

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

**DAVID SAXE PRODUCTIONS, LLC and  
VEGAS! THE SHOW, LLC, Joint Employers**

**and**

**Case 28-CA-075461**

**DAVID SAXE PRODUCTIONS, LLC, and  
FAB FOUR LIVE, LLC, Joint Employers**

**and**

**Case 28-CA-084151**

**ANNE TRACY CARTER, an Individual**

**TO: The Honorable Eleanor Laws  
NLRB – Division of Judges**

**ACTING GENERAL COUNSEL'S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

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**I. STATEMENT OF THE CASE**

This case involves Respondents' discharge of Charging Party Anne Tracy Carter (Carter) due to her protected concerted activities in violation of Section 8(a)(1) of the Act. The Show hired Carter to work as a dancer. Respondent Vegas! The Show, LLC (The Show) employed her after a rigorous rehearsal process and renewed her employment contract twice. She was then hired to perform in Respondent Fab Four Live, LLC's The Beatles Show (The Beatles Show) as well. In December 2011, Carter and other employees confronted David Saxe (Saxe), a principal for all Respondents, about holiday pay, scheduling, rehearsal pay, and injury issues. Saxe reacted negatively and disparaged, interrogated the employees, and impliedly threatened employees. About a week after this meeting, Saxe discharged Carter from both The Show and The Beatles Show. In his testimony, Saxe asserted shifting defenses ranging from Carter complaining too much, dancing in the wrong style, and having a crazed "satan voice." During Carter's employment with The Show, she and other employees signed

employment contracts with provisions that stated that employees could not discuss compensation or the terms of their agreements with each other and required them to acknowledge that no union has jurisdiction of The Show.

## **II. FACTS**

### **A. The Companies**

Saxe was<sup>1</sup> the owner or member of David Saxe Productions, LLC (DSP). (Tr. 431<sup>2</sup>) He was the owner, managing partner, and show producer for The Show. (Tr. 24-25; GCX 6) Saxe was the 50% owner of Fab Four Live, LLC with Mick McCoy (McCoy). (Tr. 25) Saxe did not bill his time to particular companies; he just triaged what he needed to do at each one. (Tr. 63-64) The shows were each performed at the Saxe Theater in the Miracle Mile shops at the Planet Hollywood Hotel. (Tr. 41) Saxe Theater, LLC owned the theater. (Tr. 42 94)

Saxe called himself David Saxe Productions when he was talking about shows for public relations purposes. (Tr. 27) He used “David Saxe” and “David Saxe Productions” interchangeably when he was discussing his shows in press releases and advertisements. (Tr. 27-28) Saxe Management, LLC was one of 13 Saxe’s companies that manage some of the others. (Tr. 29, 554)

#### **1. David Saxe Productions, LLC**

DSP’s facility at 920 Commerce Drive included offices, production offices, a dance studio, and a green screen room. (Tr. 36) All of Saxe’s companies used that address because that was where Saxe’s office was located. (Tr. 36-37) Saxe’s email was David@DavidSaxe.com. (Tr. 38) He uses that email address for all business regardless of

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<sup>1</sup> For purposes of this brief, I am using the past tense because unless otherwise discussed, these were the facts during Carter’s employment with Respondents.

<sup>2</sup> GCX\_\_\_ refers to General Counsel’s Exhibit followed by the exhibit number; RX\_\_\_ refers to Respondent’s Exhibit followed by exhibit number. “Tr. \_\_:\_\_\_” refers to transcript page held October 16-18, 2012 and December 11-12, 2012.

the company. (Tr. 40) Employees of DSP used email addresses ending in David Saxe.com. (Tr. 39) DSP provided all of the human resources services for all of Saxe's companies. (Tr. 44) DSP also handled all of the marketing consultant and "office stuff" for all of his companies. (Tr. 45) When someone is hired by The Show, the paperwork is done by DSP as well as the necessary work so that they are paid. (Tr. 46-47) In January 2011, Saxe was the producer of five shows and another ten with whom he was affiliated. (Tr. 466) DSP also performed work for shows and other entities that are not owned by Saxe. (Tr. 628)

In July 2011, Robert Smith (Smith) became the chief financial officer for DSP. (Tr. 413) In that position, Smith was responsible for doing administrative functions for all of the companies "under DSP." (Tr. 421) He currently acquires and manages insurance for Saxe's companies. (Tr. 45) DSP used to tell Managed Pay who would be working for The Show, and then Managed Pay would do an orientation with the employee. (Tr. 429) Managed Pay was a payroll firm that handled payroll for DSP and The Show until January 2012. (Tr. 413-14) Managed Pay also handled the administrative duties and processed the paperwork for DSP and The Show. (Tr. 414, 553) Smith testified that about five or six companies were involved in a consortium for the rates labeled in health insurance documents as "David Saxe Productions." (Tr. 415; GCX 22-23) In order to have a consortium, the companies must relate to each other. (Tr. 416) Smith asserts that The Show is covered under the Miracle Mile Shops workers compensation policy. (GCX 11, bates number 274) The Show has not had a certificate of worker's compensation coverage that included the name for The Show. (Tr. GCX 11, Tr. 423)

## 2. Vegas! The Show, LLC

The Show first filed its article of organization for a limited liability company with the State of Nevada on May 4, 2010. (Tr. 33) Nicole Tanner, an employee of DSP, was the original registered agent for The Show. (Tr. 35; GCX 6) The Show did not have any offices; it uses the mailing address for DSP. (Tr. 36) The records for The Show were kept at DSP's office in filing cabinets. (Tr. 37-38) The Show did not have a phone number. (Tr. 38) David Saxe Theater, LLC (the Theater) and The Show have a contract for use of the Theater and its proceeds that is signed by Saxe on behalf of each party. (GCX 45) The contract provided that The Show would need to provide evidence worker's compensation coverage at the demand of the Theater. (GCX 45, p. 7, Sec. 6.1(f)) There was a similar agreement between the Theater and Fab Four. (Tr. 615) DSP performed accounting for The Show. (Tr. 615)

