UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

META PLATFORMS, INC.

and **Case 19-CA-312724**

DAVID JAMES CARLSON, AN INDIVIDUAL

Katherine Bond, Esq.,
for the General Counsel,
Joseph E. Santucci, Jr., Matthew C. Tews, and Ryan Goldberg, Esqs.,
for Respondent

DECISION

INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This hearing was held on May 14, 2024, in Seattle, Washington, over allegations that Meta Platforms, Inc. ("Respondent" or "the Company") violated Section 8(a)(1) of the National Labor Relations Act ("Act" or "NLRA") when it offered and entered into separation agreements containing overly broad non-disparagement and confidentiality sections. The primary dispute is what standard applies to determine whether there has been a violation. At the time Respondent offered and entered into the agreements at issue, *Baylor University Medical Center*, 369 NLRB No. 43 (2020), and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020) set the standard, holding that broad confidentiality and non-disparagement provisions were generally permissible absent any additional violations surrounding the agreement's offer or execution. However, the Board later decided *McLaren Macomb*, 372 NLRB No. 58 (2023), overruling *Baylor* and *IGT* and returning to the prior standard focused on determining whether the terms of the agreement would reasonably tend to infringe upon employees' Section 7 rights.

The General Counsel argues *McLaren Macomb* should be applied retroactively, and that under that standard Respondent violated the Act by offering the separation agreements containing the unlawfully overbroad sections at issue. Respondent counters that while retroactive application would constitute a manifest injustice in this case, the sections at issue are lawful under both the *Baylor* and *McLaren Macomb* standards.

For the reasons discussed below, I conclude that, under the circumstances presented, it would not constitute a manifest injustice to apply *McLaren Macomb* retroactively in this case, and that Respondent violated Section 8(a)(1) as alleged.

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[1] Abbreviations used in this decision are as follows: Transcript citations are "Tr. ___"; General Counsel Exhibits are "GC Exh. __"; Respondent's Exhibits are "R Exh.__"; and Rejected Exhibits are as (Rej. __ Exh.__). General Counsel's Brief is "GC Br. __" and Respondent's Brief is "R Br. __." Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based on my review and consideration of the entire record.

FINDINGS OF FACT

A. Jurisdiction

Respondent is a for-profit corporation with offices throughout the United States, including in Seattle, Washington, where it is engaged in the business of providing technology services. Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. (GC Exhs. 1(c) and (e) (Jt. Exh. 2).

B. Alleged Unfair Labor Practices

The parties have stipulated to the critical facts. (Jt. Exh. 2). On about November 9, 2022, Respondent notified over 7,000 of its U.S.-based, non-supervisory employees that they were being laid off. Each affected employee was offered an 11-page Separation Agreement and Release ("Separation Agreement"), which states that in exchange for waiving any actual or potential claims and resolving any disputes they may have regarding their employment and their separation,[2] the employee would receive enhanced severance pay and other post-employment benefits. (Jt. Exh. 2).[3]

The parties have stipulated the Separation Agreements at issue are those offered and entered into between August 21, 2022, and February 20, 2023. During that period, approximately 7,511 U.S.-based, non-supervisory employees received a Separation Agreement, and of those approximately 7,236 signed. Each contained the following identical sections:

> 4. Permitted Actions and Disclosures: Nothing in this Agreement, including the Release section in Section 5, the Non-Disparagement section in Section 10, the Confidentiality section in Section 13, the Cooperation section in Section 14, should be read to prevent or prohibit you, the Company, or any other party from (i) disclosing information regarding unlawful acts in the workplace, including, but not limited to, sexual harassment, discrimination, or any other conduct that you have reason to believe is unlawful including, but not limited to, factual information related to any claims for sexual assault or under California's Fair Employment and Housing Act (if applicable); (ii) initiating communications directly with, cooperating with, providing relevant

[2] Section 5(a) (Release) of the Separation Agreement reads, in pertinent part, as follows:

> Except as described in Section 4 … you hereby … release … the Company Releasees … from any and all legally waivable actions or causes of action, suits, claims, complaints, contracts, liabilities, agreements, promises, contracts, torts, debts, damages, controversies, judgments, rights and demands, whether existing or contingent, known or unknown, suspected or unsuspected, which arise out of your employment with, change in employment status with, and/or separation of employment from, the Company. This release is intended by you to be all-encompassing and to act as a full and total release of any legally waivable claims, whether specifically enumerated herein or not, that you may have or have had against the Company Releasees arising from conduct occurring up to and through the date you sign this Agreement, including, but not limited to, any legally waivable claims arising from any federal, state or local law, regulation or constitution dealing with either employment, employment benefits or employment discrimination including any claims or causes of action you have or may have relating to discrimination under federal, state or local statutes …

(Jt. Exh. 1).

[3] Regardless of whether the affected employees signed, they each received 60- or 90-days' severance pay, depending on their location within the United States.

information to (including but not limited to information regarding the existence of or facts and circumstances underlying this Agreement), or otherwise assisting in an investigation by … [the] National Labor Relations Board ("NLRB") or any governmental authority with responsibility for the administration of fair employment practices laws regarding a possible violation of such laws; (iii) responding to any inquiry from any such governmental, regulatory, or legislative body or official or government authority, including an inquiry about the existence of this Agreement or its underlying facts or circumstances; or (iv) participating, cooperating, testifying, or otherwise assisting in any governmental action, investigation, or proceeding relating to a possible violation of any such law, rule or regulation. Further, nothing in this Agreement shall prohibit or restrict you from initiating communications directly with, or responding to any inquiry from, or providing testimony before, … any other federal or state regulatory authority regarding this Agreement or its underlying facts or circumstances, or regarding any potentially fraudulent or suspicious activities. Moreover, nothing herein is intended to limit the exercise of your rights under Section 7 of the NLRA. You are, however, waiving any right to recover money in connection with any agency charge or agency or judicial decision, including class or collective action rulings, other than bounty money properly awarded by the SEC.

