

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – SAN FRANCISCO, CA**

**MGM GRAND HOTEL, LLC
d/b/a MGM GRAND**

and

Case 28-CA-186022

CYNTHIA THOMAS, an Individual

**COUNSEL FOR THE GENERAL COUNSEL’S POST-HEARING
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

MGM Grand Hotel, LLC d/b/a MGM Grand (Respondent) interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act (Act) and discriminated against employees to discourage membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act by: suspending and discharging Charging Party Cynthia Thomas (Thomas) on October 3 and 18, 2016, respectively, because of her union and protected concerted activities, and in order to discourage such activities. Thomas exercised her Section 7 rights when she counseled a fellow Unit employee bartender only after a manager brought a potential disciplinary issue to her attention as a Shop Steward. The manager involved Thomas by describing what had happened and giving her the name of the bartender who was subject to potential discipline. Based solely on what the manager had told her, Thomas contacted the bartender in her capacity as a Shop Steward and offered one possible explanation for the scenario described by the manager. As it turned out, the bartender had already given his account to management and did not heed Thomas's suggestion. It was later revealed that Thomas's understanding of the incident with the bartender was not consistent with Respondent's conclusion about the events, but regardless, it is undisputed that her advice to the bartender had no impact on Respondent's investigation. Nevertheless, Respondent suspended and discharged Thomas for simply carrying out her duties as a Shop Steward and trying to offer a plausible defense to a bartender facing potential discipline. By doing so, Respondent violated Section 8(a)(1) and (3) of the Act.

Thomas's offering a Unit employee a plausible defense, in her capacity as Shop Steward was a protected activity. Respondent could not lawfully discipline Thomas for this activity.

To the extent Respondent asserts it believed in good faith that Thomas engaged in misconduct by maliciously telling the bartender something that they both knew to be false to thwart Respondent's investigation, the evidence establishes that, in fact, any such belief was mistaken, because Thomas believed in good faith that the defense she offered was a plausible one, based on the information then available to her.

To the extent Respondent asserts that, by telling the bartender to say something Respondent ultimately concluded was false, Thomas engaged in conduct in the course of her protected activity that was so egregious that she should lose protection of the Act, the evidence establishes that Thomas's advice to the bartender, given in her capacity as a Shop Steward, in aid of Unit employees she believed may be subjected to unjust discipline or discharge, given outside of work and outside of the presence of anyone else, and given in good faith and without malice, fell well within the leeway the Board affords to employees accused of misconduct in the course of protected activities.

Finally, even if it were determined that Thomas did engage in misconduct by telling the bartender to say something she and he both knew to be false, the evidence establishes that other employees who acted dishonestly in other contexts were treated more leniently, and, thus, if not for her being a Shop Steward and engaging in union and protected activities, Thomas would not have been suspended and discharged.

Accordingly, the evidence establishes that, by suspending and discharging Thomas, Respondent violated Section 8(a)(1) and (3) of the Act.

II. STATEMENT OF FACTS

A. Respondent's Business Operations

Respondent is a hotel casino on the Las Vegas Strip, providing gaming, lodging, entertainment, and dining services. (GCX 1(h):1-2; GCX 1(j):2)¹ Respondent employs approximately 7,000 employees. (9:22-25; 10:1) Workday is Respondent's internal personnel file system. (109:21-25; 110:1-3) InfoGenesis is Respondent's point-of-sale (POS) system. (124)

1. Respondent's Policies In Effect During the Fall of 2016

Respondent's international code of business conduct and ethics and conflict of interest policy applies to *all MGM Resorts employees*. (GCX 7:35) (*Emphasis added.*) The following are polices contained therein:

15. Cooperation:

[...]

In no event should you disclose or discuss any internal investigation or audit to any person, whether inside or outside the Company, without the express consent of those persons. The Company is authorized to conduct the investigation. Failure to cooperate fully with any internal investigation or audit may be grounds for disciplinary action, up to and including termination, the concluding of business relationship with the Company. (GCX 7:37)

[...]

#21: Failure to cooperate during or interference with a Company Investigation. Refusal to cooperate with, provide information to or identify yourself to management, security or a guest.

[...]

#28: Dishonesty: Employees will be forthcoming and honest in all written and verbal communication connected to company investigations, company records and communications. Employees will not knowingly make false statements or

¹ References to the Transcript are (__:__) showing page or pages and line or lines, respectively. GCX __ refers to General Counsel's Exhibits. RX__ refers to Respondent's Exhibits. JX__ refers to Joint Exhibits.

omit pertinent information, particularly regarding Company reports and investigations.

[...]

2. Respondent’s Supervisors, Managers and Agents

During the period covering the alleged unfair labor practices, the following individuals held the positions opposite their names at Respondent’s facility:

Maureen Keefe-Wiseman	Human Resources Business Partner (290:6-14)
Jason Shkorupa	Vice President of Food and Beverage (421)
Monica Dorsey	Executive Director of Food and Beverage (393:9-10; 420)
Michelle Zornes	Director of Beverage
Steve Ely	Assistant Director of Beverage (301:1-12; 352:1-2; GCX 9)
Leslie Hackett	Assistant Director of Beverage (352:1-2; GCX 9)
Dan Groesbeck	Beverage Manager (164:20-25; 165:1-3)
Ryan Emerson	Beverage Manager (GCX 1(h):2; GCX 1(j); 33-34)
Jenna Sanistevan	Beverage Manager (GCX 1(h):2; GCX 1(j); 33-34)
John Elliot	Assistant Beverage Manager (However he is no longer employed by Respondent.) (131:23-24; 132:1-2)
Nathan Brown	Assistant Beverage Manager/Assistant Lounge Manager (Nathan Brown was an Assistant Beverage Manager, but during the relevant timeframe he was specifically in charge of the lounges, so he also held the title of Assistant Lounge Manager.) (106-107; 163:22-25; 164:1-11)

3. Respondent’s Union Relationships

During the period covering the unfair labor practices, Respondent had a collective-bargaining agreement (CBA) with the Local Joint Executive Board of Las Vegas with effective dates of June 1, 2014 through May 31, 2018. (33-34; JX 1) The agreement was reached on March 26, 2015. *Id.*

The Local Joint Executive Board of Las Vegas (Union) is comprised of both the Culinary Workers Union Local 226 (Culinary Union) and the Bartenders Union Local 165 (Bartenders Union). (35:11-24) The Shop Stewards for the Culinary Union and the Bartender

Union are interchangeable since they work under the same CBA. (546:8-21; 201:24-25; 202:1-2; 324:23-25)

Training is mandatory to become a Union Shop Steward. (41-42; 492-493; GCX 2; JX

1:3) The parties' CBA contains the following language regarding Shop Steward training:

2.03. Training Programs. **The parties shall provide ongoing training programs in order to foster open and productive communication between the parties.**

There shall be a joint training program for Shop Stewards and supervisors, and a joint training program for Union representatives and representatives from the Employee Relations Department. The cost of providing the training programs shall be divided evenly between the parties. Employees shall be compensated at their regular straight time rate of pay for the time spent in the training sessions.

(JX 1:3) (Emphasis added.)

It is part of the representational duties of Shop Stewards to advise employees of their rights, consult and offer guidance, counsel employees on how to protect themselves and how they should answer questions during investigatory interviews, discuss plausible explanations with employees, caucus with employees before or during investigatory interviews, and defend employees from Respondent. (42-43; 45; 85; 548-549; GCX 2) Shop Stewards are entitled to consult with employees in private, and the expectation is that the consultation with the employee will remain private. (97:8-25; 98:1-12; GCX 2:3) The following Unit employees were Shop Stewards at Respondent's facility during the relevant times:

Cynthia Thomas	Culinary Shop Steward (224)
Tanara Pastore	Culinary Shop Steward (40)
Toni Venci	Bartender Shop Steward (561)
Don Levin	Bartender Shop Steward (583)
Cathy Faro	Bartender Shop Steward (241-242)
Randy West	Bartender Shop Steward (361)

Executive Director of Food and Beverage Monica Dorsey had once stated to Thomas and Tanara Pastore (Pastore) that she held Shop Stewards to a higher standard. (77:8-10, 18-24)

4. Respondent's Food and Beverage Department vs. Beverage Department

Respondent has a Food and Beverage Department which encompasses all venues within Respondent's facility that serve food and drinks. (170:1-16; 300) Within the Food and Beverage Department there is a sub-department called the Beverage Department. *Id.* The Beverage Department generally covers the casino floor, lounges and stand-alone bars where alcoholic beverages are served. On the other hand, the Food and Beverage Department can refer to restaurants where both food and alcohol are served and may even have their own bar within those restaurants. *Id.* There are approximately 550 to 600 employees in the Beverage Department. (10:2-6; 509)

There are approximately five bars and lounges covered by the Beverage Department: (1) Centrifuge (at the front of the casino by Hakkasan Nightclub); (2) Whiskey Down; (3) Zuri Bar/Lobby Bar (Zuri Bar eventually became Lobby Bar); (4) Rouge Lounge/Losers Bar (Rouge Lounge eventually became Losers Bar); and (5) Brad Garret's Comedy Club (on the basement level). (107:16-19; 544:24-25; 545:1-3; 569-570)

a. Beverage Policies, Procedures, and Best Practices

Front Bartenders tend to only the guests who sit or play at the bar top, whereas Service Bartenders are responsible for filling the drink orders for Lounge Servers who are tending to guests seated in the lounge. (120:11-18; 198:22-25; 199:1)

To ring up an order, Lounge Servers must swipe their employee cards on the right-hand side of the screen at the service well POS, which brings up a screen with table numbers; the servers then select the appropriate table number(s), followed by the specific drink(s) ordered by the guest(s). (124-125; 171:20-25; 172:1-3) Anytime a server rings up a drink order, a version of the ticket prints out from the bartender's printer. (125:10-23) The bartender's copy of the ticket

only shows the server's name, the table number, and the drink order that the bartender needs to prepare for the server. *Id.*

After ringing in a drink order, the server has the option of printing out an itemized receipt from the server's printer, or simply hitting save on the screen if the guest would like to leave the ticket open if they are not finished ordering drinks and do not want the check yet, or if the guest wants to leave a tab open. (126-127; 149:10-16)

A drink ticket automatically prints at the bartender's terminal after a drink is rung up by a server, regardless of whether the server decides to save or print the ticket at the server's terminal. *Id.* Although the Service Bartender is supposed to wait until a copy of the drink ticket prints out from the bartender's terminal, often servers will call out their drink orders as they are ringing them in and the bartender will start the order even though the ticket has not been completed and printed yet. (489-490; RX 2) Although it is not policy, it is common practice that a bartender will hand a server a drink without seeing a ticket first. (208:20-25; 209:1-8) After bartenders fill the order listed on a drink ticket, they typically stab the ticket on a poke stick and then when the stick gets full they throw them away in the garbage. (211)

Sometimes when a lounge or bar gets busy, mistakes get made. (206:1-9) For example, a guest may order two drinks and the Service Bartender only gives the Lounge Server one drink, or if there is a big party and the server can only bring so many drinks over at a time, she might come back to the bar to pick the rest of the drinks up. *Id.* (206:1-9) Also, there are occasional computer glitches and printer failures; the screen can freeze, the printer can run out of paper, the printer can run out of ink, etc. (199; 400:20-25; 488-489; 540:19-20; 578-579)

