hat suggested he had an "attitude problem" violated Section 8(a)(1)). They not only were intended to discourage Locklear from wearing a UAW hat, but implied that supporting the union was unprofessional and could hinder his future evaluations, opportunity for promotion, or even tenure as a training coordinator. The fact that Teston, Locklear's direct supervisor, made these comments to Locklear during a private meeting only increased the coercive effect.

6. Tesla Threatened an Employee for Wearing a UAW Sticker in Violation of Section 8(a)(1) [SAC ¶ 7(r)]

In the Spring of 2017, Tesla violated the Act when Camat warned Vazquez that he could face negative consequences if he continued wearing a union sticker at the Fremont facility. A supervisor's statement merely implying that displaying pro-union sentiments will negatively affect an employee's standing with the company violates section 8(a)(1) of the Act. *Ichikoh Manufacturing, Inc.*, 312 NLRB 1022 (1993) (supervisor's remark "if it was up to him, he would take off the button" unlawful).

I. TESLA TERMINATED ORTIZ FOR HIS CONCERTED PROTECTED ACTIVITIES IN VIOLATION OF SECTION 8(a)(3) [SAC ¶ 8]

1. Ortiz Was Engaged in Protected Activity When He Criticized Other Employees For Taking Tesla's Side Before the California Legislature

Section 7's "mutual aid or protection" clause guarantees "the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962). An employee's activity is "concerted" if the employee "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*). Protected activity can take many forms, including testifying on behalf of employees before legislative bodies concerning workplace issues. *See, e.g., Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1385 (9th Cir.1976).

Ortiz and Moran were engaged in protected concerted activity when they went to Sacramento in August 2017 to campaign for greater legislative oversight of the way that Tesla

ran its workplace. Ortiz was also engaged in protected concerted activity on September 14, 2017, when he criticized Pratt and Ives for testifying on behalf of Tesla and against the bill that the UAW was supporting and posted Pratt's and Ives's pictures to a private Facebook group that is only open to Tesla hourly employees. Criticism of those who oppose a union campaign or other protected concerted activity is entitled to just as much protection under the Act as praise for those who join in those activities. *Nor-Cal Beverage Co., Inc.*, 330 NLRB 610, 611 (2000). Ortiz was not, of course, particularly complimentary about either Pratt or Ives, referring to them on Facebook as "suckasses." But that sort of rhetoric does not make their conduct unprotected. *See, e.g., Roemer Industries*, 362 NLRB No. 96 (2015) (calling co-worker who failed to support him in a grievance a "backstabber" protected); *Desert Springs Hospital*, 363 NLRB No. 185 (2016) (using profane language with co-workers during discussion of union election protected).

2. Tesla Had No Right to Interrogate Ortiz About His Online Comments About Pratt and Ives or His Sources of Information

Launching an investigation of one employee's Facebook post, written during his free time and away from work, about the campaign to get the Legislature to exercise greater oversight over working conditions at Tesla was a violation of the Act. *United Services Automobile Ass'n*, 340 NLRB 784, 786 (2003) enfd. 387 F.3d 908 (D.C. Cir. 2004) (investigation to identify who had distributed union flyers unlawful). Tesla had no legitimate basis to undertake an investigation of Ortiz's protected Section 7 activities, especially since it had no rule prohibiting employees from using Workday to look up information about their co-workers.

Tesla pushed forward with this investigation, moreover, even though it was clear from the outset that there was, as Gertrude Stein once said about her old neighborhood in Oakland, "no there there." Ortiz took down his post about Pratt and Ives after two hours, when Pratt emailed him to say that this was not a good way to start communications. While Pratt may not have liked the post, he never claimed to be fearful or threatened by it; on the contrary, when he informed Hedges, the HR manager who had recruited him to go to Sacramento, about the post he laughed it off, saying that "we got under some people's skin." Pratt did not, moreover, complain that he felt his privacy had been violated in any way.

Hedges did not, however, need any evidence that might have suggested that Pratt had any complaints about this post to launch an investigation of Ortiz. He immediately notified Tesla's Employee Relations Director and its General Counsel, then contacted Gecewich to tell him to expect an assignment investigating the post.

As it turned out, moreover, this investigation ended up focusing almost exclusively on finding out who Ortiz had talked to and where he got the information he used to post his comments about Pratt and Ives—the sort of details about employees' communications with each other about their concerted activities that the employer has no business inquiring into. *Guess!, Inc.*, 339 NLRB 432 (2003). An improper investigation became progressively more intrusive and more unlawful as it proceeded.

Gecewich continued to press Ortiz for details about his sources for information about Pratt and Ives and his private communications with his coworkers, even though he had already discovered the answer to his questions by that time. When Ortiz continued to refuse to name names Tesla fired him.

3. Tesla Had No Right to Fire Ortiz For Lying About His Protected Section 7 Activities

Ortiz had enough experience with Tesla's anti-union animus over the past year to have reasonable concerns that Tesla would use whatever information it could dig up about his private communications with Moran and others about the legislative campaign as grounds for discriminating or retaliating against the employees involved. As a result, when Gecewich demanded information from him about the source of the information he had used when commenting on Ives and Pratt, Ortiz did not share any details about the conversation he had had with Moran or reveal the fact that Moran had sent him the screenshots.

His discharge violated Sections 8(a)(1) and (3) of the Act. An employer may not discharge an employee for lying in response to questions from the employer that are part of an investigation seeking to uncover protected activity. *Paragon Systems*, 362 NLRB No. 182 (2015); *United Services Automobile Ass'n, supra*; *Tradewaste Incineration*, 336 NLRB 902, 907 (2001); *St. Louis Car Co.,* 108 NLRB 1523, 1525-26 (1954).

This case is, in fact, on all fours with *Paragon*. In that case two employees lied to an investigator when asked whether they had delivered a strike notice to other employees. The Board found that the employees

> had a reasonable basis for believing that [the investigator] was attempting to pry into protected union activity and that they would suffer reprisal for that activity. Under these circumstances, [the employees] were under no obligation to respond to questions seeking to uncover protected activities.

Paragon, 362 NLRB * at xx.

Similarly in *St. Louis Car Co.*, an employee denied she was trying to organize a union at the company after the employer asked her directly. After discovering she had lied, the employer fired her for untrustworthiness. The Board found that the employee's response "was the kind an employer might reasonably anticipate to a blunt question about organizing activities" and that it was "farfetched to say that an employee has shown that she is untrustworthy by trying to keep her employer from prying into matters which are" protected. It therefore found that untrustworthiness "was a pretext and that the reason for her discharge was her leadership in organizing activities among respondent's office employees."