…

10. Non-Disparagement: Except as described in Section 4, and not including any testimony given truthfully under oath or as required by any other legal proceeding, you agree to refrain from any disparagement, defamation, libel, or slander of any of the Company Releasees; and to refrain from making any disparaging, critical or otherwise detrimental comments to any person or entity concerning the Company's products, services or programs; its business affairs, operation, management and financial condition; or the circumstances surrounding your employment and/or separation from employment from the Company. Nothing in this Agreement (a) denies you the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment, sexual assault, discrimination, or any other conduct that you have reason to believe is unlawful including, but not limited to, factual information related to any claims for sexual assault or under California's Fair Employment and Housing Act (if applicable); or (b) waives your right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment, sexual assault, discrimination, or any other conduct that you have reason to believe is unlawful when you have been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the legislature, or as otherwise allowed by Section 5.

11. Unauthorized Media Statements: In any communications with the media ("Media Statements"), you agree that you will not represent yourself as authorized to speak on behalf of the Company, or otherwise imply that any statements you make are representative of the views or policies of the Company, without advance notice, express written permission from an authorized representative of Metas's Communication Department. Media Statements include, but are not limited to, statements made on television, radio, internet blogs, social media, apps, internet sites, videos, newspapers, magazines, or any other form of media, whether in print, televised, online, electronic, of other format ("Media"). You further agree to refrain from any Media Statements regarding the Company's business, technologies, market position, operations, products

> or services ("Meta Business"). You understand and agree that this covenant against unauthorized Media Statements is reasonable and will prevent your being perceived by any member of the public as speaking on behalf of the Company as an authority on Meta, particularly on matters which you have incomplete, stale, or incorrect information. Any unauthorized Media Statements about Meta Business to the Media without advance, express written permission from Meta's Communication Department shall constitute breach of this Agreement. Notwithstanding, nothing herein is intended to limit the exercise of your rights under Section 7 of the NLRA, or otherwise limit any disclosures or actions permitted by Section 4.
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> …
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> 13. Confidentiality: Except as described in Section 4, you agree that you will not disclose to others any of the terms of this Agreement, except that you may disclose such information to your spouse or immediate family members (subject to their understanding and agreement to otherwise maintain such information in confidence), your attorney, your accountant or tax advisor (to the extent they need to understand your rights hereunder to provide advice or to prepare your tax returns), an arbitrator or court of law for purposes of enforcing the terms of this Agreement or as otherwise expressly permitted by applicable law. Nothing in this Agreement (a) denies you the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment, sexual assault, discrimination, or any other conduct that you have reason to believe is unlawful including, but not limited to, factual information related to any claims for sexual assault or under California's Fair Employment and Housing Act (if applicable); or (b) waives your right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment sexual assault, discrimination, or any other conduct that you have reason to believe is unlawful when you have been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the legislature, or as otherwise allowed by Section 4.

(Jt. Exh. 1).[4]

David James Carlson ("Carlson" or "Charging Party") was notified about his layoff on November 9, 2022. The following day, Carlson received his Separation Agreement. He testified that he reviewed and understood the terms, and he voluntarily executed it on January 13, 2023. (Jt. Exh. 2) (Tr. 39).[5] In exchange, Carlson received $97,958.84 in severance pay and six months of continued (paid) health insurance coverage. (Jt. Exh. 1).

C. Statement of the Case

Carlson filed the charge in this case on February 22, 2023, the day after *McLaren Macomb* was decided. The charge alleges that within the previous six-months, Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights by maintaining work

[4] Section 17(b) of the Separation Agreement states "if any section, or part thereof, is held invalid, void or voidable as against public policy or otherwise, the invalidity shall not affect other sections, or parts thereof, which may be given effect without the invalid section or part [and] … are declared to be severable."

[5] According to his Separation Agreement, Carlson's "Intended Separation Date" was January 13, 2023.

rules that prohibit employees from discussing wages, hours, or other terms or conditions of employment, in violation of Section 8(a)(1) of the Act. (GC Exh. 1(a)). On May 31, 2023, the General Counsel, through the Regional Director, issued the complaint and notice of hearing. It alleges that Respondent violated Section 8(a)(1): (1) since at least September 22, 2022, when it offered and entered into with each of its separated employees a Separation Agreement containing the above Non-Disparagement and Confidentiality sections, (b) on or about November 9, 2022, when it notified Carlson and other employees that they were being laid off; and (c) on or about November 10, 2022, when it offered the Separation Agreement to Carlson. (GC Exh. 1(c)). At the start of the hearing, the General Counsel confirmed she was not alleging that any of the layoffs were unlawful. (Tr. 17-19). Nor was she alleging that any other section(s) of the Separation Agreement violated the Act. (Tr. 32-33). On June 12, 2023, Respondent filed its answer, denying the alleged violations and raising 18 affirmative defenses. (GC Exh. 1(e)).[6]

[6] Respondent's affirmative defenses are: (1) the complaint fails to state a claim upon which relief may be granted; (2) the Separation Agreement offered to and accepted by the Charging Party and other employees was specifically tailored and does not interfere with, restrain, and/or coerce (expressly or impliedly) the Charging Party and/or other employees (retrospectively or prospectively) in violation of the Act; (3) the Separation Agreement offered to and accepted by the Charging Party and other employees does not prohibit (expressly or impliedly) or otherwise chill the Charging Party and/or other employees from engaging in conduct protected by the Act (retrospectively or prospectively); (4) the Separation Agreement offered to and accepted by the Charging Party and other employees was drafted consistent with the Act, as interpreted by the Board, at the time the Separation Agreement was offered and accepted; (5) the Separation Agreement offered to and accepted by the Charging Party and other employees remains consistent with the Act, as interpreted by the Board, under *McLaren Macomb*; (6) *McLaren Macomb* cannot appropriately be applied retroactively; (7) *McLaren Macomb* was wrongly decided and should not be followed; (8) the Charging Party has not suffered any damages; (9) the Charging party has no remedy available under the Act; (10) if the Charging Party and/or other employees offered the Separation Agreement sustained any damages as a result of the conduct alleged in the complaint, such damages were caused or contributed to by their own conduct and actions; (11) neither the Charging Party nor other employees offered the Separation Agreement engaged in any protected activity and/or Respondent had no knowledge that they engaged in any protected activity alleged; (12) neither the Charging Party nor other employees offered the Separation Agreement expressed intent to engage in any protected activity and/or Respondent had no knowledge that they intended to engage in any protected activity alleged; (13) neither the Charging Party nor other employees offered the Separation Agreement refrained from engaging in any protected activity; (14) the Separation Agreement was drafted and offered to the Charging Party and other employees for legitimate, lawful, non-retaliatory and non-discriminatory business reasons; (15) Respondent acted consistent with the law and in good faith; (16) the Charging Party failed to mitigate his alleged damages, if any; (17) the Charging Party's charge is barred by his release of any and all claims arising on or before January 13, 2023; and (18) the Charging Party's charge is barred, in whole or in part, by the doctrines of waiver, estoppel, ratification, acquiescence, accord, satisfaction, and/or unclean hands. Respondent asserted in its answer that by raising these affirmative defenses, it does not imply that they are the only affirmative defenses that it may raise, nor does it waive its right to raise other affirmative defenses. Respondent stated it reserved "the right to amend its answer or make affirmative defenses on the record at trial/hearing should Respondent become aware of the availability of other defenses." (GC Exh. 1(e)). Respondent did not raise additional defenses before or during the hearing.

