gross profit of $27.97 million and incurred $36.36 million in costs related to fuel delivered to customers and $33.68 million in research and development expenses. The November Prospectus also falsely stated that, for the nine months ended September 30, 2020, the Company netted a gross (loss) profit and operating (loss) income of ($.69) million and ($79.77) million, respectively, and incurred $4.31 million in costs related to provision for loss contracts related to service, $32.27 million in costs related to fuel delivered to customers, and $32.13 million in research and development expenses. These statements were false and misleading for the same reasons stated in ¶ 110 and,

indeed, the Company later admitted the financial metrics contained therein were materially false when restating them.

114. On November 24, 2020, Plug Power announced that it had completed the offering which generated approximately $1 billion in capital.

115. On December 24, 2020, Defendant Middleton sold 216,667 shares of his personally held Plug Power stock at a price of $35.1299 per share. This sale netted Defendant Middleton proceeds of approximately $7.6 million. Notably, the sale required Middleton to exercise options that were not due to expire until 2028 and 2029.

[redacted]

[redacted]

On December 31, 2020, Plug Power waived the remaining vesting conditions under the Amazon warrant, which resulted in the vesting of the remaining 20,368,784 unvested shares under the warrant.

117. On January 6, 2021, Plug Power closed a monumental deal with South Korean company SK Group, the largest energy provider in South Korea, to provide hydrogen fuel cell systems, hydrogen fueling stations, and electrolyzers to the Korean markets. The agreement required a subsidiary of SK Group to make a $1.5 billion investment in Plug Power by acquiring approximately 51.4 million shares of common stock. Following this announcement, on January 7, 2021, Plug Power's stock price jumped 35% and closed at $47.29. Notably, SK Group paid Plug Power and acquired Plug Power's common stock one week before the Company disclosed on March 2, 2021 that its financial disclosures were materially false and misleading.

118. On January 19, 2021, while Plug Power common stock was trading at an artificially inflated rate due to the above and below false and misleading statements,[4] Defendant Marsh sold 43% of his holdings for approximately $37.7 million. Not only did Marsh make this sale when Plug Power's common stock price

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[4] Plug Power stock had also increased by almost 90% in the two weeks following announcement of the SK Group deal.

was at its peak, he did so just six weeks before the Company announced the need to restate multiple years of financial results.

119. On January 26, 2021, while Plug Power's stock was trading at a 52-week high, Plug Power announced that it was commencing a secondary public offering of its common stock for $1.5 billion. The Company also increased the amount of shares that it initially planned to offer to 28,000,000 shares of its common stock at a price to the public of $65.00 per share, with up to an additional 4,200,000 shares for the underwriters.

120. On January 28, 2021, Plug Power filed a prospectus (the "January Prospectus"), which falsely stated that for FY2017, the Company: (i) netted a gross (loss) profit of ($28.09) million and incurred $28.69 million in research and development expenses; (ii) netted a gross profit of $2.62 million and incurred $27.71 million in costs related to fuel delivered to customers and $33.91 million in research and development expenses; and (iii) netted a gross profit of $27.97 million and incurred $36.36 million in costs related to fuel delivered to customers and $33.68 million in research and development expenses.

121. The January Prospectus also falsely stated that for the nine months ended September 30, 2020, the Company netted a gross (loss) profit and operating (loss) income of ($.69) million and ($79.77) million, respectively, and incurred $4.31 million in costs related to provision for loss contracts related to service, $32.27

million in costs related to fuel delivered to customers, and $32.13 million in research and development expenses. These statements were false and misleading for the same reasons stated in ¶ 110 and, indeed, the Company later admitted the financial metrics contained therein were materially false when restating them.

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127. On February 25, 2021, Plug Power released its fourth quarter and full year 2020 financial results in a letter to shareholders, which was signed by Defendants Marsh and Middleton (the "4Q2020 Letter to Shareholders"). The 4Q2020 Letter to Shareholders falsely stated that: (i) the Company's research and development expenses were $18.89 million and $51.02 million for the fourth quarter of FY2020 and the entirety of FY2020; (ii) the Company's provision for loss contracts related to service was $0.7 million and $5.01 million for this cost of revenue for the fourth quarter of FY2020 and the entirety of FY2020, respectively; (iii) the Company's fuel delivered to customers was $18.46 million and $50.73 million for this cost of revenue for the fourth quarter of FY2020 and the entirety of FY2020, respectively; (iv) the Company incurred a gross (loss) profit of ($422.69) million and ($423.34) million for the fourth quarter of FY2020 and the entirety of FY2020, respectively; and (v) the Company incurred an operating (loss) income of ($470.5) million and ($550.26) million for the fourth quarter of FY2020 and the entirety of FY2020, respectively. These statements were false and misleading for the same reasons stated in ¶ 110 and, indeed, the Company later admitted the financial metrics contained therein were materially false when restating them.

