

**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 REPLYING TO THE CHARGING PARTIES'  
ANSWERING BRIEF TO TESLA, INC.'S EXCEPTIONS TO THE ADMINISTRATIVE  
LAW JUDGE'S DECISION AND RESPONDENT'S BRIEF IN SUPPORT OF  
EXCEPTIONS**

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The Charging Parties (“CPs”) did not identify any record evidence or cite any authority that contradicted or rebutted Tesla’s showing in its opening brief. Tesla’s exceptions should be granted.

**I. TESLA PROPERLY DISCIPLINED MORAN AND DISCHARGED ORTIZ**

The CPs unsuccessfully attempt to rebut Tesla’s opening brief which established that Tesla properly conducted a workplace investigation, did not interrogate Ortiz or Moran and properly discharged Ortiz and disciplined Moran with a warning. The CPs resort to wholesale creation of “facts” and then draw conclusions based on those “facts” which are not contained anywhere in the record. Perhaps that is why the CPs’ brief is largely devoid of any record citations. None of the CPs’ fabrications should be considered, and none of their cited authority rebuts Tesla’s initial showing.

Tesla Properly Undertook a Workplace Investigation: The CPs incorrectly assert (p. 21) that the investigation occurred because of “union activity” by ignoring the ALJ’s finding that the investigation began because of Pratt’s complaint that “the release of his photo and information was inappropriate and made him feel singled out, harassed or cyberbullied.” (ALJD 60:18-20)

The CPs also attempt to take issue with Gecewich’s decision to investigate by suggesting (p. 9, fn. 4) that Gecewich’s testimony (improperly excluded by the ALJ) about a similar incident he investigated at his prior job where Workday information was posted on the internet, would not be “comparable” by stating that Ortiz and Moran’s conduct resulted in a “private, employee only posting.” This is a blatant attempt to gloss over the established fact that Moran improperly obtained *other* employees’ Workday profiles and photographs using a digital hack and then provided them to Ortiz who posted them outside the Tesla workplace, on the internet. Moran testified Workday was an *internal* company system (ALJD 58:29-31) and that Workday data *concerning other employees* should not be shared externally and that “outside sources” should not be provided access to Workday. (Tr. 762:24-763:6, 2278:19-2279:17; GC-67) Moran admitted 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” and that he did not have Pratt or Ives’ permission to take their photos from Workday. (Tr. 763:2-6, 763:14-18) Ortiz similarly described Workday’s function as “like a Facebook for Tesla; *the people inside the building.*” (ALJD 57:11-14)(italics added). Moran’s and Ortiz’s own testimony plainly establishes that they recognized their conduct was wrong and contradicts the CPs’ assertion. The fact that both this matter and the matter that arose at Gecewich’s prior company involved data being taken from Workday and posted on the internet makes Gecewich’s testimony about his other investigation relevant and probative because it provides additional foundation for Gecewich’s decision to investigate.

Lacking evidence in the record, the CPs dream up non-existent “facts” in an attempt to establish (p. 18) that the investigation was not conducted in the “normal course of Company investigations into employee conduct.” Neither the GC nor the CPs put any evidence in the record about the “normal course of Company investigations.” Nor is there any credited testimony or evidence in the record establishing the normal course of a workplace investigation or comparing it to what was done here.<sup>1</sup> Similarly, the CPs cannot and did not point to any facts to support their assertion (p. 19) that Hedges did not give Pratt’s complaint to “staff that would ordinarily investigate complaints of this nature but instead notified top executives at Tesla: the Director of Employee Relations and Tesla’s General Counsel.” The group tasked with investigating workplace complaints was the Employee Relations department, which is where Hedges sent the complaint. (ALJD 54:30-33; Tr. 883:7-884:13). The complaint was also sent to Gecewich, a senior investigator in Employee Relations. (ALJD 54:1-3, 54:30-55:1) The complaint was *not* referred to Tesla’s General Counsel. Rather, Hedges also notified Carmen Copher, to whom Gecewich reported and who was Director (and counsel) for Employee Relations. (Tr. 1114:9-10, 1887:16-18).

