

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**ALIANTE GAMING, LLC d/b/a  
ALIANTE CASINO AND HOTEL**

**and**

**Case 28-CA-145644**

**LOCAL JOINT EXECUTIVE BOARD OF  
LAS VEGAS, CULINARY WORKERS UNION,  
LOCAL 226 AND BARTENDERS UNION  
LOCAL 165, affiliated with UNITE HERE**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT'S EXCEPTIONS**

**Respectfully submitted,**

**Nathan Higley  
Counsel for the General Counsel  
National Labor Relations Board, Region 28  
300 Las Vegas Boulevard South, Suite 2-901  
Las Vegas, NV 89101  
Telephone: (702) 388-6062  
Facsimile: (702) 388-6248  
Email: [nathan.highley@nrlrb.gov](mailto:nathan.highley@nrlrb.gov)**

## **I. INTRODUCTION**

By its Exceptions and Brief in Support of its Exceptions (Brief), Aliante Gaming, LLC d/b/a Aliante Casino and Hotel (Respondent) urges the Board to ignore recent Board law, the record evidence in the case, and the well-reasoned ruling of Administrative Law Judge Gerald M. Etchingham (ALJ) that Respondent violated Section 8(a)(3) of the National Labor Relations Act (Act) by suspending and discharging its employee, Lourdes Flores (Flores). The ALJ's decision (Decision) is wholly supported by sound reasoning and the record.

The Board should only grant Respondent's exceptions (Exceptions) if it reverses its ruling in *Nichols Aluminum, LLC*, 361 NLRB No. 22 (2014) regarding *Wright Line* analysis and ignores its policy of not overruling an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence demonstrates the ALJ was incorrect. The Exceptions are without merit and should be denied.

## **II. RESPONDENT'S EXCEPTIONS**

Section 102.46(c) of the Rules and Regulations of the National Labor Relations Board states in relevant part:

Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

...(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

Counsel for the General Counsel (CGC) notes that Respondent's Brief contains an 11-page Statement of the Case presenting several pieces of fact and testimony explicitly not found or discredited by the ALJ. In the Brief that follows, Respondent, in several instances, failed to

provide argument in support of its Exceptions. CGC urges the Board to disregard the Respondent's representation of the facts of the case to the extent that they contain one-sided, discredited assertions. CGC also respectfully requests that the Board dismiss all Exceptions not supported by specific argument.

**A. The ALJ's Credibility Determinations Should Not Be Overturned**

*1. Respondent's Credibility Exceptions*

Exception 1: Respondent excepts to the ALJ's finding that Sparks was not credible when he "incredibly" stated that he had no idea why Flores did not want to continue as an unpaid job coach.

Exception 7: Respondent excepts to the ALJ's finding that Rosales' testimony was not credible. (ALJD 10 fn. 13).

Exception 10: Respondent excepts to the ALJ's finding that Rand was not credible when he allegedly fabricated his version of the events and reported to Heath that Flores twice tried to sneak a view of the video without his permission and that Rand reported falsely to management but suffered no apparent discipline and that Rand also violated Respondent's policy without suffering any discipline. (ALJD 12:30-36).

Exception 11: Respondent excepts to the ALJ's conclusion that Rand fabricated his version of the events. (ALJD 13:30-32).

Exception 15: Respondent excepts to the ALJ's decision to credit Flores' testimony over other witnesses. (ALJD 16).

Exception 16: Respondent excepts to the ALJ's decision not to credit Barahona, Rand, Danzak, and Sparks. (ALJD 16-17).

## 2. *Authority*

The Board's established policy is to not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence demonstrates that the ALJ is incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

## 3. *Argument*

The Brief contains no argument why the ALJ erred in discrediting Sparks, Rand, Barahona and Danzak. *See* Brief pp. 19-23. The Board should dismiss Respondent's Exceptions 1, 10, 11 and 16.

The Brief urges the Board to reconsider the ALJ's determination that Rosales' testimony was incredible.<sup>1</sup> The Brief argues that Rosales' admission that she had knowledge of Flores' union activity was a mistake. The ALJ concluded that Rosales' slip in admitting she had knowledge of Flores' union activity was not an innocent mistake, but an admission she later sought to correct. The ALJ also discredited Rosales because her testimony was inconsistent with the video evidence and with other witnesses. In addition, Rosales testified to key matters that were not mentioned in her previously-drafted written statement regarding the incident. Her explanation of why these new facts were not included in her statement was unreasonable. The Board should affirm the ALJ's Decision to discredit Respondent's witness, Rosales, and dismiss Respondent's Exception 7.