128. On March 2, 2021, Plug Power filed a Notification of Late Filing with the SEC (the "Notification") on Form 12b-25 stating that it could not timely file its annual report for the period ended December 31, 2020. The Notification stated:

> For the year ended December 31, 2020, Plug Power Inc. (the "Company") became a large accelerated filer for the first time and, as a result, the Company has a shortened filing deadline of 60 days rather than 75 days to file its Annual Report on Form 10-K for the year ended December 31, 2020 (the "Form 10-K"). The Company requires additional time to complete the procedures relating to its year-end reporting process, *including the completion of the Company's financial statements and procedures relating to management's assessment of the effectiveness of internal controls,* and the Company is therefore unable to file the Form 10-K by March 1, 2021, the prescribed filing due date. *The Company is working diligently to complete the necessary work, including review and assessment of the treatment of certain costs with regards to classification between Research and Development versus Costs of Goods Sold, the recoverability of right of use assets associated with certain leases, and certain internal controls over these and other areas. It is possible that one or more of these items may result in charges or adjustments to current and/or prior period financial statements. The Company is still evaluating whether any such charges or adjustments would be required and, if required, whether any such charges or adjustments would be material*; but any charges, if required, would be non-cash in nature and any such adjustments or charges would not impact the Company's guidance on forward projections. The Company expects to file the Form 10-K within the extension period provided under Rule 12b-25 under the Securities Exchange Act of 1934, as amended.
>
> * * *
>
> *The Company expects that the fourth quarter and full year 2020 result of operations to be included in the Form 10-K will reflect significant changes from the fourth quarter and full year 2019.* The Company expects that the fourth quarter and full year 2020 results of operations will be consistent with those disclosed in the Company's press release furnished as Exhibit 99.1 to the Company's Current Report on Form 8-K filed with the Securities and Exchange Commission on February 25,

> 2021, *subject to any adjustments resulting from completion of the year-end reporting process and the audit of the Company's financial statements*.

(Emphasis added).

129. Plug Power common stock closed at $52.46 per share on March 1, 2021. The Notice was filed before the market opened on March 2, 2021. Plug Power common stock declined by $3.68, or 7% on March 2, 2021 to close at $48.78 per share. The price of Plug Power common stock continued to decline, closing at $38.11 on March 8, 2021. Plug Power shares lost $14.35 in a week, a drop of 27.4%.

130. On March 16, 2021, the Company filed with the SEC a non-reliance statement on Form 8-K. It said management and the Audit Committee:

> In consultation with KPMG LLP ("KPMG"), the Company's independent registered public accounting firm, determined that the Company's previously issued financial statements as of and for the years ended December 31, 2019 and 2018, and as of and for each of the quarterly periods ended March 31, 2020 and 2019, June 30, 2020 and 2019, and September 30, 2020 and 2019 (collectively, the "Prior Period Financial Statements"), should no longer be relied upon due to errors in accounting primarily relating to (i) the reported book value of right of use assets and related finance obligations ("ROU Accounting"), (ii) loss accruals for certain service contracts, (iii) the impairment of certain long-lived assets, and (iv) the classification of certain expenses previously included in research and development costs ((i) through (iv) collectively, the "Restatement Items"). In addition, the fourth quarter and full year 2020 financial results and related discussion included in the Company's shareholder letter furnished on the Form 8-K filed by the Company on February 25, 2021 should no longer be relied upon.
>
> The Company and the Audit Committee have determined that these accounting changes will require a restatement of the Prior Period Financial Statements.

131. The March 16, 2021 Form 8-K outlined revisions in the Company's accounting practices and disclosed a material weakness in its internal controls. Specifically:

> The revised accounting for the Restatement Items will change how the Company accounts for certain transactions and items, but the revised accounting is not expected to impact cash and cash equivalents or the economics of the Company's existing or future commercial arrangements. The Company currently anticipates that the primary impact of the revised accounting on the Prior Period Financial Statements will include:
>
> - Adjustments on the balance sheets to reduce the carrying amount of certain right of use assets and finance obligations associated with leases;
> - An increase in the loss accrual relating to certain service contracts;
> - Recognition of non-cash impairment charges relating to certain long-lived assets, including certain right of use assets and certain fixed assets; and
> - A reclassification of certain costs resulting in a decrease in Operating expenses
>   - Research and development expense and a corresponding increase in Cost of revenue.
>
> In addition to the above, the Company expects to correct certain less significant items in its previously issued financial statements and other financial data. *The Company also expects that its Form 10-K for the year ended December 31, 2020 will disclose a material weakness in its internal controls over financial reporting arising from the Restatement Items*. As such, KPMG's report on the Company's internal control over financial reporting as of December 31, 2019 should no longer be relied upon. The changes that will be recorded did not result from a change in published accounting guidance during the relevant time period or any

> override of controls or misconduct, and KPMG has not informed the Audit Committee of any issues related to an override of controls or misconduct.

(Emphasis added).

132. The March 16, 2021 Form 8-K also stated that Plug Power "expects to restate its financial statements as of and for the years ended December 31, 2019 and 2018 and for each of the quarterly periods ended March 31, 2020 and 2019, June 30, 2020 and 2019, September 30, 2020 and 2019, and December 31, 2019, in its Form 10-K for the year ended December 31, 2020. The Company will not be able to file its Form 10-K for the year ended December 31, 2020 by the March 16, 2021 deadline, but it is working diligently to finalize the restated financial statements and to file its Form 10-K as soon as practicable." However, it also noted "[t]he Company's internal review is ongoing and the Company may identify further errors. There can be no assurance that the actual effects of the error corrections will be only as described above."

133. The March 16, 2021 Form 8-K was filed with the SEC after the market closed that day. Plug Power common stock closed at $42.68 per share on March 16. The next day, March 17, 2021, the price of Plug stock dropped $3.35, or 7.8%, to close at $39.33 on extraordinarily high trading volume.

