UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

v.

E.MERGE TECHNOLOGY ACQUISITION CORP.,

Nominal Defendant,

v.

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

Defendants.

No. 1: 21-CV-7072 (JPO)

MEMORANDUM OF COUNCIL OF INSTITUTIONAL INVESTORS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS

The Council of Institutional Investors ("CII" or the "Council") respectfully submits this memorandum of law as *amicus curiae* in support of plaintiffs' position that the motion to dismiss should be denied.

INTEREST OF *AMICUS CURIAE*

CII is a nonprofit association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately $4 trillion. CII's fund members include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants. Associate members include non-U.S. asset owners with about $4 trillion in assets, as well as other asset managers with over $40 trillion in assets under management.[1] As long-term investors, CII fund members have a fiduciary obligation to safeguard and increase the value of their investments. To that end, they seek to invest in companies that operate with transparency, have a board and management that are accountable to shareholders, and manage risk appropriately to promote the business's long-term health. Many CII members allocate a substantial proportion of their portfolios to public equity indexes. The success of that strategy depends in no small part on market norms that require private companies to satisfy a reasonably robust baseline of quality and preparedness before entering the public markets.

Special purpose acquisition companies, or "SPACs," in their current incarnation,[2] are investment vehicles that are offered to investors as the result of an initial public offering ("IPO") and later, when a SPAC is ready to use proceeds from that IPO and other assets to acquire a private operating company, the so-called "de-

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[1] CII's U.S. asset owner members are listed at https://www.cii.org/us%20asset%20owners and associate members at https://www.cii.org/associate_members.

[2] The current generation of SPACs date from approximately 2009. A history of SPACs prior incarnations as "blank check companies" is reviewed in Heyman, *From Blank Check to SPAC: The Regulator's Response to the Market and the Market's Response to the Regulation*, 2 ENTREPRENEURIAL BUS. L. J. 531 (2007).

SPAC" stage. This memorandum addresses concerns that CII members, as investors interested in long-term shareholder value, have identified with SPACs, principally the dilution in the value of shareholdings owing to the SPAC structure, as well as levels of compensation paid to SPAC sponsors relative to risk.

CII neither embraces nor rejects the SPAC model as a vehicle for companies seeking to access public capital markets. Instead, our point is that the current model – as exemplified by the facts alleged here – presents significant concerns for investors. This is particularly true given the prominence that SPACs now have in turning private companies into public companies. A research report published by a CII affiliate earlier this year disclosed that during the first quarter of 2021, SPACs accounted for 70% of all IPOs and 67% of overall IPO market value. By contrast, in 2017, SPACs represented just 7% of IPOs and 2% of overall market value.[3]

ARGUMENT

THE CURRENT OPERATION OF SPACS PRESENTS SIGNIFICANT INVESTOR PROTECTION CONCERNS.

The SPAC structure and the allegations in this case.

The allegations in the complaint suggest that the SPAC at issue here was created and operates in the same manner as most SPACs, as described in the

[3] CII Research and Education Fund, *Considerations before Investing in SPACs* at pp. 2-3 (April 2021) (hereinafter "*SPAC Considerations*"), available at https://7677c7b7-7992-453f-8d12-74ccbdbee23c.filesusr.com/ugd/72d47f_a37046935b9342f89a91dd943498116b.pdf.

academic literature and other sources.[4] In this section we outline the steps taken to bring a SPAC IPO to fruition and the pertinent allegations in the complaint as to how those steps were followed here.

A SPAC is typically created by a "sponsor," which can be a private equity fund, a hedge fund, a venture capital fund, another type of entity or individuals. The sponsor incorporates the SPAC, which is then managed by a group of officers and directors, who typically overlap with the persons who own and created the sponsor and whose interests and compensation are therefore aligned with the sponsor.

In this case, E.Merge Technology Acquisition Corp., the nominal defendant, is the SPAC (hereinafter the "E.Merge SPAC"). The E.Merge SPAC was created by defendant E.Merge Technology Sponsor LLC (hereinafter the "Sponsor"), and the individual defendants are members of the Sponsor and in several instances directors of or advisors to the SPAC (Complaint ¶¶ 25-36).