In arguing that the ALJ should not have credited Flores' testimony, Respondent relies mostly on contrary testimony offered by Respondent's witnesses, who were discredited by the

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<sup>1</sup> This credibility argument is not found under the credibility section of the Brief where the corresponding Exception 7 is indicated, rather, under the *Wright Line* section. Under the credibility section, the Brief contains only one instance of argument in which it characterizes Rosales' testimony as "undisputed." Without elaboration to which CGC may respond, CGC points out that Rosales' testimony was disputed in many instances by Flores' testimony.

ALJ. Respondent's Exception boils down to argument that the ALJ credited the wrong witness. As the factfinder, the ALJ is charged with making credibility determinations. In addition, the Brief incorrectly identifies points in Flores' testimony as inconsistencies and, relying further on discredited testimony, urges the Board to draw inferences and make suppositions that the ALJ chose not to make. The Respondent has recapitulated a credibility argument. The Board should dismiss Respondent's Exception 15.

With regard to its credibility Exceptions, the Respondent has failed to show that a clear preponderance of all the relevant evidence weighs against the ALJ's credibility determinations. The ALJ's credibility determinations should be upheld, and the Board should dismiss Respondent's Exceptions regarding credibility.

**B. The ALJ's Factual Findings Should Not Be Overturned**

*1. Respondent's Exceptions to the ALJ's Findings of Fact Regarding Pretext*

*a. Exceptions*

Exception 2: Respondent excepts to the ALJ's finding that Aliante issued Flores a "trumped up" written warning to Flores. (ALJD 5:4-6).

Exception 12: Respondent excepts to the ALJ's finding that Heath had already decided to discharge Flores before receiving Rosales' statement. (ALJD 13 fn. 20).

Exception 22: Respondent excepts to the ALJ's finding that Heath's due process meeting with Flores on January 22 was a sham. (ALJD 20:20-23).

Exception 24: Respondent excepts to the ALJ's finding that the reasons given for Flores' discharge were pretextual. (ALJD 21:38-40).

Exception 36: Respondent excepts to the ALJ's finding that Aliante failed to establish it would have suspended and discharged Flores absent her union activity. (ALJD 25:14-47).

b. Argument

The Brief offers no specific support for its Exceptions against the ALJ's finding that Flores' written warning was trumped up, that Heath had decided to discharge Flores before receiving Rosales' statement, or that the due process meeting was a sham.

Regarding the trumped-up written warning, the ALJ observed that Respondent issued the warning to Flores after she complained that she had not been paid for training the first three new employees and refusing to train a fourth. The ALJ's finding that Heath had decided that Flores should be discharged before obtaining Rosales' statement is supported by Heath's admission. Transcript at 374:5-15. The ALJ's finding that the due process meeting was a sham is supported by multiple facts, including: Heath's failure to obtain written statements from others present during the incident; Heath's failure to obtain Rosales' statement until after the meeting and after her decision to recommend Flores' discharge; Heath's misrepresentations during the meeting; the interrogatory nature of the meeting and other aspects that were in violation of Respondent's policy; and the fact that Heath destroyed her handwritten notes from the meeting, on which the ALJ drew an adverse inference that her notes contained information helpful to Flores. There is ample support for the ALJ's findings. The Board should dismiss Exceptions 2, 12 and 22.

The Brief offers general argument that Respondent's decision to discharge Flores was not unlawful. The ALJ found that the Respondent's stated reasons for Flores' discharge were pretextual for several reasons, including: the fact that Respondent failed to follow its own policy in its "due process meeting" (outlined above); its disparate treatment of Flores in discharging her for dishonesty while taking no action against Rand, who, two weeks prior to the hearing, Respondent discovered had lied regarding Flores' actions; Heath's failure to timely obtain Rosales' written statement; the fact that Respondent opted to discharge Flores, an exemplary

employee, rather than consider progressive discipline; Respondent's failure to conduct a proper investigation; Respondent's fabrication of the substance of the surveillance video; the substance of the video itself, demonstrating Flores' clear physical reaction during the incident; and the reasonability of Flores' belief that she was injured, as supported by the opinion of a medical professional. The Brief fails to refute any of these findings. CGC urges the Board to affirm the ALJ's findings and dismiss Exceptions 24 and 36.

