UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TESLA, INC.	
and	
MICHAEL SANCHEZ, an Individual	**Case No. 32-CA-197020**
and	
JONATHAN GALESCU, an Individual	**Case No. 32-CA-197058**
and	
RICHARD ORTIZ, an Individual	**Case No. 32-CA-197091**
and	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA, AFL-CIO	**Case No. 32-CA-197197** **Case No. 32-CA-200530** **Case No. 32-CA-208614** **Case No. 32-CA-210879**

RESPONDENT TESLA, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

This case comes before the Board pursuant to seven separate charges filed as part of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO's (UAW or Union) smear campaign against Tesla, Inc. (Tesla or Employer) designed to extort Tesla's agreement to organizational and card check neutrality. Although Tesla has over 40,000 employees worldwide, the Union's charges were directed at Tesla's automobile production facility in Fremont, California with approximately 12,000 employees (Fremont facility), and a battery production facility in Sparks, Nevada with less than 10,000 employees (Gigafactory 1). After a thorough investigation, most of the allegations raised by these charges were deemed meritless and were amended out of the charges in order to avoid the embarrassment of dismissal. As to the remaining allegations that made their way into the operative complaint, the ALJ issued her decision (ALJD) on September 27, 2019, recommending the dismissal of eight alleged violations, including all of the allegations pertaining to Gigafactory 1, but finding merit to a handful of isolated, generally minor violations concerning the Fremont facility. While Tesla believes the ALJ's adverse determinations are all unsupported by the record and contrary to law, Tesla takes exception to only eight ultimate conclusions and certain aspects of the recommended remedy.[1]

Tesla takes exception to the allegations concerning an alleged meeting that Tesla's CEO Elon Musk (Musk) and former Chief People Office Gaby Toledano (Toledano) had with one of

[1] Tesla does not except to the following alleged violations as found by the ALJ: Tesla's security guards, a human resources agent and an unnamed supervisor violated Section 8(a)(1) in their interactions with employees passing out leaflets on February 10 and May 24 [ALJD 22:11-25:13]; Supervisor Armando Rodriguez violated Section 8(a)(1) by telling employees they could not distribute stickers, leaflets or pamphlets without approval and threatening employees with termination on March 23 [ALJD 26:25-27:4]; and Supervisor Homer Hunt violated Section 8(a)(1) by making a statement of futility sometime in August [ALJD 51:1-5]. Tesla's decision to take only partial exception with respect to the ALJ's decision is borne out of a desire to avoid burdening the Board with considering issues that ultimately should not affect the remedy, as well as considerations of the significant time and expense it would require. Tesla further recognizes that some of the ALJ's decisions, though wrongly decided, are principally based on permissible demeanor credibility findings which are subject to a near insurmountable standard of review. In light of the foregoing, Tesla has opted to make use of the limited pages afforded for briefing to more thoroughly explain its position as to less-than-all of the ALJ's erroneous decisions.

the key Union organizers Jose Moran (Moran) and another employee Tony Vega (Vega) on June 7, 2017 that was not timely raised and not subject to an unfair labor practice charge (ULP) in violation of Section 10(b). But even assuming, *arguendo*, these allegations are not barred by Section 10(b), the June 7 informational meeting constituted neither a solicitation of Moran's safety complaints nor an implied promise to remedy them and was protected by Section 8(c).

Tesla also takes exception to the ALJ's finding that Tesla violated section 8(a)(1) by virtue of Musk sending a single message, or "tweet," from his personal Twitter account on May 20, 2018 in response to a *non-Tesla employee's* tweet. Only by excising the tweet from its context, removing all responses and ignoring explanations within the thread on both Twitter and in Tesla's clarifying press releases does the ALJ's decision attempt to transform the tweet into a threat or reprisal. Musk's tweet expressed his opinion protected by 8(c) and the First Amendment; no more.

The next, unrelated group of allegations Tesla excepts to concern an investigation into a complaint of harassment and misuse of internal company systems, where a neutral decisionmaker determined that Moran would be verbally coached for misuse of company systems, and a pro-union decisionmaker determined that Charging Party Richard Ortiz (Ortiz) would be terminated for lying during the investigation. Moran's own testimony acknowledged his wrongful use of the internal company system data, and other employees – like Ortiz – had been terminated for lying during a workplace investigation. Tesla conducted a fair and adequate investigation, made recommendations in accordance with other similar situations and appointed neutral business leaders who had no connection with Moran or Ortiz to make the final decision.

Tesla also excepts to the ALJ's finding that Tesla interrogated Ortiz and Charging Party Jonathan Galescu (Galescu) on May 24, 2017 concerning Cal/OSHA logs they requested pursuant to Cal. Code Regs. Title 8, § 14300.35. Tesla conducted a lawful workplace investigation, asking a few targeted questions of Ortiz and Galescu in response to a potential breach of employees' confidential medical information. Tesla did not ask any questions probing into protected concerted activities.

Tesla further excepts to the ALJ's finding that Tesla violated the Act by maintaining a General Assembly (GA) Team Wear/uniform policy insofar as the policy addresses special circumstances in the GA department of the Fremont facility in order to prevent mutilations while employees work in and around freshly painted vehicles and to maintain visual management within GA. Notwithstanding the maintenance of the policy, Tesla has not interfered with employees' rights to display union insignia in GA and, in fact, GA employees openly and freely wore union stickers and union hats at work, including the Union's "Fair Future for Tesla" emblem, but were simply not permitted to substitute UAW t-shirts bearing the same "Fair Future for Tesla" emblem for required Team Wear.

Finally, Tesla takes exception to the ALJ's extraordinary recommended remedy, a remedy not even requested by the Counsel for the General Counsel (GC), which singles out Musk and requests that he read the notice to 12,000 employees at the Fremont facility. A notice reading, much less a reading by an employer's top executive, is unsupported by the record evidence, contrary to the law, and punitive.

II. STATEMENT OF ISSUES

A. Whether the ALJ erred in finding that statements purportedly made by Musk and Toledano to Moran and Vega on June 7, 2017 (June 7 statements allegation) are barred under Section 10(b) and whether the Board has statutory authority to entertain and decide the allegation as a matter of law;

B. Assuming, *arguendo*, that the Board has statutory authority to entertain and decide the June 7 statements allegation, whether the ALJ erred in finding that the statements made by Musk and Toledano to Moran and Vega on June 7 violate Section 8(a)(1);

C. Whether the ALJ erred in finding that Musk's May 20, 2018 tweet is a threat in violation of Section 8(a)(1);

D. Whether the ALJ erred in finding that Gecewich interrogated Ortiz and Moran in violation of Section 8(a)(1);

E. Whether the ALJ erred in finding that Gecewich promulgated a rule as to the taking of screen shots of Workday information and that his alleged doing so violated Section 8(a)(1);

F. Whether the ALJ erred in finding that Ortiz was terminated and Moran disciplined in violation of Sections 8(a)(3) and (1);

G. Whether the ALJ erred in finding that Lipson interrogated Ortiz and Galescu in violation of Section 8(a)(1);

H. Whether the ALJ erred in finding that Tesla's General Assembly Team Wear policy violates Section 8(a)(1);

I. Whether the ALJ erred in recommending a broad remedy, including a notice reading singling out Musk.

III. PRELIMINARY FACTUAL BACKGROUND COMMON TO ALL EXCEPTIONS

Unknown to Tesla, the UAW began an effort to organize Tesla's Fremont employees in mid-2016 when it rented and staffed a union office one block away from the plant and began to recruit Tesla employees to serve on an organizing committee. (Tr. 47:3-17; 90:20-25) From then through early 2017, the Union held secret organizing meetings among interested Tesla workers to generate interest in the Union and enthusiasm for union organizing (Tr. 46:1-24)

The Union took its campaign public on February 9, 2017 with an article published on "medium.com" under Moran's name. (ALJD 9:23-26; GC-32; Tr. 48:12-24) The next day, Moran and other Union supporters appeared outside the Fremont plant and handed out copies of the article to Tesla workers as they came to and left from work. (ALJD 15:34-35)

In the months following February 10, organizers distributed thousands of leaflets both outside and inside the Fremont facility on at least 20 separate occasions. (Tr. 48:25-49:7, 50:3-10) Organizers also distributed hundreds of T-shirts, business cards and popsicles bearing the Union's logo to employees as they entered and exited the Fremont facility. (Tr. 49:12-15) Save for the purported events of February 10 and May 24 in the complaint, to which Tesla is not taking exceptions, Tesla never interfered with these leafletting activities.

Other than the GA department, which was subject to a Team Wear/uniform policy, union supporters commonly and collectively wore their union T-shirts to work every Friday. (Tr. 244:1-6) Other than the disputed allegations in the complaint pertaining to GA employees and vandalizing the men's bathroom with UAW stickers, employees commonly wore UAW apparel and stickers at work and handed out UAW stickers and cards to one another without Company comment or interference. (ALJD 25:35-26:5, 26:45-47, 40:10-46:19; Tr. 49:8-15, 204:14-205:2, 209:11-210:6, 223:16-19, 244:1-6, 260:12-15, 267:23-268:3, 296;15-24, 307:22-308:2, 308:21-

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IV. MUSK AND TOLEDANO DID NOT VIOLATE SECTION 8(A)(1) DURING THE JUNE 7 MEETING WITH MORAN AND VEGA

A. The Allegations As To Musk's/Toledano's June 7 Conversation With Moran And Vega Are Barred By Section 10(b)

1. ALJ's Key Findings and Summary of Tesla's Exceptions

Based on time-barred Paragraph 7(y) added to the Complaint on the eve of trial, the ALJ found that Tesla, in a June 7 meeting between Tesla CEO Elon Musk and its Chief People Officer Toledano with employees Jose Moran and Tony Vega, unlawfully solicited and promised to remedy employee safety complaints and made unlawful statements of futility. (ALJD 32:30-39) Tesla excepts to the ALJ's failure to dismiss this time-barred Paragraph because there is no ULP charge to support it, it is not "closely related" to the complaint's other timely claims over which the Board does have jurisdiction and Tesla was prejudiced by its last belated prosecution in violation of Section 10(b). [Exception Nos. 18-26]

2. Operative Facts[2]

The underlying facts were addressed in Tesla's Request for Permission to Appeal ALJ's Order Denying Employer's Motion to Dismiss (Special Appeal) (See GC-1(ffff)). Additional record evidence developed subsequent to the filing of Tesla's Special Appeal and/or contained in the ALJD includes the following: the June 7, 2017 meeting was not raised with the GC until late May 2018 while the GC was preparing Moran for trial testimony. (GC-1(gggg), *2 n. 1) Indeed, the GC concedes that, subject to the "closely related" doctrine, there is no charge to support this claim and that the June 7 meeting was not a subject of the Region's pre-trial investigation. (*Id.*) Hence, when the GC's lone witness to this event testified, there was no investigative affidavit

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[2] Unless expressly noted otherwise, the operative facts are based on facts found by the ALJ, her credibility findings notwithstanding, as well as uncontroverted evidence from the record that the ALJ did not address or consider in the ALJD.

with which to cross examine him (even though Moran had previously provided numerous affidavits to the Region as part of its investigation). (Tr. 722:1-4; 779:17-780:2) By the time the GC amended the complaint on June 4, 2018 to add Paragraph 7(y), Toledano's memory of June 7 had grown dim, so that when she finally testified on September 25, 2018, more than 15 months after the fact, she admittedly lacked a recall as to certain details. This lack of memory served as a basis for the ALJ decision to credit Moran over Toledano and find a violation of the Act.

B. Legal Analysis

1. There Is No Charge To Support Paragraph 7(y), the Allegations Contained Therein Are Not Closely Related To Allegations Which Are Supported By Charges And Over Which The Board Has Jurisdiction and their Untimely Prosecution Prejudiced Tesla

The GC concedes that Paragraph 7(y)'s allegations were not the subject of a valid charge and did not arise out of the Region's investigation of a valid charge. (ALJD 33:15-30). Based on these undisputed facts and by operation of Section 10(b), the GC had no authority to raise these uncharged claims and the Board is without subject matter jurisdiction to decide them. The ALJ, therefore, erred in denying Tesla's request that Paragraph 7(y) be dismissed as mandated by Section 10(b). *Precision Concrete v. NLRB*, 334 F.3d 88, 90 (D.C. Cir. 2003); *Precision Concrete v. NLRB*, 362 F.3d 847, 851 (D.C. Cir. 2004); *Carney Hospital*, 350 NLRB 627, 628 (2007); *Dish Network Service, LLC*, 358 NLRB No. 47, slip op at 1 n.1 (2012); *Towne Forde, Inc.*, 327 NLRB 193, 193 (1998); *W. J. Holloway & Son*, 307 NLRB 487, 487 n. 2 (1992). Further, the ALJ's attempted workaround of 10(b) by way of the Board's three pronged *Redd-I* "closely related" test to Paragraph 7(y)'s allegation is without factual or legal support. *Redd-I*, 290 NLRB 1115 (1988). For starters, Paragraph 7(y) flunks the legally related prong of the "closely related" test because solicitation and statements of futility claims are not analyzed similarly to the other allegations raised in the complaint. Likewise, notwithstanding the ALJ's reliance on the June 7 conduct's temporal proximity to union organizing (ALJD 33:27-29, 42-43), Paragraph 7(y)'s allegations fail the "factually related" prong of the *Redd-I* test because there is no record evidence linking the June 7 conduct to timely charged misconduct, i.e. evidence

demonstrating similar conduct or showing that the June 7 conduct was connected to other timely charged conduct (GC-1(ffff), *558-*563; *512-*516; GC-1(a), (c), (e), (i), (k), (m), (o), (q), (s)) and/or a part of a chain or progression of unlawful events or showing that it was part of an overall plan to undermine union activity (ALJD 34:5-32) and mere temporal proximity to union organizing is legally insufficient to establish the required factual relatedness. *Charter Communications, LLC* 366 NLRB No. 46, slip op at 2 n. 7 (2018) (quoting *Carney Hospital*, 350 NLRB at 630). Finally, the ALJ's finding that *Redd-I*'s third prong is satisfied because it ignores the fact that the last minute insertion of 7(y) into the Complaint without a charge denied Tesla of notice of the claim within 10(b)'s limitation period and deprived it of the opportunity to preserve evidence when memories of June 7 were fresh and to prepare its defense against this untimely charge. *Desert Springs Hospital Medical Center*, 363 NLRB No. 185, slip op at 5 (2016); *Pekowski Enterprises, Inc.*, 327 NLRB 413, 425 (1999); *Machinists Local 1424*, 362 U.S. 411 (1960). Indeed, the prejudice caused Tesla by this last minute, uncharged, un-"closely related" claim was manifest in the testimony of Toledano whose memory of the June 7 exchange had understandably faded, causing her testimony as to that meeting to be discredited by the ALJ. That prejudice, combined with the GC's and the ALJ's disregard for 10(b)'s requirements and limitations mandate that the allegations found in Paragraph 7(y) and the ALJ finding and conclusions based thereon be dismissed.

C. Even Assuming, *Arguendo*, Paragraph 7(y) Is Not Barred By Section 10(b), Musk's And Toledano's June 7 Meeting And Their Statements Do Not Violate Section 8(a)(1)

1. ALJ's Key Findings and Summary of Tesla's Exceptions

The ALJ erroneously found the June 7 meeting to be an unlawful solicitation of safety grievances and an implied promise to remedy them because the meeting took place during a period of organizing and because Tesla has no established policy of soliciting and resolving such grievances. (ALJD 38:40-39:24, 39:40-40:8) She incorrectly concluded that Tesla, via Musk, was soliciting Moran's safety complaints for the purpose of acting favorably on them in order to temper the employees' push for a union. (ALJD 38:41-43). The ALJ also incorrectly found that,

when viewed in the context of other unrelated conduct, certain statements made by Musk and Toledano to be unlawful statements of futility. (ALJD 38:45-39:24, 39:40-40:8) Tesla excepts to these findings because there is no evidence or Board law that renders the June 7 conversation as anything more than a mere employer-employee conversation that is protected under Section 8(c) and the First Amendment. [Exception Nos. 1-2, 10-13, 27-54]

2. Operative Facts

In June, a small group of Tesla employees circulated and signed a petition regarding workplace safety concerns and the formation of a union. (ALJD 34:28-31; GC-29) On June 6, Moran hand-delivered that petition to Tesla's then Senior Human Resources Director for Production and Supply Chain, Josh Hedges. (ALJD 5:1-3, 34:31-32). Moran next emailed Hedges from the Tesla Workers' Voluntary Committee attaching the petition, and called on Tesla to respond through Moran. (ALJD 34:10-31; GC-29) Musk was cc'd on the email. (*Id.*) The next day Moran voluntarily agreed to meet with Musk, if his co-worker Vega could accompany him as a witness. (ALJD 34:35-37) Accompanying Musk at the 15 to 30 minute meeting was Toledano and accompanying Moran was Vega. (ALJD 34:35-35:2)

Toledano began the meeting by introducing herself and saying that she and Musk had seen the petition and wanted to hear about Moran's safety concerns. (ALJD 35:4-5, 36:5; Tr. 715:3-11) Musk then chimed in, asking Moran to tell him about Moran's history with Tesla. (ALJD 35:5-7; Tr. 715:18-23) Moran responded with a lengthy narrative, describing his history at Tesla and explaining the safety concerns that he and his co-workers had.[3] (Tr. 715:24-716:8) Vega also spoke on this subject.[4] (ALJD 35:5-7; Tr. 716:9-19)

[3] There is no evidence that Musk or Toledano did anything other than listen to Moran's complaints. *Noah's New York Bagels, Inc.*, 324 NLRB 266, 267 (1997) (dismissing allegation that employer violated Section 8(a)(1) where employer "did not make any specific promise that any particular matter would be improved").

[4] As the party with the burden of proving a violation by a preponderance of the credible record evidence, one would expect the GC to have called Vega to resolve the conflicts that exist between Moran's and Toledano's clashing versions. Yet, neither the GC nor the Charging Parties' counsel called Vega. Accordingly, the ALJ was required to draw an adverse inference from the GC's failure to call Vega, that had Vega testified, he would have testified in a manner adverse to the GC's/Union's interest, i.e. that he would have contradicted Moran's version and

At this point (and without any prompting from Musk or Toledano), Moran directed the conversation away from safety to new matters, raising an issue he had with Tesla's present performance assessment system. (ALJD 35:7-10; Tr. 717:1-13) Moran complained that even though he had received a very positive performance appraisal, he had not gotten a raise, adding that that was a reason as to why he and others sought a union — as a way of gaining a voice at the Fremont facility. (*Id.*) According to Moran and as found by the ALJ, Musk responded to this last statement about gaining voice in Fremont by opining, "You know, you don't really have a voice. The UAW is a second — two class system where the UAW is the only one that has a voice and not the workers." (ALJD 35:10-13) Per Moran, Toledano then responded by acknowledging there had been problems with the Company's performance system, but adding her belief that "the majority of workers at Tesla don't want a union" and then asking rhetorically, "you know, why do you want to pay union dues?" (ALJD 35:14-17; Tr. 717:24-718:7) Uncowed and unconvinced by Toledano's last remarks, Moran responded that employees have a right to form a union to have a voice to improve working conditions, while Vega added that they did not want to hurt Tesla but just wanted to make things better. (ALJD 35:16-36:1; Tr. 718:8-18) In response to Vega's comments about making things better, Toledano suggested Moran and Vega might want to participate in Tesla's already extant and fully functioning safety committee and attend the committee's weekly meetings to call attention to their safety concerns. (ALJD 36:1-2; Tr. 718:21-25) Moran and Vega both agreed that their committee participation was a good idea, to which Musk allegedly responded that "if the safety committee meetings did not work," then "we" would "give you your union."[5] (ALJD 36:1-4; Tr. 719:1-16) At this point, the meeting ended with both Moran and Vega returning to their work. (Tr. 719:17-23)

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corroborated Toledano's. *Michael Cetta, Inc*, 366 NLRB No. 97 (May 24, 2018); *Harvey Eng'g Corp.*, 270 NLRB 1290, 1300 (1984); *Zapex Corporation*, 235 NLRB 1237 (1978), enf. 621 F.2d 328 (9th Cir. 1980). The Judge refused to do so. (ALJD 34-35, fn. 54).

