

## Volume 3

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

OMEN DIAZ, )  
 )  
Plaintiff, )  
 )  
VS. ) NO. C 17-06748 WED  
 )  
TESLA, INC. dba TESLA MOTORS, )  
INC., )  
 )  
Defendant. )  
 )  
San Francisco, California  
Wednesday, March 29, 2023

TRANSCRIPT OF TRIAL PROCEEDINGSAPPEARANCES:

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United States District Court - Official Reporter

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8:01 a.m.

2 P R O C E E D I N G S

3 ---000---

4 (Proceedings were heard outside the presence of the jury:)

5 **THE CLERK:** Please come to order.6 **THE COURT:** Please be seated, everybody. Good

7 morning.

8 (Pause in proceedings.)

9 **THE COURT:** All right. The only thing on my mind is

10 the motion that was filed overnight, and I'm going to ask

11 Ms. Knox if she can give me just the roughest of roughs of

12 Mr. Wheeler's testimony from yesterday because I want to review

13 that, and then I will deal with that issue.

14 And then the only other thing is -- on my mind is to go

15 over the jury instructions at 3:00. Should we do that by Zoom

16 or in person? I'm having in-person law and motion at 2:00, so

17 I think I will be done around 3:00. And I'm happy to do it

18 here, but I'm also happy to do it by Zoom.

19 What's more convenient for you all?

20 **MR. ORGAN:** Your Honor, I think our preference would

21 be by Zoom so that Mr. Rubin can participate.

22 **THE COURT:** Great. Okay.23 **MR. ORGAN:** Yes.24 **THE COURT:** Okay.25 **MR. ORGAN:** Thank you, Your Honor.

1 We do have a couple other issues we'd like to preview with  
2 the Court for today's testimony.

3 **THE COURT:** Go ahead.

4 **MR. ORGAN:** Um, with respect to Mr. Diaz, we intend to  
5 do a demonstration depending on the testimony of Mr. Martinez,  
6 who is testifying before him, but we might be doing a  
7 demonstration using the ELMD, and Mr. Diaz would be doing the  
8 demonstration there showing sort of the way the bale had been  
9 left for him, Your Honor.

10 And then we do have an issue relative to damages that we  
11 would like to talk to the Court about in terms of presentation  
12 because we don't want to run afoul of the Court's orders but --  
13 and this is the issue that Mr. Rubin had asked to Zoom in on  
14 this morning, Your Honor, so that he could participate in these  
15 proceedings because he is way smarter than I am in terms of  
16 legal issues and so -- and probably most things in life.

17 But in trying to craft questions for Mr. Diaz to talk  
18 about his damages, it's -- it's a little cumbersome in terms of  
19 this dealing with past and future from the -- the last trial  
20 date and this trial date, that interim period, and we just  
21 don't want to run afoul of the Court's orders, so we thought we  
22 would preview that with you, Your Honor.

23 **THE COURT:** Well, I'm always happy to see Mr. Rubin.

24 So, Ms. Davis, you can let him in.

25 And I still don't understand what the issue is, but...

1 **MR. ORGAN:** I'm not sure I fully understand it,  
2 although I am the one who is going to have to ask the  
3 questions. But it's really when I'm asking him questions such  
4 as "Describe for the jury, you know, your feelings of emotional  
5 distress since you stopped working at Tesla. And have those  
6 feelings, you know, changed? When did those feelings change?  
7 You know, they have been dissipating. Have they been getting  
8 worse?" That kind of stuff.

9 Mr. Rubin is on now, and I think he can probably  
10 articulate it better than I can, Your Honor.

11 **THE COURT:** Mr. Rubin, good morning. Can you hear me?  
12 (No response.)

13 **THE COURT:** Apparently not.

14 **MR. RUBIN:** Let's see. I can't -- I can't hear -- I  
15 don't know if you can hear me. Let me try to put --

16 **THE CLERK:** We can hear you, Mr. Rubin.

17 **MR. RUBIN:** Let me see if this will help. Hello?

18 **THE COURT:** Mr. Rubin, can you hear us?

19 **MR. RUBIN:** Yes, I can hear you now. Thank you,  
20 Your Honor.

21 **THE COURT:** Okay. Good morning.

22 **MR. RUBIN:** Good morning. And thank you for letting  
23 me participate by Zoom today. I appreciate that.

24 **THE COURT:** Yeah. So Mr. Organ was just describing --  
25 were you able to hear what's been happening so far?

1 **MR. RUBIN:** I'm on real-time, so I have been reading  
2 it, yes.

3 **THE COURT:** Go ahead. So what would you like to tell  
4 me?

5 **MR. RUBIN:** We just want to preview an issue that will  
6 arise during the questioning of Mr. Diaz later this morning  
7 concerning the distinction between past and future damages.

8 The Court obviously has been clear and consistent in  
9 ruling that this is the second phase of a two-part proceeding,  
10 and so the evidence solicited in the second phase should be as  
11 consistent as reasonably possible with the evidence presented  
12 in the first trial, and we have obviously complied with that  
13 ruling and will continue to do that.

14 For the emotional distress damages, the -- an issue is  
15 likely to arise because of that distinction. We want to be  
16 particularly careful in our questioning of Mr. Diaz not to  
17 violate the Court's rules. And therefore, just as in the first  
18 trial when the evidence was elicited about past damages, we  
19 were focusing on damages, emotional distress damages that were  
20 incurred before the date of that first trial while he was at  
21 Tesla and up until that date. And future damages, as Mr. Diaz  
22 and the expert, Dr. Reading, testified, were damages that he is  
23 likely to incur in the future.

24 We intend to proceed the same way today with Mr. Diaz. In  
25 the jury's mind, though, they may not immediately understand

1 that because of the way this trial is structured, past really  
2 means prior to the date of first trial and future means from  
3 that date forward.

4 Now, we have talked about this in at least two of the  
5 hearings, the gasoline product hearings and the scope of trial  
6 hearings. We have talked a little bit about the difference  
7 between past and future damages.

8 But as Mr. Organ indicated, as we were thinking about  
9 exactly how we were going to conduct our questioning, we  
10 realize that because the jury may not understand questions that  
11 ask how Mr. Diaz was experiencing these incidents, not just  
12 contemporaneously because that's easy, but as of October 21, we  
13 thought it would be useful, when we talk about instructions  
14 later this afternoon, to get an instruction that explains to  
15 the jury that past means prior to the date of the first phase  
16 and future means subsequent to that date.

17 We think that will clarify the issues, but we wanted to  
18 alert the Court in advance to the fact that that is how we are  
19 trying to comply with the Court's orders and how we intend to  
20 elicit the testimony from Mr. Diaz this afternoon.

21 **THE COURT:** Okay. Mr. Spiro, do you have a response?

22 **MR. SPIRO:** Maybe I'm failing to pick up on if there  
23 is a real distinction here. I mean, I haven't heard that there  
24 is something that happened between the first trial and now that  
25 is of any great significance. So I assume when they ask the

1 questions, it's not really going to draw out this minor  
2 temporal distinction, and I'm not going to torture that  
3 situation.

4 **THE COURT:** Yeah. I think that -- that's right. My  
5 assumption is that Mr. Diaz will be testifying in a way that is  
6 consistent with what he -- the way that he testified in the  
7 first trial, that there is no new evidence that -- of what's  
8 happened between that first trial and the second trial that is  
9 inconsistent with that. And as long as that's the case -- and  
10 I think we did talk about this in at least one of the pretrial  
11 hearings -- that doesn't sound like it's a problem.

12 **MR. SPIRO:** As to the second -- as to the first issue,  
13 I mean, it's a trial. I'm not going to object to Mr. Diaz  
14 demonstrating something. I mean, I don't --

15 **THE COURT:** Yeah. So -- all right. Good. Well,  
16 thank you, Mr. Rubin, and I will look forward to seeing you  
17 this afternoon.

18 **MR. RUBIN:** Thank you, Your Honor.

19 **THE COURT:** Okay. All right.

20 Is there any other issue that you wanted to raise,  
21 Mr. Organ?

22 **MR. ORGAN:** Mr. Collier has some issues, yes.

23 **THE COURT:** All right.

24 **MR. COLLIER:** I will approach for the mic.

25 The first issue we wanted to raise is just a scheduling

1 matter. I -- it's no attack on Defense Counsel, but they did  
2 go very much over their time estimates for the witnesses  
3 yesterday. And that's not a criticism, but it has forced us to  
4 bring Ms. Oppenheimer back today. She had to reconfigure her  
5 schedule.

6 We want to try to avoid doing that with our other experts  
7 who we've had scheduled for weeks to come in at 8:30 tomorrow  
8 and 9:30, respectively, and so we just -- we have that  
9 accommodation that they be able to come and testify out of  
10 order, if need be -- because the delays are what have  
11 interfered with our ability to call them at that time.

12 **THE COURT:** Well, I think one of the critical issues  
13 will be to include Mr. Diaz's testimony before they testify.

14 **MR. COLLIER:** This is my concern is if the Defendants  
15 continue with the time estimates or the time that they have now  
16 used, it has now pushed Mr. Diaz's testimony where it's  
17 probably going to overlap some with tomorrow.

18 Originally, we had it slated with their time estimates  
19 that they submitted to the Court in a way where that wouldn't  
20 have happened, but now it looks like it's going to.

21 **THE COURT:** So Mr. Diaz's testimony will be complete  
22 before the experts testify.

23 **MR. COLLIER:** Understood.

24 Next issue, Your Honor, is with regard to Mr. Quintero and  
25 Mr. Romero. Mr. Romero will testify today, Mr. Quintero

1 tomorrow. The issue with the e-mail, Exhibit 410 that Tesla  
2 has filed their brief on last night, we are concerned that both  
3 of these witnesses may try to testify about that e-mail as  
4 well.

5 And there is two reasons why we think that would be  
6 inappropriate. One is all the reasons we set out in our brief  
7 this morning, which I'm sure Your Honor is going to take a look  
8 at later.

9 The other reason, though, is that they didn't testify  
10 about this in the first trial, so it shouldn't be coming out of  
11 their testimony. It'd be a totally new issue, a totally new  
12 incident that they would be bringing in, totally new  
13 explanation for the feces incident that wasn't presented in the  
14 first trial.

15 So we just ask that at a minimum we have a ruling on the  
16 motion before they go down that path of Mr. Romero and  
17 Mr. Quintero.

18 **THE COURT:** And what's -- Mr. Spiro, are you intending  
19 to go into that incident with one of the witnesses?

20 **MR. SPIRO:** I don't think it's relevant to -- my  
21 colleagues will correct me if I'm wrong -- but I don't think it  
22 is relevant to Mr. Romero.

23 Mr. Quintero it would be relevant to. And when you say  
24 "go into," they are going to cross-examine Mr. Quintero. If  
25 his honest answer is whatever his honest answer is, I'm not

1 going to tell him to answer dishonestly.

2 **THE COURT:** That's fair enough. So I will -- as soon  
3 as I have had a chance to look at the rough, I'll make a ruling  
4 on the -- the first issue and then we'll see where we are.

5 **MR. COLLIER:** Understood, Your Honor.

6 The last issue is that -- I was going to notify you we  
7 submitted a curative instruction regarding the agency and  
8 staffing agency issue.

9 **MR. ORGAN:** It hasn't been filed.

10 **MR. COLLIER:** We will be filing it.

11 **THE COURT:** Okay. Yeah, try and get it well in  
12 advance of 3:00 o'clock so that we can have a discussion about  
13 it. And obviously, if we need to have further discussions on  
14 this tomorrow morning, we can, but I do -- I want to get -- get  
15 us in shape so that we can present the case to the jury on  
16 Friday.

17 **MR. COLLIER:** Sounds good. Thank you, Your Honor.

18 **THE COURT:** Okay. Mr. Spiro, do you have any issues  
19 that you wanted to raise?

20 **MR. SPIRO:** I do not, Your Honor. Thank you.

21 **THE COURT:** Excellent. All right. We will get going  
22 as soon as the jury is here.

23 (Recess taken at 8:14 a.m.)

24 (Proceedings resumed at 8:29 a.m.)

25 **THE CLERK:** Please come to order.

1 **THE COURT:** Mr. Spiro, are you ready?  
 2 **MR. SPIRO:** Yes, Your Honor.  
 3 **THE COURT:** Is Ms. Oppenheimer here? Why don't you  
 4 bring her in? Oh, there she is. Come on up to the witness  
 5 stand, and we will get the jury.  
 6 (Pause in proceedings.)  
 7 (Proceedings were heard in the presence of the jury:)  
 8 **THE COURT:** Please be seated, everybody.  
 9 Good morning, ladies and gentlemen. Welcome. Thank you  
 10 for working through the weather to get to the court today  
 11 punctually, and this is great. We are moving on now to the  
 12 cross-examination of Ms. Oppenheimer, who we left off with  
 13 yesterday afternoon.  
 14 Mr. Spiro, please go ahead.  
 15 **MR. SPIRO:** Thank you, Your Honor.  
 16 AMY OPPENHEIMER,  
 17 called as a witness for the Plaintiff, having been previously  
 18 duly sworn, testified further as follows:  
 19 CROSS-EXAMINATION  
 20 **BY MR. SPIRO:**  
 21 **Q.** Good morning.  
 22 **A.** Good morning.  
 23 **Q.** When you looked at Complaint 2 of the three complaints,  
 24 there was a question mark in your mind as to whether Tesla was  
 25 on notice about that incident being racial; correct?

1 **A.** I don't recall offhand if -- if you saw a question mark in  
 2 my materials, then there may have been.  
 3 **Q.** Okay. And if you wanted just to refresh your  
 4 recollection, take a look at your deposition which is to your  
 5 left. And I flagged the page for you to make it easy, which is  
 6 page 84 into 85.  
 7 (Pause in proceedings.)  
 8 **BY MR. SPIRO:**  
 9 **Q.** I think you may have skipped over that. Yep.  
 10 **A.** These are all exhibits, it looks like.  
 11 **THE COURT:** Yeah. You're on the wrong --  
 12 **MR. SPIRO:** On the wrong document.  
 13 **THE WITNESS:** I have my report, and I have the  
 14 exhibits. Apparently, I don't have -- okay.  
 15 **BY MR. SPIRO:**  
 16 **Q.** I tabbed it for you.  
 17 **A.** You had it marked but -- okay, 84.  
 18 (Pause in proceedings.)  
 19 **BY MR. SPIRO:**  
 20 **Q.** So I'm really looking at page 85.  
 21 **A.** Got it.  
 22 **Q.** And I'm asking -- and you put it in your notes. I have a  
 23 question mark about whether there was notice that it was  
 24 racial.  
 25 Do you see that?

1 **A.** Yes, I do.  
 2 **Q.** And does that refresh your recollection that you did have  
 3 a question mark?  
 4 **A.** Yes, it does.  
 5 **Q.** Okay. And if there's a factual issue to resolve, that's  
 6 ultimately for the jury; right?  
 7 **A.** Well, that factual issue is to some extent a jury issue.  
 8 I think from an expert's point of view, what I would have  
 9 expected is an investigation that would determine that, that he  
 10 felt threatened and to find out everything about the incident.  
 11 And then if there had been that investigation, then I  
 12 would have been able to answer that question.  
 13 **Q.** Well, let's talk about the question that was in your mind.  
 14 And if we could put up Number 2 -- Complaint Number 2, and  
 15 we'll -- and you see it says that there was a complaint to  
 16 Romero regarding Martinez.  
 17 Do you see how that starts?  
 18 **A.** Correct.  
 19 **Q.** And now let's just put up 92 that the jury has seen next  
 20 to it to just look at the complaint to Romero. And you see  
 21 we've got the complaint to Romero, subject line: Ramon and Ed  
 22 Romero at Tesla in the e-mail.  
 23 And in terms of Mr. Romero, in your notes and in your  
 24 evaluation of the case, you also noted that N-word graffiti was  
 25 reported to Mr. Romero?

1 **A.** Okay.  
 2 **Q.** And that Mr. Romero handled an allegation by Mr. Diaz  
 3 against Mr. Foster, and Mr. Romero fired Mr. Foster.  
 4 Do you remember that?  
 5 **A.** I recall there was an issue with Mr. Foster. I don't  
 6 remember all the details. I believe that's not part of this  
 7 case, so I just don't recall all the details.  
 8 **Q.** Well, you didn't include that Foster incident in your  
 9 report as one of the incidents. Why not?  
 10 **A.** My understanding is that it was not part of the case.  
 11 **Q.** Well, who instructed you to not put the Foster incident  
 12 in?  
 13 **A.** You know, I'm informed about various decisions made by the  
 14 Court on evidence, so I don't recall if it was a Court decision  
 15 or a decision by one of the attorneys. I don't know.  
 16 **Q.** And when you say one of the attorneys, you mean the  
 17 attorneys that you work for, not the attorneys --  
 18 **A.** The Plaintiff's counsel, sure.  
 19 **Q.** Now, you were in court yesterday, and Mr. Romero's name  
 20 came up when you were here in court observing the testimony.  
 21 Do you remember that when Mr. Kawasaki was testifying  
 22 there was questions about how, you know, Mr. Romero took  
 23 Mr. Kawasaki off of an e-mail and, like, maybe there was a  
 24 coverup? Do you remember those questions by Plaintiff's  
 25 counsel?

1 A. I do.  
2 Q. Okay. And do you remember on cross-examination how I  
3 played a video for Mr. Kawasaki with him admitting that  
4 Mr. Romero was the one who promoted Owen Diaz.  
5 Do you remember me playing that video?  
6 A. Yeah. I mean the way you're characterizing the evidence,  
7 I wouldn't necessarily characterize it that way. But I do  
8 remember the video, and I do remember the examination, yeah.  
9 Q. Well, forget characterization. But Mr. Kawasaki on video  
10 under oath said Mr. Romero was the one who promoted Owen Diaz.  
11 Those were the words; right?  
12 A. That's correct.  
13 Q. And you heard during Mr. Wheeler's examination questions  
14 about the feces incident.  
15 Did you -- were you here for that?  
16 A. I was here for that.  
17 Q. Okay. And he said: "I reached out to Security. I asked  
18 them to check the cameras in which they responded. They didn't  
19 have an angle on the cart. I reached out to Josue Torres,  
20 Victor Quintero, and Ramon. I sent e-mails, basically, to  
21 anyone I could think of."  
22 "QUESTION: Ramon, again, is Ramon Martinez?  
23 "ANSWER: Yes."  
24 Question from plaintiff's counsel: "I think you said Ed  
25 Romero as well."

1 Would you agree with me that based on the sworn testimony  
2 in front of this jury from both Mr. Kawasaki and Mr. Jackson,  
3 who were both Plaintiff's witnesses, they did attempt to check  
4 the video surveillance; true?  
5 A. They attempted to check some of it and not what would have  
6 been more dispositive in their -- if it had been available,  
7 correct.  
8 Q. And then you say that credibility of parties should have  
9 been weighed. Do you see that?  
10 A. Yes.  
11 Q. Okay. And you heard Mr. Jackson say that he spoke to  
12 Mr. Diaz and that Mr. Jackson said, "I don't recall it being  
13 any racial slurs at all." That was Mr. Jackson's testimony  
14 before this jury, that Mr. Diaz did not report anything racial  
15 about this incident; true?  
16 A. I heard -- I think mixed evidence on that as to whether  
17 who recalled what about the incident. That's why if there had  
18 been an investigation with notes from interviews, it would be  
19 contemporaneous to the event and we would have a record of what  
20 was said.  
21 Q. Well: "QUESTION: Trial yesterday in front of you, and  
22 you spoke with Owen. You don't recall him saying that Ramon  
23 was calling him the N-word at all, do you?  
24 "ANSWER: No, I do not recall that.  
25 "QUESTION: You don't recall when Owen spoke to you saying

1 And Mr. Wheeler said: "I do not recall."  
2 Were you here for that testimony?  
3 A. I'm sure I was because I was -- but I don't -- I can't  
4 recall specifically the detail of that testimony. I don't have  
5 the question that it happened.  
6 MR. SPIRO: Okay. So if we could put back up  
7 Complaint Number 2.  
8 BY MR. SPIRO:  
9 Q. And we've talked about that e-mail where the report comes  
10 in. And Wayne Jackson then testified as to bullet number 1  
11 that he did -- I'm not talking about how in depth or how  
12 perfect the investigation was, but he did speak to all  
13 three individuals: Martinez, Foster, Diaz; right?  
14 A. I believe so.  
15 Q. And the next thing that you said was no attempt -- do you  
16 see it says "no attempt to check surveillance" in your report?  
17 A. Correct.  
18 Q. And did you hear both Mr. Kawasaki and Mr. Jackson come  
19 into court and say, yeah, they checked the video surveillance.  
20 Did you hear that testimony?  
21 A. I heard they were able to check some of it but that there  
22 was additional surveillance that they thought might be  
23 available that they were unable to check.  
24 Q. Well, that may be true, but you wrote in your slide -- in  
25 your report, no attempt.

1 that Ramon used any racial slurs against him; correct?  
2 "ANSWER: I don't recall it being any racial slurs. I  
3 don't think racial stuff came in until the drawings."  
4 That was the testimony while you were sitting here in  
5 court, wasn't it?  
6 A. That was one person's testimony.  
7 Q. Right. I'm just talking about Mr. Jackson.  
8 A. Okay.  
9 Q. Okay? I'm sorry.  
10 A. There are many people.  
11 THE COURT: No. She answered the question.  
12 BY MR. SPIRO:  
13 Q. And in assessing credibility, you also heard Mr. Jackson  
14 say -- and I'm only talking about Mr. Jackson right now -- that  
15 Mr. Diaz had a pattern of any time anybody made a complaint  
16 about him, he would come over the top and say that that person  
17 was harassing him.  
18 Do you remember that testimony?  
19 A. Well, again, I remember -- yes. Let's leave it there.  
20 Q. Okay. And when you're assessing credibility, which is  
21 important in your assessment in an investigation, do you look  
22 at whether witnesses change their answers?  
23 A. It's one thing I look at, sure.  
24 Q. And do you look at when somebody says sort of  
25 opportunistically, "I don't recall. I don't recall. I don't

1 recall," would that raise a question of credibility in your  
 2 mind?  
 3 **A.** Well, you added "opportunistically." I'd have to evaluate  
 4 whether I thought it was opportunistic. The fact that somebody  
 5 can't recall something doesn't mean that they are not credible.  
 6 **Q.** Sure.  
 7 **A.** I have to look at the entire record, not something in  
 8 isolation.  
 9 **Q.** Agreed. But what about somebody that says one thing the  
 10 day something happens and then something completely differently  
 11 10 years later? Would that cause you to have some credibility  
 12 concerns?  
 13 **A.** I would certainly want to understand why, and that  
 14 certainly could be a credibility issue, but I'd need more  
 15 information as to are we parsing words and they are essentially  
 16 the same, or are they totally different? Is it --  
 17 **Q.** And the witness's interest in the outcome of an  
 18 investigation is something that you would consider for  
 19 credibility; true?  
 20 **MR. COLLIER:** I'm going to object, Your Honor. This  
 21 is starting to encroach on the instructions, and the jury is  
 22 evaluating witness credibility.  
 23 **THE COURT:** Overruled.  
 24 **BY MR. SPIRO:**  
 25 **Q.** Right. If somebody had an interest in the outcome, right,

1 by either getting somebody in trouble or getting a lot of  
 2 money, some interest, that would be something that you would  
 3 consider in terms of credibility, of course; right?  
 4 **A.** Well, again, you're sort of imposing certain things --  
 5 yes, of course, I look at motive and credibility, and it's one  
 6 of many things that I would look at.  
 7 **Q.** Yeah. For these questions, I'm just asking you, is it a  
 8 factor that you would consider? Just a factor. Not the sole  
 9 factor, but a factor.  
 10 And another factor would be that you'd be looking at  
 11 corroboration, whether there was corroboration from what the  
 12 person said; right?  
 13 **A.** Yes.  
 14 **Q.** And you'd be looking at how that person's testimony  
 15 matched up against everybody else's statements regarding the  
 16 incident.  
 17 Would you like to compare how different people saw  
 18 different things you would do that; right?  
 19 **A.** Well, I'd have to do that in the context of their ability  
 20 to perceive, so I'm not going to -- I don't look at everything  
 21 equally. Like if one person versus three, the one person may  
 22 have one more credibility because they had more availability to  
 23 see something. And so -- I look at all the credibility  
 24 factors, and they are similar or the same as the type of  
 25 credibility factors that the jury is going to use in evaluating

1 this.  
 2 **Q.** Agreed. And you'd also use your common sense; right?  
 3 **A.** Sure.  
 4 **Q.** And you know if -- if they had lied before, if the person  
 5 you were interviewing had lied before, you'd look at that;  
 6 right?  
 7 **A.** That's a hard one. It depends on in what context.  
 8 **Q.** Well, how about the context --  
 9 **THE COURT:** Just please wait.  
 10 **MR. SPIRO:** Oh, sorry. I thought -- I apologize.  
 11 **THE WITNESS:** No. I hadn't.  
 12 **BY MR. SPIRO:**  
 13 **Q.** Apology.  
 14 **A.** The fact that -- one has to be very careful not to take  
 15 evidence that could be prejudicial but not say anything about  
 16 the specific event. So you have to be careful looking at prior  
 17 conduct, and the fact that somebody might have been dishonest  
 18 in one circumstance may not shed light on what's going on in  
 19 that particular circumstance.  
 20 So I look at -- when I do an investigation, I'm looking at  
 21 investigating this particular incident, not investigating  
 22 everything about the person, you know, have they ever had an  
 23 affair or been arrested or things that would be highly  
 24 prejudicial but really wouldn't tell me much about this  
 25 particular instance.

1 **BY MR. SPIRO:**  
 2 **Q.** But what about in the specific context of making reports?  
 3 If somebody made several false or manipulative reports and they  
 4 made a fifth report, would you at least consider the fact that  
 5 there had been prior reports that turned out to not be as that  
 6 person claimed? Would you consider that?  
 7 **A.** I would be very cautious about that because the facts in  
 8 front of me are really what I want to look at, and there are  
 9 certainly instances, you know, the "boy who cried wolf"  
 10 syndrome, that somebody's exaggerated something in the past,  
 11 and then something actually happens and you ignore it, thinking  
 12 that this is untrue or exaggerated.  
 13 That's a problem. And you have to, as I said, really look  
 14 at each instance on its own merit.  
 15 **Q.** And in terms of Complaint Number 2, if -- assume for the  
 16 sake of this that that question mark, where we started our  
 17 discussion with, turns out to be right and there was no racial  
 18 slur and the incident wasn't racial at all, it was just a fight  
 19 between two men -- you understand as a lawyer and I think from  
 20 your previous testimony yesterday, that Plaintiff could then  
 21 not receive damages for that; right?  
 22 **MR. COLLIER:** Assumes facts. Improper hypothetical.  
 23 **THE COURT:** You can -- you can answer the hypothetical  
 24 if you can. If you can't, don't.  
 25 **THE WITNESS:** Well, what I would say is that I don't

1 presume somebody can just get damages because something is  
2 racial. If there is -- if there is a threat of violence, if  
3 somebody is harmed in the workplace, I'm not going to assume  
4 they can't get damages for that one way or the other. I  
5 really -- that doesn't factor into how I see things.

6 I consider a threat of violence to be very serious,  
7 regardless of whether it's racial, and I don't really think  
8 about whether they are going to have a cause of action  
9 two years from then or something.

10 **BY MR. SPIRO:**

11 **Q.** Well, the other thing is that incident that I asked you  
12 about where Mr. Romero fired Mr. Foster, right, Mr. Foster was  
13 somebody fighting with Mr. Diaz who was an African American  
14 man; correct?

15 **A.** Correct.

16 **Q.** Right. And so that act on Mr. Romero's part to fire him  
17 you did not include in your report, like we talked about;  
18 right?

19 **A.** As I believe I already said, my understanding is that it  
20 wasn't part of the case, and therefore, I wasn't supposed to  
21 opine on it.

22 **Q.** Okay. So if we go to Complaint Number 1, you heard  
23 Mr. Kawasaki say that when he arrived right at the scene and  
24 spoke to the witnesses, none of them heard the N-word; right?  
25 You heard that testimony?

1 **A.** I heard him say that people said it was racial and that he  
2 could not recall whether that included the N-word or not.

3 **Q.** And there was -- he didn't know whether or not  
4 Mr. Timbreza was speaking -- in what language Mr. Timbreza was  
5 speaking when he uttered those words; right? Do you remember  
6 that?

7 **A.** He thought that he was speaking in English, but when you  
8 asked him a few times about whether it could have been Spanish,  
9 he considered that he might not have thought about that and  
10 made an assumption.

11 **Q.** And ultimately, you know from reviewing the records in  
12 this case that Mr. Diaz was satisfied with the way that that  
13 incident was handled?

14 **A.** I don't recall that he felt satisfied with how it was  
15 handled.

16 **Q.** Well, do you recall that you -- you -- your opinion was  
17 that his satisfaction, whatever that may be, wasn't relevant to  
18 your determination, but do you recall that he did say under  
19 oath that he was satisfied with the way that was handled?

20 **A.** Yeah. I mean, maybe because it really isn't relevant you  
21 don't look to the person who is the target of the action to say  
22 yeah or nay on how you respond. You've got to have a response  
23 that is adequate, regardless. So it's not something that I  
24 give a lot of thought to.

25 **Q.** Well, just so we have this calendar up -- and I'm not

1 going to bother with the easel right now -- about when Mr. Diaz  
2 started, if there wasn't the incident in October, right, that  
3 we talked about, Incident Number 2, okay, assume --

4 **A.** The elevator incident is October. The earlier one was  
5 July.

6 **Q.** Right. So if the October incident didn't happen the way  
7 Mr. Diaz says that it happened, right, says now that it  
8 happened, the next incident is in January that you looked at,  
9 Complaint Number 3; right?

10 **A.** Yes.

11 **Q.** And you testified yesterday that zero tolerance does not  
12 mean you fire somebody. Zero tolerance means you impose some  
13 kind of discipline; true?

14 **A.** Yes. Progressive discipline that is aimed at ending the  
15 behavior and gets more serious if there is continuing behavior.

16 **Q.** And you don't have an opinion on whether or not the  
17 punishment with Mr. Martinez met that standard?

18 **A.** You mean when he drew the racist effigy?

19 **Q.** Right.

20 **A.** What's difficult there is that there was a prior incident  
21 with him, even if it wasn't racial, and there was a warning  
22 about his behavior vis-a-vis Mr. Diaz.

23 And given how serious -- if it was -- even if it was  
24 isolated and there had been no history, it was a very serious  
25 incident, and so I would expect it to be treated in a very

1 serious manner. I don't like to say that has to be  
2 termination. I would say that from what I've seen, most  
3 institutions would terminate somebody for that.

4 However, I do have to add that because of the prior  
5 incident, that has to be factored in. And if he got a prior  
6 warning, even if it wasn't racial, if it's a threat towards  
7 this person and then there is a racist effigy, you can't just  
8 say, "Oh, that was just a threat, and it wasn't racial, so we  
9 won't count that in determining what the appropriate action  
10 is."

11 **Q.** And yesterday you said that, you know, you don't even know  
12 if he had been suspended without -- right -- without pay. You  
13 know that there is no dispute in this case, that he was  
14 suspended without pay.

15 Do you know that?

16 **A.** I saw that they made the decision. I don't know that I  
17 saw that it was actually effectuated because there were so many  
18 discussions about what they were going to do. But I -- you  
19 know, I believe that it happened, so I don't mean to put that  
20 in dispute.

21 **Q.** Okay. And you know that since this time and since this  
22 incident in eight years, Mr. Martinez has never had another  
23 incident --

24 **MR. COLLIER:** Objection, Your Honor.

25 **THE COURT:** Sustained.

1 **MR. COLLIER:** Move to strike, Your Honor.  
 2 **THE COURT:** Struck.  
 3 **THE WITNESS:** How would I possibly know that?  
 4 **THE COURT:** Okay. Let's go to the next question.  
 5 **MR. SPIRO:** Okay.

6 **BY MR. SPIRO:**

7 **Q.** Mr. Jackson you heard testify that he spoke to all  
 8 three shifts, explained how offensive the drawing was, and told  
 9 everybody about what had happened, correct, you heard that  
 10 testimony?

11 **A.** I'm not recalling it precisely in terms of speaking to all  
 12 three shifts, so I -- again, if you say that he said that  
 13 yesterday, I don't have a reason to question it.

14 **Q.** In your report -- this is my final question before we turn  
 15 to the last little bit here -- which is: In your report you  
 16 said that there were oral reports that Owen Diaz said that he  
 17 brought up to people, oral reports.