The Show did not have its own email server. (Tr. 40) Darlene Ryan (Ryan), a supervisor for The Show, had an email address of Dryan@DavidSaxe.com. (GC 19; Tr. 39) DSP did not bill The Show for the time that it used DSP's facility for rehearsals. (Tr. 62) DSP handled personnel concerns for The Show employees including car rental issues that are processed by DSP employees Shannon Riley (Riley) and Armando Macias. (GCX 30; Tr. 604) DSP's Executive Vice President and General Manager Matthew Resler (Resler) and DSP's Accounting Staff Member Janien Robertson signed the paperwork for terminations regarding employees of The Show and processed other employment information about employees. (GCX 33, 35, 37-41, 49)

Although Carter received medical insurance under her contract with The Show, Carter received her medical insurance and COBRA benefits through DSP. (GCX 23-24) In order to

stop her COBRA contributions and coverage, she emailed Riley at DSP. (GCX 26) Carter wrote checks for COBRA coverage to DSP. (Tr. 130)

### **3. Fab Four Live, LLC**

McCoy and Saxe were partners in Fab Four. (Tr. 434) Fab Four filed its article of organization on August 22, 2008. (GC 5) Fab Four kept its records at McCoy's home and at DSP's offices. (Tr. 38) Fab Four did not have a phone number. (Tr. 38) Fab Four did not have an email server. (Tr. 40) Saxe testified that "somebody" at DSP produced the paperwork for performers at Fab Four so they could get paid. (Tr. 46-47, 610) Fab Four's website was maintained by DSP. (Tr. 611) If unemployment issues arose, Saxe would ask representatives at DSP for assistance in handling it. (Tr. 612) There was no written agreement between Fab Four Live, LLC to perform services. (Tr. 52-53) Fab Four had rehearsals at DSP, but DSP did not bill Fab Four for the rehearsal time. (Tr. 62) Janien Robertson signed off on the application for Fab Four to obtain a tax identification number. (GCX 29) Fab Four did not have any accountants. (Tr. 254) DSP kept Fab Four's payroll records. (Tr. 255) Fab Four did not have a worker's compensation policy. (Tr. 62) McCoy was unsure of what Saxe contributed to Fab Four in addition to the services DSP performed for Fab Four. (Tr. 461)

### **B. Carter's Employment with Respondents**

In April 2010, The Show hired Carter and other dancers. On April 20, 2010, the dancers auditioned before Saxe and choreographer Tiger Martina (Martina)<sup>3</sup> after seeing an audition notice posted on a vegasauditions.com. (Tr. 88, 220, 641) At every audition, Martina and Saxe told dancers that this is a "real show" and a "dancing show." (Tr. 470) The Show was very athletic and demanding. (Tr. 642) From late April until June 2010, rehearsals

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<sup>3</sup> After the rehearsal process, Martina has not been consistently at The Show. (Tr. 677)

led by Martina were held at the DSP facility at 920 Commerce. (Tr. 89-90, 220) After the employees were hired, Managed Pay handled the orientation and directed employees to sign up for benefits. (Tr. 90, 222-23) On April 27, 2010, Carter signed an artists' agreement (the Contract) that provided a rate of pay of \$70.84 per show. (GCX 14) Rehearsals were compensated at the rate of \$12.50 per hour before the first live performance and not compensated thereafter with a limit of four rehearsal hours per week. (GCX 14, p. 2) On May 10, 2010, dancer Amanda Nowak (Nowak) signed a similar contract. (GCX 31)

The Show had a soft opening on June 24, 2010, with a grand opening on August 5, 2010. (Tr. 94-95) Initially, performances were six days per week. However, soon after opening the show ran seven days per week with dancers performing six days per week. (Tr. 93) Each night, the dancers performed a show at 7:00 PM and another at 9:00 PM. The shows would run about one hour and 20 minutes. (Tr. 93) The Show was a high intensity performance about the history of Vegas entertainment. (Tr. 94)

Carter reported to Dance Captains Ryan Kelsey (Kelsey) and Claudia Mitria (Mitria) and Ryan who served as Company and Production Manager. (Tr. 96, 223) Kelsey and Mitria were directly in charge of the dance cast and were responsible for how The Show would run, fixing problems with the dance performance, and some of the scheduling. (Tr. 98, 246, 287, 290, 327) It was part of the dance captains' job to make independent recommendations about whether to renew a dancer at the end of the six-month contracts. (Tr. 299, 349, 367, 507) During the contractual renewal process, Saxe listened to their opinions and gave them due consideration. (Tr. 367, 477-78, 505) Kelsey earned \$100 per show, and Mitria earned \$83.34 per show. (Tr. 251) Ryan was in charge of the cast as well as relaying issues including payroll. She was also in charge of The Show's technical crew. (Tr. 97)

Employees were required to report by 6:00 PM when there was a nightly meeting. (Tr. 98, 104) At the meeting, Kelsey and Mitria gave Carter and the other dancers “notes,” which were corrections to improve the dance performance. (Tr. 98, 143, 171, 227, 244, 291, 326) Carter received notes about dance style and her not performing move at the correct count of the music. (Tr. 157, 194-95, 207) According to Mitria, Carter was no more vocal about receiving notes than the other dancers. (Tr. 348) Mitria testified that sometimes Carter took notes fine and sometimes she asked more questions, which was “not a bad thing.” (Tr. 339) Some of the dances reacted negatively to the “Devil in the Blue Dress” video. (Tr. 340)

After the initial rehearsal process ended, Saxe would appear at the Theater during The Show about two times per month. (Tr. 97, 151, 655) He did not have much interaction with Carter. (Tr. 520) Auditions for The Show were ongoing and it was very common to have dancers reaudition for their spots. (Tr. 474, 478, 576)