[5] The syntax of this alleged statement is strange and stilted, leaving a fact finder (and reader of the record) to question the testimony's accuracy and whether Musk uttered such awkward phrases. However, the ALJ found that Musk made this statement and it qualified as an unlawful statement of futility. For these exceptions, Tesla assumes the statement was made although Toledano denied that Musk said anything indicating the futility of unionization. (Tr. 956)

Consistent with their agreement to participate in Tesla's safety committee, Toledano made arrangements for Moran, Vega and others to be invited to attend the next Tesla Safety Committee meeting on June 8. (ALJD 36:9-12) Toledano attended with Tesla's then-Director of Workplace Safety, Seth Woody. (Tr. 912:15-25) The record is silent as to what happened at the Safety Committee meeting; there is no evidence that issues raised at the June 7 meeting were remedied at or as a result of the June 8 Safety Committee meeting.[6]

On June 12, Josh Hedges responded to Moran's June 6 email, stating in part:

> . . . Safety has been and always will be a priority for Tesla. We agree that it is imperative that employees have a voice with respect to safety issues. In fact, as we discussed on June 6 [an apparent reference to when Moran delivered the petition to Hedges], employees do have a voice and many employees voluntarily participate in Tesla's employee safety teams and work together to improve safety.

(GC-36) Hedges' email reply also confirmed Moran, Vega and others attended the June 8 meeting and were afforded the opportunity to raise safety issues which, in turn, were logged and being looked into. However, the letter contained no promise of remedy for those raised safety issues. (ALJD 36:16-35; GC-30) There is no evidence that any of the complaints raised at the June 7 or June 8 meetings were ever remedied.

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[6] Though never mentioned in her Legal Analysis for Complaint ¶7(y), the ALJ went to some length in her case narrative to describe a later internal email chain passing between Musk, Woody and Toledano and spawning from a safety complaint made by Ortiz on Monday June 12 at 8:38 p.m. to Josh Hedges and Elon Musk. (ALJD 36:26-29; GC-52) During this exchange, Musk spoke of a second meeting he hoped to have with Moran and Galescu [apparently Musk confused Galescu with Vega] and his intention to ask them to join to Woody's safety team full time, provided they did so in good faith and were truly committed to safety. (ALJD 36:29-35; GC-52) These comments come from, Musk's understandable and legitimate concerns about whether these vocal union supporters would misuse the safety committee to advance the interests of the Union at the expense of working for a safe Tesla workplace. In any event, naively speaking, Toledano termed this approach a "super smart idea" and "an amazing way to turn adversaries into [people who would take responsibility] for the [safety] problem," noting that by enlisting them, they could work on safety full time on behalf of all associates and not just work to pull in the UAW. (ALJD 37:1-9) Nothing links the contents of this after-the-fact email chain to the earlier June 7 meeting. Indeed, on the face of the email chain, it is apparent that the idea of deputizing Moran and others to take ownership of safety issues was a post June 7 afterthought, something that Musk came up with on June 12 in the wake of Ortiz's safety complaint. Moreover, notwithstanding Musk's mention of his wanting a subsequent meeting with Moran et. al., no such second meeting ever took place. Likewise, Musk's *post-hoc* idea of deputizing Moran and other union supporters to take full time responsibility of safety issues never came to fruition. Accordingly, this email chain is irrelevant to the events and issues of June 7 and should not be factored into determining the lawfulness of the June 7 exchange.

3. Legal Analysis

a. The June 7 informational meeting was not a solicitation of Moran's safety complaints or an implied promise to remedy

An employer violates Section 8(a)(1) when it solicits employee grievances during a union campaign where the solicitation carries with it an implicit or explicit promise to remedy the grievances and "impresses upon employees that union representation is unnecessary." *Albertson's LLC*, 359 NLRB 1341 (2013). However, not all employer-employee conversations – even during a union organizing drive – qualify as solicitations of grievances; it is not a ULP for an employer to engage employees in matters of employee concern and to simply listen to those concerns. *Noah's New York Bagels, Inc.*, 324 NLRB at 267. Whether an employer's conduct crosses the line from protected free speech/lawful listening to unlawful solicitation turns upon the specific words an employer uses and their surrounding context. Isolated and ambiguous statements cannot constitute a violation of the Act. Indeed, the Board has repeatedly held that in determining whether an employer's statement is protected by Section 8(c) or constitutes a violation, all relevant context must be considered with an objective eye towards determining whether the employer's conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their rights under the Act. *KSM Indus., Inc.*, 336 NLRB 133 (2001) ("The Board considers the totality of circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce."); *United Investment Corp.*, 249 NLRB 1058, 1063 (1980) ("in order to evaluate the statements in question, they must be viewed in context"). Absent that reasonable tendency to interfere, restrain or coerce, an employer's mere statements to or conversations with workers as to the employees' issues do not cross the line to become unlawful solicitations, even during union organizing. *Valmet*, 367 NLRB No. 84, slip op. at 2, fn. 8 (2019); *Airport 2000*, 346 NLRB 958 (2006); *Johnson Technology*, 345 NLRB 782 (2005); *Contemporary Fabrics, Inc.*, 344 NLRB 851 (2005); *Pease Co. v. NLRB,* 666F.2d (1044, 1048 (6th Cir. 1981); *c.f. Mek Arden, LLC*, 365 NLRB 109, fn. 4 (2017) (Miscimarra dissenting); *Mandalay Corp.*, 355 NLRB 529, 530 (2010) (Schaumber dissenting); *Alamo Rent-A-Car*, 336 NLRB 1155 (2001) (Hurtgen dissenting).

Contrary to the ALJ, the June 7 meeting was not a solicitation of grievances but an informal conversation about employee concerns. Its purpose was to give Tesla and, more specifically, Musk, a better understanding of the employees' safety concerns. Through Moran, Tesla employees spoke about their concerns and Musk did nothing more than listen. That way, Tesla could frame an effective, albeit lawful, response to be given to Moran as his June 6 email to Hedges and Musk specifically requested. Even in the absence of an established past practice of soliciting employee complaints, this was not a grievance solicitation because it was not inherently coercive and contained no express or implied remedial promise. Nor does the fact the conversation occurred against the backdrop of union organizing render the exchange unlawful since Section 8(c) applies to and protects such non-coercive statements (not containing threats of force or reprisal and/or promises of benefit) even during the pendency of union organizing.

Citing *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 6 (2018) and *Alamo Rent-A-Car*, 336 NLRB 1155 (2001), the ALJ incorrectly found the June 7 meeting unlawful because it occurred "during a period of organizing activity" and Tesla had no prior "established practice of soliciting and resolving [employee safety] grievances." (ALJD 38:28 – 31). While both cases contain the dicta cited by the ALJ, their facts are readily distinguishable. First, contrary to the ALJ, Tesla did have an established procedure for addressing employee safety concerns before the June 7 meeting: the employee safety committee. (ALJD 36:1-7) Second, the unlawful company communications in *Shamrock* and *Alamo* occurred after the employer's receipt of an election petition and as an integral part of an anti-union campaign where employees made no request that their employer respond to their concerns. Here, however, and contrary to the ALJ, the June 7 meeting was a separate, standalone event, triggered not by a union election petition or a part of an anti-union campaign but a discussion conducted in reaction to the employees' request that Tesla respond to their concerns. To properly frame that response, Tesla needed to understand those concerns. The evidence shows Musk and Toledano confined themselves to that purpose. They did not interrogate Moran or Vega nor did they promise to remedy the employees' complaints. They simply teed up the issue of safety and listened to the two employees as they

unburdened themselves. Importantly, unlike the supervisors in *Shamrock* and *Alamo* who substantially deviated from their employer's policy which allowed the ALJ and the Board to infer an implied remedial promise with the goal of dissuading workers from unionization, Musk and Toledano adhered to existing Tesla procedure by simply suggesting that Moran and Vega partake of the employee safety as a possible way of getting their complaints aired. By this suggestion (which both Moran and Vega accepted) and unlike the supervisors in *Shamrock* and *Alamo*, Musk and Toledano adhered to but did not exceed or deviate from Tesla's procedure. In light of that adherence and because neither Musk and Toledano said or did anything to even imply a promise to remedy complaints, the ALJ's reliance on *Shamrock* and *Alamo* and her inference of an implied promise must be rejected as being without any basis in fact.

The ALJ's reliance on *Shamrock* and *Alamo* must also be rejected as a matter of law because a rule of law that automatically infers an implied remedial promise in every employer-employee discussion of the employees' complaints, absent an established past practice of soliciting grievances, during periods of union organizing, chills free speech at a time when free speech is most critical to both employees and their employer. The mere fact that such conversations occur does not, *ipso facto*, mean that they happen so the employer can remedy the employees' complaints. Nor should they be read to automatically imply such promises. Proof of an employer's actual remedial promise or evidence sufficient to allow the implication of such a promise must be required or Section 8(c)'s guarantee of free speech is too easily rendered a nullity. Here, there is no such proof. Indeed, all the record evidence reveals is that Musk and Toledano listened as Moran and Vega spoke to the employees' safety concerns and then disagreed with them when Moran redirected the conversation away from safety to talk of unionization. Thus, a plain and fair reading of the credited record evidence reveals that no actual remedial promises were made and that none were implied at the June 7 meeting. Section 8(c) was enacted for the very purpose of allowing such non-coercive conversations to take place during periods of union organizing without the imposition of 8(a)(1) liability. Otherwise, how would employees be able to get all sides of the unionization story and be able to make an

informed judgment as to whether or not it is really in their interest to unionize? This is especially true here where employees petitioned Tesla as to their workplace safety concerns and asked that the Company to respond to those concerns.

Moreover, by imposing liability on Tesla allegedly (and simply) because the Company supposedly had no prior policy or practice of soliciting grievances, the ALJ accords greater free speech rights to employers who do.[7] A rule that operates to give differing free speech rights to employers, depending upon whether they do or do not have a past practice of soliciting employee grievances makes no sense and is contrary to the Act. Grievance solicitations are either sufficiently coercive to be condemned under Section 8(a)(1) or they're not – and an employer's prior practice should have no bearing on whether its conversations with employees wanting to discuss their complaints is unlawful. Consistent with Section 8(c)'s directive, mere solicitation of grievances (without an actual or implied remedial promise) is protected speech. Therefore, contrary to the cases cited by the ALJ, it ought not matter whether Tesla or Musk did or did not have a prior past practice of soliciting employee grievances. Likewise, contrary to the ALJ, the fact that June 7 was the first and only time that Musk ever spoke to Moran is irrelevant.

The dispositive question for determining 8(a)(1) liability on a solicitation of grievances theory is whether Musk's/Toledano's words and the context in which they were said establishes the making of an actual remedial promise or offers proof sufficient to establish the implication of such a promise. That way, Section 8(c)'s free speech guarantees and employee Section 7 rights are both balanced and given effect. Here, no evidence of an actual or implied remedial promise exists. The ALJ's entire finding of solicitation liability is grounded solely on the erroneous and irrelevant premise that Tesla had no prior past practice of soliciting employee grievances.

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[7] Focusing on an employer's past practice may make sense where dealing with an *Exchange Parts* unilateral change issue because what an employer's past practice was and whether the employer's conduct has strayed from it established past practice is central to the Board's inquiry. *NLRB v. Exchange Parts Co.*, 339 F.2d 829 (5th Cir. 1965) Likewise, as in *Shamrock* and *Alamo*, where an employer strays from its established past practice, that deviation may be inferential evidence of an employer's implied promise to remedy complaints. Neither issue is presented here.

Because that conditional finding is without any basis in fact or law, the ALJ's finding that the June 7 meeting was an unlawful solicitation must also be vacated.

b. Assuming, *arguendo*, that the ALJ findings are supported by current Board law, the current standard governing solicitations by employers without prior policies/practices of soliciting employee grievances should be changed

If the Board's current doctrine is as described and applied by the ALJ, it should be revisited because it gives short shrift to employee rights to raise complaints and to request relief during organizing. Let it not be forgotten that Section 9(a) specifically authorizes even unionized employees to approach management with complaints and to request that those issues be addressed as long as that relief is not contrary to their collective bargaining agreement. Non-union employees who may be in the midst of being organized enjoy no lesser right. Indeed, by petitioning Tesla about their safety issues and requesting Tesla to respond to that petition through Moran, that is exactly what happened here. If 9(a) is to be given effect, employers should be encouraged, not penalized, for hearing those worker complaints and, if necessary, allowed to remedy them, even if complaints are raised during organizing and even if the employer has no prior history of doing so. This is especially true for safety issues where health and injury are at stake. If the current standard is what the ALJ says it is, then employers are compelled to turn a deaf ear to time and safety sensitive issues and to place workers at risk until organizing ends (which could last months and even years as is the case here). Therefore, the Board should adopt an approach similar to that used by the Eighth Circuit in *Greater Omaha Packing v. NLRB*, 790 F.3d 816, 823 (2015) where the court denied enforcement of the Board's finding of unlawful interrogation and, agreeing with Member Johnson's dissent, observed that employers must be permitted a reasonable opportunity to exchange views with unrepresented employees about their collective concerns with terms and conditions of employment. Such innocent and legitimate dialog has little to no effect on their exercise of Section 7 rights. It does not coerce workers. And in the absence of such coercion, that dialog, though occurring during the pendency of union organizing and even if it is a departure from past practice/policy, is protected by Section 8(c).

c. Musk's retorts to Moran's/Vega's comments and Toledano's "majority of employees/union dues" statements were lawful 8(c) protected statements

Under Section 8(c), an employer is free "to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of a benefit.'" *NLRB v. Gissel Packing*, 395 U.S. 575, 618 (1969). Furthermore, an employer "may even make a prediction as to the precise effects he believes unionization will have on his company." *Id.* "At an irreducible minimum," Section 8(c) "protects the right of an employer to state its views, argument or opinion." *Dow Chem. Co., Tex. Div. v. NLRB*, 660 F. 2d 644-645 (5th Cir. 1981). Board law also establishes that, under Section 8(c), it is permissible for an employer to draw comparisons between unionized and non-union workplaces and "may offer an opinion, based on such comparisons, that employees would be better off without a union." *Unifirst Corp.*, 346 NLRB 591 (2006). Counterbalancing Section 8(c) are employee rights to be free of threats of reprisal relating to unionization including threats of futility where an employer tells or implies to workers that it will engage in illegal conduct to avoid unionization and frustrate the wishes of the majority. *Libertyville Toyota*, 360 NLRB 1298 (2014) (finding a threat of futility where employer suggests that bargaining might never begin and that employees would lose benefits because they selected a union); *Winkle Bus Co.,* 347 NLRB 1203 (2006) (an unlawful threat of futility is established when an employer states or implies that it will ensure its nonunion status by unlawful means; *Venture Industries*, 330 NLRB 1133 (2000) (manager conveys that unionization would be futile by telling employees that as far as he is concerned, the plant would never be a union shop during a speech in which he threatens workers with the loss of jobs and of promotional opportunities). However, to be an actionable threat of futility, an employer's statements must be such that employees would reasonably understand those comments to say or imply that their attempts to organize will be futile. *Queen of the Valley Medical Center*, 368 NLRB No. 116, slip op. at 2 (2019) (an employer's statement that "union or no union, I'm going

to run this department as I see fit" does not threaten workers with an employer's refusal to bargain with a union and is too vague to constitute a statement or threat of futility).

(1) Musk's June 7 comments were protected by 8(c) and were not threats of futility

Contrary to the ALJ, Musk's statements made in reply to Moran's comments about unionization were not implied threats of futility. His comment, "You know, you don't really have a voice. The UAW is a second — like two class system where UAW is the only one that has a voice and not the workers," though disparaging of the Union, said absolutely nothing about the futility of the employees' efforts to unionize or the futility of unionization. Nor does it say that Tesla would be willing to do anything including violating the law to avoid or render unionization futile. On its face, and at the absolute worst, it appears to reflect Musk's honest opinion as to how the Union worked and that where power really resided within the Union was the Union's senior management.

Likewise, Musk's off-hand, seemingly sarcastic remark about "giving the union" to the employees if they were dissatisfied with the safety committee is not a threat of futility. To the contrary, it appears to be Musk's left-handed way of suggesting to the employees that they give the extant safety committee a try and that the union might make sense to address safety issues if things did not work out with the safety committee- hardly a threat that Tesla would engage in unlawful acts to avoid unionization. Indeed, to be an actionable threat of futility, a statement must signal an employer's future action that will render unionization futile. No such signal appears in any of Musk's statements. Instead, they are statements of his personal opinion and belief which, though less than complimentary of the Union and, perhaps even unpleasant for Moran to hear, are not coercive; they contain no threat of reprisal or futility; they are, therefore, protected by Section 8(c). *Queen of the Valley Medical Ctr., supra*. *Erickson Trucking Svc.*, 366 NLRB No. 171, slip op. at 2 (2018); *Rogers Electric, Inc.*, 346 NLRB 508 (2006).

(2) Toledano's June 7 comments were protected by Section 8(c) and were not threats of futility

Equally protected by 8(c) are Toledano's remarks as to her belief that a majority of employees did not want the Union and her rhetorical question - why anyone would want to pay union dues. *Trinity Services Group*, 368 NLRB No. 115, slip op. at 2 (2019) (a supervisor's mere rhetorical question of an employee about union dues is neither an unlawful interrogation nor a coercive statement; it is a protected statement of opinion.) These words were nothing more than statements of Toledano's opinion, her belief and her views; they contain no threat or reprisal or promise of a benefit; they do not convey a message, much less an actionable threat, of futility.

Putting misplaced reliance on *Wellstream Corp.*, 313 NLRB 698 (1994) and without any supporting evidence, the ALJ mischaracterized Musk's and Toledano's statements as "clearly intended to and [having] the effect of informing employees the futility (sic) of their support of the Union" (ALJD 38:45-39:10). While their comments were directed at negative aspects of unionization, negative expressions of personal opinion as to unionization are not statements of futility. To be actionable, an employer's words and their immediate context must contemplate future action by the employer and convey the threat to workers that their employer will use any means available, including unlawful means, to ensure its nonunion status. *DTR Indus., Inc. v. NLRB*, 297 F. App'x 487, 499 (6th Cir. 2008) ("only a statement that 'conveys that the employer will act on its own initiative to punish its employees as the result of anti-union animus' falls outside § 8(c)'s protective scope."); *Cf. Sears, Roebuck & Co.*, 305 NLRB 193 (1991) (employer's predictions of violent activity ascribed to unions protected because no threatened actions by employer). Nothing in Musk's and Toledano's statements meets this requirement.[8]

[8] *Valmet*, *supra* at 11; *Newburg Eggs, Inc.*, 357 NLRB 2191 (2011) (reversing ALJ, Board finds that an employer's statements of a union's inability to dictate terms to an employer and the employer's retained right to operate its business is not a statement of futility or of an intent not to bargain in good faith but rather statements conveying the parameters of good faith bargaining); *Park 'N Fly*, 349 NLRB 132 (2007) (supervisor's statement the Union would not do the employees any good is a lawful statement of opinion; statement did not indicate that the employer would refuse to deal with the union or that it would refuse to give employees more than they received without union representation). *See also Durham School Svc.*, 364 NLRB No. 107 (2016) (Miscamarra dissenting) (statement to employees about how long it would take to consummate a new contract is not a threat of futility but rather statement of fact based on the surrounding circumstances; it is not a statement that the employer will never bargain with the union or a threat that employees will suffer job or benefit loss because they unionize).