Like the management official *St. Louis Car Co.* who was simply interested in the discharged employee's union activity, Gecewich's investigation was aimed *solely* at uncovering whether and which other employees engaged in protected activity. Gecewich's questions to Ortiz and Moran were solely about who had provided the pictures of Pratt and Ives, and not about the underlying conditions that led to the post.

Furthermore, the fact that Ortiz engaged in the protected activities that Tesla was so keen on learning about away from work, on his own time, about Section 7 activities in the legislative arena, makes Tesla's investigation wholly illegitimate. As in *Tradewaste*, where the Board held that the employer did not have the right to fire an employee who lied when asked about whether he had created and distributed a flyer discussing an issue important to a union organizing campaign, Tesla had no right to investigate Ortiz. As the Board noted in *Tradewaste*, "his untruth did not relate to the performance of his job or the Respondent's business, but to a protected right

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guaranteed by the Act, which he was not obligated to disclose." *Tradewaste*, 336 NLRB at 407. The same applies here as well.

Tesla will likely argue, however, that it had undertaken a legitimate investigation of facially valid complaints of employee misconduct when it questioned Ortiz about his sources for his Facebook page, citing *Fresenius USA*, 362 NLRB No. 130 (2015). That argument simply does not hold water.

The employee under investigation in *Fresenius* had been accused of harassment by several coworkers. The employer limited its investigation to those charges and did not question him about any protected concerted activity in which he had been involved.

Here, by contrast, Tesla launched its investigation without any complaint from Pratt or Ives, and focused entirely on the private details of Ortiz's protected Section 7 activity when demanding that he name the other Tesla employees who helped him obtain the information he used for the post in question. And Tesla continued demanding that information long after it already knew the answers to its questions, demonstrating that it was more interested in using this investigation as a tool to isolate Ortiz from his co-workers than to pursue the truth.

This investigation was biased from the outset, constructed to find grounds to discipline Ortiz and Moran, as argued in greater detail below. But even if the investigation had been conducted fairly from the outset, it was still a violation to undertake it in the first place, to continue it when Tesla discovered the answers it claims it was looking for, and to fire Ortiz because he lied to avoid having to disclose the details of his protected Section 7 activities.

4. <u>Tesla used Ortiz's Dishonesty as a Pretext for His Termination</u>

Even if Tesla could somehow prove that it had the right to fire Ortiz for refusing to disclose all the details of his work with his coworkers in the campaign for greater legislative oversight over Tesla it would still be guilty of violating the Act by using Ortiz's evasive and incomplete answers as a pretext for firing him.

In *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *Transportation Management, Inc., v. NLRB,* 462 U.S. 393 (1983), the Board established an analytical framework for deciding discipline and discharge cases where the

employer claims its motivation for disciplinary action was not based on the employee's union activities. First, the General Counsel must show that (a) employees engaged in union activity; (2) the Employer knew of the existence of protected activity; and (3) it was a "motivating factor" in the employer's decision. *Id.* Each of those conditions is met in this case.

a. Ortiz and Moran Were Engaged in Union Activity Throughout 2016 and 2017

This point does not require extended discussion. Ortiz and Moran had been among the most active Union supporters, (1) handing out flyers to Tesla employees before dawn, (2) wearing union shirts, union stickers, a union jacket and union pins, (3) spearheading the demand for OSHA logs, and (4) appearing in Sacramento to support legislation addressed to the workplace issues they faced at Tesla. Moran had also authored an article for Medium.com on working conditions at Tesla. They were the most prominent Union activists at Tesla throughout 2017.

b. Management Knew About Ortiz's and Moran's Union Activity

This is also beyond serious dispute. Management had sent multiple security guards to try to run Moran and Ortiz off its parking lot in February 2017, interrogated Ortiz concerning safety issues, and attempted to co-opt Moran by making him a member of the Safety Committee. Toledano specifically identified Moran and Ortiz as "pro-union" in her email to Musk on June 13, 2017. Management officials such as Hedges regularly visited the Facebook page where Ortiz and Moran posted frequently. Tesla knew.

c. Tesla's Investigation Was Designed to Produce a Pretext to Discipline Ortiz and Moran

Tesla's investigation of Ortiz and Moran departed from the normal course of employee investigations from the outset. It began when Pratt sent Hedges a text message mocking Ortiz for becoming upset about Pratt's and Ives's testimony in Sacramento. This was not a complaint from Pratt by any stretch of the imagination—he did not express any "fear," as Hedges later claimed, or complain that Ortiz had published any private information about him. Nor did he follow the

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protocol that applies for employee complaints by contacting either the Employee Relations department, which investigates such complaints, or his supervisor.

Instead, Pratt texted Hedges, the management official who had recruited him to go to Sacramento in the first place, with a smiley face emoticon accompanied by the words "got under some people's skin." According to Gecewich's notes, Pratt also sent photographs of the Facebook post to others "as we were getting a rise out of people." To translate Pratt's reaction into L33T, he was celebrating having "0wn3d" Ortiz.

Hedges did not pass on Pratt's text to the staff that would ordinarily investigate complaints of this sort, but instead notified Copher, the Director of Employee Relations, and Bodiford, Tesla's General Counsel. And while Hedges claims he did not ask Gecewich to investigate Ortiz, Gecewich, remarkably enough, chose to initiate an investigation after Hedges talked to him, without waiting for anyone in management to ask him to do so.

Gecewich set up this investigation to first isolate and then trap Ortiz. Gecewich was interested in uncovering the details of Ortiz's protected Section 7 activity, *i.e.*, in forcing Ortiz to tell him who had helped him obtain the screenshots he had used. He continued to demand that Ortiz tell him where he got the screenshots even after both Tesla's own IT staff and Moran had given him the answer. His fixation on Ortiz's and Moran's protected activities is enough, in and of itself, to establish the illegality of both the investigation and the discipline it produced.

Gecewich's investigation is remarkable as well for what he did not investigate: he showed little or no interest in any issue other than digging into Ortiz's and Moran's protected concerted activity, *i.e.*, learning who helped who and how. Gecewich was not concerned, for example, with Pratt's alleged privacy concerns. Similarly, even though Gecewich's investigative report mentioned that Ortiz had also posted Ives' photo as well as Pratt's, Gecewich did not even bother to interview Ives or Osbual.

Pretext may be demonstrated by various factors, including disparate treatment, shifting explanations, or an inadequate investigation into a discriminatee's alleged misconduct. *See Shamrock Foods*, 366 NLRB No. 117, slip op. at 27-28 (2018). An inadequate investigation provides particularly strong support for a finding of anti-union animus because it demonstrates

the process that management used to get to the result that it desired. *St. Paul Park Refining Co., LLC*, 366 NLRB No. 83 (2018).