18 And isn't it a fact that when you reviewed all of the  
 19 testimony, evidence, and documents in this case, you saw no  
 20 corroboration for any of those oral reports; isn't that a fact?

21 **A.** I don't know that I was given any evidence regarding the  
 22 oral reports that -- so I don't know how I would have seen -- I  
 23 mean, again, you have to have an investigation to review for me  
 24 to know whether there was corroboration. Without that, you  
 25 have no record that you -- where you should have a record

1 because there should have been an investigation of these that  
 2 would show what people said. Either they corroborated or they  
 3 didn't.

4 **Q.** Well, when there was an oral report regarding Timbreza  
 5 that actually really happened and that really happened, there  
 6 was an e-mail that corroborated the fact that it happened.

7 But my question for you is: In all of the other oral  
 8 reports that occurred, when you looked at all of the documents  
 9 and depositions and everything in this case, you saw zero  
 10 corroboration for any of his other oral reports; isn't that  
 11 true?

12 **A.** But I'm a little confused by the question because going  
 13 back to the situation with Mr. Timbreza, there was  
 14 corroboration that he complained, but the corroboration that  
 15 I'm looking for is what people would have said if they had been  
 16 interviewed and somebody had done an investigation, taken  
 17 notes, made findings. Then there would be a record that  
 18 somebody could review, and maybe we wouldn't even be here. I  
 19 don't know.

20 **Q.** Maybe we wouldn't even be here?

21 **A.** I mean, if there had been that kind of response from the  
 22 get-go, then you have a record to go on.

23 **Q.** And if there had been -- if all of these oral complaints  
 24 didn't actually happen, we'd be in the same place, wouldn't we?

25 **A.** I'm not understanding that.

1 **Q.** In any event, you were hired in this case, but you have  
 2 been hired by Mr. Organ in other cases against Tesla; correct?

3 **A.** I believe one other.

4 **Q.** Mr. -- well, you are in the process of -- you are retained  
 5 only on one other case that Mr. Organ has against Tesla for  
 6 racial harassment in the workplace, only one other? Is that  
 7 your testimony?

8 **A.** I believe so. Is there a second? I don't know. I'm not  
 9 doing much expert witness work anymore, and I have not had a  
 10 lot of contact on any case.

11 **Q.** Well, you are aware that he has more cases pending for  
 12 harassment against Tesla, and that would be work that could  
 13 come to you; true?

14 **MR. COLLIER:** Objection. Relevance.

15 **THE COURT:** Yeah, particularly if it hasn't happened  
 16 Mr. Spiro. Sustained. And it's move -- and it will be struck.

17 **BY MR. SPIRO:**

18 **Q.** In this case, just to make it very clear, the way you get  
 19 all of your information isn't through an independent  
 20 investigation. It's provided to you by the Plaintiff's  
 21 lawyers; correct?

22 **A.** Well, it's primarily the depositions that both Plaintiff  
 23 and Defense have taken in the case. I'm reviewing the evidence  
 24 in the case. That's one of the reasons it was great to be here  
 25 yesterday because then I get to hear the evidence because my

1 opinion is based on the evidence.

2 **Q.** I understand that. But you don't reach out to the other  
 3 side to say, "Hey, if there's anything that you could provide  
 4 that could give me more clarity, provide it." The only person  
 5 that you interact with from either side is the Plaintiffs, and  
 6 they select what you review?

7 **A.** Except what I'm looking at is what both sides have  
 8 provided in discovery. It's not like I say, "Don't show me  
 9 what the defense provides." If you gave me something that  
 10 wasn't in discovery, then the jury wouldn't have access to it  
 11 either. I want to review what the jury reviews because that's  
 12 the case.

13 **Q.** Right. But you didn't review every single deposition and  
 14 piece of evidence in this case. You reviewed what was provided  
 15 to you by the Plaintiff's lawyers, period?

16 **A.** Well, except I think they gave me anything other than  
 17 something that was like a psychological report that wouldn't be  
 18 relevant to what I talk about.

19 **Q.** Do you know as you sit here under oath that they gave you  
 20 every single deposition and piece of evidence in this case? Is  
 21 that what you're telling this jury?

22 **A.** No. I can't say that. I -- but I certainly got many,  
 23 many -- all the people who are going to testify, other than  
 24 maybe other experts, I reviewed the depositions, all of --  
 25 I believe all of the documents in this case. I think I was



1 given all of the exhibits.  
 2 You know, I try to limit it to things that are relevant to  
 3 what I testify about. And I always ask for things that would  
 4 tend to go either way in the case because I want to make sure  
 5 I'm reviewing a complete record and --  
 6 Q. Okay. You have never worked as a human resources  
 7 professional for a company; true?  
 8 A. True.  
 9 Q. And since you haven't worked as a human resources  
 10 professional, I assume you have never worked as a human  
 11 resources professional with 10,000 workers working overnight  
 12 shifts in that setting.  
 13 You have not done that; right?  
 14 A. No, I haven't.  
 15 Q. Okay. And you've never been the supervisor of a company  
 16 who is tasked with handling investigations of workplace  
 17 harassment; correct?  
 18 A. Well, for 20 years I was an administrative law judge and I  
 19 was the presiding judge, and I was in charge of dealing with  
 20 any complaints including sexual harassment or racial harassment  
 21 complaints. And I did have some that I was tasked with  
 22 overseeing in that context, but in the very different milieu  
 23 but, nevertheless, there are issues everywhere so...  
 24 Q. Right. Right. I'm just simply asking you, have you ever  
 25 been a supervisor and executive at a company, a corporation,

1 where you're tasked with doing this? Correct?  
 2 A. Well, I've supervised judges, but if you don't consider  
 3 that, then don't consider it.  
 4 Q. Well, I consider it. I don't -- I don't think it's  
 5 exactly the question. I consider it on its own, but I was just  
 6 simply asking if at a corporation.  
 7 A. Not a private company, no. I worked for the State of  
 8 California.  
 9 Q. And you determined that Tesla had adequate policies in  
 10 place; right?  
 11 A. I think the policies were fine, yes.  
 12 Q. And you have admitted that you do not have an opinion on  
 13 whether Tesla adequately trained its employees because you  
 14 didn't have anything necessary to make that determination;  
 15 true?  
 16 A. Well, I wasn't able to review their training. What I was  
 17 able to do is see that people said they didn't get training and  
 18 that supervisors had some serious misunderstandings.  
 19 So either the training was lacking or it wasn't getting  
 20 through, and it's hard for me to know what the problem was.  
 21 But clearly, people were not getting trained.  
 22 I think we heard yesterday people who didn't receive  
 23 training. It's possible they did and they just don't remember  
 24 it, but one would hope that the training was strong enough so  
 25 they'd have some memory of it.

1 Q. And just like in the other Tesla case that you're handling  
 2 for these lawyers, you reached a conclusion that Tesla did not  
 3 meet the standard of care; correct?  
 4 A. Again, I don't remember what other case you're talking  
 5 about, but I did conclude in this case that Tesla did not meet  
 6 the standard of care.  
 7 Q. They were negligent in the way that they did this?  
 8 A. They didn't -- they didn't have a --  
 9 MR. COLLIER: I'm sorry. Objection, your Honor.  
 10 What's the relevance?  
 11 THE COURT: Yeah. Sustained.  
 12 MR. SPIRO: Of her opinion?  
 13 THE COURT: So ask her what -- about this case.  
 14 MR. SPIRO: Just this case. Sorry.  
 15 THE COURT: Just this case.  
 16 MR. SPIRO: I apologize.  
 17 BY MR. SPIRO:  
 18 Q. I was shifting when the witness said. In this case you --  
 19 you reached the conclusion that the reasonable employer should  
 20 have taken more steps to investigate and that Tesla was  
 21 negligent in their conduct; correct?  
 22 A. Yeah. I probably don't use the word "negligent," but --  
 23 but yes, what they did was subpar and was not consistent with  
 24 what was acceptable practice during the period of time that  
 25 these events occurred.

1 Q. But I think --  
 2 A. And long before that.  
 3 Q. Sorry. Okay.  
 4 I guess I'm making the distinction. It's not that you are  
 5 saying that this is -- you know, Tesla the company should be  
 6 indicted and people should go to jail. You're not saying that,  
 7 are you?  
 8 MR. COLLIER: Legal conclusion.  
 9 THE COURT: Sustained. This is a civil case. And  
 10 that would be beyond the scope of anything that she was asked  
 11 to testify -- to provide opinions on. So let's move to what  
 12 she did give opinions on.  
 13 BY MR. SPIRO:  
 14 Q. You agree that employers are not the guarantors of a  
 15 harassment-free workplace; correct?  
 16 A. Yes.  
 17 Q. You agree that there is no perfect workplace  
 18 investigation?  
 19 A. Theoretically, I don't believe in perfection in these  
 20 sorts of things. Just like I don't think there is any perfect  
 21 trial --  
 22 Q. There is not.  
 23 A. -- so...  
 24 Q. And investigations cannot always uncover the truth; fair?  
 25 A. That's true.

1 Q. And sometimes a full investigation is necessary, but in  
2 certain circumstances to figure out what happened quickly, an  
3 initial inquiry could be sufficient in some circumstances;  
4 true?

5 A. If there are no contested facts, then an initial inquiry  
6 might be sufficient as opposed to going to -- or if there's  
7 either no contested facts or if the facts alleged were not so  
8 serious that they wouldn't -- that they don't even violate the  
9 company rules, then yes.

10 Q. In terms of the no-contested facts, you're aware of  
11 Mr. Martinez in the incident that did happen, the drawing,  
12 confessed. Said he did it.

13 MR. COLLIER: Objection. Argumentative.

14 THE COURT: Overruled. You can respond.

15 BY MR. SPIRO:

16 Q. The third complaint that happened where the drawing was  
17 made, Mr. Martinez admitted that he did that; right?

18 A. Well, my understanding is he first denied it and then  
19 admitted it, and the contested fact there is his intention why  
20 he did it and the history as to whether it was targeted  
21 specifically towards Mr. Diaz.

22 And I think that when you have a serious case, even if  
23 somebody says, "yes, I said that word" or "I drew that image,"  
24 that you need to know more to know how you're going to respond  
25 to it.

1 And so when I'm -- it's not the sort of simple case where  
2 you can simply say, "Okay. He admitted it, and we can move  
3 on."

4 Q. Well, I don't know about move on, but he -- it was just a  
5 question. Mr. Martinez admitted that he did it?

6 A. He did ultimately admit it.

7 Q. Well, you said "ultimately." He admitted it within  
8 minutes of them finding it; right?

9 A. I thought it was a little longer than minutes, but you  
10 know, I don't want to parse -- parse minutes.

11 Q. Okay. And then he wrote out a full apology and admission.

12 You saw that, right, that written document?

13 MR. COLLIER: Objection. Assumes facts.

14 Argumentative.

15 THE COURT: To the extent that you remember the  
16 testimony, Ms. Oppenheimer, you can respond.

17 THE WITNESS: I recall that there was something that  
18 he wrote out. There were the written questions that were given  
19 to him. It could have been part of that. I don't think it was  
20 a sufficient response to the action that he did.

21 MR. SPIRO: Thank you. No further questions.

22 THE COURT: All right.

23 Mr. Collier?

24 MR. COLLIER: Thank you, Your Honor.

25 ///

1 REDIRECT EXAMINATION

2 BY MR. COLLIER:

3 Q. Ms. Oppenheimer, did you know that the previous jury --  
4 I'm sorry -- the previous phase of this proceeding  
5 determined --

6 MR. SPIRO: Objection.

7 THE COURT: Yeah. The -- I'll strike what Mr. Collier  
8 has said so far.

9 And start again.

10 MR. COLLIER: I'll rephrase.

11 BY MR. COLLIER:

12 Q. Ms. Oppenheimer, you understand punitive damages are  
13 designed not to punish negligence but intentional conduct?

14 A. That's correct.

15 Q. Malicious, oppressive, or reckless disregard.

16 MR. SPIRO: Objection.

17 THE COURT: It's outside the scope both of her report  
18 and her testimony thus far. Sustained.

19 BY MR. COLLIER:

20 Q. You were asked about verbal reports. Were you here  
21 yesterday when Mr. Kawasaki and Mr. Wheeler both confirmed that  
22 Mr. Diaz had complained about the N-word verbally to them?

23 MR. SPIRO: Objection. Mischaracterizes the  
24 testimony.

25 THE COURT: Overruled.

1 THE WITNESS: Mr. Kawasaki, it seemed like, became  
2 unclear at some point about whether he said "racial" or  
3 specifically the N-word. And to me, it's -- either way, you'd  
4 respond the same way.

5 I believe Mr. Wheeler said that he did hear a complaint  
6 directly from Mr. Diaz regarding the N-word.

7 BY MR. COLLIER:

8 Q. You were asked about the Rothaj Foster incident, and you  
9 indicated you believed it was outside the scope of the case.

10 Did you know that Rothaj Foster is also Black?

11 A. Yes.

12 Q. And is that your understanding of why it's outside the  
13 case?

14 A. I'm not -- I don't -- it was a long time ago. I don't  
15 know that I can say fully why my understanding is what -- as to  
16 why it's outside the case. I try not to think about things  
17 that I'm told are outside the case.

18 Q. Understood.

19 MR. SPIRO: Can we display Exhibit 92 already in  
20 evidence, please?

21 (Pause in proceedings.)

22 MR. COLLIER: Can we blow up the complaint?

23 (Pause in proceedings.)

24 BY MR. COLLIER:

25 Q. Here in Exhibit 92, Mr. Diaz, when he reports the elevator

1 incident regarding Mr. Martinez, he states: "For some reason,  
2 Ramon jump off the tigger he was on and started yelling at me  
3 in a threatening manner."

4 Later he goes on to say: "I thought he was going to hit  
5 me, so I asked him to step back."

6 Had these -- were these allegations sufficient to trigger  
7 an investigation in your opinion?

8 **A.** Absolutely.

9 **Q.** And is it true that during the course of an investigation  
10 you would ask questions about what he was yelling?

11 **A.** Sure.

12 **Q.** And you would determine if there were racial slurs  
13 included?

14 **A.** Of course.

15 **Q.** And had this been properly investigated, it would have  
16 included an analysis of whether he had used racial slurs with  
17 Mr. Diaz before; correct?

18 **A.** Correct.

19 **Q.** Now, Wayne Jackson testified yesterday that Mr. Quintero  
20 and Mr. Romero failed to preserve the surveillance footage of  
21 this incident.

22 Did you hear that testimony?

23 **A.** Yes.

24 **Q.** All right. And they also testified that Mr. Romero and  
25 Mr. Quintero were in control of what footage he and

1 Mr. Kawasaki were able to review.

2 Did you hear that testimony?

3 **A.** Yes.

4 **Q.** And does that inform your opinion about the surveillance  
5 footage not being reviewed?

6 **A.** Well, my opinion's the same which is that any surveillance  
7 footage that could have been available should have been  
8 preserved and reviewed. You know, I don't -- I don't know  
9 enough about what to imply that they were destroyed by specific  
10 people other than it's part of a pattern of not doing  
11 investigations and not trying to find out what's really going  
12 on.

13 **MR. COLLIER:** Can we display Exhibit 39, speaking of  
14 that pattern.

15 (Pause in proceedings.)

16 **BY MR. COLLIER:**

17 **Q.** Exhibit 39 is a copy of Mr. Romero's e-mail to Victor  
18 Quintero reporting on the results of Mr. Kawasaki's  
19 investigation. You've seen this e-mail before?

20 **A.** Probably.

21 **Q.** I'll give you a moment.

22 **A.** Okay.

23 (Pause in proceedings.)

24 **BY MR. COLLIER:**

25 **Q.** I want to draw your attention to the line that says: "We

1 investigated by speaking to all witnesses present, but they  
2 said they did not hear the remarks."

3 Now you were here for Mr. Kawasaki's testimony yesterday;  
4 correct?

5 **A.** Yes.

6 **Q.** And you heard him say that not only did he confirm the  
7 remarks were made with witnesses but he reported that to  
8 Mr. Romero?

9 **MR. SPIRO:** Objection. Leading every question. He's  
10 testifying.

11 **THE COURT:** The -- I'd be more inclined to sustain the  
12 objection if this wasn't the same kind of question that you  
13 were asking, so I'm --

14 **MR. SPIRO:** I'm on cross.

15 **THE COURT:** It is true, but this can be responded to  
16 with a yes or no answer, and I'm going to overrule the  
17 objection.

18 **MR. COLLIER:** Thank you.

19 **BY MR. COLLIER:**

20 **Q.** So sorry.

21 You were here when Mr. Kawasaki testified that not only  
22 did the witnesses confirm the racial slurs, but he reported  
23 that to Mr. Romero.

24 **A.** Yeah -- no. It's very troubling that he was not  
25 interviewed because he would have been the best person to talk

1 to to find out, you know, who told him what. And obviously,  
2 you still need to go to them, but we don't know if they went to  
3 the right people or if there was a contradiction, why there was  
4 a contradiction. I mean, that's a huge hole in this whole  
5 investigation -- supposed investigation.

6 **Q.** And is it fair to say that one possibility is that  
7 Mr. Romero is covering it up?

8 **A.** It's a possibility. I mean, I -- I'm not going to assume  
9 it, but it's a possibility.

10 **Q.** And we see that Mr. Diaz isn't copied here. Do you see  
11 that?

12 **A.** Yeah.

13 **Q.** So to the extent Mr. Diaz previously testified he was  
14 satisfied with the outcome, he didn't know about this e-mail,  
15 did he?

16 **MR. SPIRO:** Objection.

17 **THE COURT:** Sustained.

18 **BY MR. COLLIER:**

19 **Q.** When you're assessing someone's motive with regard to an  
20 incident such as the elevator dispute, you also look at the  
21 totality of circumstances and interactions between those  
22 individuals; correct?

23 **A.** Sure.

24 **Q.** For example, if someone were to threaten violence against  
25 Mr. Diaz and then three months later draw a racist effigy and

1 leave it to harass Mr. Diaz, that might support an inference  
2 that the earlier threat in the elevator was also racially  
3 motivated?

4 **MR. SPIRO:** Objection.

5 **BY MR. COLLIER:**

6 **Q.** Is that true?

7 **MR. SPIRO:** Outside of her expertise and it's a  
8 leading question.

9 **THE COURT:** It is a leading question.

10 (Pause in proceedings.)

11 **THE COURT:** And I think it is -- I think we are -- we  
12 are going beyond the scope of what Ms. Oppenheimer was called  
13 here to do.

14 **MR. COLLIER:** Fair enough. I will ask one other  
15 question.

16 **BY MR. COLLIER:**

17 **Q.** Would it be fair to say that in a thorough investigation  
18 of Mr. Martinez's conduct, either in the elevator incident or  
19 in the pickaninny incident, the entire course of his conduct  
20 would be considered and not any particular incident in a  
21 vacuum.

22 **A.** Absolutely.

23 **MR. COLLIER:** No further questions.

24 **MR. SPIRO:** Just very briefly, Your Honor.

25 **THE COURT:** All right.

# RE-CROSS-EXAMINATION

1 **BY MR. SPIRO:**

2 **Q.** You are not here to give any opinion on damages; right?

3 **A.** No.

4 **Q.** Okay. And you are not offering any opinions on emotional  
5 distress, psychological injury; correct?

6 **A.** Correct.

7 **Q.** And you don't have any opinions that any harassment  
8 actually occurred; correct?

9 **A.** Not if it's contested. I'm -- I mean, there are things  
10 that were not contested; but if something is contested, then  
11 it's for the jury to determine it.

12 **MR. SPIRO:** Okay. Thank you.

13 **MR. COLLIER:** Nothing further, Your Honor.

14 **THE COURT:** Thank you, Ms. Oppenheimer. You are  
15 excused.

16 **THE WITNESS:** Thank you.

17 **MR. ORGAN:** Your Honor, the Plaintiff calls Ed Romero.  
18 (Pause in proceedings.)

19 **THE COURT:** Come on up, Mr. Romero.

20 **THE CLERK:** Step up and remain standing. I will take  
21 your photograph and then I will swear you in.

22 (Pause in proceedings.)

23 \\\

24 \\\

1 **EDWARD ROMERO,**

2 called as a witness for the Plaintiff, having been duly sworn,  
3 testified as follows:

4 **THE CLERK:** Be seated. If you would please begin by  
5 stating your full name and spelling it for the court reporter.

6 **THE WITNESS:** Edward Romero.

7 **DIRECT EXAMINATION**

8 **BY MR. ORGAN:**

9 **Q.** Good morning, Mr. Romero. How are you?

10 **A.** Good morning.

11 **Q.** You started working at Tesla on approximately January 5,  
12 2015?

13 **A.** I started working at Tesla --

14 **Q.** July 5, 2015?

15 **A.** At nextSource, uh-huh.

16 **Q.** You started working at Tesla on July --

17 **A.** At the facility, yes.

18 **Q.** Right. And you were initially hired to work at that Tesla  
19 through -- you started working there through nextSource; is  
20 that right?

21 **A.** Yes.

22 **Q.** You were a direct employee of Tesla starting approximately  
23 October 12 of 2015?

24 **A.** Yes.

25 **Q.** And you left Tesla in approximately August of 2017; is

1 that right?

2 **A.** That's probably -- I don't remember the exact date.

3 **Q.** Okay. You were Mr. Owen Diaz's supervisor?

4 **A.** Yes.

5 **Q.** You supervised the elevators?

6 **A.** Correct.

7 **Q.** You also supervised the janitorial services?

8 **A.** I did.

9 **Q.** You reported to Victor Quintero?

10 **A.** Yes.

11 **Q.** Victor Quintero was the manager in charge of several  
12 departments?

13 **A.** Yes.

14 **Q.** Those departments included recycling?

15 **A.** Correct.

16 **Q.** And those departments included the elevators?

17 **A.** Yes.

18 **Q.** Your job duties as contract services supervisor included  
19 overseeing all of the cleaning contractors for the facility in  
20 the powertrain and lower production?

21 **A.** It was -- it was divided between me and another person,  
22 but we both had authority over that.

23 **Q.** And you shared some supervision oversight, at least  
24 initially, of the two industrial elevators with Jaime Salazar;  
25 is that correct?

1 A. Correct.

2 MR. ORGAN: Now, if we could, put up Exhibit 33.

3 (Pause in proceedings.)

4 BY MR. ORGAN:

5 Q. And Exhibit 33, Mr. Diaz sent this e-mail to you with the

6 racist drawing; correct?

7 A. He did.

8 Q. And when you saw the picture -- and if we could move to

9 the second page -- third page -- when you saw this picture, you

10 were shocked that someone would do that; correct?

11 A. I was.

12 Q. You talked to Owen Diaz about the racist drawing; correct?

13 A. I don't remember in depth how the conversation went, but

14 yes, he did talk to me and I talked to him.

15 Q. When you were able to talk to him about it, you saw that

16 he was offended by it; right?

17 A. Yes.

18 Q. You saw that Owen Diaz was hurt; right?

19 A. Yes.

20 (Pause in proceedings.)

21 BY MR. ORGAN:

22 Q. So offended, hurt, those were both things that you

23 observed; correct?

24 A. Yes.

25 Q. And, in fact, you observed that Owen Diaz was very, very

1 hurt; correct?

2 A. I knew he was hurt. I don't know what you mean by "very,

3 very hurt," but he was offended and hurt.

4 MR. ORGAN: Your Honor, I would like to read from the

5 deposition -- I'm sorry -- from the first proceeding, page 187,

6 lines 9 to 12 -- 14, Your Honor.

7 (Pause in proceedings.)

8 MR. GRIFFIN: What were the pages again?

9 MR. ORGAN: 187, lines 9 to 14.

10 THE COURT: It's fine.

11 MR. ORGAN: "QUESTION: And when you talked to

12 Mr. Diaz, how did he describe how he felt when he saw this

13 cartoon?

14 "ANSWER: He was hurt. He was very, very hurt. And I

15 told him, 'I don't blame you, you know. That's not right, you

16 know,' so, you know, we initiated the proper steps that should

17 be taken to rectify it"

18 BY MR. ORGAN:

19 Q. Very, very hurt; right?

20 A. Well, you are asking me something that happened like

21 seven or eight years ago, you know, but yes, he was very hurt.

22 Q. Well, your testimony was actually just a year and a half

23 ago; right, sir?

24 A. I thought you were referring to the deposition.

25 Q. No. I was referring to --

1 A. Okay.

2 Q. -- when you testified previously in court. Do you

3 remember that?

4 A. I remember.

5 Q. Okay. And that's when you said "very, very hurt";

6 correct, sir?

7 A. If that's what I said.

8 Q. Okay. You understood that Owen Diaz was classifying the

9 drawing as racist; right, sir?

10 A. Yes.

11 Q. You thought the drawing was definitely not respectful;

12 correct?

13 A. Correct.

14 Q. Once you received the drawing from Owen Diaz, you

15 forwarded it up to Mr. Diaz's manager, Victor Quintero;

16 correct?

17 A. I did.

18 Q. You forwarded Exhibit 33 --

19 A. Okay.

20 Q. -- which we are looking at?

21 A. May I ask a question? I want to make sure I understood.

22 When you say that I referred the picture up, is that --

23 Q. Forwarded it.

24 A. Forwarded.

25 Q. You sent an e-mail, forwarded?

1 A. An e-mail, yes. Right.

2 Q. You forwarded Exhibit 33 to Mr. Quintero because Ramon

3 Martinez reported to Mr. Quintero; correct?

4 A. Correct.

5 Q. When you were younger, you had seen cartoons with a

6 jigaboo in them; is that correct?

7 A. I did.

8 Q. And the drawing that Mr. Martinez drew reminded you of

9 those cartoons; correct?

10 A. It did.

11 Q. And those cartoons were very offensive; correct, sir?

12 A. Yes.

13 Q. And, in fact, you had a meeting with Wayne Jackson and

14 Victor Quintero about the picture; correct?

15 A. Yes.

16 Q. And you and Wayne Jackson told Mr. Quintero that the

17 picture was very derogatory and bad; correct, sir?

18 A. We did.

19 Q. And once you told them that, they were supposed to handle

20 the matter; correct?

21 A. Correct.

22 Q. You never talked to Ramon Martinez about the drawing;

23 correct?

24 A. No, no.

25 Q. And the three of you, you, Wayne Jackson, and

1 Mr. Quintero, all discussed that Owen Diaz was upset by what  
 2 had happened to him; correct, sir?  
 3 A. We did.  
 4 Q. You understood that Mr. Diaz felt that Mr. Martinez's  
 5 conduct was getting worse; right?  
 6 A. That, I don't remember.  
 7 Q. If you could, let's go back to 33. And if you look at  
 8 that exhibit, he informed you in there that his conduct was  
 9 getting worse; correct?  
 10 MR. ORGAN: Could you highlight that down at the  
 11 bottom.  
 12 BY MR. ORGAN:  
 13 Q. "And because nothing -- this is not the first time Ramon  
 14 Martinez has been talk about his behavior and because nothing  
 15 has been done, it seems that his behavior is getting worse."  
 16 You saw that when that was sent to you; right?  
 17 A. Yes.  
 18 Q. And you never found out what, if any, discipline was given  
 19 to Martinez for the drawing or any other conduct, did you?  
 20 A. No.  
 21 Q. Now, prior to seeing the racist effigy or the racist  
 22 drawing about which Mr. Diaz had complained to you about, prior  
 23 to that, you had never been informed that Owen Diaz had  
 24 complained about anything racist or racial in the workplace;  
 25 correct?

1 I will rephrase it so it's clearer. Prior to this  
 2 incident, had you ever received any information about whether  
 3 or not Mr. Diaz had been exposed to racist or racial things in  
 4 the workplace?  
 5 A. I think he had -- he had -- I'm trying to remember the  
 6 dates, but I think that prior to this, he had -- he had  
 7 complained about maybe two other people using racial slurs and  
 8 so on.  
 9 Q. Okay. Well, you had your deposition taken in this case;  
 10 correct, sir?  
 11 A. Yes.  
 12 MR. ORGAN: And, Your Honor, I would like to read from  
 13 his deposition, page 137, line 3 to line 6 -- actually, I think  
 14 line 3 to line 15, Your Honor, would be more complete. 137, 3  
 15 to 15.  
 16 THE COURT: Okay. Mr. Romero, take a look at -- take  
 17 a look at this, too.  
 18 THE WITNESS: Okay.  
 19 MR. ORGAN: I think we have -- we do have his  
 20 testimony up there.  
 21 THE COURT: I'm trying to speed things along for you.  
 22 137, line 3.  
 23 MR. ORGAN: May I read that, Your Honor?  
 24 THE COURT: I'd like him to take a look at it first.  
 25 MR. ORGAN: Okay.

1 THE COURT: So that he can see it.  
 2 (Pause in proceedings.)  
 3 THE COURT: All right. I think you can proceed at  
 4 this point, Mr. Organ.  
 5 MR. ORGAN: Your Honor, just for the record,  
 6 Exhibit 37 in his deposition is Exhibit 33 in the trial  
 7 transcript.  
 8 THE COURT: Okay.  
 9 BY MR. ORGAN:  
 10 Q. "QUESTION: So prior to the racist effigy being identified  
 11 to you, had Owen Diaz ever complained to you about any kind of  
 12 racial conduct?  
 13 "ANSWER: No."  
 14 And prior to your receiving the e-mail from Owen Diaz,  
 15 what is Exhibit, now 33, had you ever been informed that Owen  
 16 Diaz had complained about anything racist or racial in the  
 17 workplace, and your answer was "No"; correct, sir?  
 18 A. At the time that's the way I remembered it.  
 19 Q. Right. So those are the answers you gave and -- those are  
 20 the questions that were asked of you, and those were the  
 21 answers you gave in your deposition. And you said "no," and  
 22 that contradicts what you're saying today; correct, sir?  
 23 A. I'm just telling you that when -- at the deposition, I was  
 24 trying to remember. At that moment I didn't remember if  
 25 anybody else had complained.

1 Q. Right.  
 2 A. Okay.  
 3 Q. I understand. I just am trying to point out there's a  
 4 contradiction. You recognize that; correct, sir?  
 5 A. I could see how you could jump to that conclusion. Okay.  
 6 Q. Right. And to get ready for your deposition today, you  
 7 met with the lawyers for Tesla; correct, sir?  
 8 A. I did.  
 9 Q. You did. And you went over this testimony, didn't you,  
 10 sir?  
 11 A. We went over my prior -- prior deposition, some of that,  
 12 and then e-mails and so on.  
 13 Q. You went over this precise issue with them, didn't you?  
 14 A. I don't remember if we touched about much detail, but  
 15 we -- we went over a lot of things in the deposition.  
 16 Q. They told you that you had to admit to having heard this  
 17 racist conduct so that you wouldn't get impeached like you did  
 18 last time you testified; isn't that true, sir?  
 19 A. No. They didn't tell me that.  
 20 Q. Well, you mentioned the Timbreza event. So let's talk  
 21 about that.  
 22 That was back in July of 2015; correct, sir?  
 23 A. Say that again, please?  
 24 Q. The Judy Timbreza -- Mr. Judy Timbreza, he was a man;  
 25 correct?