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<sup>1</sup> The only testimony about the conduct of investigations is from Gecewich, and Gecewich never testified that his investigation in this case or any other case fell short of established work practices and standards.

Tesla appropriately investigated an employee's complaint of harassment and cyber-bullying and expanded the investigation to include mis-use of Workday as the investigation progressed and the fact finding process identified additional, associated misconduct.

There is No Evidence of Pretext: The CPs' (p. 20) and the ALJ's reliance on *St. Paul Park Refining Company*, 366 NLRB No. 83 (2018) to demonstrate pretext is misplaced. The investigation in *St. Paul* was inadequate because it credited the supervisors' accounts and ignored (by failing to interview) conflicting accounts from bargaining unit employees who were percipient witnesses to the disciplined employee's repeatedly raised safety complaints. *Id.* at slip op. at 6-7. The Board found that the failure to interview any bargaining unit employee witnesses made it 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. Nothing similar did or could have occurred here. There were no conflicting accounts about the separate acts undertaken by Moran and Ortiz in connection with Workday. There were no managers or supervisors who were witnesses to Moran's and/or Ortiz's acts. The only relevant witnesses were Pratt, Kostitch, Moran and Ortiz, who Gecewich interviewed. Thus, Gecewich's investigation, which involved interviewing all the witnesses and tailoring the investigation to the complaint and wrongful workplace conduct, was more than adequate.

Presumably because *St. Paul* is easily distinguished, the CPs resorted to creating extraordinary "facts" to support their equally outlandish and baseless conclusions (p. 19) that Gecewich "set up the investigation," that he "isolate[d] and entrap[ped] Ortiz," that he had a "fixation on Ortiz's and Moran's protected activities" all of which the CPs assert establishes the "illegal motivation of both the investigation and the discipline it produced." It almost goes without saying that the CPs did not and could not cite to even a scintilla of evidence or legal authority for these flights of fancy. These statements misrepresent the record evidence and the law governing the issues here. They should be wholly disregarded.

The CPs continue in the same vein (p. 20-21) by suggesting that the investigation was “irregular” because Gecewich allegedly “chose two additional managers”<sup>2</sup> but they did not make “any significant contribution to the review of Gecewich’s recommendation” and they “appear[] to have been brought together to rubber stamp Gecewich’s recommendation, rather than to render its own decision.” Once again, the CPs do not point to any evidence to justify *any* of these bizarre statements. Nor do they identify any purported legal authority to support these claims. Furthermore, the record contradicts these claims because the decision makers met with Gecewich to discuss the Ortiz case and Gecewich’s recommendations. (ALJD 61:11-62:3-7, fn. 100). But even after the discussion, Graminger hesitated and wanted to talk to his manager (the Vice President of Manufacturing) before he made a decision. (ALJD 62:14-25). Only after that discussion and receiving additional information from his manager that there had been similar instances where employees were terminated after lying during workplace investigations, did Graminger reach a decision. (ALJD 62:21-28) The CPs’ confabulations and misrepresentations regarding non-existent pretext should be disregarded.

No Animus by Decision Makers Was Established: The CPs’ nits about Tesla’s investigation do not demonstrate the requisite animus under *Wright Line*. Quite simply, Tesla sought to determine who removed Workday information from Tesla’s internal site and posted it to Facebook, as well as how the information was removed. Although the CPs spend significant space discussing what Tesla could have done or might have done during the investigation, Board precedent only requires that Tesla conduct a fair investigation – not a perfect one. *St. Paul*, slip op. at 8-9, 15-16.

Nor did the CPs rebut Tesla’s showing that there was no animus as required by *Tschiggfire Properties, Ltd.*, 368 NLRB No. 120 (2019). The CPs do not provide any specific evidence or citation to the record – rather just the same, generalized allegations set for in the ALJ’s decision that include uncharged conduct and including alleged acts not involving decision

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<sup>2</sup> The ALJ did not make a finding that identified the person who selected the decision makers. (ALJD 60:37-61:5)

makers or involving employees other than Moran and Ortiz. *Tschiggfire Properties* is clear: the GC's burden cannot be met by simply reciting "circumstantial evidence of *any* animus or hostility toward union or other protected activity" because *Wright Line* "requires more." 368 NLRB 120, slip op. at 1. To demonstrate animus, "evidence of animus must support a finding that a causal relationship exists between the employee's protected activity and the employer's adverse action." *Id.* No such showing was made by the ALJ or the CPs. The undisputed evidence is the opposite for Graminger (Ortiz decision maker); he is pro-union, and was still a dues paying member of a union in Germany though he worked in America. (Tr. 1313:6-17).