In *St. Paul Park Refining* the Board found the Employer violated Section 8(a)(1) when it conducted a investigation into an employee's refusal to perform work in an unsafe condition and decided to forego interviewing relevant witnesses and chose to interview people "designed simply to substantiate its supervisors' versions of what occurred and justify their sending [employee] home." *St. Paul Park Refining*, 366 NLRB No. 83, *16. The Board stated that the employer's "lack of an objective and complete investigation is circumstantial evidence of pretext, establishing animus towards [employee's] protected concerted activity." *St. Paul Park Refining*, 366 NLRB No. 83, *16. The road not taken can tell us as much in some cases as the avenues that the employer pursued.

Gecewich also tailored his investigation in order to avoid any overt references to Ortiz's and Moran's Section 7 activity and, in particular, their work pushing for greater regulatory oversight over Tesla—or Pratt's and Ives' work for Tesla that led to these Facebook posts that spawned his investigation. Thus Gecewich not only did not mention the background of the September 14, 2017 post or Ortiz's and Moran's legislative work, but edited those references out of the report that he submitted to the group called together to decide what action to take.

In some cases this might be evidence that the employer was trying to restrict its investigation to neutral, legitimate grounds unrelated to employees' protected Section 7 activities. That is not the case here. Management was well aware of Ortiz's and Moran's Section 7 conduct—so much so that Graminger even took his concerns that Tesla might be disciplining employees who had been engaged in protected concerted activity to his superior, Vice President of Production, Peter Hochholdinger. Editing out any references to Ortiz's and Moran's Section 7 activities did not shield the disciplinary panel from knowing about them; the most it did was to create plausible deniability for Tesla's response to the unfair labor practice charge that it must have known would follow.

The investigation was irregular in another respect: even though Gecewich chose Martinez and McIntosh to be part of the process so they could provide input concerning Ortiz's

employment history and work performance, it does not appear that they made any significant contribution to the review of Gecewich's recommendation during this meeting. That recommendation had, moreover, already been approved by the legal department and included consideration of Ortiz's background. This panel appears to have been brought together to approve Gesewich's recommendation, rather than make its own decision.

d. Tesla Gave Conflicting Reasons for Its Decision to Discharge Ortiz

Tesla offered different reasons at different times for firing Ortiz. At the hearing it claimed that it fired him for lying to Gesewich. Gesewich, on the other hand, told Ortiz when he came before the panel that he was being terminated because his posting violated the confidentiality agreement. Tesla, not surprisingly, no longer relies on that plainly unlawful policy as grounds for terminating Ortiz.

Musk later offered a different rationale, claiming in his May 20, 2018 Tweet that Ortiz was "a guy who repeatedly threatened non-union supporters verbally & on social media & lied about it." Musk's claim that Ortiz threatened Pratt or anyone else is a complete fabrication. These shifting reasons are strong evidence of pretext. *Shamrock Foods*, 366 NLRB No. 117, slip op. at 27.

e. Tesla's Decision to Discipline Ortiz and Moran Was Driven by Its Animus against Them

This is another issue on which there is no room for dispute. Tesla management openly described Ortiz, Moran and the other VOC activists as enemies from the beginning of the Union's campaign. Musk filed the first shot, calling Moran's union advocacy in his article in Medium "morally outrageous" while adding darkly that Moran "doesn't really work for us." Toledano identified Ortiz and his fellow VOC members as "adversaries" when discussing how to neutralize them with Musk in June of 2017. And supervisors constantly warned Tesla employees of the risk of wearing Union gear while Tesla security threatened to have Union leafletters fired. This evidence of animus is powerful evidence of pretext. *See Jim Walter Resources*, 324 NLRB 1231, 1233 (1997) (employer's animus toward former employee's protected concerted activity supports 8(a)(3) finding).

5. Tesla Would Not Have Taken The Same Actions Absent Ortiz's Union Activity.

It is not enough for Tesla to proffer a legitimate nondiscriminatory reason for firing Ortiz; it also has the burden to demonstrate that it would have taken the same actions even absent the employee's union activity. *Wright Line*, *supra*, 251 NLRB at 1089; *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989) ("the burden shifts to the Respondent to show it would have taken the same action against the employees regardless of their union or other protected activities"). Tesla cannot carry that burden.

When Gecewich met with Stephen Graminger, Director of Manufacturing, the decision maker in Ortiz's case, the decision to terminate Ortiz was effectively set. Graminger and the others on the panel gave Gecewich's revised report only a few minutes of consideration, then proceeded without bothering to conduct any investigation of their own, much less speak to Ortiz about the incident, even though he had reservations about the wisdom of proceeding.[60]

A fair investigation would have done much more than simply rubber stamp Gecewich's report. Tesla's deviation from these norms makes it virtually impossible for it to prove what action it would have taken if it had not rushed to reach the result that Tesla wanted. Tesla violated the Act by firing Ortiz.

Tesla's anti-union animus and, in particular, its animus against Ortiz and Moran means that Tesla must make a particularly strong showing in rebuttal to these charges. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991); *see also Van Vlerah Mechanical*, 320 NLRB 739, 744 (1996). It cannot do so. Tesla violated the Act by firing Ortiz.

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[60] Graminger expressed some reservation about following Gecewich's recommendation for termination since it was two employees engaged in protected concerted activity, so he followed up with his superior, Vice President of Production, Peter Hochholdinger. However, Graminger never once showed Hochholdinger the investigation report created by Gecewich, did not discuss the details of the investigation report or of the circumstances surrounding Ortiz's post, never pulled Ortiz's personnel files to review his work performance with Hochholdinger, or engaged in any investigative work to independently decide to terminate Ortiz or take other appropriate disciplinary action.

J. TESLA DISCIPLINED JOSÉ MORAN FOR HIS CONCERTED PROTECTED ACTIVITIES IN VIOLATION OF SECTION 8(a)(3) [SAC ¶ 7(x)]

1. Tesla Was Overtly Hostile to Moran Because He Was One of the Most Visible Leaders of the Organizing Drive

Moran first gained Tesla's attention in early February 2017, when he publicly called out Tesla for its stagnant wages, unsafe conditions, and slow response to improve conditions. Tesla's reaction was as swift as it was negative. On the same day that Moran published his article, CEO Musk stated Moran "doesn't really work for us," causing confusion among workers, and called his desire for improving working conditions through union representation "morally outrageous."

The attention from Musk did not end in February 2017. On June 7, 2017 Musk met with Moran ostensibly to discuss workplace safety at the Fremont facility. That discussion turned to union issues, which the safety petition that Moran and others had tied to their safety concerns,[61] and ended with Musk offering Moran a position on the Safety Committee as part of a plan to co-opt him; in Toledano's words, to "turn ***adversaries*** into those responsible for the problem." (emphasis added)

Moran continued his organizing efforts after that failed attempt to co-opt him, circulating a petition asking for clarity regarding Tesla's criteria for performance reviews, wage increases, promotions, which was emailed to Musk, Toledano, and Hedges. On July 20, 2017, Tori Tanaka forwarded a copy of the petition to Gecewich, who several months later led the investigation that led to imposition of discipline on Moran.

