

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

**GENERAL MOTORS, LLC**

**Respondent**

**and**

**CASE 07-CA-053570**

**MICHAEL ANTHONY HENSON, an Individual**

**Charging Party**

**RESPONDENT GENERAL MOTORS, LLC'S RESPONSE IN OPPOSITION TO  
MOTION OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO STRIKE  
PORTIONS OF RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS**

Respondent GENERAL MOTORS, LLC ("GM" or "Company") files this response and opposition to the September 7, 2012 Motion to Strike Portions of Respondent's Brief in Support of its Exceptions ("Motion to Strike" or "Motion"), filed by Counsel Acting General Counsel ("AGC"), pursuant to Rule 102.47 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), and in support states as follows:

**I. Introduction**

In her Motion to Strike, the AGC seeks to strike eight (8) lines of text and a footnote from GM's Brief in Support of its Exceptions to the Decision of the Administrative Law Judge ("Exceptions Brief"), a twenty-nine (29) page document. The AGC's Motion to Strike is both baseless and improper.<sup>1</sup> Contrary to the assertions of the AGC in the Motion to Strike, GM's Exceptions brief contains no "factual assertions and allusions to extra-record material." Instead, the AGC's Motion to Strike is directed against arguments asserted by GM based upon the record

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<sup>1</sup> Additionally, the Motion wastes the Board's valuable resources. See President Riverboat Casinos of Missouri, Inc., 328 NLRB 77, 80 n.4 (1999) (explaining that the General Counsel's motion to strike was "unwarranted and a waste of scarce resources"); see also Redwood v. Dobson, 476 F.3d 462, 471 (7th Cir. 2007) (Easterbrook, J.) (noting that "[m]otions to strike sentences or sections out of [appellate] briefs waste everyone's time").

evidence adduced at the March 15, 2012 unfair labor practice hearing in this matter. In propounding her objections to these arguments, the AGC ignores the actual evidence in the record. Accordingly, the AGC's articulated objections that do not constitute grounds for striking text from the Company's Exceptions Brief and the Motion to Strike must therefore be denied in its entirety.

## **II. Background**

This unfair labor practice case involves a facial challenge to the GM EMPLOYEE AND REPRESENTATIVE SOCIAL MEDIA POLICY ("Social Media Policy" or the "Policy"). This Policy was developed and implemented by GM to promote the Company's legitimate business objectives and to guard against potential liability and litigation arising under various federal and state laws, including securities laws, anti-discrimination and anti-harassment statutes, and intellectual property laws.<sup>2</sup> The Policy, which was promulgated in January 2011, represents nothing more than a compilation of the Company's pre-existing work rules and employment policies pertaining to employee conduct with respect to social media communications. In particular, the Social Media Policy provides guidance to GM employees, contractors, and representatives regarding their use of social media tools.<sup>3</sup> (Tr. 56). The Policy, which applies globally, was distributed to GM employees by various means, including the Company intranet, e-mail, and an electronic newsletter. (Tr. 22). All GM employees -- including the many thousands of employees represented by the UAW, IAM, IBEW, and IUOE -- have access to the Company intranet and, consequently, to the Policy. (Tr. 22, 100).

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<sup>2</sup> The Social Media Policy was offered and admitted into evidence at the March 15, 2012 hearing as GC Exhibit 1(h), Exhibit A. References to the Policy are cited as ("Policy, p. \_\_").

<sup>3</sup> All references to testimony adduced at the March 15, 2012 unfair labor practice hearing are to the official transcript and are cited as ("Tr. \_\_").

The Policy is three (3) pages long and expressly incorporates by reference existing GM policies. In fact, the Policy actually refers employees to the general Corporate Policy Manual for further information and/or clarification:

This Social Media Policy can be summarized as “New Tools, Old Rules,” since it is really a summary of existing GM policies and how they apply to GM employees and representatives (agencies, contract and fee-for-service workers) who participate in social media. **See the Corporate Policy Manual for all GM Policies.**

(Tr. 55-56; Policy, p. 1) (emphasis added).

The Policy also contains a prominent disclaimer. The disclaimer emphasizes that the Policy will be construed and administered in accordance with all applicable laws, including Section 7 of the National Labor Relations Act:

GM’s Social Media Policy will be administered in compliance with applicable laws and regulations (**including Section 7 of the National Labor Relations Act**). GM reserves the right to amend, modify, suspend or terminate this Policy at any time and in its sole discretion without prior notice.

(Policy, p. 3) (emphasis added).

On March 15, 2012, a hearing was held before Administrative Law Judge Ira Sandron (the “ALJ”) to adjudicate the AGC’s Complaint pertaining to GM’s Social Media Policy. At the hearing, the AGC acknowledged that she was proceeding under one theory only -- that the Policy is overbroad as written. (Tr. 70). However, the AGC offered no evidence in support of her theory. Moreover, absolutely no evidence was adduced at the hearing that GM implemented the Policy in response to Section 7 concerted activity, or that GM possessed any anti-union animus in creating or promulgating the Policy. (ALJD, p. 2). And, although GM did not have the burden of proof in this case, the Company called five (5) witnesses to testify regarding the legitimate purposes for the Policy, the scope and application of the Policy, and the fact that the

Policy does not restrict (and has never restricted) GM employees in the exercise of their Section 7 rights.