It is important to note that Respondent considers failing to ring in a drink to be a loss of revenue, and therefore theft, which is grounds for immediate termination. (148:3-21)

b. Lobby Bar

Lobby Bar (formally called Zuri Bar) is a raised lounge located by the front desk of the hotel casino and holds about 75-80 people. (113; 544-545 GCX 6:2) There are tables and couches in the lounge for guests to sit at and gaming machines at the bar top. *Id.* Lounge Servers tend to the guests seated at the tables and couches, whereas the Bartenders remain stationed behind the bar and serve the guests seated at the bar top. *Id.* It is also the job of the “Service Bartenders” also prepare the drink orders placed with the Lounge Servers by guests seated at the tables and couches. (*Id.*; 116:19-24) The “service well” is where Lounge Servers go to place the drink orders and receive the drink orders from the Bartender and put them on trays and deliver them to guests seated in their sections. *Id.*

c. Rouge Lounge/Losers Bar and Third-Party Operator Steve Ford

Rouge Lounge was a lounge owned and operated by Respondent at its facility in “The District,” also known as restaurant alley, located across from an Italian restaurant, FiAMMA. (510:23-25; 513) However, around 2015 or 2016, a third-party vendor became interested in leasing the space and remodeling/rebranding that space as “Losers Bar,” a country-themed watering hole.² (145; 444-445)

Around 2015 or 2016, Respondent did a “pop-up” when the rodeo was in town to see if the Losers Bar model would work; a mock room setup and façade were built for the trial run. (444-445; 510-511; 515-516; 545:3-5; 555; 565-566) At some point, the space went back to being Rouge Lounge. *Id.*

² <https://mgmgrand.mgmresorts.com/en/nightlife/losers-bar.html#/Venue>

However, around July 2016, Rouge Lounge closed for good so it could go back to being Losers Bar. *Id.* Then third-party came in to own and operate the venue. (145:10; 510-511) A contract side-letter was negotiated with the Union, Respondent, and Losers Bar. (514; JX1:30-34) Losers Bar had its official re-opening around December 2016 after the pop-up was replaced by the set structure. (516; 565-566)

Steve Ford (Ford) is the owner of Losers Bar. (69:5-11; 440:20-25; 511) Although Losers Bar is a third-party operated venue, the employees who work there are still covered by the CBA and are considered Unit employees. (198; 445-446; JX1:47-48) If Losers Bar employees first worked for Respondent, they are grandfathered in and can keep their seniority. *Id.*

B. Charging Party Cynthia Thomas: Union Shop Steward and Employee Advocate

1. Thomas's Work History and Union Membership

Thomas worked for Respondent from March 2005 to October 2016³ as a cocktail/lounge server, until she was suspended on October 3, and discharged on October 18. (35-36; 543-544) She began working on the casino floor as a cocktail server and eventually made her way to the lounges as a Lounge Server. *Id.* She worked at Zuri Bar/Lobby Bar, Rouge Lounge/Losers Bar, and Brad Garrett's Comedy Club. (544-545) Just prior to her discharge, Thomas was working as a Lounge Server at Brad Garrett's Comedy Club from about 6:15PM to 2:15AM Sundays through Thursdays, with Fridays and Saturdays off. (545:14-21)

Prior to her discharge, Thomas had been a member of the Culinary Union for about 13 years and had served as a Union Shop Steward at Respondent's facility for about 5 years. (545:21-25; 546:1-7)

³ All further dates are in 2016, unless otherwise noted.

Thomas had a practice of deleting her personal text messages every day or every few days because she believed it used up storage on her phone. (558) Thomas only saved text messages that pertained to her own discipline. (660; GCX 16)

2. Thomas and Ford Exchange Text Messages Regarding Union Concerns

Thomas met Ford when she first started working at the Losers Bar pop-up. (555-556) Ford would regularly come in to the bar when he was in town and check in on things. *Id.* Ford and Thomas exchanged phone numbers at one point. *Id.* Ford and Thomas maintained regular text correspondence. (566) It was common practice for Ford to text with the employees who worked there. (444:14-19)

Around June 30, there were concerns amongst the servers about whether they were going to lose their shifts and get “deckered” (meaning have their positions eliminated and have to be placed back into circulation with all the other servers based on seniority), or whether under the CBA, incumbent employees had rights to work in the re-vamped area with continued seniority protection once Rouge Lounge became Losers Lounge permanently. (550; GCX 18)

Around early July, Thomas exchanged text messages with Ford about issues affecting the servers as a result of Rouge Lounge becoming Losers Bar, such as whether they would be fired and would have to reapply (or would be reabsorbed back into the pool of MGM servers based on seniority); and if they did have to reapply for Losers Bar, whether they would have to audition and dance (as per an announcement allegedly made by Executive Director of Food and Beverage Monica Dorsey at a meeting at FiAMMA restaurant at Respondent’s facility with Shop Stewards regarding the closing the Rouge Lounge). (514; 555-556; 567-568; GCX 18) Thomas testified that Ford replied something to the effect of – *No, where did you hear that from?* – and then indicated that Losers Bar and Respondent were apparently not on the same page. (567-568)

Ford texted Thomas that this Union stuff was confusing to him and she replied letting him know that he could always reach out and ask her since she was a Shop Steward, and that he could not always believe everything management told him. (559)

C. Early Morning of Wednesday, September 28, 2016: Bartender Lee Crain and Server Fontay Jones are Suspected of Theft by Manager Nathan Brown For Serving a Beer Without a Ticket

1. Lobby Bar and The Case of the Missing Ticket

The evening of Tuesday, September 27 was a busy night as the casino; there were a lot of big parties in the Lobby Bar and tickets were popping out left and right. (204-205) Lobby Bar has two POS screens at the service well by the bar top for the Lounge Servers to ring up drinks, each with its own printer; there is also a screen on the other side of the bar top for the Bartender with a corresponding printer. (117:2-12)

Just after midnight, at about 12:20AM on Wednesday, September 28, Assistant Lounge Manager (Brown) observed an incident at the Lobby Bar involving Lounge Server Fontay Jones (Jones) and Bartender Lee Crain (Crain). (111:10-25; 112:1-10; GC 5) Brown watched Jones act as though she was placing a drink order and then turn and ask Crain for a Sierra Nevada beer without a drink ticket. (GCX 5:2; 128) Crain grabbed the beer, opened it, and gave it to Jones because he thought it had already been rung up on a big party ticket and was part of the order she had previously placed. (204-205). Crain had worked with Jones for six months at Lobby Bar and prior to that at other venues at Respondent's facility. (218-219) Crain believed Jones to be very trustworthy and no reason to believe that she would not have rung up the drink. *Id.*

Brown did not see a drink ticket print out from the bartender's terminal before Crain handed Jones the beer, so while Jones was serving the drink, Brown confronted Crain and asked

him where the ticket was for the beer he had just given Jones. (204-205) Crain responded he did not know and started looking for the ticket in his immediate work area and in the garbage. (*Id.*; 127-128; 211) When Jones returned to the bar after delivering the beer, Crain confronted her too. (GCX 5:2) According to Crain, Jones gave him “the runaround” and she mentioned how tickets are transferred between servers and she would have to wait until the end of her shift to figure it out. *Id.* When Crain pressed Jones, she told him she was certain that she had already rung up the beer on an earlier check. *Id.*

According to Brown, he swiped the screen and could not find the beer listed on the itemized ticket for the table he believed she served it to. (136-137) Brown testified that he did not recall which table it was. *Id.* Brown then instructed Jones to ring in the beer, but she refused because she believed she had already rung it in earlier and she did not want to overcharge the guest. (131:10-14; 177:23-25) Since Jones refused, Brown ended up ringing in the drink himself. *Id.*

At no point was Jones disciplined as a result of this incident, either for insubordination, theft, or otherwise, even though both theft and insubordination are grounds for immediate discharge under Article 18.01 of the CBA. (*Id.*; 102:10-17; 411; JX 1:41)

2. Brown Investigates the Suspected Theft, Notifies Management, and Helps Initiate the Suspension, Pending Investigation, of Crain and Jones

After this early morning incident at Lobby Bar on Wednesday, September 28, Brown went to the Beverage Office and discussed the matter with Assistant Beverage Manager John Elliot (Elliot). (131:22-25; 132-133) Brown informed Elliot of what had transpired between Jones and Crain. (134; GCX 5:2) Elliot told Brown that it was clear that both the server and

bartender were in violation of company policy that resulted in loss of revenue (*i.e.*, stealing) and that surveillance footage could be pulled to confirm the situation. *Id.*

So, around 2:00AM on Wednesday, September 28, Brown and Elliot went downstairs to one of the surveillance rooms and watched video footage of the Lobby Bar from about around 12:20AM to 12:30AM. (134-135) Crain did not watch any footage from before 12:20AM because he had not considered that the drink could have been rung up prior to his arrival at Lobby Bar, despite both Jones and Crain telling him they believed it was on one of the big party tickets. (136:19-22; 205) Based on the 10-minute window of video footage he viewed, Brown concluded that the beer had not been rung in by Jones before Crain handed her the beer to serve. (155:1-2)

Brown and Elliot returned to the Beverage Office where Brown proceeded to type out an email memorializing these events (including that he watched Jones “act as though she was placing a drink order”) and copied several Beverage managers and Assistant Beverage Directors on the email while Elliot started filling out the Suspension Pending Investigation (SPI) paperwork for the bartender and server. (140:14-23; GCX 5) However, by that point, Jones and Crain’s shifts had ended around 2:00AM and they had already left. (214) Brown’s shift ended around 4:00AM that morning (Wednesday, September 28). (110:15-25; 111:1-6; 143:1-9)

D. Respondent’s Animus Toward Thomas’s Union Activities Involving Third-Party Vendor/Owner of Losers Bar Steve Ford

1. Mid-Day Wednesday, September 28, 2016: Thomas Is Asked to Come In Early To Submit to Questioning About an Undisclosed Topic

Around 11:02AM on Wednesday, September 28, Director of Beverage Michelle Zornes (Zornes) texted Thomas asking her to come into Human Resources (HR) at 5:30PM. (GCX 16) Thomas replied via text, asking if it was bad and what it was about. *Id.* Zornes simply responded

that she and HR Business Partner Maureen Keefe-Wiseman had some questions for Thomas. *Id.* Thomas texted Zornes, asking for her to call, but Zornes replied that she was in a meeting. *Id.*

Thomas again asked what the matter pertained to because she might need to prepare some documents or do some research. *Id.* Thomas again asked Zornes to call her when she was done with her meeting. *Id.* Zornes sidestepped Thomas's questions and responded vaguely about needing to ask Thomas some questions about information that was brought to her attention, but noted that Thomas did not need to bring any documents with her. *Id.*

Thomas again asked what it was about and asked whether she need Union representation. *Id.* Zornes replied that she could not say over the phone and that she had already arranged for Shop Steward Toni Venci (Venci) to be there (thus giving the impression that discipline could potentially result from their questioning). *Id.*

The reason Zornes and Keefe-Wiseman wanted to question Thomas is because Executive Director of Food and Beverage Monica Dorsey (Dorsey) met with Ford, and he supposedly told her about his texts with Thomas. (440-442) Dorsey claims he showed her a text that said something to the effect of: *Do not trust Dorsey.* *Id.* Dorsey testified that she was surprised to hear this because she believed she worked well with the Union and had good relationships with all the Shop Stewards, including Thomas. *Id.*

Subsequently, Dorsey notified Keefe-Wiseman and Zornes of the situation and asked them to address it with Thomas by asking Thomas whether she did it, and if she did, to not contact Ford and make negative comments about anybody on the property. (443-444; 517-518)

2. Early Evening of Wednesday, September 28, 2016: Thomas Arrives to Work Early and Is Interrogated About Her Texts With Ford