134. On March 18, 2021, after the close of trading, the Company issued a press release and filed a Form 8-K with the SEC advising that Plug Power received

a notice from the Listing Qualifications Department of the NASDAQ stating that its failure to file a timely annual report for 2020 violated NASDAQ rules. The Form 8-K stated:

> Under Nasdaq rules, the Company has 60 calendar days from the date of the Nasdaq notification letter, or until May 17, 2021, to file the 2020 Form 10-K with the SEC. If the Company is unable to file the 2020 Form 10-K with the SEC by May 17, 2021, the Company intends to submit a plan to regain compliance with the Nasdaq Listing Rules on or prior to that date. If Nasdaq accepts the Company's plan, then Nasdaq may grant an exception of up to 180 calendar days from the due date of the 2020 Form 10-K, or until September 13, 2021, to regain compliance. If Nasdaq does not accept the Company's plan, then the Company will have the opportunity to appeal that decision to a Nasdaq hearings panel.

135. On May 10, 2021, Plug Power filed with the SEC Form 12b-25, Notification of Late Filing, regarding its inability to file a timely quarterly report for the period ended March 31, 2021. The Form 12b-25 stated:

> As previously disclosed, Plug . . . is restating certain of its prior period financial statements and has not yet filed its Annual Report on Form 10-K for the year ended December 31, 2020 (the "Form 10-K"). The Company continues to work diligently along with its external auditor to complete the restatement process and to complete and file the Form 10-K as expeditiously as possible. However, given the time and focus dedicated to the restatement and the Form 10-K, the Company is necessarily delayed in its reporting and review process for the quarter ended March 31, 2021 and is unable to file its Quarterly Report on Form 10-Q for the quarter ended March 31, 2021 by the prescribed filing due date of May 10, 2021.

136. The Form 12b-25 also said that Plug Power "expects that the result of operations for the quarter ended March 31, 2021 to be included in the Form 10-Q

will reflect significant changes from the quarter ended March 31, 2020. These changes are expected to include, among others, an increase in revenue of more than 60%, subject to adjustment resulting from completion of the quarterly reporting and review process."

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146. On May 14, 2021, the Company issued a press release entitled "Plug Power Completes Restatement of Previously Issued Financial Statements and Files 2020 Annual Report." The press release announced the filing of the Company's 2020 Form 10-K, and the completion of the restatement of its financial statements for fiscal years 2018 and 2019 and its quarterly filings for 2019 and 2020. According to the press release:

> As previously announced, the key areas addressed were primarily related to several non-cash items, including:
>
> - The reported book value of right of use assets and related lease liabilities and finance obligations;
> - Loss accruals for certain service contracts;
> - The impairment of certain long-lived assets; and

- The classification of certain costs, resulting in a decrease in research and development expense and a corresponding increase in cost of revenue.

Collectively, the adjustments as part of the restatement and finalization of the 2020 Annual Report (as compared to the unaudited 2020 results shared February 25, 2021 and 2018 and 2019 results as previously reported) had the following impact to net revenue and earnings per share ('EPS'):

For the year ended:	2020	2019	2018
Net Revenue (millions)	$7.2	($.03)	($.04)
EPS	($.10)	$0.00	($.03)

In 2020, despite a positive impact to net revenue, EPS was negatively impacted stemming from one-time non-cash charges associated with $35 million in loss accrual provisions and a $6.4 million long-lived asset impairment.

* * *

In connection with the restatement process, the Company identified a material weakness in its internal controls over financial reporting. Management is committed to remediating this material weakness and has already begun to implement a plan to do so. Steps the Company has taken, and will continue to take, include expanding its finance and accounting resources with expertise in the complex technical accounting issues and highly judgmental accounting determinations that affect the Company's financial statements. Additional information is included in the 2020 Annual Report.

147. Plug Power filed its annual report for 2020, Form 10-K, with the SEC on May 14, 2021. The Form 10-K commenced with an "Explanatory Note" regarding the restatements, stating:

In this Annual Report on Form 10-K, the Company:

- Restates its Consolidated Balance Sheet as of December 31, 2019 and the related Consolidated Statements of Operations, Consolidated Statements of Comprehensive Loss, Consolidated Statements of Stockholders' Equity (Deficit), and Consolidated Statements of Cash Flows for the fiscal years ended December 31, 2019 and 2018;

- Amends its Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") as it relates to the fiscal years ended December 31, 2019 and 2018;

- Restates its "Selected Financial Data" in Part II, Item 6 for fiscal years 2019, 2018, 2017 and 2016; and

- Restates its Unaudited Quarterly Financial Statements for the first three fiscal quarters in the fiscal year ended December 31, 2020 and each fiscal quarter in the fiscal year ended December 31, 2019.

Restatement Background

As described in our Current Report on Form 8-K filed with the U.S. Securities and Exchange Commission ("SEC") on March 16, 2021, the Company and the Audit Committee of the Company's Board of Directors (the "Audit Committee") concluded that, because of errors identified in the Company's previously issued financial statements, the Company is restating its financial statements as of and for the years ended December 31, 2019 and 2018 and for each of the quarterly periods ended March 31, 2020 and 2019, June 30, 2020 and 2019, September 30, 2020 and 2019, in its Form 10-K for the year ended December 31, 2020 (collectively, the "Prior Period Financial Statements"). In addition, we have restated the statement of operations for the three months ended December 31, 2019, which was previously disclosed as a note in its form 10-K for the year ended December 31, 2019.