In October 2010, Nowak gave her notice to stop working, and, after consulting with Ryan and Kelsey, she became a part-time, swing dancer. (Tr. 225, 237) She worked without a contract until signing another one on February 11, 2012. (GCX 32) Mitria and Kelsey told her when she was scheduled to work. (Tr. 246)

On December 26, 2010, Carter signed a second contract with a rate of pay of \$65.84 per show with a bonus of \$5.00 per show, provided that she complied with the “Duties of the Artist requirements.” (GCX 15) Carter met with Ryan and Resler in his office at DSP regarding the signing of the contract. (Tr. 169, 696) Neither Resler nor Ryan counseled Carter about her performance or attitude. (Tr. 169, 171, 696, 706)

Carter received all of her bonus pay. (Tr. 250) She never received a written counseling during her employment with Respondents. (Tr. 169) On April 26, 2011, Carter signed an extension of the earlier agreement, which was set to expire on January 2, 2012. (GCX 16)

### **C. The Contract**

Many contracts, including Carter's and Nowak's include the following clauses:

**NONDISCLOSURE/NONDISPARAGEMENT.** Artist agrees not to disclose the terms of this Agreement to third parties or fellow Artists without Company's prior written consent. Once again, Artist may not disclose Artists compensation or solicit information regarding anyone else's compensation or other terms of their agreements. If this occurs, Company shall not have the right to immediately terminate this agreement and collect damages as set forth in section 6 of this agreement. Artist shall agree not to disparage each other to any person in the media or any manor during the terms of this agreement and continuing for ten (10) years thereafter.

**NON-UNION.** Artist acknowledges that the Show is not under the jurisdiction of any labor union. (GCX 15, p. 4; GCX 16, p.4; GC 32, p. 4; Tr. 72)

The contracts provide that violating the confidentiality provisions regarding salaries or personnel matters is a breach of the agreement. (GCX 15, p. 4; GC 31, p. 2) The contracts dancers could be terminated by The Show with two weeks written notice without cause and that employees could be released from the contracts with 30 days notice. (GCX 14, 15, 31, 32; Tr. 575) The Show had the right to terminate the contracts "without notice in the event of breach by the employee of any covenant contained" therein or for insubordination. (GCX 14, p. 2 GCX 15, p. 4; GCX 30, p. 2; GCX 31, p. 3)

### **D. Carter's Employment with The Beatles Show**

In the spring of 2011, McCoy and Saxe decided to use dancers from The Show in The Beatles Show because they were looking for better dancers to be and the dancers already had dressing room space at the Theater. (Tr. 454) The dancers learned about The Beatles Show

positions when Ryan came into the dressing room for the Show, and said that Saxe wanted to use dancers from The Show for The Beatles Show. (Tr. 101) Ryan said that they would have the opportunity to make extra money and asked if any of the dancers would be interested in dancing in The Beatles Show. (Tr. 101) Ryan informed Carter that she and Monteece Mask (Mask) would be dancing in the show. (Tr. 102) Ryan directed them to attend rehearsals with Martina at DSP. (Tr. 102) Martina ran the one-to-two week of rehearsals without input from the dancers. (Tr. 56-57, 102-03, 151, 215, 271) The performances were fully choreographed. However, there are specific times where dancers are placed to get audience participation, and, after such placement, they are allowed to “freestyle.” (Tr. 40, 152, 272, 331, 454) During the rehearsals, Carter asked Martina if there were going to be contracts and if they were going to be paid for their rehearsal time, and Martina directed Carter to ask Ryan. (Tr. 103, 154)

The Beatles Show included two female dancers and was a less rigorous show than The Show. (Tr. 103-04, 437) Ryan told Carter that the dancers needed to be there at 5:00 PM for the 5:30 PM show that ended about 15 to 20 minutes before 7:00 PM. (Tr. 56, 104, 155) Martina told the dancers what style to create for their hair and make-up. (Tr. 105) At Ryan’s direction, the dancers created their own schedules until dancer Anna Van Sambeck (Sambeck) was appointed to do the scheduling. (Tr. 153-54, 217, 274) The dancers received a 1099 form from the Employer at the end of the year rather than W-2’s. (Tr. 155, 164, 330, 435) The performers in The Beatles Show did not have profit sharing or have any other stake in the show. (Tr. 55) Dancers could not subcontract their role in The Beatles Show. (Tr. 77-78)

During The Beatles Show, dancers were asked to roll a large prop in the shape of an arrow off of the stage. (Tr. 111, 216) Carter was concerned because the arrow had fallen on dancer Sambeck’s head. (Tr. 111, 275) A few of the dancers were unhappy about moving the

arrow. (Tr. 276) Sometimes the dancers did not move the arrow when they were in the track that performed on stage left, where Carter danced. (Tr. 156) Carter asked Ryan to about whether she had to move the prop. (Tr. 112) McCoy spoke to Carter and said that she would have to move the arrow or he would find someone else who would do it. (Tr. 113) After this conversation, Carter moved the arrow. (Tr. 113)

**E. December 13, 2011 Meeting with David Saxe**

**1. Events Leading Up to December 13 Meeting**

Around late November 2011, Ryan was discharged.<sup>4</sup> After she left, there was a lot of concern and speculation among the cast and staff because Ryan was the person to whom employees brought their work-related issues. (Tr. 113-14, 158, 160, 226, 388-89) The show was more chaotic. (Tr. 312) Kelsey and Mitria took over the scheduling and Ryan's other duties. (Tr. 312, 327) At that time, a lot of the cast was injured and the part-time hires prevented the full-time cast from taking time off. (Tr. 114, 226) Employees were concerned about having enough time between shows to prepare for the next performance because shows did not always start on time, and the "meet-and-greets" required dancers to meet with the public in between shows. (Tr. 114, 226) Carter was the most vocal of the dancers about work concerns including holiday pay, part-time employees an schedules, rehearsal pay, injuries, and meet-and-greets. (Tr. 361, 365, 389, 409) Carter spoke to Mitria about how to resolve these issues, and she suggested that they talk to Saxe. (Tr. 114, 176) On December 11, 2011, Carter approached Saxe's assistant Armando Macias, Project Manager for DSP, about meeting with Saxe. (GC 9; Tr. 113-14)