LEGAL DISCUSSION

A. Overview

1. General Principles

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."[7] Section 7 affords employees the right to seek to improve their wages, hours, and other terms and conditions of employment or otherwise improve their lot as employees through channels both inside and outside their immediate employee-employer relationship. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). These channels include administrative, judicial, legislative, and political forums, newspapers, the media, social media, and communications to the public. See *Tesla, Inc*., 370 NLRB No. 101, slip op. at 4 (2021); *Triple Play Sports Bar & Grille*, 361 NLRB 308, 308-309 (2014), affd. 629 Fed.Appx. 33 (2d Cir. 2015); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. sub nom. 358 Fed. Appx. 783 (9th Cir. 2009); *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995); *Allied Aviation Service Co. of New Jersey, Inc*., 248 NLRB 229, 230-231 (1980), enfd mem. 636 F.2d 1210 (3rd Cir. 1980)). The communications to the public must be part of and related to an ongoing labor dispute, see, e.g., *Allied Aviation Service Co. of New Jersey, Inc*., 248 NLRB 229, 231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980), and not so disloyal, reckless, or maliciously untrue as to lose the Act's protection. See *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 477 (1953).

The test for evaluating whether there has been a violation of Section 8(a)(1) is an objective one, i.e., whether, under the totality of the circumstances, the employer's statement or conduct would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Multi-Ad Services*, 331 NLRB 1226, 1227-1228 (2000); *Sage Dining Services, Inc*., 312 NLRB 845, 846 (1993); *Brown Transportation Corp*., 294 NLRB 969, 971-972 (1989). In making this evaluation, the Board does not consider the employer's motive or whether the coercion succeeded or failed.[8] *American Freightways Co., Inc*., 124 NLRB 146, 147 (1959).

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[7] The Board has held that Section 2(3) of the Act's definition of "employee" broadly includes applicants for employment, former employees, employees of other employers, and members of the working class, generally. See e.g., *Briggs Mfg. Co*., 75 NLRB 569, 570-571 (1947); see also *Waco, Inc*., 273 NLRB 746, 747 fn. 8 (1984); *Little Rock Crate & Basket Co*., 227 NLRB 1406, 1406 (1977).

[8] Respondent issued a subpoena duces tecum to Carlson to produce documents, including those reflecting his communications and activities prior to and after executing his Separation Agreement, including, but not limited to, incoming and outgoing texts, emails, and social media posts relating to the Separation Agreements and/or the layoffs. (R. Exh. 1(a)). Carlson and the General Counsel filed petitions to revoke, primarily arguing the documents were irrelevant to proving or disproving the allegations at issue. In response, Respondent argued the information was relevant to proving the proffer of the agreements did not interfere with or restrain Carlson or other employees in the exercise of their Section 7 rights. I granted the petitions to revoke those paragraphs seeking Carlson's communications and activities both before and after he entered into his Separation Agreement as irrelevant under the Board's objective standard. (Tr. 9-14). During its case, Respondent offered texts, posts, and other messages Carlson sent after he signed his Separation Agreement, containing critical and disparaging commentary about Respondent, his layoff, and his Separation Agreement. The General Counsel objected for

2. Standards for Separation Agreements

a. Prior to 2020

The standard for determining whether a separation agreement violates Section 8(a)(1) has changed in recent years. Prior to 2020, the Board analyzed the terms of the agreement to determine whether they reasonably would tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. If so, the agreement violated Section 8(a)(1).

In *Metro Networks*, 336 NLRB 63 (2001), the Board held the employer violated the Act by discriminatorily discharging employees for engaging in union activities, and separately by conditioning their severance pay on execution of a separation agreement with overly broad non-assistance and non-disclosure sections. The non-assistance section stated the employee agreed "not to sue or file a charge … in any forum or assist or otherwise participate, except as may be required by law, in any claim, arbitration, suit, action, investigation or other proceeding of any kind which relates to any matter that involves [the employer] … and that occurred on or before [execution of the agreement]." The confidentiality section stated the employee agreed not to "publish … communicate … to any entity … information concerning your employment …, the existence of [the agreement] or the terms described herein except to your immediate family, attorneys, accountants or tax advisors." The Board held both sections unlawfully prohibited employees from cooperating with the Board in the investigation and litigation of unfair labor practice charges. Id. at 67. It further held the "required by law" section did not render the non-assistance section lawful because the Board relies heavily on the *voluntary* assistance of individuals to provide information, and the refusal to voluntarily assist during an investigation may result in an otherwise meritorious charge being dismissed. The Board concluded sections that prevent the signatory from assisting others with their charges affects all employees, in violation of Section 8(a)(1). Id.