Nothing Musk and Toledano said or did during the June 7 meeting contemplates future adverse action by Tesla or conveys a threat to the workers that the Company will use unlawful means to frustrate their unionization. Accordingly, contrary to the ALJ, those statements are protected by 8(c) and cannot, as a matter of law, be the basis for a finding of a threat or statement of futility.

d. Tesla's other alleged ULPs do not infect Musk's and Toledano's lawful statements with illegality and render them statements of futility

The ALJ all but acknowledged the lawful and protected nature of Musk's and Toledano's June 7 comments. But rather accept them for the lawful statements they were, the ALJ condemned them as "warnings of [the] serious harm" that would befall Tesla's employees were they to unionize made in the context of Tesla's other ULPs. According to the ALJ, when viewed in that context, these June 7 statements imparted a "coercive overtone" that rendered them unlawful. However, there is no basis for mischaracterizing these innocuous statements of fact or opinion as "warnings", much less warnings of "serious" harm. Moreover, while other ULPs may be looked at for the purpose of giving an unlawful meaning to otherwise lawful statements, the mere commission of other ULPs does not automatically render protected statements unprotected. "This virus-type theory by which unlawful conduct apparently infects mere statements of opinion and morphs them into implied threats is a work around of basic First Amendment principles and does not comport with the express statutory language that only permits [the Board] to find speech unlawful if it *contains* a threat or promise." *Fred Meyer Stores v. NLRB*, 362 NLRB 698, 703 (2015) (Johnson dissenting), enf. denied 865 F.3d 630 (D.C. Cir. 2017); *Southern Bakeries, LLC*, 364 NLRB No. 64, slip op. at 11 fn. 9 (2016) (Miscimarra dissenting in part) (disagreeing that an employer's statements otherwise protected by 8(c) and the First Amendment lose their protected status by "mere proximity" to ULPs), enf. granted in part, denied in part in 871 F.3d 811 (8th Cir. 2017); *Erickson, supra*. at 2 fn. 6 (Pearce dissenting) (same). The ALJ's finding and conclusions thus must be vacated as unfounded in fact or law.

V. MUSK'S TWEET DID NOT VIOLATE SECTION 8(A)(1)

A. ALJ's Key Findings And Summary Of Tesla's Exceptions

The ALJ found that that Tesla violated section 8(a)(1) by means of Musk's May 20, 2018 tweet from his personal Twitter account *directed to a non-Tesla employee* stating there is

> "[n]othing stopping Tesla team at our car plant from voting union. Could do so tmrw if they wanted. But why pay union dues & give up stock options for nothing? Our safety record is 2X better than when plant was UAW & everybody already gets healthcare."

(ALJD 72:1-75:30, 74:12-75:30; GC-56; GC-69, p. 2; Jt.-4, #7-13) Tesla excepts to the ALJ's finding/conclusion that Musk's tweet (taken out of context) can only be read by a reasonable employee as an unlawful threat to employees that if they voted to unionize they would "lose" or "give up" stock options. (ALJD 74:12-75:30) [Exception Nos. 7-11, 55-74]

B. Operative Facts

Musk maintains a personal account on the social media website Twitter (@elonmusk), separate and distinct from Tesla's official twitter account (@Tesla) that it uses to share information about the company. (ALJD 72:22-28) On May 20, 2018, Musk posted a photo of a rocket made by a different company he heads to his personal Twitter account. (GC-69, p. 1) The photo generated a large number of responses from other Twitter users who are not Tesla employees. One non-Tesla employee Twitter user, @dmatkins tweeted a link to an article titled "Report: Tesla Factory Workers Are In Danger Because Elon Musk Hates the Color Yellow." (GC-69, p. 1; Jt.-4, #7, 12) The following exchange took place:

@elonmusk: Tesla factory literally has miles of painted yellow lines & tape. Report about forklifts not beeping is also bs. These are both demonstrably false, but were reported as 'facts' by Reveal."

@dmatkins137: Yellow is fine, got it. How about unions? (replying to @elonmusk)

@elonmusk: Nothing stopping Tesla team at our car plant from voting union. Could do so tmrw if they wanted. But why pay union dues & give up stock options for nothing? Our safety record is 2X better than when plant was UAW & everybody already gets healthcare. (replying to @dmatkins137)

(ALJD 72:6-10; GC-56; GC-69, pp. 1-2)

On May 22, 2018, the thread is picked up by another non-Tesla employee Twitter account (@ericbrownzzz), which wrote:

@ericbrownzzz: Hi Elon, why would they lose stock options? Are you threatening to take away benefits from unionized workers? (replying to @elonmusk & @dmatkins137)

Musk responded:

@elonmusk: **No, UAW does that**. They want divisiveness & enforcement of 2 class "lords & commoners" system. That sucks. US fought War of Independence to get *rid* of a 2 class system! Managers & workers shd be equal w easy movement either way. Managing sucks btw. Hate doing it so much. (replying to @ericbrownzzz & @dmatkins137)

(GC-69, p. 2; Jt.-4, #8, 12) (emphasis added).

One day later, on May 23, 2018, the following Twitter exchange occurred between Musk and individuals who are not employed by Tesla:

@elonmusk: I've never stopped a union vote nor removed a union. UAW abandoned this factory. Tesla arrived & gave people back their jobs. They haven't forgotten UAW betrayed them. That's why UAW can't even get people to attend a free BBQ, let alone enough sigs for a vote. (replying to @ParkerMalloy)

@JackallisonLOL: Yesterday you said they'd lose stock options if they unionized. (Replying to @elonmusk & @ParkerMolloy)

@AltWouss: You took that out of context, he clarified that in a response where he believed that UAW does not allow union workers to own stock. (replying to @elonmusk, @jackallisonLOL, & @ParkerMalloy)

@elonmusk: **Exactly. UAW does not have individual stock ownership as part of the compensation at any other company.** (replying to @AltWouss, @jackallisonLOL, & @ParkerMolloy

(GC-69, pp. 2-3; Jt.-4, #9-12) (emphasis added).

The Twitter exchanges above were reported by numerous major media outlets (Jt.-4, #17, 19), and in response Tesla issued a widely reported press statement explaining:

> **Elon [Musk]'s tweet was simply a recognition of the fact that unlike Tesla, we're not aware of a single UAW-represented automaker that provides stock options or restricted stock units to their production employees, and UAW organizers have consistently dismissed the value of Tesla equity as part of our compensation package.** We fundamentally believe it's critical that all employees be owners of Tesla so that everyone is on the same team, with all sharing in the company's success.

(ALJD 73:4-6, fn. 110) (emphasis added)

Among the tens of thousands of Tesla employees, there is only evidence that *one* employee, Jose Moran, read any of the above referenced tweets/exchanges. (Tr. 739:6-17)

Moran, however, did not testify that he construed any of them as a threat. (Tr. 823:7-827:14; GC-1(QQQ), Exhs. 1-4)

C. Legal Analysis

1. Musk's May 20, 2018 Tweet is Not a Violation of Section 8(a)(1), Because the Tweet is Privileged Under Section 8(c)

Musk's May 20, 2018 tweet from his personal Twitter account directed to a non-Tesla employee is plainly an expression of "views, argument, or opinion" and therefore protected by section 8(c) unless it contains a "threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). An employer "may even make a prediction as to the precise effects he believes unionization will have on his company." *Gissel Packing Co.,* 395 U.S. at 618. "[A]n employer's predictions of adverse economic consequences are to be deemed presumptively truthful" and the Board bears "the burden of showing that section 8(c) does not protect an employer's predictions of the consequences of unionization when the employer asserts section 8(c) as a defense." *NLRB v. Pentre Elec., Inc.*, 998 F.2d 363, 371 (6th Cir. 1993); *see also Benjamin Coal Co. & Empire Coal Co., Inc.*, 294 NLRB 572, 581 (1989). The law is also clear that an employer raising section 8(c) as a defense need not submit evidence substantiating its predictions of the economic effects of unionization. *Pentre Elec.*, 998 F.2d at 371 ("Requiring an employer to present…evidence to corroborate its predictions would, in our mind, defeat the integral purpose of section 8(c)"); *NLRB v. Vill. IX, Inc.*, 723 F.2d 1360, 1368 (7th Cir. 1983) ("we do not read *Gissel* to require the employer to develop detailed advance substantiation" of predictions of the consequences of unionization). And, "statements are not objectionable when additional communication to the employees dispels any implication that wages and/or benefits will be reduced during the course of bargaining and establishes that any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining." *Histacount Corp.*, 278 NLRB 681, 689 (1986).

The facts here are strikingly similar to *Noral Color Corp.*, 276 NLRB 567, 570 (1985), where the Board held that an employer's statement during a decertification campaign that a stock

option plan was available to nonunion employees, and that the union had opposed represented employees' inclusion in the plan, was protected by section 8(c). Other decisions of the Board have reached similar conclusions in similar contexts. *See, e.g., TCI Cablevision of Washington, Inc.*, 329 NLRB 700, 700-701 (1999) (employer permitted to report that its nonunion employees received a 401(k) benefit and that in the past the relevant union "had not successfully negotiated for this benefit."); *Smithfield Foods, Inc.*, 347 NLRB 1225, 1226-1227 (2006) (employers permitted to offer factual statements about union's failure to prevent plant from closing on three separate occasions under separate ownership).

The Courts of Appeals have reached similar conclusion as the Board. The Ninth Circuit held in *NLRB v. Lenkurt Elec. Co.* 438 F.2d 1102, 1107 (9th Cir. 1971) that "predictions of possible disadvantages which might arise from economic necessity or because of union demands or union policies" are fully protected by section 8(c). There, the employer predicted that "unions were adverse to temporary transfer of employees outside their primary department," that "in the event that the prime shop were unionized and work was slow in the printing department, the Company might be unable to send these women out to work in other departments," and thus "it might be necessary" to "lay them off temporarily during these periods." Similarly, in *Monfort, Inc. v. NLRB*, 1994 WL 121150, at *16 (10th Cir. 1994), a special master appointed by the Tenth Circuit to determine compliance with a prior judgment found that section 8(c) protected an employer's right to display banners and hand out leaflets stating "Protect Your Profit Sharing. Vote No." The special master held that the employer's challenged statements "simply reiterated the major theme of [the employer]'s response to the Union campaign: namely, that the [union] would not vigorously support profit sharing in contract negotiations, and therefore, a Union victory would place the profit sharing program in grave jeopardy." *Id.*, affd. by *NLRB v. Monfort, Inc.*, 29 F.3d 525 (10th Cir. 1994).

While the Board has repeatedly held that all relevant context must be considered in determining whether an employer's statement is protected by section 8(c) or constitutes a violation of section 8(a)(1), the ALJ ignored all of these principles in concluding that the tweet

violated the Act. The ALJ improperly focused exclusively on the phrase "[b]ut why pay union dues & give up stock options for nothing" and concluded with nearly no analysis that it "threatened to take away a benefit enjoyed by the employees consequently voting to unionize." (ALJD 74:12-13; GC-56; GC-69, p. 2) The ALJ's *ipse dixit* construction of the tweet cannot be squared with the surrounding context, which Board precedent demands be considered.

The ALJ further ignored that Musk (in subsequent tweets) and Tesla (in communications with the press) made it crystal clear that Musk's message regarding "giv[ing] up stock options" was a prediction of the results of unionization and collective bargaining based on objective facts, not a unilateral threat. (GC-69, pp. 2-3; R-45) This lawful message is the only reasonable interpretation of the tweet, when its full context is considered. For example, when Musk was asked directly by Twitter user @ericbrownzzz "why would they lose stock options? Are you threatening to take away benefits from unionized workers," he responded "**No**, UAW does that." (GC-69, p. 2) (emphasis added) When Twitter user @AltWouss stated a few days later "You took that out of context, he clarified that in a response where he believed that UAW does not allow union workers to own stock," Musk unequivocally agreed: "**Exactly.** UAW does not have individual stock ownership as part of the compensation at any other company." (GC-69. p. 3) (emphasis added) Thus, when the entire context of Musk's tweets are considered, it is beyond dispute that the May 20 tweet was a lawful predication of the consequences of unionization or bargaining (i.e. that the Union would not permit stock options as part of represented employees' compensation package), not a threat. Tesla's widely distributed press comments that Musk's "tweet was simply a recognition of the fact that unlike Tesla, we're not aware of a single UAW-represented automaker that provides stock options or restricted stock units to their production employees, and UAW organizers have consistently dismissed the value of Tesla equity as part of our compensation package," further demonstrates that there was no express or implied threat or promise of benefit in the tweet at issue. *DTR Indus., Inc.*, 297 F. App'x at 499.

Even stripped of its surrounding context, the tweet on its face strongly suggests the referenced loss of stock options is a prediction of the result of the unionization and bargaining,

not a threat of unilateral action to be taken by Tesla. The opening sentences of the tweet make it clear that there is "[n]othing stopping Tesla team at our car plant from voting union" and that they "[c]ould do so [tomorrow] if they wanted." (ALJD 72:6-10) The use of the phrase "give up" in reference to stock options is most naturally understood by a reasonable reader as referring to the give and take of bargaining; i.e. that as a result of representation the Union would "give up" the employee's stock options in the bargaining process to extract other benefits, in line with its past positions. (*Id.*) This interpretation is confirmed by the next sentence's touting of Tesla's safety results and healthcare policies as superior to those the Union would bargain for in exchange for "giv[ing] up" stock options. (*Id.*) At most, the tweet is plausibly ambiguous, but courts and the Board have held that isolated and ambiguous statements cannot constitute a violation of the Act. *Pease Co.*, 666 F.2d at 1048.

Ignoring the plain language of the tweet and all of its surrounding context, the ALJ found that the tweet is unlawful because "Musk did not reference collective bargaining or express that the loss of stock options could be a result of negotiations" and because "Musk presented no objective facts to support his statement that employees would lose their stock options." (ALJD 74:23-25) Yet, as described above, Tesla did in fact express that Musk's predication of a loss of stock options was based on the probable results of collective bargaining and negotiations. This is apparent both from the tweet, which refers to the Union "giv[ing] up" stock options in conjunction with other subjects of bargaining such as safety and healthcare, and later made even clearer in Musk's subsequent tweets and Tesla's statements to press. *Histacount Corp.*, 278 NLRB at 689. But the Act does not require an employer to specifically reference collective bargaining for its predictions of the consequences of unionization to be protected. For instance, in *Hendrickson USA, LLC. v. NLRB*, 932 F.3d 465, 474 (6th Cir. 2019), "[t]he Board's opinion and its brief on appeal ma[d]e much of the fact that [the employer] failed to explain that compensation would ultimately be determined based on the natural give and take of good-faith negotiations," but the court held that "the lack of these specific phrases fails to provide substantial evidence that the company was threatening to adopt a regressive bargaining posture."

Likewise, the ALJ's finding that "Musk presented no objective facts to support his statement that employees would lose their stock options" is again unsupported by the record. (ALJD 74:24-25) Musk's subsequent tweets and Tesla's press statement expressly clarified that Musk's statement was based on the objective fact that the Union's organizers have consistently dismissed the value of Tesla's equity compensation and that none of their contracts provide for employee stock options. *Noral Color*, 276 NLRB at 570; *TCI Cablevision*, 329 NLRB at 700-701; *Lenkurt*, 438 F.2d at 1107; *Monfort*, 1994 WL 121150 at *16. Neither the GC nor the Union provided any evidence to rebut these objective facts, which is dispositive because "an employer's predictions of adverse economic consequences are to be deemed presumptively truthful" and the employer need to submit evidence substantiating its predictions of the economic effects of unionization. *Pentre Elec., Inc.*, 998 F.2d at 371; *Benjamin Coal Co. & Empire Coal Co., Inc.*, 294 NLRB at 581; *NLRB v. Vill. IX, Inc.*, 723 F.2d at 1368 (7th Cir. 1983). The ALJ's findings and conclusions thus must be vacated as unfounded in fact or law.

2. The Board Should Read the Act in a Manner Consistent with Tesla's and Musk's First Amendment Rights

A basic principle of statutory construction is that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *Int'l Ass'n of Machinists*, 367 U.S. 740, 749 (1961). This principle has been applied to the NLRA by both the Supreme Court and the Board. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB 797, 807 fn 35 (2010) ("We…believe that the Board has the authority, indeed, that the Board has a duty, to construe the Act, if possible, so as not to violate the Constitution"). The Supreme Court has been clear that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's

guaranty" and that employer speech on this topic is entitled to "the same protection" as employee speech. *Thomas v. Collins*, 323 U.S. 516, 537-38 (1945).

The ALJ's only effort to deal with the serious First Amendment issues at stake is one sentence stating "in *Gissel*, the Supreme Court specifically set forth that a statement loses the protection of the First Amendment if the statement is based on misrepresentation regarding the consequences of bargaining if the employees unionized." (ALJD 75:1-4) Even assuming this broad statement accurately characterizes *Gissel*'s holding (it does not), the principle invoked by the ALJ has no application here because Musk's tweet did not "misrepresent" anything. Musk predicted that allowing the Union to represent Tesla employees would cause the employees to lose stock options, based on objective facts tied to the Union's past negotiated contracts and positions. (GC-69, pp. 2-3; R-45); *see Pentre Elec.*, 998 F.2d at 371.

Furthermore, *Gissel* does not establish a general "NLRA exception" to the First Amendment as the GC has suggested. While generally affirming an employer's right to speak on labor issues, the Supreme Court in *Gissel* suggested that employer to employee *workplace* speech might face greater restrictions than similar speech in other contexts because of "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gissel*, 395 U.S. at 617. *Gissel* held "any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting." *Id.* To the extent *Gissel* recognized some form of diminished First Amendment protection for employer speech, the rationale is clearly inapplicable to Musk's tweets. Musk's tweet was not directed at any employees and was not made at the workplace. It was made using Musk's personal Twitter handle in response to a non-employee. In this context, there is no "dependency" between Musk and his audience and no concern that the audience might "pick up intended implications." *See* Eugene Volokh, Comment, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791, 1849-55 (1992) ("*Gissel* was based on the premise that employers' speech is inherently more threatening to employees than the same

statements made in other contexts…"). Indeed, the parties stipulated that Musk has over 22 million Twitter followers, that "[i]t is not possible to identify or determine the number of individuals that viewed the tweets" in question, and that "the tweets by [Musk]…were republished and disseminated." (Jt.-4, #2, 17, 19)

The mere fact that some Tesla employees hypothetically could have seen Musk's tweet does not take it outside the protection of the First Amendment. If this were the law, it would subject all of Musk's tweets and public statements to the *Gissel* standard of scrutiny, which is a substantially overbroad burden on Musk's right to speak his mind in light of *Gissel's* justification for subjecting employer-to-employee workplace speech to diminished protection. *See Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (a content based speech restriction is constitutional only "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy.").