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<sup>4</sup> Joy Schaffer was Ryan's successor. (Tr. 303) The record does not indicate when she started her employment, and Saxe denied that there was ever another company manager. (Tr. 591)

## 2. December 13 Meeting

On December 13, 2011, Saxe came into the girls' dressing room and held a meeting. It was not common for Saxe to address a whole group of dancers. (Tr. 364-365) About 10 female dancers were present, and Kelsey walked into the dressing room during the meeting. (Tr. 115) The dancers were sitting at their dressing room stations, and Saxe sat in the middle. (GCX 47; Tr. 510, 701-02) Saxe said that he heard that morale was low, and he wanted it to be a positive environment. (Tr. 115) Carter said that of course, morale was low; Ryan had just been fired and that over the past couple of years, The Show had lost a lot of employees and everybody was wondering who was going to be next and what was going to happen. (Tr. 115) Saxe said that Ryan was fired because she was not filling out the nightly show reports and said, "fuck you" in an argument. (Tr. 115, 228) Carter said that they were not really interested in why she was fired or whether or not she was doing her job, but as a cast, they were interested in getting someone in there who can open up the lines of communication and have a chain of command so employees could voice their issues. (Tr. 115-16, 228) Saxe asked what the concerns were. (Tr. 116, 228) Dancer Natasha Boychoure (Boychoure) asked for incentives for those who had been there since the beginning. (Tr. 116) She stated that they worked hard and that they work every holiday and would like holiday pay. (Tr. 116, 228) Saxe said, "why are you bitching, what does your contract say about rehearsal and holiday pay?" (Tr. 117, 228) Nowak said that she did not think that Boychoure was bitching and that Saxe said that he was there to communicate. (Tr. 228-29) Boychoure said, "you know we're not bitching, we love our jobs, we work extremely hard." Boychoure said that the contract did mention nights that they only do one show and that they were supposed to be given time-and-a-half but they never received it. (Tr. 117) Saxe said that they did receive it

and that rehearsal time would be compensated. (Tr. 117) Kelsey said that the dancers' first four hours of rehearsal are free. (Tr. 1170) Carter said that that was not what is in their current contract. (Tr. 117) Carter said that Saxe must get away with not paying for rehearsals because the contract says that "it is up to his discretion." (Tr. 117) Saxe said, "all you do is bitch, bitch, bitch I give you a job and all you do is bitch." (Tr. 117, 180, 228)

Carter said, "we love our jobs, we are grateful to have our jobs, we enjoy working here, however, there are concerns that we have." (Tr. 118) Carter said that the part-time dancers were affecting each of the cast members, especially since a lot of them were injured at the time. (Tr. 118) Carter said that having part time employees come in three or four days per week was causing those of them that are there to six days per week to be unable to attend to injuries and illnesses. (Tr. 118, 229) Saxe said that he provided insurance. (Tr. 118) Carter said that that does not cover everything and that she needed to see a physical therapist twice per week as did other cast members. (Tr. 118) Saxe said that he wanted dancers with a positive attitude and that The Show was their top priority. (Tr. 118) Carter said, "you can't justify hiring people part-time that have other employment and still say that The Show is their top priority." (Tr. 119, 230) Saxe said that he would look into it.

Carter said that meet-and-greets were affecting time constraints and that those constraints were aggravated by shows that started late. (Tr. 120, 229-30, 239) Saxe said that he understood, but he didn't want all this "bitching." (Tr. 120) Carter reiterated how much she loved and cared about her job and that was why she was voicing these concerns. (Tr. 120, 231) Out of all the dancers, Carter spoke up the most at this meeting. (Tr. 245)

After the meeting, Saxe met with dancer Jennaia Roussel (Roussel) about her contract. He asked her how she felt about what goes on backstage. (Tr. 385-86) Roussel indicated to Saxe that she found Carter to be very negative. (Tr. 42)

## **F. Carter's Discharges**

### **1. Email Exchange**

About a week after the December 13, 2011 meeting, Carter noticed Saxe meeting with other dancers about their contracts. (Tr. 120-21) On December 21, 2011, she contacted Saxe via email: "Hi David, I didn't get a chance to talk to you yesterday, I was wondering if there will be another time to do that or if I can schedule a time? Thanks, Anne Carter." At 7:59 PM, Saxe emailed her back:

Hi Anne, Due to your constant negative attitude and lackluster performance I will not be renewing your contract for Vegas! The Show. Your contract ends January 2. I hope that you are professional enough to finish your contract and I would appreciate it if you could cease all of the complaining in the dressing room. Your fellow cast members would really appreciate it. Constant complaining and negativity just can't be tolerated anymore.

Thank you for all of the good things you have done in the past. Call or email me any questions you might have. I tried to talk to you in person but you left last night.  
David Saxe (GCX 20)

Carter saw the headline of message stating "not renewing you" when she was in dressing room during a performance and continued with her performance. (Tr. 122, 699, 708)

### **2. Telephone Conversations**

On about December 23, 2011, Carter called Saxe. Carter said that she was blind-sided by what happened, that she did not understand, that she was an original cast member who had been very loyal, that she enjoyed her job, and that she just did not understand. (Tr. 122) Saxe said that of course someone like her would be blind-sided and would not understand. (Tr. 122) Saxe said that he knew her type and all she did was bitch. (Tr. 122, 211) Saxe said

that she is the most negative person in the dressing room and all the cast members could not stand her. (Tr. 122) Saxe said that the choreographer thinks that she is “a pain in the ass.” (Tr. 123) Carter asked how he could say that the cast members did not like her when the entire cast was at her Christmas Party three nights ago.<sup>5</sup> Carter said that she finds it hard to believe and that as far as her performance, there was nothing lackluster. (Tr. 123) Carter said that she was a professional and would complete her contract. (Tr. 123)