1 A. Yes.  
 2 Q. He worked on the elevators.  
 3 A. Yes.  
 4 Q. And there was an incident reported in July of 2015;  
 5 correct?  
 6 A. I don't remember the date, but there was an issue, yes.  
 7 Q. Okay. And so Tom Kawasaki, he was the elevator lead at  
 8 that time in July; correct?  
 9 A. He was -- from what I remember, he was actually a lead for  
 10 the recycle and worked with Jaime Salazar.  
 11 Q. But he had responsibility over the elevators at the end of  
 12 July of 2015; correct?  
 13 A. That was my understanding at the time.  
 14 Q. Yeah. And Owen Diaz was an elevator operator back in July  
 15 of 2015?  
 16 A. Yes.  
 17 Q. Correct? And if you received -- let's put up  
 18 Exhibit 38 -- you received this e-mail from Mr. Kawasaki;  
 19 correct?  
 20 A. Yes.  
 21 Q. And he informed you in this e-mail that comments were  
 22 being made towards Owen Diaz that were racist in nature;  
 23 correct?  
 24 A. That it had been brought to their attention, yeah.  
 25 Q. It had been brought to his attention? And that was then

1 brought to your attention; correct, sir?  
 2 A. Yes.  
 3 Q. And Mr. Kawasaki, he tells you that Mr. Diaz was  
 4 complaining about racial slurs; correct? He let you know that  
 5 when you talked to him; right?  
 6 A. Talked with Tom Kawasaki?  
 7 Q. Yeah.  
 8 A. Yes.  
 9 Q. And he let you know that Owen Diaz had complained about  
 10 racial slurs; correct?  
 11 A. Through this e-mail, yes. Uh-huh.  
 12 Q. Okay. And Mr. Kawasaki told you that he learned from the  
 13 people who observed the altercation between Owen and  
 14 Mr. Timbreza that racial slurs were thrown; correct? That's  
 15 how he phrased it, racial slurs were thrown; right?  
 16 A. Yes. Yes.  
 17 Q. So those -- so Mr. Kawasaki confirmed that people that he  
 18 talked to also confirmed that racial statements had been made  
 19 towards Mr. Diaz; right, sir?  
 20 A. Can you ask me again, please?  
 21 Q. Yeah. Mr. Kawasaki confirmed to you that the people  
 22 around this incident had confirmed to Mr. Kawasaki that racial  
 23 slurs had been thrown at Mr. Diaz.  
 24 A. I don't remember him saying that he -- it was confirmed.  
 25 I think they -- I'm trying to remember, but he was informing

1 that Mr. Diaz had said that individuals had used racial slurs  
 2 against him. Okay. And at that time I think that's where it  
 3 was at.  
 4 MR. ORGAN: Your Honor, I would like to read from the  
 5 first trial -- the trial, first phase, page -- Day 1,  
 6 page 141 -- [audio cut out].  
 7 MR. ORGAN: My audio is off?  
 8 THE CLERK: Sorry.  
 9 MR. ORGAN: Line 8 to 21, Your Honor.  
 10 (Pause in proceedings.)  
 11 MR. ORGAN: May I read that, Your Honor?  
 12 MR. GRIFFIN: Your Honor, there is no impeachment. It  
 13 is a consistent statement to his current testimony.  
 14 BY MR. ORGAN:  
 15 Q. "QUESTION:"  
 16 THE COURT: Overruled.  
 17 MR. ORGAN: I'm sorry, Your Honor.  
 18 BY MR. ORGAN:  
 19 Q. "QUESTION: And Mr. Kawasaki let you know that Owen Diaz  
 20 complained about racial slurs; correct?  
 21 "ANSWER: Yes. Yeah. And Mr. Kawasaki tells you that he  
 22 had learned from the people who observed the altercation  
 23 between Owen and Mr. Timbreza that racial slurs" -- he uses the  
 24 term "thrown -- "that racial slurs were thrown by Mr. Timbreza.  
 25 That's what he told you; right?

1 "ANSWER: I don't remember the exact wording.  
 2 "QUESTION: Okay.  
 3 "ANSWER: Okay.  
 4 "QUESTION: But that information was at least communicated  
 5 to you; correct?  
 6 "ANSWER: I -- I knew about it, yes.  
 7 You never conducted any kind of investigation into the  
 8 issues relating to Judy Timbreza using any kind of racist words  
 9 or racially offensive remarks towards Owen Diaz; correct?  
 10 A. Okay. I lost you here. Okay?  
 11 Q. Oh, I moved on. I apologize.  
 12 A. Yeah.  
 13 THE COURT: This is a question.  
 14 MR. ORGAN: New question.  
 15 THE WITNESS: Oh, it's a question. I thought he was  
 16 reading on.  
 17 BY MR. ORGAN:  
 18 Q. No. I'll try the question again, sir. I apologize.  
 19 You never conducted any kind of investigation into the  
 20 issues relating to Judy Timbreza using any kind of racist words  
 21 or racially offensive remarks towards Owen Diaz; correct?  
 22 A. I did not talk to any -- any of the witnesses, but it was  
 23 an investigation as a collaborative thing, you know, the group.  
 24 And Jaime Salazar was the supervisor. Okay?  
 25 So him and Tom Kawasaki were the ones that were speaking

1 to the folks in the area there.

2 Q. Okay. Did you receive an e-mail from Jaime Salazar

3 talking about anything that he did to interview people?

4 A. I don't recall.

5 Q. So the only e-mail you ever got about what happened

6 relative to the Judy Timbreza use of the N-word or racist slurs

7 towards Mr. Owen Diaz, the only document you ever received from

8 anybody who talked to people was the document we just looked

9 at, Exhibit 38; is that correct?

10 A. That's what I recall.

11 Q. Okay. Now, let's look at Exhibit 39.

12 A. Okay.

13 (Pause in proceedings.)

14 BY MR. ORGAN:

15 Q. And so this is now four days later. The Exhibit 38 was

16 from July 31. This is August 4, 2015.

17 And this is an e-mail from you to the manager, Victor

18 Quintero; correct, sir?

19 A. Yes.

20 Q. And you sent this e-mail; right?

21 A. I did.

22 Q. You write in this e-mail: "Mr. Owen says this has

23 happened before"; correct, sir?

24 A. If I put it there, it's because that's what it was.

25 Q. And you got that information from Mr. Kawasaki; right?

1 This has happened before. Mr. Kawasaki told you that this had

2 happened before?

3 A. I don't remember if Tom said it and Mr. Salazar said it.

4 I don't remember exactly who said it.

5 Q. Okay. But you got the information that it had happened

6 before; correct?

7 A. Yes.

8 Q. And you never investigated what prior racist conduct had

9 happened before; correct?

10 A. I don't think at the time that I had heard of any -- any

11 prior racist remarks. I don't remember. Okay.

12 Q. But you do note it in your e-mail; right, sir?

13 A. I note that -- that they said Mr. Owen had said it

14 happened before.

15 Q. Right.

16 A. Yes.

17 Q. Okay. So the information you had at this point, August 4,

18 2015, was that racial conduct, racist slurs had been confirmed

19 by witnesses and thrown at Mr. Diaz by Judy Timbreza on the

20 31st; correct, sir?

21 A. Well, at that time I don't know if they had -- the remarks

22 had been confirmed by anyone. Okay? Because if I remember

23 correctly, there was, later on, the witnesses or the people who

24 supposedly heard this said that they hadn't heard it.

25 Q. To whom, sir? Who did these people allegedly say that

1 they never heard things? Who did they hear that -- how did you

2 get that information?

3 A. I understood that Tom Kawasaki and Mr. Salazar had gone

4 back to talk to the people who supposedly heard this and that

5 they had said that they didn't hear it.

6 Q. Mr. Kawasaki was just here yesterday. He never testified

7 that he went back and talked to people and they never confirmed

8 it. He said just the opposite, that they had confirmed it.

9 A. Well, I don't know what he said, but you know...

10 MR. GRIFFIN: Objection.

11 THE COURT: The jury will -- I'm going to overrule the

12 objection and remind the jury that it's your memory of what the

13 evidence is that controls. The lawyers are using throughout

14 the questioning today -- they're using their perspectives on

15 what happened yesterday. It's your perspective that controls.

16 Go ahead, Mr. Organ.

17 BY MR. ORGAN:

18 Q. This statement that you put in here, "We investigated by

19 speaking to all witnesses," again, the "we" does not include

20 you; right, sir?

21 A. Well, it was like -- as I mentioned, you know, I was

22 not -- at that time I was not the elevator supervisor. I was

23 coming into -- into the elevator operation. Okay.

24 Jaime Salazar was still supervisor over the elevators. I

25 understood Tom Kawasaki was his lead. Okay.

1 And so when this happened, they were -- they were pretty

2 much taking the lead in talking to the people involved.

3 Q. But Jaime Salazar never sent an e-mail to the manager over

4 everyone, Victor Quintero; correct?

5 MR. GRIFFIN: Objection. Calls for speculation.

6 BY MR. ORGAN:

7 Q. As far as you know, Jaime Salazar never sent an e-mail?

8 A. I have no way of knowing what he did. I have no way of

9 knowing if he sent e-mails or not.

10 Q. Right. You never received such an e-mail; correct?

11 A. No.

12 Q. And so the -- and Mr. Kawasaki, you just testified that

13 Mr. Kawasaki did inform you that the witnesses had at least

14 confirmed that racial slurs had been thrown; right, sir?

15 A. I don't think that he confirmed. I think he was stating

16 the fact that people -- that Owen had complained that some

17 people had used racial slurs. Okay. At that moment that's

18 where it was at.

19 Q. Okay. You would admit that in terms of witnesses did not

20 hear the remarks, Mr. Kawasaki did at least communicate to you

21 that he had talked to people who had said they had heard

22 something; correct, sir?

23 MR. GRIFFIN: Objection. Asked and answered.

24 THE COURT: Overruled.

25 THE WITNESS: At this time when this was sent, it was



1 my understanding that Mr. Diaz had said that someone had used  
2 racial slurs. Okay. And that supposedly these people had  
3 heard this. Okay. Then -- then in the follow-up  
4 investigation, or whatever you want to call it, they had said  
5 no, that they hadn't heard that. That was my understanding.

6 **BY MR. ORGAN:**

7 **Q.** And was there any documentation of this follow-up  
8 conversation?

9 **A.** That at this moment that I can direct you to say this  
10 e-mail or this text or whatever, I can't remember.

11 **Q.** Let's shift gear --

12 **A.** Okay.

13 **Q.** -- and move ahead in time to October 17. Okay. So about  
14 three months before the drawing, the jigaboo drawing that we  
15 saw before.

16 And let's look at Exhibit 235.

17 (Pause in proceedings.)

18 **BY MR. ORGAN:**

19 **Q.** Do you see that? You received this; correct?

20 **A.** Yes.

21 **Q.** And so -- so at this point in time, October 17, 2015, you  
22 understood that Mr. Diaz was complaining about threatening  
23 conduct towards him by Ramon Martinez; correct?

24 **A.** That's what Owen said, yes.

25 **Q.** Owen said to you in the e-mail that Ramon was in his face;

1 right?

2 **A.** Yes.

3 **Q.** That Owen told you that Ramon was mad and upset; correct?

4 **A.** Yes.

5 **Q.** And if you look at what Mr. Diaz said, he said that Ramon  
6 jumped off the tugger near the elevator doors; right?

7 **A.** That's what he said, yes.

8 **Q.** And he said that "Ramon started yelling at me in a  
9 threatening manner." That's what he was telling you; right?

10 **A.** Yes.

11 **Q.** And Owen Diaz told you that Ramon said, "You have a  
12 problem with me? You have a problem with me?"

13 **A.** That's what he said, yes.

14 **Q.** Yeah. And Owen told you that Ramon followed him into the  
15 elevator, that's what he said, right, in the e-mail?

16 **A.** I understood Ramon was in the elevator.

17 **Q.** Okay. And Mr. Diaz told you that Ramon kept yelling at  
18 him; right?

19 **A.** He did.

20 **Q.** Yep. And Mr. Diaz told you that he reminded Ramon that  
21 they were on cameras; right?

22 **A.** Yes.

23 **Q.** Pointed to the camera and told you that; right?

24 **A.** Yes.

25 **Q.** And he said, "I don't feel safe around him now," that's

1 what he said in the e-mail; right?

2 **A.** That's what he said.

3 **Q.** And a safety issue is an important issue in a factory,  
4 isn't it, sir?

5 **A.** Safety is always important everywhere.

6 **Q.** Because if there is safety conflicts in a factory where  
7 there is dangerous machinery, that can lead to physical  
8 injuries; right, sir?

9 **A.** Yes.

10 **Q.** Okay. At this time Ramon Martinez was a supervisor;  
11 correct?

12 **A.** I don't know if he was or not.

13 **MR. ORGAN:** Your Honor, I would like to read --

14 **THE WITNESS:** I can't remember.

15 **MR. ORGAN:** -- from the first transcript, Day 1,  
16 page 152, lines 20 to 22.

17 (Pause in proceedings.)

18 **THE COURT:** You may.

19 **BY MR. ORGAN:**

20 **Q.** "QUESTION: At this point in time, Ramon Martinez, he's a  
21 supervisor; correct?

22 "ANSWER: Yes."

23 Owen Diaz said at the end of Exhibit 235, "You can check  
24 the surveillance system to confirm" --

25 **THE COURT:** If you are going to ask him a question, he

1 wanted to check the deposition transcript, so.

2 **MR. ORGAN:** Oh, I'm sorry. Yeah, we have moved on,  
3 so...

4 **BY MR. ORGAN:**

5 **Q.** Let's go back to Exhibit 235. Look at the exhibit on your  
6 monitor, sir.

7 Owen Diaz says at the end of Exhibit 235, "Check the  
8 surveillance system to confirm"; correct?

9 **A.** Yes.

10 **Q.** But you never talked to Tom Kawasaki about what was in the  
11 video; is that correct?

12 **A.** Okay. What was the question again?

13 **Q.** I'll change the question. Did you check the surveillance  
14 system?

15 **A.** No.

16 **Q.** And you would have had to talk to Mr. Quintero to get  
17 access to the surveillance system; is that correct?

18 **A.** I would have to talk to him, and then Tesla would have to  
19 authorize the permission to look at the cameras.

20 **Q.** And you didn't bother to go talk to Mr. Quintero to get  
21 access to that video system; correct?

22 **A.** I can't remember the conversation I had with -- with  
23 Mr. Quintero about that at all, to be honest with you.

24 **Q.** Erin Marconi, she was the HR person over that area at that  
25 time for Tesla; correct?

1 A. I don't know if it was that area or what area she was  
 2 over, but yes, she was with HR.  
 3 Q. Okay. And at some point in time, Erin Marconi sent you an  
 4 e-mail saying you should stop investigating; correct?  
 5 A. I was transitioning from nextSource to Tesla as a Tesla  
 6 employee. Okay. In that period of time, okay, you know,  
 7 people assumed -- some people from nextSource -- janitors  
 8 assumed that I was their supervisor.  
 9 Other people were just -- I was going into the elevator  
 10 service supervisor. Okay. And so, you know, at that moment  
 11 that I remember they wanted me to -- Wayne Jackson said, "Well  
 12 this happened, and we should look into it." Okay.  
 13 By then I was a Tesla employee, and that's why they said,  
 14 "No, now you are a Tesla employee. It's better that you don't  
 15 follow up on that." And that's where it was at. That was the  
 16 reason behind that.  
 17 Q. Owen Diaz was promoted by Victor Quintero in August of  
 18 2015; correct, sir?  
 19 A. Ramon?  
 20 Q. Owen Diaz was promoted by Victor Quintero in August of  
 21 2015; correct?  
 22 A. I don't remember the date.  
 23 Q. But Owen Diaz was promoted by Victor Quintero at some  
 24 point; correct?  
 25 A. He became a lead, yes.

1 Q. Okay. So he complained to you about two people using the  
 2 N-word then; is that correct, sir?  
 3 A. And -- yeah, they were dealt with each time.  
 4 Q. I see. And when you say, "They were dealt with," was --  
 5 they were dealt with under Tesla's zero-tolerance policy?  
 6 Well, let me rephrase that.  
 7 Tesla had a zero-tolerance policy for race harassment;  
 8 right, sir?  
 9 A. That's what I understand, yes.  
 10 Q. And the two people that Owen complained to you about  
 11 regarding use of the N-word, did -- that would have violated  
 12 the zero-tolerance policy, using the N-word towards Owen Diaz;  
 13 correct?  
 14 A. I would assume, yes.  
 15 Q. And under Tesla's zero-tolerance policy for using racial  
 16 slurs, were those people fired because they used the N-word  
 17 towards Mr. Diaz?  
 18 A. I don't remember anybody being fired for that. I would --  
 19 I would think that they got disciplined.  
 20 Q. Okay.  
 21 MR. ORGAN: No more questions. Thank you, sir.  
 22 Thank you, Your Honor.  
 23 (Pause in proceedings.)  
 24 MR. GRIFFIN: May I approach and give him this,  
 25 Your Honor?

1 Q. Because Victor Quintero approved that; correct?  
 2 A. I'm assuming that he -- it needed his approval.  
 3 Q. Okay. It's your position, your contention, that no one  
 4 ever came to you with a complaint about the N-word; correct?  
 5 (Pause in proceedings.)  
 6 THE WITNESS: Can you ask me again, please?  
 7 BY MR. ORGAN:  
 8 Q. Yeah. It's your position and contention that no one ever  
 9 came to you with a complaint about the N-word; correct?  
 10 A. From what I remember, Owen was the one that had  
 11 complaints. Okay. And I can think of, you know, of at least  
 12 two occasions. Okay. And we dealt with it immediately. We  
 13 dealt with the issue immediately.  
 14 Q. And who is the second person Owen lodged the N-word  
 15 complaint with?  
 16 A. Judy Timbreza was one, I think, and -- and I think Troy  
 17 Dennis was the other one.  
 18 Q. Troy Dennis?  
 19 A. Yes.  
 20 Q. I see. Okay.  
 21 So you did receive a complaint from Troy Dennis about --  
 22 you received a complaint about Troy Dennis --  
 23 A. From --  
 24 Q. -- using the N-word?  
 25 A. Owen complained, yes.

1 THE COURT: Please.  
 2 (Pause in proceedings.)  
 3 CROSS-EXAMINATION  
 4 BY MR. GRIFFIN:  
 5 Q. Mr. Romero, let me make sure that's your deposition  
 6 testimony and not your prior proceeding testimony.  
 7 (Pause in proceedings.)  
 8 BY MR. GRIFFIN:  
 9 Q. Mr. Romero, can you go to -- do you remember the questions  
 10 from Plaintiff's counsel about your deposition testimony at  
 11 page 137? Do you recall that?  
 12 A. Yes.  
 13 Q. And can you go to page 137 of your deposition, starting on  
 14 line 25 and going to page 138:11.  
 15 (Pause in proceedings.)  
 16 THE WITNESS: Okay. What line?  
 17 MR. GRIFFIN: Page -- line 25 on page 137 to  
 18 page 138:11.  
 19 THE WITNESS: Starting at line 25?  
 20 MR. GRIFFIN: Yeah. I just want you to read that from  
 21 line 25 to 138:11.  
 22 THE WITNESS: You want me to read it?  
 23 THE COURT: Just to yourself.  
 24 MR. GRIFFIN: To yourself.  
 25 (Pause in proceedings.)

1 **BY MR. GRIFFIN:**  
2 **Q.** Do you recall that they were asking you about whether or  
3 not -- the question that counsel asked you was on 137, line 3  
4 to 137, line 15, about the racist effigy and whether or not  
5 Mr. Diaz had previously complained to you, and do you see from  
6 page 137:25 to 137:11 you clarified your answer?  
7 **A.** Yes.  
8 **Q.** What was your --  
9 **MR. GRIFFIN:** Your Honor, may I read the transcript  
10 in?  
11 **THE COURT:** Sure.  
12 **BY MR. GRIFFIN:**  
13 **Q.** So right after on the same page that counsel read to you,  
14 there was a question, "So Thomas," and then you stopped him and  
15 said, "Could I clarify something?" Correct, Mr. Romero?  
16 **A.** Yes. Uh-huh.  
17 **Q.** And your answer was: "Before you touched on Thomas, you  
18 asked a question about if I was aware of any other incidents  
19 where Owen might have said there was some racial situation, and  
20 there was one other situation. When you asked me the question,  
21 I kept thinking about when I was a supervisor now over the  
22 elevators. But prior to me becoming a supervisor, there was  
23 one incident that he complained it had to do with a fellow  
24 named Judy Timbreza or something like that."  
25 Isn't that what you clarified at your deposition, sir?

1 **A.** Yes. Uh-huh.  
2 **Q.** And at the end of your -- at the questioning you mentioned  
3 a complaint between Mr. Diaz and a man named Troy Dennis;  
4 correct?  
5 **A.** Yes.  
6 **Q.** Who was Troy Dennis?  
7 **A.** I think he was also an elevator operator.  
8 **MR. GRIFFIN:** And, your Honor, I'd like to use an  
9 exhibit to refresh this witness' recollection about Mr. Dennis.  
10 **THE COURT:** Well, so far there's no basis to do that,  
11 and once you have that basis, I'd like to take a look at it  
12 before. You go ahead.  
13 **BY MR. GRIFFIN:**  
14 **Q.** All right. Mr. Romero, you testified about alleged  
15 interaction between Mr. Dennis and Mr. Diaz; correct?  
16 **A.** Yes.  
17 **MR. ORGAN:** Objection, Your Honor, this is outside the  
18 scope of the prior trial.  
19 **THE COURT:** It is, but you asked questions about it,  
20 so I'm -- you may proceed.  
21 **MR. GRIFFIN:** Okay.  
22 **BY MR. GRIFFIN:**  
23 **Q.** And you recall that Mr. Dennis -- there was -- do you  
24 recall a situation where Mr. Dennis had made a complaint --  
25 there was a complaint about Mr. Dennis?

1 **A.** Yes.  
2 **Q.** And you're familiar with a man named Javier Temores?  
3 **A.** Yes.  
4 **Q.** And at any point in time did Mr. Temores make a complaint  
5 about Mr. Dennis?  
6 **A.** He had a complaint against him.  
7 **Q.** And --  
8 **THE COURT:** We are getting a little far afield,  
9 Mr. Griffin. Let me see what you've got there.  
10 **MR. ORGAN:** Could we see it, Your Honor, so that I  
11 could --  
12 **MR. GRIFFIN:** Exhibit 106.  
13 **THE COURT:** I would like to see it, if it's all right.  
14 (Pause in proceedings.)  
15 **MR. GRIFFIN:** The bottom e-mail, Your Honor.  
16 (Pause in proceedings.)  
17 **THE COURT:** Show the Plaintiff.  
18 **MR. GRIFFIN:** Counsel, do you need a copy?  
19 **MR. ORGAN:** I've got it. Wait. I don't think I have  
20 yours -- oh, I do. Yep. I got it. Thanks.  
21 **THE COURT:** Is there an objection to this?  
22 **MR. ORGAN:** There is not an objection to them  
23 admitting the exhibit, Your Honor.  
24 **THE COURT:** Okay. Well, then let's proceed.  
25 **MR. ORGAN:** All right. It's about this incident.

1 **THE COURT:** I'm sorry. Let's proceed.  
2 **THE CLERK:** Do you want to publish this exhibit?  
3 **MR. GRIFFIN:** I would like to publish the exhibit,  
4 Your Honor.  
5 **THE COURT:** Okay. Is there an objection to the  
6 publishing the exhibit?  
7 **MR. ORGAN:** No, Your Honor.  
8 **THE COURT:** Okay. Let's move it into evidence. So  
9 this -- what is the exhibit number here?  
10 **MR. GRIFFIN:** Exhibit 106, Your Honor.  
11 (Trial Exhibit 106 received in evidence.)  
12 **BY MR. GRIFFIN:**  
13 **Q.** You'll see Exhibit 106 is an e-mail from you on  
14 December 30, 2015, Mr. Romero?  
15 **A.** Yes.  
16 **Q.** And at the bottom of the e-mail, there's -- you're  
17 describing an incident between Javier Temores and Troy Dennis.  
18 Do you see that?  
19 **A.** Uh-huh. Yes.  
20 **Q.** Does that refresh your recollection that the complaint you  
21 received about Mr. Dennis was actually from Mr. Temores and not  
22 Mr. Diaz?  
23 **MR. ORGAN:** Objection. Leading.  
24 **THE COURT:** Overruled. You can answer.  
25 **THE WITNESS:** Okay. Yes. It's -- you know, it was

1 from Javier Temores.

2 **BY MR. GRIFFIN:**

3 **Q.** What race, for the record, is Mr. Temores?

4 **MR. ORGAN:** Objection. Relevance, Your Honor.

5 There's no relevance to that.

6 **THE COURT:** Overruled. This -- this has opened the  
7 door. You can answer.

8 **BY MR. GRIFFIN:**

9 **Q.** What race was Mr. Dennis?

10 **A.** Black.

11 **Q.** Okay. And so in this e-mail you're writing -- you're  
12 informing Wayne Jackson about a complaint that Mr. Temores had  
13 made about a Black man, Troy Dennis, calling Mr. Temores the  
14 N-word; correct?

15 **A.** Yes.

16 **Q.** And why did you want to inform Mr. Jackson about this?

17 **A.** Because, you know, we didn't want to tolerate any of that  
18 type of conduct. Okay. And being that he was working for  
19 nextSource, I felt it was important that they knew what this  
20 Javier was complaining about.

21 **Q.** And so when you ever got a complaint about the N-word,  
22 what did you do to respond?

23 **A.** Any time I heard any type of that kind of complaint, we  
24 dealt with it immediately by informing our -- our managers, and  
25 by extension, they informed HR. You know, that's -- but it was

1 dealt with immediately.

2 **Q.** Okay. And I just want to go back to the -- to ask some  
3 preliminary questions. Okay, Mr. Romero?

4 Do you still work at Tesla?

5 **A.** No.

6 **Q.** When's the last time you worked at Tesla?

7 **A.** 2017.

8 **Q.** And do you own any Tesla stock?

9 **A.** No.

10 **Q.** Okay. And counsel asked you about your interactions with  
11 Mr. Kawasaki related to the July 2015 incident concerning  
12 Mr. Timbreza?

13 **A.** Yes.

14 **Q.** And do you recall at any point in time that Mr. Kawasaki  
15 said to you that the N-word, N-I-G-G-E-R, was actually used in  
16 that situation?

17 **A.** No.

18 **Q.** And Mr. Diaz reported the issue concerning Mr. Timbreza;  
19 correct? He reported -- Mr. Diaz reported the issue to  
20 Mr. Kawasaki; correct?

21 **A.** Yes.

22 **Q.** And then after that, Mr. Kawasaki reported to you?

23 **A.** Well, he informed me of what was going on, him and both  
24 Jaime Salazar.

25 **Q.** And then after that point in time, was Mr. Diaz ever given

1 any discipline related to reporting that incident to you?

2 **A.** Was Mr. Diaz?

3 **Q.** Yeah. Was he punished for reporting racial harassment?

4 **A.** No.

5 **Q.** Okay. And I want to point your attention to Exhibit 222.  
6 It should be on the screen, Mr. Romero.

7 This is an e-mail from August 17, 2015. Do you see that?

8 **A.** Yes.

9 **Q.** And this is about two weeks after that incident with  
10 Mr. Timbreza?

11 **A.** Yes.

12 **Q.** And what is this e-mail relating to?

13 **A.** Owen Diaz being promoted to a lead elevator operator.

14 **Q.** Okay. And did he have a change in salary at that time as  
15 well?

16 **A.** He got an increase in salary.

17 **Q.** Okay. At any time prior to the incident with  
18 Mr. Timbreza, did Mr. Diaz ever report any racial harassment or  
19 slurs that were used -- did Mr. Diaz ever report there were any  
20 slurs or racial harassment used against him?

21 **A.** No.

22 **Q.** Okay. And you talked about the incident between Mr. Diaz  
23 and Mr. Martinez in the elevator in October.

24 Do you remember those questions?

25 **A.** Yes.

1 **Q.** Between the time period in July 31 where you had the  
2 Timbreza incident and the incident in the elevator, did  
3 Mr. Diaz ever report any issues of racial harassment to you?

4 **A.** No.

5 **Q.** Okay. With regards to your job over the elevators, when  
6 did you start taking more day-to-day responsibilities for the  
7 elevator?

8 **A.** When I was still an employee of -- of nextSource, at that  
9 time Mr. Quintero let it be known to me that I -- that I -- he  
10 liked the way I worked and so on and that maybe in the future  
11 there might be an opportunity.

12 So being that that's what he was planning, I started  
13 getting introduced to the elevator operations.

14 **Q.** Okay. A lot of --

15 **THE COURT:** A lot of information. I want a little  
16 information myself, Mr. Griffin. How much longer will you be?

17 **MR. GRIFFIN:** Less than 10 minutes.

18 **THE COURT:** Okay. I think I'll still take the break,  
19 the morning break now.

20 Ladies and gentlemen, we'll be back at 10:15. Please  
21 remember the admonitions. Don't discuss the case with anybody,  
22 don't look up anything, and enjoy the break.

23 **THE WITNESS:** Do I stay here for the break?

24 **THE COURT:** You get to step down.

25 (Proceedings were heard outside the presence of the jury:)

1       **THE COURT:** All right. We are in recess.  
2                   (Recess taken at 10:03 a.m.)  
3                   (Proceedings resumed at 10:16 a.m.)  
4       **THE CLERK:** Please come to order.  
5       **THE COURT:** Mr. Griffin, are we ready for the jury?  
6       **MR. GRIFFIN:** Mr. Spiro will be here in a second.  
7       **THE COURT:** Well, I'm not going to wait -- you're  
8 asking the questions.  
9       Ms. Davis, let's go.  
10                   (Pause in proceedings.)  
11                   (Proceedings were heard in the presence of the jury:)  
12       **THE COURT:** All right. Please be seated, everybody.  
13       Mr. Griffin, please continue.  
14       **MR. GRIFFIN:** Thank you, Your Honor.  
15                   CROSS-EXAMINATION   (resumed)  
16 **BY MR. GRIFFIN:**  
17 **Q.** Mr. Romero, do you recall an elevator worker named Rothaj  
18 Foster?  
19 **A.** Yes.  
20 **Q.** Okay. And do you recall a dispute that Mr. Foster and  
21 Mr. Diaz had in the fall of 2015?  
22 **A.** I remember they had a -- an issue.  
23 **Q.** What was that issue?  
24 **A.** Mr. Foster reported to work -- this is me going through my  
25 recollection here -- reported to work thinking that he was

1 going to be transferred to the recycling department. Okay?  
2 That elevator operation's low on a person, so when he called  
3 me, I said, "No. You can't go over there now because we're  
4 short-handed. We can't just have you leave like that." Okay.  
5       It's my understanding that he said that Wayne Jackson had  
6 told him that he was going to move him over to the recycling  
7 department. Okay.  
8       That started some issue between him and Owen.  
9 **Q.** And what happened between him and Owen?  
10 **A.** He complained that Owen was being mean to him and not  
11 letting him take his breaks and things like that. I told him,  
12 "Well, look. We're short. I'm sure Owen, you know -- you  
13 know, once things settle down, he'll let you go to break" and  
14 so on. Okay?  
15       The issue kept escalating. I received a call, like, early  
16 evening, and then about 9:00 o'clock I got another call from  
17 him -- I mean, from him that Owen wasn't letting him go to his  
18 breaks or lunch or something. Okay.  
19       I decided to call Owen. So I called Owen. He said,  
20 "Well, no, you know. You know, we're busy and, you know, he'll  
21 be able to take his break as soon as we can get to it or  
22 whatever." Okay?  
23       But he said that Mr. Foster was -- was being kind of,  
24 like, belligerent, you know, and so on. So I decided to go.  
25       Owen said that Mr. Foster had told him, "You better watch

1 out for your car" or something like that. So I thought it was  
2 very serious. So I went back to the --  
3       **THE COURT:** Can we proceed by questions and answers?  
4       **MR. GRIFFIN:** Sure.  
5 **BY MR. GRIFFIN:**  
6 **Q.** So you were talking about things escalating. What  
7 ultimately happened between Mr. Diaz and Mr. --  
8 **A.** Being that there were threats being made by Mr. Foster, I  
9 went in and decided to ask him to go home. You know, I didn't  
10 want that to escalate to the point that they had a big issue.  
11       So I asked Security to, you know, let him know that he  
12 needed to leave the premise. I told him "You are suspended.  
13 We'll deal with this tomorrow."  
14 **Q.** What ultimately happened to Rothaj Foster and his  
15 employment with Tesla?  
16 **A.** He was terminated.  
17 **Q.** Why was he terminated?  
18 **A.** Because he was being threatening.  
19 **Q.** Okay. And then after Mr. Foster was terminated, were you  
20 short people in the elevator shift?  
21 **A.** Yes, we were -- it was -- it was a responsibility that we  
22 were always short of people.  
23 **Q.** And do you recall a gentleman named Lamar Patterson?  
24 **A.** Yes.  
25 **Q.** And who is Lamar Patterson?

1 **A.** He was an elevator operator.  
2 **Q.** How did he get the job at the plant?  
3 **A.** If I recall -- and I'm not -- I'm only going by memory  
4 from many years ago -- I think it was related to Owen.  
5 **Q.** What do you recall from that?  
6 **A.** I think Owen had recommended him to -- you know, and he  
7 was hired on.  
8 **Q.** Okay. And I want to go back and point your attention to  
9 Exhibit 235. Exhibit 235 is the complaint that Mr. Diaz sent  
10 to you in October -- October 17 of 2015; right?  
11 **A.** Uh-huh.  
12 **Q.** And you went through this document with Plaintiff's  
13 counsel; correct?  
14 **A.** I think -- yes.  
15 **Q.** And is there anything in Mr. Diaz's e-mail where he makes  
16 a complaint about racial harassment related to this October 17  
17 incident?  
18 **A.** No.  
19 **Q.** And when -- you spoke to Mr. Diaz about this October  
20 incident; correct?  
21 **A.** Yes.  
22 **Q.** And did he ever complain to you when you spoke to him  
23 about Mr. Martinez using any racial slurs or racially harassing  
24 language related to this incident?  
25 **A.** No.