In *Clark Distribution Systems*, 336 NLRB 747 (2001), the Board held the employer violated the Act by discriminatorily laying off employees for engaging in union activities, and separately by conditioning their severance packages on signing a separation agreement containing an overly broad confidentiality section. The confidentiality section read, in relevant part, that the employee agreed to not "voluntarily appear as a witness, voluntarily provide documents or information, or otherwise assist in the prosecution of any claims … against the company." Citing to *Metro Network*, the Board held that such sections were unlawful because they prohibited the signatory from voluntarily providing evidence to the Board in its investigation of charges that concern other employees. Id. at 749. In reaching this conclusion, the Board distinguished *Hughes Christensen Co*., 317 NLRB 633 (1995), enf. denied on other grounds 101 F.3d 28 (5th Cir. 1996) and *First National Supermarkets*, 302 NLRB 727 (1991), which involved release agreements limited to the claims of the employees who signed them and did not prevent them from assisting in the investigation or litigation of a Board charge filed by another employee.

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the same reasons stated in her petition to revoke, and Respondent raised the same arguments in response. I allowed Respondent to lay the necessary foundation, sustained the objections, and placed the offered documents with the rejected exhibits, allowing Respondent to preserve its arguments on appeal. (Tr. 44-45; 48-49) (Rej. R. Exh. 4). Respondent argues, in its post-hearing brief, that my rulings were in error and requests that I reconsider them. I find no error in my rulings and reaffirm them now. As stated, the Board applies an objective standard in evaluating alleged Sec. 8(a)(1) violations, making the subjective reactions or actions of Carlson, or any of the other employees, irrelevant.

In *Shamrock Foods Co*., 366 NLRB No. 117 (2018), the Board held the employer violated the Act by discriminatorily discharging an employee for engaging in protected activity, and separately by offering and maintaining a separation agreement containing overly broad confidentiality and non-disparagement sections. The confidentiality section prohibited the signatory from disclosing information regarding the employer's businesses, including but not limited to financial, personnel or corporate information "for any reason." The non-disparagement section prohibited the signatory from "making any disparaging remarks or [taking] any action now, or at any time in the future, which could be detrimental to [the employer]." The Board found the sections unlawful because they broadly required the signatory to waive certain Section 7 rights that would have prevented protected activity, including aiding former coworkers, disclosing any "personnel or corporate information" to the Board, and making any remarks or taking actions which could be "detrimental" to the employer. Id. slip op. at 3 fn. 12.

b. *Baylor University* and *IGT*

In 2020, the Board adopted a new standard. In *Baylor*, supra, 369 NLRB No. 43 (2020), the complaint alleged the employer violated Section 8(a)(1) when it offered separation agreements to employees with non-participation, non-disparagement, and confidentiality sections, without any allegation that any of the separations were unlawful The non-participation section stated the employee "agrees that, unless compelled to do so by law, [he or she] will not pursue, assist or participate in any Claim brought by a third party against [Baylor] or any Released Party." The confidentiality section stated the employee "agrees that [he or] she must . . . keep secret and confidential and not . . . utilize in any manner all . . . confidential information of [Baylor] or any Released Parties made available to the signatory during [his or] her . . . employment, . . . including . . . information concerning operations, finances, . . . and other personal information regarding . . . employees." The non-disparagement section stated the employee agrees to "not ... make, repeat or publish any … disparaging, negative, ... or derogatory remarks ... concerning ... [Baylor] ... or otherwise take any action which might reasonably be expected to cause damage ... to ... [Baylor]." The ALJ applied *Boeing Co*., 365 NLRB No. 154 (2017), which, at the time, set forth the framework for reviewing work rules. He concluded the non-assistance and confidentiality sections were unlawfully overboard, but not the non-disparagement section, and the employer violated Section 8(a)(1) by offering employees separation agreements with those two sections in exchange for severance pay and post-employment benefits they otherwise would not be entitled to receive.

The Board reversed and dismissed the complaint. At the outset, it held *Boeing* did not apply because the complaint did not allege the sections themselves were unlawful, only that the mere offer of the agreement containing them was. It also distinguished separation agreements from work rules, noting the former are voluntary, pertain to postemployment activities, and do not impact on terms and conditions of employment or any accrued pay or benefits the employee would receive regardless of whether they executed the agreement. On the merits, the Board shifted the focus from the terms of the agreement to the circumstances surrounding its offer and execution. It found no violation because the complaint did not allege that anyone offered the agreement was unlawfully discharged, or that they were offered the agreement under circumstances that would otherwise tend to infringe upon their or other employees' Section 7 rights. In reaching this conclusion, the Board overruled *Metro Networks*, *Clark Distribution*, and *Shamrock Foods Co.*

In *IGT*, supra, 370 NLRB No. 50 (2020), the Board (then-Member McFerran dissenting) extended *Baylor* by holding that a non-disparagement section in a separation agreement was not

unlawful because the agreement was entirely voluntary, did not affect pay or benefits that were established as terms of employment, and had not been offered in an otherwise coercive manner.

c. *McLaren Macomb*

Baylor and *IGT* remained controlling precedent until February 21, 2023, when the Board decided *McLaren Macomb*, supra, 372 NLRB No. 58 (2023). In that case, the employer permanently furloughed 11 represented employees and presented them with severance agreements without first bargaining with their union, in violation of Section 8(a)(5). One of the issues was whether the offers of the severance agreements independently violated Section 8(a)(1) based on their overly broad confidentiality and non-disparagement provisions. The confidentiality provision required the employee "not to disclose [the terms of the agreement] to any third person, other than their spouse, or … professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency …" The non-disparagement provision required that the employee "not to make statements to … employees or to the general public which could disparage or harm the image of Employer, its parents and affiliated entities and their officers, directors, employees, agents and representatives." Further, the agreement stated that breach of either section could result in substantial monetary and injunctive sanctions against the employee.

The ALJ applied *Baylor* and found the offers to be lawful. The Board (with Member Kaplan dissenting) reversed. It expressly overruled *Baylor* and *IGT* as "flawed in multiple respects" and returned to the prior, well-established principle that a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. It further held the mere offer of such agreements is unlawful, without regard to the commission of additional unfair labor practices or other external circumstances, including whether it was executed.