Saxe called back and asked if she would be coming to work that night. (Tr. 123) Carter said that she was a professional and planned on completing her contract. (Tr. 123) Saxe said that he did not think that Carter was showing up for work so he took her off The Beatles Show. (Tr. 123) Carter was not scheduled to perform in The Beatles Show after this conversation. (Tr. 217)

### **3. Conversations with Mitria and Kelsey**

A couple of days later, Carter approached Mitria and said that she was completely blind-sided by what happened. (Tr. 124, 215) Carter said that if there was something with her performance, attitude, or whatever, she would have hoped that Mitria would have let Carter know. (Tr. 124) Carter said that as a friend, if there was something that she was doing that was severe enough to cause her to lose her employment, Mitria should have let Carter know. (Tr. 124) Mitria said that any concerns she had, she had voiced to Ryan. Carter said that Ryan had not told her anything. (Tr. 124) Mitria said that she was so sorry. (Tr. 124)

Carter approached Kelsey and said he that he heard through the grape vine what had happened and that he was glad she approached him. (Tr. 125, 215) Carter asked why he gave her no warning. Kelsey said that as far as performance is concerned, she was “amazing” and always “gave” great energy and a great show. (Tr. 125) Carter said that she knew that she

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<sup>5</sup> Numerous cast members had been at Carter’s party, including Mitria and Kelsey. (Tr. 179, 316, 360)

was outspoken and that she spoke up a lot and that any concerns were because she cared about the show and it was for the greater good of the cast. (Tr. 125) Carter said that it was never out of negativity and during the meeting with Saxe, she tried to voice those concerns in a positive manner. (Tr. 125) Kelsey said that unfortunately Saxe “flies off the handle and doesn’t like it when people talk back to him”. (Tr. 125, 215) Kelsey said that he was sorry about that. (Tr. 125) Carter said that she could not believe that Saxe said that the entire cast hated her. (Tr. 125) Kelsey said, “you know that that’s not true.” Kelsey said that he hoped that their friendship was not affected by this. (Tr. 125)

#### **4. Carter’s Performances and Attitude**

Carter worked until the end of her contract. (Tr. 127) During her employment, no one ever informed her that she had to improve her dancing or her contract would not be renewed. (Tr. 162) Carter was well-liked, got along with everyone and had a good attitude. (Tr. 233, 245-46) Carter was a “full-out” dancer who always gave 110%. (Tr. 233, 244-45) Nowak testified that she learned from Mitria and Kelsey that there was some concern about dancer Paige Annette Cola’s attitude, but she never heard complaints about Carter’s attitude. (Tr. 243, 246, 248) Roussel testified that Carter had a good sense of humor and that she never communicated to Carter any concerns about Carter being too negative. (Tr. 382) According to Martina, Carter’s spacing was typically good, and she had good energy levels. (Tr. 688) Dancers including Mitria and Kelsey attended Carter’s Christmas Party in December 2011. (Tr. 316, 360) Mitria never told Carter that cast members thought that she was too negative. (Tr. 344)

Some employees testified about an argument regarding whether Carter would work on New Year’s Eve. In September 2011, Carter had requested New Year’s Eve off from the

Show and Ryan approved the request. (Tr. 697) Later in December 2011, after Carter had been informed that her contract was not going to be renewed, Mitria informed the dancers that Saxe no longer wanted employees taking off New Year's Eve. (Tr. 697) After some discussions, Carter was reapproved to have the night off. (Tr. 697)

## **G. Respondents' Defenses**

### **1. Supervisors' Testimony**

Dance Captain Kelsey testified that Carter did not take notes well, but she was never in direct opposition. (Tr. 293-94) Kelsey testified that early on, he brought up a concern about Carter being a negative influence in the backstage. (Tr. 294) Kelsey testified that Carter's own style crept in during the latter day of employment. (Tr. 295) Kelsey asserted that other dancers came to Kelsey to talk about her concerns they had with Carter's attitude backstage and in the dressing room. (Tr. 296) During the first contract review, Kelsey was concerned about Carter "bitching and complaining to friends and peers." (Tr. 298) Kelsey asserted that during the last contract review, Kelsey told Saxe and Martina that Carter's negativity outweighed any benefit that they were getting on stage. (Tr. 308) Carter's negativity included issues about not having paid holidays, scheduling, and meet-and-greet issues, and injuries. (Tr. 314)

Fab Four partner McCoy admitted that Carter is a qualified dancer. (Tr. 441) McCoy testified that the first conversation he had with Carter was when she was refusing to move a prop across the stage. (Tr. 441) After she agreed to move the arrow, he noted that it would have been easier to work with Carter if she were a "team player." (Tr. 441-42) McCoy testified that at one point, Saxe called him and was talking about Carter not performing in The Show, and McCoy said that he would rather see other girls in The Beatles Show. (Tr. 448-49)

McCoy saw all of the dancers' styles during the rehearsals with Martina. (Tr. 452-53)

McCoy testified that he did not see Carter as keeping with his image of the show. (Tr. 443)

Choreographer Martina testified that he talked to Saxe very early in the running of The Show about replacing Carter and wanted her first contract to expire. (Tr. 653-54, 673)

Martina admitted that in several of the pictures Respondent moved into evidence, dancers other than Carter were not performing correctly. (Tr. 685, RX 4; Tr. 686, RX 6; Tr. 686-87, RX 9; Tr. 666, 687-88, RX 11; Tr. 688, RX 12) Martina testified that there would be no difference from one scene to the next as if she was not portraying a character and that Carter had stiff hips. (Tr. 671) As a performer, Carter had good spacing and consistent energy. (Tr. 688-89) Martina has discharged employees himself. (Tr. 690) Martina did not recall telling Carter that if she did not improve, her contract would not be renewed. (Tr. 689)