These errors were identified after the Company reported its 2020 fourth quarter and year end results on February 25, 2021 during the course of the audit with respect to the Company's financial statements for the year ended December 31, 2020, as well as during preparation of this Annual Report on Form 10-K. We have determined that these errors were the result of a material weakness in internal control over financial reporting that is reported in management's report on internal control over financial reporting as of December 31, 2020 in Part II, Item 9A, "Controls and Procedures" of this Annual Report on Form 10-K.

The restated financial statements as of and for the years ended December 31, 2019 and 2018 correct the following errors (the "Restatement Items") (for impacts to the quarterly periods, see Note 3, "Unaudited Quarterly Financial Data and Restatement of Previously Issued Unaudited Interim Condensed Consolidated Financial Statements"):

(a) $112.7 million overstatement of the right of use assets related to operating lease liabilities at December 31, 2019, due to the Company incorrectly calculating the operating lease liability associated with certain sale/leaseback transactions;

(b) ($1.6) million understatement of benefit for loss contracts related to service on the Statement of Operations for the year ended December 31, 2019, inclusive of the partial release of the 2018 accrual to the cost of services performed on fuel cells and related infrastructure, and a $5.3 million understatement of the provision for loss contracts for the year ended December 31, 2018, due to the Company not properly estimating the loss accrual related to extended maintenance contracts;

(c) $19.5 million and $21.2 million, overstatement of gross profit (loss) for the years ended December 31, 2019 and 2018, respectively, due to the Company not properly presenting certain costs related to research and development activities and cost of revenues;

(d) $1.8 million recording of a deemed dividend for certain conversions of the Company's Series E Convertible Preferred Stock settled in common stock during the year ended December 31, 2019;

(e) The Company determined that the amount recorded to accumulated deficit as of January 1, 2018 for a cumulative adjustment of approximately $3.4 million was the correction of an error in prior lease accounting. As a result of the correction of this error, the $3.4 million charge to accumulated deficit is now reflected in the beginning accumulated deficit for the 12 months ended December 31, 2018; and

(f) $5.3 million understatement of bonus expense and related payroll taxes for the three months ended September 30, 2020, due to the Company not properly estimating bonus expense for the nine month period ended September 30, 2020.

In addition to the errors described above, the Prior Period Financial Statements also include adjustments to correct certain other errors, including previously unrecorded immaterial adjustments identified in audits of prior years' financial statements (the "Other Adjustments"). The accounting for the Restatement Items and the Other Adjustments in this Annual Report on Form 10-K does not materially impact revenue and does not impact cash and cash equivalents or the economics of the Company's existing or future commercial arrangements.

Restatement, Revision and Recasting of Previously Issued Consolidated Financial Statements

This Annual Report on Form 10-K restates and revises amounts included in the Company's previously issued financial statements as of and for the years ended December 31, 2019 and 2018, and as of and for each of the quarterly periods ended March 31, 2020 and 2019, June 30, 2020 and 2019, September 30, 2020 and 2019 and December 31, 2019.

See Note 2, "Restatement of Previously Issued Consolidated Financial Statements," and Note 3, "Unaudited Quarterly Financial Data and Restatement of Previously Issued Unaudited Interim Condensed Consolidated Financial Statements," in Part II, Item 8, "Financial Statements and Supplementary Data" for additional information. To further review the effects of the accounting errors identified and the restatement adjustments, see Part II, Item 7, "Management's Discussion and Analysis of Financial Condition and Results of Operations" included in this Annual Report on Form 10-K.

Previously filed annual reports on Form 10-K and quarterly reports on Form 10-Q for the periods affected by the restatement have not been amended. Accordingly, investors should no longer rely upon the Company's previously released financial statements for these

> periods and any earnings releases or other communications relating to these periods, and, for these periods, investors should rely solely on the financial statements and other financial data for the relevant periods included in this Annual Report on Form 10-K. See Note 3, "Unaudited Quarterly Financial Data and Restatement of Previously Issued Unaudited Interim Condensed Consolidated Financial Statements," for the impact of these adjustments on each of the first three quarters of fiscal 2019 and fiscal 2020. In addition, we have restated the statement of operations for the three months ended December 31, 2019, which was previously disclosed as a note in Form 10-K for the year ended December 31, 2019. Quarterly reports for fiscal 2021 will include restated results for the corresponding interim periods of fiscal 2020.
>
> **Internal Control Considerations**
>
> In connection with the restatement, our management has assessed the effectiveness of our internal control over financial reporting. Based on this assessment, management identified a material weakness in our internal control over financial reporting, resulting in the conclusion by our Chief Executive Officer and Chief Financial Officer that our internal control over financial reporting and our disclosure controls and procedures were not effective as of December 31, 2020. Management is taking steps to remediate the material weakness in our internal control over financial reporting, as described in Part II, Item 9A, "Controls and Procedures."
>
> See Part II, Item 9A, "Controls and Procedures," for additional information related to the identified material weakness in internal control over financial reporting and the related remediation measures.