In reviewing the non-disparagement provision, the Board concluded that on its face it interferes with employees' Section 7 rights. First, it noted that public statements by (former) employees about the workplace are central to the exercise of Section 7 rights, and the provision at issue broadly prohibited statements to other employees or the public which could disparage or harm the image of the employer, including critical statements regarding any labor issue, dispute, or the terms and conditions of employment. The Board reaffirmed that employees have the right to critique employer policy, including to the public, subject only to the requirement that it not be so disloyal, reckless, or maliciously untrue as to lose the Act's protection. Second, the Board noted the provision expansively applied to the employer's parents and affiliated entities and their officers, directors, employees, agents, and representatives, without temporal limit. The result was a broad bar that tended to chill the exercise of statutory rights.

In examining the confidentiality provision, the Board reached the same conclusion, finding that it broadly prevented the employee from disclosing the terms of the agreement to any third person. This proscription would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into the employer's use of the severance agreement, including the non-disparagement provision. The Board concluded that "[s]uch a broad surrender of Section 7 rights contravenes established public policy that all persons with knowledge of unfair labor practices should be free from coercion in cooperating with the Board." Id. slip op. at 8. The Board further concluded the provision would also prohibit the employee from discussing the terms of the severance agreement with his former coworkers, who could find themselves in a similar predicament facing the decision whether to accept a severance agreement. In this manner, the provision impaired the rights of the signatory's former coworkers to call upon the signatory for support in comparable circumstances. It

also prevented the employee from discussing with their union the terms of the agreement, or such discussion with a union representing employees where the subject employee may gain subsequent employment, or alternatively seek to participate in organizing, or discussion with future co-workers.

In the end, the Board declared a severance agreement will be found to be unlawful if it broadly precludes an employee from discussing or disclosing labor disputes or concerns about working conditions with other employees, a labor organization, the Board, or the public. Id. at 9. It further held that conditioning severance pay or benefits on the forfeiture of statutory rights plainly has a reasonable tendency to interfere with, restrain, or coerce the exercise of those rights, unless it is narrowly tailored to respect the range of those rights. Id. The Board did not define "narrowly tailored" in the context of a severance agreement, but it noted prior decisions have approved agreements where the releases waived only the signing employee's right to pursue employment claims and only as to claims arising as of the date of the agreement. See *Hughes Christensen* Co., supra, 317 NLRB 633; and *First National Supermarkets*, supra, 302 NLRB 727.

B. Analysis

1. *Overview*

The General Counsel alleges that since at least September 22, 2022, Respondent has violated Section 8(a)(1) by offering and entering into Separation Agreements containing the Non-Disparagement and Confidentiality sections, including on about November 10, 2022, when it offered a Separation Agreement to Carlson.[9] As stated, Respondent denies these allegations and raises various affirmative defenses.[10]

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[9] The General Counsel incorrectly asserts the complaint alleges Respondent violated Sec. 8(a)(1) by offering *and maintaining* the Separation Agreements with the sections at issue. (GC Br. 1). There is no maintenance allegation. At the hearing, I sought clarification from the General Counsel regarding what she was alleging to be unlawful, and she confirmed we were "solely dealing with the offering of the agreements." (Tr. 18).

[10] Respondent argues that the complaint must be dismissed because the allegations contained therein are not, as a matter of law, closely related to the allegations in Carlson's charge. (R. Br. 11-12). As stated, Carlson's charge alleged that within the previous six months, Respondent has interfered with, restrained, and coerced its employees in the exercise of their Sec. 7 rights *by maintaining work rules* that prohibit employees from discussing wages, hours, or other terms or conditions of employment, in violation of Sec. 8(a)(1), but the complaint alleges Respondent violated Sec. 8(a)(1) since at least September 22, 2022 *by offering and entering into the Separation Agreements* with the Non-Disparagement and Confidentiality sections.

Sec. 10(b) of the Act requires that unfair labor practice charges be filed and served within 6 months of the allegedly unlawful conduct. However, the Board permits litigation of an otherwise untimely complaint allegation if the conduct alleged occurred within six months of a timely filed charge and is closely related. The test for determining whether the otherwise untimely allegation is closely related is set forth in *Redd-I, Inc*., 290 NLRB 1115 (1988). Under *Redd-I*, the Board considers whether (1) the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge; (2) the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge (i.e., the allegations involve similar conduct, usually during the same time period, and with a similar object); and (3) a respondent would raise the same or similar defenses to both the otherwise untimely and timely allegations.

Respondent contends the discrepancy between the charge and the complaint is fatal to the General Counsel's case because---according to Board law---the allegations in the charge are not closely related to those in the complaint. The Board in *Baylor*, *IGT*, and *McLaren Macomb* held the terms of separation agreement are not work rules. *McLaren Macomb*, supra slip op. at 10 fn. 51; *Baylor*, supra slip. at 1; and *IGT*, supra slip op. at

Each of the offers at issue occurred before *McLaren Macomb* was decided, while the charge and complaint occurred after. The General Counsel argues *McLaren Macomb* should be applied retroactively in this case, and that Respondent's offers violated Section 8(a)(1) because the Non-Disparagement and Confidentiality sections reasonably would tend to infringe on Section 7 rights. Respondent, on the other hand, argues *Baylor* and *IGT* apply, and that retroactive application of *McLaren Macomb* would constitute a manifest injustice. But regardless, it contends the offers were lawful under both standards.

2. *Lawfulness of Sections under Both Standards*

As discussed, under *Baylor* and *IGT*, broad confidentiality and non-disparagement provisions like those at issue were generally permissible absent any additional violations surrounding the agreement's offer or execution. Here, the General Counsel does not contend (and there is no evidence) that any of the layoffs were unlawful, or that the offers were made under circumstances that otherwise violated the Act.[11] I, therefore, find Respondent did not violate Section 8(a)(1) under *Baylor* and *IGT*.