In similar contexts, courts have recognized the First Amendment problem with imposing liability on the basis of public speech on a matter of public concern simply because some particular individuals will hear the speaker and be adversely affected. For example in *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2009), the Ninth Circuit held that a college could not be held liable under Title VII for refusing to discipline a professor who sent allegedly racially harassing emails over the college's email system. The Ninth Circuit held that because the emails were on matters of public concern and directed to the entire college, "not racial insults or sexual advances directed at particular individuals," they were fully protected by the First Amendment. *Id.* at 710 ("Kehowski's website and emails were pure speech; they were the effective equivalent of standing on a soap box in a campus quadrangle and speaking to all within earshot"). The *Rodriguez* rationale is applicable to the ALJ's decision here. As in *Rodriquez*, the GC seeks to impose liability on Tesla for a widely broadcasted statement on a matter of public concern, not a directly threatening or harassing communication to an employee. And as in *Rodriguez*, the First Amendment's protections are not overcome simply because some employees might come across the widely broadcast statements and potentially feel threatened or harassed. To impose liability on Tesla in this scenario stretches the rationale of *Gissel* past its

breaking point and violates the First Amendment. Thus, to avoid unseemly conflicts between the Act and First Amendment protections, the Board should apply the Act such that it does not impose liability on Tesla for Musk's constitutionally protected speech.

3. Alternatively, if Tesla Violated the Act Under Existing Law, the Board Should Adopt a New Standard Finding Under the Totality of the Circumstances that Musk's Tweet is Lawful Under 8(c) and the First Amendment

The United States Supreme Court has held that "[t]he Board has the responsibility to adapt the Act to changing patterns of industrial life." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Communications on Twitter are limited to short 280 character (formerly 140) messages, so it cannot reasonably be expected that corporate officers and supervisors engage in lengthy substantive and highly detailed discussions of the complexities of collective bargaining and set forth detailed factual bases for an opinion the ALJ seems to demand when using this modern communication medium. The Board should clarify that employers may make use of short form social media communications to express their protected opinions without subjecting themselves to section 8(a)(1) simply because of the nature of the medium. For these reasons, and contrary to the ALJ, the tweet is protected by section 8(c) and the First Amendment.

VI. THE ALJ ERRED IN FINDING TESLA VIOLATED SECTION 8(A)(1) AND 8(A)(3) BY DISCHARGING ORTIZ AND DISCIPLINING MORAN

A. ALJ Key Findings And Summary Of Tesla's Exceptions

Applying *Wright Line*, the ALJ found Tesla violated Section 8(a)(3) and (1) when it discharged Ortiz and disciplined Moran and questioned them during the investigation. (ALJD 65:5-71:44) Tesla, however, lawfully discharged Ortiz for lying during an investigation and appropriately disciplined Moran for misappropriating and misusing internal personnel information of other employees – which is not protected concerted activity. But even assuming, *arguendo,* that either Ortiz or Moran engaged in protected concerted activity, the GC failed to establish a *prima facie* case because there is no evidence that Ortiz's discharge or Moran's discipline was motivated by anti-union animus with any causal connection to them. [Exception Nos. 1,5-6, 10, 12,13, 75-121]

B. Operative Facts

UAW Legislation: In 2017, the UAW successfully lobbied to have the funds earmarked in the California Budget Act of 2017 for the Clean Vehicle Rebate Program be conditioned upon an EV manufacturer's receipt of a certification from the state of California attesting that they were "fair and responsible in the treatment of workers." (Tr. 495:1-15; GC-46; CP-10) The State Assembly held hearings on September 13 and 14, and several pro-Tesla/anti-union employees, including Travis Pratt (Pratt) and Shaun Ives (Ives), testified. (ALJD 52:1-12, 17-18) Ortiz received a video link of the Pratt/Ives testimony but could not open it. (ALJD 52:16-20) He texted Moran the link with the following message:

> "Hanna is sensing [sic] me a video of the suck asses Tesla has been taking ti [sic] Sacramento" so that he could confirm their identity and "walk up to them AND say see you in Sacramento suck ass."

(ALJD 52:23-27) Moran opened the link and watched the video solely "to find out if they [Pratt and Ives] were actual Tesla employees." (ALJD 52:27-29; Tr. 722:23-723:21)

Workday Access Misuse: Tesla uses Workday, a third-party software program for its human resource system, which houses its policies and personnel records. (ALJD 5:11-17) It cannot be accessed unless you are an employee and you log in. (ALJD 52:30-32). Moran logged into Workday on his smart phone to look up the names of the three pro-Tesla witnesses in the video link for the sole purpose of determining if they were Tesla employees. (ALJD 52:31-37) Moran's visual review of the Workday information confirmed that the persons in the video were employees – the information Ortiz had requested. (Tr. 794:17-20) Even though he now knew they were Tesla employees, Moran went to the unnecessary and inexplicable additional step of taking screenshots of each employee's Workday profile page and texting that information to Ortiz.[9] (Tr. 724:9-10, 724:23-727:3, 499:12 - 507:15; GC-43, pp. 1-5) Moran testified that he did not have Pratt's or Ives' permission to take the photos from Workday. (Tr. 763:14-18)

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[9] Moran could offer no reason or explanation for taking these needless screenshots or for sending the Workday information to Ortiz. (Tr. 794:2-795:14, 2288:6-10) Moran had no prior understanding or expectation of what Ortiz would do with the screenshots after he sent them to Ortiz. (Tr. 766:2-7)

Facebook Posting: Ortiz posted the Workday profiles on a Tesla employee Facebook page: "[t]his just proves how much kissing ass and ratting on people get you" and asserting that Pratt and Ives were "lying about how things are at Tesla." (ALJD 53:3-19; Tr. 766:5-7), 16-17)

Pratt was alerted to Ortiz' post by Bryan Kositch (Kositch), and Pratt lodged a complaint with Hedges in Human Resources by sending him a screenshot and speaking with him on the phone. (ALJD 59:29-33; Tr. 1179:15-23, 1182:11-15) Hedges responded to Pratt's complaint that he felt targeted and that his picture and Tesla information were on Facebook by saying he would pass the complaint to Employee Relations (ER), Tesla's primary investigative branch. (ALJD 54:5-15, 30-33) Hedges informed the head of ER and counsel, Carmen Copher (Copher), and ER's senior investigator Ricky Gecewich (Gecewich). (ALJD 54:1-3, 54:30-55:1)

Investigation: Gecewich first had to determine the nature of Pratt's complaint and if an investigation was necessary, which he did by conducting phone interview with Pratt and Kostich. (ALJD 55:10-13,:24, 27-29, 56:11-12; Tr. 1790, 1799) Pratt told Gecewich that he felt the posting had been inappropriate, had singled him out and was harassing because it gave his name, used his picture and publicized how much money he had made, and even though it had been taken down, Pratt still felt harassed. (ALJD 55:30-56:3) Kostich also raised the fact that the posted photos "were workday on mobile," that someone took "screenshots of this" and thought it was "100% wrong, and quite disgusting." (ALJD 56, fn. 84; GC-64, p. 2) Gecewich decided he had no choice but to proceed with an investigation.[10]

[10] Another independent basis for proceeding with the investigation was that Gecewich had been presented with a similar case involving posting of Workday photos and ensuing harassment at his prior workplace, Google. (Tr. 2234:23-2235:5) In the prior case at Google, Workday photos were posted on the internet which precipitated an actionable pattern of harassment directed at the persons whose Workday photos were posted. (Tr. 2236:2-15, 2237:13-2238:1) Gecewich perceived the obvious parallels between what the Google employees experienced and what Pratt experienced. (Id.) This prior case experience factored into his thinking about Pratt's complaint and confirmed his decision that he should indeed proceed with the investigation. (Id.) However, the ALJ refused to hear the testimony, declaring it to be irrelevant. (Tr. 2236:16-17)

Initial Ortiz Interview: On September 21,[11] Gecewich interviewed Ortiz who admitted he posted the names, pictures and accompanying comments. (ALJD 57:3-9) Gecewich then delved into Ortiz' understanding and use of Workday, which Ortiz described as "like a Facebook for Tesla; *the people inside the building*." (ALJD 57:11-14) (italics added) Ortiz told Gecewich he got the photographs by text message but then lied and said he couldn't recall from whom. (ALJD 57:15-17, 59:24-25) As found by the ALJ, it is Ortiz's lie about the source of the Workday screenshots that resulted in his termination. (ALJD 67:8-9) Because Ortiz did not take the Workday screenshots, the investigation next sought to identify the person(s) who did.

Over the next three weeks, Gecewich tried to find the source of the Workday photos by requesting and analyzing data showing who accessed Pratt's Workday profile during the time period from September 10 to September 16. (ALJD 57:25-58:10) The information he received from his search on October 6, led him to Moran as the source of the photos. (ALJD 58:9-12)

Moran Interview: On October 12, Gecewich interviewed Moran and told him he was investigating a Workday concern and asked how Moran used Workday. (ALJD 58:23-29) Moran told Gecewich that Workday was an internal company system, he used it to update his contact information, electronically sign documents, review his performance and check on the seniority and pay of his coworkers. (ALJD 58:28-31) Gecewich told Moran that he knew Moran had taken screenshots of *other* employees' Workday profiles and asked why he had done that. (ALJD 58:32-34) Moran said he took the screenshots "to find out if the individuals were actual employees of Respondent." (ALJD 58:34-35) Moran admitted that his visual review of the Workday profiles already told him that and the screenshots were unnecessary. (Tr. 794:17-20) When Gecewich pressed Moran about why it was necessary to go the extra step of taking screenshots of their Workday profiles, Moran could offer no explanation except to reaffirm that he had, in fact, taken the screenshots. (Tr. 794:2-795:14, 2288:6-10)

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[11] The ALJ's decision incorrectly reports the interview date as September 19; it was September 21. (Tr. 1820:3-6)

Follow-up Ortiz Interview: A few hours after the meeting with Moran, Gecewich again met with Ortiz. (ALJD 59:14) Ortiz knew about Gecewich's interview of Moran since the two spoke after the interview. (ALJD 59:20-21) From that conversation, Ortiz also knew that Moran's identity as the source of the Workday profiles was known. (*Id.*) When Gecewich again asked Ortiz to tell him the screenshots source, Ortiz knew that he had been caught in a lie, and first said "*it was 85 percent likely* that Jose Moran had shared the screenshots of the Workday profile photos" and only when asked about the remaining 15%, did he finally admit it was Moran who had sent the screenshots and that he had lied during the initial interview. (Tr. 632:25-633:8, 2297:3-2298:7, 2296:24-2297:2; GC-68) (emphasis added)

Investigation Report: Gecewich drafted his report with his findings and recommendations for the business leaders who would make the ultimate decision as to discipline. (ALJD 55:5-9, 13-19, 59:29-31, 38) Ortiz admitted that he had lied to Gecewich which Gecewich viewed as a terminable offense. (ALJD 62:3-4, fn. 100) In a recent investigation he conducted while at Tesla, a witness was fired for lying to him during the course of the investigation. (ALJD 62, fn. 100) Accordingly, as in the case of the lying employee who was fired, Gecewich recommended that Ortiz be terminated.[12] For Moran, Gecewich concluded taking Workday profile screenshots was an inappropriate, non-business use of Workday, and he recommended a verbal warning. (ALJD 63:33-34)

Ortiz' Termination: On October 17, Gecewich met with the decision makers including Stephan Graminger (Graminger). (ALJD 61:7-9) Graminger paid attention to union issues and was still a dues-paying union member in Germany, even while working in America. (Tr. 1313:6-17) Graminger had no knowledge of the pending investigation or the purpose of the meeting.

[12] The ALJ's attempt to quibble with the terms of this on-point comparator case are unsupported by the actual testimony. The ALJ's suggestion (ALJD 69:35-38) that the employee terminated for lying was not similar because the disciplined employee was in management is a distinction without a difference. Whether the employee was a production line worker or in management, Gecewich's testimony is that if the employee lies during a workplace investigation, termination is recommended. These were similar situations and they were similarly treated: termination was recommended.

(ALJD 61:9-10) Gecewich presented the findings contained in his report (which was available for review) and his recommendation that Ortiz be terminated for lying during the investigation. (ALJD 61:11-20, 62:3-4) Counterbalancing Gecewich's recommendation were the comments coming from Ortiz's supervisor about Ortiz's consistently good performance, but this did not mitigate Gecewich's recommendation which went to Ortiz's integrity, not job performance. (ALJD 62:6-7) Graminger asked Gecewich if similar cases had been treated in the same way in the past and Gecewich said they had. (ALJD 61:32-62:2, fn. 100)

Because he was new to Tesla and the situation was a sensitive case involving the termination of a known union supporter, Graminger said that he wanted to talk to his boss, VP of Manufacturing Peter Hochholdinger (Hochholdinger), before making a decision. (ALJD 62:14-17) Graminger then spoke to Hochholdinger about it, who was not aware of the investigation. (ALJD 62:19-21) Hochholdinger confirmed that there had been similar instances where someone was lying during an investigation and employees would be terminated according to Tesla personnel policy. (ALJD 62:21-25) Satisfied, Graminger then emailed to proceed as discussed and that Hochholdinger was aware of Graminger's decision to terminate Ortiz. (ALJD 62:26-28)

<u>Moran discipline:</u> Brian Cunningham (Cunningham) was the decision maker for Moran and agreed with Gecewich's recommendation that Moran receive a verbal coaching with a written follow-up about his mis-use of Workday, which was done on October 19. (Tr. 2307:15-21; GC-62; GC-82) Gecewich sent Moran an email to follow up on their meeting stating, in pertinent part: "we found that you used an internal system, Workday, for personal purposes and without proper business justification. You are reminded that you should only access internal systems, including Workday, for legitimate and official business purposes." (ALJD 63:35-39)

C. Tesla Lawfully Discharged Ortiz For Lying During An Investigation

1. The General Counsel Failed to Establish a *Prima Facie* Case

Although the ALJ states that she is evaluating the discipline and termination under the standard in *Meyers Industries* (ALJD 65:13-35) and *Wright Line* (ALJD 67:25-31), the ALJ

instead invokes what appears to be a just cause arbitration standard that relies upon and substitutes the ALJ's business judgment in place of Tesla's. The Act does not allow an ALJ to make her own assessments and apply her own judgment to determine whether an investigation was sufficiently thorough or whether the investigator did ask or should have asked particular questions of each witness or which witnesses the investigator should have questioned. *Cellco Partnership v. NLRB*, 892 F.3d 1256, 1262 (D.C. Cir. 2018) ("[T]he ALJ is unabashedly taking on the company's business judgment chair – and that has been repeatedly held to be improper."); *St. Paul Park Refining Company*, 366 NLRB No. 83, slip op. at 8-9, 15-16 (2018) (employee entitled to an adequate and objective investigation, not a perfect investigation). Nor does it permit the ALJ to make her own decisions about discipline of other employees and make a "business judgment" that the comparison case was somehow different because of an employee's position in management. *Cellco*, 892 F.3d at 1263 ("[T]he relevant question is not the validity of the ALJ's business judgment but only whether the company's judgment was reasonably consistent.").

a. Ortiz's lying during an investigation was not protected concerted activity

The ALJ found "the credited evidence shows that Respondent terminated Ortiz for lying during an investigation." (ALJD 67:8-9) Lies about misconduct are not protected even though in some instances (not applicable here), lies about union activity not associated with misconduct may sometimes be protected. *Trade-Waste Incineration*, 336 NLRB 902, 904 (2001). But *Fresenius* governs here and Ortiz's lies are not protected. In *Fresenius*, a union supporter placed anonymous, vulgar statements in a breakroom, prompting an investigation. 362 NLRB at 1065. The employee denied writing the statements during an interview but unwittingly confessed the next day in a phone call and was terminated for the statements and his dishonesty. *Id.* In upholding the termination, the Board found that "as part of a full and fair investigation, it may be appropriate for the employer to question an employee about facially valid claims of harassment and threats, *even if that conduct took place during the exercise of Section 7 rights*." *Id.* (emphasis added). The investigation was found to be necessary and was "clearly related to its

[the company's] ability [to] effectively [] operate its business." *Id.* at 1066. The same is true here: Ortiz was asked about the source of internal company information that he posted to Facebook during an investigation into harassment and misuse of internal company information; he lied; and he was terminated for lying.

The ALJ's reliance upon case law which involves directly questioning employees as to their union involvement and activities are simply not comparable or on point with Ortiz lying about the source of the Workday profile screenshots because he was not questioned about his union involvement or activities. (ALJD 67:8-15); *See, e.g., Trade-waste Incineration*, 336 NLRB 902, 904 (2001). In *Trade-waste,* an employee posted a handwritten note stating that a newer employee "make 18.75 hr" and that "[t]his shows that this company has no regard for the guys who has work to get where they are." *Trade-waste* 336 NLRB at 904. The employee suspected of writing the notice and another employee suspected of copying and posting the notice were each questioned separately by management and asked (1) if he had seen the notice; (2) if he wrote the notice; (3) if he photocopied the notice; and (4) if he posted the notice on company property or bulletin boards. *Id.* at 904, 907. There were no allegations that the wage information was wrongfully or improperly obtained by the employees. *Id.* The *only* wrongdoing being investigated in *Trade-waste* was who wrote the content of the notice, who created and who posted the notice about wage inequality. *Id.* This case has no applicability here.

For the same reasons, the ALJ's reliance on *St. Louis Car Company*, 108 NLRB 1523 (1954) is also misplaced. In *St. Louis Car Company*, the company president learned that telephone operator employees were trying to organize and he questioned each operator, asking her if she was trying to organize a union and each one responded (untruthfully), no. *Id.* at 1524. When the President consulted management and identified the actual organizing employee, she was wrongly discharged for dishonesty, which the President claimed made her an untrustworthy employee. *Id.* at 1524-25. This 1954 case bears no relation to the facts here.

The questions asked by Gecewich and the lies told by Ortiz were not related to any such union-specific topics or any protected conducted at all. The lies and untruths told by Ortiz

concerned the removal of internal company data from Workday; not union involvement, not union affiliation, and not Ortiz's union aspirations. Nor did Gecewich question Ortiz about the content or the meaning of the Facebook post, in contrast to *Trade-waste.*[13]

b. Even assuming, *arguendo,* Ortiz engaged in protected concerted activity, there is no evidence of animus

(1) The General Counsel did not show animus by the decision maker

As *Tschiggfire Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1 (2019) makes plain, the GC's burden is not satisfied simply with "circumstantial evidence of *any* animus or hostility toward union or other protected activity;" *Wright Line* "requires more." "[E]vidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action." *Id.* That burden was not met by the ALJ's reliance on "numerous unfair labor practices and the entire record;" (ALJD 68:36-38); and the ALJ's improper assessment of the quality of the investigation (ALJD 69:20-30).