148. The Form 10-K admitted that Plug Power's "determination to restate the Prior Period Financial Statements as a result of the identification of accounting errors may affect investor confidence and raise reputational issues" and "events relating to our determination to restate certain of our previously issued consolidated

financial statements . . . could cause the market price of our common stock to fluctuate substantially." In addition, the Form 10-K disclosed:

> We received comment letters from the staff of the SEC's Division of Corporation Finance (the "Staff") relating to our Annual Report on Form 10-K for the fiscal year ended December 31, 2019 (the "2019 10-K") and the Form 8-K filed with the SEC on November 9, 2020. Until these comments are resolved, or until any additional comments raised by the Staff during this process are resolved, we cannot provide assurance that we will not be required to amend the 2019 Form 10-K, the Form 8-K or make any material changes to the accounting or financial disclosures contained in the 2019 Form 10-K, the Form 8-K or similar disclosures made in our other filings, including this Annual Report on Form 10-K for the year ended December 31, 2020.

149. Following these disclosures, purchasers of Company securities sued Plug Power and Defendants Marsh and Middleton for violations of federal securities laws. One complaint (*Tank*) alleged that:

> Throughout the Class Period, defendants violated the federal securities laws by disseminating false and misleading statements to the investing public and/or failing to disclose adverse facts pertaining to the Company's financial results, business, and prospects. Specifically, defendants concealed material information and failed to disclose that:
>
> > (a) the Company had overstated the carrying amount of right of use assets and finance obligations associated with leases;
> >
> > (b) the Company had understated the loss accruals relating to certain service contracts;
> >
> > (c) certain of the Company's long-lived assets suffered from material impairments, including right of use assets and fixed assets;
> >
> > (d) the Company had misclassified certain important costs, resulting in an overstatement of operating and research and development expenses and an understatement of revenue costs;

> (e) the Company suffered from material weaknesses in its internal controls over financial reporting; and
>
> (f) as a result, defendants' public statements regarding the Company's past financial results were materially false and misleading at all relevant times.

Tank Class Action Complaint, No. 21-cv-03985-ER (S.D.N.Y. May 4, 2021), ¶ 8.

150. On June 29, 2022, the *Wall Street Journal* published the aforementioned article concerning Defendant Marsh, regarding his fraudulent stock sales.[5] The article stated:

> As Plug Power Inc. shares soared to a 15-year high in January 2021, longtime Chief Executive Andrew Marsh unloaded some of his stock in a well-timed sale. In his biggest-ever payday from selling the company's shares, Mr. Marsh netted $36 million by selling about 40% of his holdings under an automatic trading plan. ***The plan, it turned out, had been set up only the month before. And shortly after he sold, a string of negative company announcements sent the fuel-cell maker's shares plunging -- down 60% over three months***.
>
> * * *
>
> ***The fall in Plug Power's stock started just a week after Mr. Marsh sold***. On Jan. 26, the company announced a large new stock offering that diluted existing shares and drove down the price. Then, on Feb. 25, Plug Power reported a steeper-than-expected loss and negative revenue for the quarter ended Dec. 31. In March, Plug Power said it would have to restate financial results back to 2018.
>
> ***The sharp decline in share price meant that if Mr. Marsh had waited three months to sell, his gain would have been $23 million less***. Shares have continued to fall over the past year -- a sale this month would have netted around $27 million less than his sale in January 2021.

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[5] Tom McGinty and Mark Maremont, *CEO Stock Sales Raise Questions About Insider Trading*, Wall St. J., June 29, 2022, at A1.

* * *

> ***Mr. Marsh, who took the CEO slot in 2008, didn't sell any shares until 2020***, when the company's stock began to rise amid optimism about its technology and its sales of fuel cells for use in forklifts.
>
> In the first two weeks of 2021, Plug Power's stock more than doubled to $69, after the company announced two major deals. The first was a $1.5 billion investment from South Korea's SK Group, announced Jan. 6, 2021; the second, a joint venture with France's Groupe Renault announced on Jan. 12, 2021.
>
> ***Mr. Marsh's big sale, near the stock's peak at around $66 per share, came a week after the Renault deal was announced, and before the news -- including the financial restatement -- that sent the stock tumbling to the $25 range in mid-April.***
>
> Mr. Marsh sold those shares under a preset plan he set up in early December 2020, his Form 144 filing shows. Mr. Marsh and other Plug Power officials didn't respond to questions about whether, at the time the CEO set up his trading plan, he knew of the coming news that would send the stock soaring and then crashing.

(Emphasis added).

151. Significantly, each of the seven other Director Defendants also sold Company stock at artificially inflated prices while in possession of material non-public Company information. These sales are detailed below as follows:

a. Defendant McNamee sold 181,500 shares of Plug Power stock for proceeds of over $4.3 million. Notably, Defendant McNamee sold 40,000 shares between January 6 and January 13, 2021, worth approximately $2.2 million, just two months before the truth was revealed.

b. Defendant Silver sold 42,576 shares of Plug Power stock on November 9, 2020, and an additional 1,780 shares on January 11, 2021.

c. Defendant Willis sold 91,200 shares of Plug Power stock on December 11, 2020.

d. Defendants Kenausis sold 55,000 shares of Plug Power stock on December 28, 2020.

e. Defendant Schneider sold 2,500 shares of Plug Power stock on January 4, 2021.

f. Defendant Helmer sold 15,311 shares of Plug Power stock on December 14, 2020.

g. Defendant Roth sold 1,915,034 shares of Plug Power stock, the entirety of his holdings, on November 13, 2020.