As requested, Thomas came in early before her scheduled shift that evening and met with Zornes, Keefe-Wiseman, and Venci in HR around 5:30PM on September 28. (561-562) Thomas was questioned about whether she sent Ford a text shining Dorsey in an unflattering light. (561-562) Keefe-Wiseman asked Thomas for a copy of the text message she sent Ford, but Thomas no longer had it because she deletes her text messages regularly. (520; 558) The meeting lasted about 20-30 minutes. (569) Thomas was not asked to give a statement. (569:7-10) After the meeting, Thomas went and changed into her uniform to start her shift at Brad Garrett's Comedy Club. (569)

E. Manager Brown Involves Thomas As a Shop Steward And Discloses Details Under Investigation Concerning Potential SPI/Discipline of Jones and Crain

1. Evening of Wednesday, September 28, 2016: Brown Approaches Thomas

There were two shows at Brad Garrett's Comedy Club the night of September 28 and Thomas worked both of them. (570) After the second show Thomas went to Centrifuge Lounge to see if she could pick up some more hours. *Id.*

Brown's shift ended around 4:00AM the morning of September 28, but he returned later that night for his next shift around 8:00PM. (110:15-25; 111:1-6; 143:1-9) Sometime after 10:30PM, Brown approached Thomas while she was at the Centrifuge Lounge. (143:3-16; 572-573; GCX 4:1) Brown had previously supervised and worked with Thomas and they enjoyed a friendly and good working relationship. (143:19-21; 146:9-19; 150:4-7) Brown said he wanted to run a few things by her because she was an experienced Shop Steward. (143:3-16; 572-573; GCX 4:1)

Brown asked Thomas what the role was of a Shop Steward in the SPI process since he was a newer manager and was not very familiar with the process. *Id.* They discussed the role of the Shop Steward as well as SPI process. *Id.*

Brown then revealed to Thomas that he was asking because he had witnessed an incident earlier that morning involving a server and a bartender at Lobby Bar. *Id.* Brown began telling her how he had observed the server act like she was ringing in a drink and then turn to the bartender and asked for the beer and the bartender gave it to the server without a ticket. (572-575; GCX 4) He divulged additional details of the incident as well as the names of the bartender and server, Crain and Jones. *Id.*

Brown told Thomas that he had asked Crain where the ticket was and that Crain started looking around for it. *Id.* Brown also told Thomas that he had asked Jones about the beer and that Jones had replied she was pretty certain she rang it in already and did not want to overcharge the customer. *Id.* Brown told Thomas that he ultimately could not find the beer on the check in the system so he rang it in himself. (576)

Thomas began presenting Brown with different hypothetical scenarios that could explain why he might not have seen a ticket print out or why it might not have shown up in the system. (147:21-25; 148:1-2) Some of the plausible explanations discussed included a screen error/computer glitch, a printer error, whether the server had enough time to ring it in, whether the server was trying to speed up service and bring the guest the beer and ring it in later because it was busy, etc. (174:6-17; 576-578; GCX 6)

Thomas and Brown also discussed the ramifications of a drink not being rung in since Respondent considers loss of revenue to be theft, which could be grounds for discharge. (148:3-21) Thomas testified that Brown said management would SPI Jones and Crain, but that

they would probably come back anyway. (573) At no point during did Brown ask Thomas to keep their conversation private or confidential. (157:14-21) The discussion between Brown and Thomas lasted about 10-20 minutes. (578) Thomas went home after her shift ended around 2:15AM on Thursday, September 29. (657-658)

2. Thursday, September 29, 2016: Thomas Attempts to Contact Crain In Her Capacity As a Shop Steward

Thomas woke up around noon on Thursday, September 29 and tried texting Crain (albeit with typos) at about 2:41PM and then later tried calling him, but he did not respond to either attempt. (GCX 10; 237-238:1-4; 580; 626; 657-658) Thomas was concerned about situation Brown had brought to her attention the night before and wanted to reach out to Crain in her capacity as a Shop Steward and give him a heads-up. *Id.* Thomas was more comfortable with Crain and had worked with him more recently than with Jones. *Id.* Since Crain did not respond, Thomas tried texting him again at about 11:53PM that evening. (GCX 10; 237-238:1-4; 657-658) Crain still did not respond.

3. Thursday, September 29, 2016: Crain Gets SPI'ed

Unbeknownst to Thomas, Crain was placed on an SPI that evening (Thursday, September 29). (601-602) In response to Brown's email summary from the night before, Groesbeck replied-all to Zornes, Keefe-Wiseman, Dorsey, Assistant Director of Beverage Leslie Hackett (Hackett), and Assistant Director of Beverage Steve Ely (Ely), and wrote in pertinent part:

After watching the surveillance footage it is clear that the beer was not rang in by the cocktail server (Fontay Jones) and the bartender (Lee Crain) clearly handed the beer to Fontay without receiving a ticket for the transaction.” (GCX 17).

Before Crain could start his shift around 6:00PM that night, he was called into the manager's office by Beverage Manager Dan Groesbeck (Groesbeck). (214-219; 342:18-25; GCX 8) Shop Steward Randy West was already present. *Id.* Groesbeck asked Crain for his version of events regarding the incident at the Lobby Bar and Crain explained that he had given Jones the beer, and that although he did not remember seeing her ring it in, he was sure it had been rung in on the big party ticket and that the beer was owed to her. *Id.* At the end of the meeting Groesbeck suspended Crain, pending investigation, and had him sign SPI papers and turn in his badge and nametag. *Id.* Jones was on her two-days off, so she was not placed on an SPI. *Id.*

4. Friday, September 30, 2016: Crain's Due Process Meeting

On Friday, September 30, at about 11:30AM, Crain had a Due Process meeting in HR attended by Shop Steward Tony Venci, Keefe-Wiseman, Hackett, and Ely. (GCX 9; 230; 406) During the meeting, Crain was questioned about the incident involving Jones, and he admitted that he had given Jones the beer without having a ticket in hand for it. (220-221) The Due Process meeting lasted about 30 minutes. (405-406; GCX 9)

At the conclusion of Crain's Due Process meeting, Respondent decided there was no harm, no foul, because regardless of Jones or Crain's intent, ultimately the beer was rung in, so there was no injury committed against Respondent, even if Jones or Crain's actions were inconsistent with policy. (241:12-14; 229; 259:16-25; 260:1-2; 292:9-22; 293:5-10; 343; 346:16-19; 457:22-25) It was simply deemed an "honest mistake." *Id.* So Respondent lifted Crain's SPI and authorized him to return to work that same evening for the swing shift, thus concluding its investigation into the potential theft. *Id.*

Neither Crain, nor Jones was disciplined for theft. (292:9-12) In fact, Jones was never actually placed on suspension because the investigation was resolved so quickly, before she even returned to work for her next shift. (292:13-19)

Crain, however, was issued a Documented Verbal Warning for job performance: “Specifically Lee was observed on his cell phone during operating hours at the bar, and not using his jigger. Also, served a beer without verifying if the item was rung in properly.” (RX 6) Despite serving a beer to Jones that neither of them had rung in and telling HR and management that they were certain it had been rung in, neither Crain nor Jones were disciplined for theft or dishonestly. *Id.* None of the same policy violations (#28, #21, #39) cited in Thomas’s discharge were noted in Crain’s discipline because Crain’s actions were deemed “an accident”. (347:17-19) Jones did not receive any discipline whatsoever as a result of the incident at the Lobby Bar on September 28. (102:10-17)

Crain went home after the meeting and came back later that evening for his shift around 6:00PM. *Id.*

5. Friday, September 30, 2016: Thomas Tries to Contact Crain Again In Her Capacity As a Shop Steward

Thomas was off on Friday, September 30, and she tried calling Crain again. (581-582) At some point after 12:33PM, Thomas texted Crain again asking him to call her. He responded, “Will do in a meeting.” Thomas, suspecting that it may be a disciplinary-related meeting, shared the details Brown had conveyed to her, and, in essence, reminded Crain to tell the truth consistent with her understanding of the events. (GCX 10)

Thomas suggested in the text to Crain that the printer could have failed and that is why he might not have seen or had a ticket when he gave Jones the beer:

Ok.

It's very important. !!

Claim. U saw her entering stuff on the computer and you figured the printer failed so you gave her the beer she asked for."

Id.

There is some dispute as to whether Crain was still speaking with management regarding other issues after the Due Process portion of the meeting concluded when Thomas attempted to contact him. Crain claimed that prior to the Due Process meeting commencing, he was seated in the HR waiting room when he received the 12:33PM text from Thomas stating, "It's Cynthia. Call me". (263-265; GCX 10) Crain testified that he replied, "Will do in a meeting," on his phone as he was walking into the meeting, and that the subsequent text messages from Thomas regarding the potential printer failure were received while he was still in the meeting. (275; 277)

Although Crain claims he received and read Thomas's text messages during the meeting, he did not mention them to management at that time, even though he was admittedly "pissed about the texts" and stayed after his Due Process meeting ended to discuss other matters. (271; 276; 405)

Regardless of when Crain actually received Thomas's text messages, Crain testified that the texts had no impact whatsoever on the information he shared with Respondent. (276:23-25; 277:1-12) Similarly, Respondent conceded that Thomas's text messages to Crain had no impact on its investigation into the alleged theft incident involving Crain and Jones. (297:6-10) So it is undisputed that Thomas's text messages had no effect on the investigation, irrespective of where Crain was when he received them. *Id.*

F. The Aftermath of Thomas’s Attempt to Assist a Unit Employee After Management Brought The Issue To Her Attention as a Shop Steward

Crain was upset by Thomas’s texts despite having had a good working relationship with Thomas, knowing she was a Shop Steward, and having no reason to believe that she held any ill will toward him or would purposely try to get him in trouble. (224:20-25; 225:1-7; 279) Crain testified that he interpreted Thomas’s text message as telling him to lie. (265:1-7) However, Crain testified that he had no reason to believe that Thomas would tell him to lie. (256:8-10)

Crain testified that although he knew Thomas’s suggested version of events was not true, he was not aware whether Thomas knew that to be the case. (278-279) Crain conceded he never corrected Thomas, nor did he ever tell her that the version of events that she posited was inconsistent with his experience of the event. *Id.* At no point did Crain notify Thomas that he was already discussing his disciplinary matter with another Shop Steward. (239:7-10) Crain made no attempt to ask Thomas what she meant by her text message, or ask for any clarification whatsoever. (237-239; 240:2-7; 241:7-11; 280:3-5). Crain had no other contact with Thomas after he texted, “Will do in a meeting.” *Id.* Crain admitted that he had no way of knowing Thomas’s intent. (279)

1. Friday, September 30, 2016: Crain Contacts Shop Stewards Cathy Faro and Randy West about Thomas’s Text Messages/Calls

After his Due Process meeting, but before his 6:00PM shift that evening, Crain contacted Cathy Faro (Faro) about the calls and texts he received from Thomas. (241) Upon request, Crain sent Faro a screen shot of his text exchange with Thomas. (242:18-20; 245; 267) Faro said she was unavailable and told him to contact Shop Steward Randy West (West). (*Id.*; 473)