Despite the AGC's captious behavior at the hearing,<sup>4</sup> the GM witnesses provided un rebutted testimony regarding, *inter alia*, the scope of the Company's social media initiatives, the high unionization rate at GM, employees' awareness of their Section 7 rights, the Company's legitimate efforts to protect the integrity of its valuable intellectual property, and the Company's respect for employees' Section 7 rights. (Tr. 19-90; 91-100; 102-12; 114-18; 119-36). After receiving the testimony and considering all the evidence, the ALJ correctly concluded that the vast majority of GM's Social Media Policy is lawful. (ALJD, pp. 7-9). As to those portions of the Policy that the ALJ found to be in violation of Section 8(a)(1) of the Act, GM filed timely exceptions to the ALJ's decision.

### III. Argument

Faced with an ALJ decision that largely upheld GM's Social Media Policy, the AGC now contends in her Motion to Strike that "GM's [exceptions] brief is riddled with factual assertions and allusions to extra-record material that were never elicited in testimony or encompassed by admitted exhibits." (Motion to Strike, p. 1). Nothing could be further from the truth. Indeed, the instant Motion is nothing more than a misguided attempt to find fault where there is none. Once again, context eludes the AGC. For the purposes of clarity, the challenged portions of GM's Exceptions Brief appear below in bold type:

- GM's existing policies (e.g., **anti-harassment policies, anti-discrimination policies, workplace violence policies, privacy policies**) are used to provide additional reference points for

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<sup>4</sup> The AGC objected thirty-one (31) times in a three-and-a-half hour hearing. (*See* Tr. 30, 33, 44-45, 49-51, 53-56, 58, 60-62, 73, 93-95, 97-98, 104-05, 112-14, 117-18, 120, 122, 132-33). Her near-constant stream of objections and interruptions eventually prompted the ALJ to begin questioning witnesses directly. (*See* Tr. 133-34).

employees' understanding of their obligations while on social media websites.<sup>5</sup> (Exceptions Brief, p. 8).

- GM's Social Media Policy is comprised of the core policies maintained by GM to ensure compliance with state and federal employment laws, with SEC and FTC requirements, **export control requirements (laws prohibiting trade with certain countries)**, with privacy and **publicity laws, and to protect inventions, marketing strategies** and the like. (Exceptions Brief, p. 9).

- **GM Secret, Confidential, and Attorney-Client Privileged information are defined terms in GM's policy on information management, and employees receive training on handling such information. Therefore when information about compensation is read in the context of these defined terms, employees understand the prohibited disclosures do not restrict Section 7 rights.** (Exceptions Brief, p. 20 n.8).

- It is important to consider that GM's Social Media Policy does not exist in a vacuum. In fact, **GM's employees are aware of related policies respecting the protection of GM's prototype vehicles, and information that GM is legally charged with protecting (e.g., social security numbers, undisclosed financial information, and medical information)** (R at 56). The types of prohibited information listed in GM's Policy provide employees with sufficient context to understand that their Section 7 rights will not be restricted. (Exceptions Brief, p. 21).

*First*, the AGC's Motion should be denied because the transcript demonstrates that the entirety of GM's Exceptions Brief -- including those portions the AGC has asked the Board to strike -- is fully supported by the record. GM's Director of Social Media, Mary Henige ("Henige"), offered un rebutted testimony that the Social Media Policy is "just one of many GM policies, and all GM's other policies apply." (Tr. 60). Further, Henige expressly referred to other Company policies in her undisputed hearing testimony:

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<sup>5</sup> To the extent necessary, the Board can take judicial notice of the federal statutes and regulations underlying such policies, including Title VII of the Civil Rights Act of 1964. See First Transit, Inc., 352 NLRB No. 111, at \*6 (2008) (explaining that "any judge may take into account" statutes and regulations); see also FED. R. EVID. 201(b) (permitting judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

We wanted employees to understand that all of GM's other policies still applied, but because of the prevalence of the web and mobile devices, that whether they're at work or they're not at work they can have access to postings, we wanted them to know that the **same laws that we have from the FTC, the SEC, privacy issues, confidentiality and protecting GM business information all apply**, and we also wanted to sensitize them to the fact that things really stay on the web forever, and that their conversations, it's not -- they're not private, that they're very visible or discoverable.

(Tr. 56) (emphasis added).

Similarly, GM's Chief Trademark Counsel, Timothy Gorbatoff ("Gorbatoff"), testified without contradiction regarding the relationship between the Social Media Policy and the Company's broad intellectual property enforcement interests:

GM's trademarks are the GM logo, the Chevrolet bowtie emblem . . . the Cadillac name and logo; copyrights could be photographs, could be work[s] such as service and repair manuals; and then trade secrets too is another element that comes in to play, intellectual property, and that's [sic] such as **product plans for future vehicles, product images of vehicles that haven't been released yet, so there's all kinds of different types of intellectual property**, all important for the . . . ongoing business of GM to obtain and maintain these.