2. Tesla Disciplined Moran for His Protected Activity

Moran joined Ortiz and the UAW to support the proposed rule that would require Tesla to be certified as a "fair and responsible workplace" before customers could be eligible for taxpayer-backed electric vehicle rebates. Both their work before the Legislature and their criticism of other Tesla employees who opposed these proposals were protected Section 7 activities. *Kaiser Engineers*, *supra*; *Nor-Cal Beverage*, *supra* at 611.

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[61] As that petition stated, "We believe the best way to improve safety at Tesla is to gain a true voice within the company by forming a union."

This protected activity led to Moran's discipline. When Ortiz criticized these co-workers on Facebook, Tesla initiated an investigation into where Ortiz obtained the screenshots of Pratt and Ives that he used in that post. Tesla assigned that investigation to Gecewich, who was already familiar with Moran's article calling for changes at Tesla.

Gecewich's investigation focused exclusively on uncovering the links between Moran and the other Union activists, such as Ortiz, who had lobbied for the UAW's proposed "fair and responsible workplace" proposal. Gecewich pressed Moran to admit that he had sent the screenshots of Pratt, Ives, and Osbual to Ortiz, even though he already knew that Moran, user "jmoran," had accessed the profiles of Pratt, Ives, and Osbual at approximately 5:55 p.m. on September 14, 2017. Moran admitted that he had and, at Gecewich's insistence, showed Gecewich his phone so that Gecewich could see the text message chain between him and Ortiz.

Gecewich knew, moreover, why Moran had accessed these three employees' Workday profiles, since these were the three employees whom Hedges had chosen to speak to the Legislature on behalf of Tesla. Tesla disciplined Moran for conduct that it knew was protected Section 7 activity.

3. Moran Did Not Violate Any Rules in Obtaining Information About Other Employees from Workday

Moran did not violate any rule or policy when he accessed Workday. He accessed Workday, and continues to access it, like any other employee, by using his Tesla-assigned credentials to login on his phone or via his personal computer. On the platform, he updates his contact information, reviews and complete performance reviews, gives and receives feedback, and/or sign documents as assigned and required by the Company. He used Workday on this occasion for both legitimate and protected reasons: to view the profiles of fellow employees, looking at their start date and title, to compare their employment advancement relative to his.

Gecewich informed Moran that Workday was only for "legitimate and official business purposes," presumably as defined by Tesla on a case-by-case basis in the absence of any rule or policy restricting access to Workday, for the first time during his interview. No supervisors,

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managers or human resources employees had ever informed Moran, or any other employees for that matter, of any restrictions on access Workday prior to October 2017.

This discipline for violating a non-existent and wholly undefined rule is a classic example of pretext. Management undertook this investigation to find something to discipline Moran for and then invented a rule and applied it ex post facto in order to justify that discipline for his protected activity. *See Morgan Precision Parts*, 183 NLRB 1141, 1144 (1970) (discharge of union supporter based on nonexistent production quota violated the Act). This is, it goes without saying, a violation of Section 8(a)(1) and (3) of the Act.

K. MUSK'S STATEMENT REGARDING STOCK OPTIONS WAS A THREAT OF REPRISAL THAT VIOLATED SECTION 8(a)(1) OF THE ACT [Complaint in 32-CA-220777]

On May 20, 2018, Tesla CEO Musk issued a public statement via Twitter that threatened to take away Tesla employees' stock options if they choose to unionize. Specifically, while discussing employees' option to vote for a union, he rhetorically asked "[b]ut why pay union dues & give up stock options for nothing?" This constitutes a blatant "threat of reprisal" under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969) in violation of Section 8(a)(1) of the Act.

Section 8(a)(1) of the National Labor Relations Act prohibits employer conduct that has a reasonable tendency to coerce employees in the exercise of their Section 7 rights. *American Freightways Co.,* 124 NLRB 146 (1959); *Gissel,* 395 U.S. at 618. No proof of the employer's intent or the employee's reaction is necessary to establish a violation of Section 8(a)(1) of the Act. *El Rancho Market*, 235 NLRB 468, 471 (1978). Employer statements that threaten to take away employee benefits, including stock options, if employees choose to unionize tend to coerce employees' rights under the Act and thus violate Section 8(a)(1). *KSM Industries*, 336 NLRB 133, 133 (2001); *Ready Mix, Inc.*, 341 NLRB 958, 960 (2004).

The Supreme Court long ago drew a line distinguishing between threats of reprisals that violate Section 8(a)(1) and employer free speech that lawfully predicts the effects of unionization. *Gissel*, 395 U.S. at 618. For a prediction to be lawful, the effects of unionization must be "carefully phrased on the basis of objective fact" and involve "probable consequences

beyond [the employer's] control." *Id.*; *Systems West*, 342 NLRB 851, 852 (2004). If these factors are not met, then the statement is not a prediction, but a "threat of retaliation based on misrepresentation and coercion." *Gissel*, 395 U.S. at 618. Such statements have no protection under Section 8(c) of the Act or the First Amendment. *Id.*

Musk's statement does not meet the standard under *Gissel* for a carefully stated lawful prediction. First, it does not state an objective fact. If Tesla employees unionized, Section 8(a)(5) of the NLRA would require Tesla to maintain all existing terms and conditions, including employee stock options, until the parties reach a collective bargaining agreement. If Tesla forced employees to "give up" their stock options because they voted in favor of unionizing, that would violate the Act. Musk does not come close to "carefully phrasing" an "objective fact."

Second, the statement does not convey a consequence that is outside of the Employer's control. Tesla controls its employee stock option plan, so it makes the ultimate decision on who is eligible. Excluding unionized employees from the stock option plan is therefore not a lawful prediction outside the employer's control, but is instead an unlawful threat of retaliation.

1. <u>Musk's Twitter Statement was Not Ambiguous</u>

Musk's Twitter statement, while stated rhetorically, is a threat that reasonably tends to coerce employees in their support of the union. In assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992). The "threats in question need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening." *Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995), *citing NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

Musk's Twitter statement begins by asserting, "Nothing stopping Tesla team at our car plant from voting union. Could do so tmrw [tomorrow] if they wanted." He then states, "But why pay union dues & give up stock options for nothing?" He finishes by explaining why he believes the benefits of unionization to be 'nothing,' "Our safety record is 2X better than when plant was

UAW & everybody already gets healthcare." The question in the third sentence of this Tweet is plainly a rhetorical response to the first two sentences of the statement. The CEO provides his analysis, in the form of a question, why employees should not vote for a union tomorrow or any other day: unionization will result in giving up stock options. The only entity that could guarantee that employees lose this benefit is Tesla.