The inquiry then turns to whether the offers were unlawful under *McLaren Macomb*. The General Counsel argues the Non-Disparagement section is substantially similar to the one found unlawful in *McLaren Macomb*, in that it requires employees to "refrain from making any disparaging, critical, or otherwise detrimental comments to any person or entity concerning the Company's products … operation … or the circumstances surrounding [their] employment and/or separation from employment." The contention is this language would bar employees from engaging in this sort of

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2. Respondent, therefore, argues the allegations in the complaint are untimely under Section 10(b) of the Act. I reject this argument.

The Board has held Section 10(b) is an affirmative defense that must be raised in the pleadings or at the hearing, or it is deemed waived. See *Paul Mueller Co*., 337 NLRB 764, 764-765 (2002) (failure to plead or specifically litigate 10(b) defense at hearing resulted in its waiver). See also *United Government Security Officers of America International and its Local 129*, 367 NLRB No. 5 slip op. 1 fn. 1 (2018) (employer waived its Sec. 10(b) defense because the defense was insufficiently specific and was not litigated during the hearing); *Taft Broadcasting*, 264 NLRB 185, 190 (1982) (untimely raising of 10(b) defense prejudiced General Counsel's ability to counter it); and *McKesson Drug Co*., 257 NLRB 468 fn. 1 (1981) (10(b) defense is untimely when first raised in brief to administrative law judge). Respondent did not raise Sec. 10(b) in its answer or at the hearing, including during its opening statement, when it detailed its various affirmative defenses. Respondent raises it for the first time in its post-hearing brief. It contends that Sec. 10(b) is encompassed by its first (the complaint fails to state a claim upon which relief may be granted) and ninth (the Charging Party has no remedy available under the Act) affirmative defenses. As stated, the Board requires Sec. 10(b) be specifically plead or raised to be considered timely, and the cited defenses Respondent relies upon are too vague to satisfy this requirement.

Moreover, even if Respondent had properly raised Sec. 10(b) as a defense, that defense would fail under *Redd-I*. The complaint was issued within four months of the timely filed charge. The legal theories of the charge and the complaint are the same: whether provisions in the Separation Agreement have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights. The complaint allegation arises from the same factual situation or sequence of events: Respondent's offering of the Separation Agreement to employees it laid off. Finally, Respondent's defenses to the complaint allegation are similar or the same as to the charge allegations. In either circumstance, Respondent contends that the provisions in the Separation Agreement are not unlawfully coercive. Thus, any "untimely" complaint allegation is closely related to the timely charge allegation.

[11] The General Counsel's post-hearing brief fails to address whether the offers or executions of the Separation Agreements at issue were unlawful under *Baylor* and *IGT*.

commentary to other employees, a labor organization, or the public that is related to ongoing labor disputes, labor issues, and/or the terms and conditions of employment with the Respondent.

The General Counsel also argues the Confidentiality section is substantially similar to the one found unlawful in *McLaren Macomb*, in that it requires employees to "not disclose to others any terms of this Agreement, except that you may disclose such information to your spouse or immediate family members … your attorney, your accountant or tax advisor, an arbitrator or court of law for purposes of enforcing the terms of this Agreement or as otherwise expressly permitted by applicable law." The contention is this language would bar employees from discussing the terms of their Agreement with other employees who could find themselves in a similar predicament or to call upon them for support in comparable circumstances., and also reasonably would tend to chill them from raising or discussing labor issues and disputes with third parties, including the public, which the Board has held they are permitted to do.

Respondent defends that the sections differ significantly from those in *McLaren Macomb* in that they are carefully drafted to alleviate any potential chilling effects on Section 7 activity. Unlike in *McLaren Macomb*, the Non-Disparagement and Confidentiality sections, when read in conjunction with Section 4 ("Permitted Actions and Disclosures"), do not limit the ability to assist the Board in an investigation of any alleged violation, or to assist other employees or their representatives in this regard. Section 4, which is specifically referenced at the beginning of the Non-Disparagement and Confidentiality sections, states that employees are free to initiate communication with, cooperate, and provide relevant information to (including but not limited to information regarding the existence of or facts and circumstances underlying their Agreement) the Board, and they are free to participate, cooperate, testify, or otherwise assist in any action, investigation, or proceeding relating to a possible violation of the Act. Section 4 further states that "nothing herein is intended to limit the exercise of your rights under Section 7 of the [Act]." Based on these safe harbor provisions, Respondent argues the employees do not waive any Section 7 rights by virtue of accepting the Separation Agreement.[12]

In reviewing the sections at issue, I conclude the General Counsel has established that each has a reasonable tendency to chill Section 7 activity. The Non-Disparagement section prohibits employees from making "any disparaging, critical or otherwise detrimental comments" about Respondent or the circumstances surrounding their employment or separation, even if truthful. This prohibition, which uses descriptors that are otherwise undefined, reasonably would tend to discourage protected conduct,

[12] The General Counsel makes multiple arguments in response to Respondent's contentions. First, she argues Respondent is mistaken because government officials do not initiate the protected concerted activities of employees engaged in mutual aid and protection. It is that right to talk to one another as employees that cannot legally be chilled by the restrictions at issue. Specifically, while Section 4 allows employees to participate in any government investigation, such as a Board investigation, Respondent conditions the benefits of the Separation Agreement in exchange for a release to recover "any claim for equity or other benefits; or any other statutory and/or common law claim." Second, she argues such a release would encompass individual remedies for the employees that the Board might order, which further evinces a chilling effect on employees' Section 7 rights. Finally, even though Section 4 specifically lists the Board as an agency that employees are permitted to disclose information to, she asserts such "right" is still "a reactive in its allowance — i.e., employees are permitted to disclose information if approached by the government agency, but actively discouraged from proactively approaching anyone themselves (including a government agency, for example, by filing charges with the Board alleging an unfair labor practice)." Such a proscription is unlawful under *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) and *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967). As discussed below, I conclude Section 4 fails to adequately safeguard employees' Section 7 rights. It, therefore, is unnecessary for me to address these additional arguments.

including making comments to seek the assistance and support of other employees or third parties regarding labor disputes or issues related to terms and conditions of employment with Respondent. Similarly, the Confidentiality section reasonably would tend to discourage employees from discussing the terms of their Agreement with fellow employees or third parties for the same or similar purposes. As the Board emphasized in *McLaren Macomb*, public statements by employees about the workplace, their employment, or their separation are central to the exercise of Section 7 rights. The sections at issue prohibiting disclosure or commentary (except where related to unlawful acts or the ability to testify about unlawful acts) are unlawful because they discourage statutorily protected communications with others, including the public.