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[4] The description of SPACs here is taken from the following sources:

(1) Michael Klausner, Michael Ohlrogge and Emily Ruan, *A Sober Look at SPACs* at pp. 9-19 (August 15, 2021 draft, forthcoming in the Yale Journal on Regulation (Jan. 2022)) (hereinafter "Klausner"). For the convenience of the Court, a copy of that paper is being submitted with this memorandum; earlier versions of this article were published as research papers, starting in October 2020, and the authors received comments from interested parties that were considered in the current version. Information on earlier versions is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720919;

(2) Minmo Gahng, Jay R. Ritter, Donghang Zhang, *SPACs* (July 23, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775847 and

(3) Office of Investor Education and Advocacy, Securities and Exchange Commission, *What You Need to Know about SPACs* (May 25, 2021), available at https://www.sec.gov/oiea/investor-alerts-and-bulletins/what-you-need-know-about-spacs-investor-bulletin.

A SPAC's initial goal is an IPO that seeks to raise capital from investors. In anticipation of that IPO, however, a sponsor typically acquires a block of shares (perhaps several million of them) at a nominal price that will be adjusted to an amount of 25% of IPO proceeds or, equivalently 20% of post-IPO equity. This block of shares is the "promote" and represents the sponsor's compensation for setting up the SPAC and supporting the SPAC's management while the latter seeks a private company to take public. In this case, the complaint alleges that the E.Merge SPAC created such a "promote" in the form of 10 million shares of Class B stock, which were sold to the Sponsor for a total of $25,000 (Complaint ¶¶ 12, 59-61).[5]

The next step in launching an IPO is for the SPAC to file a registration statement with the Securities and Exchange Commission ("SEC") outlining the nature of the offering to investors. Typically (and in this case, plaintiffs allege) the SPAC will state that proceeds of the IPO will go into a trust consisting of government securities or similar assets and that the SPAC will use those proceeds to merge with a private operating company within two years of the IPO (Complaint ¶¶ 45-46).

A SPAC's IPO typically offers investors "units," with each unit consisting of one share of common stock plus a warrant allowing the purchaser to acquire a fraction of a share of common stock for a period of time after the SPAC identifies a

[5] After a dividend was declared, the number of shares is alleged to have increased to 15 million (Complaint ¶ 60).

target company and completes a merger (or, as defendants in this case call it, the "initial business combination"). In this case, the E.Merge SPAC's IPO offered "units" priced at $10 per unit, with each unit consisting of one share of Class A stock plus a warrant allowing the investor to purchase one-third of an additional share of Class A stock at $11.50 per share for a period beginning 30 days after the initial business combination and ending five years after the date of the initial business combination (Complaint, ¶ 40). A SPAC typically (and in this case) has two years within which to find a suitable target company and execute a merger. Otherwise, the SPAC will liquidate and distribute funds in the trust to public shareholders. (Complaint ¶ 54).

These are the steps that are taken to get a SPAC IPO off the ground and that defendants are said to have followed here. Specifically, the complaint states that in August 2020, the E.Merge IPO sold 52.2 million IPO units at a price of $10 per unit, for total proceeds of $522 million. An additional 7.8 million units were sold the following month at the same price, as the IPO underwriters exercised their "over-allotment option" to sell additional shares after the IPO; in addition, at the time of the IPO the E.Merge SPAC privately sold 1.2 million units to its Sponsor at a price of $10/unit (Complaint ¶¶ 42-44). As of June 30, 2021, the E.Merge SPAC had assets of $600,948,466 invested primarily in government securities and money market mutual funds (Complaint ¶ 46).

With those assets, the E.Merge SPAC then sought to identify a target company with which to merge and thus transform that company into a publicly traded company. The process leading up to that merger and the merger itself is known as a "de-SPAC." In this case, the E.Merge SPAC has not yet identified such a target. However, the de-SPAC process has some notable features that affect the rights of investors, particularly those who purchased shares issued in the IPO.