Moreover, the GC did not rebut Tesla's showing that the record establishes Tesla did not harbor anti-union animus towards Ortiz or Moran. Moran distributed a blog post he had published at the Fremont facility on February 10, 2017. (ALJD 9:23-35) About four months later on June 7, Moran presented a petition to management and met with management. Shortly thereafter, instead of any adverse consequences, Moran was promoted to a lead position and got a pay raise. (Tr. 748:3-16; 750:7-15) Even after his October 2017 warning, he received a \$4,000 performance bonus and continues to receive even higher bonus payments. (Tr. 752:12-754:4) The same is true for Ortiz. He participated in the February 10 leafletting and met with Liza Lipson about the use of OSHA 300 logs on May 24. (ALJD 29:4-11) Two months later, Ortiz got a "consistently strong" performance award of \$2,807.00. (Tr. 564:15-565:9; GC-13; GC-14) The CPs' generalized statements as to animus are factually and legally insufficient and should be disregarded.

Finally, the CPs now suggest (p.21-22) – without any legal or factual support whatsoever – that the decision made as to Ortiz was not valid because Graminger and the other decision makers did not "conduct any investigation of their own" or "speak to Ortiz about the incident." This is both puzzling and preposterous. The CPs cannot have it both ways: they cannot claim that Ortiz was interrogated in violation of the Act because he was questioned during a workplace investigation and then suggest that there is a requirement that management also question Ortiz (which apparently would not violate the Act) before any discipline can be meted out. Even more

ridiculous is the invention new requirements –i.e., that decision makers are somehow supposed to conduct their own investigation (after reviewing the workplace investigation that was already completed) or that an employer conduct two investigations and that one of those be conducted by management. This is implausible both as a matter of law and practicality.<sup>3</sup>

Neither Moran Nor Ortiz Engaged in Protected Activities: Moran lost the protection of the Act (to the extent he ever engaged in protected activities) when he misappropriated other employees’ personnel information from Workday, Tesla’s internal database that houses its personnel records. Ortiz lost the protection of the act (to the extent he ever engaged in protected activities) by lying during a workplace investigation.

Moran Improperly Accessed Internal Workday Information: The CPs’ assertion (p. 14) that Moran’s conduct was protected because he was providing “visual confirmation” that persons who testified at the State Capitol were Tesla employees is false. It is flatly contradicted by Moran’s testimony. Moran was able to confirm the employment status of the individuals simply by looking at Workday. (ALJD 52:31-37; Tr. 794:17-20) But rather than stop there, Moran needlessly (and improperly) took screenshots of the other employees’ Workday profiles with their pictures and texted them to Ortiz. (Tr. 724:9-10, 724:23-727:3, 499:12 - 507:15; GC-43, p.1-5) When questioned, 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)

Equally untrue is the CPs’ assertion (p. 24) that Tesla made Workday information “available to employees without restriction, and employees used and shared that information with each other freely.” It is undisputed that an employee could only access Workday through a log-in, which is a restriction, and there is no testimony that employees shared Workday information with each other – other than Moran’s improper misappropriation. (ALJD 52:30-32) Workday did not allow Moran to print or share the Workday profiles directly with Ortiz (another employee). Instead, Moran had to use a digital hack to obtain the information.

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<sup>3</sup> As explained above, workplace investigations is a function delegated to the Employee Relations department; not manufacturing managers.