As for Section 4, the Board in *First Transit, Inc*., 360 NLRB 619, 621-622 (2014), held that a savings clause may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule or restriction. In deciding whether a savings clause adequately clarifies the rule or restriction, the Board considers whether the language "address[es] the broad panoply of rights" protected by Section 7; the length of the document and the placement of the savings clause in relation to the provisions that it is claimed to remedy; whether the savings clause and the provisions reference each other; and whether the employer has enforced the overbroad provision in a way that shows employees that the savings clause does not safeguard their Section 7 rights. Id. at 621-622. See also *Care One at Madison Avenue*, 361 NLRB 1462, 1465 fn. 8 (2014), enfd. 832 F.3d 351 (D.C. Cir. 2016). In deciding whether a savings clause renders an otherwise overly broad rule or restriction lawful, the Board construes any ambiguity against the employer as the drafter. *Century Fast Foods, Inc.*, 363 NLRB 891, 901 (2016).

Weighing these considerations, I conclude that while the assurances in Section 4 go further than those in the cases previously discussed, it fails to adequately cure the infirmities of the Non-Disparagement and Confidentiality sections. First, it does not adequately address the broad panoply of rights protected by the Act. It assures employees of their right to communicate with and assist the Board, including testifying at a hearing, and states that nothing in the Separation Agreement is intended to limit the employees' rights under Section 7 of the Act. But it does not otherwise clarify or limit the scope of the Non-Disparagement and Confidentiality sections to make them otherwise lawful, including by explaining what types of protected disclosures and commentary are permitted.[13] An employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general reference to rights protected by law. *Allied Mechanical*, 349 NLRB 1077, 1084 (2007); *McDonnell Douglas Corp*., 240 NLRB 794, 802 (1979); *Trailmobile*, 221 NLRB 1088, 1089 (1975).

Second, while the Non-Disparagement and Confidentiality sections both refer to Section 4, they are separated by four and five pages, respectively. Even with the reference, the proximity of the sections at issue to the actual language of Section 4 is too remote to provide meaningful clarification

[13] As discussed, the Non-Disparagement section prohibits "disparaging," "critical," and "potentially detrimental" commentary about the Company. Those descriptors are undefined, and Section 4 fails to clarify that employees retain the right to engage in this sort of commentary so long as it is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.

The Board has held a savings clause does not remedy an otherwise overbroad rule where the effect of the reassurances in the savings clause on the overbroad provision could only be understood through the application of legal analysis. In *Ingram Book, Co*., 215 NLRB 515, 516 fn. 2 (1994), the Board noted that employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers and cannot be expected to have the expertise to examine company rules from a legal standpoint.

or limitation regarding the scope of the restrictions.[14] See *San Rafael Healthcare and Wellness, LLC*, 369 NLRB No. 105 (2020) (savings clause at the end of three-page document held sufficiently prominent and proximate).

Finally, while the Separation Agreements have not been enforced, and Respondent have not, to date, threatened to enforce them, the restrictions in the sections at issue do not contain any temporal limitations. As such, they remain in effect and enforceable against employees indefinitely.

I, therefore, conclude that even with Section 4, the Non-Disparagement and Confidentiality sections would, under *McLaren Macomb,* reasonably tend to infringe upon Section 7 rights.

3. *Retroactive Application of McLaren Macomb*

The issue then becomes whether *McLaren Macomb* should be applied retroactively in this case. The Board's usual practice in unfair labor practice cases is to apply new policies and standards retroactively "to all pending cases in whatever stage," unless retroactive application would work a "manifest injustice." *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co*., 121 NLRB 995, 1006-1007 (1958)).[15] Under Supreme Court precedent, "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp*., 332 U.S. 194, 203 (1947)). In determining whether the retroactive application of a Board decision will cause manifest injustice, the Board balances three factors: (1) the reliance of the parties on preexisting law; (2) the effect of retroactivity on accomplishing the purposes of the Act; and (3) any particular injustice arising from retroactive application. *SNE Enterprises*, supra at 373.

In applying these factors, I conclude retroactive application would not work a manifest injustice in this case. First, Respondent presented no evidence that it relied upon *Baylor* or *IGT* when it drafted, offered, or entered into the Separation Agreements at issue. Quite the opposite, Respondent argues that it carefully drafted, or "narrowly tailored," the sections at issue so as not to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

Next, while the Board did not directly address retroactivity in *McLaren Macomb*, it explained why it was overruling *Baylor* and *IGT* and returning to its prior, long-standing precedent:

> *Baylor* and the *IGT* majority ignore well-established precedent concerning waiver of employee rights. The Board does not write on a clean slate regarding employee waiver

[14] Although not at issue in this case, Section 11 (Unauthorized Media Statements), in contrast, restricts certain communications with the media but concludes by stating "Notwithstanding, nothing herein is intended to limit the exercise of your rights under Section 7 of the NLRA, or otherwise limit any disclosures or actions permitted by Section 4."

[15] Respondent argues that a pending charge is a pre-condition to retroactive application, and because Carlson filed the charge after *McLaren Macomb* was decided, that decision cannot be applied retroactively in this case. Respondent cites to no authority, and I have found none, supporting this argument. Limiting retroactivity to "pending" cases ensures that there is consistency in analyzing open cases, see e.g., *Tecnocap LLC*, 372 NLRB No. 136 (2023), and *Valley Hospital Med. Ctr*., 371 NLRB No. 160 (2022), and it prevents the re-litigation of closed cases. Although this case may be an anomaly regarding timing of the events in relation to the changed law, the critical inquiry remains whether retroactive application would constitute a manifest injustice.