## **2. Saxe's Testimony**

Saxe testified that he loves feedback. (Tr. 495, 503) During the first contract renewal, Saxe testified that Martina viewed Carter as a "pain in the butt" and not doing the choreography right and that she should not be renewed. (Tr. 479-80, 498) Saxe decided to "keep working with her." (Tr. 654)

Saxe testified that he or someone else took the pictures that were introduced at trial.<sup>6</sup> (Tr. 482, RX 4-7, 9-14) Saxe did not rely on the pictures to discharge Carter; rather he reviewed them in anticipation of litigation. (Tr. 490) Saxe said that there were about 50,000 pictures total of the Show. (Tr. 62, 559) He stated that he noticed that the pictures were the worst for Carter. (Tr. 480)

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<sup>6</sup> The times on the pictures are suspect due to the frequent references to AM. The Show was performed at night. (Tr. 93)

Saxe testified although he did not speak at the counseling meeting, he personally witnessed Carter at DSP getting a written counseling, which he has been unable to locate. (Tr. 481) He testified that he did not speak during the meeting regarding the counseling. (Tr. 481) Saxe testified that Carter had multiple write-ups<sup>7</sup>. (Tr. 81, 588) Saxe testified, without producing documentation, that Carter had taken off more time than anyone else. (Tr. 514)

During recommendations about the last contract, Saxe testified that Martina said that he did not want Carter back because she kept doing something different. (Tr. 506) Saxe testified that Mitria and Kelsey said that they were done and that Carter was unable and unwilling to do anything. (Tr. 507)

During the December 13, 2011 meeting, Saxe testified that other people kept rolling their eyes behind Carter and making faces. (Tr. 512-513, 516) After the meeting, Saxe said that he spoke with Roussel who said that Carter was terrible and that Roussel could not work with her any more. (Tr. 517) Saxe testified that Roussel was upset that Carter wanted something to be paid for things that were not to be paid per the contract and that she wanted “money for something that didn’t exist<sup>8</sup>.” (Tr. 517) Saxe testified that after talking with Martina, Kelsey, and Mitria, and following the conversation he had with Roussel and Nicole Hamilton and seeing the reaction of the other employees to the December 13 discussion, he made his decision not to renew Carter’s contract. (Tr. 519)

Saxe testified that he called Carter and told her that her contract was not being renewed, and Carter called him a liar and was screaming. (Tr. 520) Saxe testified that Carter said that she was the best dancer. (Tr. 520) Saxe claimed that he then sent her an email.

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<sup>7</sup> However, Respondents failed to produce any write-ups for Carter. (Tr. 82)

<sup>8</sup> Jennaia Roussel testified, but did not corroborate these statements.

(Tr. 521, GCX 20) Saxe asserted that Carter called him back, and she was angry and she wanted to know why her contract was not renewed. (Tr. 523) Saxe testified that he said when your immediate supervisor asks you to do something, you should probably do it, do not argue with them, show up on time, and do the stuff you're supposed to do and not make it difficult. (Tr. 523) Saxe claimed that it had been going on for a long time and that she had been written up on numerous occasions. (Tr. 524) Saxe testified that Carter was speaking in a "Satan voice" that was "creepy" and she was "screaming more than he heard in his entire life" and turned "psycho." (Tr. 525) Saxe testified that he was concerned that she would come in with an "uzzi" and kill Mitria or Kelsey. (Tr. 525, 551) Saxe testified that Smith and Riley heard Carter's scary voice<sup>9</sup>. (Tr. 583) According to Saxe, the conversation ended when he asked her if she was going to continue working until the end of her contract. (Tr. 526)

Saxe testified that he then called McCoy because Carter wanted to find out what her role was going to be in The Beatles Show. Saxe said that he spoke with McCoy who said that Carter was difficult with moving a prop and was a "pain in the butt." (Tr. 528, 531) Saxe told McCoy that he was worried that Carter would not show up. (Tr. 531)

After the trial resumed in December, Saxe testified that he made the decision to discharge Carter in October 2011, and that on November 18, 2011, DSP was had auditions to replace the lowest four performing dancers in The Show including Carter. (Tr. 541) The audition notice did not reference The Show, the work ethic of the performers or the required heights of the dancers as has been common in previous audition notices. (RX 8; Tr. 682) Saxe and Martina admitted that sometimes they had auditions for future projects and for some of Saxe's other shows including the Ultimate Variety Show. (Tr. 578, 682) Saxe stated that he was unaware of who replaced Carter, despite auditions for Carter's position supposedly

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<sup>9</sup> Smith testified, but did not testify about this conversation. Riley did not testify.

having occurred. (Tr. 579) Saxe testified that McCoy complained about Carter being late and “some weird make-up and hair” at The Beatles Show<sup>10</sup>. (Tr. 548) Despite several employee witnesses testifying in October about Carter’s “negativity” in the dressing room, Saxe testified that employee concerns about Carter’s complains were not a reason for failing to renew Carter’s contract. (Tr. 592) Contrary to his earlier testimony, Saxe testified that he did speak at the meeting about Carter’s first contract renewal. Saxe testified that he told Carter that she would have to improve and listen to Kelsey and Mitria. (Tr. 718)

### III. LEGAL ANALYSIS

#### A. Respondents The Show and DSP and Fab Four and DSP are two sets of Joint Employers or in the alternative two, Single Employers

##### 1. Law Regarding Joint and Single Employer Status

A joint employer relationship exists where companies amounting to independent legal entities have chosen to handle jointly important aspects of their employer-employee relationship. It is not necessary to demonstrate that the various entities form a single integrated enterprise. See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122-23 (3<sup>rd</sup> Cir. 1982). The standard in a joint employer finding is here two entities exert significant control over the same employees, and where it can be shown that these two entities share or co-determine matters governing their essential terms and conditions of employment. See *Capitol EMI*, 311 NLRB 997, 999 (1993); *Marcus Management*, 292 NLRB 251, 259 (1989). A joint employer must meaningfully affect matters relating to employment such as hiring, firing, discipline, supervision and direction. *Riverdale Nursing Home*, 317 NLRB 881, 881 (1995); *Browning –Ferris Industries*, supra at 1123.