For similar reasons, the CPs (p. 25) are unable to distinguish *Roadway Express Inc.*, 271 NLRB 1238 (1984). *Roadway Express* does not discuss other employees' photographs. Further, Tesla restricted the use of Workday and the transfer of information from Workday. Thus, Tesla did not affirmatively grant all employees access to Workday. The same problems attach to the CPs failure to distinguish *Ridgley Manufacturing Company*, 207 NLRB 193 (1973) because the CPs only discuss employees' ability to view information in Workday. That is not what happened here. Moran went well beyond viewing the information or writing down the employee information. Instead, he digitally captured the information from Workday and transmitted it in the exact form to Ortiz.

Also meaningless are the CPs' examples (p. 24) of possible uses of Workday information (organizing a softball team, assigning dishes for a potluck, and smoking support groups) because none of these suggestions involve taking the information wholesale from Workday and posting it externally to the internet. The CPs are also unable to identify any comparator cases (p. 26) where Tesla employees were treated differently after misappropriating Workday information and posting it externally to a third party database, such as Facebook.

Ortiz Lied During A Workplace Investigation: The CPs (p.14-15) fail to revive the ALJ's cited cases that Tesla distinguished in its opening brief. The CPs only attempt to resuscitate *Tradewaste Incineration*, 336 NLRB 902 (2001) is to suggest that it is on point because Ortiz's post provided salary information for other employees, which misses the mark. Ortiz's misconduct was lying about the source of the Workday profiles; not whether he provided salary information for other employees. Similarly, their reliance on *St. Louis Car Company*, 108 NLRB 1523 (1954) is also misplaced. Ortiz was not discharged for being untrustworthy for not answering questions about whether he (or other employees) were trying to organize but rather because he did not provide the source of digitally hacked Workday profiles for other employees. And Ortiz was not discharged for lying about distributing union flyers, also rendering *United Services Automobile Association*, 340 NLRB 784 (2003) inapposite.

Furthermore, the CPs (p.22-24) also grossly mischaracterize Tesla’s proposed new standard for addressing employee deception during investigations by arguing that recognizing “core” rights under the NLRA would require a “momentous shift in Board law.” This is simply not true. The Board and courts have long acknowledged that certain “core” NLRA rights exist. *See, e.g., Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018); *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994); *Boeing Co.*, 365 NLRB No. 154, slip op. at 15 (2017) Nor can the CPs rely upon the GC to challenge the proposed standard because the GC failed to point to any authority whatsoever.

Gecewich Properly Questioned Moran and Ortiz During the Investigation: The CPs mischaracterize the application of the *Rossmore House* factors to suggest that Moran and Ortiz were interrogated. Contrary to the CPs’ assertions (p. 26), Tesla did not investigate Ortiz and Moran to learn “about a campaign to persuade the state legislature to exercise greater oversight over working conditions at Tesla.” Rather, in order to determine the origin of the misuse of Workday information – and Ortiz’s subsequent lies – Gecewich had to ask about the Workday portion of the post. Notably, Gecewich did not ask about any of the pro-union discussion surrounding the post: just the Workday information. (ALJD 57:3-17, 58:23-34, 59:24-25) The CPs’ argument essentially can be condensed to an assertion that any employee misconduct is insulated from investigation if it is tied to other protected concerted activity. But this is inconsistent with the Board’s holding in *Unique Thrift Store*, 368 NLRB No. 144, slip op. at 4 (2019), which reinforced an employer’s legitimate business interest in conducting effective, confidential workplace investigations.

Equally unavailing is the CPs’ citation to *Guess!, Inc.*, 339 NLRB 432 (2003). The facts in *Guess* are materially different from the facts here. *Guess* involved a deposition taken in a Workers’ Compensation case, during which the employer asked questions about the identity of employees who attended union meetings. *Id.* at 434. The Board found the questions were unlawful because the employee’s confidentiality interests outweighed the employer’s need for the information. *Id.* Specifically, the employer’s questions were broad inquiries about union

meetings generally, not the meetings the plaintiff attended or the specific time period when the plaintiff was injured – which “would not necessarily lead to information that would be helpful for, or relevant to, the Respondent's workers' compensation defense.” *Id.* at 435. Unlike the employer in *Guess*, Gecewich’s questions were narrowly tailored to focus specifically on the Workday information. Gecewich did not, for example, ask Ortiz or Moran to identify other Tesla employees who were members of the Facebook group, what other Tesla employees made posts in the Facebook group, or what was discussed in the Facebook group.