First, when a merger proposal is announced, SPAC shareholders who purchased units issued in the IPO can and often do redeem their *shares* at the $10 IPO price plus interest that has accumulated in the trust. The Klausner study examined the 47 SPAC mergers that occurred between January 2020 and June 2021 and determined that the mean rate and the median rates of redemption were 58% and 73%, respectively, of all shares issued as part of the IPO. Klausner, *supra* note 4, at pp. 14-15. However, these investors can and often do retain their *warrants* and if the stock price is favorable, they can use these warrants to purchase shares in the merged company at a price of $11.50 per share until the end of the five-year redemption period (Complaint ¶ 40). Because a SPAC cannot predict in advance how many shares will be redeemed, it is difficult for a non-redeeming investor who buys shares issued during an IPO to assess the extent of dilution of an investment.

Second, because redemptions can shrink a SPAC's cash, a SPAC will often solicit new, third-party investors, typically through a vehicle known as a "private interest in public equity" ("PIPE"). Klausner, *supra* note 4, at pp. 12-15. PIPE investors are usually institutional investors that negotiate the terms of their investment in non-public agreements. These investments replace some (or all) of the funds lost because the SPAC's initial investors redeemed their shares. Id.

Third, when a merger does close, the SPAC sponsor's shares in the "promote" will convert to the class of shares sold to the public. In this case, according to the complaint, a merger would mean that upon completion of the merger the Class B shares will convert to Class A shares with the same economic rights as the existing Class A shares. The ratio of the conversion will be at least one to one, which will guarantee that the Sponsor will receive a number of Class A shares equal to at least 25% of all the Class A shares outstanding at the time of the IPO or (equivalently) 20% of the total number of both Class A and Class B shares outstanding at the time of the IPO. The conversion ratio ensures that if the E.Merge SPAC issues new shares to third-party investors to finance the merger, the Sponsor will receive additional Class A shares equal to 25% of the number of new shares issued (Complaint ¶ 63).[6]

This third point is particularly noteworthy. As the complaint notes, if the E.Merge SPAC here manages to complete a merger within the two-year time period, its Sponsor's 20% holding will be worth more than $100,000,000 – a significant return on a $25,000 investment – and significant compensation to the defendants

[6] Moreover, if the E.Merge SPAC should succeed in executing a merger, and if a significant percentage of initial investors decide to redeem their shares, the Sponsor could end up holding a considerably larger percentage of the Class A shares (Complaint ¶ 64).

(Complaint ¶¶ 65-66).

Concerns for investors.

What is wrong with this picture?

From an investor's standpoint, there are significant disclosure problems with respect to any proposal by a SPAC to merge with a private company. In addition, although IPOs are subject to limitations on company projections of future performance, some have argued that no such limitation exists with respect to a de-SPAC merger and that forward-looking statements are permitted in that situation under the Private Securities Litigation Reform Act. See Klausner, *supra* note 4, at pp. 64, 80. The SEC staff has recently addressed that point and signaled the possibility of greater scrutiny of such proxy statements, but concerns remain.[7]

However, for purposes of this brief, CII would like to focus on what it views as the core problem, namely, the misalignment of interests between a SPAC's sponsor and public investors in a SPAC IPO. This misalignment is fundamental and exists regardless of the quality of the target company, the price that the SPAC

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[7] See John Coates, Acting Director, Division of Corporation Finance, Securities and Exchange Commission, *SPACs, IPOs and Liability Risk under the Securities Laws* (April 8, 2021) available at https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws#_ftnref5 (noting various provisions of securities laws that bar materially false or misleading statements); Division of Corporation Finance, Securities and Exchange Commission, *Special Purpose Acquisition Companies: CF Disclosure Guidance: Topic No. 11* (Dec. 22, 2020), available at https://www.sec.gov/corpfin/disclosure-special-purpose-acquisition-companies (urging enhanced disclosure when the economic interests of SPAC sponsors differ from the economic interests of public shareholders).

sponsor negotiates to pay for the target company, and the target company's ultimate success as a public company. *SPAC Considerations, supra* note 3, at p. 5.