2. *Respondent's Exceptions to the ALJ's Findings of Fact Regarding Wright Line Elements*

a. Exceptions

Exception 4: Respondent excepts to the ALJ's finding that Aliante maintained a "super vigilant monitoring program" of union activities. (ALJD 7:37-40; 9:9-10).

Exception 5: Respondent excepts to the ALJ's finding that Sparks knew Flores supported the union in August 2014. (ALJD 7:40).

Exception 18: Respondent excepts to the ALJ's finding that Flores engaged in union activity in 2014, and the Respondent had knowledge of it and harbored animus towards it. (ALJD 18:38-40).

Exception 19: Respondent excepts to the ALJ's conclusion that Flores openly engaged in union activities. (ALJD 19:17-19).

Exception 20: Respondent excepts to the ALJ's finding that the record contains ample evidence of the Respondent's antiunion animus. (ALJD 19:24-29).

Exception 26: Respondent excepts to the ALJ's finding that Respondent's alleged "super vigilant monitoring program" would have transferred direct knowledge of Flores' union activities up the chain. (ALJD 22:4-13).

Exception 27: Respondent excepts to the ALJ's finding that Respondent had specific direct knowledge of Flores' protected union activities in late 2014. (ALJD 22:15-16).

Exception 28: Respondent excepts to the ALJ's finding that it is reasonable that management knew of Flores' union activities. (ALJD 23:13).

Exception 29: Respondent excepts to the ALJ's finding that the record establishes that the decision-makers were very much aware and were regularly kept apprised of all union activity at Respondent. (ALJD 23:19-21).

Exception 31: Respondent excepts to the ALJ's finding that the evidence establishes that starting in February 2014 and continuing through Flores' discharge, Rosales, Sparks, Barahona, Heath, and Danzak had either specific knowledge of Flores' protected union activities or general knowledge of those activities in 2014. (ALJD 23:27-31).

Exception 32: Respondent excepts to the ALJ's finding that Flores openly supported the union. (ALJD 23:40-47).

Exception 34: Respondent excepts to the ALJ's finding that Flores openly engaged in union activities and was known to Respondent as a union supporter and that there is substantial evidence of Respondent's animus against the union. (ALJD 24:37-47).

b. Argument

Respondent offers no argument in support of its Exceptions to the ALJ's finding that it maintained a super vigilant monitoring program. In making this finding, the ALJ relied on e-mails between Respondent's executives reporting union activities, supervisors' knowledge of union activity on Respondent's property, and the findings made by Administrative Law Judge Chu in his decision in JD(NY)-12-15. In light of the ALJ's sound basis for this finding and the



lack of specific argument to which CGC may respond, CGC urges the Board to dismiss Exception 4.

As the ALJ pointed out, Respondent failed to refute at hearing Flores' testimony that she informed Sparks of her support for the Union and for then-terminated employee Chavez. Respondent points out that Sparks denied having knowledge that Flores supported the Union but fails to address ALJ's decision to credit Flores in this regard. The Board should dismiss Exception 5.

The ALJ found that Flores openly distributed authorization cards to Respondent's employees, discussed the Union with employees in the team members' dining room (TDR) and parking lot, voiced support to her supervisor for a coworker who was discharged due to her union activity, and discussed a Union rally with coworkers before and after she attended. The record amply supports the finding that Flores actively and openly supported the Union. The Board should dismiss Exceptions 18, 19, 32 and 34 with regard to Flores' union activity.

The ALJ based his finding that Respondent had knowledge of Flores' activity primarily on the Respondent's monitoring program. The record demonstrated that Respondent requested that its department managers discover who did not support the Union and to report union activity. There are multiple items of record evidence demonstrating that supervisors reported union activity to management. At hearing, Barahona never offered a rational explanation for how she came to identify non-Union supporters. The ALJ also relied on Sparks' direct knowledge (see above) and Rosales' admission that Flores' Union support was common knowledge (see credibility argument above). In addition, Flores was communicating directly with a known Union supporter at the time of the incident in question. The Brief fails to

demonstrate how any of these findings are improper. The Board should dismiss Exceptions 5, 18, 26, 27, 28, 29, 31 and 34 with regard to Respondent's knowledge of Flores' union activity.

The ALJ relied on several facts of record in finding that the Respondent demonstrated animus toward union activity, including: Flores' trumped up discipline (see above); the timing of Flores' discharge; the pretextual reasons for Flores' discharge (see above); Danzak's anti-union script, which he read to employees during meetings in which Union supporters were separated from non-Union supporters; and the findings in Judge Chu's decision. The ALJ's finding that the Respondent demonstrated anti-union animus is amply supported by the record. Respondent fails to demonstrate how the ALJ erred. The Board should dismiss Exceptions 18, 20 and 34 with regard to Respondent's animus.