It is undisputed that decision maker Graminger testified that he was pro-union. He not only approved of unions, but he paid attention to unions and was (while working in America) still paying dues as a union member in Germany. (Tr. 1313:6-17) And Graminger had no dealings with Ortiz until making the decision in the investigation. (ALJD 61:9-10) Nor did Hochholdinger, whom Graminger consulted and confirmed that other employees were terminated for lying during workplace investigations. (ALJD 62:19-28) Furthermore, Ortiz's union activities did not cause him to suffer any work-related consequences. In June 2017, Ortiz received a "consistently strong" performance rating resulting in a performance award valued at

[13] Equally unhelpful is the suggestion that Ortiz's conduct is similar to the concerted activity found in the ALJ's cited case - *Triple Play Sports Bar and Grille*, 361 NLRB 308 (2014). (ALJD 65:45-66:9) The only similarity between these cases is that Facebook is involved. But in *Triple Play*, the conduct at issue was *multiple employees* commenting on Facebook about the employer's failure to properly withhold taxes resulting in tax liability for the employees, which was found to be concerted activity. *Id.* at 310. The *Triple Play* Facebook conversation about wage and tax issues has no similarity to the issues presented here (other than both involved Facebook postings). The *content* of Ortiz's Facebook post, and whether others made comments on it has no bearing whatsoever on the investigation; it is not the wrongful conduct and it is not Ortiz's wrongful conduct.

$2,807.00. (Tr. 564:15-565:9; GC-13; GC-14) Therefore, there is no evidence satisfying *Tschiggfire Properties* to show the motivation for terminating Ortiz was anything but the fact that he lied during an investigation.

(2) The investigation was valid and Gecewich had no animus

Board precedent recognizes employers have a "have a legitimate business interest in investigating facially valid complaints of employee misconduct," especially in harassment cases. *Fresh & Easy*, 361 NLRB 151, 158 (2014). In cases involving harassment, an employer's need to investigate is also dictated by federal statues, such as Title 7 and state anti-discrimination statutes. *See, e.g.*, *Fresenius USA Manufacturing, Inc.*, 362 NLRB 1065, 1066 (2015).

Gecewich's investigation began with a complaint by Pratt to Hedges that the Facebook post made him feel harassed, targeted and singled out. Gecewich then began his normal investigation process by assessing the complaint and whether it needed to be investigated. (ALJD 55:5-9, 13-19) He conducted phone interviews with Pratt and Kostich, and even though Pratt acknowledged that the Facebook post had been removed, he still felt harassed. Kostich told Gecewich the post contained Workday profile photos, names and titles, which were screenshots from a mobile phone and that it was "100% wrong, and quite disgusting." (ALJD 56, fn. 84; GC-64, p. 2). Gecewich was a seasoned investigator who handled a multitude of workplace concerns from employees, supervisors, business leaders and HR partners. (ALJD 55:5-9) He was aware of a similar case of Workday photo misuse, from experience at his prior employer Google, that assisted in his determination that this was a valid complaint that needed to be investigated.[14]

These types of social media "outings" (like Ortiz's post) are a form of cyber-bullying known as "doxing," often seen in workplace harassment cases. Not only was Gecewich bound by profession to proceed with the investigation of a harassment complaint, he was required to do

[14] This testimony is relevant to Gecewich's decision to investigate and was wrongly excluded by the ALJ. (Tr. 2236:16-17)

so by state and federal law to reasonably investigate all forms of workplace harassment they know of or should know of and to take appropriate action to remedy that harassment.[15] *See* 42 U.S.C. § 2000 *et seq.*; Cal. Govt. Code §§ 12923, 12940 *et seq.*; *Swenson v. Potter,* 271 F.3d 1184, 1192 (9th Cir. 2001); *Thompson v. City of Monrovia,* 186 Cal.App. 4th 860, 880 (2010).

Finally, there is no evidence that Gecewich harbored any personal animus toward Ortiz or the Union, particularly since Gecewich had no prior dealings or relationship with Ortiz before the investigation. (Tr. 793:21-794:1)

(3) Ortiz was not questioned about the union or any protected concerted activity

Gecewich made a determination to pursue an investigation and was careful to circumscribe his questioning to the narrow areas of misconduct at issue – obtaining information from an internal HR system and posting it. *See Fresh & Easy*, 361 NLRB at 159 & n.27 (citing *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528-29 (2007)). Just like in *Bridgestone Firestone*, it is undisputed that Gecewich deliberately did not question Ortiz about his union activities or affiliations but simply wanted to know where Ortiz obtained the Workday profile screenshots of the other employees that he then posted on Facebook.[16]

Furthermore, Gecewich's investigation began based on Pratt's harassment complaint, but contrary to the ALJ's assertion, it was not a "fabricated" investigation into Workday use. (ALJD 66:46-67:1) Rather, the investigation expanded as Gecewich began conducting interviews and

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[15] Contrary to the established facts, the ALJ uses her own personal assessment of Pratt's text message to Hedges to jump to the unsupported conclusion that because Pratt used an emoji, it "does not reflect a concern of harassment." (ALJD 66:14-19) Based on an emoji, she decides that the "claim is disingenuous." (*Id.*) The difficulty presented by these improper personal conclusions is that Pratt did not testify (ALJD 54, fn. 78), and all the testimonial evidence is to the contrary. Without Pratt's testimony, the ALJ had no basis for interpreting or discounting his feelings or concerns or reasons for sending his complaint to ER via Hedges. Gecewich and Hedges were the only testifying individuals who spoke with Pratt about the complaint; only their testimony can support conclusions about Pratt's feelings, emotional state – and their conclusion was that Pratt felt harassed by his Workday profile information and photograph being posted.

[16] The decision attempts to make much of what Gecewich knew, how much he knew, and when he knew the extent of Ortiz' union activities. (ALJD 56, fn. 85) The precise extent of Gecewich's knowledge of Ortiz' union activities is not relevant to his investigation. What is important is that he was *aware* of the union activities and deliberately circumscribed and limited his investigation to avoid delving into any union activities.

obtaining facts. He first interviewed Ortiz, whom Pratt identified as the person who posted the Workday profiles on Facebook. Ortiz admitted to the Facebook post, but refused to identify where he got the Workday profiles other than saying he received it by text. Gecewich's investigation then required him to look for the other employee or employees who took the Workday information because Ortiz did not. Once Gecewich obtained information from Workday on which people accessed the Pratt and Ives information, the investigation then required him to interview Moran. This is a progression that is natural in any investigation. As facts develop, investigations can expand because new issues are raised, or additional misconduct is identified, or it can expand because additional employees are identified as being involved in the misconduct, which is what occurred here.

Finally, contrary to the ALJ's assertion, the investigation conducted by Gecewich was objective and adequate. (ALJD 69:29-31) He focused on the complaints of harassment and Workday misuse; interviewed witnesses as he learned about them; and relied upon objective information (Workday access logs) to identify the wrongdoers.

None of the case law relied upon by the ALJ supports the suggestion that the investigation was not appropriate and thorough. The ALJ misplaces reliance on *St. Paul Park Refining Company*, 366 NLRB No. 83 (2018). In *St. Paul*, a bargaining unit employee was told to perform a new procedure that involved injecting heated hydrochloric acid cylinders into a machine. *Id.* at slip op. at 6-7. The employee repeatedly expressed his concerns about the safety of this new procedure to his fellow bargaining unit employees and supervisors. *Id.* The supervisors and others suggested additional, new safety procedures but the complaining employee remained unsatisfied. Finally, the employee tried to initiate a safety stop under the CBA. *Id.* At this point, the supervisor sent the employee home. *Id.* During the investigation that followed, the HR personnel *only* interviewed two supervisors and decided not to interview any of the complainant's bargaining unit employees who were identified as witnesses and participants in the events surrounding the procedure and attempted safety stop. *Id.* at 8-9, 15-16. The failure to interview any bargaining unit employee witnesses was found to be an "inadequate

investigation" which was "designed simply to substantiate its supervisors' versions of what occurred and justify their sending" the employee home. *Id.* at 16.

No such facts are presented here. The complaining employee, the poster and the source of the material posted were all interviewed; none were omitted. Gecewich did not rely on any supervisor or managerial report or directive. *St. Paul Park* is inapposite, and Gecewich's investigation was adequate and objective.[17] As case law makes clear if "the ALJ is unabashedly taking on the company's business judgment chair – and that has been repeatedly held to be improper." *Cellco*, 892 F.3d at 1262.

c. The ALJ failed to apply her cited case law on disparate treatment

The proper analysis for pretext and disparate treatment is set forth and applied in *Electrolux Home Products, Inc.* 368 NLRB No. 34 (Aug. 2, 2019). Although *Electrolux* is cited by the ALJ (ALJD 68:1), she fails to abide by its mandate. In *Electrolux*, the GC attempted to show pretext by establishing that other insubordinate employees were disciplined more leniently. That evidence was not sufficient to establish that the employee's union activity was the motivating factor for her discharge. *Id.* at 3. "[W]hen the Respondent's stated reasons for its decision are found to be pretextual – that is, either false or not in fact relied upon – discriminatory motive *may* be inferred, but such an inference is not compelled." *Id.* (emphasis in original). The record and circumstances must be examined and the surrounding facts must tend to reinforce the pretext for a determination of motivating factor, and no such determination was made in *Electrolux*. *Id.*

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[17] The ALJ's decision contains numerous nits about questions she believes witnesses should have been asked about their Workday use (including bystander Kostich) and the general conduct of the investigation. When the other employees were not identified as potential wrongdoers, it would be illogical to pursue such questions (particularly as Kositch was aware of the inappropriate uses of Workday). Regardless, as even *St. Paul Park Place* makes plain, an employee is only entitled to an *adequate* investigation – not a textbook or perfect investigation. Where, like here, all relevant witnesses were interviewed and the scope of the investigation was tailored to the complaint and wrongful conduct in the workplace, it was more than adequate.

Here, the ALJ found "the credited evidence shows that Respondent terminated Ortiz for lying during an investigation." (ALJD 67:8-9) The comparator case described by investigator Gecewich was a vice president who was terminated after an investigation in which he lied about using a company vehicle, drugs and alcohol found in the vehicle and an improper co-worker relationship. (ALJD 62, fn. 100) Gecewich testified that the vice president was terminated "only for *lying during the investigation*, not for the alleged acts." (*Id.*) (italics added) While the ALJ attempts to quibble that decision maker Graminger's testimony did not provide the facts of this comparator case from Gecewich, it wholly ignores the fact that Graminger then obtained *additional confirmation of similar cases* from his direct report Hochholdinger who told him there have been similar cases where employees were terminated for lying during an investigation and were terminated according to the personnel policy. (ALJD 62:21-24)

The ALJ's finding of anti-union animus is simply speculation. It is undisputed that Gecewich and Graminger were both independent actors. They were not being controlled, led or driven by Hedges[18] or Toledano. Hedges' only involvement was (1) to refer the complaint to ER (and then Gecewich made his own evaluation and proceeded to investigate accordingly) and (2) *after* the investigation was concluded he identified a director-level decision maker (Graminger). As for Toledano, there is no nexus whatsoever between her and Graminger. And the suggested connection with Gecewich (by using her name in an email to Nanda) was debunked by the actual testimony and Gecewich's notes that showed Toledano simply had no involvement whatsoever in the investigation.[19]

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[18] The ALJ's attempt to create an inference that Hedges actually caused Pratt's complaint to be investigated and that Hedges and/or Tesla determined the result of the investigation (ALJD 69:29-30), is contradicted by other findings in the record. Hedges was part of HR, not ER which is the division responsible for investigation. (ALJD 5:2-3, 54:30-33). And Hedges was not a decisionmaker (ALJD 61:7-9)

[19] The ALJ's suggests that Gecewich was not credible because in his attempt to proceed expeditiously, he held the specter of Toledano monitoring the investigation as a ruse to get Nanda to obtain the employee access logs from Workday. (ALJD 58, fn. 90) When Gecewich testified these statements were untrue and without any basis, the ALJ simply decides that this raises a "red flag" as to his investigation methods. (*Id.*) As *Cellco* makes plain, this is an improper exercise of the ALJ's "business judgment." The ALJ then discredits Toledano's testimony because she finds it "incredulous" that Toledano was not monitoring the investigation,

Based on the facts as found by the ALJ, *Electrolux* governs, and no pretext or animus can be demonstrated on this record.

D. Assuming, *Arguendo,* The General Counsel Met The *Prima Facie* Elements, Tesla Demonstrated A Legitimate Business Justification Under *Wright Line*

1. Lying During an Investigation is a Legitimate Basis for Termination

Only "if the General Counsel makes a showing that a *prima facie* showing that protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the 'same action would have taken place even in the absence of the protected conduct.'" *NLRB v. Alan Motor Lines Inc.,* 937 F.2d 887, 889 (3d Cir. 1991) (quoting *Wright Line,* 251 NLRB 1083, 20-21 (1980)); *accord D & D Distrib. Co. v. NLRB,* 801 F.2d 636, 642 (3d Cir. 1986) (citing *NLRB v. Transportation Mgmt.,* 462 U.S. 393, 401-02 (1983)). *Wright Line* is designed to preserve an employer's long recognized general freedom to discharge an employee "for a good reason, a poor reason, or no reason at all, so long as the terms of the [Act] are not violated." *Meyers I* , 268 NLRB 493, 497 n.23 (1984).

It is undisputed that Ortiz was terminated for lying during an investigation. (ALJD 67:8-9). As *Cellco* makes plain, this is wholly appropriate. "It is clear that Verizon has made a legitimate business judgment—a not unusual one—that an employee lying during an investigation is a serious threat to management of the enterprise. The Board has no warrant to challenge that decision." *Cellco,* 892 F.3d at 1262.

2. The ALJ's Analysis on an Alleged "Lack Of A Work Rule" was Incorrect and Tainted Her Decision to Reject the Company's Legitimate Justification

Terminations for dishonest conduct reported by co-workers have been upheld without a written policy. *Cellco*, 892 F.3d at 1262. The suggestion that Ortiz could not be terminated for

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did not know the findings and result and all the details until after the investigation was completed. (ALJD 63:18-29). This is not a proper basis for a credibility determination. And even if it were, it does not permit the ALJ to *assume* facts that are in direct contradiction to the discredited testimony and have no record support whatsoever: "[b]ased on what is more likely than not, Toledano knew about the investigation as well as the reasons for Ortiz' termination." (ALJD 63:26-28) There is no record evidence whatsoever to support these assertions; the ALJ cannot manufacture facts by discrediting testimony.

lying during a workplace investigation *without* a written policy (ALJD 64:10-11) defies Board precedent because employers are not required to promulgate written rules. *The Boeing Company*, 365 NLRB No. 154, slip op. at 10 (2017) ("*Boeing*").

Even if a written rule were somehow required, Tesla's minimal written policies require employees to be "honest and accurate" when reporting information in order for Tesla to make responsible business decisions. (R-6) And its Anti-Handbook Handbook assumes its employees will do the "right thing," maintain "trust and responsibility," and behave "like the sort of person you want as your co-worker" and "[t]reat[ing] everyone like you want to be treated." (R-5)

Further, California law requires employees to follow lawful directions, such as Gecewich's admonition to be truthful that he gave at the beginning of each witness interview. Cal. Labor Code §2856. That law is not abated simply because Tesla did not specifically identify in writing that the common precept of do-not-lie applies to workplace investigations is not a basis to condone employee dishonesty.

3. Alternatively, if Tesla Violated the Act Under Existing Law, the Board Should Adopt a New Standard Regarding Employee Deceit During Internal Investigations

Section 7 of the Act guarantees that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The core rights protected by the Act are the first three listed in the statute: (1) to self-organize, (2) to form or join labor organizations and (3) to collectively bargain. These three "core" rights are those that correspond to the purpose of the Act: to encourage collective bargaining which in turn is fundamental to the resolution and prevention of labor strife and unrest. *See* 29 U.S.C. § 151.

If the ALJ's reasoning is followed, every employee now has carte blanche to lie during an investigation, merely by suggesting that it might in some way be related to protected concerted activity. The employee will enjoy blanket immunity from discipline or termination without any

regard or consideration given to the Company's obligation to maintain a safe, harassment-free workplace and to conduct workplace investigations to ensure its obligation is upheld.

This cannot be the rule. To provide necessary guidance to those governed by the Act, the Board should build upon its precedent in *Fresenius* to establish a bright line rule that appropriately limits the circumstances under which an employee can choose to be dishonest during a workplace investigation to "core" Section 7 activities. These are clearly delineated in the Act, and this will strike the appropriate balance between employees' right to form and join unions and to collectively bargain while ensuring that the Company will be able to investigate workplace disciplinary issues and thus maintain a harassment-free workplace.

Workplace investigations would tolerate employee untruths *only* if the questions being posed are directed at and go to "core" Section 7 activities. That is, the questions must seek to probe and tease out the what "core" activities are being undertaken, the persons involved in those "core" activities, and the motivation for the "core" activities. If the questions are not seeking information about forming unions, joining unions or collective bargaining, then no "core" activities are involved, and honesty is expected from employees.

Here, the bright line test would not shield Ortiz's lies because he was not engaged in any "core" activities. This is not a case about an employee trying to get other employees to sign union authorization cards and then lying about those efforts. This is a case involving one employee (Moran) who physically hacked the Company's HR system to obtain information on other employees and then gave the stolen information to another employee (Ortiz) who (unbeknownst to the first employee) posted the stolen information on Facebook and then lied about how he obtained the information during the investigation. Neither the data theft nor the lies about who took the data should be tolerated. The Board should not condone employees lying under these circumstances because no "core" Section 7 activities are involved and none of this conduct is in any way related to the purposes of the Act. Lying about stolen company information is not an effort to join or form a union, nor is it part of any collective bargaining

efforts. It is wrongful workplace conduct that the Company is entitled to investigate and impose appropriate discipline.

E. Tesla Lawfully Disciplined Moran For Misappropriating Workday Information

1. General Counsel Never Proved the Anti-Union Animus Element

Tschiggfire Properties again demonstrates that the GC's burden was not met with the ALJ's reliance on an assertion that "Respondent violated the Act numerous times" (ALJD 70:32-33) and the incorrect supposition that Gecewich "create[d] a new Workday rule." (ALJD 70:39-41) because the burden is not met simply "by producing *any* evidence of the employer's animus or hostility" but requires a nexus with the employee. There is no evidence that Gecewich harbored any anti-union animus or had any feelings about a union at Tesla. Likewise, there is no evidence that his decision to proceed with an investigation was influenced by or made at the direction of anyone else. (Tr. 2244:3-6, 12-19) The decision maker for Moran was similarly disinterested.

Moreover, the evidence credited by the ALJ establishes that Moran did not suffer for any union-related activities. For example, within a few months after his Medium article and his delivery of an employee petition to Hedges, as Moran testified, he received a job promotion and an increase in pay. (Tr. 748:3-16, 750:7-15) And even *after* his discipline, Moran testified he received a "4" on his performance review, and drew a $4,000.00 bonus for his high rating. (Tr. 752:12-754:4) And he has continued to receive even higher performance bonuses. (*Id.*) Similarly, if a broader spectrum approach is taken, Galescu and Branton Philips (Philips) both engaged in such pro-union activities (including testimony before the California legislature) and yet both remain employed by Tesla. (Tr. 379:11-14, 831:16-24)

Even if there were any evidence that the investigation was a pretext (it was not), it does not warrant an inference that the discipline was motivated by Moran's union activities. Here there is no evidence of anti-union animus and without animus there is no discriminatory intent;

more is required by *Tschiggfire Properties*. *See Electrolux*, 368 NLRB, slip op. at 3 (even if pretext may be inferred, a motive of discriminatory intent is not compelled).