Musk added an additional barb to this threat of lost stock options, telling employees that they would end up paying dues and losing benefits "for nothing" and implying a union could not improve healthcare or safety at Tesla. This is an unlawful prediction that unionization would be futile. *Hertz Corp.*, 316 NLRB 672, 686 (1995) (telling employees that union does not do anything for employees and that they have better benefits than unionized employees constitutes statement of futility in selecting union); *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992) (union will not do anything for employees).

Simply because Musk couched this statement in the form of a rhetorical question does not make it ambiguous. In *Concepts & Designs, Inc.*, 318 NLRB at 954, after the Company inadvertently failed to print an employee's check, the Company President stated to the employee, who was a union supporter, "It would sure be nice to get one of these every week, wouldn't it?" Despite not mentioning the union or the employee's support of it, the Board found this remark to be an implied threat that violated Section 8(a)(1).

In *KSM Industries*, the operations manager told strikers "these people in here have jobs" and asked "[w]hat are you doing for a livelihood?" 336 NLRB at 133. The Board found this comment violated Section 8(a)(1) because it was "plain that [the manager's] comment and question were simply another way of telling the strikers they were out of a job" and therefore the "rhetorical questioning had a reasonable tendency to coerce." *Id.*

2. <u>The Act Prohibits Threats of Reprisals Against Employees' Right to Stock Options</u>

The Board has repeatedly found that threatening employees with the loss of stock options if they unionize violates section 8(a)(1). In *Ausable Communications,* 273 NLRB 1410 (1985) the Board found a violation of Section 8(a)(1) where a supervisor told two employees that they

"would lose their rights to acquire company stock in the future" if the workplace unionized. *Id.* at 1413. In *Ready Mix, Inc.*, 341 NLRB 958 (2004) the Board found an 8(a)(1) violation where an employer stated in a memorandum to its employees that they could not continue to participate in its employee stock option plan if they chose union representation. *Id.* at 960. In *Dynacorp*, 343 NLRB 1197 (2004) the Board found an 8(a)(1) violation where a supervisor told employees that the employer would immediately cease making its contribution to the employee stock ownership plan if the union were elected.

The Board has also reached the same conclusion for similar threats involving 401(k) plans. In *Smithfield Foods*, 347 NLRB 1225 (2006) the Board found that an employer unlawfully threatened employees when the Plant Manager announced a new 401(k) program for employees but stated that employees would lose their eligibility if they voted for the Union. *Id.* at 1229; *see also E & L Plastics Corp.*, 305 NLRB 1119, 1120 (1992) (finding 8(a)(1) violation where pension and profit-sharing plan unlawfully conveyed to employees the impression that they would automatically lose retirement benefits if they were ever to unionize); *Meyer Jewelry Co.*, 230 NLRB 944 (1977) (finding 8(a)(1) violation where supervisor threatened loss of profit-sharing benefits if union came in).[62]

3. Musk's Twitter Statement Did Not Refer To Collective Bargaining

Musk's statement did not include any reference to collective bargaining or good faith negotiations. Statements implying that employees might lose benefits if they unionize may be lawful "when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations." *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980); *Kezi, Inc.*, 300 NLRB 594, 595 (1990). This is not one of those cases.

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[62] The Board has also found that similar comments warrant overturning representation elections because they convey a threat in retaliation for employees' exercise of their right to choose to be represented. In *BCI Coca-Cola Bottling Co.*, 339 NLRB 67 (2003) a branch manager told an employee that "with the Union, there is no 401(k)." The Board found this comment, and the Company's later failure to clearly disavow the remark, required the direction of a second election. In *Hertz Corp.*, 316 NLRB 672 (1995) the Board overturned an election after the employer distributed a summary of its 401k plan during the union campaign that stated a 401(k) benefit existed "only for non-unionized Hertz shops." *Id.* at fn. 2, 695. The Board found this statement "conveyed the impression that the employees would lose the 401k plan immediately on choosing union representation." *Id.* The Board further found that the employer's oral explanation of the negotiation process was insufficient to dispel this impression.

In *Kezi*, the employer implied that unionized bargaining units were excluded from the company's 401(k) plan, but also clearly stated that employees' retirement benefits would be the subject of good-faith bargaining. *Id.* The Board found no violation of the Act, drawing a distinction between lawful statements that indicate "benefits for unionized employees are subject to negotiation" versus unlawful statements that suggest that employees are "foreclosed from inclusion in a particular plan simply because they have a union bargaining on their behalf." *Id.*

In this case, neither Musk, nor anyone else from Tesla, has stated that Tesla will engage in good faith bargaining over stock options if the employees' choose union representation. Because the Company has never even suggested that employees would have the right to bargain before they would lose their benefits, but simply presented loss of benefits as if it were a *fait accompli*, the statement remains coercive.

4. <u>Tesla's Alternate Interpretation Is Both an After-the-Fact Fabrication and Factually Wrong</u>

Tesla now asserts that the intended meaning of Musk's Tweet was that the UAW, not Tesla, would make employees give up their stock options, supposedly because the UAW does not favor stock options. This is both an unreasonable interpretation of the Tweet and factually wrong.

The record contains eight different "Tweets" from CEO Musk all issued between May 20, 2018 and May 23, 2018, seven of which have to do with employee working conditions. (GCX 38, 56, 69) The record also includes six Tweets from unknown individuals who either responded to Musk, or Musk responded to them, or both. (GCX 69) Out of this series of messages, Tesla appears to argue that, even if Musk's initial Tweet reasonably tended to coerce employees in their support of the union, his subsequent Tweets clarified and removed any coercive effect.

First, this argument must fail because Musk's supposed clarifications occurred in different Tweets several days later. We have no way of knowing whether employees who viewed Musk's coercive May 20, 2018 Tweet, also viewed his supposed clarifications on May 22 and May 23.

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In addition, the original coercive Tweet remains online and visible by the public, including employees. Deleting the Tweet would be a necessary first step to undoing the coercive harm caused by it.

Furthermore, the supposedly clarifying Tweets are themselves coercive. On May 22, 2018, a Twitter user named Eric Brown publicly Tweeted, "Hi Elon, why would they lose stock options? Are you threatening to take away benefits from unionized workers?" (GCX 69-2) CEO Musk then publicly tweeted:

> 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 shd [should] be equal w easy movement either way. Managing sucks btw. Hate doing it so much.

