

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

PURPLE COMMUNICATIONS, INC.

and

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO

Cases 21-CA-095151
21-RC-091531
21-RC-091584

GENERAL COUNSEL'S RESPONSE
TO NOTICE TO SHOW CAUSE

Counsel for the General Counsel files this response to the Notice to Show Cause that issued on June 22, 2020 seeking a position on why the complaint allegation that Respondent's maintenance of its allegedly unlawful Internet, Intranet, Voicemail, and Electronic Communication Policy (the Electronic Communication Policy) should not be remanded to the administrative law judge for further proceedings as a result of the Board's decision in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019), including reopening the record, if necessary.

On December 11, 2014, the National Labor Relations Board issued a Decision and Order Remanding, adopting a new standard for determining the lawfulness of an employer's rule restricting employee use of a company's email system and remanding the issue of whether the Respondent violated Section 8(a)(1) of the Act by maintaining its Electronic Communication Policy to Administrative Law Judge Paul Bogas (ALJ Bogas), for further appropriate action. *Purple Communications, Inc.*, 361 NLRB 1050 (2014) (*Purple Communications I*). On March 16, 2015, in light of the Board's decision in *Purple Communications I*, ALJ Bogas issued a supplemental decision and order in this matter. On March 24, 2017, the Board issued a

Supplemental Decision and Order affirming ALJ Bogas' conclusion that the Respondent violated Section 8(a)(1) by maintaining the Electronic Communication Policy. *Purple Communications, Inc.*, 365 NLRB No. 50 (2017) (*Purple Communications II*).

Respondent's petition for review of both decisions in the United States Court of Appeals for the District of Columbia Circuit, and the Charging Party's petition for review of *Purple Communications II* in the United States Court of Appeals for the Ninth Circuit were consolidated in the Ninth Circuit. While these petitions were pending, the Board overruled *Purple Communications I* and announced a new standard that applies retroactively to all pending cases alleging, as here, that an employer unlawfully maintained a rule restricting the use of its email system. *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 368 NLRB No. 143, slip op. at 8-9 (2019). In *Caesars Entertainment*, the Board held, in relevant part, that "an employer does not violate the Act by restricting the nonbusiness use of its IT resources *absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other.*" 368 NLRB No. 143, slip op. at 8 (emphasis added).

On February 27, 2020, the Ninth Circuit granted the General Counsel's motion to remand *Purple Communications I* and *Purple Communications II* to the Board for further proceedings in light of the Board's decision in *Caesars Entertainment*. The parties to this proceeding have not yet had an opportunity to address whether this exception to the rule of *Caesars Entertainment* applies to the facts of this case. Counsel for the General Counsel is of the view that the allegations involving Respondent's Electronic Communication Policy (alleged at paragraph 6 of the Complaint) should be remanded to ALJ Bogas for further proceedings consistent with the

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Board's decision in *Caesars Entertainment*, including reopening the record if necessary.

Respectfully submitted,

_____/s/_____
Cecelia Valentine
Counsel for the General Counsel
National Labor Relations Board, Region 21

Dated at Los Angeles, California this 6th day of July, 2020.

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PURPLE COMMUNICATIONS, INC. AND COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	Cases 21-CA-095151 21-RC-091531 21-RC-091584 DATE OF SERVICE <u>July 6, 2020</u>
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AFFIDAVIT OF SERVICE OF GENERAL COUNSEL'S RESPONSE TO NOTICE TO SHOW CAUSE

I hereby certify that a copy of the above-entitled document(s) has been submitted by E-filing to the Executive Secretary of the National Labor Relations Board, on July 6, 2020 and that each party was served with a copy of the same document addressed to them as indicated below:

E-MAIL

David A. Rosenfeld, Esq.
Lisl R. Soto, Attorney at Law
Weinberg, Roger & Rosenfeld
ldrosenfeld@unioncounsel.net
soto@unioncounsel.net

E-MAIL

Frank Arce, Vice President
Domonique Thomas, Assistant to the
Vice President
Communications Workers of America,
District 9
frankarce@cwa-union.org
dthomas@cwa-union.org

E-MAIL

Lawrence D. Levien, Shareholder
Maury Baskin, Shareholder
Littler Mendelson
llevien@littler.com
mbaskin@littler.com

July 6, 2020
Date

Aide Carretero, Designated Agent of NLRB
Name

/s/ Aide Carretero
Signature