3. *Other Factual Findings*

a. Exceptions

Exception 8: Respondent excepts to the ALJ's finding that Flores would not have known whether Washburn almost hit her unless he did hit her. (ALJD 11:20).

Exception 9: Respondent excepts to the ALJ's finding that Flores shifted the towel she was holding from her right hand to her left hand so she could touch her back with her right arm where she felt pain from the incident. (ALJD 11:26-28).

Exception 13: Respondent excepts to the ALJ's finding that Heath misrepresented to Flores that she had multiple witnesses and that she falsely accused Flores of anything. (ALJD 14:10-14; 20:27-29).

Exception 14: Respondent excepts to the ALJ's disagreement with Heath that it was clear there was no contact between Washburn and Flores at the time of the incident and that it was

impossible to determine whether the video showed that Washburn touched Flores. (ALJD 15:4-11).

Exception 21: Respondent excepts to the ALJ's finding that Respondent portrayed union activity and the union in general to its employees with great disdain in a bad faith attempt to prevent the union from gaining recognition at Aliante. (ALJD 20:8-10).

Exception 23: Respondent excepts to the ALJ's finding that Respondent disparately treated Flores from Rand. (ALJD 21:2-4).

Exception 30: Respondent excepts to the ALJ's finding that Heath was a decision-maker. (ALJD 23:19-20).

b. Argument

In determining that Flores would not be able to tell that she was "almost" struck from behind, the ALJ noted the undisputed fact that Flores' back was facing Washburn when he fell. The ALJ logically concluded that it would have been impossible for her – or anyone, for that matter, because our eyes are on the front of our heads – to know that Washburn *almost* made contact with her. The Board should dismiss Exception 8.

The ALJ credited Flores' testimony that she moved a towel from her right hand to her left in order to use her right hand to touch her back where she felt pain. Respondent urges the Board to overrule the ALJ's credibility determination in favor of Respondent's argument that "[i]t can reasonably be assumed" instead that Flores did so to adjust her radio. Brief at 22. As argued above, the Board should not overrule the ALJ's credibility determination. CGC requests that the Board dismiss Exception 9.

Respondent presented no argument in support of Exception 13 to the ALJ's finding that Heath misrepresented to Flores that she had multiple witness statements. This is firmly

established by the record and admitted to by Heath. Transcript at 361:12-19. The Exception also takes issue with the ALJ's finding that Heath falsely accused Flores. The ALJ noted that Heath falsely represented the contents of Washburn's report, and she falsely accused Flores of viewing surveillance video without permission. Lacking any specific argument to which CGC may respond, CGC requests the Board dismiss Exception 13.

The ALJ found that the surveillance video was taken at an angle that does not show a clear view of Flores and Washburn and makes it difficult to view the details of the incident. The video was taken from considerable distance; Flores was wearing all black, which would obscure on video any movement of the clothing; and at the moment of impact, Washburn's body obstructs the view of Flores. Based on all of these facts, the ALJ's finding that Heath could not credibly state that she was certain, on review of the video, that there was no contact between Flores and Washburn is reasonable. The Board should dismiss Respondent's Exception 14.

The ALJ's finding that Respondent portrayed the Union negatively is supported by Danzak's admission that he did not want the Union at Respondent, the e-mails demonstrating that this attitude was shared by Respondent's executives, and the content of Danzak's script, which he delivered orally to employees. The ALJ observed that the script infers that the Union might make illegal use of employees' personal information should they sign authorization cards. The ALJ found that the script intentionally causes employees to fear for the safety of their personal bank accounts if they sign authorization cards. These conclusions are reasonably based on the content of the script. Together with evidence of Respondent's super active monitoring of union activity, the finding that Respondent portrayed the Union negatively finding is firmly rooted in the record. In addition, Respondent offered no specific argument in support of this Exception. The Board should dismiss Exception 21.

Respondent offers no support of its argument that Respondent treated Flores disparately from Rand. Respondent's Brief admits that Respondent learned of Rand's false statement two weeks prior to the hearing. Brief at 38. No action has been taken against Rand. The evidence is clear that Respondent treated Flores disparately. The Board should dismiss Exception 23.