(GCX 69-2) Musk did not explain what he mean by "No, UAW does that" or how UAW would "take away" stock options from unionized workers. Nor does his statement assure employees Tesla would engage in good faith bargaining if they chose to unionize. Instead, the CEO appears to warn that unionization will bring "divisiveness," a "2 class system," and the loss of "easy movement" between manager and employee status.

Rather than alleviating the harm of his May 20, 2017 Tweet, this Tweet only increases the coercive effect of the earlier statement. *See Hendrickson USA*, 366 NLRB No. 7 (2018). In *Hendrickson*, the employer conveyed to employees in a PowerPoint presentation that, if they were to elect the Union, "the culture will definitely change," "relationships suffer," and "flexibility is replaced by inefficiency," while extolling the existing "easy-going atmosphere" of the workplace. *Id.* The Board found that employees would reasonably interpret these statements as conveying a threat that, if the employees elect the Union, the employer would retaliate by changing the easy-going culture and by adopting a less flexible managerial approach in its workplace relationships. *Id.*

Tesla next proposes that Twitter user "Wooter" clarified Musk's May 20, 2018 Twitter statement in his or her May 23, 2018 Tweet. After Twitter user "Therm Scissorpunch" publicly Tweeted to Musk "Yesterday you said they'd lose stock options if they unionized," Wooter publicly responded, "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." (GCX 69-3) While this Tweet is public, it is not clear whether employees would be likely to see this message.

Musk then issued a Twitter statement, in response to Wooter, Therm Scissorpunch, and the Twitter account of "Parker Malloy," stating "Exactly. UAW does not have individual stock ownership as part of the compensation at any other company." This inaccurate statement, occurring three days after the initial coercive Tweet in a different "thread" of conversation, does not correct or even mitigate the coercive effect of the May 20, 2018 Tweet. Tesla asks us to tie its CEO's rhetorical assertion that employees would "give up stock options for nothing" if they unionized with his later assertion that UAW does not have stock ownership at other companies. Even if such a claim were true, it says nothing about what the employees at Tesla would choose to bargain for if they unionized or why such a fact would lead to Tesla employees giving up their current stock options.

Tesla's alternate interpretation of the Tweet must fail for a second reason: it is a complete fabrication. The UAW does not have a policy preventing UAW-represented employees from owning stock options. (RX 45C) Therefore, even under Tesla's preferred interpretation, the Twitter statement does not state an objective fact outside the employers control. *See Ed Chandler Ford, Inc.,* 254 NLRB 851 (1981) (Board found 8(a)(1) violation where employer's prediction that employees would lose bonuses if they unionized because the union's contracts with other car dealerships did not include bonuses was not based on objective facts); *cf. Eagle Transport Corp.,* 327 NLRB 1210 (1999) (posting letters from customers saying they would make other arrangements if the Company unionized did not violate the Act, because the letters conveyed an objective fact outside of the employer's control).

Predictions concerning the precise effects of unionization, however, "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Gissel*, 395 U.S. at 618; *Systems West*, 342 NLRB 851, 852 (2004). In *Systems West*, a supervisor at a construction company told employees that if the company unionized, the employees would be unable to work jobs outside of a certain geographical area, because of union rules. The Board found, because the statement was both

untrue and involved choices that the employer would have either complete or partial control over, the unlawfully threatened retaliation.

Contrary to Tesla's suggestion, *Noral Color Corp* and *TCI Cablevision of Washington* do not hold differently. In both of these cases, the employer made a statement that if employees' decertified the union, they would receive the 401(k) or ESOP programs already provided to nonunion employees at the company. The Board found each of these statements to be an objective fact based on factors outside the Company's control. *See TCI Cablevision of Washington, Inc.*, 329 NLRB 700, 700-01 (1999) (employer's 401(k) plan, according to "the provisions of ERISA," must be available to all employees who are not represented by a collective-bargaining representative); *Noral Color Corp.*, 276 NLRB 567, 570 (1985) (denying participation in ESOP plan for nonunion employees "would have amounted to discrimination of another sort" and "might well have jeopardized the favorable tax benefits of the ESOP plan").

Finally, Tesla has failed to offer evidence that the union does not value stock options as a form of compensation or would not negotiate to maintain them upon unionization. *Cf. Monfort, Inc. v. NLRB*, 1994 WL 121150, at *16 (10th Cir. 1994) (objective evidence established profit-sharing plan was not favored by the union). Instead, its only evidence for this absurd position is its CEO's own tweets. This *ipse dixit* has no basis in reality; it is a lie put forward to scare employees into opposing the union.

5. <u>The Method Used To Communicate The Threat Does Not Alter The Analysis</u>

While Musk used a social media platform to issue his unlawful threat of reprisal, that does not make this case unique. *See e.g.*, *Cayuga Medical Center*, 365 NLRB No. 170 (2017) (supervisor's Facebook post threatening retaliation against employee engaged in protected activity violated the Act); *Miklin Enterprises*, 361 NLRB 283, 290 (2014) (manager's posts on an anti-union Facebook site encouraged harassment of an employee who supported the union) Nor does the fact that the statement was issued through a public forum. *See Vemco, Inc.*, 304 NLRB 911, 925 (1991) (unlawful threat was communicated to the public and respondent's employees through media coverage of the press release); *Operating Engineers Local 12 (Associated*

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Engineers), 282 NLRB 1337, 1343 (1987) (statements by respondents' agents to the news media constituted threats in violation of Section 8(b)(1)(A) of the Act).

Further, it is irrelevant whom an employer's statement is directed to or intended to be heard by when evaluating the coerciveness of the statement. *Crown Stationers*, 272 NLRB 164 (1984); *Corporate Interiors, Inc.*, 340 NLRB 732, 733 (2003). In *Crown Stationers*, the store manager unintentionally left an unenclosed letter in a place where an employee was likely to find it, the letter contained a threat of discharge of a union supporter, and it was found and disseminated by an employee. The Board, holding that the fact "that the letter was personal and not intended for the eyes of employees is irrelevant," found the letter had a tendency to coerce employees in the exercise of their Section 7 rights and therefore violated Section 8(a)(1) of the Act. *See also Unbelievable, Inc.*, 323 NLRB 815, 816 (1997) (finding restaurant supervisor's coercive threat, overheard by a hidden busboy, violative of Section 8(a)(1) regardless of supervisor's lack of knowledge of busboy's presence); *Williams Motor Transfer*, 284 NLRB 1496, 1499 (1987) (finding company president's threats, overheard by a driver, unlawful regardless of president's intent or whether he was aware of driver's presence); *Corporate Interiors*, 340 NLRB at 733 (owner's threat of violence toward a union organizer during telephone call had a tendency to interfere with the free exercise of employee rights, whether or not owner was aware of employee's presence and whether or not he intended employee to hear the threat).