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<sup>10</sup> McCoy did not testify about Carter having any hair or make-up issues.

To determine whether two or more entities are sufficiently integrated to be considered a single employer, the Board examines four principal factors: 1) common ownership; 2) common management; 3) interrelation of operations; and 4) centralized control of labor relations. *Waterbury Hotel Management, LLC*, 333 NLRB 482, 523 (2001). Not all of these criteria need be present to establish single-employer status, which ultimately depends on all the circumstances of the case, but a highly significant factor is the absence of an “arm’s length relationship found amongst unintegrated companies.” *Denart Coal Co.*, 315 NLRB 850, 851 (1994); *Herbert Industrial Relations Co.*, 319 NLRB 510, 524 (1995); *Emsing’s Supermarket, Inc.*, 284 NLRB 302, 303 (1987), *enfd.* 872 F.2d 1279, 1289 (7th Cir. 1989).

**2. The Show and DSP and Fab Four and DSP are Joint Employers, Respectively**

**a. DSP and The Show are Joint Employers**

Saxe was the sole member of both The Show and DSP. He controlled both companies. However, Respondents assert that they are completely separate companies. Throughout the testimony, Saxe made the decisions regarding whom to hire and discharge and established the terms and conditions of their employment. According to Saxe, DSP performed the “office stuff” for his companies. (Tr. 45) Saxe did not bill hours or distinguish for whom he was performing work among the companies he controlled. (Tr. 63-64) Resler, Vice President and General Manager of DSP was present when Carter’s contract with The Show was renewed. (Tr. 169, 696) These companies each had their own limited liability corporation status (LLC). Saxe created The Show and uses DSP to implement the policies to support the Show. Whether it was Managed Pay or DSP itself, DSP directed the human resources matters. (GCX 33, 36, 47-41, 49) Saxe was the final arbiter or all issues for both

companies. His control over the labor relations policies of DSP and The Show make them joint employers.

**b. DSP and Fab Four are Joint Employers**

DSP and Fab Four had a similar relationship with Saxe as DSP and Fab Four do. Saxe was the sole member of DSP and a 50% partner of Fab Four. (Tr. 25) Saxe controlled labor relations at Fab Four and worked out of his office at DSP. (Tr. 36-37) Although Fab Four and DSP may argue that Fab Four did not have any labor relations because Fab Four does not have any employees, Counsel for the Acting General Counsel contends that Carter was an employee and not an independent contractor. Saxe directed Ryan to seek dancers to perform in The Beatles Show. (Tr. 101) Although Saxe was not involved in the scheduling of the dancers, he removed Carter from working in The Beatles Show. (Tr. 123) Saxe admitted that if someone tried to collect unemployment benefits from Fab Four, he would contact someone at DSP for assistance. (Tr. 612) He further admitted that “somebody” at DSP produced the paperwork for performers in The Beatles Show so that they could get paid. (Tr. 46-47, 610) Saxe controlled the labor relations and did not differentiate whether he was representing DSP or Fab Four, and thus, DSP and Fab Four are joint employers.

**3. The Show and DSP and Fab Four and DSP are a Single Employers, Respectively**

Although there is no requirement that each of the criteria for single employer status be met, *Waterbury Hotel Management*, supra. at 523, the record is replete with evidence of how The Show and DSP, and Fab Four and DSP meet each of the factors for single employer status.

**a. The common ownership factor is satisfied because Saxe was the sole member of DSP and The Show and the 50% share member in the Fab Four.**

It is undisputed that Saxe has been sole “member” of both DSP and The Show. (Tr. 431, 24-25) Based solely on Saxe’s ownership interest in both Respondents, the common ownership factor in the single-employer calculus has been satisfied here.

Similarly, DSP and Fab Four meet the common ownership test for a single employer. McCoy is a 50% owner with Saxe in the Fab Four, but that still is common enough ownership to meet the common ownership test for a single employer. See *Bolivar-Tees, Inc.*, 349 NLRB 720, 722 (2007), *enfd.* 551 F.3d 722 (8th Cir. 2008) (finding that Respondent Alan Heller’s 100% ownership interest in Bolivar-Tees and his 60% and 50% interests in three related companies satisfied the common ownership prong of the single employer test).

**b. The common management factor in single employer status is satisfied here because Saxe was the primary manager of DSP, The Show and Fab Four.**

Saxe is the sole managing member of DSP and he is not only the sole member for The Show, but the manager who hires and discharges employees as well. With respect to the employees of The Show, Martina testified that he has discharged employees on his own, but this is not one of his typical duties. (Tr. 690) Martina testified that he worked for DSP. (Tr. 680) As noted on the organizational charts, Saxe is the top of each company’s hierarchy. (GCX 9, 43, RX 15) Saxe signed an agreement with himself between DSP and The Show to perform services at rates that were never disclosed.

Saxe directed that new dancers from The Show begin performing for The Beatles Show. Ryan, the company manager for The Show, supervised employees of the Fab Four from the middle to the end of 2011. Martina provided choreography and led rehearsals for the

Fab Four as well as for The Show. Although McCoy was a partner, it was Saxe who discharged Carter, and never distinguished between which company he was representing. In short, Saxe exercised “overall control of critical matters at the policy level.” *Emsing’s Supermarket*, *supra* at 302.