To the extent that a SPAC and its sponsor have an overriding goal, it is to finalize a merger within a two-year window. A related goal – and a strong incentive to find a merger target – is the compensation that can flow to a sponsor after a modest outlay such as $25,000, regardless of whether the target company succeeds as a public company. These risk/reward incentives are out of sync for public investors who may be more interested in the quality of the target company as an investment over a longer period of time.

The risk/reward imbalance is perhaps most pronounced in two areas: (a) dilution of an initial investment in a SPAC, which can be profound for shareholders who retain their shares up to and after the merger, and (b) compensation*, i.e.,* the reward available to a SPAC sponsor simply for closing a deal on time, regardless of the merged company's long-term success. We address each point in turn.

Dilution.

An investment in a SPAC can result in substantial dilution, and an investor in the IPO may not know the extent of that dilution until after the SPAC has merged with a target company. There are at least four sources of such dilution:

(a) the promote, which dilutes the cash raised in the SPAC IPO;

(b) "warrants" to purchase shares at a future point in time;

(c) a sponsor's ability to demand and receive additional shares at no cost to maintain a fixed percentage of share ownership; and

(d) the underwriting fees associated with the IPO taking the SPAC public. Klausner, *supra* note 4, at pp. 20-28.

The first three factors we have discussed above. As to the fourth, the nominal underwriting fee for a SPAC IPO may be 5% to 5.5%, which would appear to compare favorably to the median 7% fee for a traditional IPO. But if 50% of the IPO shares are redeemed before the de-SPAC transaction, then the underwriter's fee is effectively 10%-11% of the IPO funds that are raised for the ultimate purpose of bringing a private company public. Klausner, *supra* note 4, at p. 25.

From an investor's standpoint, it is not possible to calculate the actual degree of dilution until after the de-SPAC has occurred. However, academic research suggests that the costs can be significant. Table 5 of the Klausner study (at p. 28) calculates the breakdown of these costs as follows for the 47 mergers in the study group, broken down by whether the SPAC is deemed a "high quality" or "HQ" SPAC or a "non-HQ" SPAC.[8]

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[8] Klausner explains (at p. 28) that the 24 (out of 47) "high-quality" SPACS "either have sponsors that are private equity funds listed in PitchBook with assets under management of over $1 billion, or they have sponsors or managers that are former senior officers of Fortune 500 companies." These designations "are not based on performance; some non-high-quality SPACs have performed very well, and some high-quality SPACs performed poorly. The distinction is based solely on the experience of the sponsor outside the SPAC context." Id.

Table 5: Total SPAC Cost Summary

	Median			Mean		
	All	**HQ**	**Non-HQ**	**All**	**HQ**	**Non-HQ**
Costs as % Pre-Merger Equity						
Net Promote	24%	16%	40%	31%	21%	41%
Underwriting + Other Fees	10%	9%	14%	14%	12%	16%
Warrant + Right Cost	7%	5%	23%	14%	8%	20%
Total Costs	43%	30%	80%	58%	40%	77%
Cash per Share	$5.70	$7.00	$2.70	$4.10	$5.80	$2.30
Costs as % Post-Merger Equity						
Net Promote	8%	8%	8%	9%	8%	10%
Underwriting + Other Fees	3%	3%	4%	4%	4%	4%
Warrant + Right Cost	3%	2%	4%	4%	3%	5%
Total Costs	14%	13%	19%	18%	15%	20%

The Klausner study estimated that the costs embedded in the SPAC structure are "much higher" than those for a traditional IPO to bring a company to market, id. at p. 7, even accounting for underwriters' underpricing shares in an IPO, id. at pp. 7, 33 n.43. The study concluded (at p. 1):

> Although SPACs raise $10 per share from investors in their IPOs, by the time the median SPAC merges with a target, it holds just $5.70 in cash per share to contribute in a merger. We further find, however, that SPAC shareholders that hold shares at the time of a merger, as opposed to the shareholders of target companies, tend to bear SPAC costs and as a result experience steep post-merger losses. This explains the current attraction of SPACs to their targets, but it is not a sustainable situation.