The General Counsel established that employee Michael Sanchez saw Musk's May 20, 2018 Twitter statement. (Tr. 52-53) Furthermore, the parties stipulated that Musk's May 20, 2018 Twitter statement was posted publicly and subsequently republished and disseminated and that Musk has used the same Twitter account to post about Tesla's personnel matters in the past. (JX 4, ¶¶ 3, 15, 19) His May 20, 2018 Twitter statement was therefore visible to all employees in a location they had a strong interest to check.

Tesla's numerous other unfair labor practices, as described in this brief, provide context and support for a finding that Musk's Tweet violated Section 8(a)(1). Indeed, a threat of loss of existing benefits is more coercive in the context of a union organizing campaign where, as here,

the employer has already committed numerous other unfair labor practices. *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980). Tesla's demonstrated disregard for the rights of its employees under the National Labor Relations Act would reasonably make employees more sensitive to Musk's threat. Employees would have to presume Musk is willing to follow through on his threat in light of Tesla's previous conduct.

6. Finding a Violation Does Not Restrict Musk's or Tesla's First Amendment Rights

The Supreme Court's decision in *Gissel* conclusively rebuts Tesla's First Amendment arguments. In *Gissel*, the Court stated that if "any indication" exists that an employer may take an action "solely on his own initiative" and "for reasons unrelated to economic necessities," then the statement

> is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and *as such without the protection of the First Amendment*.

Gissel, 395 U.S. at 618 (emphasis added) Thus, because threats of retaliation do not receive First Amendment protection, there is no conflict between the NLRA and the First Amendment.

IV

NONE OF THE ALLEGATIONS IN THE SECOND AMENDED COMPLAINT ARE TIME-BARRED

The allegations of Complaint ¶ 7(y), involving the June 6, 2017 meeting between Moran and Musk, are closely related to no less than six different timely Unfair Labor Practice Charges filed by the Charging Parties. *See* 32-CA-197020; 32-CA-197058; 32-CA-197091; 32-CA-197197 ; 32-CA-200530; 32-CA-208614.[63] Respondent's assertions to the contrary amount to nothing more than wishful thinking.

On August 10, 2018, Judge Tracy denied Respondent's Motion to Dismiss the General Counsel's amendment to include ¶ 7(y), finding that she had "no authority to overturn [the

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[63] Charging Parties do not concede that the allegations in Complaint ¶ 7(y) were not alleged in Charge Nos. 32-CA-197020; 32-CA-197058; 32-CA-197091; 32-CA-197197 ; 32-CA-200530; 32-CA-208614. *See Embassy Suites Resort*, 309 NLRB at 1314 (a violation of Section 8(a)(1) in general terms is sufficient to support a complaint alleging a particularized violation of Section 8(a)(1)).

Regional Director's] decision to amend the Complaint" and that genuine issues of material fact remain regarding the relationship of the amended allegations to the Charges. As the Judge noted, the remaining issue is "whether the amended allegations arise from the same factual situation or sequence of events as the timely filed charges," under *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988). *See also Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 2 (2018).

The General Counsel has "broad investigatory power" to deal with "unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 308-09 (1959). The Region may make allegations that are "closely related" to a timely filed charge and involve conduct occurring within six months of that timely charge. *Carney Hospital*, 350 NLRB 627, 628 (2007). An unfair labor practice charge is not a formal pleading. Its function is not to give notice to the respondent of the exact nature of the charges against it; that is the function of the complaint. *Fant Milling Co.*, *supra*; *Redd-I, Inc.*, 290 NLRB at 1116-17.

Under the *Redd-I* test, the Board (1) considers whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge; (2) considers whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) "may look" at whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations. *Redd-I*, 290 NLRB at 1118; *Seton Co.*, 332 NLRB 979, 983 (2000). *Carney Hospital*, *supra*, further refined the second prong of this test, stating that it is satisfied where the two sets of allegations "[1] demonstrate similar conduct, usually during the same time period with a similar object, or [2] there is a causal nexus between the allegations and they are part of a chain or progression of events, or [3] they are part of an overall plan to undermine union activity." *Carney Hospital*, 350 NLRB at 630.

The General Counsel can easily meet all three parts of the *Redd-I* test. First, Paragraph 7(y) employs the same legal theory as numerous other allegations in the Complaint: interference with employees' Section 7 right to select the Union as their collective-bargaining representative in violation of Section 8(a)(1) of the Act. The Board will find the first prong satisfied when the

original charge and the new allegation both involve "the same section of the Act (Section 8(a)(1)) and the same legal theory (interference with employees' Section 7 right to select the Union as their collective-bargaining representative)." *Seton Co.*, 332 NLRB 979, 983 (2000).

Second, there is a "causal nexus" between the allegations and they are "part of a chain or progression of events." *Carney Hospital*, 350 NLRB at 630. Musk and Toledano held the June 7, 2017 meeting with Moran and Vega in direct response to the events described in timely filed charges. First, on February 10, 2017, after Moran posted his time for Tesla to Listen article, which discussed safety problems at Tesla, Respondent's security guards coerced employees attempting to distribute his article to co-workers, as alleged in Charge Nos. 32-CA-197020, 32-CA-197058, 32-CA-197091; 32-CA-197197, and 32-CA-200530 and Complaint ¶ 7(c) -(i).

Next, on April 5 and 28, 2017, Tesla attempted to prohibit Galescu and Ortiz from sharing injury data they had lawfully requested, as alleged in Charge Nos. 32-CA-197020, 32-CA-197058, 32-CA-197091; 32-CA-197197, and 32-CA-200530 and Complaint ¶ 7(k), (m). Then, on May 24, 2017, Respondent's security guards coerced employees distributing flyers summarizing a health and safety report based on the injury data obtained by Galescu and Ortiz, as alleged in Charge Nos. 32-CA-197020, 32-CA-197058, 32-CA-197091; 32-CA-197197, and 32-CA-200530 and Complaint ¶ 7(n) - (p). Also on May 24, 2017, Respondent unlawfully interrogated Galescu and Ortiz regarding the health and safety report, as alleged in Charge Nos. 32-CA-197020, 32-CA-197058, 32-CA-197091; 32-CA-197197, and 32-CA-200530 and Complaint ¶ 7(q).

Respondent held the June 7, 2017 meeting with Moran in direct response to the above events. As the undisputed evidence demonstrates, Musk held this meeting to solicit Moran's safety concerns and dissuade him from engaging in further protected concerted activity. This meeting can therefore only be interpreted as "part of a chain or progression of events" with previous timely allegations. The allegations in the Amendment therefore meet the "closely related" test and should not be found untimely under Section 10(b).