## **II. MUSK’S MAY 20 TWEET DID NOT VIOLATE THE ACT**

Like the ALJ and the GC, the CP erroneously read the May 20 Musk tweet in isolation and claim it to be an unambiguous threat to “force employees to ‘give up’ their stock options because they [vote] in favor of unionizing.” (p.28) However, on its face and as argued in Tesla’s opening brief in support of its exceptions, the May 20 tweet is, at worst, an ambiguous statement that says absolutely nothing about forcing unionizing employees to do anything or to indicate that Tesla would take stock options away from employees were they to unionize. The *sole* Tesla employee on record as having seen Musk’s May 20 tweet never testified that he read it to be a threat. Moreover, the CPs concede that Musk’s May 20 tweet was a rhetorical question. Thus, based on that concession, the May 20 tweet was not an unlawfully coercive statement as a matter of law (even though it came from Elon Musk). *Trinity Services Group, Inc.*, 368 NLRB No. 115, slip op. at 2 (2019)(finding a management official’s comment not to be unlawful where “in context,” it “was a rhetorical question posed as part of a lawful expression of his opinion that paying money to the Union was not a good investments. The only fact that tends to favor a finding of coercion is that [the official] is a high-level manager. This is far from sufficient to make out a violation of the Act.”)

Further, while acknowledging that Musk’s subsequent tweet thread and Tesla’s press statement should ordinarily be considered in the proper legal evaluation of the May 20 tweet, the CPs call on the Board to disregard those later Twitter messages, erroneously claiming that the employees viewing the May 20 message would not have seen the subsequent clarifying tweets.

This erroneous assertion is contrary to the record evidence which shows that Jose Moran, again the only Tesla employee on record to have seen the May 20 tweet admitted that he also saw the subsequent messages. Likewise, the cases cited by the CPs on p. 29-30 are inapposite because they involve statements describing what an employer could and would do to workers, while Musk's tweets expressed his legally protected opinion as to what the UAW could do unionizing Tesla workers and not what Tesla would do.

And finally, even though Musk's non-threatening expressions of his opinions and beliefs about the Union require no proof of supporting facts, *North Kingstown Nursing Care Center*, 244 NLRB 54, 65 (1979), *Nestle Co*, 248 NLRB 732 (1980), the CPs' assertion that it does must be rejected because Musk's subsequent clarifying tweets and Tesla press release do describe facts that satisfy this "non-requirement." Further, by this argument, the CPs ask the Board to misallocate the burden of proof since Musk's non-coercive statement is presumptively protected by Section 8(c) and the First Amendment, making it the GC's/CPs' burden to prove the statement's alleged unlawfulness by presenting UAW contracts that allow UAW bargaining units to receive employer stock options, establishing the falsity of his statement. Indeed, who better to produce such evidence than the GC and the UAW. Yet no such proof was offered, highlighting the point that Musk could and did reasonably believe that the UAW does not authorize employees to receive stock options and that Tesla employee and Twitter users would reasonably interpret Musk's tweet to be an expression of his protected point of view and not a threat to strip them of their Tesla stock options in the event they unionized.

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

Dated: February 27, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By:



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**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 February 27, 2020, I served a true copy of the document(s) described as:

**RESPONDENT TESLA, INC.'S BRIEF REPLYING TO THE CHARGING PARTIES'  
ANSWERING BRIEF TO TESLA, INC.'S EXCEPTIONS TO THE ADMINISTRATIVE  
LAW JUDGE'S DECISION AND RESPONDENT'S BRIEF IN SUPPORT OF  
EXCEPTIONS**

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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 [dbacon@sheppardmullin.com](mailto:dbacon@sheppardmullin.com) to the person(s) at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on February 27, 2020, at San Francisco, California.

A handwritten signature in blue ink that reads "Doug Bacon". The signature is written in a cursive style with a large initial "D".

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Doug Bacon