2. Friday, September 30, 2016: Crain and West Go to Management about Thomas's Text Messages/Calls

When Crain returned to work later that evening (after his SPI was lifted), he went and spoke to West. (244; 473) Although West had not even seen the text exchange at that point, he suggested they go speak to management. (245; 269; 474; 495:15-25) Together they went and spoke to Groesbeck in the manager's office for about 10 minutes. (245) Crain told Groesbeck that a Shop Steward had contacted him about his Due Process meeting and showed Groesbeck the text from Thomas. (245; 269) Groesbeck asked Crain and West to write up statements for him. (475) Groesbeck also asked Crain to email him the text, so Crain took a screen shot of the exchange on his iPhone and immediately emailed it to Groesbeck. (246) Groesbeck then told Crain not to speak to anybody else about this. *Id.*

West testified that he knew nothing about the text Thomas sent to Crain before they went to speak to Groesbeck; and even after West had read the text, he admitted he did not know what Thomas meant. (497:20-25; 498:1-8) At no point did West try to reach out to Thomas and find out what was going on before he suggested to Crain that they go to management. (498-499) West also admitted that he had not considered going to the Union and suggesting that Thomas get retrained as a Shop Steward, even though training and retraining is outlined in the CBA. (494; JX 1:3) West admitted that he did not know what Thomas knew about Crain's incident with Jones, or even how she knew of it. (498-499) Keefe-Wiseman testified that Randy West's written statement did not factor into Respondent's decision to discharge Thomas. (401:20-25; 402; 403:1-2)

3. Friday, September 30, 2016: Groesbeck Notifies Dorsey of Thomas's Text Messages to Crain

Groesbeck sent Dorsey an email the evening of Friday, September 30, informing her of the text message Thomas sent Crain along with the attached screenshot Crain had provided. (423) Dorsey then forwarded the email and attached screenshot to Keefe-Wiseman in HR. (423) Keefe-Wiseman subsequently opened an investigation into Thomas. (423)

G. Respondent Retaliates Against Thomas For Her Union Activities

Keefe-Wiseman conducted the investigation into Thomas's text message to Crain. (298-299; GCX 14)

1. Monday October 3, 2016: Thomas is SPI'ed

Thomas was off Saturday, October 1, and took medical leave on Sunday, October 2, so her first day back was not until the following day. (582)

Around 6:00PM on Monday, October 3, Thomas reported to work for her scheduled shift, but upon her arrival she was asked to go to the Beverage Office. (582-583) Beverage Manager Ryan Emerson, Assistant Director of Beverage Steve Ely, Brown, and Shop Steward Don Levin were present. *Id.* Thomas was placed on an SPI and given a notice to sign. (583-584; GCX 12) Thomas was told that someone from HR would reach out to her. (584) A few days later HR contacted Thomas about scheduling a meeting.

2. Friday, October 7, 2016: Thomas's Due Process Meeting

On Friday, October 7, Thomas's Due Process meeting was held in Keefe-Wiseman's office in HR. (370; 584-585; GCX 3) Keefe-Wiseman, Zornes, Thomas, and Shop Steward Tanara Pastore (Pastore) were present. (305-306; 371) Thomas had requested Pastore be present as her Shop Steward. *Id.* Keefe-Wiseman asked Thomas if she had recently texted

another employee. (585-590; GCX 3) Thomas had only texted one employee around that time, so she came right out and admitted that she had texted Crain because Brown had brought the potential theft situation to her attention as a Shop Steward. (586-588) Thomas explained how Brown had approached her as a Shop Steward and told her about the incident involving Jones and Crain and that they discussed a number of hypotheticals that would explain why Brown did not see the drink rung up immediately before Crain passed the beer to Jones. (374) Thomas also explained to them the possibility of computer and printer errors. (GCX 3) Keefe-Wiseman asked if they knew for sure whether the ticket did not print, and Thomas answered truthfully that she did not know; she only knew what Brown had described to her. (GCX 3:2)

When asked what her intent was, Thomas told them that she reached out to Crain based on information brought to her attention by a manager as a Shop Steward and was trying to help him recall the situation and to think about all the things that could have happened and to help him think through his process. (588-589; GCX 3) Thomas was essentially attempting to refresh Crain's recollection by relaying what Brown had told her and wanted Crain to think about how things transpired and to help him recall what might have happened. (373-374; 635; GCX 3) Thomas stressed that it was not her intent to tell Crain to lie or be dishonest because she only knew what Brown had told her. (373: 4-8; 374; 586-589; GCX 3)

During the meeting Pastore asked for a copy of the text message in question and not only did Keefe-Wiseman refuse to provide the copy in her possession (at the time she only had the version without the phone number at the top), but she also refused to acknowledge whether she had a copy, thus denying them access to relevant information. (305-306; GCX 2:1) Keefe-

Wiseman admitted that Respondent suspended Thomas without first having any proof that would link the text to Thomas. (306) Thomas stated clearly during her Due Process meeting that she did not tell Crain to lie. (307) The meeting lasted about 10-20 minutes, and, at the end, Thomas was told that she would remain on an SPI. (585; 589)

3. October 1-17, 2016: Respondent's Investigation and Basis for Its Personnel Action Against Thomas

Keefe-Wiseman interviewed Crain, Thomas, Brown, and Jones as part of her investigation into Thomas's text message. (299; GCX 14)

On Thursday, October 6, Keefe-Wiseman met with Crain in HR. (247-248) West was also present for the meeting. *Id.* During this meeting, Crain told Keefe-Wiseman that although he did not see Jones ring in the beer, he believed he owed it to her because it was on the ticket for a big 15-person party that had been seated. (205; 258-259) Crain also told Keefe-Wiseman that he believed Thomas was telling him to lie because her understanding of the events was not consistent with his recollection of them. (271)

Upon request, Crain gave HR a written statement regarding the text message. (249; 251-252; GCX 11) In his written statement, Crain wrote that he did not respond to Thomas's text messages until *after* his Due Process meeting was already over. (GCX 11) Keefe-Wiseman testified that everything in Crain's written statement matched up with the conversation she had with him, which would include the timing of the text messages. (370:16-21) Keefe-Wiseman also had Crain email a screenshot of the text showing the phone number at the top to verify that it matched the number Respondent had on file for Thomas. (304-305; 312; 365)

Keefe-Wiseman learned about the conversation Thomas had with Brown during Thomas's Due Process meeting, so she and Zornes followed-up with Brown in Zornes's office. (303:1-6; 304) Keefe-Wiseman admitted that she knew Brown had approached Thomas and

involved her in the Lobby Bar incident because Thomas was a Shop Steward. (308:24-25; 309:1-3) Keefe-Wiseman reviewed Brown's September 28 email during the course of her investigation. (343:21-25; 344:1)

Keefe-Wiseman was aware that Thomas had no first-hand knowledge of what had actually transpired between Jones, Crain, and Brown the evening of September 28. (309) Keefe-Wiseman was also aware that of those three, Brown was the only person Thomas had spoken to about incident, because she confirmed that Thomas had no contact with Jones. (295:16-25; 296:1-10; 310:2-8; 380:12-25; 381-383; RX 9; GCX 10) Keefe-Wiseman testified that she had no idea what Thomas's intent was in sending the text. (408:22-25; 409:1-4)

Keefe-Wiseman was aware that Thomas and Crain had previously worked together. (324:20-22) Keefe-Wiseman was aware that Thomas was a Shop Steward. (314:3-5) Keefe-Wiseman admitted that nothing during the course of her investigation made her think Thomas harbored any ill will toward Crain. (396:22-25; 397:1) Wiseman admitted that she was aware it was a Shop Steward's duty to advise employees. (324:4-12) Keefe-Wiseman conceded that Thomas did not know what actually happened at the time Thomas texted Crain. (322:8-13) Keefe-Wisemen admitted that she was aware of Beverage employees complaining about computer screens and printers malfunctioning occasionally. (400:20-25) Keefe-Wiseman acknowledged that both Jones and Crain thought the beer had been rung in on a previous check and that this is what they had told Crain, who then relayed this to Thomas. (346:16-25; 347:1-9; 350:3-7; RX 2)

Nevertheless, Keefe-Wiseman concluded that Thomas's text to Crain was dishonest and therefore cause for immediate termination under Article 18.01 of the CBA. (301-302) Keefe-Wiseman presented these findings to Zornes and Dorsey. (299-300; RX 10)

Dorsey reviewed everything Keefe-Wiseman prepared and then went over it with Keefe-Wiseman and then later with Vice President of Food and Beverage Jason Shkorupa (Shkorupa). (422-426)

Dorsey was aware of the summary of events Brown had emailed management just a couple of hours after the Lobby Bar incident occurred on September 28, wherein he wrote that he watched Jones “act as though she was placing a drink order and then ask the bartender, Lee, for a Sierra Nevada without the ticket.” (GCX 5; GCX 17; 435:2-5; 538:10-23) Dorsey was forwarded this summary the following day on Thursday, September 29, by Groesbeck. (GCX 17)

In making the decision to terminate Thomas, Dorsey considered that Thomas had not spoken to either Crain or Jones before she texted Crain and concluded that Thomas had not ascertained any of the details, had no idea what was going on, and that Thomas’s actions were egregious because she inserted herself as a Culinary Shop Steward (as opposed to a Bartenders Shop Steward). (JX 2: 268:11-21) Dorsey’s position was that no one asked Thomas to get involved when she began making phone calls and then sending text messages, and Dorsey found that very odd and it did not make any sense to her. *Id.*

Dorsey acknowledged that Thomas had not witnessed the incident between Crain and Jones, nor had she ever reviewed any video footage. (434:1-7) Dorsey also conceded that Thomas only knew what Brown had told her since she never actually spoke to Jones or Crain (besides the brief text exchange). (434-438)

Together, Keefe-Wiseman, Dorsey, and Shkorupa decided to terminate Thomas because it was substantiated that Thomas sent the text in question to Crain. (422-426; RX 10:2)

4. October 18, 2016: Thomas is Discharged For Her Union Activities

Zornes contacted Thomas to let her know Respondent had reached a decision and needed to meet with her. (534) On October 18, Zornes met with Thomas and Pastore. (534) Zornes read them the Separation Notice and then gave Thomas some paperwork fill out to get her final check, and asked Thomas to turn in her employee card. Thomas's Separation Personnel Action Notice ("Separation PAN") cites in the "Remarks" section:

Termination reason for violation of GRC#28 Dishonesty. Employees will be forthcoming and honest in all written and verbal communication connected to company investigations, company records and communications. Employees will not knowingly make false statements or omit pertinent information particularly regarding company reports and investigations. #21 Failure to cooperate during or interference with a company investigation. Refusal to cooperate with, provide information to or identify yourself to management, security or a guest. #39 failure to comply with the MGM Resorts International Code of Business Conduct, Ethics and Conflict of Interest Policy. Specifically, Thomas sent a text message to another employee directing them to lie in a Company investigation.