152. In addition to the insider sales by each of the Director Defendants described above, Individual Defendants Middleton, Conway, and Schmid also made similar sales while the Company's stock was trading at artificially inflated prices. Indeed, while in possession of material non-public Company information, Defendant Middleton sold 216,667 shares of Plug Power stock on December 24, 2020, Defendant Conway sold 108,333 shares on January 4, 2021, and Defendant Schmid sold 200,000 shares on December 17, 2020.

DAMAGE TO PLUG POWER

153. Plaintiff incorporates by reference and realleges each and every allegation contained above as though fully set forth herein.

154. As a direct and proximate result of the Individual Defendants' misconduct, the Company has incurred and will continue to incur significant financial losses, including but not limited to, the costs of defending and potentially

paying class wide liability in the Securities Action. These damages also include the costs of remediating deficiencies in the Company's internal controls, compensation and benefits paid to the Individual Defendants, who breached their duties to Plug Power, and reputational harm and loss of goodwill.

DERIVATIVE ALLEGATIONS

155. Plaintiff brings this action derivatively for the benefit of Plug Power to redress injuries suffered and to be suffered as a proximate result of the Individual Defendants' breaches of fiduciary duties and other violations of law.

156. Plaintiff will adequately and fairly represent the interests of Plug Power and its stockholders in enforcing and prosecuting its rights.

157. Plaintiff is an owner of Plug Power common stock and has been a continuous holder of the Company's common shares since June 4, 2020.

DEMAND FUTILITY ALLEGATIONS

158. Plaintiff incorporates by reference and realleges each and every allegation contained above as though fully set forth herein.

159. At the time this action was commenced, the eight Director Defendants[6] and non-parties Harriman, Song, Bua, and Mahtani, comprised the twelve-member Board. Accordingly, Plaintiff is only required to show that six Directors cannot

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[6] For ease of reference, the Director Defendants are Defendants McNamee, Willis, Helmer, Marsh, Roth, Kenausis, Schneider, and Silver.

exercise independent objective judgment about whether to bring this action or whether to vigorously prosecute this action. As set forth below, all of the Board's current directors, and if not all, at least eight, are incapable of making an independent and disinterested decision to institute and vigorously prosecute this action, including because they face a substantial likelihood of liability, and so demand on the Board to institute this action is not necessary because such a demand would have been a futile act.

160. The Director Defendants, together and individually, violated and breached their fiduciary duties of candor, good faith, and loyalty. Specifically, the Director Defendants knowingly approved and/or permitted the wrongs alleged herein and participated in efforts to conceal those wrongs. The Director Defendants authorized and/or permitted the false statements to be disseminated directly to the public and made available and distributed to shareholders, authorized and/or permitted the issuance of various false and misleading statements, and are principal beneficiaries of the wrongdoing alleged herein, and thus, could not fairly and fully prosecute such a suit even if they instituted it.

161. Each of the Director Defendants (and Defendant Middleton) signed the Company's materially false and misleading Form 10-Ks from 2018 and 2019 in bad faith.

162. The Director Defendants either knowingly or recklessly issued or caused the Company to issue the materially false and misleading statements alleged herein. The Director Defendants knew of the falsity of the misleading statements at the time they were made. As a result of the foregoing, the Director Defendants breached their fiduciary duties, face a substantial likelihood of liability, are not disinterested, and demand upon them is futile, and thus excused.

163. As members of the Board charged with overseeing the Company's affairs, each of the Director Defendants had knowledge, or the fiduciary obligation to inform themselves, of information pertaining to the Company's core operations and the material events giving rise to these claims. Specifically, as Board members of Plug Power, the Director Defendants knew, or should have known, the material facts surrounding certain critical accounting issues and the accuracy of the Company's public reporting.

164. Moreover, the Director Defendants willfully ignored, or recklessly failed to inform themselves of, the obvious problems with the Company's internal controls, practices, and procedures, and failed to make a good faith effort to correct the problems or prevent their recurrence.

165. Defendants Willis, Helmer, and Kenausis are not disinterested or independent, and therefore, are incapable of considering a demand because they serve as members of the Audit Committee and, pursuant to the Audit Committee

Charter, were specifically charged with the responsibility to assist the Board in fulfilling its oversight responsibilities related to, *inter alia*, key accounting issues and public disclosure requirements. Throughout the relevant period, however, these Defendants breached their fiduciary duties to the Company by failing to prevent, correct, or inform the Board of the issuance of material misstatements and omissions regarding critical accounting issues and the adequacy of the Company's internal controls as alleged above. Therefore, Defendants Willis, Helmer, and Kenausis cannot independently consider any demand to sue themselves for breaching their fiduciary duties to the Company, as that would expose them to substantial liability and threaten their livelihood.

166. Notably, all eight Director Defendants, as well as Individual Defendants Middleton, Schmid, and Conway, sold large amounts of Company stock while it was trading at artificially inflated prices due to the false and misleading statements alleged herein, and while in possession of material non-public Company information.

167. Additionally, each of the directors received payments, benefits, stock options, and other emoluments by virtue of their membership on the Board and their control of the Company. Indeed, all of the Director Defendants benefitted directly from the wrongdoing alleged herein. Specifically, the Director Defendants

benefitted from the artificial inflation of the price of the Company's stock and the resulting increase in the value of Plug Power stock and stock options they held.