1           **MR. ORGAN:** Objection. Leading, Your Honor.  
2           **THE COURT:** Overruled.  
3   **BY MR. GRIFFIN:**  
4   **Q.** And so the two incidents we've talked about involving  
5 racial incidents for Mr. Diaz that were reported to you were  
6 the Timbreza incident and the drawing incident; correct?  
7   **A.** Yes.  
8   **Q.** Okay.  
9           **MR. GRIFFIN:** No more questions.  
10          **THE COURT:** All right. Mr. Organ.  
11          **MR. ORGAN:** Just a few and we'll let you go.  
12          **THE WITNESS:** Okay.  
13                    **REDIRECT EXAMINATION**  
14   **BY MR. ORGAN:**  
15   **Q.** Okay. Mr. Romero, you mentioned when I was asking you  
16 questions earlier that you recalled that Owen Diaz --  
17          **MR. ORGAN:** Is that too loud, Your Honor?  
18          **THE COURT:** No. You are fine.  
19          **MR. ORGAN:** Okay. That -- oh -- it pulls my hearing  
20 aids out when I take that out, but okay.  
21   **BY MR. ORGAN:**  
22   **Q.** In response to my question that you hadn't heard the  
23 N-word, you said you remember "Owen was the one that had  
24 complaints. I can think, you know, of at least two occasions,"  
25 and that you dealt with it.

1 using the N-word?  
2   **A.** When I said "two," those are the two people that came to  
3 mind. Okay? All right? So there was no others.  
4   **Q.** So now you are changing your testimony that it wasn't  
5 two complaints about the N-word?  
6   **A.** When I answered the question, okay, those two names are  
7 the ones that in my mind, trying to remember back, came to  
8 mind; but there were no other people that I ever recall Owen  
9 ever complaining about the N-word.  
10   **Q.** Isn't it true, sir, you don't remember anybody complaining  
11 about the N-word? You are unclear about this whole topic,  
12 aren't you, sir?  
13   **A.** No. I -- we are talking about things that happened many  
14 years ago. Okay, you know.  
15   **Q.** Well, you gave testimony in the first phase of this  
16 trial -- in the first phase of this case, a year and a half  
17 ago; right, sir?  
18   **A.** Yes, I was here.  
19   **Q.** Yeah. And isn't it true that you said that you don't  
20 remember anybody coming directly about that, not offhand;  
21 that's what you said, sir, a year and a half ago; right?  
22   **A.** I don't remember the context of how --  
23   **Q.** Your memory is not perfect on this, you will admit that;  
24 right?  
25   **A.** Uh-huh. Nobody's memory is perfect.

1 And the two occasions that you mentioned were the Timbreza  
2 incident that -- that was one N-word complaint; correct.  
3   **A.** Yes.  
4   **Q.** Okay. And then the other occasion you thought was the  
5 Troy Dennis incident; right?  
6   **A.** Yes.  
7   **Q.** So -- but we just found out from that Exhibit 106 that  
8 actually there was a complaint about Troy Dennis using the  
9 N-word.  
10 So that was a different complaint; right, sir?  
11   **A.** Yes, yes.  
12   **Q.** So the second complaint then that you remember from Owen  
13 Diaz about the N-word, that had to be about Mr. Martinez;  
14 right, sir?  
15          **MR. GRIFFIN:** Objection.  
16          **THE COURT:** Overruled.  
17          **THE WITNESS:** Ask it again.  
18   **BY MR. ORGAN:**  
19   **Q.** That second complaint -- you said there were two --  
20   **A.** Yes.  
21   **Q.** -- about the N-word. That second complaint, it had to be  
22 about Ramon Martinez; right, sir?  
23   **A.** No.  
24   **Q.** Well, it had to be about someone other than Troy Dennis.  
25 Who was the other person that Mr. Diaz complained to you about

1   **Q.** Right. Except maybe somebody who went through it; right?  
2 They have a better memory; right?  
3          **MR. GRIFFIN:** Objection. Argumentative.  
4          **THE COURT:** Overruled.  
5          **THE WITNESS:** Okay. I'm going to have to ask you to  
6 ask me again.  
7          **MR. ORGAN:** I will withdraw that.  
8          **THE WITNESS:** Okay.  
9          **MR. ORGAN:** No more questions, Your Honor. Thank you.  
10          **THE COURT:** Thank you, Mr. Romero. You can step down.  
11          **THE WITNESS:** Thank you.  
12          **MR. ORGAN:** Your Honor, we're going to play the  
13 Marconi video.  
14          **THE COURT:** Okay.  
15          **MR. ORGAN:** I should say Ms. Grislis will play the  
16 Marconi video for us.  
17          **THE COURT:** Okay.  
18          **MR. ORGAN:** Because if I did it, it would not work.  
19          **THE COURT:** So, ladies and gentlemen, before this is  
20 played, this is testimony that was given under oath. You are  
21 to give it the same weight that you would as if it was  
22 happening here in court. And there are going to be a couple of  
23 these videos.  
24 (Video was played but not reported.)  
25          **MR. ORGAN:** Your Honor, for the record, Exhibit 37 in

1 the depo is Trial Exhibit 33.  
2 **THE COURT:** All right.  
3 (Video was played but not reported.)  
4 **MR. ORGAN:** That's it, Your Honor.  
5 **THE COURT:** So I just want the record to reflect  
6 clearly, since it wasn't at the beginning of the testimony,  
7 that the person -- the witness testifying there was Erin  
8 Marconi.  
9 What's next?  
10 **MR. ORGAN:** I'm sorry?  
11 **THE COURT:** What's next?  
12 **MR. ALEXANDER:** Your Honor, the next witness will be  
13 Ramon Martinez.  
14 **THE COURT:** Step on up here, please, Mr. Martinez.  
15 **THE CLERK:** Remain standing. I'm going to take your  
16 picture and then I will swear you in.  
17 **THE WITNESS:** You want me to remove my mask?  
18 **THE CLERK:** Yes, if you have been vaccinated.  
19 (Pause in proceedings.)  
20 **THE CLERK:** Raise your hand for me, please.  
21 **RAMON MARTINEZ,**  
22 called as a witness for the Plaintiff, having been duly sworn,  
23 testified as follows:  
24 **THE CLERK:** Please be seated. If you would please  
25 begin by stating your full name and spelling it for the court

1 reporter.  
2 **THE WITNESS:** Ramon Martinez. R-A-M-O-N,  
3 M-A-R-T-I-N-E-Z.  
4 **MR. ALEXANDER:** Thank you, Your Honor.  
5 **DIRECT EXAMINATION**  
6 **BY MR. ALEXANDER:**  
7 **Q.** During what timeframe were you employed -- were you  
8 working at the Tesla Fremont factory?  
9 **A.** It was in the beginning of 2015, January 2015.  
10 **Q.** And when -- and when were you last there?  
11 **A.** I'm still working for the company.  
12 **Q.** And what position did you hold in 2015, 2016?  
13 **A.** I was hired as a lead supervisor for the graveyard shift.  
14 **Q.** The graveyard shift of what department?  
15 **A.** For recycling department.  
16 **THE COURT:** Mr. Martinez, if you could bring the mic a  
17 little closer to you, that would be great. Thank you.  
18 **THE WITNESS:** Not a problem.  
19 **MR. ALEXANDER:** Could we display, please,  
20 Exhibit 33-2.  
21 **BY MR. ALEXANDER:**  
22 **Q.** Do you recognize that picture, Mr. Martinez?  
23 **A.** Yes, I do.  
24 **Q.** And that picture shows a bale with a drawing on it. Do  
25 you see that?

1 **A.** Yes.  
2 **Q.** With regard to the drawing that is on that bale, there  
3 appear to be two. One on the far left as you are facing the  
4 picture has Pac-Man; is that correct?  
5 **A.** That's correct.  
6 **Q.** Did you draw those Pac-Man?  
7 **A.** No, I don't.  
8 **Q.** You did not?  
9 **A.** No.  
10 **Q.** Okay. And then in the center there is a drawing that is  
11 made there. Did you draw that drawing?  
12 **A.** Yes, I did.  
13 **Q.** And that drawing is Inki the Caveman; correct?  
14 **A.** That's correct.  
15 **Q.** That's correct.  
16 **MR. ALEXANDER:** If we could put beside Exhibit  
17 Number 33-2 Exhibit Number 133.  
18 (Pause in proceedings.)  
19 **BY MR. ALEXANDER:**  
20 **Q.** And at the point when you drew what is on the bale there,  
21 you intended it to be Inki the Caveman; is that correct?  
22 **A.** That's right. Yes.  
23 **Q.** Thank you. And then there is a red item that is in the  
24 picture of Exhibit 33-2. That red item, what is it?  
25 **A.** I'm sorry. Can you repeat that again?

1 **Q.** There is something red that is behind the -- the drawing  
2 and in front of the drawing. Is that a forklift?  
3 **A.** That is a forklift.  
4 **Q.** Okay. And so -- and this drawing is on a bale of  
5 cardboard; is that correct?  
6 **A.** That's correct.  
7 **Q.** Could you estimate -- generally, these cardboard bales,  
8 how heavy are they?  
9 **A.** Around 1,350 to 1,400 pounds of cardboard.  
10 **Q.** Somewhere close to 1,400 pounds?  
11 **A.** Correct.  
12 **Q.** So they have to be lifted with a forklift?  
13 **A.** That's right.  
14 **Q.** With regard to this bale, it's your understanding that it  
15 was left in a -- in a loading area; is that correct?  
16 **A.** Yes.  
17 **Q.** A loading zone; right? And with regard to that, the bale  
18 and it being left there, did you drive the bale and put it  
19 there?  
20 **A.** No, I don't.  
21 **Q.** Do you know who drove the bale and put it there?  
22 **A.** No -- a specific person, no I don't.  
23 **Q.** Did you direct that person to put the bale there?  
24 **A.** No, I didn't.  
25 **Q.** So you drew the drawing. You intended the drawing to be

1 left for Owen Diaz; correct?

2 **A.** I'm sorry?

3 **Q.** You intended the drawing to be left for Owen Diaz;

4 correct?

5 **A.** No.

6 **Q.** Well, where was the drawing made?

7 **A.** That was a little competition between shifts to see who

8 was more productive. If you look at the picture of Pac-Man, it

9 has a lot of names on top of the Pac-Man and two little ghosts,

10 meaning the swing shift, graveyard, and daytime shift.

11 So when I just came in, I see there were -- according to

12 the bale in the picture, they were saying that they were making

13 more bales than other shifts. And my intent to draw the Inki,

14 that was because -- first of all, there was a memory from my

15 youngest, from my childhood, and I feel that I was -- watching

16 those Looney Tune cartoons, Daffy Duck and Bugs Bunny and other

17 characters were there.

18 So I feel -- I feel that Inki was a persistent character

19 that was always consistent to reach his goals. There was no

20 other meaning behind that.

21 **Q.** So the Pac-Man, that -- those characters had nothing to do

22 with the Cavenan Inki; right?

23 **A.** That's right.

24 **Q.** All right. So I was confused about your answer.

25 Where did you draw this?

1 **Q.** And so when you added the word "boo" to Inki, which had

2 nothing to do with the word "boo," you intended jigaboo; isn't

3 that; correct?

4 **A.** No, sir. I was -- the "boo" meaning for me was, like,

5 we -- we wasn't afraid of other shift making more bales than

6 us.

7 **Q.** So can you tell me what about the word "boo" was going to

8 communicate to the other shift that they were -- that you were

9 somehow ahead of them making more bales than them?

10 **A.** I just was saying -- and like I said, in that specific

11 moment, that was only to let them know that we can make more

12 bales out of whatever they were making.

13 **Q.** All right. So I just want to understand. You drew this

14 figure on cardboard, yes?

15 **A.** Yes, sir.

16 **Q.** And that cardboard was intended to be the figure Inki;

17 right?

18 **A.** That's right.

19 **Q.** And the figure that you drew had a bone in it and big

20 lips; correct?

21 **A.** That's right.

22 **Q.** And you're saying that when it was taken over to the

23 elevator area, you didn't direct that it be left for Owen Diaz?

24 **A.** That's correct.

25 **Q.** And so it's just a coincidence that the figure has dark

1 **A.** On the recycling area.

2 **Q.** And so in order for this to be left in front of the

3 elevator, it had to be moved from your area. I forgot what it

4 is.

5 **A.** The recycling area to the elevator drop zone.

6 **Q.** So it had to be moved from recycling over to the

7 elevators?

8 **A.** Yes, sir.

9 **Q.** At the point when you drew this figure on the cardboard,

10 was anyone else present?

11 **A.** I believe there was a few more people next to me.

12 **Q.** How many more people?

13 **A.** I'm not sure clear for the timeframe, but I believe there

14 was two or three more people with me.

15 **Q.** Any of them African American?

16 **A.** No.

17 **Q.** Okay. And so then you drew this. When you drew it,

18 you -- you added, if we look at the photograph, the word "boo,"

19 B-O-O.

20 **A.** That's right.

21 **Q.** The Cavenan Inki, there was no boo reference inside the

22 Cavenan Inki cartoons; right?

23 **A.** That's correct.

24 **Q.** And so you added the word "boo" to it; right?

25 **A.** Yes, sir.

1 skin, Inki the Cavenan?

2 **A.** Like I was saying before, there was some memory from my

3 childhood.

4 **Q.** I understand, like, it's a memory from your childhood, but

5 you brought that memory into the workplace and drew it on the

6 bale. So what I'm trying to figure out is: Did you purposely

7 draw that bale -- I'm sorry -- that picture on the bale because

8 you intended it for a Black man to see it?

9 **A.** No, sir.

10 **Q.** Okay. So it was a coincidence that a Black man saw it.

11 Is that what you're saying?

12 **A.** I believe so.

13 **Q.** Okay. And you're using the word "boo" which is not at all

14 associated with a caveman. You're saying that that was also a

15 coincidence that it goes with jigaboo?

16 **A.** I believe so. I don't have an idea how they can get

17 related.

18 **THE COURT:** Could you bring the mic a little closer to

19 you, Mr. Martinez? Thank you.

20 (Pause in proceedings.)

21 **BY MR. ALEXANDER:**

22 **Q.** So if I -- if I recall correctly, at some point,

23 Mr. Wheeler and Israel walked around to try and figure out who

24 had written -- who had drawn this -- this character.

25 Do you remember that?



1 A. I remember Mr. Wheeler come looking for me because there  
 2 was an issue at the elevator, yes.  
 3 Q. But the elevator area, it's separate from the area that  
 4 you were talking about, the recycling area?  
 5 A. Yes, sir.  
 6 Q. How much distance separates it?  
 7 A. I'm assuming 150 -- 150 feet away from in distance in  
 8 between.  
 9 Q. At the point when you wrote on the bale, you understood  
 10 that the bale was going to be thrown out; right?  
 11 A. Not thrown out but taken to the elevator, yes.  
 12 Q. The only way that the bale could get from your location  
 13 down out of the building, which was the intention, was it had  
 14 to be taken on a forklift and left by the elevators; right?  
 15 A. That's correct.  
 16 Q. So at the point when you drew this drawing, you knew for a  
 17 fact that it would end up in front of the elevators; right?  
 18 A. Yes. That's the process. That was the process.  
 19 Q. Now, just so that we're clear, before this incident with  
 20 the "pickaninny," you had had a previous incident with Mr. --  
 21 with Mr. Diaz associated with the elevators; right?  
 22 A. That's correct.  
 23 Q. And with regard to that previous incident associated with  
 24 the elevators, you and he had an altercation; right?  
 25 A. Yes.

1 Q. So before you drew this drawing of Inki the Caveman, you  
 2 had had a previous incident where there was a confrontation  
 3 with Owen Diaz?  
 4 A. Yes.  
 5 Q. And in that confrontation, it was a threat of a physical  
 6 confrontation; isn't that true?  
 7 A. No.  
 8 Q. Okay. You sent --  
 9 MR. ALEXANDER: Let's show Exhibit Number 31.  
 10 (Pause in proceedings.)  
 11 MR. ALEXANDER: Yes, 234.  
 12 (Pause in proceedings.)  
 13 BY MR. ALEXANDER:  
 14 Q. And with regard to the elevator incident, you say: "Hi,  
 15 Mr. Romero. I just want to bring to your attention that the  
 16 lead for the elevator, Owen, he's not acting on the  
 17 professional way with me, and I would like to talk to you about  
 18 it. If there's any situation, I'd like to fix it, please."  
 19 When you say "if there's any situation, I'd like to fix  
 20 it, please," what is it you are referring to?  
 21 A. I'm referring to about co-worker that called me that very  
 22 same day. She was really crying on the phone, and she was  
 23 telling me that Mr. Owen comes really aggressive towards her  
 24 because she was trying to use the elevator because Mr. Owen  
 25 wasn't in his position to start doing or transporting the

1 material for second floor to bottom floor?  
 2 And when she tried to use the elevator because Mr. Owen  
 3 wasn't there, the moment that she was trying to operate it, he  
 4 arrived and he was really aggressive towards her saying that  
 5 she should not touch his elevator and she will remove her  
 6 person out of the control panel.  
 7 So when she called me saying that she had some issues and  
 8 she was crying, that's the reason that I went to the elevator  
 9 one and looked -- started looking for Mr. Diaz and looking for  
 10 answers. Why was she not be able to remove the items from  
 11 second floor to the first floor?  
 12 Q. So the confrontation, you said, had inside the elevator is  
 13 because this woman had contacted you?  
 14 A. Yes.  
 15 Q. And so you rushed into the elevator to speak to Mr. Diaz  
 16 about that; correct?  
 17 A. That's right.  
 18 Q. And with regard to this incident, during the incident,  
 19 it's a correct statement that Owen Diaz reported to the --  
 20 pointed to the cameras while you were inside the elevator;  
 21 right?  
 22 A. Because -- right. He say, "Do you know we are in front of  
 23 the cameras?"  
 24 And I say, "Yes. I'm aware of it, and I'm not worried  
 25 about it because I'm going to make report of this."

1 Q. And at the point -- the reason why Mr. Diaz pointed to the  
 2 cameras is because you were aggressively moving towards him;  
 3 isn't that correct?  
 4 A. No, sir. We were up right to each other.  
 5 Q. The reason why you -- the reason why Mr. Diaz pointed to  
 6 the cameras is because you had your fist raised coming towards  
 7 him; isn't that correct?  
 8 A. No, sir.  
 9 Q. The reason why you provided Exhibit -- the reason why you  
 10 wrote Exhibit 234 and you say: "If there is any problem, I'd  
 11 like to fix it is because once he pointed to the cameras you  
 12 realize that you had been acting aggressively with Mr. Diaz and  
 13 raising your fists at him"; isn't that correct?  
 14 A. No, sir. The reason that I wrote that is because he is  
 15 being aggressive several times to our recycling department by  
 16 removing the items from second floor to the bottom floor.  
 17 Q. So if I understand correctly, this incident on the  
 18 elevator where you said "if there's a situation, you'd like to  
 19 fix it," that happened before you drew Inki on that cardboard;  
 20 correct?  
 21 A. That's right, sir.  
 22 Q. Are there -- and you said there are no African American  
 23 people inside your workplace, so you didn't intend for an  
 24 African American person inside your workplace to see this  
 25 drawing; right?

1 **A.** Say that again?  
2 **Q.** I will withdraw it.  
3 You understood that Mr. Diaz was African American; right?  
4 **A.** Yes, sir.  
5 **Q.** So at this point when -- at the point when Mr. Wheeler and  
6 Israel found you, you delayed acknowledging that you were the  
7 person that drew this item on the bale; isn't that correct?  
8 **A.** No, sir. At the moment Mr. Wheeler, he went to look for  
9 me. We both went to the elevator and looked for Mr. Diaz.  
10 That's when I realized at the time that I saw him and see him  
11 there, the way he was affected by what I did. I definitely  
12 understand that it was something wrong and something bad that I  
13 did.  
14 **Q.** And so what you're saying is, the very instant you were  
15 confronted about this drawing on there, you immediately  
16 admitted that it was you?  
17 **A.** Yes, sir.  
18 **Q.** Okay. There was no delay?  
19 **A.** No delay.  
20 **Q.** All right. Now, you gave a statement -- a written  
21 statement; right?  
22 **A.** Yes.  
23 **Q.** And in that written statement, you said that you  
24 apologized to Owen Diaz; is that correct?  
25 **A.** That's correct.

1 could see the e-mail that he was going to send out?  
2 **A.** I never saw anything on physically e-mail, but he said he  
3 has the e-mail in his phone.  
4 **Q.** How did you know that he was going to send an e-mail?  
5 **A.** Because he said it.  
6 **Q.** He told you at the point when he was standing there that  
7 he was going to send an e-mail?  
8 **A.** He said to me that he will send -- if he find out it was  
9 me, he wouldn't -- he's not looking for any trouble for myself,  
10 and he understand and will definitely delete the e-mail.  
11 **Q.** And so he said that he was going to not send an e-mail  
12 about this object that you drew because you apologized?  
13 **A.** I didn't know because I apologized, but at the time that  
14 he saw me, he is saying that, I believe, he understand that it  
15 was -- first of all, feeling really bad. Secondly, that I  
16 was -- my intent wasn't to hurt anybody until I realized that I  
17 hurt someone.  
18 **Q.** With regard to -- with regard to the N-word, did you use  
19 the N-word inside the workplace?  
20 **A.** No, sir.  
21 **Q.** Did you use the word "mayate"?  
22 **A.** No, sir.  
23 **Q.** Did you use the word "chongo"?  
24 **A.** No, sir.  
25 **Q.** Did you use the word "porch monkey"?

1 **Q.** How many times did you apologize to Owen Diaz?  
2 **A.** Don't remember exactly how many times, but it was -- three  
3 to four times probably at least.  
4 **Q.** Well, when you -- after you were confronted about this,  
5 you went over to the bale that had been drawn; right?  
6 **A.** Yes?  
7 **Q.** Yes?  
8 **A.** Yes.  
9 **Q.** And when you got to that bale, Mr. Wheeler, Israel,  
10 yourself, and Mr. Diaz were present; right?  
11 **A.** Yes.  
12 **Q.** And it's your testimony that when you apologized,  
13 Mr. Wheeler would have been in the vicinity close enough to  
14 have heard that apology assuming you made it; right?  
15 **A.** That's right.  
16 **Q.** All right. So you would expect that if Mr. Wheeler came  
17 and testified, he would have confirmed that you apologized in  
18 front of him; correct?  
19 **A.** I'm assuming. If he is telling the truth, I'm assuming he  
20 would say that.  
21 **Q.** And it's also your testimony that you spoke to Mr. Diaz  
22 and you apologized to him, and as a result of the apology, he  
23 said that he was not going to send out an e-mail.  
24 **A.** That's right.  
25 **Q.** And at the point when you spoke with him, he had -- you

1 **A.** No.  
2 **MR. ALEXANDER:** Nothing further.  
3 **THE COURT:** Mr. Spiro.  
4 **MR. SPIRO:** No questions, Your Honor.  
5 **THE COURT:** All right. You are excused. Thank you  
6 very much.  
7 **THE WITNESS:** Thank you.  
8 **MR. ORGAN:** Your Honor, the Plaintiff calls Owen Diaz.  
9 **THE CLERK:** If you can remain standing for just a  
10 moment, Mr. Diaz.  
11 (Pause in proceedings.)  
12 **THE CLERK:** Raise your right hand.  
13 **OWEN DIAZ,**  
14 called as a witness for the Plaintiff, having been duly sworn,  
15 testified as follows:  
16 **THE CLERK:** Please be seated. If you would please  
17 begin by stating your full name and spelling it for the court  
18 reporter.  
19 **THE WITNESS:** My full name is Owen Orapio Diaz.  
20 O-W-E-N, O-R-A-P-I-O, D-I-A-Z.  
21 **DIRECT EXAMINATION**  
22 **BY MR. ORGAN:**  
23 **Q.** Good morning, Mr. Diaz. How are you, sir?  
24 **A.** Good morning, sir. How are you doing?  
25 **Q.** If you could, you -- I notice you are wearing a uniform.

1 Tell the jury about that. What is that?

2 **A.** I work for AC Transit. I'm a bus operator. This is the

3 job I got after Tesla.

4 **Q.** Okay.

5 **THE COURT:** Could you bring the mic just a little bit

6 closer.

7 **THE WITNESS:** Yes, sir.

8 **THE COURT:** Thank you.

9 **BY MR. ORGAN:**

10 **Q.** And where did you -- where were you born -- where did you

11 grow up?

12 **A.** I grew up in Oakland, California, just across the bay.

13 **Q.** Okay. And how old are you?

14 **A.** 55 now.

15 **Q.** Are you married?

16 **A.** Yes. I have been married for 25 years, been with the same

17 woman 30 years. We have -- we share one kid together. Then my

18 daughter La'Drea Jones, and my son, Owen, Jr. -- well, I should

19 say third because I'm a junior -- and my oldest daughter,

20 Laketa (phonetic).

21 **Q.** Okay. And where did your parents come from?

22 **A.** My parents are from Belize.

23 **Q.** Okay. And so at some point in time you applied for a job

24 at Tesla; is that right?

25 **A.** Yes. In May I had applied for the job at Tesla, and I got

1 **Q.** Okay. And so you started working on the elevators?

2 **A.** Yes.

3 **Q.** And who was your supervisor at this point in time?

4 **A.** It first started off as Tom Kawasaki.

5 **Q.** Okay. And then after Tom Kawasaki, who was your

6 supervisor?

7 **A.** It eventually ended up being -- um, Mr. Romero.

8 **Q.** The man who just testified?

9 **A.** Yes, sir.

10 **Q.** Okay. And how did you like your job when you first

11 started as an elevator operator?

12 **A.** You could look at my badge when I first started, I was

13 real excited I was at Tesla. You know, at that particular

14 time, they were the first ones to mass produce electric cars.

15 **MR. ORGAN:** Your Honor, I would like to pull up

16 Exhibit 19.

17 **THE COURT:** Okay.

18 (Pause in proceedings.)

19 **BY MR. ORGAN:**

20 **Q.** Is this the badge you're talking about?

21 **A.** Yes. You can see me grinning for being there.

22 **Q.** Okay. So you look pretty happy there. Did you need this

23 job to support your family?

24 **A.** Yes. You know, I really did need it. My family was

25 living from paycheck to paycheck.

1 hired in June.

2 **Q.** Okay. What year?

3 **A.** In June of 2015, June 3, to be precise.

4 **Q.** And tell the jury why, why Tesla?

5 **A.** Um, they were on the forefront of technology. You know,

6 today -- or should I say now most automakers are going with the

7 electric vehicles, so at that point I thought I wanted to be on

8 the forefront of technology.

9 **Q.** Okay. And did the zero emission thing play any role in

10 your decision to apply for Tesla?

11 **A.** Yes, it did. You know, I believe in Elon Musk's vision.

12 The thing is that we do need to move away from fossil fuels.

13 We need to be able to leave the world better than we left it

14 for our kids.

15 **Q.** Okay. What -- what was your job when you got to Tesla in

16 June?

17 **A.** When I first got hired on, I went -- I went to Citistaff.

18 And when they sent me over to Tesla, I was first going to be in

19 recycling, but the guy that had the position -- where was going

20 to get the position before me, he didn't have on steel-toed

21 boots.

22 And so I believe it was Jaime Salazar, he looked and sent

23 the guy home. He looked and saw I had on steel-toed boots, and

24 he told me I was a man that dressed for the job, and he put me

25 on a golf cart and took me over to the elevators.

1 **Q.** Okay. And so what did you like about the elevator job

2 when you first started doing it?

3 **A.** I liked it because of the fact that it was mostly how it

4 was explained to me it was an intricate part of the facility.

5 What would happen was is if we stopped moving parts, the

6 whole facility would go down.

7 **Q.** Okay. Now, we're going to talk about some serious things

8 here.

9 **A.** Yes, sir.

10 **Q.** So I would like to move a little bit forward and -- a

11 couple months after you started to July 31, 2015.

12 Who was Judy Timbreza at this point in time?

13 **A.** He was a guy that would -- he was actually an elevator

14 operator on the other side, but he was a guy that would get on

15 the elevator with me with his friends, you know, other guys.

16 When he got on the elevator, he would say something and get me

17 to agree to it, and I would --

18 **Q.** Like what would he say? What were some of the things --

19 **A.** Well, he -- I couldn't pronounce it, and I still today

20 can't, but it was "mo mo porch" something or another, and you

21 know, he would say it and "yeah, yeah, yeah," and I would

22 actually agree to it, "yes, yes, yes." And then he and his

23 friends would leave out of the elevator laughing, and then he

24 would say at the end of it like "mayate." Even though my last

25 name is Diaz, I don't speak a lick of Spanish.

1 Q. Okay. So did you ever find out what he was saying when he  
2 was laughing and getting you to agree?  
3 A. Yes.  
4 Q. How did you do that?  
5 A. After a while of him and his friends coming inside the  
6 elevator and doing it, I got pretty curious. So I had recorded  
7 it on the phone that I had at that time. And when I recorded  
8 it and translated it through Google, I found out -- I'm  
9 embarrassed to say I found out I was agreeing to be a porch  
10 monkey.  
11 Q. I'm sorry I have to take you back here, but you know the  
12 jury is here and has --  
13 THE COURT: Do you want to take a break, Mr. Diaz?  
14 THE WITNESS: It's all right.  
15 (Pause in proceedings.)  
16 THE WITNESS: I'm sorry. It just takes me right back  
17 to that place. It just puts me back to that --  
18 THE COURT: Why don't we take a five-minute break.  
19 MR. ORGAN: Thank you, Your Honor.  
20 THE COURT: Actually, why don't we take our morning  
21 break, and then we will just come back for a little longer. So  
22 we'll take 15 minutes, and we'll be back at 25 of. Please  
23 remember the admonitions.  
24 (Proceedings were heard outside the presence of the jury:)  
25 THE COURT: All right. We will be in recess.

1 MR. ORGAN: Thank you, Your Honor.  
2 THE WITNESS: Thank you.  
3 (Recess taken at 11:21 a.m.)  
4 (Proceedings resumed at 11:34 a.m.)  
5 THE CLERK: Please come to order.  
6 THE COURT: Are we set to go?  
7 MR. ORGAN: Yes, Your Honor.  
8 THE COURT: It will be nice to have Defense Counsel  
9 here.  
10 (Pause in proceedings.)  
11 THE COURT: Are you ready for the jury?  
12 MR. SPIRO: Yes. I'm sorry.  
13 THE COURT: Okay.  
14 (Proceedings were heard in the presence of the jury:)  
15 THE COURT: All right. Please be seated, everybody.  
16 Mr. Organ, please proceed.  
17 MR. ORGAN: Thank you, Your Honor.  
18 DIRECT EXAMINATION (resumed)  
19 BY MR. ORGAN:  
20 Q. Mr. Diaz?  
21 A. Yes, sir.  
22 Q. Could you please explain to the jury why you just got  
23 so --  
24 THE COURT: Do you want to take off your mask?  
25 MR. ORGAN: Oh, sorry. Thank you, Your Honor.

1 BY MR. ORGAN:  
2 Q. Can you please explain to the jury why it was so upsetting  
3 for you to take yourself back to that time?  
4 A. Well, after I got hired, for several weeks, like I said,  
5 they were getting on the elevator and having me agree to being  
6 a racist term, so calling myself a porch monkey. You know, it  
7 really hurt. You know, what ended up happening was -- is after  
8 I had translated it, I had -- it took I'm saying maybe a day or  
9 so before I saw Mr. Timbreza again, and I confronted him about  
10 it.  
11 Q. Could you put the microphone a little closer to you there,  
12 Mr. Diaz.  
13 A. Yes, sir.  
14 Q. Okay. Is it hard to talk about this stuff?  
15 A. Yes, it is. You know, it's like I'm sitting here in a  
16 room full of people telling them that I agreed to something  
17 that I shouldn't have been agreeing to. Makes me feel, you  
18 know, embarrassed, humiliated.  
19 Q. And you said he called you "porch monkey," which you  
20 figured out through the Google Translate; right?  
21 A. Yes, sir.  
22 Q. And then I think you said "mayate"?  
23 A. Yes, sir.  
24 Q. And did there come a time when he said anything to you  
25 that was racist in English?