In addition, contrary to Respondent's assertion, Complaint ¶ 7(s), regarding Supervisor Homer Hunt's remark in August 2017, "the union's never getting in here. This is Tesla," is not

barred by Section 10(b). On October 25, 2017, no more than three months after the allegations in Complaint ¶ 7(s) took place, the UAW filed Charge No. 32-CA-208614, stating, in part:

> Within the past six months and ongoing, Tesla, Inc., though its agents, has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act by intimidating and harassing employees for their Section 7 Activities.

This charge fully encompasses the allegations in Paragraph 7(s) of the Second Amended Complaint. A statement of futility tends to intimidate and coerce employees in the exercise of their rights under Section 7 of the Act. *Wilson Tree Co., Inc.*, 312 NLRB 883, 896 (1993) (statements implying that union activity is futile are intimidating).

V

TESLA'S REPEATED FAILURE TO PRODUCE RELEVANT DOCUMENTS MERITS ADVERSE INFERENCES AGAINST IT AND ITS WITNESSES

An adverse inference should be applied against Tesla's defense that it conducted a lawful investigation and a negative inference should be drawn concerning the credibility of Hedges, who directed the investigation, and Gecewich, who conducted it, based on Tesla's repeated failure to produce documents in a timely manner, despite the Administrative Law Judge's Order granting the production of relevant documents to the investigation. (CPX 7) *Metro-West Ambulance Service*, 360 NLRB 1029, 1030-31 and n. 13 (2014) (where respondent in Section 8(a)(3) discrimination case failed to produce accident reports over the previous two years in response to General Counsel's subpoena, an adverse inference was proper that respondent failed to show that it treated the discriminatee the same as other employees who engaged in comparable misconduct).

Here, Tesla stonewalled the General Counsel and the Charging Parties the entire hearing by failing to produce documents which related to the termination and discipline of Ortiz and Moran, respectively. Hedges testified that he received Pratt's complaint and forwarded it to General Counsel Jamie Bodiford, Director of Employee Relations and Counsel Carmen Copher, and Gecewich (Tr. 1184, 1213). A copy of this email, text, or any sort of communication coming from Hedges to Bodiford, Copher, or Gecewich was not produced. Further, Gecewich testified

that he presented an enlarged and redacted version of Ortiz's Facebook post (GCX 28) to Ortiz during the investigation, but this was not produced.

Tesla failed to produce several responsive documents until the last week of the hearing. These were non-privileged versions of Gecewich's investigative report, along with its modification history. See GCX 85, GCX 86, CPX 4, CPX 5. Tesla also failed to produce emails sent by Gecewich to the decision makers in Ortiz's case without a valid excuse. See RX 15.

Additionally, in the last week of the hearing, Tesla belatedly produced the notes taken by Holcomb (GCX 91) which it previously deemed privileged. Tesla's behavior in its production of documents is unexcused and unexplained and demanding a negative inference on the lawfulness of the investigation and the credibility of those leading it.

VI

THE REMEDY

In order to remedy these significant violations, the Board should craft a comprehensive Order that reverses Tesla's unlawful conduct, where possible, and ensures going forward that employees believe that Tesla will respect their rights under the Act.

In order to accomplish this, any notice posting should be (1) sent through Tesla's email system to all employees at their "@tesla.com" email account, (2) read aloud by a senior management officials to all employees during working hours, with representatives of the UAW in attendance at all such readings, and (3) posted on Musk's Twitter account, "@elonmusk." *Midwest Terminals*, 365 NLRB No. 134, *6 (2017) (requiring notices be distributed electronically, including email, intranet site, "and/or other electronic means," if the Respondent customarily communicates with its employees by such means); *Cayuga Medical Center*, 365 NLRB No. 170, *2 (2017) (discussing when public reading of remedial notice appropriate).

Further, because the violations involved senior corporate officials, including the CEO, the notice posting should be distributed at all of Respondent's facilities, not just the Fremont and Sparks facilities. *See Murray American Energy*, 366 NLRB at fn. 4 (notice at all employer facilities appropriate when corporate officials were involved in the commission of the violations).

Tesla should be ordered to rescind its unlawful Confidentiality Acknowledgement, cease and desist from maintaining and enforcing a confidentiality policy that restricts protected activity, and affirmatively state that employees have the following rights: (1) information about working conditions at Tesla is not confidential information; (2) employees are permitted to communicate with anyone outside Tesla about working conditions at the company, including members of the media; (3) employees are permitted to write publicly about working conditions at Tesla, including in any social media, blog, or book; (4) employees cannot be disciplined or terminated for communicating information about working conditions at Tesla to anyone inside or outside of the Company.

The Board should order the reinstatement of Richard Ortiz to his former position with full back pay, and the rescission of the disciplinary warning issued to Jose Moran. Tesla should further be ordered to rescind its unlawful Team Wear Policy, cease and desist from maintaining and enforcing a uniform policy that restricts protected activity, and affirmatively state that employees have a right to wear shirts and other clothing containing union insignias.

Tesla should also be ordered to cease and desist from restraining and coercing off-duty employees distributing union literature, rescind any rule requiring pre-approval of union literature, and affirmatively state that employees have the right to distribute union literature to co-workers in non-working areas during non-working hours without harassment. The Board should further order Tesla to cease and desist from threatening to revoke employee's stock options if employees choose to unionize and affirmatively state that the Company will not unilaterally revoke employee's stock options if the employees choose to be represented by the UAW.

Finally, Tesla should be ordered to cease and desist from all other unlawful conduct discussed above, including interrogating employees about protected activity, stating that union organizing activity was futile, soliciting grievances to dissuade protected activity, promising to remedy safety problems to dissuade protected activity, preventing employees from sharing injury data with outside representatives, and threatening reprisal for wearing a union insignia. Tesla should further affirmatively state it will not take these actions again in the future.

VI

CONCLUSION

For all the reasons set forth above Charging Parties Michael Sanchez, Jonathan Galescu, Richard Ortiz, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO respectfully requests that the Administrative Law Judge uphold the charges made in the Second Amended Complaint and issue the remedial orders set forth above.

DATED: December 21, 2018

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ID 365966

PROOF OF SERVICE BY ELECTRONIC MAIL

Case No. 32-CA-197020 et al.

HENRY M. WILLIS certifies as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 6300 Wilshire Boulevard, Suite 2000, Los Angeles, California 90048-5202. My electronic notification address is lz@ssdslaw.com.

On December 21, 2018, I caused the foregoing document(s) described as: **POST-HEARING BRIEF OF CHARGING PARTIES MICHAEL SANCHEZ, JONATHAN GALESCU, RICHARD ORTIZ, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO**
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__X__ **BY E-MAIL:** By transmitting a copy of the above-described document(s) via e-mail to the individual(s) set forth above at the e-mail addressed indicated.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 21, 2018, at Los Angeles, California.

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