168. Defendants Marsh, Middleton and Schmid were awarded over $1.1 million in bonuses and over $17 million in stock and option awards in 2020.

169. The Director Defendants, as members of the Board, were and are subject to the Company's Code of Conduct. The Code of Conduct goes well beyond the basic fiduciary duties required by applicable laws, rules, and regulations, requiring the Director Defendants to also adhere to Plug Power's standards of business conduct. The Director Defendants violated the Code of Conduct because they knowingly or recklessly engaged in and participated in making and/or causing the Company to make the materially false and misleading statements alleged herein. Because the Director Defendants violated the Code of Conduct, they face a substantial likelihood of liability for breaching their fiduciary duties, and therefore demand upon them is futile.

170. Furthermore, demand in this case is excused because the Director Defendants derive substantial revenue from the Company, control the Company, and are indebted to each other. The Director Defendants have longstanding business and personal relationships with each other and with other Individual Defendants that preclude them from acting independently and in the best interests of the Company and the shareholders. For example: (i) Director Defendants Marsh and Kenausis

have served on the board of GEVO, Inc. together since 2015; (ii) Defendant Roth is the founder, chairman, and managing director of FiveT Capital Holding AG, the parent company of FiveT Capital AG, where Defendant Kenausis has been an investment manager since 2014; and (iii) Defendants Marsh, Helmer, McNamee, and Willis have served the Company together for well over a decade. These conflicts of interest precluded the Director Defendants from adequately monitoring the Company's operations and internal controls and calling into question the Individual Defendants' conduct. Thus, any demand on the Director Defendants would be futile.

171. Significantly, neither the Director Defendants nor any of the four non-party directors have taken remedial action to redress the conduct alleged herein. For instance, none of the Company's current directors have sought to enforce Plug Power's "Policy for Recoupment of Incentive Compensation," which provides, "if we are required to prepare an accounting restatement due to material non-compliance with any financial reporting requirement and/or intentional misconduct . . . our Compensation Committee may require the covered executive to repay to us any excess compensation received by the covered executive during the covered period."

172. The Director Defendants' conduct described herein and summarized above could not have been the product of legitimate business judgment as it was based on bad faith and intentional, reckless, or disloyal misconduct. Thus, none of

the directors can claim exculpation from their violations of duty pursuant to the Company's charter. As a majority of the directors face a substantial likelihood of liability, they are self-interested in the transactions challenged herein. They cannot be presumed to be capable of exercising independent and disinterested judgment about whether to pursue this action on behalf of the shareholders of the Company. Accordingly, demand is excused as being futile.

173. The acts complained of herein constitute violations of fiduciary duties owed by Plug Power's officers and directors, and these acts are incapable of ratification.

174. The Director Defendants may also be protected against personal liability for their acts of mismanagement and breaches of fiduciary duty alleged herein by directors' and officers' liability insurance if they caused the Company to purchase it for their protection with corporate funds *i.e.*, monies belonging to the stockholders of Plug Power. If there is a directors' and officers' liability insurance policy covering the Director Defendants, it may contain provisions that eliminate coverage for any action brought directly by the Company against the Director Defendants, known as, *inter alia*, the "insured-versus-insured exclusion." As a result, if the Director Defendants were to sue themselves or certain officers of Plug Power, there would be no directors' and officers' insurance protection. Accordingly, the Director Defendants cannot be expected to bring such a suit. On the other hand,

if the suit is brought derivatively, as this action is brought, such insurance coverage, if such an insurance policy exists, will provide a basis for the Company to effectuate a recovery. Thus, demand on the Director Defendants is futile and, therefore, excused.

175. If there is no directors' and officers' liability insurance, then the directors will not cause Plug Power to sue the Defendants named herein, since, if they did, they would face a large uninsured individual liability. Accordingly, demand is futile in that event as well.

176. Thus, for all of the reasons set forth above, all of the directors, and, if not all of them, certainly at least eight of them, cannot consider a demand with disinterestedness and independence. Consequently, a demand upon the Board is excused as futile.

COUNT I

Breach of Fiduciary Duty
Against the Individual Defendants

177. Plaintiff incorporates by reference and realleges each and every allegation set forth above as though fully set forth herein.

178. The Individual Defendants owe the Company fiduciary obligations. By reason of their fiduciary relationships, the Individual Defendants owed and owe the Company the highest obligations of good faith, candor, loyalty, and due care.

179. The Individual Defendants willfully ignored the obvious deficiencies in the Company's internal controls, practices, and procedures and failed to make a good faith effort to correct the problems or prevent their recurrence.

180. The Individual Defendants, together and individually, violated and breached their fiduciary duties of good faith, candor, loyalty, and due care. Specifically, the Individual Defendants breached their fiduciary duties by willfully or recklessly: (i) making and/or authorizing false and misleading statements and omissions of material fact regarding the Company's business, finances, accounting, and internal controls; (ii) failing to correct and/or causing the Company to fail to correct these false and misleading statements and omissions; (iii) selling Plug Power stock at artificially inflated rates while in possession of material, non-public Company information; and (iv) failing to establish, maintain, and/or monitor adequate reporting systems and internal controls.