1 A. Yes, he did. Um, the day I confronted him, he just  
2 started in -- in it with it with his friends. They were back  
3 on the elevator again, and he started to say it, and I  
4 confronted him like, "Hey, man."  
5 And then from there, they started leaving out the  
6 elevator. He just called me the N-word.  
7 Q. And this is Mr. Timbreza; is that correct?  
8 A. Yes, sir.  
9 Q. Okay. And then what happened next after he called you the  
10 N-word?  
11 A. I called over my immediate supervisor at that time which  
12 was Thomas Kawasaki, and he broke us up at that point.  
13 Q. So did the two of you get involved in some kind of -- was  
14 it a physical altercation, or was it just verbal?  
15 A. It was verbal. It got pretty intense.  
16 Q. Okay. Now, Tesla in their opening statement talked about  
17 you toe to toe.  
18 What -- how were you -- were you guys facing off?  
19 A. We were within maybe about, I'm going to say, an arm's  
20 length from each other. Maybe a little bit more.  
21 Q. Okay. And then what happened next? Mr. Kawasaki -- you  
22 called Kawasaki; correct?  
23 A. Yes. I called Mr. Kawasaki over. Mr. Kawasaki came over.  
24 And after he separated both of us, Mr. Kawasaki did the first  
25 initial investigation. He talked to the people that were

1 around, and they confirmed that's what he said.  
2 **Q.** And did you talk to Mr. Kawasaki?  
3 **A.** Yes. I talked to Mr. Kawasaki afterwards, and I told him  
4 exactly what has been going on, and that's when I explained to  
5 Mr. Kawasaki that it had been going on for several weeks.  
6 **Q.** Okay. So did you tell Mr. Kawasaki about being called the  
7 N-word in English that night?  
8 **A.** I believe so.  
9 **Q.** Okay. And let me ask you this: Had anyone ever called  
10 you the N-word in the workplace before this?  
11 **A.** I have worked for several companies, and the N-word or  
12 derogatory is just not used inside of the workplace.  
13 **Q.** Okay. So -- and then what happened next?  
14 **A.** After -- like I said, after he did his initial  
15 investigation, he found out that the words were being said.  
16 Mr. Kawasaki sent Mr. Timbreza home.  
17 **Q.** Okay. And did you have any more interactions with  
18 Mr. Timbreza?  
19 **A.** He wasn't on the elevator anymore. I believe Mr. Kawasaki  
20 handled the situation appropriately.  
21 **Q.** Okay. Did you ever -- did you ever get anybody from Tesla  
22 that came to you and asked you questions about it?  
23 **A.** No.  
24 **Q.** So no one from Tesla HR said anything to you; is that  
25 right?

1 **A.** The initial?  
2 **Q.** About this one.  
3 **A.** No. The initial was just Tom Kawasaki.  
4 **Q.** Okay. What, if anything, did Ed Romero do relative to  
5 this incident, if you know?  
6 **A.** Well, up until that point, I -- I didn't have contact with  
7 Mr. Romero. I only had contact with Mr. Romero after Thomas  
8 Kawasaki was pushed out -- well, I'm not going to say pushed,  
9 but left his position and Mr. Romero stepped in.  
10 **Q.** Mr. Kawasaki got a promotion to some other position,  
11 right, on the night shift?  
12 **A.** Yes, sir.  
13 **Q.** Okay. And then you actually got a promotion on the night  
14 shift; right?  
15 **A.** Yes, sir.  
16 **Q.** Okay. So in terms of the Kawasaki -- Kawasaki -- in terms  
17 of the Timbreza incident, you don't have any issues because  
18 Timbreza's harassment of you stopped at that point; is that  
19 right?  
20 **A.** His harassment had stopped at that point, yes.  
21 **Q.** But the fact that you were called these horrific words,  
22 does that stay with you?  
23 **A.** Yes, it do. It -- that's why I can say it is just, you  
24 know, it is just so embarrassing. Just think of a person  
25 getting you to agree to something that -- that's racist in

1 nature and you not knowing that you're agreeing to it.  
2 **Q.** Okay. Now, shortly after -- so this is the -- this is,  
3 I guess --  
4 (Pause in proceedings.)  
5 **MR. ORGAN:** So in this event -- I don't think he can  
6 see it. This is cumbersome. Move my chair. Yeah. Thanks.  
7 **BY MR. SPIRO:**  
8 **Q.** Okay. So this event, this is July 31; right?  
9 **A.** Yes, sir.  
10 **Q.** Okay. And then -- and then at some point after this, so  
11 after this July 31 incident, did you -- were you called  
12 anything by Ramon Martinez in the August time period?  
13 **A.** Well, between the -- the October and August, I didn't see  
14 Mr. Martinez over the factory. I believe one time we were  
15 inside of the trailer back in the rear.  
16 **Q.** Excuse me, Mr. Diaz. I'm actually just trying to find  
17 out: Did Mr. Martinez start calling you anything in August of  
18 2015?  
19 **MR. SPIRO:** I'm going to object to the cutting off the  
20 witness in the middle of the question.  
21 **THE COURT:** Overruled. You can answer that question.  
22 **THE WITNESS:** Yes.  
23 **BY MR. ORGAN:**  
24 **Q.** Okay. And did Mr. Hurtado, Robert Hurtado call you any  
25 names in that time period, August of 2015?

1 **A.** Yes, he did.  
2 **Q.** In August of 2015 after the Timbreza incident had been  
3 handled by Mr. Kawasaki, did you recommend to your son Demetric  
4 to come to work at Tesla?  
5 **A.** Yes, I did.  
6 **Q.** And did you recommend that he come to work in the  
7 elevators with you?  
8 **A.** No. Because of the things that was going on in my  
9 department, I definitely didn't want him with me. So I  
10 definitely told him to go to another place because I figured  
11 that if he was on the other side of the factory in another  
12 department -- well, I should say, I hoped that he would be  
13 insulated from what happened.  
14 **Q.** Okay. And did you recommend that -- Demetric is your son;  
15 right?  
16 **A.** Yes, he is. My youngest.  
17 **Q.** And how old was Demetric at this point in time?  
18 **A.** He was young. Just -- he was 19. It was his first --  
19 basically, a year out of high school.  
20 **Q.** And it's been said in this courtroom that you thought it  
21 would be a good experience for him; is that right?  
22 **A.** Well, the thing is that I thought being on the other side  
23 of the factory he would be insulated and that as an experience  
24 it was a good-paying job. They offered stock options. You  
25 know, who wouldn't want their kid to be set up to be able to

1 experience a better life.  
 2 **Q.** Did you actually like the job on the elevators?  
 3 **A.** In the beginning, yes.  
 4 **Q.** Okay. And what was it you liked about them?  
 5 **A.** Again, it was the forefront of being green. You know, we  
 6 have these new vehicles coming out. They were being mass  
 7 produced. I like that when I was on the street I saw a Tesla  
 8 go by. You know, basically my hands was somewhat into that  
 9 product being made.  
 10 **Q.** So why did you think that Demetric applying through a  
 11 different staffing agency, why did you think he would not be  
 12 exposed to similar racial harassment to what you were  
 13 experiencing near the elevators?  
 14 **A.** Well, up until that point I hadn't been around the whole  
 15 factory and I didn't know how pervasive it was around the  
 16 factory. Like, he started in the battery casing area, which  
 17 is -- actually, the factory is so, so big, it's like almost a  
 18 mile.  
 19 In order to get around the factory, you had to use  
 20 bicycles and golf carts to be able to get around the factory?  
 21 So I figured him being on the other side of the factory he  
 22 would be insulated.  
 23 **Q.** Do you have any regrets about your son -- well, let me ask  
 24 you this: Did your son get exposed to racial harassment at the  
 25 factory?

1 basketball coach, football coach. Um, me and him hung out, but  
 2 that day he saw his father being broke. He didn't know what to  
 3 do. I didn't know what to do. We were in a professional  
 4 setting. I couldn't go over and say nothing. His boss had  
 5 seniority over me. His boss had seniority over me.  
 6 **Q.** And did you complain to -- to Demetric's boss?  
 7 **A.** No, sir.  
 8 **Q.** Why not?  
 9 **A.** I couldn't.  
 10 **Q.** Okay. Did you suggest to Demetric to complain?  
 11 **A.** Yes, I did. My son went to HR.  
 12 **Q.** Okay. He told you that?  
 13 **A.** Yes, he did.  
 14 **Q.** Is it difficult having to share this experience with your  
 15 son in open court?  
 16 **A.** Yes, it is. I'm in an open forum telling strangers how I  
 17 ruined my son's life.  
 18 **Q.** Let me ask you this: Prior to -- your son, I think,  
 19 worked in the battery casings area; is that right?  
 20 **A.** Yes. It was downstairs. He was placing metal parts  
 21 inside of a robot so it could weld them.  
 22 **Q.** Prior to Demetric getting a job at Tesla in the battery  
 23 casings department, had you ever heard the N-word or any other  
 24 racist stuff in that area?  
 25 **A.** No. Nor had I been in that area prior to that.

1 **A.** Yes, he did.  
 2 **Q.** And do you have any regrets about that?  
 3 **A.** That's one of the biggest regrets in my life because me  
 4 and my son now have a fractured relationship.  
 5 **Q.** How would you do it differently now?  
 6 **A.** If I knew what I knew now, I would have never brought him  
 7 anywhere near that factory.  
 8 **Q.** And how did that racial harassment that was directed  
 9 toward -- did you witness any of the racial harassment that was  
 10 directed towards your son?  
 11 **A.** I had -- around about the time he had started, I had got  
 12 the promotion and I was the lead. So it kind of afforded me a  
 13 little bit more leeway of when I could take my lunch.  
 14 So one day I was taking my meal break. I had -- I was  
 15 going around into his -- into the area that he was. As I was  
 16 rounding the corner, you had his Caucasian boss telling him he  
 17 couldn't stand all these F'ing Ns.  
 18 (Pause in proceedings.)  
 19 **BY MR. ORGAN:**  
 20 **Q.** And when you say "Ns," you mean N-word; right?  
 21 **A.** Yes.  
 22 **Q.** And how did the racial harassment that was directed at  
 23 your son Demetric, how did that impact your relationship with  
 24 your son Demetric?  
 25 **A.** Well, this is a person that I raised. I was his

1 **Q.** Okay. You'd never been there?  
 2 **A.** No. Not until then.  
 3 **Q.** Okay. Let me ask you this: Did you talk about your  
 4 experience at Tesla with your family, how it impacted you? Or  
 5 what was happening? Let me rephrase that.  
 6 **MR. ORGAN:** Sorry, Your Honor.  
 7 **BY MR. ORGAN:**  
 8 **Q.** Did you tell your family about what was going on?  
 9 **THE COURT:** While he was employed at Tesla?  
 10 **BY MR. ORGAN:**  
 11 **Q.** When you were employed at Tesla, yeah.  
 12 **MR. ORGAN:** Thank you, Your Honor.  
 13 **THE WITNESS:** When I was employed at Tesla, no, I did  
 14 not. Reason being is because I'm trying to leave work at work  
 15 and home at home. It's like I can't take my burdens home to my  
 16 family and unload them on them. I have a wife. I have a kid.  
 17 Us, being males, we have to show a certain, as they say -- I  
 18 can't let them see that what I'm going through because at that  
 19 point, once they find out, it's like I'm the captain of the  
 20 ship. Everything breaks down.  
 21 **BY MR. ORGAN:**  
 22 **Q.** Okay. At some point in time Tesla brought up that La'Drea  
 23 applied to Tesla for a job.  
 24 Did you hear that?  
 25 **A.** Yes, I did.

1 Q. And at the time that La'Drea applied, did you know that  
 2 she was applying?  
 3 A. No, I did not.  
 4 Q. So someone had said that you had encouraged her to apply,  
 5 that would have been a false statement; right?  
 6 A. That's a false statement, sir.  
 7 Q. Okay. And then you know a man named Lamar Patterson; is  
 8 that right?  
 9 A. Yes. I met Lamar.  
 10 Q. Okay. And did you -- did you have some interaction with a  
 11 cousin of his who approached you?  
 12 A. It was this guy. He approached me while I was on the  
 13 elevator. The elevator was short-staffed some days. We only  
 14 had three employees. If we only had three employees, I would  
 15 have to run a whole elevator by myself.  
 16 This guy came over and asked me to forward an e-mail.  
 17 Q. Forward an e-mail of his cousin's resume?  
 18 A. Yes.  
 19 Q. And were you hoping to get another employee on the -- to  
 20 work on the elevators?  
 21 A. Yes, I was -- I was short-handed, so I needed somebody to  
 22 help.  
 23 Q. And when did you first meet Mr. Patterson?  
 24 A. I didn't meet Mr. Patterson until the first day he started  
 25 to work.

1 Q. And is Mr. Patterson Black?  
 2 A. Yes. Eventually, I found that out. Yes, he was.  
 3 Q. Prior to actually meeting Mr. Patterson, did you know that  
 4 he was Black?  
 5 A. No. The person that asked me to forward the e-mail, he  
 6 e-mailed -- I don't -- it was like with Mr. Jackson and Mr. --  
 7 I don't believe the other guy over there -- but he was a mixed  
 8 race. He was a real light guy, and he didn't look African  
 9 American to me, but if you tell me that's your cousin after I  
 10 meet you, far be it for me to say it's not.  
 11 Q. Okay. Let's talk about Ramon Martinez. Mr. Martinez  
 12 started calling you racist slurs in this August time period.  
 13 Was he a supervisor at the Tesla factory?  
 14 A. Yes.  
 15 Q. And did Ramon Martinez do anything -- after he started  
 16 calling you racial slurs in August, did he do anything that you  
 17 felt was harassing based on your race after that?  
 18 A. I don't understand. Can you tell me one more time,  
 19 please?  
 20 Q. It's a bad question. Let me try it differently.  
 21 What was the -- what were some of the racist terms that  
 22 Mr. Martinez used towards you during your time at Tesla?  
 23 A. Um, he would tell me to go back to Africa. He would call  
 24 me the N-word, and one time he specifically told me, "I hate  
 25 you, N."

1 (Pause in proceedings.)  
 2 **BY MR. ORGAN:**  
 3 Q. You said something else. "Go back to Africa. I hate you,  
 4 Ns." What else?  
 5 A. No. He told me he hate me specifically.  
 6 Q. Oh, I see. Okay. And then he used the N-word with that?  
 7 A. Yes, he did.  
 8 Q. Did he ever use "mayate"?  
 9 A. I heard it, but it -- the mayate wasn't directed towards  
 10 me, no.  
 11 Q. Okay. And how many times do you think he -- Mr. Martinez  
 12 used the N-word towards you?  
 13 A. Honestly, he used it so much I didn't know, but I told the  
 14 examiner -- I believe her name was Antonucci.  
 15 Q. Barbara Antonucci, the first attorney for Tesla.  
 16 A. Yeah. That was the first attorney. She kept hammering,  
 17 and then she started using numbers, 5, 10, 15, 20, and when she  
 18 got to 30, I said, well, look. Instead of us keep going up in  
 19 numbers, I just said, you know, it was 30-plus times because it  
 20 was well over 30 times.  
 21 Q. Okay. 30-plus times.  
 22 And Mr. Hurtado, did he use the N-word toward you?  
 23 A. Yes, he did. Mr. Hurtado would come into the elevator,  
 24 but he would mostly be on the Elevator 2. He would use terms  
 25 like "N, hurry up and push the button. Ns are lazy." He would

1 say that because of the fact I'm pushing a battery inside of  
 2 it, and we talking about these batteries weigh like  
 3 1,500 pounds, and I have to physically push it inside of the  
 4 elevator?  
 5 And because we wasn't getting his material down fast  
 6 enough, there were some racial slurs he would use.  
 7 Q. Okay. Did -- I want to go back to Mr. Martinez for just a  
 8 second.  
 9 Did Mr. Martinez ever say anything about how your job  
 10 might be in jeopardy or how he might try to get you fired? Did  
 11 he ever say anything like that?  
 12 A. We were in south dock, and we were in passing, and  
 13 Mr. Martinez said, "I wish I can get all of you Ns fired."  
 14 Q. Okay. And that was in the south dock; is that right?  
 15 A. Yes, sir.  
 16 Q. How many times did he say that -- did Mr. Martinez say  
 17 that?  
 18 A. It was just that one time in passing.  
 19 Q. Okay. And then let's go back to Mr. Hurtado.  
 20 Did -- did Mr. Hurtado -- how many times do you think  
 21 Mr. Hurtado used the N-word towards you?  
 22 A. It would go back to Miss Antonucci, their previous  
 23 counsel. She went through the same thing again.  
 24 How many times would he say it? How many times would he  
 25 say it? And you know, 5 times, 10 times. And I said the same

1 thing. You know, I can tell you it was more than 30 times.  
 2 30-plus times.  
 3 **Q.** 30-plus. Do you know the exact number?  
 4 **A.** No, I do not.  
 5 **Q.** Okay. So how did it make you feel to have a second  
 6 supervisor using the N-word towards you?  
 7 **A.** It made me feel bad. It made me feel less than a man. It  
 8 made me question my worth.  
 9 **Q.** Hold on one sec because I'm going to make a lot of noise  
 10 here.  
 11 (Pause in proceedings.)  
 12 **BY MR. ORGAN:**  
 13 **Q.** "Question your worth. Less than a man." Why did you  
 14 stay? Why did you stay in this place where people are saying  
 15 these things to you and making you feel this way?  
 16 **A.** Again, sir, I was living from paycheck to paycheck. I  
 17 needed the job. I had to feed my family.  
 18 **Q.** Did -- did Mr. Hurtado ever refer to you as a "boy"?  
 19 **A.** Yes, he did. That was one of the terms that he would use.  
 20 **Q.** And how did that -- how did that make you feel when he  
 21 referred to you as a boy? Did you say anything to him?  
 22 **A.** At some particular time I did say something to him, but  
 23 how they made me feel, at that point I was a man in my late  
 24 40s. And you know, when you meet a person, the last thing I'm  
 25 going to refer to as a grown man is a boy. You know, it's

1 "hey, dude," "hey, man," or something like that. But in order  
 2 for me to greet or tell another man that he's a boy, that's  
 3 disrespectful.  
 4 **Q.** Okay. Mr. Hurtado, at any time from when he started  
 5 calling you these words in August to when you left in March of  
 6 2016, did he ever stop calling you those terms?  
 7 **A.** No. Mr. Hurtado, he was pretty persistent.  
 8 **Q.** Okay. I just need to go back to the Demetric incident one  
 9 time. Sorry about that.  
 10 How did it make you feel to not be able to help your son  
 11 in that situation?  
 12 **A.** Again, this was a person that I provided his care. I did  
 13 everything that I could do with him, and for him to see me at  
 14 my most vulnerable moment and him in the same, it fractured our  
 15 relationship. Now, my son can't even look me in the eye.  
 16 **Q.** Let me ask you: When you're driving home that night after  
 17 that incident with your son where he had been called the N-word  
 18 in front of you and you couldn't do anything, what was going --  
 19 was Demetric in the car with you?  
 20 **A.** I believe he might have got a ride from somebody else.  
 21 **Q.** He got a ride from somebody else that night?  
 22 **A.** I believe so.  
 23 **Q.** So you had to drive home alone after that incident?  
 24 **A.** Yes.  
 25 **Q.** And what's going on in your mind as you're driving home

1 after your son has been called the N-word at the Tesla factory?  
 2 **A.** A gambit of emotions. I couldn't help my son. My son, he  
 3 doesn't respect me anymore. It's just --  
 4 **Q.** Did he say that?  
 5 **A.** My other kids told me. He doesn't talk to me.  
 6 **Q.** And then the next day or shortly after that, did you have  
 7 to drive back to the factory where your son had been called the  
 8 N-word in front of you? Did you have to do that?  
 9 **A.** Yes, I did.  
 10 **Q.** And what were you thinking? What is going on in your mind  
 11 as you're driving back to the place that broke the relationship  
 12 with your son? What's going on in your mind?  
 13 **A.** At this point he had got back in the car with me. We were  
 14 driving. We're trying to -- I'm trying to talk to him but, you  
 15 know, once kids get something in their mind, they don't want to  
 16 talk about it anymore.  
 17 He got to the factory and, like, I kept telling him,  
 18 encouraging him, to do something about it, but me personally,  
 19 I'm just -- I'm just running, wondering what could I have did  
 20 better. How could I have protected him?  
 21 But there's nothing I could do. I needed to be able to  
 22 pay rent. I need to be able to put food on the table.  
 23 **Q.** As these racial insults mount time and time and time  
 24 again, what are you thinking? What's going on in your mind in  
 25 terms of your situation?

1 **THE COURT:** I'm sorry. You're going to have to do a  
 2 point in time and be a little --  
 3 **MR. ORGAN:** Thank you, Your Honor.  
 4 **THE COURT:** -- less dramatic and a little more direct  
 5 in your questions.  
 6 **BY MR. ORGAN:**  
 7 **Q.** Let's go to October 17.  
 8 **A.** Yes, sir.  
 9 **Q.** That was an incident -- there was an incident between you  
 10 and Mr. Martinez; correct?  
 11 **A.** Yes, it was.  
 12 **Q.** Okay. Why don't you tell the jury about that incident on  
 13 the 21st -- the 17th of October. What's going on that day?  
 14 **A.** Well, this particular day -- well, I should say evening  
 15 because my shift was from 6:00 at night to 6:00 in the morning.  
 16 I was in the elevator, so I can kind of describe to you  
 17 guys what the elevator was like.  
 18 The elevator was maybe three times the size of that jury  
 19 box and a little bit, maybe, over to this side. It would take,  
 20 like, two or three full-size Teslas.  
 21 The buttons to operate the elevator, when you walked in  
 22 the elevator because most people think of elevators opening up  
 23 like this, but this elevator opened up like this. On this side  
 24 was the controls, and the corner at the top it was a camera,  
 25 and it was some other panel on this side. And then it had the



1 bumper railings right there.

2 So on this particular day, myself and Mr. Foster were  
3 inside the elevator. We were going down in the elevator. I  
4 was explaining to Mr. Foster his role and his job because  
5 Mr. Foster had just started, so I was training Mr. Foster.

6 The elevator doors come open, and there's Mr. Martinez.  
7 Mr. Martinez jumped off the tugger and yelled, "Why are you  
8 telling him who his boss is?"

9 At this point I didn't say anything to Mr. Martinez. I  
10 started to go back in the elevator. Mr. Martinez ran inside  
11 the elevator after me yelling, had his fists balled up. I  
12 thought Mr. Martinez was going to strike me.

13 I'm a bigger guy, but I do --

14 **THE COURT:** Hang on just a second. Let's proceed by  
15 questions and answers, shall we?

16 **MR. ORGAN:** Yes, Your Honor.

17 **BY MR. ORGAN:**

18 **Q.** In terms of -- so you have this confrontation with  
19 Mr. Martinez. It started outside the elevator?

20 **A.** I was -- I was basically half and half. He was on the  
21 outside. I was on the -- basically, I was on the threshold of  
22 the elevator, I should say.

23 **Q.** And the elevator, is it bigger than the jury box here?

24 **A.** Yes. Like I said, it was like three times the size of the  
25 jury box.

1 **Q.** So back to Tesla's table; is that right? About that far?

2 **A.** I'm going to say maybe around to where the end of your  
3 table is.

4 **Q.** So about here. So from here to --

5 **A.** To the wall.

6 **Q.** -- to the wall. Let the record reflect I'm standing under  
7 the seal so about half of the courtroom; is that about right?

8 **A.** That's about right.

9 **Q.** And the distance, would it be -- would it be the length of  
10 the jury box?

11 **A.** It was big enough to park three full-size cars in because  
12 at some point it was three full-size cars in there.

13 **Q.** Okay. So Mr. Martinez comes in. He has his fists balled  
14 up.

15 Does he say anything to you?

16 **A.** Um, he was asking me, did I have a problem with him; and  
17 as he was yelling, he said, "You Ns aren't S-H-I-T."

18 **Q.** Okay. And what did you do?

19 **A.** Like I said, I'm a bigger guy, and I do realize the  
20 optics. So I put my hands -- excuse me. So I put my hands up  
21 in a neutral position to let everybody know that I'm not trying  
22 to be defensive because most people view -- when they see a  
23 bigger guy pounding on a little guy, nobody ever asks why is  
24 the big guy pounding on the little guy.

25 They just say, "Hey, this big guy is beating up this

1 little guy." They don't realize sometimes the little guy might  
2 have did something. But like I said, I realize the optics of  
3 that and put my hands in a neutral position as he was still  
4 being irate. In order for me to get him to back off, I had to  
5 point to the camera, "Hey man. You know we on camera. You  
6 know they can hear and see what's going on."

7 And at that point he ran up out of the elevator.

8 **Q.** Okay. And you sent a complaint to your boss, Mr. Romero,  
9 after this happened; is that right?

10 **A.** Not immediately after it happened because I still -- like  
11 I said, I was short-handed. So I was still had to conduct my  
12 job, and I had wrote the e-mail in pieces as it was going on.

13 **MR. ORGAN:** Sabrina, can you please put up  
14 Exhibit 235.

15 (Pause in proceedings.)

16 **BY MR. ORGAN:**

17 **Q.** Mr. Diaz, is this the complaint that you sent to  
18 Mr. Romero?

19 **A.** Yes, I did.

20 **Q.** And we've seen this before with other witnesses. It  
21 doesn't have in here your, "Ns aren't S."

22 Why didn't you put that in there? Had you complained  
23 before about the N-word?

24 **A.** Yes, I had. To Tom Kawasaki.

25 **Q.** And who else had you complained to about the N-word prior

1 to this incident in October of 2015?

2 **A.** To Ed Romero.

3 **Q.** Mr. Romero, who just testified a little earlier; right?

4 **A.** Yes, sir.

5 **Q.** How many times had you complained about the N-word to  
6 Mr. Romero?

7 **A.** About three to seven times. Well, what happened is --  
8 excuse me -- after Tom had left his role to me, I took over  
9 with the elevator lead. Mr. -- me and Mr. Romero in the  
10 mornings -- because the shifts overlapped, Mr. and  
11 Mr. Romero -- sorry for butchering his name -- but Mr. Romero  
12 used to sit in the cafeteria and have breakfast in the morning,  
13 and we would discuss the events of the day. So I would tell  
14 Mr. Romero at that point what was going on.

15 **Q.** Okay. Why didn't you put "Ns aren't S" in this e-mail?

16 **A.** Well, to go back, that would -- I would have to talk about  
17 a previous job. I used to work right down the street for  
18 Hamilton Families which is the homeless shelter.

19 One day I had put them words in an e-mail once I found out  
20 that because the director had called me in, him and -- him and  
21 another personnel, and they were saying, "Hey, look. Certain  
22 things you don't put in an e-mail. What you do is you use key  
23 words. Check the surveillance. We have an issue. We need to  
24 discuss something. We have an issue with this individual," and  
25 then at that point people would come together, and they would

1 discuss it.

2 **Q.** Okay. And the surveillance system, you mention that in

3 here. Did you think that that might get -- help them -- help

4 Tesla figure out what happened?

5 **A.** Yes. I figured it out because I did put the key words in

6 there that I was -- I was previously trained to do.

7 "Can you check the surveillance system to confirm?"

8 If they would have pulled the surveillance system, you

9 know, it should have had audio. It should have had the video.

10 They would have saw and heard what was going on. They could

11 have even interviewed Mr. Foster.

12 **Q.** And did -- did Mr. Foster ever tell you that he got

13 interviewed about this incident?

14 **A.** No, sir.

15 **Q.** Okay. After this incident in the elevator, have you ever

16 had any kind of issues -- any kind of issues in elevators?

17 **A.** Mr. Foster had threatened to shoot me at one time. Reason

18 being is that Mr. Foster, he was taking long lunch breaks. He

19 had took off. We couldn't find Mr. Foster. I had sent

20 Mr. Romero a text message to let him know that Mr. Foster

21 didn't return from lunch.

22 Mr. Romero said, "Keep trying to contact him," which I

23 did.

24 When Mr. Foster returned, I told Mr. Foster it was

25 unacceptable to be gone from the elevator at the time because

1 what I couldn't do was I couldn't relieve the other employees

2 so they can get their breaks.

3 Mr. Foster got upset. I put that in the e-mail and --

4 well, a text message. I saw it somewhere in -- in some of the

5 exhibits, but I don't know if they are in these exhibits, but I

6 did give him that.

7 From that point --

8 **Q.** Did Mr. Foster say the N-word to you?

9 **A.** No. Mr. Foster never said the N-word. Mr. Foster

10 threatened to kill me, sir.

11 **Q.** Okay. And Tesla got rid of him; is that right?

12 **A.** Yes.

13 **Q.** To your knowledge, has Tesla ever fired any of the people

14 that called you the N-word?

15 **A.** No, sir.

16 **Q.** Now, let me ask you this: Since you left Tesla and the

17 elevator position there, since then, have you had any issues --

18 any feelings relative to being on an elevator?

19 **A.** Well, when I'm getting in the elevator now, I always try

20 to be the last person in there. If I don't feel comfortable

21 with the people that I see that's in the elevator, even though

22 I don't know them, if I don't feel comfortable with them, I

23 step out of the elevator and I try to wait.

24 Um, it just -- you know, being in an enclosed space and

25 not knowing.

1 **Q.** Let me take you back now -- let's go to Exhibit 33. I

2 want to take you back --

3 **MR. ORGAN:** Actually, let's put up Exhibits 1 and

4 then 2.

5 **BY MR. ORGAN:**

6 **Q.** Exhibit 1, do you recognize this one?

7 **A.** Yes, I do. That's a jigaboo or a pickaninny, sir.

8 **Q.** Okay. And how did you first come to see that?

9 **A.** When I first saw it, I had -- I was -- the line which was

10 the battery line, my battery line, had called me over. They

11 needed some parts that was delivered downstairs.

12 I went downstairs to get the parts for the battery line,

13 and I brought back up the parts and I went over to the battery

14 line itself.

15 When I got to the battery line, I dropped off the parts

16 that was in the battery line. And when I returned --

17 **Q.** Let's do this. Let's do this. I've got a demonstration.

18 Why don't we demonstrate for the jury, Your Honor how this

19 happened, and we've got some models that we can do it on.

20 Is that okay?

21 **THE COURT:** Sure. We'll see what the models look

22 like.

23 **MR. ORGAN:** Okay.

24 (Pause in proceedings.)

25 **MR. ORGAN:** Here are the models.

1 **MR. SPIRO:** I don't care. I heard the word "models."

2 **MR. ORGAN:** Not New York models, like your -- okay.

3 Let's see.

4 (Pause in proceedings.)

5 **MR. ORGAN:** How many lawyers does it take to --

6 **THE COURT:** Let's just keep going with the case.

7 **MR. ORGAN:** Yes, Your Honor.

8 (Pause in proceedings.)

9 **MR. ORGAN:** Is it okay if Mr. Diaz comes down --

10 **THE COURT:** Yes, Mr. Diaz, if you want to step down,

11 that would be great.

12 **THE WITNESS:** Thank you.

13 (Pause in proceedings.)

14 **BY MR. ORGAN:**

15 **Q.** Okay. And just if you could explain to the jury what

16 these models represent.

17 (Pause in proceedings.)

18 **THE WITNESS:** Um, I use this to represent the pallet

19 rider I was using.

20 **BY MR. ORGAN:**

21 **Q.** Will you explain to the jury, what's a pallet rider?

22 **A.** The pallet rider is a piece of equipment that -- that you

23 use to move things heavy equipment -- I mean, heavy products or

24 heavy loads.

25 It's something that you can ride on. It's maybe -- it may

1 be like, I'm going to say, 8 feet long or something. It has  
2 the forks that stick out. It's another part that I would stand  
3 on top of. It has this lever that acts as a brake, and it has  
4 a throttle on the lever.

5 So in order to operate it, the first thing you do is you  
6 push the lever down towards the floor and use the throttle, and  
7 it'll move it forward or backwards.

8 Q. Okay. So you've got the pallet rider, this green little  
9 truck here. You're telling the jury about how you had driven  
10 off, so where would you have driven off to?

11 A. So I had went down -- so I had went downstairs. I had got  
12 the product that they had requested for me to get. It was --  
13 the crate that I had was sitting on the front, so it's no way  
14 that you can drive with it this way because you can't see over  
15 the load. So it's basically you're going this way.

16 So I came out the elevator. I went around the drop zone,  
17 and I went down an aisle, and I went to the battery line and  
18 dropped off the parts.

19 Q. Okay. And when you come back, what do you see?

20 A. When I came back, I'm going to use this to represent the  
21 bale -- when I came back, there was a forklift sitting with a  
22 bale on it in the aisle, which was -- which is actually a no-no  
23 because it would have been blocking all the traffic, and it's a  
24 no-no at Tesla.

25 Q. And if you could with your finger, point to where the bale

1 should have been left?

2 A. Well, the bale that they had had -- let's use the pink  
3 side as where the -- where the jigaboo was and the blue side  
4 that would be the reverse. So what they were supposed to do  
5 was go to the drop zone. We're going to use this right here.  
6 That's a wall. This is -- goes up high.