2. Misusing and Misappropriating Workday Information was Not Protected Concerted Activity

Objectively, there was no action or activity that Moran and Ortiz undertook together because (1) Moran was not asked to provide Workday profiles with photos and (2) Moran did not know what Ortiz was going to do with this data. Thus, there was no protected concerted activity. And even with time for a post-hoc rationale, Moran could not put forward any reason or explanation for his provision of the Workday profile information. During the investigation, Gecewich tried to understand *why* Moran took the screenshots, but even when asked twice, Moran could not come up with a response for Gecewich other than reaffirming that he took them. (Tr. 794:2-795:14, 2288:6-10)

Moran's conduct is something he undertook himself, and for which he can provide no explanation other than admitting he did it. The ALJ's citation to *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 3 (2019) is on point here. In *Quicken Loans*, an employee's angry gripe about a customer call in the men's room with another employee was (1) not concerted action and (2) not for mutual aid and protection. *Id.* These findings were made because there was no involvement with the other banker in the restroom and the Board did not make a finding that mortgage bankers generally had pre-existing complaints about customer calls. *Id.* Like *Quicken Loans*, the record evidence, as credited by the ALJ here, cannot support a finding of protected concerted activity.

Even assuming that Moran (and Ortiz's) conduct is found to be "concerted" and for their "mutual aid and protection," their actions undoubtedly placed them outside the protection of Section 7. Even if "an activity is concerted . . . [it] does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems*, 465 U.S. 822, 837 (1984). Although the Board recognizes that there must be some leeway for impulsive behavior, concerted activity may nonetheless lose the Act's protection under certain circumstances. *See*

American Steel Erectors, 339 NLRB 1315, 1316 (2003). It is well established that one of the ways employees can lose that protection is to improperly access employer files and records. "[A]n employer, *regardless of whether it has a written rule*, has a right to expect its employees not go into its files and take its business records for whatever purpose they wish, and it is not unreasonable for an employer to consider such conduct as justifying discipline." *Roadway Express, Inc.*, 271 NLRB 1238, 1239 (1984) (emphasis added). Surreptitiously obtaining access to business records "is not protected under the Act." *Id.* Employees who obtained and distributed copies of *other* employees' performance reviews also lost the protection of the act because the reviews were clandestinely copied. *See, e.g.*, *Bullock's*, 251 NLRB 425, 426 (1990) (employees did not have access to other employees' performance reviews).

The same principles are recognized in *Ridgeley Manufacturing Company*, which is cited in *Roadway Express* (and *Roadway Express* was cited favorably by the ALJ). (ALJD 66:32-34) The employee in *Ridgeley* was free to memorize employee names from time cards displayed openly to all workers but was not free to surreptitiously obtain the same information from private or confidential business records. *Ridgely Manufacturing Company*, 207 NLRB 193, 196-97 (1973). The ALJ incorrectly suggests that *Ridgley* supports her assertion that there must be a violation of a written rule about accessing Workday. (ALJD 66:30-34) *Ridgley* contains no such language, and Board precedent, such as *Roadway Express* is expressly to the contrary. Nor do any of the cited cases support the ALJ's suggestion that the Workday information taken by Moran was not confidential, internal Company information. *Id.* This is further clarified by case law which confirms that the *method* by which an employee obtains the business records or business information is also a critical part of the analysis to determine if the information accessed or taken was confidential, business information or records. *See Roadway Express, Inc.*, 271 NLRB at 1239. It is not sufficient, as the ALJ suggests, to determine that some information may be or was potentially available from other sources, as was the case in *Ridgeley Manufacturing*. (ALJD 60:23-27)

The ALJ's unsupported conclusion that information contained in Workday could not be proprietary and Tesla could have no interest in the information because "employees can take a photo of their own badge and post it elsewhere" has no applicability here. (*Id.*) The issue is not what Ortiz or Moran did with their *own* Workday photograph, but that Moran accessed an internal HR system, other employees' photographs and business title information that could not be validly obtained by Moran via Workday and he had to employ a physical hack (a screenshot) to obtain that information. Whether the same information might be available from other sources without improperly accessing and hacking the information from Workday is irrelevant, because it is undisputed that the *method* by which Moran took the information is via a hack and without the permission of Ives or Pratt. (Tr. 763:14-18) The same reasoning applies to refute the ALJ's suggestion that the Workday profile information was available on employee badges (ALJD 60:23-28) because again it wholly ignores the fact that Moran had no access to Pratt's or Ives' Workday badge and that is not the *method* by which Moran wrongfully obtained the information.

3. Tesla had a Legitimate Business Justification – Misuse of Company Information

As detailed above, the Board recognizes that employers have a legitimate business interest in investigating facially valid complaints of employee misconduct, and that is precisely what Tesla did here. The ALJ's bald and unsupported assertion that "[a]ll of Gecewich's questions were designed to elicit information from Ortiz and Moran about their protected concerted activity and their union organizing activities" has no factual basis, as Moran's testimony in conjunction with Gecewich's notes demonstrate. (ALJD 71:28-30)

Gecewich specified at the beginning of his interview that he was going to ask Moran questions about Workday; that is exactly what he did. (Tr. 728:9-12, 731-732) Moran's own testimony confirms that Gecewich did *not* ask him any questions about his involvement with the union or any union related activities. Therefore, there was no interrogation. *See, e.g., Naomi Knitting Plant*, 328 NLRB 1279, 1279-1280 (1999). Gecewich's questions were all based on

Moran's use, accessing and removal of data from Workday; none of these questions related any purported protected conduct – because there was none.

Even if Moran's conduct were arguably protected, Gecewich would still have the right to ask questions about harassing behavior, even if it included protected concerted activity. *See Fresh & Easy*, 361 NLRB at 158-59 (during investigation, it was found permissible to ask employee why she felt she had to get her co-workers to sign her sexual harassment complaint even though this was found to be protected concerted activity. Questioning is also authorized when it is "appropriately circumscribed . . . to avoid prying into the employee's union views." *Id.* at 159, n.27 (citing *Bridgestone Firestone South Carolina*, 350 NLRB at 528-29). Just like in *Fresh & Easy* and *Bridgestone Firestone*, Gecewich's questioning of Moran was limited to understanding how Moran accessed Workday, Moran's understanding that Workday was an internal system and that information about other employees in Workday was not for external use, Moran's understanding that accessing or providing Workday information to sources outside of Tesla was not authorized, what data Moran removed from Workday and how he removed that data. None of these questions probed the relationship that any of these areas of inquiry may have had to union activities. Therefore, there was no interrogation.

a. Moran knew Workday was for internal use only

This is further confirmed by Moran's own testimony which implicitly confirmed that he engaged in misconduct when he took screenshots of other employees' Workday profiles. The Workday system was described as "the employee like human resources system." (ALJD 5:11-17; Tr. 1132:6-7) Workday houses Tesla's personnel files and policies. (ALJD 5:11-17) Moran affirmatively testified that he did know that Workday was an *internal* system for *internal use*. (Tr. 762:24-763:1). And he readily acknowledged that Workday data *concerning other employees* could not be shared externally and that "outside sources" should never be provided access to Tesla's internal Workday system. (Tr. 762:24-763:6, 2278:19-2279:17; GC-67) He

further acknowledged that when he took "a screenshot of the information" and "passed it on to Ortiz," he was "not limiting [his] [] use of Workday to internal use."[20] (Tr. 763:2-6)

Moran's undisputed conduct, analyzed by all the cited case law above, loses any protection it may have had under the Act because of the type of data, the means by which Moran swiped the data, and Moran's own admission that he was not authorized to take the data. Moran improperly and surreptitiously accessed and took Tesla's internal, confidential records.

Next, Moran's method of obtaining the internal Workday information was improper. The facts here are no different than those in *Roadway Express, Inc.* except that instead of surreptitiously photocopying the information from the internal HR system Workday, Moran employed a modern physical hack of Tesla's Workday system. The Workday application did not allow Moran to email or text the employee's picture and title from Workday. Instead, while the information from the Workday application was displayed on his smartphone, Moran used his phone camera to take a picture of the Workday information (a screenshot) and then texted each of these screenshots of three other employees' Workday profiles to Ortiz. (ALJD 52:33-34; GC-64, p. 2) Moran's hack of the Workday system to improperly obtain information was aggravated by giving the data to Ortiz when he had no idea what Ortiz would do with it data. (Tr. 766:2-7)

Therefore, under *Roadway Express*, *Ridgeley* and their progeny, Moran lost any protection under the Act when he accessed internal company data that pertained to other employees and because the method he used to access and extract that data (which the system did not permit) was a physical hack of Tesla's internal systems. Any considerations put forward by the ALJ to the contrary (ALJD 66:23-25, 29-30) fly in the face of logic and the credited testimony and should be disregarded.

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[20] The ALJ's purported finding that there were no limitations placed on Workday data relied upon the testimony of Phillips, Galescu and Ortiz (ALJD 52, fn. 76) and should be rejected because it improperly disregards Moran's credited testimony that he knew there were limitations and this was Tesla, internal data. (Tr. 762:24-763:6, 2278:19-2279:17; GC-67) It also pointedly ignores Ortiz's contrary testimony that he understood that Tesla internal information should not be photographed and posted and that he knew an employee was terminated for photographing Tesla information inside the factory and posting it. (Tr. 522:13-25).

4. The ALJ's Analysis Based on an Alleged "Lack of a Work Rule" was Incorrect and Tainted Her Decision to Reject Tesla's Legitimate Justification

The ALJ attempts to *both* rely *upon* a Workday rule or policy and to rely upon the *lack* of a specific Workday rule or policy to suggest that Moran's conduct was protected, when she states "Moran did not lose the protection of the Act for violating a nonexistent rule." (ALJD 66:34) Any attempt to fit this into a requirement for a policy or a policy driven decision has no basis in the record or the formal papers.[21]

a. Tesla has no obligation to promulgate rules under *Boeing*

The ALJ's competing propositions – that a rule is both required and is non-existent – is contrary to established Board precedent because the Board acknowledges that employers have no legal obligation to ever publish employee policies in the first instance. *Boeing*, 365 NLRB No. 154, slip op. at 10. Tesla had no obligation to publish any specific rules regarding Workday to enforce what the software itself prevents and common precepts mandate. As discussed *supra*, no written rule or policy is required to show that employees lose the protection of the Act when they improperly access internal company files, confidential company information or information that a company maintains as confidential.

b. Nonetheless Tesla's workplace policies did contain such prohibitions

Even if the supposition that a rule was somehow promulgated had any merit, it ignores the testimony and admitted exhibits with respect to Tesla's deliberately limited written policies. An overarching feature of Tesla's unique workplace approach is a deliberate limitation on written policies expressed in its Anti-Handbook Handbook: "If you're looking for a traditional employee handbook filled with policies and rules you won't find one. . . . . That's not us." (R-5) The reason for this is that Tesla is "different and we like it that way. Being different allows us to do what no one else is doing; to do what others tell us is impossible." (*Id.*) Employment at

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[21] A challenged policy is subject to different criteria and if found to suppress Section 7 rights, it may be modified or stricken. *See, e.g., North West Rural Electric Cooperative*, 366 NLRB No. 132 (2018) (written Facebook policies stricken because they prevented electric lineman from posting about safety issues). *Id.*, slip. op. at 1

Tesla is based on a worker meeting a few general "high standards," "behaving like the sort of person you want as your co-worker" and "[t]reat[ing] everyone like you want to be treated." (*Id.*) Tesla operates on the continuing assumption that its employees will do the "right thing" even though some people have violated that trust or ignored their responsibilities. (*Id.*) If that happens, Tesla does not change its approach or lower its expectations, but consistent with the above precepts, Tesla regularly terminates associates who do not live up to its high expectations—even though they may not be written down or codified in work rules. (*Id.*)

In evaluating workplace rules, the Board must give rules a reasonable reading and "must not presume improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). When a policy was republished to stress that employees should treat each other with dignity and respect, the reiteration of the policy was not the Company "promulgating a new rule in response to union activity that employees would reasonably construe as restricting their Section 7 rights." *Care One at Madison Avenue LLC*, 361 NLRB 1462, 1466 (2014) (Johnson, dissenting in part). Instead, in *Care One*, the policy was re-issued and attached to a memorandum explaining it was being provided in response to reports of threats of violence. *Id.* The memorandum did no more than remind employees of their obligations under the policy. *Id.* at 1467.

The "Workday rule" that the ALJ conjures up, is a statement reminding Moran of his obligations (of which he testified he was aware) that Workday should only be used for "legitimate and official business purposes." (ALJD 63:35-39) This at best is simply a succinct restatement of how Tesla's internal personnel files of *other* employees are to be treated, which reflects both Moran's understanding and Tesla's written policies, such as the Anti-Handbook Handbook. (R-4) It reflects existing rules and basic precepts in the workplace; not a rule that was "created" or "promulgated" – let alone a rule whose purpose is to suppress protected concerted activity. Notably, there is no discussion in the decision (because there could not be) on how preventing employees from removing data from Workday for non-business purposes is in any way related to protected concerted activity.

Furthermore, whether or not Moran was able to point to any specific written policy, his undisputed testimony makes plain that *he* understood that Workday information was confidential Company information only appropriate for internal use (other than what he chose to with his *own* employee data) and that the data of *other employees* should not be shared externally. Therefore, there were real and not "non-existent" rules of which Moran was aware and he was also aware and admitted his conduct violated those rules when he texted Workday profiles of three other employees to Ortiz. The ALJ's attempts to fit these facts into a framework requiring a written policy or policy-driven decision are wholly unsupported by the record.

VII. LIPSON DID NOT INTERROGATE ORTIZ AND GALESCU ON MAY 24 IN VIOLATION OF SECTION 8(A)(1)

A. ALJ's Key Findings And Summary Of Tesla's Exceptions

The ALJ found that then HR Partner Liza Lipson (Lipson) interrogated Galescu and Ortiz on May 24 under the totality of the circumstances test in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub. nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). (ALJD 31:45-32:4) Tesla excepts to the ALJ's failure to consider that pursuant to Board precedent, employers like Tesla may question employees as part of a legitimate investigation even if the conduct being investigated took part during the employees' exercise of Section 7 rights. *Fresh & Easy*, 361 NLRB at 158. Tesla also excepts to the ALJ's erroneous analysis regarding the factors set forth in *Rossmore House*, including consideration of factors not identified in *Rossmore House*. (ALJD 31:8-32:4) [Exception Nos. 1, 10, 12-13, 45, 122-139]]

B. Operative Facts

On April 4, Galescu and Ortiz sent an email to several Tesla supervisors requesting Cal/OSHA safety logs (Form 300) and summaries (Form 300A) pursuant to the California Code of Regulations. (ALJD 27:25-27) The Cal/OSHA safety logs contain personally identifiable information of employees. (ALJD 27:45-28:3, 28, fn. 46) Tesla has an obligation under federal

and state law to maintain the confidentiality of employee medical information.[22] Under Cal. Code Regs. Title 8, § 14300.35, there is a narrow exception to this obligation, since an employer has to give access to certain injury and illness records to "employees, former employees, their personal representatives, and their authorized employee representatives." A "personal representative" is the "legal representative of a deceased or legally incapacitated employee or former employee" or a person the employee or former employee "designates as such, in writing." An "authorized employee representative" is an "authorized collective bargaining agent of employees."[23] The purpose of the regulations is to allow employee involvement and access, not to allow broad publication of confidential employee health information. Cal. Code Regs. Title 8 §14300.35.

From April 5 to April 21, HR Business Partner David Zweig and then Director of Global Environmental Health and Safety Seth Woody corresponded with Galescu and Ortiz about their request, Tesla's concerns about the confidentiality of employees' medical information, and Tesla's efforts "to protect the privacy and confidential health information of injured and ill employees." (ALJD 27:25-28:36; GC-17-001, GC-18, GC-21, GC-23) Ultimately, all requested information was provided to Ortiz and Galescu.[24] (ALJD 28:20-22) During their email exchange, Tesla reiterated to Galescu and Ortiz that pursuant to Cal. Code Regs. Title 8, § 14300.35, the information could be shared with employees, former employees, and their

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[22] *See e.g.,* Cal. Code Regs. Title 8 § 14300.35; *see also* Cal. Civ. Code § 1798.82; Cal. Civ. Code § 56.20; Cal. Const., art. 1, § 1; *County of Los Angeles v. Los Angeles County Employee Relations Com.*, 56 Cal. 4th 905, 927 (2013) (California Supreme Court recognized employee privacy interests include "interests in precluding the dissemination or misuse of sensitive and confidential information.").

[23] Federal OSHA regulations provide the same. 29 CFR 1904.35(b)(2).

[24] The top of the OSHA 300 form, approved by U.S. Department of Labor and provided to Ortiz and Galescu, states: "ATTENTION: This form contains information relating to employee health and *must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes*." (GC-18) (italics added) *See also* the Preamble to the Occupational Injury and Illness Recording and Reporting Requirements, the Recordkeeping rule, 66 FR 5916, 29 CFR Parts 1904 and 1952, https://www.osha.gov/recordkeeping/faqs/1904_35_preamble.html

authorized representatives. (ALJD 28:1-25; GC-23) Yet, neither Galescu nor Ortiz designated a representative to receive the data during this exchange. (ALJD 27:25-28:36)

In May 2017, Hochholdinger sent out an email to all production associates entitled "Update on Safety Initiatives and Progress." His email stated the following:

> One of our employees has requested logs of all our OSHA 300 forms for California injury and illness recordkeeping. These documents which are maintained by all companies, outline recordable incidents and have occurred at our Fremont facility between 2012 and 2017, including employee names and the nature of the incident. It is an employee's right to request these forms and we are required by law to provide them in their entirety.
>
> *We wanted to provide advance notice to employees, as we believe this request is intended to ultimately make this information public despite our efforts to protect your privacy.* …

(ALJD 28:26-36; R-2) (emphasis added)

On May 24, Tesla employees distributed a leaflet at Tesla's Fremont facility entitled "The Truth about Injuries at Tesla." That leaflet references that employees recently requested copies of Cal/OSHA logs and summaries which they shared with a California non-profit organization. (ALJD 29:1-5) The leaflet also references a report at www.fairfutureattesla.org/injuryreport, called "Analysis of Tesla Injury Rates: 2014-2017" published by an organization called Worksafe. (ALJD 29:1-5; R-3, p. 4, Exhibit D). The report names specific employees and specific injuries from the Cal/OSHA 300 logs and summaries. (R-3, Exhibit D, p. 7-8)

On May 24, Hedges asked Lipson to meet with Ortiz and Galescu to discuss Tesla's "concern that the Cal/OSHA logs had been shared with individuals outside Tesla." (ALJD 28:40-41) Later that day, Lipson and then Senior Environmental Health and Safety Specialist Lauren Holcomb (Holcomb) met separately with Ortiz and then with Galescu in conference rooms within the middle of the facility. (ALJD 29:5-30:5) Lipson was an HR Partner who regularly communicated with production employees, including Ortiz and Galescu (Tr. 2349:7-18, 2372:10-17) Holcomb's sole role at the meeting was to act as a witness and to take notes. (ALJD 29, fn. 49) At the time of the meeting, both Ortiz and Galescu publicly supported the union. (ALJD 8:38-40, 21:5-6) However, neither Ortiz nor Galescu had informed Tesla that

they had designated someone as their "representative" pursuant to Cal/OSHA regulations. (ALJD 29:5-30:15) In the meetings, Lipson asked Ortiz and Galescu what they did with the Cal/OSHA safety logs, whether anyone else had done anything with them, and if anyone was able to access the logs outside of Tesla and/or Tesla's system. (ALJD 29:5-30:5) Ortiz said he had not shared the information with anyone else and that he did not know if anyone else had done anything with them. (ALJD 29:5-20) Galescu declined to answer and stated that he would not answer any questions without "his representative." (ALJD 29:20-30:5) Lipson asked who his representative was, to which Galescu responded that it was someone outside the room. (ALJD 30:3-5) Lipson did not ask Ortiz or Galescu about unions, safety conditions, and/or leafletting during the meeting and neither Ortiz nor Galescu responded by raising unions, safety conditions, and/or leafletting during the meetings. (Tr. 611:9-16, 2354:24-2355:3; GC-91) Following the meeting, Galescu sent Lipson an email stating that it was "nice" to meet with her. (GC-48) Approximately two weeks later, on June 6, Galescu and Ortiz informed Tesla for the first time that their "representatives" were Worksafe and the UAW. (ALJD 30:6-9, 14-15)

C. Legal Analysis

1. Lipson Conducted a Lawful Workplace Investigation, Asking Targeted Questions of Ortiz and Galescu in Response to a Potential Breach of Employees' Confidential Medical Information

Similar to *Fresh & Easy* and *Bridgestone Firestone*, *supra,* Lipson was investigating a legitimate concern about the potential disclosure of private employee medical information. Tesla has an obligation under federal and state law to maintain the confidentiality of employee medical information and investigate disclosure of said information to third parties. At the time of the May 24 meetings, it was not evident that there was anyone who fit the definition of "personal representative" or "authorized employee representative" who would have been permitted to have access to the Cal/OSHA 300 logs and summaries – the Union had not actually been certified, and Galescu did not share the names of his and Ortiz' "personal representatives" until after the May meetings. Thus, when Tesla became aware that an outside organization had published information from the Cal/OSHA logs and that said information was in the public domain, it had a

statutory obligation to determine whether there had been a breach of employees' confidential medical information and whether it needed to take additional steps to protect employee privacy. Accordingly, Lipson's questions focused on what Ortiz and Galescu did with the Cal/OSHA safety logs and if anyone was able to access the logs outside of Tesla and/or Tesla's system. None of these questions probed the relationship that any of these areas of inquiry may have had to union activities.