The ALJ correctly found that Heath is a decision-maker. Respondent's own witnesses established the following: Regarding Flores' termination, Danzak did not conduct an investigation; rather, he considered Heath's recommendation. Transcript at 186:19-187:2, 22-25; 188:10-12; 567:22-23. Heath and Danzak had only two sit-down meetings to discuss Flores. Transcript at 200:9. Heath ran the investigation, including conducting a "due process" meeting, without direction from Danzak. Although Danzak had ultimate say, it is clear that the decision to terminate was effectively made by Heath. The Board should dismiss Exception 30.

### **C. The ALJ Correctly Interpreted and Applied the Law**

#### *1. Respondent's Exceptions to the ALJ's Legal Analysis*

Exception 3: Respondent excepts to the ALJ's decision to consider and rely on Judge Chu's decision in another case involving Respondent. (ALJD 6-7; 19:34-50; 22:48-49).

Exception 17: Respondent excepts to the ALJ's description of the *Wright Line* test as not requiring the General Counsel to prove a causal connection between alleged animus and alleged protected activity as part of the General Counsel's initial burden. (ALJD 18:16-26).

Exception 25: Respondent excepts to the ALJ's finding that alleged "sham adverse actions by Respondent against Flores further evidenced Aliante's anti-union animus." (ALJD 21:43-44).

Exception 33: Respondent excepts to the ALJ's finding that the decision to discharge Flores was baseless, unreasonable, and contrived and that the alleged false reasons for her

discharge were a strong factor in inferring Respondent's knowledge of Flores' union activity. (ALJD 24:15-20).

Exception 35: Respondent excepts to the ALJ's conclusion that the circumstances strongly support an inference of unlawful motive and that the General Counsel met his initial burden under *Wright Line*. (ALJD 25:8-11).

## 2. Authority

In *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394-95 (1998), *enfd. mem.* 215 F.3d 1327 (6th Cir. 2000), the Board found it appropriate for an administrative law judge to rely on another judge's findings in an earlier case as evidence of animus even though the case was pending before the Board on exceptions.

The Board has rejected the view that *Wright Line* requires a fourth 'nexus' factor. *Nichols Aluminum, LLC*, 361 NLRB No. 22, slip op. at 3 (2014) (see fn. 7 and cases cited therein).

Circumstantial evidence is sufficient to justify an inference of employer knowledge. *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046 (1985). See, e.g., *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), *enfd. mem.* 97 F.3d 1448 (4th Cir. 1996); *BMD Sportswear Corp.*, 283 NLRB 142, 142-43 (1987), *enfd. mem.* 847 F.2d 835 (2d Cir. 1988). Knowledge of union activity may be inferred from "such circumstantial evidence as the timing of the alleged discriminatory actions; the Respondent's general knowledge of its employees' union activities; the Respondent's animus against the Union; and the pretextual reasons given for the adverse personnel actions." *North Atlantic Medical Services*, 329 NLRB 85, 85 (1999), *enfd.* 237 F.3d 62 (1st Cir. 2001)

Discriminatory motivation may be inferred when an employer's proffered reasons for taking action against an employee prove to be pretextual. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (2014); *Embassy Vacation Resorts*, 340 NLRB 846, 848-49 (2003), *rev. denied* 2004 WL 210675 (D.C. Cir. 2004); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

### 3. *Argument*

Board law clearly establishes that the ALJ was entitled to rely on the findings in Judge Chu's decision. The Brief makes no argument for why the Board should overrule the law in this regard. Exception 3 should be dismissed.

Notwithstanding Respondent's citations of various circuit court decisions, the Board has stated unequivocally on multiple occasions that the General Counsel is not required under *Wright Line* to establish a nexus between an employee's protected activity and the employer's adverse action. Exception 17 should be dismissed.

The Board, through multiple decisions, has endorsed the rule that an administrative law judge may use a finding of pretext to infer an employer's knowledge of an employee's protected activity and the employer's animus toward that activity. The ALJ did so properly here. As discussed above, the record demonstrates that the Employer's proffered reasons for discharging Flores were pretextual. The Decision provides extensive support, based soundly on the record, that Respondent's motive for discharging Flores was unlawful (see argument regarding *Wright Line* exceptions – specifically animus – above). The Board should dismiss Exceptions 25, 33 and 35.