(319; GCX 13)

Keefe-Wiseman drafted the above termination language. (319; 385; 389; GCX 14) Keefe-Wiseman was aware Thomas was a Shop Steward and testified that Thomas was a Shop Steward the entire time Keefe-Wiseman knew her. (671-672)

According to Respondent, Thomas had a 3-day disciplinary suspension on her record from January 29-31, 2016. (328-329; RX 1) Under the CBA, discipline remains active for one year. (327:20-23; JX 1) The Union believed that they had reached an agreement to reduce it. (JX 2) However, whether Thomas was on a Last & Final is irrelevant since Respondent maintains that Thomas's text was grounds for immediate termination under Section 18.01 (despite the Separation PAN stating that it was based on progressive discipline). (GCX 13; RX 10; 389:16-19)

Respondent attempts to argue that Thomas is a recidivist liar because her 3-day suspension involved dishonesty, but Respondent cannot rely on recidivism. Thomas's 3-day suspension was for helping a guest, who did not have cash, tip-out a piano player by processing a charge to the room and giving the guest cash from the register; working an extra 45 minutes off the clock (meaning that even though she punched out, she continued to help her coworker and served drinks, closed out checks, and cleaned) rather than leaving her work area; and having her 20-year-old daughter wait for her to finish at the back of the bar in an employee-only area. (331-335; 395:4-10)

a. Thomas Did Not Violate GRC#28 (Dishonesty)

Keefe-Wiseman testified that Respondent believed Thomas violated rule #28 because her text message to Crain constituted dishonesty. However, she also testified Thomas's text message to Crain was not part of the company's investigation into the Lobby Bar incident, nor was it a company record or communication, so she did not violate the first portion of rule listed. (320:5-15) Keefe-Wiseman testified that even though Thomas did not violate that first portion of the rule, HR always lists the whole rule intact; they do not cut up the policy language. (320-321)

As for the second portion of rule #28 listed in the Separation PAN, "knowingly make false statements...regarding company reports and investigations," Keefe-Wiseman testified that Thomas did not know what happened (and thus could not have knowingly made a false statement). (320-322)

b. Thomas Did Not Violate GRC#21 (Cooperation/Interference)

Keefe-Wiseman testified that with respect to rule #21 listed in the Separation PAN, Thomas had not failed to cooperate during the investigation; again, that first portion was only included because Keefe-Wiseman listed the whole rule intact. (319-321)

Thomas was only found to have interfered with the company's investigation into the Lobby Bar incident by sending Crain the text. (319-321) However, Keefe-Wiseman admitted that Thomas's text did not actually interfere with Respondent's investigation. (321) Keefe-Wiseman, Crain, and Dorsey all testified that Thomas's texts had no impact on the company's investigation whatsoever. (321:16-22; 276-277; 457)

As for the latter part of rule #21, Keefe-Wiseman testified that Thomas did not fail to identify herself to management, security, or a guest. (323:5-16; 326:10-19)

c. Thomas Did Not Violate GRC#39 (MGM Resorts International Code of Business Conduct, Ethics and Conflict of Interest Policy)

When asked how Thomas violated rule #39 (failing to comply with the Code of Conduct), Keefe-Wiseman testified: "Well, truthfulness and ethics and code of conduct. I don't know, it speaks for itself."

Ultimately, the sole basis for Thomas's discharge was the text message she sent to Crain. (323:5-16) The bottom line of Thomas's Separation PAN states "Specifically, Thomas sent a text message to another employee directing them to lie in a Company investigation." (319; GCX 13)

5. Comparator Evidence:

West, who worked for Respondent for 23.5 years testified that he was unaware of any Shop Stewards who had been disciplined or discharged for telling an employee to lie, for giving bad advice to an employee, or for giving a suggestion to an employee that later turned out to be

inconsistent with the events that occurred. (468; 503:4-16) Zornes also testified confirming this. (536)

Along those lines, the Union does not pursue every grievance because sometimes the facts claimed by the grievant turn out to be inaccurate or are not always consistent with how things happened. (49:18-23) Similarly, Respondent does not always get things right and has falsely accused employees of misconduct and suspended them pending investigation, but then subsequently brought employees back from suspension and given them full-backpay. (72:10-25) The company sometimes gets things wrong too. Crain himself had been let go by the company, but then was subsequently brought back after filing a grievance. (200)

Respondent was only able to present one example of another employee fired for dishonesty. (366:20-25) Respondent fired Clayton Simmons (Simmons) for fabricating an alternate identity and falsifying documents during the course of an investigation that resulted from a guest complaint. (367; 454) Simmons was not a Shop Steward, nor did his alleged misconduct have anything to do with Union activity. (536)

Brown was never disciplined for violating Respondent's company-wide policy about disclosing or discussing internal investigations with Thomas. (168:2-25; GCX 7) Brown was not disciplined for giving inconsistent accounts as part of a company investigation. (GCX 5; GCX 6) Likewise, Crain was never disciplined for the dishonest and inaccurate portions of his written statement given to HR about the timing of Thomas's text messages, which was considered part of a company investigation. (249-251; 320-321; GCX 11)

H. The Processing of the Union Grievance and NLRB Charge Regarding Thomas's October 3, 2016 Suspension and October 18, 2016 Discharge

1. Union Filed a Grievance and Thomas filed an NLRB Charge Over Her October 3, 2016 Suspension and October 18, 2016 Discharge

On Tuesday, October 11, Thomas filed an NLRB charge over her suspension. (GCX 1(a)) After she was discharged, Thomas filed an amended charge to include her termination on November 4. (GCX 1(c))

On about Friday, October 20, the Union file a grievance over Thomas's October 3 suspension and October 18 discharge. (JX 3-part 2 of 3: "J2" from arbitration record) A Board of Adjustment meeting was held, during which Thomas elaborated that there was a misunderstanding when it came to her text message with Crain. (415)

2. The Allegations Contained in the NLRB Charge were Deferred Since There Was Already A Grievance Pertaining to the SPI and Discharge

On Friday, December 30, the Regional Director of Region 28 deferred the allegations raised in the amended charge to the parties' grievance and arbitration process pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984). (668; GCX 1(e)) The Union did not appeal the Region's deferral. *Id.*

3. Respondent and the Union Arbitrated Thomas's SPI and Discharge

The parties proceeded to arbitration on November 14 and 30, 2017 before Arbitrator Gary L. Axon (the Arbitrator). (JX 2; JX 4) Respondent sought to submit the charge allegations to the arbitrator who heard Thomas's grievance, but the Union refused to specifically define the statutory allegations as issues for the arbitrator to decide. (668; JX 4:2; JX 5; JX 6) Nevertheless, evidence regarding whether Thomas was discriminated against due to her Shop Steward duties

was presented during the course of the arbitration, and the arbitrator considered the statutory issue in his April 2, 2018 Opinion and Award:

The Company's very serious allegation that Grievant was dishonest during an investigation is compounded by the fact she was a Shop Steward, charged with representing members of the bargaining unit with honesty and integrity.
(JX 4:15)

If Brown told Grievant he saw Jones trying to ring up an order before retrieving the beer from Crain her text message could prove factually true. Grievant was a trained Shop Steward and had assisted multiple members of the bargaining unit during investigations. She understood telling the truth was an essential component during an investigation. Grievant had an active suspension for dishonesty during a prior investigation. She understood that if it was found she instructed Crain to lie, she could face termination. If Grievant's version of the conversation with Brown was found to be accurate, it could exonerate her from discharge.
(JX 4:17)

Grievant's misconduct was particularly egregious because she was an experienced Shop Steward charged with representing fellow members of the bargaining unit during the disciplinary process. In this advocacy role she had a higher duty to be honest, forthcoming, and to refrain from any activity, which could interfere with the integrity of an investigation. Thomas understood she was not supposed to coach witnesses or otherwise interfere in an investigation. Yet she did so.
(JX 4:24)

Your Arbitrator does not agree with the Union's assertion Grievant was punished for engaging in Shop Steward duties. This is not a case of an overzealous or vigorous Shop Steward advocating on behalf of a member. Protections for engaging in Union activities do not extend to an employee or Shop Steward, who is dishonest during an employer investigation.
(JX 4:24)

After the Region was notified of the Arbitrator's Opinion and Award, it determined that the grievance decision was not reasonable in light of the purposes of the Act, and, in fact, was repugnant to the Act, and therefore deferral was inappropriate revoked deferral and reopened the investigation on August 31, 2018. (GCX 1(f)) Also on August 31, 2018, the Region approved the withdrawal of independent 8(a)(1) allegations concerning unlawful interrogation and giving the impression of surveillance of protected activities. (GCX 1(g))

Ultimately, the Region determined that the Arbitrator's Opinion and Award was not reasonable in light of the purposes of the Act and was repugnant to the Act since it explicitly discriminated against Thomas on the basis of her Shop Steward status, and therefore deferral was inappropriate. Accordingly, the Complaint and Notice of Hearing issued on September 27, 2018. (GCX 1(h)-(i)) On October 11, 2018, Respondent filed its Answer and Statement of Defenses on and later amended it orally on the record. (GCX 1(j); 33-35) The hearing was rescheduled to commence February 12, 2019. (GCX 1(l)) On January 15, 2019, Respondent filed a Motion for Summary Judgment. (GCX 1(o)) On January 22, 2019, CGC filed an Opposition. (GCX 1(p)) On January 29, 2019, Respondent filed a Reply. (GCX 1(q)) On February 14, 2019, the Board issued its Order denying Respondent's Motion for Summary Judgment. (GCX 15)

III. CREDIBILITY RESOLUTIONS: WHEN IN CONFLICT WITH THAT OF RESPONDENT'S WITNESSES, THE TESTIMONY OF THE GENERAL COUNSEL'S WITNESSES SHOULD BE CREDITED

A. Legal Standard

Significant weight is given to an administrative law judge's (ALJ) credibility determination because the ALJ sees and hears witnesses firsthand. It is for this reason that a witness's demeanor, including their expressions, physical posture and appearance, manner of speech, and non-verbal communication, may convince the ALJ the witness is testifying truthfully or falsely. *Medeco Security Locks*, 322 NLRB 664 (1996); *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996). *Accord V&W Castings*, 231 NLRB 912, 913 (1977), *enfd.* 387 F.2d 1006 (9th Cir. 1978). Furthermore, the ALJ should consider the witnesses' demonstrated ability to recall *events*, not necessarily specific dates, along with the demeanor of each witness, the weight of the respective evidence (established and admitted), inherent probabilities, and

reasonable inferences, which may be drawn from the record as a whole. *C-F Air Freight, Inc.*, 247 NLRB 403, 405 (1980).

A critical component of this case is witness credibility. The glaring insufficiencies of Respondent's witnesses' testimony must be addressed before reconciling the facts of this case.

B. Respondent's Witnesses Should Be Wholly Discredited

1. Brown Should Be Discredited

At hearing, Crain denied ever seeing Jones act as though she was placing a drink order in complete contradiction of his September 28 email which reads in pertinent part: "Walked into Lobby Bar at around 12:20am and upon waking up to the bar *I watched Fontay (server) act as though she was placing a drink order* and then ask the bartender (Lee) for a Sierra Nevada without a ticket." (121-122; GCX 5) (Emphasis added.) Crain drafted and sent this email at 3:34AM, just about three hours after the incident happened. *Id.* Yet, when asked whether his memory was better closer in time to the incident in 2016 than it was the day of the hearing in 2019, Crain did not agree. (161) When asked whether he remembered the details more vividly now than he did a few hours after it occurred, he answered yes. *Id.* Clearly a summary he wrote three hours after the incident occurred is more accurate than his memory of an event that occurred three years ago. Brown continuously gave self-serving narratives and would not answer simple yes or no questions. (147)

Additionally, there was testimony at arbitration about how when Keefe-Wiseman interviewed Brown about his discussion with Thomas, he initially told her he had not given Thomas any specifics or identified who was involved in the scenario they were talking about. (JX 2: 204 lines 2-15) According to Keefe-Wisemans' arbitration testimony, Brown downplayed his conversation with Thomas and made it seem like he had simply asked her some basic

questions about shop steward duties. *Id.* Brown also tried to downplay his conversation with Thomas when he was later asked to write a statement. (RX 10:2)

Brown's testimony and conduct was arrogant, self-serving, and evasive. For these reasons, Your Honor should credit Thomas's testimony when in conflict with Brown's.