2. The ALJ Misapplied *Rossmore House*

Although the ALJ accurately cited the Board's current standard for interrogation as set forth in *Rossmore House*, the ALJ misapplied the law and improperly substituted her business judgment for that of Tesla's. The meetings were conducted in a conference room in the middle of the facility by a front-line HR representative who regularly communicated with production employees. Despite Galescu and Ortiz being open and active union supporters, Lipson did not ask Ortiz or Galescu about unions, safety conditions, and/or leafletting during the meeting and neither Ortiz nor Galescu responded by raising unions, safety conditions, and/or leafletting during the meetings. Likewise, there were no threats associated with the questions asked by Lipson, nor were they asked in a hostile manner. Similarly, Ortiz testified that he did not understand the questions as relating to the Union. (Tr. 611:9-16) Rather, consistent with the purpose for the interview and Tesla's obligations under California privacy laws, the questions lawfully concerned whether the Cal/OSHA logs were provided to parties beyond those enumerated in the California Code of Regulations and whether Tesla needed to take additional steps to preserve employee medical information. Accordingly, based on the *Rossmore House* factors, there was no unlawful interrogation.

While the judge found that Lipson did not explain to Ortiz and Galescu the purpose of the meeting (ALJD 29, fn. 50), this was not a factor mentioned in *Rossmore House* and was inappropriately considered by the ALJ. *Trinity Services Group, Inc.*, 368 NLRB No. 115, fn. 8 (2019); *RHCG,* 365 NLRB No. 88, fn. 8 (2017) (Chairman Miscimarra, concurring); *Evenflow Transportation, Inc.*, 358 NLRB 695, 696 fn. 4 (2012) (Member Hayes, concurring), adopted by

reference 361 NLRB 1482 (2014). Even assuming, *arguendo,* the ALJ appropriately considered this, she overstated its significance and the thrust is still the same: Lipson was investigating concerns about the potential disclosure of employees' private medical information. Further, given the background concerning the meetings, including Hochholdinger's email to all production associates and the specific email exchanges between Tesla, Ortiz, and Galescu concerning the requests for the logs, the release of private employee medical information, and the Cal/OSHA regulations governing the sharing of said information, the questions did not restrain, coerce, or interfere with the employees' exercise of their protected rights under the Act. Accordingly, there was no unlawful interrogation and Paragraph 7(q) should be dismissed.

VIII. TESLA'S GENERAL ASSEMBLY (GA) TEAM WEAR POLICY DOES NOT VIOLATE SECTION 8(A)(1)

A. ALJ's Key Findings And Summary Of Tesla's Exceptions

The ALJ found that certain provisions of Tesla's GA Expectations are overbroad and facially invalid in violation of Section 8(a)(1). It reads as follows[25]:

> At Tesla, the people drive the culture. We must commit to high standards in Safety, People, Quality, Rate, and Cost. …
>
> 1. Safety. We want everyone to go home every day in the same condition they arrived. Safety is everyone's responsibility and it starts with you.
>
> …
>
> - ***Team Wear: It is mandatory that all Production Associates and Leads wear the assigned team wear.***
>   - ***On occasion, team wear may be substituted with all black clothing if approved by supervisor.***
>   - ***Alternative clothing must be mutilation free, work appropriate and pose no safety risks (no zippers, yoga pants, hoodies with hood up, etc.).*** . . . .

(ALJD 40: 25-35; GC 37-01) Tesla excepts on the grounds that employees in GA wore union stickers and union hats at work without issue, and thus, contrary to the ALJ's conclusion, neither *The Boeing Co.*, 365 NLRB No. 154 (2017), nor *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), have any application to the lawfulness of the GA Expectations. Tesla also excepts on the grounds that the GA Expectations lawfully address a special circumstance in the GA area of the

[25] The text portions that are challenged in Paragraph 7(l) appear below in boldfaced italics.

facility: Team Wear must be worn in order to (1) prevent mutilations while employees work in and around painted vehicles in GA and (2) to maintain visual management within GA. Alternatively, Tesla contends that the GA Team Wear requirement is a facially neutral rule that does not interfere with Section 7 rights covered by Category 1 under *Boeing*. [Exception Nos. 1, 4, 10, 12-17, 140-159]]

B. Operative Facts

Team Wear Policy Established in 2016: Tesla first rolled-out the Team Wear expectations in a document entitled "*General Assembly* [GA] Expectations" in in the Summer of 2016, well before the Union's organizing campaign. (Tr. 1379:11-21; R-17) (Emphasis added) Under the "Mutilation Protection" section of the expectations, it stated the following: "Team wear is *mandatory* for all team members and leads." (R-17) (Emphasis added) In October 2017, Tesla updated the GA Expectations and issued a revised version to all production associates that is at issue in Paragraph 7(l) and quoted above. [26] (Tr. 1386:14-1388:1; GC 37)

The GA Expectations for Team Wear are only applicable to that single department within the Fremont facility. (ALJD 40:24-35; Tr. 1369:13-1370:5) The GA department is relatively small with only 1,000-3,000 production associates (depending on time period) out of 12,000 employees, working in a 500 yard length area compared to the rest of the five million square foot facility. (ALJD 4:18-19, 7:5-7; Tr. 191, 1116) Production associates are overseen by team leads and quality inspectors[27] and supervised by production supervisors, production associate managers, and production managers. (Tr. 1399:7-1400:18) In GA, approximately 14

[26] In 2017, during a time of rapid operational growth and expansion, Tesla experienced significant backorders in Team Wear. (Tr. 1381:25-1382:14) As a result, Team Wear was not available in certain sizes and some associates did not have a sufficient number of Team Wear shirts to make it through the week. (*Id.*) Accordingly, on occasion, some supervisors and associate managers allowed associates to wear a plain black cotton t-shirt that was mutilation free in lieu of their assigned Team Wear. (Tr. 1384:16-20, 1403:13-24, 1411:15-25) In addition, on occasion, some supervisors allowed associates to cover up the logo/picture/emblem on a black cotton t-shirt with mutilation protective tape. (Tr. 2407:7-19, 2535:8-17) In both situations, the substituted clothing had to be approved by the supervisor and be mutilation free. (Tr. 1384:16-20, 1403:13-24, 1411:15-25, 2407:7-19, 2535:8-17)

[27] The GC concedes that team leads and quality inspectors are statutory employees.

supervisors and 71 team leads work per shift; there are two shifts per day. (ALJD 7:9-10; Tr. 1391:23-1392:6)

Union Insignia Displayed in GA: Despite the GA Expectations, employees in GA have always been allowed to wear UAW stickers, including the Union's "Fair Future for Tesla" emblem, on their clothing, including on their assigned GA Team Wear. (Tr. 204:14-205:2, 209:11-210:6, 260:12-15, 307:22-24, 308:21-23, 333:23-334:3, 759:12-13, 1388:16-1389:10, 1636:5-1637:6, 2408:18-2409:2, 2535:18-2536:7) As stickers do not pose mutilation risk or interfere with visual management within GA, they are not prohibited by the GA expectations. (Tr. 2408:18-21) Accordingly, there is no evidence of any manager or supervisor telling an employee in GA they could not display a union sticker on their clothing or that they would be sent home if they did so. (Tr. 204:14-205:2, 209:11-210:6, 260:12-15, 307:22-24, 308:21-23, 333:23-334:3, 759:12-13, 1388:16-1389:10, 1636:5-1637:6, 2408:18-2409:2, 2535:18-2536:7)

GA Associates In Constant Contact With Painted EVs: When the vehicle arrives in GA, the paint is not fully cured and 100% of the vehicle body is susceptible to mutilation. Thus, unlike the final vehicle that reaches a customer, only minimal touching and handling of the painted exterior is permissible without risk of mutilation. (ALJD 7:25-27, 7:37-38; Tr. 1347:17-22) In order to help prevention mutilations, all GA employees are required to wear proper mutilation protective gear. (ALJD 7:12-15; Tr. 1369:13-1370:20, 1373:5-8) Mutilation protection gear includes wearing ring covers, belt covers, and watch covers. (ALJD 7:18-20; Tr. 1374:20-25) It also includes Team Wear that has been issued and approved by Tesla. (ALJD 7:10-20; Tr. 1372:5-1373:4) For all production associates, the assigned Team Wear consists of a black cotton shirt with a Tesla-embroidered logo and black cotton pants that do not have buttons, rivets, or an exposed zipper. (ALJD 7:10-20; GC-37; Tr. 392:14-16, 1369:13-1370:20, 2398:24-2399:5, 2545:10-15, 2524:13-2525:1) For all team leads, assigned Team Wear is a red cotton shirt with a Tesla embroidered logo and the same black cotton pants. (ALJD 7:16-20; Tr. 1372:12-17) For all quality inspectors, the assigned Team Wear is a white cotton shirt with an embroidered logo and the same blank cotton pants. (ALJD 7:16-20; Tr. 1372:24-1373:1)

While the ALJ described GA Team Wear as just Tesla "shirts" and "pants" (ALJD 7:10-20), they are not. Rather, GA Team Wear is clothing that is safe and mutilation-compliant. (Tr. 1370:2-5, 1599:13-23) The ALJ credited Production Manager Mario Penera and Production Manager Kyle Martin's testimony that the Team Wear requirement limits the risk of mutilations to painted vehicles. They testified extensively about how all production employees in GA regularly come in contact and physically touch freshly painted vehicle bodies as part of their job duties and thus pose a significant risk of mutilation to the vehicles.[28] (ALJD 7:5-40; Tr. 1347:8-1348:8, 1351:19-1352:12, 1353:12-24, 1354:16-23, 1355:2-15, 1356:10-1357:19, 1358:1-13, 1358:17-1359:18, 1363:23-1365:9) Further, Penera described in painstaking detail exactly how GA employees install various components to the painted vehicle bodies and how workers come in physical contact with the vehicles as they are transported on moving conveyors in GA. They also testified that the assigned GA Team Wear is safe and mutilation compliant, meaning that it has been tested by Tesla's Team Wear department to come in contract with vehicles during manufacturing without causing a mutilation.

Increased Mutilations: In April 2017, Tesla experienced an unusually high number of seat mutilations in GA that was interrupting the flow of production and ultimately getting finished vehicles to customers. (Tr. 1600:4-14, 1601:1-9) As a result, Tesla began an "audit" in May 2017 to determine what the causes were. The audit reports show that individual associate managers and supervisors were tasked with conducting daily "audits" for Team Wear and mutilation protection in an attempt to reduce mutilations. (Tr. 1603:3-12, 1605:7-1608:3; 1608:9-1610:5, 1610:15-1611:3, 1621:25-1622:6; R-27) While it took months for a team of experts to figure out and reduce the number of mutilations, no one item or problem standing alone was ever identified as the sole or root cause, and there was not just one thing that needed to

[28] On the other hand, while various individuals outside of GA have occasion to visit GA as part of their job duties (e.g., material handlers deliver parts to GA), these individuals do not come in contact with the painted vehicle and thus pose no mutilation risk. (Tr. 1342:22-1343:8, 1378:12-1379:7, 1408:12-24)

corrected.[29] Instead, it was a series of attempted fixes and remedies, which included enforcement of the Team Wear requirement.[30] (Tr. 1603:3-12, 1605:7-1608:3; 1608:9-1610:5, 1610:15-1611:3, 1621:25-1622:6; R-27)

Team Wear Necessary for Visual Management: Penera and Martin also testified that the Team Wear requirement helps maintain visual management within GA. (ALJD 41:1-10; Tr. 1375:3-1376:12, 1377:11-1378:11, 1596:14-19, 1673:-1674:5) Again, only employees in GA are assigned mandatory Team Wear. Thus, Team Wear helps distinguish GA employees from thousands of other employees across other manufacturing departments and contractors, who walk through the general area, but who do not come into contact with painted vehicles. Moreover, within GA, employees are assigned specific Team Wear colors to further distinguish duties and roles: black, red, and white for production associates, team leads, and quality inspectors, thus assisting managers and supervisors with managing their respective teams. (ALJD 7:16-20; Tr. 1372:12-17, 1372:24-1373:1) Given that GA employees are all working in and around robots and heavy vehicles moving through a complicated conveyor system in a confined space within the facility, the Team Wear requirement allows managers and supervisors to safely and efficiently scan the various lines within GA (e.g., Trim 1-3, Chassis Line 1-3, End of Line) to determine if team members who have been trained and certified to work in and around vehicles are working in their approved locations. (Tr. 1375:3-1376:12, 1377:11-1378:11) This helps reduces safety hazards and quality issues. (*Id.*) The Team Wear requirement also assists non-managers and non-supervisors in GA safely and efficiently identify other GA employees who

[29] Individual associate managers and supervisors updating an excel spreadsheet tracker documenting the actions taken from June through September 2017. As the weekly audit summaries reflect, management took a number of actions to address the seat mutilations including enforcing the mandatory team wear requirement by counseling associates and even "dismissing" them (sending them home) for non-compliance); enforcing use of yoga mats at the door installation; periodically checking to ensure tools were not left on seats; and ensuring that the 5-seaters sat upright before employees left the line to prevent mutilations due to belt buckles. (Tr. 1622:13-1626:13; R-29) (R-30, TESLA-NLRB 001977) (R-31, TESLA-NLRB 001954) (R-31, TESLA-NLRB 001955)

[30] Despite making significant progress reducing (but not eliminating) the number of mutilations over the course of several months, ultimately management decided to order and use seat covers in June 2017 to further prevent mutilation. (Tr. 1655:8-1656:2)

may need assistance while working on vehicles transported on moving conveyors. (Tr. 1375:3-1376:12) For example, a production associate (in black Team Wear) can quickly identify a quality lead (in white Team Wear) for assistance with a manufacturing defect. (*Id.*)

On the other hand, if an associate is wearing a black UAW shirt or some other shirt with a logo, it is impossible to identify visually if that associate is a GA production associate, team lead or quality inspector, much less whether that individual even works in GA and is approved to be in and around vehicles and robots in GA. (Tr. 1674:6-11) Further, rather than mandate that every single employee within GA submit to a test by Tesla's Team Wear department to determine whether every article of clothing worn by every single GA employee is mutilation compliant on a daily basis – which would be unduly burdensome – the Team Wear requirement allows managers and supervisors to safely and efficiently scan their lines to confirm that all employees are wearing assigned GA Team Wear, and are thus mutilation compliant. [31]

C. Legal Analysis

1. The GA Expectations Do Not Prevent Employees from Wearing Union Insignia

Tesla did not interfere with employees' rights to display union insignia in GA. The undisputed evidence establishes that GA employees *openly and freely* wore union stickers and union hats at work, including the Union's "Fair Future for Tesla" emblem. GA Employees were simply not permitted to substitute UAW t-shirts with raised logos bearing the same "Fair Future

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[31] The ALJ failed to acknowledge, let alone addresses, any of the above referenced reasons for Tesla's GA Team Wear requirement in her decision. Instead, she inappropriately substituted her judgement for Tesla's and concluded that the black Team Wear was not "substantially different" from the black colored UAW shirts and implicitly suggested that the UAW shirts would not have interfered with visual management within GA. For purposes of visual management, whether they are "slightly" or "substantially" different misses the mark. The only commonality between the photos of the UAW shirts introduced into evidence and the black Team Wear assigned to production associates working GA is that they are black. Thus, there is no way to visually differentiate a GA production associate wearing a black UAW shirt from a GA team lead or GA quality inspector wearing a black UAW shirt. (Tr. 1674:6-11) Nor is there a way to visually differentiate a GA production associate wearing a black UAW shirt from a non-GA employee wearing a black UAW shirt walking on a pathway through GA (e.g., a material handler who may delivering a part to a line). Accordingly, the ALJ altogether failed to understand Tesla's underlying visual management rationale for the Team Wear requirement, much less analyze it in a coherent way. The ALJ's conclusions, therefore, must be rejected by the Board.

for Tesla" emblem for required Team Wear in GA. On the other hand, employees outside of GA, where there is arguably no risk of mutilation to painted vehicles or need for visual management, were free to wear UAW t-shirts and frequently did so. Accordingly, neither *Boeing* nor *Republic Aviation,* have any application to the lawfulness of the GA Expectations.

2. The Team Wear Policy is Lawful Under *Republic Aviation* Because "Special Circumstances" Prevail in GA that Justify the Team Wear

The Board with Supreme Court approval held that the wearing of union buttons or insignia is generally protected under Section 7 of the Act. *Republic Aviation,* 324 U.S. at 801-03. But the law is equally well settled that there is no absolute right to wear union insignia or other union attire in the workplace. *Id.* at 797-98; *see also United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). In general, this balancing of employee and employer rights involves application of the "special circumstances" principle. The "special circumstances" principle is designed "to balance the potentially conflicting interests of an employee's right to display union insignia and an employer's right to limit or prohibit such display." *Southern New England Telephone Co. v. NLRB*, 793 F.3d 93 (D.C. Cir. 2015). The Board has found special circumstances justifying the proscription of union insignia or apparel where, as here, their display "may jeopardize employee safety [or] damage machinery or products." *Komatsu America Corp.*, 342 NLRB 649, 650 (2004); *see also Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enf'd. *Communications Workers of America, Local 13000 v. NLRB*, 99 Fed.Appx. 233 (D.C. Cir. 2004).