> of Section 7 rights via a severance agreement. There is a backdrop of nearly a century of settled law that employees may not broadly waive their rights under the NLRA. Agreements between employers and employees that restrict employees from engaging in activity protected by the Act, or from filing unfair labor practice charges with the Board, assisting other employees in doing so, or assisting the Board's investigative process, have been consistently deemed unlawful. The "future rights of employees as well as the rights of the public may not be traded away" in a manner which requires "forbearance from future charges and concerted activities." This broad proscription underscores that the Board acts in a public capacity to protect public rights to give effect to the declared public policy of the Act.

McLaren Macomb, supra slip op. at 5-6 (footnotes and citations omitted).[16]

Based on this reasoning, I conclude applying the pre-*Baylor* standard better aligns with and accomplishes the declared public policy of the Act, which is to safeguard against overly broad waivers and restrictions on employees' ability to engage in future Section 7 activity.

Finally, as for any claimed injustice, I agree with the General Counsel that in balancing expectations Respondent might have held based on the Board's short-lived deviation from well-established precedent against the harm to employees' free exercise of their Section 7 rights, it is clear that the ill effect of such claimed unsettled expectations is outweighed significantly by the mischief that would result in not retroactively applying the restored standard focusing on the language of the agreement. The Board consistently applies decisions retroactively when they restore prior precedent recently and briefly upset by changes in the law. See e.g., *Tecnocap LLC*, 372 NLRB No. 136 (2023) (unilateral changes based on past practice); *Wendt Corp*., 372 NLRB No. 135 (2023) (same); *The Atlanta Opera, Inc*., 372 NLRB No. 95 (2023) (independent-contractor analysis); *Lion Elastomers LLC*, 372 NLRB No. 83 (2023) (whether outbursts lose statutory protection); *Tobin Ctr. for Performing Arts*, 372 NLRB No. 28 (2022) (off-duty employee access); *Valley Hospital Med. Ctr*., 371 NLRB No. 160 (2022) (survival of dues checkoff provisions post expiration); *Care One at New Milford*, 369 NLRB No. 109 (2020) (duty to bargain over discretionary discipline); and *Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019) (restricting email access). Cf. *Babcock & Wilcox Construction Co*., 361 NLRB 1127 (2015); and *WKYC-TV, Inc*., 359 NLRB 286 (2012) (decisions applied prospectively because they involved significant changes from well-established precedent).

For these reasons, I conclude *McLaren Macomb* applies retroactively in this case, and Respondent violated Section 8(a)(1) by offering and entering into the Separation Agreements containing the overly broad Non-Disparagement and Confidentiality sections at issue.

[16] Respondent argues Carlson released all claims on or before his effective separation date, which was January 13, 2023, including any claims arising out of the terms of the Separation Agreement. As stated above, employees may not broadly waive their rights under the Act, including their right to engage in protected activity in the future. The Board has declined to give effect to agreements that contain a prospective waiver of Section 7 rights. See *Clark Distribution Systems*, supra, 336 NLRB at 751. Additionally, as stated, Section 7 rights are public rights, which employees generally are not free to trade away. *Metro Networks*, supra, 336 NLRB at 66 (citing *Mandel Security Bureau, Inc*., 202 NLRB 117, 119 (1973)).

CONCLUSIONS OF LAW

1. Meta Platforms, Inc. ("Respondent") is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

2. Between August 21, 2022 and February 20, 2023, Respondent violated Section 8(a)(1) of the Act by offering and entering into the Separation Agreements containing Non-Disparagement and Confidentiality sections that reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found the Respondent violated Section 8(a)(1) of the Act by offering and entering into Separation Agreements containing the unlawfully overbroad language from the Non-Disparagement and Confidentiality sections, Respondent is ordered to cease and desist therefrom. Respondent is further ordered to rescind the overly broad language in the Non-Disparagement and Confidentiality sections (discussed below) and to notify the employees subject to the Separation Agreements entered into between August 21, 2022 and February 20, 2023, in writing, that the language has been rescinded and will not be enforced. Respondent shall also be required to post a notice and take the steps as detailed in the Order below.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[17]

ORDER

The Respondent, Meta Platforms, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Offering or entering into separation agreements with an unlawfully overbroad non-disparagement section prohibiting employees from "making any disparaging, critical or otherwise detrimental comments to any person or entity concerning the Company's products, services or programs; its business affairs, operation, management and financial condition; or the circumstances surrounding your employment and/or separation from employment from the Company,"

(b) Offering or entering into separation agreements with an unlawfully overbroad confidentiality section prohibiting employees from disclosing "any of the terms" of the separation agreement.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[17] If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days of the Board's order, rescind the above unlawfully overly broad language in the non-disparagement and confidentiality sections of the separation agreements and notify, in writing, all former employees who signed the separation agreements between August 21, 2022 and February 20, 2023, that it has done so and that language in those sections will not be enforced or given effect.

(c) Within 14 days after service by the Region, post at its U.S. based facilities, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent at all its U.S. locations and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since August 22, 2022.[19]

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 19, 2024

Andrew S. Gollin
Administrative Law Judge

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[19] As an enhanced or extraordinary remedy, the General Counsel seeks an order requiring Respondent to hold mandatory training sessions to inform employees about their rights under the Act. The General Counsel's post-hearing brief refers to the Board's discretionary authority to order such remedies but fails to include any specific rationale for why mandatory training is warranted in this case. Absent specific support, I decline to order the training sought.

NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT offer or enter into a separation agreement containing non-disparagement language prohibiting you from "making any disparaging, critical or otherwise detrimental comments to any person or entity concerning the Company's products, services or programs; its business affairs, operation, management and financial condition; or the circumstances surrounding your employment and/or separation from employment from the Company."

WE WILL NOT offer or enter into separation agreements containing confidentiality language prohibiting you from disclosing "any of the terms" of the separation agreement.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days of the Board's order, rescind the above unlawfully overly broad language in the non-disparagement and confidentiality sections of the separation agreements and notify, in writing, all former employees throughout the United States who signed the separation agreements with the above language that it has done so, and that the language will not be enforced or given effect.

META PLATFORMS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov
915 2nd Avenue, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at or by https://www.nlrb.gov/case/19-CA-312724 using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS SECTIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (206) 220-6340