7 So what they were supposed to do was take it, drop it here  
8 at the drop zone, and leave.

9 I would have came back, picked it up, took it into the  
10 elevator, and took it downstairs.

11 Q. Would you have ever seen the jigaboo drawing if they had  
12 done it like that?

13 A. No. I never would have seen it. Reason being is because  
14 how it was faced out on the forklift, it wouldn't have been  
15 facing towards me. It would have been facing towards the wall.

16 Q. Okay. So put the -- put the bundle, the Post-its, which  
17 are the bundle of cardboard back on. You come back.

18 A. So I come back from dropping off the parts that the  
19 battery line needed. I come back around. Swing back. Because  
20 of how the pallet rider is, I'm riding the pallet rider, so I  
21 have to always pay attention to the forward motion.

22 So I'm headed out to the forward motion -- to the forward  
23 motion. I get into position, and I start to come in like this  
24 so my forks would line up to where I can get under there and  
25 take it -- go and take it and leave with it.

1 Q. Okay. And then you see -- and if you could -- thank you.  
2 You can go back now.

3 Then you see Exhibit 1; right?

4 MR. ORGAN: If you'd please put that up.

5 THE WITNESS: Yes, sir.

6 MR. ORGAN: Thank you, Ms. Davis.

7 (Pause in proceedings.)

8 BY MR. ORGAN:

9 Q. And what do you -- what do you feel or what do you think  
10 when you see that?

11 A. First thing, I felt like I was kicked in the stomach. The  
12 significance of it. It started to remind me of the stories my  
13 parents used to tell me when they got here during the civil  
14 rights movements. It reminded me of my parents being beat with  
15 water hoses, having dogs sicced on them.

16 Q. Had you ever thought about the way your parents had been  
17 treated in any other workplace?

18 A. No.

19 Q. And how does your perspective change after this is done?

20 Well, let me ask you this: Was this different than any of  
21 the prior conduct that had been directed at you?

22 A. It -- it was a progression of Mr. Martinez's actions that  
23 I already didn't feel safe around him even after they had -- I  
24 hadn't seen him around -- well, I'm not going to say I didn't  
25 see him around. It's just that I actively avoided

1 Mr. Martinez. I would see Mr. Martinez in places. I would  
2 either hit the button, close the elevator, shoot upstairs. But  
3 he was -- the best way I could put it, he was always lurking  
4 somewhere and -- prior to this incident.

5 Q. After -- after this incident, did the conduct stop? The  
6 conduct in terms of all of the racial conduct that you were  
7 being subjected to, did it stop?

8 A. No, it did not stop. I still had other individuals  
9 telling me, "N, you're lazy. Boy, hurry up and push the  
10 button, or N, hurry up and push the button."

11 So I still had individuals harassing me, sir.

12 Q. Okay. And one of those was Mr. Hurtado; right?

13 A. Yes, it was.

14 Q. Okay. In terms of how this conduct has impacted you,  
15 let's go back before you actually experienced any harassment at  
16 Tesla. Okay?

17 What sorts of things brought you joy?

18 A. Gardening, fishing, family, just -- period, you know.  
19 It's like things was tough, but at least we can still have a  
20 laugh. You know, take the kids out fishing, what me and my  
21 wife used to call "no money dates." You know, we'd just go do  
22 things.

23 Q. And during the time that you were at Tesla, did you still  
24 enjoy gardening?

25 A. After this job started to really impact me and I had to

1 start to look around my shoulder and wonder what was going to  
2 happen because of the fact that I was in a dangerous factory,  
3 it was easy to just leave the forks up on that forklift and run  
4 into me and kill me, and it was just -- it would have been  
5 deemed an accident.

6 Q. So you had fear?

7 A. Yes. I was fearful, sir.

8 Q. And you described anxiety. You had anxiety?

9 A. I was fearful. I had anxiety. Mistrust. It was -- I  
10 just started to change my whole routine. I started to really  
11 put my car in the rear when other employees would leave, and I  
12 tried to be around a group. I didn't know what was going to  
13 happen.

14 You know, you had one guy threaten to kill me. I had  
15 another guy in the elevator accost me saying that he wanted to  
16 do me harm, and now we have this pickaninny and everything  
17 else. So, you know, after the elevator incident, I really,  
18 like I said, I -- and all this accumulation of stuff, I really  
19 started to -- even when I was away from work, I had to look and  
20 wonder, is he in this parking lot?

21 Q. If you could, tell me the top three words that describe  
22 how you felt when you first saw the -- strike that. I didn't  
23 ask you that question.

24 Had you seen any racist graffiti while you were at the  
25 factory?

1 A. Yes, I did. It was graffiti in the bathroom.

2 Q. What kind of stuff did you see?

3 A. It was stuff that was added to over a period of time. So  
4 you had the N-word, swastikas that was inside of the bathroom  
5 stalls and stuff like that.

6 Q. So after you -- and when did that start?

7 A. Um, I started to see it after my second day at work and --  
8 in the bathroom that I was using the most.

9 Q. Okay. And if you could -- and I know this is hard -- can  
10 you describe your anxiety?

11 A. Well, in the bathrooms over a period of time, you know,  
12 like I said, these guys would use these type of markers like  
13 this. This is like what Tesla provided us to mark off parts  
14 and stuff, and we had them in our pockets.

15 So you know, these are paint markers. If anybody know  
16 what a paint marker is, it's like almost impossible to get this  
17 stuff off while you apply it, but over a period of time, it was  
18 "Death to all Ns." It was swastikas, and these wasn't just  
19 purple. They was in yellow, red, blue. So you know, over a  
20 period of time, they just started adding things and adding  
21 things, and it gave me more anxiety, especially because I  
22 don't -- I don't know who I'm dealing with.

23 We have an individual or individuals on the property that  
24 already are putting swastikas and "Death to all Ns" on the  
25 property.

1 Q. Did you ever come to get a feeling of being overwhelmed by  
2 all of this?

3 A. Yes. I was overwhelmed.

4 Q. And how -- can you describe for the jury that feeling of  
5 being overwhelmed? How did it make you feel?

6 A. It's like you're being held under water. You know, you  
7 are yelling for help; i.e., I'm telling these people what is  
8 going on. I'm talking to Ed Romero.

9 And it's like being held under water. Nobody can hear  
10 you. Nobody cares to hear what you're saying. It's like --  
11 it's just accumulation. It's almost like being buried under a  
12 mountain.

13 Q. When you -- you mentioned that the racial graffiti seemed  
14 to build up over time, what -- what three words would you  
15 describe -- what three words would you use to describe that?

16 A. I would describe it as humiliating, fearful, degrading.

17 Q. The first time that you realized that you were being  
18 called the N-word, what three words would you use to describe  
19 that when you were being called the N-word?

20 A. Humiliating, upset. Just -- you know, less than a human.

21 Q. When you saw the pickaninny, the jigaboo, what three words  
22 come to your mind in terms of your emotions when you were  
23 seeing the jigaboo?

24 A. Upset, disbelief, concern.

25 Q. What were you concerned about?

1 A. I was concerned that just somebody around here is actually  
2 bold enough to just leave this in the middle of a plant floor.

3 Q. When you saw your son called the N-word, what three words  
4 come to your mind in terms of how you were feeling then?

5 A. I was upset, demoralized, and disgusted.

6 Q. With yourself?

7 A. Yes, sir.

8 Q. Now, when you left Tesla, did you have a job lined up?

9 A. No, I did not. I just couldn't be there anymore.

10 Q. Did you try to find a job prior to March of -- mid-March  
11 of 2016?

12 A. Yes. I was on Indeed actively looking for work in another  
13 location.

14 Q. Okay. So why did you leave Tesla when you didn't have a  
15 job lined up, even though you needed to feed your family?

16 A. Initially I left Tesla because my mother died. After I  
17 had handled all the affairs with my mother and I was supposed  
18 to return to the factory, I had -- let's just say a little  
19 breather to be able to think. With the combination of my  
20 mother dying and the things that was going on in the factory,  
21 I -- I just couldn't trust myself to be back in that factory.

22 Q. And in terms of -- during the time that you were at Tesla,  
23 were you able to enjoy -- I think you said gardening and your  
24 family?

25 A. Fishing, family.

1 Q. Fishing. Were you able to go fishing while you were at  
2 Tesla?  
3 A. Normally, I always make time for fishing. It's one of my  
4 hobbies, that and gardening, and I always find time for it, but  
5 in that time I just couldn't find the joy in life anymore.  
6 Q. Driving a bus for AC Transit, is that stressful like it  
7 was at Tesla?  
8 A. No, it's not. I get -- my driver's seat is about this  
9 big. I get to close the door, and it's just me and the road.  
10 Q. Has anyone called you the N-word at AC Transit on the bus?  
11 Anybody call you the N-word on the bus?  
12 A. I've been called a lot of things. I have been called  
13 bald-headed. I have been called fat. I even had -- one lady  
14 said my head looked like a used condom, but no.  
15 Q. Okay. What are some of the physical ways the stress at  
16 Tesla affected you when you were there?  
17 A. It -- and again, I'm embarrassed to say it translated over  
18 into my family. You know, I couldn't perform with my wife. I  
19 was so much under stress. My wife, she needed -- she needed  
20 her needs. She needed to be attentively looked to, and because  
21 of the things I was going through, it's like I felt like I  
22 was -- I was demasculated. Like I didn't have a manhood  
23 anymore.  
24 Q. Is it fair to say that you are doing better now than you  
25 were when you worked at Tesla?

1 ingrained in me. It's a part of my life. It's a memory now  
2 that, you know, like some people say, when you ring a bell, you  
3 can't unring it.  
4 Q. But if you were, let's say, given time and money, you  
5 would be able to do fishing -- you fish now again; right?  
6 A. I fish now again, yes, I do.  
7 Q. And does fishing bring you joy?  
8 A. Yes, it brings me joy.  
9 Q. And gardening, you like to garden?  
10 A. Yes. I love my tomatoes and squash, yes, I do.  
11 Q. And you are not growing tomatoes right now, are you?  
12 A. No. It's too cold. The growing season won't start until  
13 June the 1st.  
14 Q. Okay. I don't grow, so I don't know. But I know that  
15 tomatoes in -- tomatoes [different pronunciation], that's my  
16 wife's word -- tomatoes are not so good in the store right now,  
17 but okay.  
18 In terms of -- if you were given time and money to do  
19 those hobbies, fishing, gardening, spending time with your  
20 family, would that make your life better?  
21 A. Yes, it would.  
22 Q. And let me ask you this: Do you think -- based on what  
23 happened to you, do you think that Tesla should be punished for  
24 what they did?  
25 A. I'm going to say this: I -- I'll take accountability in

1 A. Some days.  
2 Q. When you have to think back about what happened to you  
3 when you were working for Tesla, does that bring back the  
4 emotions like we saw here today?  
5 A. Sometimes I will sit and stare off into space. It brings  
6 back intense emotions, and things can trigger at times, yes, it  
7 can.  
8 Q. Do you think that you will ever be able to completely  
9 forget what happened to you when you worked for Tesla?  
10 A. How can I? I have to look at my -- I have to -- whenever  
11 I see my son or if he is around me or when he comes to visit my  
12 wife, I have to look in his face. I have to look at him and  
13 know I destroyed an individual's life with my decisions.  
14 Q. Now, you testified before about losing some weight because  
15 of this?  
16 A. Yes. I lost weight at the time. I was a lot bigger than  
17 I am now.  
18 Q. Okay. And any other physical ways you felt like you had  
19 been injured at Tesla?  
20 A. I would have sleepless nights. I wouldn't eat. I would  
21 sit on the stairs for hours and just cry some nights because of  
22 the things that I did.  
23 Q. How long do you think it will take to forget about these  
24 things at Tesla?  
25 A. Honestly, I will never forget. It's always going to be

1 my part in it. All I ask is for Tesla to take accountability  
2 for their part.  
3 Q. Okay. After the -- after the first part of this case, did  
4 anyone from Tesla apologize to you?  
5 A. No.  
6 Q. Why did you bring this lawsuit?  
7 A. To get the word out. I don't -- the best way I can say it  
8 is how everything got started is I was at home one day. I was  
9 watching a news report. The news report was about a guy named  
10 DeWitt Lambert. DeWitt Lambert was a Tesla employee, and he  
11 was working on the -- the general assembly line.  
12 Some other Tesla employees had stole his cellular device  
13 to his phone and made a death threat video.  
14 MR. SPIRO: I'm going to object to this.  
15 THE COURT: Yeah. Sustained. Let's --  
16 MR. ORGAN: Okay. I will ask another question,  
17 Your Honor.  
18 BY MR. ORGAN:  
19 Q. Let me ask you this: What do you think your future looks  
20 like?  
21 MR. SPIRO: I think that's been asked. You can ask it  
22 again. It's --  
23 MR. ORGAN: I will ask a different question.  
24 BY MR. ORGAN:  
25 Q. Did the intensity of your anxiety lessen after you left

1 Tesla?

2 **A.** I can say yes to that question, yes.

3 **Q.** Okay. So is it fair to say that when you had to work at

4 the Tesla factory, that was when it was worse. That was the

5 worst time; is that fair?

6 **A.** Yes.

7 **Q.** But is it fair to say that there's still residual impacts

8 that have come forward since then?

9 **A.** Yes.

10 **Q.** And like when you go on an elevator now, do you have any

11 anxiety being on an elevator? You said that. You said you

12 have to go to the back of the elevator.

13 When you see a Tesla, does that bring up any anxiety?

14 **A.** It -- I will always remember when I see a Tesla on the

15 road, when I go by a Tesla building, see one of their

16 commercials, the first thing it does is it doesn't equate to me

17 as a new product. It equates to me as what I went through.

18 **Q.** Okay.

19 **MR. ORGAN:** I think that's it, Your Honor.

20 **THE COURT:** All right.

21 **MR. ORGAN:** Thank you.

22 **CROSS-EXAMINATION**

23 **BY MR. SPIRO:**

24 **Q.** Good afternoon.

25 **A.** Good afternoon, sir.

1 complaint that you had while he was with you at Tesla?

2 **A.** I wasn't really a hundred percent paying attention, but

3 that's why I said you would have to show me what he said.

4 **Q.** Well, you've been asked under oath previously if you ever

5 complained to Mr. Kawasaki about anything other than the Judy

6 Timbreza incident, and you said no. Right?

7 **A.** Can you show me that, please, sir.

8 **Q.** Well, let me ask you this --

9 **THE COURT:** It's a fair answer. If you want to show

10 him, fine. If you don't --

11 **MR. SPIRO:** Sure. I don't want to -- if we do too

12 much of that, we'll --

13 **THE COURT:** Well, then don't. Go onto where you want

14 to go.

15 **BY MR. SPIRO:**

16 **Q.** Do you remember any other complaint that you made to

17 Mr. Kawasaki in particular?

18 **A.** Are you talking about the sending him the e-mail what

19 happened in the elevator?

20 **Q.** Yeah. Well, other than the Judy Timbreza incident, are

21 you aware of another racial incident? We'll move aside from

22 the elevator. Okay. We'll count the elevator.

23 Any other incident that you haven't described yet today

24 that you told Mr. Kawasaki?

25 **A.** I just explained. If you are talking about the elevator,

1 **Q.** You had a positive relationship with Mr. Kawasaki, your

2 first supervisor at Tesla?

3 **A.** I thought so.

4 **Q.** Okay. And you trusted him?

5 **A.** Yes, I did.

6 **Q.** Okay. And he came into court just a couple days ago. You

7 were here, and he said that you joined on June 3, and the only

8 racial complaint he received from you was the Judy Timbreza

9 incident; is that correct?

10 **A.** That's mischaracterizing his statement. He never said

11 when I was hired. You said that.

12 **Q.** Well, the record of that he says "so he joins June 3" is

13 in the record. Mr. Kawasaki did tell the jury that the only

14 complaint he got from you was the incident with Timbreza;

15 correct?

16 **A.** I complained to Mr. Kawasaki about Judy Timbreza, yes,

17 that is correct.

18 **Q.** Right. And my question is a little different. That's

19 just the only complaint that Mr. Kawasaki could remember when

20 he testified; right?

21 **A.** Can you show me that anywhere where he said that?

22 **Q.** We will maybe at some point, but I'm just asking for your

23 memory. You were here. I was here. The jury was here. The

24 transcript is here.

25 Do you remember Mr. Kawasaki remembering any other

1 yes, that was another incident.

2 **Q.** Okay. So those two. Is there any others?

3 **A.** Not that I can know that I tagged Mr. Kawasaki in.

4 **Q.** Okay. And you heard Mr. Jackson testify, and he said that

5 the only complaint that he received regarding racial harassment

6 from you was regarding the picture on the bale; right?

7 **A.** That's true. The only one he received from me, yes.

8 **Q.** Okay. And Mr. Wheeler was here who was somebody that you

9 worked with; correct?

10 **A.** Yes, it is, sir.

11 **Q.** And he was somebody who, when you saw the picture on the

12 bale, you wanted to bring over to show him what was on the

13 bale; right? That's -- you did do that; correct?

14 **A.** Yes, I did call Mr. Wheeler.

15 **Q.** Right. But as Mr. Wheeler testified in front of the jury,

16 prior to the time of the bale, you had never talked to him

17 about the use of the N-word in the Tesla factory; right?

18 **MR. ORGAN:** Objection. Misstates his testimony,

19 Your Honor.

20 **THE COURT:** The jury's recollection -- these aren't

21 memory games for the witnesses, but if he recalls, he can

22 answer and go forward.

23 **BY MR. SPIRO:**

24 **Q.** Do you recall that Mr. Wheeler said that the only time --

25 that he had never spoken to you about the use of the N-word at

1 the Tesla factory prior to the point in time where you brought  
 2 him over to the bale? Do you remember him saying that?  
 3 **A.** No.  
 4 **Q.** Okay. Do you remember this question: "Prior to the  
 5 drawing that you were just shown in evidence, Mr. Diaz never  
 6 talked to you about the use of the N-word at the factory;  
 7 true?"  
 8 Do you remember that question?  
 9 **A.** That question wasn't asked to me. That question was asked  
 10 of Mr. Wheeler.  
 11 **Q.** Right. Right. And he said he knew of no incident; right?  
 12 You do remember the question. And he said he knew of no  
 13 incident where you had personally complained to him about the  
 14 use of the N-word at the Tesla factory prior to that time;  
 15 true?  
 16 **MR. ORGAN:** It's a compound question.  
 17 **THE COURT:** You can say what you remember, and then  
 18 we'll move onto the next thing.  
 19 **THE WITNESS:** Again, even though I was in here and I  
 20 was hearing what Mr. Wheeler was saying, I wasn't hanging on  
 21 every word that Mr. Wheeler was saying. So if you say that's  
 22 what he said, and you can put it in front of me, sir, I  
 23 definitely will review it and give you an answer.  
 24 **BY MR. SPIRO:**  
 25 **Q.** Okay. Well, let me ask it a different way. Are you

1 telling this jury that you ever prior to the bale incident ever  
 2 complained to Mr. Wheeler about the use of the N-word at the  
 3 Tesla factory?  
 4 **A.** Me and Mr. Wheeler had talked before, yes.  
 5 **Q.** Okay. And you mentioned something about the Mr. Foster  
 6 incident and how you texted Mr. Romero, and then Mr. Romero  
 7 came and ended up removing and firing Mr. Foster; right?  
 8 **A.** No. I never said that, sir. You're saying that. I  
 9 texted Mr. Romero. Mr. Romero never showed up. Mr. Romero --  
 10 I mean, Mr. Romero would normally be there in the daytime, and  
 11 then when I sent him a text, I believe he called and he said,  
 12 like he would normally do, is, "Mr. Diaz, get some rest, and I  
 13 will deal with the situation later."  
 14 **Q.** And I think when you first described this to the jury you  
 15 said that you saw that text when you were reviewing some of the  
 16 discovery in this case?  
 17 **A.** I saw what text?  
 18 **Q.** You were talking about how you had seen stuff about the  
 19 Foster incident when you were reviewing discovery in this case;  
 20 right? Just now. Just about 30 minutes you said that.  
 21 Do you recall that?  
 22 **A.** No, I don't recall that. That's mischaracterizing my  
 23 statement.  
 24 **Q.** I apologize. Well, there's no text messages to Mr. Romero  
 25 about any of the other conduct that you're here complaining

1 about today; right?  
 2 **A.** It was text messages. There are exhibits, but I don't  
 3 know what you and my counsel may agree to. I don't know what  
 4 Judge Orrick may have let in or may have not let in.  
 5 But there was exhibits of them text messages, sir.  
 6 **Q.** Okay. Well, I will -- I would -- I do not object to any  
 7 text messages coming into evidence between you and any other  
 8 person complaining about anything regarding racism. Okay?  
 9 **THE COURT:** Yeah. So that will be struck.  
 10 Ladies and gentlemen, this case is really about the  
 11 damages that Mr. Diaz is entitled to as a result of the  
 12 instructions that I provided to you.  
 13 It's not about -- it's not a memory game of what's  
 14 happened in this courtroom so far. You're going to be the  
 15 judges of that. It is about what his memory is and what all  
 16 the other witnesses' memory is. And to the extent that it  
 17 conflicts, those are things that you'll be able to judge  
 18 because you've been listening to the evidence.  
 19 So let's just -- let's deal with that.  
 20 **BY MR. SPIRO:**  
 21 **Q.** Can you point to any text message that you sent to  
 22 Mr. Romero, Mr. Kawasaki, Mr. Jackson, or Mr. Wheeler  
 23 complaining about any of the incidents you told this jury  
 24 about?  
 25 **MR. ORGAN:** Objection. 403, Your Honor.

1 **THE COURT:** I could not hear that objection. What is  
 2 the objection?  
 3 **MR. ORGAN:** 403, Your Honor.  
 4 **THE COURT:** Um, overruled. If you're aware of any  
 5 text messages beyond what you've already testified to,  
 6 Mr. Diaz, you can say so. Otherwise, you can say, "I'm not  
 7 aware."  
 8 **THE WITNESS:** Other than what I sent, I'm not aware  
 9 of, sir.  
 10 **BY MR. SPIRO:**  
 11 **Q.** Okay. Well, I mean, are you aware of any text messages  
 12 that you sent to any of those individuals complaining about any  
 13 of the racial incidents you've told this jury about?  
 14 **MR. ORGAN:** Asked and answered.  
 15 **THE COURT:** Overruled.  
 16 **THE WITNESS:** Again, like I said, if you can put that  
 17 text message in front of me, sir, I can review that text  
 18 message, and I can tell you what was sent. And until then, my  
 19 answer is going to be the same. I'm sorry. I apologize. I  
 20 can't give you what you need.  
 21 **BY MR. SPIRO:**  
 22 **Q.** Well, no, no. I don't need anything. I'm just simply  
 23 asking you if you remember as you're sitting here -- you know,  
 24 you spent a lot of time with this case -- if you remember,  
 25 sitting here, any text message that you sent to any of those

1 individuals complaining about any of the things you're saying  
2 now here eight years later.  
3 **A.** No, I cannot.  
4 **Q.** Okay. And you can't tell us any friend or family member  
5 that you sent a text message to complaining about any of the  
6 things that you're now telling this jury about eight years  
7 later, can you?  
8 **A.** A text message from eight years? I cannot.  
9 **Q.** Okay. Well, you also can't point to any other -- to any  
10 other e-mails that you sent to any of these individuals or any  
11 of the other folks that I have referenced complaining about any  
12 of the other incidents that you've described here today to this  
13 jury, can you?  
14 **A.** Have I sent e-mails? Yes, I did send e-mails, sir.  
15 **Q.** The ones that the jury has seen, but you mentioned now  
16 here in this courtroom a lot of other incidents, and I'm just  
17 asking: Do you have an e-mail about any of those other  
18 incidents telling anybody "Hey, you can't believe what  
19 happened," or words to that effect or anything to anybody?  
20 **MR. ORGAN:** Objection. Argumentative, Your Honor.  
21 **THE COURT:** Overruled.  
22 You can answer.  
23 **THE WITNESS:** All I can say is again, sir, I can't say  
24 what you and my side agree to be in evidence.  
25 **MR. SPIRO:** Judge, I'm not --

1 **THE COURT:** That's -- you are -- you're not going to  
2 get a further answer than what you've gotten, Mr. Spiro. He's  
3 testified to what his knowledge is.  
4 **MR. SPIRO:** Well, but I'm not asking you about what  
5 was agreed. What I'm asking about is if you are aware of any  
6 e-mail that you sent. If you can tell me "I remember being so  
7 upset one day I e-mailed my friend," did that ever happen?  
8 Can you tell me about an e-mail that you ever sent  
9 complaining to anybody in real-time, not eight years later,  
10 about any of the things you've told this jury about? That's my  
11 question.  
12 **MR. ORGAN:** That's argumentative, Your Honor. It's  
13 eight years later.  
14 **THE COURT:** Overruled. If you don't remember what  
15 e-mails you sent eight years ago, just say that. If you do  
16 remember that there are some other e-mails, please tell  
17 Mr. Spiro.  
18 **THE WITNESS:** What I can say is I turned everything I  
19 had over to my side and your side, sir.  
20 **BY MR. SPIRO:**  
21 **Q.** Okay. We talked about how Mr. Romero did ultimately fire  
22 or was involved in the firing of Mr. Foster who you complained  
23 about.  
24 Do you remember that testimony?  
25 **A.** I never said he fired him, no. I don't -- I know that he

1 was let go, but I don't know the dynamics of that.  
2 **Q.** All right. But Mr. Romero stepped in, and he was let go.  
3 And Mr. Romero was involved in the hiring of Mr. Patterson;  
4 correct?  
5 **A.** I don't know if he would have had the last say-so. I  
6 wouldn't have been privy to that, sir.  
7 **Q.** Not the last say-so, but you forwarded Mr. Patterson's  
8 resume onto Mr. Romero; correct?  
9 **A.** Yes. I did do that.  
10 **Q.** And I think you testified to this jury that Mr. Patterson,  
11 who you were recommending to be working there, was African  
12 American; correct?  
13 **A.** Eventually. When his first day of work, he showed up, I  
14 found out he was African American, yes.  
15 **Q.** And I have to ask these questions in this case because of  
16 the kind of case it is. The person who recommended him was his  
17 cousin; right?  
18 **A.** Yes, sir.  
19 **Q.** And his cousin, you're saying now, is biracial?  
20 **A.** I didn't say now. I said that back in my deposition.  
21 That was five, six years ago I said that.  
22 **Q.** Okay. And when Mr. Patterson shows up first day, he's  
23 African American; right?  
24 **A.** Yes, he was.  
25 **Q.** And you didn't tell Mr. Patterson, you know, "You

1 shouldn't stay around these elevators. Get out of here," warn  
2 him. He just worked that job and worked next to you, sir;  
3 right?  
4 **A.** I wouldn't have privity [sic] to Mr. Patterson's  
5 financials. Only thing I can say is what I did. Yes, I did  
6 forward an e-mail. Yes, his cousin was biracial. Just like  
7 Mr. Jackson couldn't make the distinction of your colleague  
8 being a Black man, I couldn't make the distinction.  
9 **THE COURT:** Mr. Diaz, I think the question is, once he  
10 was there in the elevator, did you have any discussion with him  
11 about the -- the racial incidents that have been occurring in  
12 the factory.  
13 **THE WITNESS:** I can't recall.  
14 **BY MR. SPIRO:**  
15 **Q.** When you would leave work every day from the Tesla factory  
16 you had like an hour, good hour commute back home; right?  
17 **A.** I was living in Antioch at the time, and it was in  
18 Fremont. So it was a commute, yes.  
19 **Q.** A good hour; is that fair?  
20 **A.** It's depending on the traffic conditions, sir.  
21 **Q.** And you testified earlier that you never discussed  
22 anything about what you have told this jury about with your  
23 wife; right?  
24 **A.** No. I did not discuss it with my wife, sir.  
25 **Q.** With your daughter? Is that your testimony?