**D. The ALJ's Typographical Error Was Harmless**

*1. Respondent's Exception to the ALJ's error*

Exception 6: Respondent excepts to the ALJ's mistaken reference to January 15, 2016, instead of January 15, 2015. (ALJD 10:20)

*2. Authority*

The Board has found that where an administrative law judge's error does not affect the substance of the decision or the Board's conclusion, that error is harmless. *See, e.g. In re Newburg Eggs, Inc.*, 357 NLRB No. 171, slip op. at 1, fn. 3 (2011); *Universal Laundries & Linen Supply*, 355 NLRB 88, 88 fn. 3 (2010).

*3. Argument*

Although, the ALJ listed the incorrect year, this was a mere typographical error. It was contained within the ALJ's findings of fact related to a foundational matter and did not affect the ALJ's findings or the substance of the Decision. Respondent presented no argument in connection with Exception 6, and it should be dismissed.

**E. The ALJ's Conclusions of Law are Supported by Board Law and the Record**

Exception 37: Respondent excepts to the ALJ's conclusions of law. (ALJD25:50; 26:10). The Brief makes no reference to Exception 37. Without argument or mention of this Exception to which it may respond, CGC urges the Board to affirm the ALJ's conclusions of law.

**F. The ALJ's Recommended Remedies and Order are Proper**

*1. Respondent's Exceptions to the ALJ's Recommendations*

Exception 38. Respondent excepts to the ALJ's recommended remedies. (ALJD 26-27).

Exception 39. Respondent excepts to the ALJ's recommended order. (ALJD 27-28).



## 2. *Argument*

The Brief argues in a conclusory manner that because the ALJ's findings and conclusions are improper, so are the remedies recommended. Without argument that the remedies themselves are improper in some manner, CGC recommends the Board issue the order recommended by the ALJ, including the remedies, and dismiss Exceptions 38 and 39.

## **IV. CONCLUSION**

The ALJ's Decision is comprised of proper credibility determinations, thorough reasoning based on the record as a whole, and correct interpretation and application of Board law. Respondent has not shown why any applicable Board precedent or any aspect of the Decision should be overruled. Respondent's Exceptions to the Decision should be dismissed entirely.

Dated at Las Vegas, Nevada, this 22<sup>nd</sup> day of January 2016.

Respectfully submitted,

/s/ **Nathan A. Higley**

Nathan A. Higley  
Counsel for the General Counsel  
National Labor Relations Board  
Region 28 – Las Vegas Resident Office  
300 Las Vegas Boulevard South, Suite 2-901  
Las Vegas, NV 89101  
Telephone: (702) 388-6062  
Facsimile: (702) 388-6248  
E-Mail: [nathan.higley@nlrb.gov](mailto:nathan.higley@nlrb.gov)

## **CERTIFICATE OF SERVICE**

I hereby certify that **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** in **ALIANTE GAMING, LLC d/b/a ALIANTE CASINO AND HOTEL**, Case 28-CA-145644 was served via E-Gov, E-Filing, and E-Mail, on this 22<sup>nd</sup> day of January 2016, on the following:

### **Via E-Gov, E-Filing:**

Gary W. Shinnars, Executive Secretary  
National Labor Relations Board  
Office of the Executive Secretary  
1015 Half Street SE, Room 5011  
Washington, DC 20570

### **Via Electronic Mail:**

Mark Ricciardi, Attorney at Law  
Anthony B. Golden, Attorney at Law  
David B. Dornak, Attorney at Law  
Fisher & Phillips, LLP  
300 South Fourth Street, Suite  
Las Vegas, NV 89101  
Email: [mricciardi@laborlawyers.com](mailto:mricciardi@laborlawyers.com)  
[agolden@laborlawyers.com](mailto:agolden@laborlawyers.com)  
[ddornak@laborlawyers.com](mailto:ddornak@laborlawyers.com)

Richard G. McCracken, Attorney at Law  
Eric B. Myers, Attorney at Law  
Davis, Cowell & Bowe  
595 Market Street, Suite 1400  
San Francisco, CA 94105-2821  
Email: [rmccracken@dcbsf.com](mailto:rmccracken@dcbsf.com)  
[ebm@dcbsf.com](mailto:ebm@dcbsf.com)

*/s/ Dawn M. Moore*

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Dawn M. Moore, Acting Secretary to the RA  
National Labor Relations Board  
Region 28 - Las Vegas Resident Office  
Foley Federal Building  
300 Las Vegas Boulevard South, Suite 2-901  
Las Vegas, Nevada 89101  
Telephone: (702) 388-6417  
Facsimile: (702) 388-6248  
E-Mail: [dawn.moore@nlrb.gov](mailto:dawn.moore@nlrb.gov)