2. Crain Should Be Discredited

Lee Crain refused to cooperate with CGC and did not make any attempt to contact CGC after receiving CGC's subpoena and cover letter via email. (190) Crain claimed he did not receive the phone calls or voicemails CGC made to him. *Id.* Even though Respondent's counsel was not representing Crain in this matter, Crain cooperated with Respondent's counsel and met with Respondent's counsel and Keefe-Wisemen. (191-192) They showed Crain a copy of his testimony from the arbitration transcript, as well as exhibits, including prior statements and text messages. Additionally, Crain could only remember what he said to management when he was being questioned by Respondent's counsel. (269)

Crain testified at hearing that he was sitting in the HR lobby waiting for his Due Process meeting to start when he received the 12:33PM text from Thomas stating, "It's Cynthia. Call me," and that he responded, "Will do in a meeting," as he was walking into the meeting (263-265; GCX 10) Crain further testified that he read Thomas's subsequent text messages on his Apple Watch while he was in the Due Process meeting, but at the arbitration he testified he read them on his phone and that he had his phone out while he was being interviewed because he has kids. (275-277; JX2:135)

However, Crain's Due Process meeting started at 11:30AM, and the Due Process part lasted about 30 minutes, but the parties stayed behind a little while after to discuss other issues. (GCX 9; 230; 405-406) So, even assuming the parties were there for an hour, Crain would have

received Thomas's texts well after the Due Process portion of the meeting ended. Furthermore, in the statement he gave to the company as part of the investigation, Crain wrote: "I finally responded *after* my Due Process meeting." (GCX 11) Notably, Crain claims he received and read Thomas's text messages during the meeting, but he did not mention them despite being really worked up about them. (271; 276; 405)

So, Crain either lied and gave an inaccurate statement as part of a company investigation in violation of the same policies under which Thomas was fired, or he lied at the ULP hearing. (250-251; GCX 11) If it is the former, then there is disparate treatment because he did not get in trouble for giving an inaccurate or false statement as part of a company investigation, even though he had first-hand knowledge of the events and could have easily verified the timing before submitting his statement, especially since he is apparently attached to his phone at all times. (278:3-5; JX2:135)

Brown's testimony was arrogant, self-serving, and evasive. For these reasons, Your Honor should credit Thomas's testimony when in conflict with Crain's.

3. West Should Be Discredited

West thought that his job as a Shop Steward was to be a passive witness rather than a zealous advocate. (470) For example, West testified that even if he knew ahead of time that Respondent had an employee on camera doing something wrong, West would not tell the employee in advance. (485-486) West would let employee go in blind to disciplinary meetings without telling them what the topic was if he knew in advance and he testified that he thought that was consistent with his role an employee advocate and Shop Steward. *Id.* At one point, he even testified that it was his role to represent both sides. (470)

4. Keefe-Wiseman Should Be Discredited

Keefe-Wiseman repeatedly answered questions using conditional language such as, “I would probably have...” etc. (294; 302; 317-318; 403) When asked whether or not she actually recalled something happening or being said, she often testified that she did not remember or did not know. *Id.*

Keefe-Wiseman testified that she had asked Thomas to elaborate on what Thomas meant when she told them she intended for Crain to think about his process, but Keefe-Wiseman said that she could not recall what else Thomas told them. (673:15-19)

Keefe-Wiseman’s notes took notes during Thomas’s Due Process meeting, but admittedly her notes are not verbatim or exhaustive. (363:22-25; GCX 3) There were a number of times Keefe-Wiseman testified about things said that were not reflected in her notes. (374)

Given that Keefe-Wiseman consistently gave conditioned self-serving answers and could not actually remember details when pressed, Thomas’s testimony should be credited when in direct conflict with Keefe-Wiseman’s.

5. Dorsey Should Be Discredited

Contrary to the testimony of Keefe-Wiseman (who, mind you, was the one who actually interviewed Thomas, conducted the entire investigation, and drafted the Separation PAN), Dorsey testified that she believed Thomas was guilty of violating the first portion of rule #28 for not being forthcoming during the investigation. (433:8-24; 455:12-21) Dorsey further testified that:

It was based on the text message, and it was based on in the due process notes she had stated that – – she had stated that Lee Crain had mentioned that he saw her doing – – he saw Fontay on the computer maybe ringing in something when that wasn’t true at all. And at that point she knew that wasn’t to be true. So that’s where I thought she was being dishonest. *Id.*

However, Dorsey's summary of the events is completely contrary to the record evidence. Thomas never once claimed she spoke with Lee beyond the text messages she sent him. (581-582) Furthermore, just because Crain told Thomas that he ended up ringing in the drink himself does not mean that there could not still have been a screen/printer error. These two occurrences are not mutually exclusive. A computer glitch could have prevented the drink from being rung in, or perhaps it was rung up on the wrong ticket or table number. Crain had only checked one table, and it was never determined whether it had been rung up on another check. (131; 177)

Additionally, both Crain and Jones were certain that the drink had already been entered into the system before Brown arrived, and more importantly, this is what Brown told Thomas. (373-374; 586-589)

Dorsey went as far as to accuse Thomas of making up a story, even though Thomas's understanding of events was consistent with Brown's initial summary of them. (433:8-24; 455:12-21; GCX 5:2; GCX 3) Dorsey had once told Thomas and Pastore that she held Shop Stewards to a higher standard. (77:8-10, 18-24)

Given Dorsey's absurd interpretation of the facts and clear bias, Your Honor should credit Thomas and Keefe-Wiseman's testimony over Dorsey's when in direct conflict.

6. Zornes Should Be Discredited

Zornes testified that she was not surprised to hear that Brown had spoken to Thomas about the incident involving Jones and Crain, but then later testified that managers do not often have conversations with employees or Shop Stewards regarding other people's disciplinary issues and found Crain's actions to be unusual because he gave Thomas the names of the employees involved and because that information was privileged. (530; 532:1-9)

Given these inconsistencies, Your Honor should credit Thomas's testimony over Zorne's when in direct conflict.

C. Thomas's Testimony Should Be Credited

Thomas testified credibly throughout the trial. She was often asked to testify about difficult topics and was consistent with her responses. Thomas testified consistently on cross-examination regarding the intent of her text message Crain (*i.e.*, to fulfill her duties as a Shop Steward by helping Crain recall the situation and think about all the things that could have happened that night) (588-589; 634-635) She also testified consistently that she had explained to management that Brown involved her as a Shop Steward and that is why she contacted Crain (637:23-25; 638:1-6) Thomas answered candidly and honestly. Thomas was forthcoming in the investigation. When asked whether she had contacted Jones, Thomas answered truthfully that she had not. (585-586)

Thomas testified consistently on cross-examination regarding what Brown told her about the situation involving Crain and Jones. (640-641) She admitted that Brown had told her that he rang in the beer himself. *Id.* Unlike Respondent's witnesses who tried to offer self-serving, nonresponsive or narrative answers even when there was no question pending, Thomas remained forthcoming about what she did not or did not know. (240; 398; 458; 500; 563; 615; 618; 643)

For these reasons, Thomas's testimony should be credited when in conflict with other witnesses' testimony.

IV. ARGUMENT

A. Respondent Violated the Act Under *Burnup & Sims*

1. Legal Standard: *Burnup & Sims*

Under the principles set forth in *Burnup & Sims*, 379 U.S. 21 (1964), when an employer disciplines an employee for misconduct arising out of a protected activity, Respondent has the burden of showing that it held an honest belief that the employee engaged in serious misconduct. Once Respondent establishes that it had such an honest belief, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur. *Id.* In circumstances where misconduct is committed in the course of protected activity, the lawfulness of the discipline depends on the severity of the misconduct. *Id.*; *Trilogy Communications, Inc.*, JD(ATL)-46-01, 2001 WL 1598656 (2001)

2. Legal Analysis: Thomas Did Not Engage in Serious Misconduct, Nor Did Respondent Have a Good Faith Belief That She Did, and Even if She Had, Her Misconduct Was Not Severe

Respondent thought that Thomas engaged in misconduct by telling Crain to lie, but in fact, she did not engage in misconduct. Thomas honestly believed that there had been a technological malfunction because the manager stated that both Jones and Crain were certain that the beer had been rung in on an earlier ticket. When Thomas texted Crain, she was merely refreshing his recollection as to the series of events that transpired, as she understood them, based solely on her conversation with Brown. Thomas was in fact instructing Crain to tell the truth as she knew it. Given that both Jones and Crain were sure that the drink had been rung up, but Brown did not see a ticket for it, a computer/printer error was a logical conclusion for Thomas to reach. Moreover, the fact that Brown told Thomas he could not find the beer in the system and rang it in himself does not mean that there was not a technological malfunction when

Jones attempted to ring it in. Thomas's suggested theory would still explain why Brown did not see a ticket for the beer. Frankly, we still do not know what really happened the early morning of September 28 at the Lobby Bar since Brown only looked at the ticket for one table in the system and only looked at 10 minutes' worth of surveillance footage from the time he arrived at Lobby Bar, and no footage from prior to his arrival.

Respondent has failed to show that it had an honest belief that Thomas engaged in any misconduct. It was undisputed by all the witnesses that Thomas did not actually know that happened the night of incident at the Lobby Bar, so Thomas could not have knowingly told Crain to lie. In fact, Thomas was reminding Thomas of what she believed to be true, based on what Brown had told her, and Thomas had no reason to believe that Brown was lying to her about what had happened, nor did Crain have any reason to believe that Thomas would tell him to lie. The record evidence is clear that Thomas was acting as an employee advocate when she attempted to contact Crain via phone call and text several times to speak with him about the matter Brown drew her attention to as a Shop Steward. (Had Crain answered any of Thomas's phone calls then perhaps things would have ended differently, but we will never know.) The fact of the matter is that Crain never disputed or corrected Thomas's mistaken belief. Notably, Respondent has zero evidence that Thomas held any kind of malicious intent.

Although Respondent argues that Thomas knew there could not have been a technological malfunction because Brown told Thomas that he had rung in the beer himself, this alone does not disprove that a computer or printer error could have explained why Brown saw Crain hand Jones a beer without a ticket, and why Brown would have had to later ring it in; nor does it negate that both Jones and Crain believed that it had been rung in. Thomas was not privy to Respondent's investigation or conclusions.

Respondent's treatment of the other employees involved in the events of September 28 also cuts against Respondent's honest belief of misconduct. Respondent had concluded that based on the way Jones said, "I need that drink," that Crain had a reasonable belief that it had already been rung in and that it was just a miscommunication. However, in Thomas's instance, even though the way Brown described the details of the event gave Thomas a reasonable belief that there was computer/printer error, Respondent deemed that to be intentional lying. Thus, just like Respondent could not prove that Crain and Jones intended to steal by serving a beer that they had not rung up, Respondent cannot prove that Thomas intended to tell Crain to lie. Moreover, Thomas's actions were no more careless than those of West, who had not even seen the text or found out the facts before he suggested to Crain that they go talk to Groesbeck about it. (473-476) Unlike West, Thomas actually tried to reach Crain several times before she sent the text in question.

Even if Respondent held a good faith belief that Thomas engaged in misconduct, the lawfulness of the discharge depends on the severity of the misconduct. Here, Respondent was not able to produce any evidence that Thomas's text had any impact on its investigation into potential theft involving Crain and Jones. Her actions were no more severe than those of Jones and Crain who were let off the hook for alleged theft because Respondent decided there was no harm, no foul. Similarly, Thomas should have been let off the hook since there was no actual interference on the company's investigation.

Here, Respondent was mistaken in its belief that Thomas engaged in misconduct, since she was not saying something she knew to be untrue but was instead was suggesting what she in good faith believed to be a plausible defense. Respondent did not have a good faith basis to believe Thomas engaged in misconduct because Brown's written account of watching Jones act

like she was ringing in a drink, corroborated Thomas's understanding of the events as told to her by Brown.