<u>Compensation.</u>

As was discussed above, the completion of a merger transaction could make the Sponsor's $25,000 investment worth more than $100,000,000 for what may be little more than two years' work (Complaint ¶¶ 65-66). Although the Sponsor's members are nominally directors of a publicly traded company, such compensation is out of line with what one would expect for directors of a publicly traded operating company. There is no alignment between the directors' interests and shareholder interests, and this conflict of interest is inherent in the SPAC structure.

This misalignment is most apparent when one considers the potential compensation available to a sponsor simply for taking a company public, regardless of the effect on IPO investors or subsequent investors. Because the E.Merge SPAC has not yet found a merger partner or closed a merger, the extent of the disconnect can only be calculated in theoretical terms in this case. Nonetheless, experience with respect to SPAC mergers that have closed illustrates how profound the disconnect of interests can be.

Two recent examples illustrate the potential imbalance between investors and sponsors, even well-regarded sponsors.

• In 2020 a former Citigroup banker and his team launched their SPAC (Churchill Capital Corp.) in an IPO that earned $1.1 billion. The founders paid $25,000 for a promote consisting of 17,250,000 shares (later increased to 27,500,000 shares after a stock dividend). Thus, all things being equal, the promote would be worth $275,000,000 if Churchill could merge with a target company that opened at $10/share.[9]

[9] MultiPlan Corp., Form S-1, at p. 131 (filed Oct. 30, 2020), available at https://www.sec.gov/Archives/edgar/data/1793229/000110465920120123/tm2031592-1_s1.htm.

In October 2020 Churchill completed its merger with a health care company, MultiPlan Corp.,[10] and began trading under that name at a price of $10/share. MultiPlan is now the subject of shareholder litigation claiming that the SPAC concealed the fact that MultiPlan was about to "crater" when its top customer withdrew from a key business relationship and set up a competing business unit; the stock price is approximately half what it was at the time the merger closed.[11]

• In similar fashion a former Facebook executive paid $25,000 for a promote of 17,250,000 shares (later increased to 20,700,000 shares to maintain the 20% of holdings requirement),[12] and in January 2021 his SPAC merged with Clover Health Investments and undertook trading under that name.[13] Less than a month later, an analyst note reported that Clover Health and the SPAC founder had "misled

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[10] *MultiPlan and Churchill Capital Corp III Announce Closing of Business Combination* (Oct. 8, 2020), available at https://www.prnewswire.com/news-releases/multiplan-and-churchill-capital-corp-iii-announce-closing-of-business-combination-301148617.html.

[11] *SPAC Pioneer M. Klein Sued Over MultiPlan Blank-Check Merger*, Bloomberg Law (March 25, 2021), available at https://news.bloomberglaw.com/mergers-and-acquisitions/spac-pioneer-m-klein-sued-over-multiplan-blank-check-merger. A performance chart for MultiPlan Corp. is available at https://finance.yahoo.com/quote/MPLN?p=MPLN&.tsrc=fin-srch.

[12] Social Capital Hedosophia Holdings Corp. III, Amendment No. 1 to Form S-4 Registration Statement, at p. 315 (filed Oct, 20, 2020), available at https://www.sec.gov/Archives/edgar/data/1801170/000119312520298445/d69158ds4a.htm.