The Board and the Courts have recognized that an employer can meet its burden of proving "special circumstances" by demonstrating a reasonable belief of harm – even in the absence of actual harm. *See e.g., Medco Health Solutions of Las Vegas v. AFL-CIO*, 701 F.3d 710 (D.C. Cir. 2012). In *Medco*, to encourage employee performance, Medco instituted a voluntary "WOW program," to recognize employee achievement. Some employees voiced displeasure with the program, including one who wore a shirt to work that read "I don't need a WOW to do my job." The DC Circuit held that Medco did not violate the NLRA by requiring

the employee to remove the shirt that mocked the WOW program. While the Union argued that Medco had not offered any evidence that the slogan "reasonably raised the genuine issue of harm to the customer relationship," the D.C. Circuit held that Medco need not show actual harm in order to satisfy the "special circumstances" analysis. Rather, the Court reasoned that Board precedent did not "require the employer to offer additional evidence beyond a relationship between its business and the banned message." Because Medco provided considerable evidence about the WOW program itself, the Court was able to draw reasonable inferences between the employer's asserted business justifications and the potential harm to customers, thus justifying the ban on the anti-wow shirt. *See also Southern New England Telephone Co. v. NLRB,* 793 F.3d 93 (D.C. Cir. 2015) ("*AT&T*") (employer lawfully prohibited offensive T-shirt because of potential harm to customer relations without evidence of actual damage).

3. Team Wear Prevents Mutilations While GA Employees Work In and Around Painted Vehicles and Maintains Visual Management in GA

The justifications for the rule are self-evident from the rule itself and can be gleaned from the particular work environment in GA. Indeed, it is beyond common sense that an automobile manufacturer has a strong business interest in preventing mutilations to freshly painted cars. *See e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (Supreme Court addressed punitive damages standard after jury awarded $4,000 in compensatory damages and $4 million in punitive damages based on BMW's failure to notify customers of repainting to cure predelivery damage to new cars); *Yates v. BMW of North America, Inc.*, 642 So.2d 937 (Ala. 1993) (presale repainting of new car diminished its value by 10 percent); *See also Bourgi v. West Covina Motors, Inc.*, 166 Cal.App.4th 1649 (2008) (new car purchaser alleged undisclosed presale repainting diminished vehicle's value by 20 percent); *Tina Nelson v. Ford Motor Co.,* Case No. 2:19-cv-02712 (W.D. Tenn. 2019) (class action complaint filed alleging paint defects); *Ponzio et al. v. Mercedes-Benz USA, LLC et al*, Case No. 1:2018cv12544 (D.N.J. 2018) (same). To that end, the first version of the "General Assembly Expectations" listed the Team Wear requirement under the "Mutilation Protection" section of the expectations. (R-17) When the "General

Assembly Expectations" were updated in 2017, Tesla again emphasized that the Team Wear requirement was intended to keep vehicles "mutilation free" and to improve the "Safety" component of Tesla's "Safety, People, Quality, Rate, and Cost" (SPQRC) metrics -i.e., meaning Tesla "want[ed] everyone [in GA] go home every day in the same condition they arrived." In addition to the text and history of the Team Wear requirement, Tesla provided substantial evidence about the business justifications: to reduce mutilation risk while employees work in and around painted vehicles in GA and to help maintain visual management within GA.

The GA Team Wear requirement is also narrowly tailored under *Republic Aviation.* Tesla did not interfere with employees' rights in this regard. As discussed above, GA employees wore union stickers and union hats at work, including the Union's "Fair Future for Tesla" emblem. Employees in GA were simply not permitted to substitute UAW t-shirts with raised logos bearing the same "Fair Future for Tesla" emblem for required Team Wear in GA. Thus, any adverse impact of Tesla's GA Team Wear requirement is comparatively slight and is outweighed by substantial and important justifications associated with the GA Team Wear requirement.

While the ALJ found that Tesla had not introduced sufficient evidence that the various UAW shirts worn by employees actually *caused* mutilations to painted vehicles or caused an injury/safety hazard to employees in GA warranting the GA Team Wear requirement,[32] such evidence is not required in order for the Board to conclude that the Team Wear requirement addresses a "special circumstance" in the GA area of the factory. *See e.g., Medco* and *AT&T*,

[32] While Tesla does not need to show that the UAW shirts actually caused damage to vehicles or injuries/safety hazards, the ALJ incorrectly stated that Martin, Penera, and other supervisors admitted that the UAW shirt (as reflected in photographs shown to them during the hearing) did not cause mutilations to vehicles. Rather, they all testified that they either did not have personal knowledge or had not conducted a mutilation test concerning the shirt portrayed in the photo. Likewise, the ALJ incorrectly stated that "no management witness could provide an example of a vehicle being damaged by shirts." (ALJD 42:2-5) This finding flies in the face of Martin's testimony, who provided numerous examples of non-Team Wear t-shirts damaging vehicles: "[s]ometimes T-shirts have, like, raised emblems on them or they have, like, a -- like the Gucci T-shirts, they have the gold emblem on them. If you're brushing up against the vehicle it can scratch the paint." (Tr. 1598:19-1599:2) And when asked to evaluate whether a particular non-team wear t-shirt would cause mutilations, he testified that he knows t-shirts with raised logos (e.g., Gucci t-shirts) caused mutilations and that he could not evaluate non-team wear without knowing the material of the logo. (Tr. 1648:4-15)

supra.[33] Here, like in *Medco* and *AT&T*, Tesla has shown that it could "reasonably believe" that the maintenance of the GA Team Wear requirement was necessary to protect its product and manage employees in GA. In short, given the straightforward evidence that Tesla introduced regarding the legitimate and substantial business justifications for the GA expectations and the circumstances under which GA employees interacted with robots and freshly painted vehicles that were not fully cured, the Board should find "special circumstances" are present here.

Take for example Tesla's mutilation audits conducted from April-August 2017. While the ALJ found that the "emails and audit reports do not indicate the relationship between seat mutilations and noncompliance with team wear" and thus the exhibits were not "probative" of Tesla's business justification for Team Wear requirement, (ALJD 41:65, 45:30-45) it is undisputed that Tesla discovered an increase in seat mutilations in April 2017 and thus Tesla began an audit in GA in May 2017 to determine what the causes were. While the audit reports do not necessarily prove causation between seat mutilations and noncompliance with Team Wear (only correlation), they do show Tesla rigorously enforced the Team Wear requirement in an

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[33] The ALJ mistakenly relied on *Boch Imports, Inc.*, 362 NLRB 706, 707-708 (2015) to support her findings. Quite apart from the incorrectness of that case (which Tesla asserts should have been analyzed under the principles offered by dissenting Board Member Johnson), a careful reading of this decision reveals that it is factually distinct from the instant case and does not support the ALJ's findings. In *Boch Imports, Inc.*, the Board found that a Honda dealership – not a manufacturer – had not justified maintenance of its dress code and hygiene policy that prohibited "employees who have contact with the public" from "wear[ing] pins, insignias, or other message clothing." The Honda dealership asserted that the policy was implemented "to prevent injury to employees and damage vehicles." While the ALJ found that "a pin could fall off an employee's uniform and possibly damage the engine, interior, or exterior of a vehicle on which the employee was working, or it could become a projectile and injure the employee," the Board overturned the ALJ and found that the policy was not narrowly tailored because "[a]s written it applied to employees who have contact with the public, *regardless whether they come into contact with Respondent's vehicles*." In fact, the policy applied to employees who typically did not have contact with vehicles, such as finance and administrative personnel. The Board also found that the handbook policy did not include any statement in the policy itself arguably linking the rule to the employer's "safety consideration" and that there was no evidence of "safety concerns" for public facing employees. Unlike *Boch Imports, Inc.*, Tesla's GA Team Wear requirement is narrowly tailored and only applies to GA employees who regularly come in contact and work on freshly painted vehicles where the paint is uncured and susceptible to mutilations. In addition, Tesla has offered compelling evidence concerning the business justifications for GA Team Wear requirement, and the various reiterations of the GA Assembly Expectations document emphasize the purpose behind the policy: to reduce mutilation risk and maintain visual management for employee safety.

attempt to reduce mutilations. The audit reports also demonstrate the complexities of the manufacturing process and just how difficult it is to determine what actually causes mutilations to vehicles. Thus, even if there is no finding of a simple causal connection (i.e., that only non-Team Wear caused the mutilations), the fact that it took a team of experts months to figure out and reduce the mutilations demonstrates how complex this process is. No one item or problem standing alone was ever identified as the sole or root cause, and there was not just one thing that needed to be revised or remedied to correct the seat mutilations absent placing seat covers on every single seat. Instead, it was a series of attempted fixes and remedies, which included strict enforcement of the Team Wear requirements, in order to reduce the number of mutilations. The ALJ is not free to substitute her judgment – compared to the body of experts working this problem – that there was no connection with non-compliance with the Team Wear requirement and the seat mutilations. As the undisputed testimony shows from both Martin and Penera, Team Wear helps *reduce* the risk of mutilation. (Tr. 1376:13-17, 1599:24-1600:3) Put another way, the ALJ seeks to simplify this to a one-to-one causal relationship: either non-Team Wear t-shirts cause mutilations or they don't, but the undisputed testimony confirms the problem cannot be simplified to this level. Team Wear was put in place in 2016 as part of a series of interlinked measures to reduce mutilations. If a preventative measure such as Team Wear is removed from the manufacturing process, the evidence shows there then will be a higher risk of mutilations occurring generally and for certain clothing with raised logos, mutilations will increase.

4. The GA Expectations are a Lawful Category 1 Workrule Under *Boeing*

The GA Expectations do not explicitly ban or otherwise restrict activity protected by Section 7. They are, therefore, facially neutral rules which must be analyzed in accordance with *Boeing,* focusing on the balance between a rule's negative impact on the exercise of Section 7 rights and the rule's connection to an employer's right to maintain discipline and productivity in their workplace. Under *Boeing*, the Team Wear requirement is a uniform policy that does not interfere with Section 7 rights covered by Category 1. As discussed above, when read as a whole

and within its context, the purpose and reach of Tesla's Team Wear requirement in GA is clear: Team Wear must be worn in order to prevent mutilations while employees work in and around painted vehicles and to maintain visual management for employee's safety within GA. Further, while the Team Wear provisions restrict the type of shirt and pants that must be worn in GA, the provisions contain no express prohibition on the wearing of union insignia at work, such as attaching union stickers to Team Wear or wearing hats with union insignia on them. Even if the Team Wear requirement may potentially interfere with Section 7 rights, any adverse impact is outweighed by the substantial business justifications associated with Tesla's maintenance of the rule under *Boeing*. Although the justifications associated with the Team Wear requirement are especially compelling, Tesla submits that uniform/team wear policies in the automobile industry fall into Category 1 workplace rules that the Board should find lawful based on common sense business considerations. But assuming *arguendo* that the text of the GA expectations is not a Category 1 workplace rule, it is still lawful under Category 2. Thus, in the event the Board concludes that *Boeing* applies, the Board need not analyze the special circumstances principles in determining that Tesla's maintenance of the Team Wear provisions are lawful. Accordingly, the ALJ should find that Tesla's maintenance of the Team Wear requirement did not constitute unlawful interference with protected rights in violation of Section 8(a)(1).

IX. THE ALJ'S RECOMMENDED REMEDY IS UNSUPPORTED BY THE RECORD EVIDENCE, CONTRARY TO LAW, AND PUNITIVE

Despite the GC not requesting the remedy, the ALJ recommended that Tesla hold a meeting at the Fremont facility, at which the notice is to be read to the employees by Musk (or at Respondent's option) a Board agent in the presence of Musk, along with security guards, managers and supervisors. (ALJ 80:35-39) A notice reading, much less a reading by an employer's top executive, is unsupported by the record evidence, contrary to law, and punitive. [Exception Nos. 12, 13, 160-166]

As the Board has continuously emphasized, and the ALJ readily admits here (ALJD 77:44-75:19), a personal notice reading is an extraordinary remedy that the Board has reserved

for cases where the "unfair labor practices are so numerous, pervasive, and outrageous that special notice and access remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) enf'd. in part by 97 F.3d 65 (4th Cir. 1996). The GC has the heavy burden of showing that traditional remedies do not "sufficiently ameliorate the effect of the unfair labor practices found." *First Legal Support Servs., LLC*, 342 NLRB 350, 351 fn.6 (2004). Applying this standard, the Board has generally ordered personal notice readings when, unlike here, the employer engages in a pattern of extensive and serious unfair labor practice violations, often during an extended period of time, and when the same individuals were directly involved in multiple violations. *See, e.g.*, *Stern Produce Company, Inc.*, 368 NLRB No. 31 (2019) (Board affirming notice reading where employer engaged in extensive and serious unfair labor practices, including "hallmark" threats of job loss, layoffs, and facility closure); *Pacific Beach Hotel*, 361 NLRB 709 (2014) (Board affirming notice reading where employer had 10-year history of committing extensive and serious unfair labor practices and notwithstanding the Board's enforcement efforts, continued to commit additional ULPs).

In *Fieldcrest*, the Board affirmed a notice reading where the employer, through its supervisors and managers, and the vice president of human resources, engaged in over 30 ULPs. 318 NLRB at 474. The employer made "hallmark" threats to employees, including threats of discharge, loss of benefits, and plant closure, among other threats. *Id.* The employer also terminated 10 employees for engaging in protected activities. *Id*. The Board reasoned that a notice reading was warranted because of the "corporate-wide nature of Respondent's egregious and notorious unfair labor practices," and ordered the vice president of human resources to read the notice, or at his option, to permit a Board agent to read the notice. *Id.* at 473.

Two contrasting decisions are also instructive. In *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), the Board refused to issue a notice reading where the employer engaged in 10 ULPs. The Board found that the employer violated the Act because it interrogated employees and solicited and resolved employee grievances, engaged in surveillance of employees' union

activities, discouraged the distribution of union literature, distributed racially inflammatory literature, and conditioned employees' receipt of separation payments on employee forbearance of Section 7 rights. *Id.* at 177. Additionally, the employer violated the Act because it suspended an employee and terminated another employee. *Id.* at 175, 190. The vice president of manufacturing was involved in multiple employee meetings where the violations took place and assisted in preparing a deliberately racist leaflet. *See Id.* The Board, however, declined to order a notice reading, reasoning that it did not meet the necessary level of "egregiousness." *Id.*

Similarly, in *Hartman & Tyner, Inc.,* 359 NLRB 895, 897 (2013) enfd. in part by 361 NLRB No. 679 (2015), the Board refused to issue a notice reading where the employer engaged in 14 ULPs. The Board found the employer violated the Act because it coercively interrogated employees, threatened employees with unspecified reprisals, and threatened employees with arrest for engaging in protected activities. *Id.* The employer also violated the Act when it discharged eight employees due to their protected activities. *Id.* The Board declined to order the employer to read the notice, reasoning that " [t]he Acting General Counsel has not demonstrated that this measure is needed to remedy the effects of the Respondents unfair labor practices." *Id.; see also Perry Brothers Trucking*, 364 NLRB No. 10 (2016); *Chinese Daily News*, 346 NLRB 906 (2006); *Checkers and Fast Food Workers Committee*, 363 NLRB No. 173 (2016).

Singling out a high-ranking official to publicly read the notice is an even more extraordinary remedy reserved for only truly egregious circumstances carried out by the high-ranking official themselves. As the D.C. Circuit explained, a notice singling out a specialized individual has numerous problems with enforcement and in most situations, "[i]t is quite likely that a personal assurance from the chief executive officer of a company will have a marginally greater impact than one coming from some other official of lesser rank." However, "the negative aspects" of an order singling out a high-ranking official like a CEO "overwhelm the marginal benefit" of such an order since it "create[s] the impression that the Board is seeking to punish an uncooperative respondent." *Id.* Accordingly, that high-ranking official must have personally engaged in extensive and egregious violations of the Act that would otherwise justify an

extraordinary remedy such as a notice reading. *See e.g. Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (2019) (finding that two high-ranking officials engaged in extensive ULPs, including the discharge of key union supporters; threat of plant closure; threats of loss of wages, benefits, and jobs; and the solicitation of grievances with responsive grant of benefits); *cf. Monfort of Colorado*, 298 NLRB 73, 86 fn. 47 (1990) (finding that the high-ranking executive was not required to read the notice because he was involved in only two of the many violations).

As described above, the Board should grant Tesla's exceptions because they are unsupported by the record evidence and law. The three allegations the ALJ credited and which Tesla does not except to are benign violations which do not warrant a notice reading, much less by its top executive. In any event, even if the Board overrules Tesla's exceptions and affirms all of the ALJ's findings, Tesla's isolated, generally minor violations are still not sufficiently numerous, pervasive, and outrageous to warrant a notice reading as an extraordinary remedy.

Undisputed Violations	**Alleged Violations Tesla Excepts To**
1. Two security guards, an unnamed human resources agent and an unnamed supervisor violated the Act in their interactions with employees passing out leaflets on February 10 and May 24.	1. Musk agrees to meet with Moran after Moran cc's Musk in an email explicitly requesting a response to an employees' petition regarding workplace safety concerns; Musk and Toledano allow Moran to lay out employee concerns and provide responses without ever making any changes.
2. Supervisor Armando Rodriguez violated the Act when he told employees during a meeting they could not distribute stickers, leaflets or pamphlets on March 23.	2. Musk, while using Twitter, is asked about unions by a non-Tesla employee during a thread about another company, and both Musk and Tesla clarify lawful meaning of tweet.
3. Supervisor Homer Hunt violated the Act in August when he told an employee that the Union was never getting in, this is Tesla.	3. Tesla warns Moran for undisputedly photographing information without authorization from an internal database and then sending it to Ortiz with no idea whether it would be disclosed externally; and terminates Ortiz after lying during a company investigation re photos taken from same database.
	4. Tesla maintains a GA Team Wear policy to prevent the surface of uncured vehicles from being damaged, and to maintain visual management for safety.
	5. Lipson, investigates breach of employees' medical information and asks Ortiz and Galescu if OSHA forms went to an unauthorized party under state law.

None of the allegations include serious, "hallmark" threats of job losses, layoffs, and facility closures, all key factors that are generally the basis for a notice reading as an extraordinary

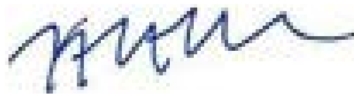
remedy. Nor do the allegations depict a pattern of extensive, repeated violations by Tesla. Indeed, the ALJ credited a handful of isolated, disconnected allegations. They do not involve Tesla ignoring the Board's initial enforcement efforts and, with the exception of the May 2018 tweet, allegedly occurred over a short period of time. Further, Mr. Musk did not personally and directly engage in multiple, egregious violations of the Act equivalent to that of officials in the rare cases like in *Sysco Grand Rapids* when the Board has required a notice reading by a high ranking executive. Rather, the only allegations involving Musk were two incidents based on ambiguous statements, one to a non-employee on Twitter, and the other during a meeting with an employee that was prompted by the employee's own request for Tesla to listen to his alleged safety concerns. These are not the acts of a CEO who is inimically hostile to employee NLRA rights. Accordingly, the facts that typically require a broad cease and desist order and reading, much less a reading by an employer's top executive, are clearly absent in this case. The Board should therefore grant Tesla's exception to the ALJ's recommended remedy.

X. CONCLUSION

Tesla respectfully requests that each of Tesla's exceptions be granted.

Dated: December 9, 2019

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By 

MARK S. ROSS
KEAHN N. MORRIS

Attorneys for
TESLA, INC.

CERTIFICATE OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Four Embarcadero Center, 17th Floor, San Francisco, CA 94111-4109.

On December 9, 2019, I served a true copy of the document(s) described as **RESPONDENT TESLA, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** on the interested parties in this action as follows:

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BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address sasmith@sheppardmullin.com to the person(s) at the e-mail address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 9, 2019, at San Francisco, California.

Sarah Smith