Even if Thomas's suggestion of a potential defense to Crain was misconduct, the lawfulness of the discipline depends on the severity of the misconduct. Even if Thomas had misled Crain, and Respondent held an honest belief that Thomas told Crain to lie, her misconduct was not so egregious as to remove her from the protection of the Act. *Union Carbide Corporation*, 331 NLRB No. 54 (2000); *Consumers Power Co.*, 282 NLRB 130, 132 (1986); *United Cable Television Corp.*, 299 NLRB 138, 142 (1990). Telling a lie is not a violent act and, in the circumstances of this case, the alleged misconduct was not otherwise so flagrant or extreme that it forfeited the Act's protection, especially considering it had no impact on Respondent's investigation into one beer.

B. Respondent Violated the Act Under *Atlantic Steel/Pier Sixty*

1. Legal Standard: *Atlantic Steel/Pier Sixty*

When an employee is disciplined for alleged misconduct that is part of the *res gestae* of protected concerted activities, the pertinent question is: whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Public Service Company of New Mexico*, 364 NLRB No. 86 slip op. at 7 (2016); *Atlantic Steel Co.*, 245 NLRB 814 (1979); *Stanford Hotel*, 344 NLRB 558, 559 (2005), citing *Aluminum Co. of America*, 338 NLRB 21 (2002).

In *Atlantic Steel*, the Board set forth the following four factors to be considered in determining whether an employee who is engaged in concerted activity can lose the protection of the Act when the alleged misconduct that is integral to the events constituting protected concerted activity: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. 245 NLRB 814.

As a general matter, the *Atlantic Steel* framework is not well suited to address issues involving employees' off-duty, offsite use of digital communication with other employees or with third parties. *Triple Play Sports Bar & Grille*, 361 NLRB 308, 310 (2014). In *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015), the Board adopted a totality of the circumstances test in determining whether an employee's digital communications were egregious enough to lose the protection of the Act. The following nine factors were outlined in *Pier Sixty*: (1) whether the record contained any evidence of Respondent's antiunion hostility; (2) whether the Respondent provoked the employee's conduct; (3) whether the employee's conduct was impulsive or deliberate; (4) the location of the digital communication; (5) the subject matter of the digital communication; (6) the nature of the digital communication; (7) whether Respondent considered similar communications to be offensive; (8) whether Respondent maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon the employee was typical of that imposed for similar violations or disproportionate to the offense.

362 NLRB 506.

Not every impropriety committed during otherwise protected activity places the employee beyond the protective shield of the Act. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). The protections that Section 7 affords would be meaningless were the Board not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses. *Consumers Power Co.*, 282 NLRB 130, 132 (1986). Thus, the employee's right to engage in concerted activity permits "some leeway for impulsive behavior." *NLRB v. Thor Power Tool Co.*, 351 F.2d at 587.

Further, in considering whether statements in the course of protected concerted activities lose the protection of the act due to actual or perceived untruthfulness, courts and the Board afford employees greater leeway than they might be afforded in other contexts not involving protected concerted activities, in order to allow for the kind of vigorous debate that is inherent in labor-management relations. See *Linn v. Plant Guards*, 383 U.S. 53, 58 (1966) (“Labor disputes are ordinarily heated affairs. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.”); *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953); *MasTec Advanced Technologies*, 357 NLRB 103 (2011), *enfd.* 837 F.3d 25 (D.C. Cir. 2016), *cert. denied* 138 S.Ct. 92 (2017).

2. Legal Analysis:

The credible record evidence establishes that Thomas acted not as a rank and file employee, but as a Shop Steward, and did not commit an act so egregious as to lose the protection of the Act under either the *Atlantic Steel* factors or the *Pier Sixty* factors.

Applying the *Atlantic Steel* factors, the evidence clearly shows that Thomas did not lose the protection of the Act. Regarding the first factor, the place of the conduct, Thomas’s statement was made in a private text message on her personal cell phone while both she and Crain were off the clock and not working, in a context unlikely to interfere with business operations or undermine discipline in the workplace.

As to the second factor, the subject matter of the conversation, Thomas’s statement was made specifically in her capacity as a Shop Steward attempting to counsel an employee facing potential discipline or discharge, only after it was brought to her attention by management because she was a Shop Steward. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984);

Interboro Contractors, Inc., 157 NLRB 1295 (1966). As such, the second factor weighs heavily in favor of finding that Thomas's conduct and remarks were protected. *Stanford Hotel*, 344 NLRB at 559.

Although Respondent may assert that Thomas's suggestion of a defense to Crain was not protected because she was not asked by Jones or Crain to represent them and she was therefore not serving as their Shop Steward, Brown came to Thomas because she was a Shop Steward and everyone was aware of her status. Brown involved Thomas only because she was a Shop Steward. Any Shop Steward worth their salt will try to help an employee when made aware a potential disciplinary issue by management. It was only natural for Thomas, as a Shop Steward, to try and follow-up with Crain. Moreover, even if Thomas were not a Shop Steward at all, her attempt to protect other employees from potential discipline without just cause, in violation of the collective-bargaining agreement would be protected under the Act as an assertion of employees contractual rights under *City Disposal* and *Interboro Contractors*, cited above.

Regarding the third factor, the nature of the conduct, the evidence does not support a finding that Thomas's comments were so outrageous as to lose protection of the Act. Thomas's statement was made early in her own investigation into the events and consisted of a plausible explanation of what she, in good faith, believed might have happened based on the Brown's account to her and her experience with Respondent's technological resources. Furthermore, Thomas's text message did not involve violence, profanity, or any other conduct likely to undermine order and discipline in the workplace and, in fact, had no effect on Respondent's investigation. Even if Thomas's comments were inconsistent with what Respondent ultimately concluded to be the truth, in a unionized workplace, when a disciplinary investigation is being conducted, or when a grievance is being investigated or pursued, usually, the union agent

representing employees in the investigation or the processing of a grievance does not have all facts available at the outset. Naturally, then, union agents may suggest defenses or arguments along the way that, by the end of the process, will be disproven. To count a union agent's suggestion of a defense that the employer ultimately determines to be untrue against her in a balancing of the *Atlantic Steel* factors would undermine employee union agents' ability to explore all potential defenses and to vigorously advocate for the employees they represent. Such a result would be entirely contrary to the aims of precedent allowing employees greater leeway when engaging in protected activities, including *Thor Power Tool*, *Linn*, *Jefferson Standard*, and *Atlantic Steel* itself. Thus, Respondent's argument that Thomas should lose the protection of the Act because it believes she got it wrong would set a dangerous precedent. It would chill employee union representatives in offering counsel to bargaining-unit employees during a disciplinary investigation, for fear of being fired if they suggest defenses to employees that differ from the employer's position.

As to the fourth factor, whether the statement was provoked by Respondent's unfair labor practice, the evidence weighs in favor of Thomas not losing the protection of the Act. Although the statement was not provoked by an unfair labor practice, it was provoked by the potential discipline or discharge of two bargaining unit employees, something Thomas as a Shop Steward, had a duty to investigate and address to ensure discipline was not issued and that discharge was not effected without just cause, in violation of the CBA. All four of the *Atlantic Steel* factors weight heavily in Thomas's favor.

Similarly, even assuming Thomas's suggestion of a potential defense to Crain was misconduct, then under *Pier Sixty*, the misconduct was not so egregious as to lose protection of the Act because: Respondent demonstrated its hostility toward employees' union activity (the

first factor) when it stated it held Shop Stewards to a higher standard and in disparately enforcing its policies against Thomas when Jones, Brown, and Crain were guilty of similar “honest mistakes,” “human errors,” and “accidents” during the course of company investigations. Thomas’s comment was instigated by Respondent (the second factor) when Brown went to her specifically because she was a Shop Steward to discuss the potential discipline of two Unit employees.

Thomas’s impulsive reaction (the third factor) was based on her understanding from Brown that Crain was potentially facing discipline. Thomas was acting as any rational steward would, and was trying to give Crain a heads-up. She tried calling and texting Crain to call her several times about the matter before he responded that he was in a meeting. Upon receiving his text that he was in a meeting, she acted impulsively and with urgency because she assumed it may have been a disciplinary meeting.

The location and subject matter of Thomas’s text (factors four and five) also weigh in her favor. She texted from her personal cell phone, while alone, off work, and outside of Respondent’s facility. There is no evidence that her text messages interfered with or impacted the Respondent’s investigation, much less the work environment or its relationship with its customers. Further, her advice echoed Brown’s previous comments to her about the details from that evening.

Regarding factor six, the overwhelming evidence establishes that, Thomas’s text was not violent, distasteful or profane. As for factor seven, Respondent tolerated Jones’s insubordination, confusion and “mistaken belief,” about the beer being on the ticket already as well as Crain’s “human error” in serving the beer without a ticket and the falsehoods he gave in his written statement, which was a company document provided during the course of an investigation.

Respondent also tolerated Brown's evasiveness when he interviewed about his discussion with Thomas and how much he disclosed to her, as well as the inconsistencies between his two email statements about the events that occurred on September 28.

The policies under which Respondent discharged Thomas (factor eight), specifically say, "Employees will not *knowingly* make false statements..." and "interference with a company investigation." Here, Thomas did not *knowingly* tell Crain to do something inconsistent with her knowledge of how the events unfolded. Similarly, her text to Crain did not interfere with the company's investigation.

As for factor nine, the punishment imposed upon Thomas was not typical of that imposed for similar violations and was disproportionate to her alleged offense. Respondent only presented evidence of only one other employee, Simmons, who was discharged for dishonesty and the situations could not have been more different. First of all, Simmons was not a Shop Steward engaged Union activities. Secondly, he fabricated an alternate identity and falsified documents during the course of an investigation that resulted from a guest complaint, which caused and interference with Respondent and its customer. Simmons's conduct was extreme when compared to Thomas's.

The *Pier Sixty* factors all weigh in Thomas's favor. Based on the totality of circumstances, Thomas did not lose the protection of the Act by texting Crain her knowledge of the events (as a plausible defense), based on Brown's account to her, in her capacity as a Shop Steward. Even if Thomas had said something she knew to be untrue and thereby engaged in misconduct, it was not to egregious as to lose the protection of the Act under either the *Atlantic Steel* or *Pier Sixty* factors.

C. Respondent Violated the Act Under *Wright Line*

1. Legal Standard: *Wright Line*

When an employer asserts that it discharged an employee for reasons separate and apart from the employee's protected activities, the Board applies the framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), in determining whether the discharge was unlawful. Under *Wright Line*, the existence of a violation turns on an analysis of the employer's motivation. *Gravure Packaging, Inc.*, 321 NLRB 1296, 1304 (1996).

As set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), the General Counsel has the initial burden of making a prima facie showing that anti-union animus "contributed" to Respondent's decision to discharge an employee.⁴ The General Counsel must make an initial showing that animus toward the protected activity was a substantial or motivating factor for the employer's action. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). To do so, the General Counsel must demonstrate that: (1) the employee engaged in protected activity; (2) the employer had knowledge of that activity; and (3) the employer carried out the adverse employment action because of such activity (*i.e.*, harbored animus toward that activity. *Nichols Aluminum, LLC*, 361 NLRB 216, 218 (2014) (see fn. 7 discussing the Board's approach of the multi-factor test under *Wright Line* and its dismissal of the view that a fourth 'nexus' factor is also required); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983).