1 A. Eventually, I did discuss something with my daughter, yes.  
 2 Q. Okay. What about in 2015, 2016?  
 3 A. What I discussed with my daughter is one day my daughter  
 4 had told me that she had filled out an application for Tesla.  
 5 I had asked my daughter what the outcome of that was, and she  
 6 said she didn't get the job, and I said thank God.  
 7 Q. Well, your daughter has testified previously in front of  
 8 you, and she says that she told you that after she filled out  
 9 the application and you did not dissuade her. That's what her  
 10 testimony was; right?  
 11 A. Can you show me where she said that, sir?  
 12 Q. We will -- we can -- I'm just asking you for your memory  
 13 at this point, right? If I showed you every document, I  
 14 wouldn't get through my examination. So just for now, I'm  
 15 asking you, do you recall that your daughter testified in front  
 16 of you that she told you she submitted an application and that  
 17 you did not dissuade her?  
 18 Do you recall that testimony?  
 19 A. That would be false, sir.  
 20 Q. Okay. You had other experiences in life that you've  
 21 talked about before job at Tesla. You had had, you know, a  
 22 dozen or more jobs before; right?  
 23 A. I'm not going to say a dozen or more, but I had a few jobs  
 24 before.  
 25 Q. Okay. And you had seen racist graffiti before in your

1 life?  
 2 A. Yes, I have.  
 3 Q. And you had seen fights before in your life?  
 4 A. Yes, I have, sir.  
 5 Q. And when you -- you know, come to the Tesla factory, you,  
 6 you know, talked about how your first day -- and you talked in  
 7 pretty vivid detail about the steel-toed shoes.  
 8 Do you remember that testimony?  
 9 A. Yes. I do remember that.  
 10 Q. Well, when you filled out an application to work at Tesla  
 11 and in that application there were some statements that were  
 12 inaccurate; right?  
 13 A. You would have to show me the application, sir.  
 14 Q. Okay. Well, why don't we put that up on the screen. Very  
 15 quickly. And we will move through this part quickly.  
 16 MR. SPIRO: If you can put that up on the screen.  
 17 Thanks. Go to the next page.  
 18 BY MR. SPIRO:  
 19 Q. Okay. And so if you recall, previously, you were  
 20 questioned about your answer to a top part of the application  
 21 that's redacted, and you were told -- you said that it was  
 22 inaccurate because you were rushing to fill out the  
 23 application.  
 24 Do you remember that testimony?  
 25 A. I do remember rushing to fill out an application. I do

1 remember that, sir.  
 2 Q. Right. And you remember that that was the reason you gave  
 3 for having an inaccuracy on the application, sir. I don't want  
 4 to spend a long time on this. But your reasoning for making  
 5 the mistake on the application was that you were rushing;  
 6 right?  
 7 A. As I see this, I can see where it says: "Have you worked  
 8 for Citistaff before?" My answer was, no, I had never worked  
 9 for them before.  
 10 Can I comply with a drug test? I don't use drugs because  
 11 I drive a bus.  
 12 May -- conditions may require for me to lift between 30  
 13 and 50 pounds. I marked, yes, I can do that.  
 14 Q. Sir, I actually -- that's a little different than my  
 15 question.  
 16 THE COURT: Ask another question.  
 17 BY MR. SPIRO:  
 18 Q. Yeah. So I'm just asking, the question that you can't  
 19 see, do you recall previously that you gave testimony where you  
 20 said, "Yes. That was inaccurate, but I was rushing to fill  
 21 this out."  
 22 Do you recall that testimony?  
 23 MR. ORGAN: Objection. Move to strike. He's talking  
 24 about the redacted part, Your Honor.  
 25 THE COURT: Okay. Was it redacted at the time for a

1 reason?  
 2 MR. ORGAN: There was a motion in limine previously.  
 3 THE COURT: Okay. So let's move on and if -- we can  
 4 talk about it after the -- after this afternoon.  
 5 MR. SPIRO: Let me just show the witness. If you can  
 6 put Volume 1 of your deposition --  
 7 MR. ORGAN: I object, Your Honor.  
 8 THE COURT: Let's do this after 1:30.  
 9 MR. SPIRO: Okay.  
 10 BY MR. SPIRO:  
 11 Q. Is it your testimony here under oath -- I think I heard  
 12 you say a few minutes ago that you recall saying that you  
 13 rushed on your application.  
 14 Do you recall that?  
 15 A. I had limited time. They had wanted me to fill out the  
 16 application so I can get over to the Tesla facility.  
 17 Q. And you also had said that any mistakes on your  
 18 application were an oversight; right? They were not  
 19 intentional by you?  
 20 A. Oversight means that I knew what I was doing. So if it  
 21 was a mistake, you know, it was a mistake. It was a generally  
 22 honest mistake.  
 23 Q. Okay. And we're going to come back to this. But for now,  
 24 in addition to what we were just discussing, you also put on  
 25 your application that you were working at that family --

1 Hamilton Family Center for a year plus before you started at  
 2 Tesla.  
 3 Do you remember that?  
 4 **A.** In order for me to give you the accuracy, you would have  
 5 to put that on the screen and I would have to --  
 6 **Q.** Sure. We can put that back on the screen.  
 7 And you see you said that you started on January 13 and  
 8 you ended on February 14. Do you see that?  
 9 **A.** Yeah. That was 13 months, sir.  
 10 **Q.** Right. So you put down over a year; right?  
 11 **A.** Thirteen months, sir, yes.  
 12 **Q.** Okay. And that wasn't true; correct?  
 13 **A.** How was that not true when I worked right down the street.  
 14 You can -- definitely could have subpoenaed them and brought in  
 15 my records.  
 16 **Q.** Well, yeah, you -- the -- you were let go after several  
 17 months, and you were not eligible for re-hire; correct?  
 18 **A.** Nowhere -- that's a false statement, sir. I'm -- I hate  
 19 to say that.  
 20 **MR. ORGAN:** Objection. Relevance, Your Honor.  
 21 **THE COURT:** Let's go to the next thing.  
 22 **BY MR. SPIRO:**  
 23 **Q.** You start working and you talked about your first day.  
 24 The second day you were at Tesla, you -- you saw graffiti  
 25 sketched into the bathroom area, the N-word, and you reported

1 it to Ed Romero; correct?  
 2 **A.** I didn't report it to Ed Romero my second day. At some  
 3 point I did report it to Ed Romero. And yes, they did have it  
 4 scratched or scrawled into the metal, and they also used these  
 5 paint pens, sir.  
 6 **BY MR. SPIRO:**  
 7 **Q.** Okay. Well, I want to -- if I can draw the Court's  
 8 attention to your prior proceeding testimony on page 401.  
 9 (Pause in proceedings.)  
 10 **MR. ORGAN:** Page 401.  
 11 **THE COURT:** And where are you -- where do you want me  
 12 to look?  
 13 **MR. SPIRO:** If you can start on line 2 and then go to  
 14 the question.  
 15 **THE COURT:** Okay.  
 16 **MR. SPIRO:** "And did you report the graffiti to  
 17 anyone?"  
 18 (Pause in proceedings.)  
 19 **THE COURT:** You can do that. I'm not sure it's  
 20 inconsistent, but you can do that.  
 21 **BY MR. SPIRO:**  
 22 **Q.** Okay. And did you report the -- "QUESTION: And did you  
 23 report this graffiti to anyone?  
 24 "ANSWER: Yes, I did. Yes, I did. I reported it to my  
 25 immediate supervisor at the time which was -- I believe, it was

1 Ed Romero or maybe Tom Kawasaki. I do believe it was Ed  
 2 Romero."  
 3 Did you give that testimony?  
 4 **A.** That's what I said here, and basically that's what I just  
 5 told you, sir.  
 6 **Q.** Okay. And you had previously testified under oath that  
 7 you reported this to Ed Romero; true?  
 8 **A.** At some point yes, I did report it to Ed Romero, sir.  
 9 **Q.** Okay. And in your trial testimony, since you have it up,  
 10 your attention is directed to that N-word scratched into the  
 11 metal; right?  
 12 **A.** Where is that at? Let's see here. Can you give me the  
 13 line, please.  
 14 **Q.** Yeah. If you are at 401, about eight lines in. "I went  
 15 down there in the bathroom. The first thing I saw while I was  
 16 in the bathroom was the N-word scratched into the metal."  
 17 **A.** Yes, I see that. And it said, "There was other graffiti,  
 18 you know, and over a period of time the stuff was added to."  
 19 That's exactly what I just told you, sir.  
 20 **Q.** Right. And in -- when you were previously questioned  
 21 about the same graffiti that you saw on the stall, you said  
 22 that as soon as you got to Tesla you saw it, and you reported  
 23 it to Ed Romero; correct?  
 24 **MR. ORGAN:** Objection.  
 25 **THE COURT:** Sustained. Not only has this been asked

1 and answered, but the entire portion of that testimony doesn't  
 2 say exactly the way that you asked that question.  
 3 So Mr. Spiro why don't you --  
 4 **MR. SPIRO:** We can do another clip of that, if that's  
 5 okay with the Court. I'm referring to a different testimony.  
 6 **THE COURT:** Okay. Where is that testimony?  
 7 **BY MR. SPIRO:**  
 8 **Q.** Okay. Let me just ask you this: Did you report the  
 9 N-word of the bathroom stall that we're discussing to Ed  
 10 Romero? Yes or no?  
 11 **MR. ORGAN:** Objection. Vague and ambiguous.  
 12 **THE COURT:** I think it was asked and answered.  
 13 **MR. ORGAN:** And asked and answered.  
 14 **THE COURT:** Sustained.  
 15 **BY MR. SPIRO:**  
 16 **Q.** You know, sir, as you sit here now, that Ed Romero did not  
 17 work at Tesla when you started your second day; true?  
 18 **A.** Mr. Romero -- and again, sir, I just testified to you at  
 19 some point of time I reported it to Ed Romero. What you are  
 20 trying to do is mischaracterize my testimony.  
 21 **Q.** Same section, 401, I'm going to read the part before.  
 22 "After you start working at" --  
 23 **THE COURT:** Hang on.  
 24 **MR. SPIRO:** Sorry.  
 25 **THE COURT:** Where are you?

1 **MR. SPIRO:** Just after -- the same section I thought  
2 that was fine with Your Honor. 401, line 2, "After you start  
3 working at Tesla, do you see any graffiti in the factory?"

4 **THE COURT:** Go ahead.

5 **BY MR. SPIRO:**

6 **Q.** "QUESTION: After you start working at Tesla, do you see  
7 any graffiti in the factory?"

8 "Yes, sir.

9 "And where do you see the graffiti?"

10 "It was my second day of work, and I had to use the  
11 restroom, so I went down the stairs. And that was next to the  
12 elevator, and I believe it was conveyance. I went down there,  
13 and I was in the bathroom, and the first thing I saw while I  
14 was in the bathroom was the N-word scratched into the metal.  
15 There was other graffiti, you know, and over a period of time  
16 it was stuff that was added to."

17 And then it's: "After that point in time, did you report  
18 this graffiti to anybody?"

19 "Yes, I did. Yes, I did. I reported it to my immediate  
20 supervisor at that time which was -- I believe it was Ed Romero  
21 or maybe Tom Kawasaki. I do believe it was Ed Romero."

22 That was your sworn testimony; right?

23 **A.** That's what I just said, sir.

24 **Q.** Okay. And when you filed your lawsuit in this case, there  
25 was nothing about graffiti in it; correct?

1 **A.** Um, I don't know the parameters of what they filed. I  
2 know at some point in time Ms. Antonucci had deposed me. These  
3 are the questions that Ms. Antonucci had asked me, and these  
4 are the questions I had answered. I answered the questions  
5 with me and you here. You asking me the questions, sir. And I  
6 apologize again. I'm really, really sorry, but these are the  
7 things that I'm telling you, and it's consistent, and you are  
8 proving that, what I have been saying.

9 **Q.** Okay. So you do -- let me just ask you this. Your second  
10 day at Tesla, did you report the graffiti?

11 **THE COURT:** It's been asked and answered, Mr. Spiro,  
12 please move on.

13 **MR. SPIRO:** I want to --

14 **THE COURT:** Mr. Spiro --

15 **MR. SPIRO:** Sure.

16 **THE COURT:** -- please move on.

17 **BY MR. SPIRO:**

18 **Q.** The Timbreza incident that happens next. Okay. You go  
19 into the elevator. You hear him speaking in these words, and  
20 you recorded it; correct?

21 **A.** Yes, I did, sir.

22 **Q.** Okay. When you previously testified under oath in this  
23 case -- and I'm going to go to Trial Testimony 406 --

24 **MR. ORGAN:** What line?

25 **MR. SPIRO:** 5 to 15.

1 (Pause in proceedings.)

2 **THE COURT:** Okay. What do you want to do with it?

3 **MR. SPIRO:** He previously testified in this case he  
4 did not say he recorded it. He said he was trying to remember  
5 it when he Googled it.

6 **THE COURT:** Okay. Go ahead.

7 **BY MR. SPIRO:**

8 **Q.** When you were previously asked in this case "What else did  
9 he say in Spanish, if you recall" --

10 **A.** Thank you, sir. Appreciate that. What line are we on,  
11 sir?

12 **Q.** 406, line 5.

13 **A.** 406, line 5. Okay. I'm here.

14 **Q.** "What else did he say in Spanish, if you recall," is the  
15 question.

16 **ANSWER:** What -- well, what end up happening is after  
17 that went for a while, I got kind of curious because they would  
18 laugh every time, you know. They would get me to say 'yeah,  
19 yeah, yeah,' and they would bust up laughing and walk out.

20 "And then after that, I got kind of curious. So you know,  
21 I kind of like tried to really remember what they were saying,  
22 and then from there I took Google and I translated it through  
23 Google, and then that's when I found out he was calling me a  
24 porch monkey."

25 Do you see that?

1 **A.** Yes, sir, I do. I do see that.

2 **Q.** Okay. So in your prior testimony, you did not say that  
3 you recorded -- in this prior testimony, you did not say that  
4 you recorded Mr. Timbreza; true?

5 **A.** In this testimony I did not say it, but that's what I did.  
6 I'm sorry if --

7 **THE COURT:** It's okay. You answered his question.

8 **BY MR. SPIRO:**

9 **Q.** And you have -- you have used your cell phone to record  
10 things that you've witnessed in other circumstances; true?

11 **MR. ORGAN:** Objection. Vague and ambiguous,  
12 Your Honor.

13 **THE COURT:** Overruled.

14 **MR. SPIRO:** Thank you.

15 **THE COURT:** At Tesla.

16 **MR. SPIRO:** Well, I'm asking, have you -- when you've  
17 seen something that was wrong, have you used your cell phone to  
18 record it.

19 **THE COURT:** So let's keep it to Tesla and ask that --  
20 that would be relevant or prior to the time that he left Tesla.

21 **MR. SPIRO:** Sure.

22 **BY MR. SPIRO:**

23 **Q.** Prior to the time you left Tesla, had you taken out your  
24 phone when you'd seen something that was wrong and recorded it  
25 before?

1 **A.** If we're talking about the pickaninny, yes, I took my  
2 phone, and I took a photo; that's a form of recording.  
3 **Q.** Right. But I'm talking -- I mean, you've posted on  
4 YouTube recordings that you've made where you've recorded  
5 people doing things you thought were wrong, and you posted them  
6 on the internet; true?  
7 **MR. ORGAN:** Objection. That's beyond the scope.  
8 **THE COURT:** Prior to 2017, 2016?  
9 **MR. SPIRO:** Yes, yes.  
10 **MR. ORGAN:** It's still beyond scope, Your Honor.  
11 **THE COURT:** You can answer.  
12 **THE WITNESS:** I have recorded things before, yes.  
13 **BY MR. SPIRO:**  
14 **Q.** Right. And posted them on the internet to make sure that  
15 you brought attention onto the problem that you saw; correct?  
16 **A.** I -- I'm not really active on social media like that. You  
17 know, start posting a lot of things. You know, I'm still a  
18 little bit of a dinosaur at the same time.  
19 **Q.** Sure. But you did post certain things that you saw that  
20 you thought were wrong. You would record them, and you would  
21 post them on the internet for other people to see; true? I'm  
22 not asking generally, are you active or not? I'm just saying,  
23 you have done that act before. Record something that you  
24 thought was wrong. Put it on the internet?  
25 **A.** That's a -- that has to be a false statement. No. I

1 haven't recorded something that I saw that was wrong and posted  
2 on the internet. That's a false statement, sir.  
3 **Q.** You didn't walk into your bank at Wells Fargo and go up to  
4 the counter and record and say, "I want to see your manager. I  
5 want to see your manager" and put that on the internet? You  
6 didn't do that?  
7 **MR. ORGAN:** Objection. Relevance.  
8 **THE WITNESS:** Do you have the recording?  
9 **THE COURT:** I'm sorry. I'm sorry.  
10 **MR. ORGAN:** 403.  
11 **THE COURT:** I should have stopped this before. Move  
12 on to something, Mr. Spiro, that is related to this case  
13 please.  
14 **MR. SPIRO:** Again, I'm --  
15 **THE COURT:** Please.  
16 **MR. SPIRO:** We'll talk about it.  
17 **BY MR. SPIRO:**  
18 **Q.** When you heard the recording, were you upset from the  
19 Timbreza incident?  
20 **A.** Do you mean when I translated it, was I upset?  
21 **Q.** Yes.  
22 **A.** Yes, I was.  
23 **Q.** Okay. And we would agree, I think, that the recording is  
24 the best evidence for whatever was said in the elevator better  
25 than your memory eight years later; correct?

1 **MR. ORGAN:** Objection. Argumentative.  
2 **THE COURT:** Overruled.  
3 **THE WITNESS:** I would agree. If I still had the  
4 recording, yes, I would agree that would be better.  
5 **BY MR. SPIRO:**  
6 **Q.** You don't have the recording?  
7 **A.** I don't even own that phone anymore, sir.  
8 **Q.** Well, let me ask it maybe an easier way.  
9 Did you tell Mr. Kawasaki that you had a recording?  
10 **A.** I don't recall.  
11 **Q.** When you hear the recording and you find out that this guy  
12 is calling you these names, you confronted him; correct?  
13 **A.** Not immediately. It was after I had found out what they  
14 were saying, yes, I did confront him.  
15 **Q.** Understandably so.  
16 You did not first go to Mr. Kawasaki. You went to him and  
17 confronted him?  
18 **A.** Yes. I confronted him. Yes, I did.  
19 **Q.** And in the middle of this confrontation, you called  
20 Mr. Kawasaki on his cell phone; right?  
21 **A.** I don't know if it was his phone. I don't know if it was  
22 Tesla's phone, but yes. A call was made, sir.  
23 **Q.** And he showed up right on the scene; right? And you heard  
24 him testify he doesn't remember the specific N-word being said;  
25 true?

1 **A.** I heard Mr. Kawasaki testify that he had interviewed the  
2 people in the surrounding areas and had confirmed that  
3 something was said. Let's say that.  
4 **Q.** No dispute that something was said. My question is a  
5 little different. Well, let me ask it a different way.  
6 On the recording that you don't have anymore, on that  
7 recording, can we agree the N-word was not said?  
8 **A.** I can agree that he definitely called me a porch monkey.  
9 I don't remember everything that was recorded on the phone.  
10 Every few years I update my phone. I'm sorry. I didn't keep  
11 it. I wish I would have in hindsight, but I gave that phone  
12 back to AT&T and got a new phone. I'm sorry.  
13 **Q.** Yeah. It's okay. You don't have to apologize, sir, to  
14 your answers. I just want truthful answers, and we'll get  
15 through this.  
16 The -- my point is a little different. My point is, just  
17 given that you had to go to Google Translate to figure out what  
18 was being said in the recording, fair to say that it wasn't an  
19 English word, the N-word that you would have recognized, on  
20 that recording; isn't that fair to say?  
21 **A.** I don't -- I don't understand the question.  
22 **Q.** Well, my question is this: Whatever was on that recording  
23 required you, in your mind, to take the act to go to Google  
24 Translate to see what the words meant.  
25 So what I'm asking you is, doesn't that make it a fact

1 that it wouldn't have been an English word that you needed to  
 2 translate. The N-word would not have needed to be translated;  
 3 fair?  
 4 **A.** I do believe I said I translated the porch monkey. I  
 5 never said I translated the N-word. So for you to say that,  
 6 sir, is a mischaracterization of what I said.  
 7 **Q.** I think we may be talking past each other. I'm not saying  
 8 you're -- I'm not saying that. What I'm -- I'm just asking one  
 9 simple question which is: Given that you had to use Google  
 10 Translate, doesn't that mean that that recording did not have  
 11 English to English N-word on it, or you wouldn't have had to  
 12 use Google Translate. That's all I'm asking.  
 13 **A.** And again, you can keep asking me the same question, sir,  
 14 and you're going to get the same answer.  
 15 I recorded -- I don't -- if I had the phone still, I could  
 16 tell you everything, every sound that was recorded on it, but I  
 17 apologize again. I gave the phone back to AT&T, sir.  
 18 **Q.** Okay. We can agree that whatever the Spanish word was  
 19 that you have testified about, was wrong; true? Whatever the  
 20 word was.  
 21 **A.** It was humiliating, yes. I'll agree with that.  
 22 **Q.** Okay. And you didn't see Mr. Timbreza after that  
 23 situation was dealt with; correct?  
 24 **A.** I can say he didn't work on the elevators anymore. That's  
 25 what -- that's what I can say to you.

1 **Q.** Okay. And you said that you were satisfied with the  
 2 response; right?  
 3 **A.** I was satisfied the way Mr. Kawasaki handled the response,  
 4 yes. I definitely was.  
 5 **Q.** Okay. And -- well, you don't know what all was going on  
 6 behind the scenes between who -- between Ed Romero and  
 7 Mr. Kawasaki did what when you worked around; right?  
 8 **A.** No. I wasn't privy. They never tagged me into an e-mail.  
 9 They never interviewed me, came back and said anything, yes, I  
 10 will agree with that.  
 11 **Q.** Okay. So ultimately, Mr. Timbreza also -- you did not  
 12 include him in your lawsuit; correct?  
 13 **MR. ORGAN:** Objection. Relevance, Your Honor.  
 14 **THE COURT:** You can answer the question.  
 15 When you saying included in the lawsuit, are you saying  
 16 that he's not a party?  
 17 **MR. SPIRO:** No, no. The lawsuit's 30-plus pages,  
 18 200 paragraphs, various things and accusations --  
 19 **THE COURT:** Then that is irrelevant and --  
 20 **MR. ORGAN:** Move to strike.  
 21 **THE COURT:** -- that'll be stricken.  
 22 **BY MR. SPIRO:**  
 23 **Q.** When you were asked for initial disclosures in this case,  
 24 of who --  
 25 **THE COURT:** We're not going through discovery. We're

1 not doing what -- what lawyers might have done. We're doing  
 2 what happened to Mr. Diaz or didn't happen to Mr. Diaz.  
 3 **BY MR. SPIRO:**  
 4 **Q.** So let me ask this question --  
 5 **THE COURT:** And get to -- we're going to break pretty  
 6 soon, so come to a place that you're really excited about  
 7 finishing for the day.  
 8 **MR. SPIRO:** I -- it doesn't matter where we end for  
 9 the day, but I would ask for five more minutes to just finish  
 10 this little brief part.  
 11 **THE COURT:** You have got about two minutes.  
 12 **BY MR. SPIRO:**  
 13 **Q.** Okay. In your first deposition in this case. Okay. So  
 14 forget the lawsuit. Forget legal responses.  
 15 When you were testifying under oath the first time in this  
 16 case and you were asked about what happened at Tesla, you never  
 17 mentioned the Timbreza incident; true?  
 18 **A.** That, again, is a mischaracterization of my testimony,  
 19 sir, because if you go through my -- to my -- through my  
 20 deposition, his name is mentioned in the deposition, sir.  
 21 **Q.** In your first deposition testimony?  
 22 **THE COURT:** How is he going to remember this,  
 23 Mr. Spiro? Come on.  
 24 **MR. SPIRO:** It would be fair --  
 25 **THE COURT:** Come on.

1 **MR. SPIRO:** In fairness --  
 2 **THE COURT:** I think we probably ought to stop for the  
 3 day, and then we'll pick up tomorrow morning with the resumed  
 4 cross-examination of Mr. Diaz.  
 5 So, ladies and gentlemen, please remember the admonitions  
 6 that I've given you. The case is moving along at a good clip,  
 7 and we are -- we're on target.  
 8 So, as long as everybody comes in and -- as promptly as  
 9 you did the last two days, it will be great.  
 10 Meanwhile, please don't communicate about the case. Don't  
 11 do any research, and we'll pick things up tomorrow morning.  
 12 Thank you.  
 13 (Proceedings were heard outside the presence of the jury:)  
 14 **THE COURT:** You can step down, Mr. Diaz.  
 15 **THE WITNESS:** Thank you, sir. I appreciate it.  
 16 **THE COURT:** Please be seated, everybody.  
 17 (Pause in proceedings.)  
 18 **THE COURT:** So, Mr. Spiro, you have that look on your  
 19 face again. So -- so please express what you want to express,  
 20 and then we'll deal with it.  
 21 **MR. SPIRO:** Yeah. So a few things. One is -- and  
 22 again, I am surprised but I will always respect the Court's  
 23 ruling that I can't ask a witness why they didn't say something  
 24 earlier or why in a lawsuit they didn't include certain  
 25 information.

1 I can only say that based on my experience, that's an  
2 appropriate question or I wouldn't have asked it. So that's  
3 one.

4 **THE COURT:** Let's start there. To ask somebody  
5 whether what they said in a deposition that was seven years  
6 before when the deposition is being taken by the defense  
7 lawyer, I have no idea what's in it. He's going to have no  
8 idea what's in it. It is an unfair question.

9 What's in the complaint? That's drafted by a lawyer.  
10 He's not going to be the person to be answering those  
11 questions, but it does prejudice -- it potentially prejudices  
12 him in front of the jury when you're asking those questions and  
13 he can't recall it.

14 So that's why I stopped you. With respect to the  
15 deposition that you were trying to use -- and this has  
16 happened, I think, maybe three times before in the last few  
17 days -- you have a particular perspective on the case and, like  
18 many lawyers, when you find something that you think is a  
19 "gotcha," you drill into it.

20 The thing that you were trying to get him to -- to admit  
21 wasn't -- it could have said what you thought it did, and it  
22 could have said at another time. It was ambiguous, and your  
23 continuing to drill into it was inappropriate which is why I  
24 stopped it.

25 **MR. SPIRO:** Yeah. So if I can just take those in

1 turns because I don't want to jump around too much.

2 Again, and I can try to find a case that says this. If  
3 you file a lawsuit, it's fair game of what you include or do  
4 not include in your lawsuit. If you say "I was struck  
5 three times," I can say, "Isn't it true that when you filed  
6 your lawsuit you said you were struck three times, and now  
7 you're saying four times?" That's a fair question.

8 In my judgment, it's a fair question and, I believe, is  
9 allowed in every plaintiff's case. If I'm wrong, I will stand  
10 corrected but --

11 **THE COURT:** Well, if you had brought the complaint and  
12 put it down in front of him, you don't want to do that. This  
13 case is about damages. We had the liability case. You're  
14 attempting to re-try liability, and I don't blame you for the  
15 way that you're going after this, but that's what those things  
16 go to, and what we are interested in right now is damages.

17 **MR. SPIRO:** So -- and I thought -- candidly, I  
18 actually think that that's really why Your Honor and I may be  
19 talking past each other because I know that that -- the way you  
20 say that is your -- and it's your courtroom and it's your view  
21 on this.

22 From my perspective, if one or two incidents happened, the  
23 jury is allowed to determine one or two incidents happened.  
24 They don't have to interpret. And we both agree on that --

25 **THE COURT:** Yeah.

1 **MR. SPIRO:** -- I can say.

2 Okay. So if that's the case, then I can cross-examine him  
3 on those other eight incidents just like I would in any trial.  
4 And if that's true, then I can test his credibility. And if  
5 that's true, I can ask him questions in terms of the part of  
6 the testimony that you thought was not as inconsistent, the  
7 question before the Court -- and, you know, maybe I didn't get  
8 there fast enough -- cut me off. There is also a deposition  
9 clip where he makes it clear that he reported it to Ed Romero.

10 The second point is which is both the complaint and  
11 interrogatory responses, again, all I can tell the Court is  
12 based on my experience and my view of the law, I can ask a  
13 witness, "You didn't include in your complaint." I don't have  
14 to show him the complaint. I can say, "As you sit here today,  
15 isn't it a fact you didn't put that in your lawsuit?"

16 If he then says to me, "I don't know," I'm stuck with it.

17 But I'm allowed to ask -- in my view, I'm allowed to ask  
18 that question, and I'm allowed to ask, "Isn't it true that when  
19 you were served interrogatories in this case and you were asked  
20 X and you said -- and you and your lawyers said Y."

21 I'm allowed to ask that, too. So as long as this is a  
22 regular trial as to the issues that are still contested, I  
23 think I'm allowed to do those things. So that's why I did  
24 them. If I didn't think I was allowed, I wouldn't have done  
25 them, frankly.

1 **THE COURT:** Well, I hope that that's true. And your  
2 perspective on things may be different than mine, but I'm sure  
3 that you're trying to meet your professional obligations.

4 **MR. SPIRO:** Of course. So you are saying that  
5 tomorrow if I put the complaint up there, and I say, "Isn't it  
6 true that there was no complaint about Judy Timbreza in your  
7 lawsuit?" Then that's a fair question? It's just --

8 **THE COURT:** Yes.

9 **MR. SPIRO:** Okay.

10 **THE COURT:** You can do that and --

11 **MR. SPIRO:** Okay.

12 **THE COURT:** -- and you will have to -- I don't know  
13 how long it will take him to read the complaint, and it's  
14 not -- you have to figure out how -- what the best way is of  
15 cross-examining him. And you're an accomplished lawyer, so I'm  
16 sure you're going to do it just the way that makes the most  
17 sense to you.

18 To me, it is the factual issues of what has happened in  
19 this case that's interesting and not some of the stuff that  
20 you're doing. But that's your -- it's your call, not my call.

21 **MR. SPIRO:** And all I would ask is for the same, you  
22 know, freedoms that I would get in cross-examining any case.

23 And I think that at the end of the cross-examination  
24 hopefully the Court will view the case differently than it  
25 views it now, and hopefully the Court will think that I got to

1 the correct issues. That's all I can say.

2 The only other issue that I think came up is I'm obviously  
3 not going to elicit anything that I'm not allowed to elicit  
4 based on motions in limine. Okay. Of course not.

5 The exhibit was redacted, and the Court must have noticed  
6 I was edging completely away from that and, in fact, stopped  
7 the witness from going through any questions on the  
8 application.

9 All I simply said, which he's already said under oath, is  
10 you put things on the application that were incorrect. You  
11 have admitted that, and your answer to that is you were rushing  
12 and that it was an oversight. That was your testimony. And  
13 that's that.

14 **THE COURT:** Well, if that had been that, then you  
15 would have moved on. That wasn't what you did, Mr. Spiro, I  
16 don't think. Maybe I miss- -- maybe the transcript will show  
17 that I imagined things, but --

18 **MR. SPIRO:** No, no, I think what happened was there  
19 was an objection regarding something I was not going to do.  
20 The Court didn't know where I was going, and so the Court told  
21 me to move on. That is exactly what I was going to do, and  
22 that's what I was halfway through doing. So that's all I'm  
23 going to ask him on that tomorrow.

24 **THE COURT:** I think you already got that -- you got  
25 that the first words out of his mouth.

1 **MR. SPIRO:** I don't think when the Court reviews -- if  
2 the Court does review the transcript, you will see that I did,  
3 so --

4 **THE COURT:** I will.

5 **MR. SPIRO:** Okay. If it's in the transcript, I won't  
6 go back. If it is -- if it is not in the transcript and I take  
7 it the Court isn't precluding me from asking those quick  
8 questions, and if I think it's worthwhile, the Court doesn't  
9 have a problem with me asking those questions.

10 **THE COURT:** Well, I would view it the reverse way. If  
11 you want to ask me tomorrow morning after I've reviewed the  
12 transcript of whether you can do that, I'm happy to answer that  
13 question again. But as of now, don't go back there.

14 **MR. SPIRO:** Okay. Well, I'm definitely -- I can just  
15 tell the Court I will -- I didn't get through that part, and I  
16 am going to ask to do that tomorrow.

17 **THE COURT:** Okay.

18 **MR. SPIRO:** And --

19 **MR. ORGAN:** Your Honor, if we can have the citations  
20 because my concern when I objected was that he was asking that  
21 the mistake was made relative to Mr. Diaz's criminal history  
22 which is the blacked-out part.

23 **THE COURT:** So --

24 **MR. ORGAN:** If the testimony was about that, it was a  
25 completely improper question. Even if it doesn't reference

1 the -- the -- the fact of the prior conviction, the fact that  
2 he is asking a question about an improper topic and an excluded  
3 topic from the case is completely improper.

4 **THE COURT:** Was there something else? You were saying  
5 that there was a mistake with respect to Hamilton. Was that  
6 the -- was that the mistake you were referring to?

7 **MR. SPIRO:** We also discussed that. There were  
8 several mistakes on it. But the reality is I was never  
9 obviously going to say, which was why it wasn't, said that  
10 you -- you can't use these things. They're using these things.  
11 They're using the motion in limine on his prior criminal  
12 record. They're using the fact that we're walled off from  
13 discussing the son to elicit different testimony where they're  
14 prejudicing the defense by blocking us from things.

15 If a person lies on an application to a company, and they  
16 lie about a topic, and that topic is taboo, and they've  
17 admitted to lying about something on their application, they  
18 don't get to protect themselves by saying, "Well, one of the  
19 things I lied about on the application was." The second  
20 thing --

21 **THE COURT:** You are actually going in a different -- I  
22 know that you're interested in something else. You're  
23 interested in credibility, which is an appropriate issue.

24 **MR. SPIRO:** Correct.

25 **THE COURT:** And -- but the -- the thing that he has

1 already admitted to with respect -- which I think he has  
2 already admitted to with respect to the application, that's  
3 all -- that's all you need. So anyway, we'll -- I will look at  
4 this.

5 **MR. SPIRO:** Thank you, Your Honor.

6 **THE COURT:** And we can talk about it at 8:00.

7 **MR. SPIRO:** And the last thing, and I say this most  
8 respectfully --

9 **THE COURT:** I cringe whenever somebody says something  
10 like that.

11 **MR. SPIRO:** Because I feel is it necessary for me to  
12 say it, I mean, which is: I understand that the Court has  
13 lived through this trial, and I understand the Court's pretrial  
14 rulings, and I understand we're here to decide liability. I  
15 really do understand all of that and it's -- frustration of it  
16 is probably not lost on you that I might be feeling that.

17 But at the same time what can happen in a case is because  
18 everyone has seen it before and because it's a solo issue  
19 that -- that a person doesn't get a proper opportunity to  
20 cross-examine.

21 And so all I'm saying is I'm going to question him  
22 differently than he was questioned the last time, and all I'm  
23 asking for is, you know, a fair shot to do that and -- and I  
24 think if the Court would give me a little bit of leeway to --  
25 because I don't hear anybody telling me that the questions per

1 se are impermissible. I think the Court will see where I'm  
2 going by Question 4. And what happened a few times is I was on  
3 Question 3. So I just say that, and I have nothing further.  
4 Thank you, Judge.

5 **THE COURT:** Okay. I will just say I think I'm giving  
6 you broad latitude, and I've allowed some questions that I  
7 normally wouldn't. But I have cut you off, and I recognize  
8 that as well because I think you've gone too far. But  
9 that's -- I'll look at the transcript --

10 **MR. SPIRO:** Thank you, sir.

11 **THE COURT:** -- and then we can deal with the rest at  
12 8:00.

13 **MR. SPIRO:** Thank you.

14 **MR. ORGAN:** Your Honor, just to make the record  
15 complete. First of all, the convictions were excluded, and  
16 then Tesla stipulated that they would not -- they would not  
17 address those things.

18 The -- with respect to Judy Timbreza and the reference to  
19 him, their attorneys asked the questions the first day of  
20 deposition. In the second day of deposition, there are  
21 13 references to Judy Timbreza.

22 So it's a lawyer trick. And, in fact, most of what  
23 they're doing here are lawyer tricks that are improper and  
24 contrary to their prior stipulations. That's the concern.  
25 Thank you, Your Honor.

1 **MR. SPIRO:** I think I have to respond to that very  
2 quickly. There is a -- he has asked dozens and dozens of  
3 questions in his first day of deposition.

4 **THE COURT:** You know, I actually don't want to have to  
5 read the first day of his deposition eight years ago. If you  
6 want to spend the time to go through all of those questions  
7 with him and then have Mr. Organ point out the 13 times that he  
8 does it in the second, help yourself. But I just don't -- I  
9 just don't see it as something useful.

10 **MR. SPIRO:** All right. Thank you.

11 **THE COURT:** All right.

12 **MR. ORGAN:** Thank you, Your Honor.

13 **THE COURT:** Thank you all. See you at 8:00.

14 **MR. ORGAN:** See you at 3:00, Your Honor.

15 **THE COURT:** Oh, see you at 3:00. That's right.

16 (Recess taken at 1:44 p.m.)

17 (Proceedings resumed at 3:06 p.m.)