181. The Individual Defendants made and/or authorized false and misleading statements concerning the Company's business, finances, and accounting practices, and the adequacy of the Company's financial reporting and internal controls, because, *inter alia*, they failed to disclose the misclassification and manipulation of critical accounting considerations and deficiencies in their internal controls.

182. The Individual Defendants further breached their fiduciary duties by failing to ensure that reasonable information and reporting systems existed with respect to critical accounting issues and the adequacy of the Company's public reporting.

183. The Board either failed to institute an oversight system concerning these critical accounting considerations, and with regard to the adequacy of the Company's public reporting, or consciously disregarded a series of related red flags. Despite being made aware of these red flags warning that the Company had misclassified and misreported key accounting considerations, and maintained deficient internal controls, the Board failed to act.

184. The Individual Defendants also breached their fiduciary duties by failing to take remedial action against the other Defendants and by concealing the other Individual Defendants' fraudulent statements and material omissions.

185. As a direct and proximate result of the Individual Defendants' breaches of their fiduciary obligations, Plug Power has sustained significant damages as alleged herein. As a result, the Individual Defendants are liable to the Company.

186. Plaintiff, on behalf of Plug Power, has no adequate remedy at law.

COUNT II

Breach of Fiduciary Duty Against the Director Defendants, Defendant Middleton, Defendant Conway, and Defendant Schmid For Making Illegal Insider Sales

187. Plaintiff hereby incorporates the allegations in the foregoing paragraphs as if fully set forth herein.

188. The Director Defendants and Defendants Middleton, Conway, and Schmid engaged in insider sales of Company stock while in possession of material non-public information during the period the Individual Defendants' false and misleading statements and omissions caused Plug Power's stock price to trade at artificially inflated rates.

189. Plaintiff, on behalf of Plug Power, is entitled to disgorge these illegal profits.

190. Plaintiff, on behalf of Plug Power, has no adequate remedy at law.

COUNT III

Unjust Enrichment Against the Individual Defendants

191. Plaintiff incorporates by reference and realleges each and every allegation set forth above as though fully set forth herein.

192. By their wrongful acts and omissions, the Individual Defendants were unjustly enriched at the expense of and to the detriment of Plug Power.

193. The Individual Defendants were unjustly enriched by their receipt of compensation and with respect to insider sales of Company stock.

194. Plaintiff, as a stockholder and representative of the Company, seeks restitution from the Individual Defendants, and seeks an order of this Court disgorging all profits, benefits, and other compensation obtained by the Individual Defendants as a result of their wrongful conduct and fiduciary breaches.

195. As a direct and proximate result of the Individual Defendants' misconduct, the Company has suffered significant damages, as alleged herein.

196. Plaintiff, on behalf of Plug Power, has no adequate remedy at law.

COUNT IV

Aiding and Abetting Breaches of Fiduciary Duty Against the Individual Defendants

197. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

198. By encouraging and accomplishing the illegal and improper transactions alleged herein and concealing them from the public, the Individual Defendants have each encouraged, facilitated, and advanced their breaches of their fiduciary duties. In so doing, the Individual Defendants have each aided and abetted, conspired, and schemed with one another to breach their fiduciary duties, waste the Company's corporate assets, and engage in the *ultra vires* and illegal conduct complained of herein.

199. Plaintiff, on behalf of Plug Power, has no adequate remedy at law.

COUNT V

Waste of Corporate Assets
Against the Individual Defendants

200. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

201. The Individual Defendants breached their fiduciary duties by failing to properly supervise and monitor the adequacy of Plug Power's internal controls, by issuing, causing the issuance of, and/or failing to correct the false and misleading statements identified herein, and by allowing the Company to engage in an illegal, unethical, and improper course of conduct, which was continuous, connected, and ongoing at all relevant times.

202. The Individual Defendants wasted corporate assets by, among other things, incurring and paying defense costs in connection with the Securities Action, and approving performance-based compensation linked to the Company's perceived successes.

203. As a result of the waste of corporate assets, the Individual Defendants are liable to the Company.

204. As a direct and proximate result of the Individual Defendants' breaches of fiduciary duties, the Company has suffered significant damages, as alleged herein.

205. Plaintiff, on behalf of Plug Power, has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment, as follows:

A. Declaring that Plaintiff may maintain this derivative action on behalf of Plug Power and that Plaintiff is a proper and adequate representative of the Company;

B. Awarding the amount of damages sustained by the Company as a result of the Individual Defendants' breaches of fiduciary duties and unjust enrichment;

C. Directing Plug Power to take all necessary actions to reform and improve its corporate governance and internal procedures to comply with applicable laws and to protect Plug Power and its stockholders from a repeat of the damaging events described herein, including, but not limited to:

- strengthening the Board's supervision of operations and compliance with applicable state and federal laws and regulations;
- strengthening the Company's internal reporting and financial disclosure controls;
- developing and implementing procedures for greater shareholder input into the policies and guidelines of the Board; and
- strengthening the Company's internal operational control functions;

D. Awarding to Plug Power restitution from the Individual Defendants;

E. Awarding to Plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses; and

F. Granting such other and further relief as the Court deems just and proper.

Dated: July 19, 2022

PUBLIC VERSION DATED:
JULY 22, 2022

RIGRODSKY LAW, P.A.

/s/ Seth D. Rigrodsky

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