⁴ In determining whether the General Counsel has established a prima facie showing of unlawful animus, the Board will not "quantitatively analyze the effect of the unlawful motive." The existence of such is sufficient to make a discharge a violation of the Act. *Wright Line*, 251 NLRB at 1089 n. 14.

Once the General Counsel satisfies its initial burden, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity. *See Manno Electric, Inc.*, 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros., Co.*, 303 NLRB 638, 649 (1991). To meet this burden “an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence, *Merrilat Industries*, 307 NLRB 1301, 1303 (1992), that the same action would have taken place even in the absence of the protected conduct.” *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *Durham School Services, L.P.*, 360 NLRB 694 (2014).

Essentially, the examination turns to Respondent’s actual motive behind the decision. *Schaeff Incorporated*, 321 NLRB 202, 210 (1996). However, the Board has held that a finding of pretext or false reasons, “necessarily means that the reasons advanced by Respondent either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.” *International Carolina Glass*, 319 NLRB 171 (1995); *Limestone Apparel Corporation*, 225 NLRB 722, 736 (1981), *enfd.* 704 F.2d 799 (6th Cir. 1982). “Shifting explanations for discharge may, in and of themselves, provide evidence of unlawful motivation,” and strengthens the inference that the true reason for Respondent’s decision was for union activity. *United States Coachworks, Inc.*, 334 NLRB 118, 122 (2001); *NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7th Cir. 1990); *Sound One Corp.*, 317 NLRB 854, 858 (1995); *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985).

Under certain circumstances, an inference of animus and discriminatory motivation may be appropriate even without direct evidence. *Operating Engineers Local Union No. 3*, 324 NLRB 1183 (1997). Such indirect evidence includes timing, false reasons proffered in defense, and the failure to adequately investigate the alleged misconduct. *Id.* at 1188. Animus can be

shown through direct evidence, or it can be imputed from circumstantial evidence and the record as a whole. *Tubular Corp. of America*, 337 NLRB 99, 99 (2001); *Sawyer of Napa*, 300 NLRB 131, 150 (1990) (timing of discharges, coming two working days after Respondent learned about employee union activity, supports an inference of animus).

It is well established that a union steward engages in protected activity when administering the collective bargaining agreement and that, accordingly, an employer violates Section 8(a)(3) by disciplining employees “because of their conduct as union stewards in processing grievances, policing the collective-bargaining agreement, or for engaging in other activities as union steward.” *Pacific Coast Utilities Services*, 238 NLRB 599, 606 (1978), *enfd.* 638 F.2d 73 (9th Cir. 1980). See also *Garland Coal & Mining Co.*, 276 NLRB 963, 965 (1985) (employer violates the Act by disciplining employees “for engaging in protected activity as union representatives”).

2. Legal Analysis

Respondent’s suspension and discharge of Thomas violates Section 8(a)(3) of the Act under *Wright Line*. Brown involved Thomas in a disciplinary matter as a Shop Steward. She then contacted a Unit employee in her capacity as Shop Steward regarding the disciplinary matter to offer him her limited knowledge based on her understanding of the events (as conveyed to her by Brown). She then was fired for her text message to Crain.

The record evidence conclusively establishes that the General Counsel met his burden to show that Thomas’s protected conduct was a motivating factor in Respondent’s decision to suspend and terminate her, and Respondent has failed to establish that it would have taken the same action absent Thomas’s protected conduct. This is especially true in view of the strength of

General Counsel's strong prima facie case.⁵ Respondent knew of Thomas's activities, and was clearly hostile towards them and holds Shop Stewards to a higher standard.

Even if Thomas had said something she knew to be untrue and thereby engaged in misconduct, and her misconduct was so egregious as to lose the protection of the Act, her status as a Shop Steward and protected activities were the real reason for her suspension on discharge, and Respondent's reliance on her alleged lie as the reason for her discharge is pretext, since others who were actually dishonest in the course of the very same incident were treated differently. Thomas was the only one who got fired. Moreover, because of the nature of the process of enforcing a CBA, where the potential contract violation may immediately be known, but the underlying facts must be pieced together over time, the Union and employees file grievances all the time that contain factual errors. Yet the record reflects that Respondent has not fired anyone for a misrepresentation in a grievance.

There is no difference between Thomas's situation and Jones and Crain's situation, other than how Respondent treated Thomas because she was a Shop Steward:

Crain indicated that the server said "I need that Sierra Nevada" and the manner in which she said it made Crain think that he had missed a drink on Jones's last order. Jones verified this information and added that she thought she had rung in the beer. She said she must have made a mistake and there was no intent to steal. (RX 10)

Jones got off scot-free even though she was the one responsible for ringing in the drink and then was insubordinate to Brown when she refused to ring in the drink per Brown's instruction. Crain got off with just a verbal warning, which was not even for theft, because he was observed violating other policies (such as not using a jigger to pour).

⁵ In *Vemco, Inc.*, the Board stated that an employer has a "particularly heavy burden" establishing a *Wright Line* defense when General Counsel establishes a strong prima facie case. 304 NLRB 911, 911-912 (1991), *enfd. in part* 989 F. 2d 1468 (6th Cir. 1993)

The manner in which Thomas texted Crain made him think she was telling him to lie, but Respondent verified that Thomas only knew what Brown had told her and Thomas believed in good faith that Jones had attempted to ring in the beer and that Crain did not have a ticket because there was a possible printer/screen error. Thomas said that there was no intent to tell Crain to lie, and Crain admitted that he had no reason to believe Thomas would try to get him in trouble. Yet, Thomas got discharged for a text she sent on her personal phone to Crain's personal phone off the clock, and the only reason she was reaching out to him was because she was a Shop Steward and trying to help a coworker whom she believed was facing potential discipline. Jones and Crain's mistaken belief about the drink already being rung up was considered "human error," not dishonesty or theft, whereas Thomas's mistaken belief about what transpired that evening was considered dishonesty and she was fired.

Respondent cannot prove that it would have discharged Thomas absent her Shop Steward activities. Respondent argues that had Crain done as Thomas's text suggested, that he would have been lying to the company, and therefore Thomas's text interfered with its investigation. However, those are not the facts at hand. It is undisputed that Thomas's texts had no impact on the investigation, so there was no injury suffered. Similarly, there was no harm, no foul when Jones and Crain failed to ring in a drink. Jones, Crain, and Thomas all held an honest belief as to their actions, and Respondent could not prove their intent, however in Thomas's case, she was acting in her capacity as a Shop Steward.

V. DEFERRAL IS INAPPROPRIATE IN THIS MATTER

Under extant Board law, deferral of an alleged violation of Section 8(a)(1) or (3) of the Act to an arbitral award is only appropriate if the party urging deferral meets the burden of establishing that: (1) the arbitrator was explicitly authorized to decide the unfair

labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award. *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1131 (2014). Prior the Board's establishment of this standard, deferral of an alleged violation of Section 8(a)(1) or (3) of the Act to an arbitral award is only appropriate if: (1) the arbitration proceedings were fair and regular; (2) all parties agreed to be bound; (3) the arbitral decision was not repugnant to the purposes and policies of the Act; (4) the contractual issue was factually parallel to the unfair labor practice issue; and (5) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue. *Olin Corp.*, 268 NLRB 573 (1984); *Speilberg Mfg. Co.*, 112 NLRB 1080 (1955).

Deferral to the arbitrator's award concerning Thomas's discharge is not appropriate under either of these standards because, even assuming the statutory issue was presented to the arbitrator, the arbitrator's award, on its face, discriminates against Thomas based on her status as a Shop Steward. It therefore is not reasonably permitted by Board law and is repugnant to the purposes and policies of the Act. The Board gives no deference to decisions made, even just in part, on a discriminatory basis. In *International Longshoremens Association, Local 28 (Ceres Gulf, Inc.)*, 366 NLRB No. 20 (2018), an ALJ made credibility determinations grounded in sex stereotypes and bias and intertwined those bases with other legitimate considerations to such an extent it precluded the Board from determining whether the ALJ's credibility resolution could be adopted based on legitimate considerations, so the Board remanded the case to a new judge for rehearing. The matter at hand is analogous to the *Longshoremens* case because the Arbitrator's award is ripe with

prejudice against Thomas because of her Shop Steward status. Deferral to the arbitrator's award would therefore serve only to extend the unlawful discrimination against Thomas.

VI. SEEKING REIMBURSEMENT FOR CONSEQUENTIAL ECONOMIC HARM

Under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *E.g.*, *Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), *enfd. as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB 101, 102 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v.*

NLRB, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore “the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act’s “general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company’s” unlawful act).

Moreover, the Supreme Court has emphasized that the Board’s remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must “draw on enlightenment gained from experience.” *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB 104-105 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act’s make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enf. denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel.*

Co., 304 U.S. 333, 348 (1938) (recognizing that “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress”). Compensation for employees’ consequential economic harm would further the Board’s charge to “adapt [its] remedies to the needs of particular situations so that ‘the victims of discrimination’ may be treated fairly,” provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); see *Pacific Beach Hotel*, 361 NLRB 709, 718-719 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent’s unlawful conduct.

Reimbursement for consequential economic harm achieves the Act’s remedial purpose of restoring the economic status quo that would have obtained but for a respondent’s unlawful act. *Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.⁶ Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of

⁶ However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).⁷

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enfd.* 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB at 718-719 (Board considered an award of front pay but

⁷ Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.⁸ In *Nortech Waste, supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing

⁸ This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee’s consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996)).⁹

VII. CONCLUSION

It is respectfully submitted that the record amply demonstrates that Respondent has violated Sections 8(a)(1) and (3) of the Act as alleged. CGC urges the Administrative Law Judge to issue an appropriate remedial order requiring Respondent to: (1) reinstate Thomas immediately to her previous positions or, if such position no longer exists, in a substantially equivalent position, without prejudice to her seniority or other rights and privileges to which she may have been entitled; (2) make Thomas whole; (3) post an appropriate notice (a proposed copy

⁹ The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized “damages for ‘future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.’” *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007) (“[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages” for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affd mem.*, 862 F.2d 304 (2d Cir. 1988).

of which is attached); and (4) and provide whatever other relief the Administrative Law Judge deems just and necessary to remedy Respondent's violations of the Act.

Dated at Las Vegas, Nevada, this 12th day of April 2019.

Respectfully submitted,

/s/ Elise F. Oviedo

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

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

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

WE WILL NOT retaliate against you, including by suspending or firing you, because of your union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL, within 14 days from the date of the Board’s Order, offer **Cynthia Thomas** full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make employee **Cynthia Thomas** whole for any loss of earnings and other benefits suffered as a result of her unlawful suspension and discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses and compensation for any consequential economic harm resulting from her discharge.

WE WILL compensate **Cynthia Thomas** for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to our unlawful suspension and discharge of **Cynthia Thomas**, and **WE WILL**, within 3 days thereafter, notify her in writing that this has been done and that the unlawful actions will not be used against her in any way.

MGM Grand Hotel, LLC d/b/a MGM Grand

(Employer)

Dated: _____

By: _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004

Telephone: (602)640-2160
Hours of Operation: 8:15 a.m. to 4:45 p.m.

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This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that a copy of **COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in MGM GRAND HOTEL, LLC d/b/a MGM GRAND, Case 28-CA-186022 was served by E-Gov, E-Filing, and E-Mail on this 12th day of April 2019, on the following:

Via E-Gov, E-Filing:

Honorable John T. Giannopoulos
Administrative Law Judge
National Labor Relations Board
NLRB – Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103-1779

Via E-Mail:

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