18 (Proceedings were heard outside the presence of the jury:)

19 **THE COURT:** So we are back -- we are back on the  
20 record and having a discussion about the draft final  
21 instructions, which I filed last night. They are very similar  
22 to the ones that -- the preliminary instructions.

23 And so I am interested in your comments. I have seen --  
24 and we will get to the two additional instructions that have  
25 been requested by the Plaintiffs -- but first, let me start

1 with the Plaintiffs.

2 Are there other instructions that you think are  
3 appropriate, ones we should take out, edits?

4 I don't know, Mr. Rubin, are you the guru here?

5 **MR. RUBIN:** I think I am unless someone tells me  
6 otherwise, Your Honor.

7 **THE COURT:** Okay.

8 **MR. RUBIN:** We only have two typos and one edit.  
9 Nothing substantive.

10 **THE COURT:** Excellent.

11 **MR. RUBIN:** No instructions to add. None to delete.

12 **THE COURT:** Okay. So why don't you just give it to us  
13 now. What are the typos and the edit?

14 **MR. RUBIN:** Instruction number 15, we would like to  
15 add the name of our damages expert, Chip Mahla.

16 **THE COURT:** Okay.

17 **MR. RUBIN:** Instruction 19 at line 6, since you are  
18 going to be giving the written instructions to the jury --

19 **THE COURT:** I'm sorry. Which number again?

20 **MR. RUBIN:** Nineteen --

21 **THE COURT:** Okay.

22 **MR. RUBIN:** -- at about line 6, there is an extra  
23 period and an end parentheses that should be deleted.

24 (Pause in proceedings.)

25 **THE COURT:** On number 19 -- page 19 probably?

1 **MR. RUBIN:** Number 19.

2 **MR. ALEXANDER:** Excuse me. On number 15, it has Amy  
3 Oppenheimer. On my version it doesn't have a reference to  
4 Dr. Reading.

5 **MR. RUBIN:** Oh, I'm sorry. We should put Dr. Reading  
6 as well. Chip Mahla, Dr. Reading, and Amy Oppenheimer. That's  
7 right.

8 **MR. ALEXANDER:** Thank you.

9 **MR. POSNER:** Can I ask a clarifying question, Your  
10 Honor -- this is Mr. Posner -- just to make sure we are all  
11 talking about the same document.

12 **THE COURT:** That's a good idea.

13 **MR. POSNER:** Are we talking about Docket 436? Is that  
14 what we are all working from?

15 **THE COURT:** Because my copy doesn't include that --  
16 yes, we are.

17 **MR. POSNER:** Thank you.

18 **THE COURT:** Okay. Again, I was confused because I  
19 didn't see the extra periods and --

20 **MR. RUBIN:** I actually don't -- that's interesting.  
21 Well, let me move to the next one and I will double back and  
22 find that one.

23 **THE COURT:** Okay.

24 **MS. NUNLEY:** Your Honor, the period and end  
25 parentheses is the second paragraph of instruction number 29 on



1 page 30. It's like about four lines down, second paragraph.  
 2 **THE COURT:** So instruction number 29 --  
 3 **MR. RUBIN:** There it is. Sorry, it's 29 rather than  
 4 19.  
 5 **THE COURT:** All right. I see.  
 6 **MR. RUBIN:** And then on instruction number 30, the  
 7 next one, the end of the first paragraph, I think you meant for  
 8 there to be a -- line 4, a comma after "involves" and "accept"  
 9 as part of that same sentence rather than a period and a new  
 10 sentence.  
 11 **THE COURT:** Yeah.  
 12 **MR. RUBIN:** That's it.  
 13 **THE COURT:** Okay. All right. So, on -- either  
 14 Mr. Griffin or Mr. Posner, what -- with just the things that  
 15 were filed last night, do you have any comments, one way or the  
 16 other on them?  
 17 **MR. POSNER:** Yes, this is Mr. Posner, Your Honor.  
 18 Thank you for preparing these.  
 19 First of all, I would like to incorporate and remind about  
 20 the objections that we asserted most recently in docket 425.  
 21 We maintain those objections.  
 22 The only point I want -- I would like to emphasize again  
 23 from them is our objection to what is now instruction 24, which  
 24 was previously instruction 9.  
 25 This is the one -- it's on page 25 -- liability for

1 What 24 says, that we think is even more problematic, is  
 2 that it's been established that Tesla's conduct that harmed  
 3 Mr. Diaz was malicious, oppressive or in reckless disregard of  
 4 Mr. Diaz's rights.  
 5 Now, I believe I made the argument at the pretrial  
 6 conference that that language is problematic because the jury  
 7 here is basically taking a fresh look at how harmful the  
 8 conduct was. Was it harmful for compensatory damages?  
 9 And so we made the point that we are not aware of any case  
 10 that has instructed that the predicate for punitives is decided  
 11 when a jury is also deciding compensatory damages, but I think  
 12 you can see really the problem with this when you compare that  
 13 language, that I just read -- the first sentence from 24 -- (as  
 14 read:) "It's been established that Tesla's conduct that harmed  
 15 Mr. Diaz was malicious" -- and then you go to 27, which is the  
 16 punitive damages instruction, and the -- the beginning of the  
 17 second paragraph in 27 says "you may award" -- I'm paraphrasing  
 18 a bit -- "you may award punitive damages for Tesla's conduct  
 19 that harmed Mr. Diaz, which was malicious."  
 20 And so two instructions earlier the jury is being  
 21 instructed that the conduct that harmed him was malicious, just  
 22 sort of in a vacuum, untethered to any particular conduct.  
 23 Two instructions later it says "you may award punitives  
 24 for conduct that harmed Mr. Diaz, which was malicious." And I  
 25 think it is at a minimum confusing. The jury might be

1 malicious, oppressive or reckless conduct. And, you know, it  
 2 continues to strike us, Your Honor, that this instruction is --  
 3 you know, even in light of our objection to instructing the  
 4 jury about the predicate to punitive damages -- which we have  
 5 certainly made and Your Honor has heard -- even, you know,  
 6 notwithstanding that, this one is particularly problematic  
 7 because it is really entirely duplicative in substance of other  
 8 instructions.  
 9 Certainly on instruction 24, the second sentence beginning  
 10 with "conduct" is entirely duplicative of the corresponding  
 11 language in instruction number 27 from page 28 other than  
 12 changing the references from Plaintiff to Mr. Diaz and  
 13 Defendant to Tesla.  
 14 And so this is really our most fundamental objection to  
 15 these instructions; and to repeat them twice, we feel, you  
 16 know, is doubling down on this error.  
 17 I don't believe anyone proposed an instruction that  
 18 corresponds with what is now number 24. And so we object to  
 19 it -- you know, because not only for the reasons we already  
 20 made but also it remains duplicative and to emphasize this  
 21 issue, we feel is particularly prejudicial and unnecessary.  
 22 And the first sentence of 24 -- so the instructions  
 23 elsewhere say in more than one place that Mr. Diaz is entitled  
 24 to punitive damages. I believe that's in an early instruction  
 25 and it's also in instruction 27.

1 wondering, you know, what conduct harmed him that was  
 2 malicious? What conduct harmed him that was not? And what are  
 3 we tasked to do here?  
 4 And so, I think the -- the request that we would make,  
 5 subject to our other objections, and really, I think, the way  
 6 to clean this up even, you know, given Your Honor's clear  
 7 understanding that the basis for punitive damage has been  
 8 entitled -- excuse me, has been established is to cut what is  
 9 now instruction 24, which is either entirely unnecessary and  
 10 duplicative and/or confusing to the extent it's -- it's, you  
 11 know, duplicative and somewhat different from the way it's  
 12 phrased in 27, which more accurately states what the jury's  
 13 task actually should be on the retrial. So I wanted to make  
 14 that point.  
 15 **THE COURT:** Okay. And, you know, I think you have  
 16 made that point. I understand it before -- and I understand  
 17 that the structure of the instructions on the -- what the prior  
 18 jury found includes what the law was that they had to look at  
 19 in order to make that finding. That's the reason why I have  
 20 included that language in 24.  
 21 And with respect to 27, that is the -- that's the  
 22 operative instruction for what they are going to be considering  
 23 with respect to punitive damages. And, of course, it includes,  
 24 you know, the final paragraph, which leads -- which really  
 25 tells them okay, this is what you -- this is what you need to

1 be looking at in order to -- to make their determinations.  
2 So I appreciate the -- the objection but I think I will  
3 leave it as it is.

4 **MR. POSNER:** Thank you, Your Honor.

5 **THE COURT:** So then there are -- there were two other  
6 instructions. One -- the first one was the direct and staffing  
7 agency employees.

8 And let me first ask whoever drafted this, is this  
9 something that you are requesting be given now? Is it  
10 something that you are requesting be put into these  
11 instructions? And then I would like to hear from Mr. Posner or  
12 Mr. Griffin on it.

13 **MR. RUBIN:** Michael Rubin, Your Honor. I think that  
14 there is no need to give it now, and we think it probably falls  
15 best after your new number 17, liability of corporation, scope  
16 of authority not an issue.

17 **THE COURT:** Mr. Posner.

18 **MR. POSNER:** All right. Well, we object to this  
19 instruction. We think it's unnecessary and prejudicial; and I  
20 actually think -- you know, we have been -- we just got this  
21 today and have been struggling a little bit about why they have  
22 been asking for this.

23 You know, Your Honor understands that we are not -- Tesla  
24 is not intending to raise the same defense that it raised and  
25 the same position it took in the first trial about, you know,

1 essentially passing off liability to or trying to avoid  
2 liability on the grounds that the conduct was committed by  
3 staffers or non-employees of Tesla.

4 And I think the implication of this instruction and the  
5 reason why they are trying to bring it in is because they are  
6 suggesting that we are doing that, and essentially they want an  
7 anchor in the closing to be able to set up a strawman that  
8 we've made that argument but knock it down.

9 And there is no basis. We think that would be improper  
10 given the positions that we have taken and how we are pursuing  
11 the second trial.

12 You know, they raised a little bit of testimony and said:  
13 "Oh, we need this instruction because of some things that have  
14 come in."

15 I think when Your Honor looks at the record so far in this  
16 case, if any party has tried to draw out a distinction between  
17 employees and contractors, it really has been the Plaintiff.  
18 And, you know, we were looking back at some testimony -- I  
19 don't think we have had a chance to fully canvass everything --  
20 but, for example, I can refer Your Honor to the examination of  
21 Mr. Jackson yesterday, the direct examination.

22 Mr. Alexander asked what -- Your Honor overruled a leading  
23 objection but really, you know, was a leading question. He  
24 asked (as read:) "You were not able to interview the  
25 eyewitness, Rothaj Foster?"

1 And the answer was -- this is at page 389 of the  
2 transcript from yesterday. Mr. Alexander asked (as read:) "You  
3 were not able to interview the witness, Mr. Foster?"

4 The answer (as read:) "Yes, sir, I was not. I don't  
5 believe I was able to interview Mr. Foster. I think I started  
6 the interview with Mr. Foster and that's when I found out that  
7 he wasn't under the nextSource umbrella."

8 The implication that he couldn't have done that because it  
9 just wasn't within the realm of what he could do.

10 And we addressed that in the cross-examination to show,  
11 for various reasons, that that was not true; but we believe  
12 that that was really the Plaintiff drawing that distinction.

13 And then it struck me again today, you know, after reading  
14 this instruction, that in Mr. Organ's direct examination of  
15 Mr. Diaz, he -- he repeatedly said using, you know, what  
16 Your Honor later referred to as maybe an overly dramatic tone,  
17 you know, "Mr. Kawasaki might have done a decent investigation  
18 but Tesla did not. Tesla did not."

19 He said that more than once. And so it occurs to us that  
20 the Plaintiffs might be trying to draw out this distinction.  
21 They want Tesla to be responsible for the bad conduct of the  
22 contractors, but they don't want Tesla to enjoy the benefits of  
23 work that contractors did. But it's nothing that we have done,  
24 we feel, to justify the need for a curative instruction.

25 And so, you know, whatever reasoning they have for trying

1 to draw out this distinction and then seek this instruction, we  
2 are concerned by it; and we don't think it's appropriate.

3 We think that it might end up providing an anchor so that  
4 they can set up and tell the jury again that we are making this  
5 argument that we really have not.

6 And, you know, there's several reasons why we also don't  
7 believe it's necessary. This issue has been -- it's addressed  
8 by other instructions. Mr. Rubin just said: "Well, this would  
9 go nicely after the new instruction number 17."

10 I think 17 fairly covers the general issue. To the extent  
11 there is any issue about whether contractor conduct matters, I  
12 would refer Your Honor to several instructions in the recent  
13 set -- these numbers are from what was filed last night --  
14 numbers 19, 20, Number 21, Number 22, Number 23, and Number 17.  
15 They all cover this issue in some way, shape or form.

16 And then the other point I would make is this distinction  
17 between, you know, liability for the conduct of -- conduct of  
18 contractors as opposed to employees. It really is a liability  
19 issue, and we need to be cognizant that this jury is being  
20 asked to award damages based on the liability findings that the  
21 first jury made and based on the evidence and the instructions  
22 in that first trial.

23 And there was a whole, you know, analytical way for the  
24 jury to make these types of determinations in the first trial.

25 And if Your Honor is inclined, docket 280 is, I believe,

1 the final jury instructions. There were a series of agency  
2 instructions that -- instructions number 19, 20, 21, 22, 23,  
3 and 24, from the first set that all touched on this issue to  
4 some extent.

5 The parties, I believe, agreed not to include those in the  
6 second set because that issue wasn't going to become a part of  
7 this trial, and I believe that really remains the case.

8 But, you know, I'm concerned that giving an instruction  
9 like this curative instruction that is, you know, paraphrasing  
10 and combining a whole set of instructions from the first trial,  
11 that was at least in some part potentially the basis for  
12 liability, could be problematic because this jury is going to  
13 be making potentially a determination different from what the  
14 jury made on this issue.

15 So, there are several reasons why we object to this  
16 instruction from it not being necessary to it potentially being  
17 prejudicial to it being covered by instructions that already  
18 exist in this set and in the prior trial.

19 **THE COURT:** Okay. Mr. Rubin, do you want to respond  
20 to that?

21 **MR. RUBIN:** Yes, please. Mr. Spiro made a very  
22 powerful argument in his opening. Tesla cannot be held liable  
23 for any damages that Tesla -- and he emphasized the word  
24 "Tesla" -- didn't cause.

25 We are concerned about jury confusion. The jurors have

1 heard a lot of testimony so far; that some employees and some  
2 supervisors were direct employees of staffing agencies; some at  
3 Tesla; some both at different times.

4 Our concern is that in the jury's mind it is not at all  
5 clear the extent to which a contractor is an agent of Tesla.

6 Yes, instruction 17 does say that a corporation is  
7 responsible for the acts of its employees and agents.

8 The reason this instruction would fit so well after number  
9 17 is it clarifies that in determining -- and this is the  
10 jury's only task in determining the appropriate amount of  
11 compensatory and punitive damages. It is not affected by  
12 whether any particular employee or supervisor was hired  
13 directly or through a staffing agency.

14 It's as if -- we tried to phrase this in neutral terms  
15 just to say that is not -- who hired them in the first instance  
16 is not an issue that should affect your calculation of damages,  
17 and we think that that should be enough to alleviate the  
18 conclusion -- sorry, the confusion that is necessarily been  
19 elicited by the testimony of witness after witness who drew the  
20 distinctions because they saw distinctions for purposes of  
21 their everyday worklife even though those aren't distinctions  
22 that the law makes in the context of what are appropriate  
23 damages here.

24 **THE COURT:** Mr. Posner, I am -- the witnesses do make  
25 those distinctions, and I think the statement is a -- is a

1 correct statement of the law; and I think it's -- I don't see  
2 what would be prejudicial about it.

3 I suppose I could give it tomorrow morning and just --  
4 just to clarify for their perspective if your concern is that  
5 you don't want them to see it in the written instructions,  
6 but -- but I -- I'm really not sure -- I don't think anybody  
7 has been going after that issue, first of all. So I agree with  
8 you there.

9 I think it is -- it is potentially a question in the  
10 jurors' minds because the witnesses are making -- drawing those  
11 distinctions. And for purposes of damages, those distinctions  
12 shouldn't be considered. And so I think it's worth -- I think  
13 it's worth saying something on that.

14 **MR. POSNER:** The jury made this distinction in the  
15 first trial too. I mean, it was an important part of that  
16 case, and the jury was instructed and there were liability  
17 findings made; and those liability instructions that led to  
18 those findings have now been reproduced into the instructions  
19 here to tell the jury this is how the first jury made its  
20 determinations.

21 And so, you know, I agree, the instruction is not  
22 particularly offensive as drafted; but I also am concerned that  
23 it upsets the liability findings and the way that the jury  
24 reached these determinations based on this same issue, which  
25 was a much bigger issue in the first trial, and they didn't

1 have this instruction. They had other instructions that  
2 affected this issue, so --

3 **THE COURT:** Okay. Well, I appreciate the argument. I  
4 think I am going to put it in, and I will think -- and I may  
5 either add it to 17 or I may make it a separate instruction,  
6 and I do think -- when I was thinking about this last night,  
7 that's what I was thinking about putting it there, so -- okay,  
8 because I was thinking about that issue.

9 And then there was also number 32, which is the -- the  
10 definition on past and future. Mr. Posner, have you seen that  
11 one? Have you had a chance to look at that one?

12 **MR. POSNER:** I might like a further opportunity. I --  
13 literally, I just took a photo of it on my phone for this  
14 conversation so I could have it for this conversation.

15 **THE COURT:** Okay.

16 **MR. POSNER:** I can tell you my -- you asked them to  
17 file it early. I think they filed it right at 3:00.

18 You know, my very initial concern about it is it draws a  
19 distinction between things that happened before October 2021  
20 and things that happened afterwards, and we all know amongst  
21 ourselves why that matters; but there has been no testimony to  
22 the jury about why that matters, and I'm not sure there will be  
23 any testimony as to why that matters.

24 I understand this is a potential source of (inaudible),  
25 perhaps, for the jury and how they parse this out. I think,

1 you know, Dr. Reading will have to be careful; other witnesses  
2 will have to be careful; but I think it would make matters  
3 worse to send the jury back to the jury room and have to decide  
4 what happened before October 2021 and what happened after  
5 because that just hasn't been an issue in this trial.

6 And so that's my initial concern. I might like an  
7 opportunity to discuss it with our team if Your Honor is  
8 inclined to consider it further after this proceeding at least,  
9 but that was my initial reaction.

10 **THE COURT:** Okay. And what's the -- what's the  
11 response there? How is the jury going to know before I give  
12 this instruction what that -- why I am using that date?

13 **MR. RUBIN:** So far I don't see it as an issue. The  
14 principal reason we presented this is because we want the  
15 instructions to be as consistent with Your Honor's prior  
16 rulings as possible.

17 And as we talked about it several times, conceptually  
18 that's been our understanding of the difference between past  
19 damages and future damages.

20 I think, perhaps, it would be most prudent, if you don't  
21 have to decide on the final jury instructions today, to defer a  
22 ruling on this until we see how all the damages evidence comes  
23 in and then have a final hearing or decide yourself the  
24 appropriateness.

25 This is an appropriate instruction given the way the trial

1 is proceeding. Whether you conclude it matters for the jury or  
2 not is going to be up to you.

3 We just wanted to make sure that there was sufficient  
4 clarity in the verdict form because there's certainly -- and we  
5 haven't gone through most of Mr. Diaz's cross-examination. We  
6 don't know what Tesla is going to ask. This may become an  
7 important issue. And if so, it would be very important to  
8 clarify it for the jury.

9 **THE COURT:** So, I will -- I don't have to file  
10 anything until I read these instructions to the jury on Friday.

11 So, let's -- let's keep it open. I do think it would be  
12 useful for somebody other than me to say -- to explain the  
13 value of -- of the date of October 2021; but if that doesn't  
14 make sense from the testimony and it's -- I will keep -- I will  
15 keep looking at it, but I think they do have to know what the  
16 difference is between past and future and when that comes.

17 So...

18 **MR. RUBIN:** Right, Your Honor. This last instruction  
19 does explain the significance of the date. It explains and it  
20 ties right into what you said about two phases, and the jury  
21 has heard over and over again there were two phases.

22 So, this is explanatory. It is directly relevant to  
23 distinctions you have drawn. So we are not saying it for the  
24 first time. We haven't told them that the first phase -- well,  
25 people have said "18 months ago, when you testified earlier" --

1 I don't think anyone has said "October 2021," but that would be  
2 an easy thing to explain to the jury.

3 So there the jury does know that there was a first phase  
4 proceeding in this trial roughly 18 months ago, which, in  
5 fact -- and that's what we are tying this into.

6 **THE COURT:** Okay. So I think --

7 **MR. ALEXANDER:** If I can just follow-up, Your Honor,  
8 if you look at the point of view of the people that are doing  
9 the closing argument, if we don't have the same demarcation  
10 point for talking about past and future, the consequence is you  
11 are going to have the Defense, perhaps, talking about one thing  
12 and the Plaintiff talking about another and that creates  
13 issues.

14 And so if the Court were to tell us when the past starts  
15 and when the future starts, that resolves an issue. And so  
16 looking at the point of view of standing up in front of the  
17 jury and making representations, it would be so much better if  
18 we knew that we would comply with as opposed to accidentally  
19 saying something that would be out of compliance with what the  
20 Court intends.

21 **THE COURT:** Yeah, I think that's a very fair point.  
22 Mr. Posner, did you want to say something?

23 **MR. POSNER:** Well, I mean, there is a demarcation and  
24 we all know about it and you have told us about it. You know,  
25 my concern -- and, again, just one minute of thinking about

1 this -- is that the jury has not, and that's not how the  
2 evidence would come in.

3 And I would, frankly, be surprised if Dr. Reading, you  
4 know, he did his interview of Mr. Diaz some time before  
5 October 2021. And I'm not -- I'm not sure, frankly, how that's  
6 going to come in; but I just don't really see any evidence  
7 coming in in this case that allows this jury to demarcate  
8 between pre-October 2021 and post-October 2021.

9 I'm not saying that that's not an issue and maybe -- maybe  
10 the parties can meet and confer. Maybe we should see how -- I  
11 think Dr. Reading might be examined tomorrow and re-visit this  
12 in the afternoon, but I don't see this instruction being  
13 helpful to the jury. I think going back to the jury room, they  
14 are going to say "What do we do with this distinction?"

15 **MR. GRIFFIN:** Your Honor, can I add about the  
16 rhetorical argument in closing? Right now we have  
17 Dr. Reading's exam in 2019. We know he didn't talk to Mr. Diaz  
18 at the time of trial; but if they can say "We are talking about  
19 future damages," which is some implication there is an 18-month  
20 window and that Reading is going to bolster that window, which  
21 we have no idea what happened, so they are getting with this  
22 instruction -- when I hear Mr. Alexander saying is you are  
23 going to talk about future starting in 2021 and we can't  
24 challenge anything after 2021. So we have to assume that  
25 October 21 -- 2021 until today is something that we can't touch

1 based on the Court's orders and the parties' agreements.  
 2 So if they are talking about future from trial to today  
 3 and then going on beyond that, then we are kind of hamstringing  
 4 with how we address that 18-month period especially because the  
 5 jury is going to be considering well, why didn't the Defendants  
 6 talk about what happened in 2022 or beginning of 2023?  
 7 It sets us in a position where we can't address that black  
 8 hole of evidence that we are not allowed to question him about,  
 9 and there is an assumption that he has future damages going  
 10 forward.  
 11 **THE COURT:** Well, he testified today about the  
 12 continuing nature of his distress and -- and it's fair game  
 13 to -- to poke holes in that to the extent that -- you are not  
 14 bringing in stuff from left field.  
 15 But that's --  
 16 **MR. GRIFFIN:** Well --  
 17 **THE COURT:** That's okay. I assume that your  
 18 examination -- that your examination is going to be --  
 19 challenging the credibility of what he said about things.  
 20 And it's -- you can argue that he doesn't have any --  
 21 that -- not only did -- he doesn't have damages of a  
 22 significant -- that is -- that the compensatory damages should  
 23 be low prior to October 2021. You can argue they should be  
 24 nonexistent after October 2021. The jury will make that  
 25 determination. So as long as --

1 about that period. No one is precluding eliciting testimony  
 2 about past damages or future damages.  
 3 This is just about what you call damages for the two  
 4 distinct time periods we are focused on, and the -- and how you  
 5 characterize them -- past or future -- doesn't make any  
 6 difference other than we want the -- the jury is going to put  
 7 them in two different boxes on the verdict form, but I think  
 8 the evidence would be the same both ways; and we were very  
 9 careful not to introduce any evidence, as you will be, as to  
 10 that 18-month period.  
 11 **MR. GRIFFIN:** And I agree. Plaintiff's counsel was  
 12 careful but now as Mr. Posner has pointed out, we are entering  
 13 a new fact into the record defining something that neither side  
 14 has taken issue with.  
 15 And so we create a confusion about what's going on in this  
 16 time period when if the parties do what we agreed to do  
 17 pursuant to the Court's order, that not address this window,  
 18 then why do we need to address it in an order that creates  
 19 confusion about a window of time that -- that has not currently  
 20 been placed in front of the jury?  
 21 **THE COURT:** So is the -- you know, I think -- you-all  
 22 have very fair comments about how this ought to work out.  
 23 The -- and maybe -- maybe the -- maybe we ratchet back the  
 24 date of the -- I haven't thought about this. Maybe you either  
 25 ratchet back the date of the past non-economic damages to, you

1 **MR. GRIFFIN:** I was concerned about the opening of the  
 2 door question. My understanding was we were not going to probe  
 3 conduct between last trial and this trial.  
 4 And so that's my concern about setting this demarcation.  
 5 If we can't ask him about his -- you know, the -- about what  
 6 happened in that window and they are saying -- obviously as  
 7 Your Honor pointed, they are pointing out the issues of, he is  
 8 continuing having issues today forward; and they are going to  
 9 want to talk about the issues from Tesla to the 20th -- until  
 10 October 2021, but we can't ask anything about the middle time.  
 11 And so this instruction leaves us in a position where  
 12 we -- you know, the jury will be confused about, "Well, Tesla  
 13 didn't ask him if he had any treatments between October 2021  
 14 and today. How much counseling did he have? What else is  
 15 going on in his life?"  
 16 And we are hamstringing because we don't want to open the  
 17 door because we don't have any evidence. They haven't produced  
 18 anything. There is no medical records.  
 19 I want to make sure that me and Mr. Spiro don't open the  
 20 door because our question was going to be cabined to a time  
 21 period that the parties had agreed upon.  
 22 **MR. ORCAN:** We didn't testify as to anything in the  
 23 gap either today.  
 24 **MR. RUBIN:** Right. We all agree -- if I may,  
 25 Your Honor, no one is testifying about representing evidence

1 know, through the first year or -- to some -- some date that --  
 2 some chronological date after his -- after he left Tesla that  
 3 is a year after or 18 months after or something like that and  
 4 then make the future from there. I don't -- I don't know how  
 5 to --  
 6 **MR. RUBIN:** We can --  
 7 **MR. GRIFFIN:** Your Honor --  
 8 **THE COURT:** Hey, hey --  
 9 **MR. GRIFFIN:** We haven't had a chance to talk about  
 10 this with our whole team. We got this literally when we were  
 11 on the call. We would hope that there would be no  
 12 determination made about this until we have had at least a  
 13 chance to talk to our team.  
 14 **THE COURT:** No, I promise. I'm just trying to help  
 15 sort it out. Mr. Rubin, you were going to say something.  
 16 **MR. RUBIN:** The important thing from our perspective  
 17 is consistency, consistency with the Court's rulings and  
 18 consistency in the way the remaining testimony comes in and  
 19 finally the consistency, as Mr. Alexander pointed out, between  
 20 how counsel for the respective parties present the issue of  
 21 damages.  
 22 So, we think this is the best way to resolve the issue.  
 23 And we leave it to the Court to make that determination.  
 24 If they want to give it some more thought, if they want to  
 25 meet and confer, that's obviously fine with us; but I think

1 that clarity will help avoid confusion among the jurors and  
2 that's why we are requesting this.

3 **THE COURT:** So there is no doubt about that and -- and  
4 there is also no doubt that the lawyers need to know when they  
5 are arguing what they are arguing about.

6 So, the -- tomorrow I won't have time to address this  
7 unless the parties have reached agreement by the 8:00 o'clock  
8 session, which I'm guessing won't have happened, and -- but I  
9 have got my 1:30 calendar is -- is a 1:30 calendar tomorrow.

10 So I will decide this on Friday morning at our  
11 8:00 o'clock session, and we will be -- I will be very clear  
12 about it; and I would like if the -- if the Defendant -- if the  
13 Defendants have a different perspective or better -- just some  
14 idea of how this particular issue could be resolved so that it  
15 is clear that the lawyers are arguing about the same thing and  
16 the jury is being presented with -- with the -- a clear  
17 demarcation, talk with -- talk with your colleagues and see  
18 whether agreement can be reached. If it can't, I will just --  
19 I will do what I think is the best thing under the  
20 circumstances.

21 **MR. GRIFFIN:** Thank you, Your Honor.

22 **MR. POSNER:** Will we get a chance to argue it at  
23 8:00 in the morning on Friday if we don't reach agreement  
24 before?

25 **THE COURT:** Yeah, sure. I assume that -- you will be

1 very brief in that; and if there is -- if there is something --  
2 I was thinking should -- should I ask for any briefing, but I  
3 don't think -- I don't think briefing helps here.

4 I think it's -- I think what I'm looking for is clarity,  
5 consistency and -- and fairness in light of all the  
6 circumstances.

7 So, I -- I will figure that out and you can appear by  
8 Zoom, Mr. Rubin.

9 **MR. RUBIN:** Thank you. I appreciate that. And just  
10 one thought to throw out, I think this is the best way to do  
11 it. Another way would be to key it to the day of Dr. Reading's  
12 examination. I don't think it's as good, but it is an idea for  
13 Defense Counsel to think about.

14 **MR. POSNER:** The idea of clarity and consistency is  
15 obviously important. I think the attorneys -- that's our  
16 obligation in how we present the case. I'm still just  
17 concerned about what the jury would do with this piece of  
18 information if they had to try to draw this line not having  
19 really heard anything about what happened before or after that  
20 date. So it's an issue and we will consider it further.

21 **THE COURT:** Yeah. And consider Mr. Rubin's idea just  
22 now, which is a -- that's going to be the last information that  
23 comes in. I think that's actually a pretty good idea, but I  
24 will let you -- I haven't decided anything.

25 I will look forward to the wisdom that you-all can

1 provide. And other than that, is there anything else we ought  
2 to talk about with respect to instructions?

3 **MR. RUBIN:** Not from Plaintiff, Your Honor.

4 **MR. POSNER:** Did you want to address verdict form,  
5 Your Honor?

6 **THE COURT:** Sure.

7 **MR. POSNER:** And, I mean, the only thing I would do  
8 is -- I believe this is the same verdict form that Your Honor  
9 provided a few weeks ago -- and so I would renew and retain our  
10 objections as stated in docket 385, which are basically to add  
11 the language "if any" in front of the various forms of damages  
12 and to reedit the predicate question, you know, the concern  
13 being this jury -- you know, Mr. Diaz bears the burden of  
14 proving his damages by a preponderance of the evidence.

15 If this jury were to find that he had not proven damages  
16 by a preponderance of the evidence or any particular amount,  
17 the language we have proposed would make it clear that the jury  
18 can make that finding.

19 I'm not sure I understand Your Honor has determined that  
20 the -- that Mr. Diaz is entitled to some amount of compensatory  
21 damages, but it remains his burden to prove it.

22 So it's unclear -- you know, it still feels to us that  
23 this jury -- even as instructed as Your Honor is doing -- could  
24 find no damages if no damages are proven. So that's our  
25 objection.

1 **THE COURT:** Yeah, well, the -- I appreciate that  
2 perspective that your team brings to this trial. That's not my  
3 perspective, as you know. And you are free to argue that the  
4 compensatory damages should be minimal and based on the  
5 evidence, and the jury will do with that what they do with  
6 that, so...

7 **MR. POSNER:** Thank you.

8 **THE COURT:** With that, I think we are done. Thank you  
9 I will see you tomorrow morning.

10 **MR. GRIFFIN:** Thank you, Your Honor.

11 **THE COURT:** Yep.

12 **MR. ORGAN:** Thank you.

13 (Proceedings adjourned at 3:45 p.m.)

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**CERTIFICATE OF REPORTER**

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, March 29, 2023



Marla F. Knox, CSR No. 14421, RPR, CRR, FMR  
United States District Court - Official Reporter

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