(Tr. 120) (emphasis added).

Also, when the AGC attempted to assert at the hearing that the Social Media Policy "doesn't reference anything else," the ALJ quickly corrected her misstatement by pointing out that the Policy expressly refers readers to other existing GM policies. (*See* Tr. 61) ("I stand corrected to that extent. Thank you.").

Moreover, the AGC's Motion asks the Board to disregard the plain language of the Policy itself. The Policy, under the heading "Internal Social Media," discusses employee obligations with respect to information designated by the Company as "GM [C]onfidential" and/or "GM Secret":

Do not discuss information that is classified as “GM [C]onfidential” or is otherwise not public on these social media forums. If you are invited to participate in a private, secure discussion group within a GM internal social media site and it is otherwise appropriate to do so, “GM [C]onfidential” information may be discussed. GM Secret information may NOT be discussed on any social media sites.

(Policy, p. 3).

As can be seen from the unrebutted hearing testimony of Henige and Gorbattoff, and the Policy language cited above, each and every objection lodged by the AGC is meritless. In fact, all of the challenged portions of GM’s Exceptions Brief are supported by the record. *Cf. Alpha Biochem. Corp.*, 293 NLRB 753, 767 n.3 (1989) (denying motion to strike and finding no merit to the contention that the brief was unsupported by the record). Indeed, the purpose behind a motion to strike would not be served if the instant Motion were granted. Here, the AGC had ample opportunity to cross-examine the Company’s witnesses on those points that she now challenges. *Cf. Today’s Man*, 263 NLRB 332, 333 (1982) (granting a motion to strike where the parties would otherwise be denied “the opportunity for *voir dire* and cross-examination”). The Motion must be denied for these reasons alone.

*Second*, the Motion ignores the context surrounding the challenged portions of GM’s Exceptions Brief. The Company does not dispute that §102.45 of the Board’s Rules and Regulations controls as to the record in a case on appeal. Clearly, GM is not attempting to improperly supplement or reopen the record. The AGC’s argument to the contrary -- namely, that GM is somehow trying to “confuse[] the official record and prejudice[] the other parties -- grossly misrepresents the Exceptions Brief and GM’s motives. (Motion to Strike, p. 2).

The language in the challenged portions of GM’s Exceptions Brief makes clear that the Company is merely offering illustrative examples, not introducing extra-record evidence. (*See*

Exceptions Brief, p. 21) (“e.g., social security numbers, undisclosed financial information, and medical information) (emphasis added). The AGC’s Motion rings especially hollow given that she criticized the Company in her Exceptions Brief for not introducing any of its other rules or policies to clarify the scope of the Social Media Policy, while repeatedly and strenuously objecting to GM’s efforts to offer any evidence of the interpretation or application of the Policy outside the four corners of the Policy at the hearing. (*Compare* AGC Exceptions Brief, pp. 14-15, *with* Tr. 61-63, 73, 77-78, 94, 112, 117). In sum, as GM has argued throughout this case, context matters. Accordingly, the AGC’s eleventh-hour attempt to divorce the language of GM’s Exceptions Brief from its context should be rejected.

*Finally*, even if the Motion were granted (it should not be granted), the Company’s case would not be impaired in any material way. As is discussed in greater detail in GM’s Post-Hearing Brief, Exceptions Brief, Brief in Response to the AGC’s Exceptions, Reply Brief, and the instant Response, the AGC has utterly failed to show that the Policy is unlawful on its face, as is required under the applicable burden of proof. *See* Delchamps, Inc. v. NLRB, 588 F.2d 476, 478 (5th Cir. 1979) (declining to enforce Board order where General Counsel failed to satisfy burden of proof); NLRB v. Louis A. Weiss Memorial Hospital, 172 F.3d 432, 446 (7th Cir. 1999) (concluding in a Section 8(a)(1) and 8(a)(3) case that the “failure of General Counsel to create a factual record in no way supports a finding that General Counsel met its burden of proof”). Deleting eight (8) lines of text and one (1) footnote from a twenty-nine (29) page Exceptions Brief cannot possibly salvage the AGC’s case. Thus, the AGC’s Motion should be denied because it is ultimately futile.

#### IV. Conclusion

For the foregoing reasons, the Motion of Counsel for the Acting General Counsel to Strike Portions of Respondent’s Brief in Support of Exceptions must be denied in its entirety.

## CERTIFICATE OF SERVICE

I, Onika C. Celestine, hereby certify that on September 21, 2012, I caused copies of Respondent's Response in Opposition to Motion of Counsel for the Acting General Counsel to Strike Portions of Respondent's Brief in Support of Exceptions, in *General Motors, LLC, case 07-ca-053570*, to be served upon all parties of record, by electronic transmission, as follows:

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