[13] *Clover Health and Social Capital Hedosophia Holdings Corp. III Announce Closing of Business Combination* (Jan. 7, 2021), available at https://www.businesswire.com/news/home/20210107005762/en/Clover-Health-and-Social-Capital-Hedosophia-Holdings-Corp.-III-Announce-Closing-of-Business-Combination.

investors about critical aspects of Clover's business" before the merger and that there was an "active investigation" by the Justice Department into "at least 12 issues ranging from kickbacks to marketing practices to undisclosed third-party deals," according to a Civil Investigation Demand the analyst had obtained.[14] Unsurprisingly, class action lawsuits were soon filed, and Clover Health stock, which had opened at approximately $15/share after the merger closed, dropped to nearly half that price and has remained in single digits for much of the past year (and is currently trading in the $7-$8/share range).[15]

Note the disconnect. The SPAC sponsor's 20 million shares were thus worth $300,000,000 at the time trading in the merged company opened in January. Even with a nearly 50% stock drop, those shares are still worth over $150,000,000 – a 6000% return on an investment of $25,000. Compare that to the losses suffered by investors who bought $10 units in the initial SPAC and remained after the Clover Health merger, whose shares have declined 25%, or investors who bought Clover Health stock right after the merger, whose investment had dropped nearly 50% in a matter of months.

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[14] Hindenburg Research, *Clover Health, How the "King of SPACs" Lured Retail Investors Into a Broken Business Facing an Active Undisclosed DOJ Investigation* (Feb. 4, 2021), available at https://hindenburgresearch.com/clover/.

[15] The cases are consolidated in the PACER docket for Bond v. Clover Health Investments, Corp. No. 3:21-cv-96 (M.D. Tenn.). A stock performance chart for Clover Health (CLOV) is available at https://finance.yahoo.com/quote/CLOV?p=CLOV&.tsrc=fin-srch.

There can be no dispute that SPAC sponsors take financial risks and incur costs when they set up a SPAC and that they are entitled to a financial reward if they choose a merger partner wisely. Nor can there be a dispute that the two-year clock to close a deal is always ticking. However, the defendants here make too much of these points. Their memorandum repeatedly emphasizes that the SPAC sponsors risk losing everything if they cannot find a suitable target within two years – so instead of earning $100,000,000 or $200,000,000, they could be forced to pay back their IPO investors and wind up with nothing. Memorandum in Support of Defendants' Motion to Dismiss at pp. 3-4, 9.

In theory that risk is certainly there. However, defendants ignore what is happening in the real world. First of all, the SPAC decides whether to propose a merger and thus has a measure of control over that process. In addition, a 2020 survey on SPAC liquidations disclosed that since 2009 92% of all SPACs managed to complete a merger deal; only 8% of all SPACs had to liquidate for failing to close such a deal, most often because of lack of investor support for announced deals.[16] Thus, defendants' emphasis on the "all or nothing" nature of SPAC compensation requires some context. A 92% success rate is nothing to sneeze at.

To be sure, not every SPAC merger will yield a 6000% return on an

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[16] Wachtell, Lipton, Rosen and Katz, *The Resurgence of SPACs: Observations and Considerations* at 2 (Aug. 20, 2020), available at https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.27066.20.pdf.

investment of $25,000 (not counting expenses). Even so, there remains a disconnect between the interests of investors (particularly long-term investors such as CII members) and the interests of SPAC sponsors, who can be handsomely rewarded simply for closing a deal, regardless of the newly public company as a long-term investment.[17] In fact, many sponsors may not stick around to find out. The Klausner study found (at p. 14) that, notwithstanding sponsors' initial insistence on owning at least 25% of the SPAC's post-IPO shares, the median percentage of post-merger shares held by the sponsor was 12%.

This misalignment between the interests of SPACs and investors is problematic on its face and is even more a matter of concern in a market where there may be too many SPACs chasing too few quality targets, yet the two-year clock is always ticking. Such an environment may prompt a SPAC to strike a merger deal that the SPAC might pass up in a less heated market, and the current disclosure regime may provide inadequate information to investors considering an investment.

CONCLUSION

For the foregoing reasons the Council of Institutional Investors, as *amicus curiae,* respectfully submits that defendants' motion to dismiss should be denied.

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[17] Or a short-term investment for that matter. The Klausner study found (at p. 7) that of the 47 mergers examined, the mean and median market-adjusted returns to non-redeeming SPAC shareholders twelve months after a merger were negative 27% and negative 60%, respectively.

Respectfully submitted,

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Dated: Washington, D.C.
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