**c. The lack of arm’s length transactions between DSP and The Show and DSP and the Fab Four as well as the use of common office areas, clerical personnel, and accounting services militate in favor of a finding of interrelation of operations.**

Notwithstanding the different business purposes between real estate companies and other types of businesses, a single employer relationship can be found particularly where there is evidence of a lack of an arm’s length relationship between the entities. *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1993), *enfd. mem.* 55 F.3d 684 (D.C. Cir. 1995), *cert. denied* 516 U.S. 1093 (1996); *G. Zaffino & Sons, Inc.*, 289 NLRB 571, 577 (1988); *Capitol Theatre*, 231 NLRB 1370, 1374-1375 (1977). Presence of non-arm’s length transactions at reduced prices or without payment entirely is probative of interrelation of operations. *Lebanite Corp.*, 346 NLRB 748, fn 5 (2006).

Here, the lack of arms length transactions between DSP and The Show are fundamental to the companies’ operations. Saxe testified about his 13 companies of which DSP and The Show are two. He does not bill or otherwise segregate his time between his companies. (Tr. 63-64) DSP and The Show have a written agreement for DSP to perform various unspecified services for The Show. (GCX 10) Neither the specific nature of the services nor the price of the services is described in the agreement.<sup>11</sup> The document was signed by Saxe on behalf of each DSP and The Show. DSP permitted The Show to have rehearsals at its location without compensation for The Show’s use of the space. (Tr. 62)

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<sup>11</sup> Respondents never submitted any documentation that showed what the rate was.

These practices applied to The Show's relationship with another of Saxe's companies – the Theater. The agreement, inter alia, requires that The Show produce a certificate of worker's compensation coverage when requested by the Theater. However, Smith testified that The Show does not have a certificate of worker's compensation that includes its name. (Tr. 423; GCX 11) It appears that this was not a concern because Saxe is the owner of The Show as well as the Theater, both of which receive services from DSP.

Saxe testified that he believed that DSP and the Fab Four had a similar agreement for services as between DSP and The Show, but the agreement was not produced pursuant to subpoena and Respondent's never sought to introduce it into evidence. (Tr. 52-53) In fact, there is no evidence of any written documents between DSP and Fab Four. Such blatant disregard for corporate formalities require a finding Respondents DSP and The Show and DSP and Fab Four are a single integrated enterprise with each being liable for The Show's and Fab Four's unfair labor practices. See *Emsing's Supermarkets*, supra at 302.

Companies sharing office areas, clerical staff, and accounting services is evidence of interrelation of operations. See *Three Sisters Sportswear*, supra at 863. In this case, it is undisputed that Saxe has an office at DSP where he conducts business on behalf of all of his companies. It is also undisputed that some of The Show's and Fab Four's business records were stored at DSP's premises. (Tr. 37-38, 255) The Show and Fab Four have no phone or address of their own other than that for DSP. By sharing phone and fax lines as well as office space, Respondents exhibit a dependence on one another that establishes the lack of an arm's length relationship between the two entities. According to Saxe, he used DSP as the name on an audition notice for dancers in The Show and has done so in the past.<sup>12</sup> (RX 8, Tr. 578)

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<sup>12</sup> Counsel for the Acting General Counsel disputes that this audition was for dancers at DSP, but it is the position that Respondents' maintain nonetheless.

DSP provided services to all of Saxe's companies. As Smith testified, he secured all of the insurance policies ranging from medical to liability to worker's compensation for all of Saxe's companies. (Tr. 415) Similarly, the record is clear that Janien Robertson, an accounting staffer for DSP, performed vital services for The Show and Fab Four including processing payroll. (Tr. 427) Robertson was involved in routine processing of employee payroll and personnel matters for both The Show and Fab Four. (Tr. 427) Staff at DSP maintained The Show's and Fab Four's websites (Tr. 609, 611) and provided the server so that employees of The Show would have emailing capability. (Tr. 40)

**d. DSP and The Show and DSP and Fab Four have centralized control of labor relations, respectively.**

As noted in the analysis of Joint Employer status, Saxe himself had control of labor relations with respect to each of the companies. Regardless of whether Mitria and Kelsey are supervisors of The Show or whether Ryan was a supervisor of Fab Four, the chain of command stopped with Saxe. Even with respect to Fab Four, a partnership, Saxe directed Ryan to hire new dancers who worked for The Show. Saxe discharged Carter via email and then, in a follow-up discussion, informed Carter that she was not to come in to perform in the Fab Four that night. Saxe never indicated that he was speaking on behalf of a different company. Rather, he made the decisions regardless of which company on whose behalf he was acting. He consulted with the various supervisors and had them implement the policies, but he had the control of the labor relations.

Respondent appears to argue that each of these companies is separate because, aside from Saxe, they are separate companies. However, they are Saxe's companies and he acts on behalf of them such that a single employer relationships exist. Considering the evidence of common ownership, management, interrelations of companies, and joint control over labor

relations as exercised by Saxe, the ALJ should conclude that Respondents are a single employer.

**B. Supervisory Status of Mitria, Kelsey and Ryan**

The supervisory status of Mitria and Kelsey with respect to The Show and Ryan<sup>13</sup> with respect to the Fab Four, remains at issue.

Under Section 2(11) of the Act, the term supervisor means:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of authority to engage in any one of the enumerated supervisory functions is sufficient to confer supervisory status on an individual, provided the authority is held in the interest of the employer and its exercise is not of a merely routine or clerical nature but requires the use of independent judgment. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

The alleged individuals possessed the supervisory indicia outlined in Section 2(11) of the Act. See similarly, *Metropolitan Transportation Services, Inc.*, 351 NLRB 657, 660-61 (2007), where the Board found that individuals with the authority to among other things, discipline employees and assign work are statutory supervisors. Because these individuals are statutory supervisors, their actions are imputed to Respondent, which makes them statutory agents under Section 2(13) of the Act. See *Oakwood Healthcare, Inc.*, supra. at 687.

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<sup>13</sup> The parties stipulated: Mick McCoy was a supervisor and agent of the Fab Four. (Tr. 17); Tiger Martina was a supervisor and agent of The Show. (Tr. 14). Ryan was a supervisor of The Show until she was discharged. (Tr. 17, 399)

**1. Mitria and Kelsey were supervisors and agents of The Show**

Mitria and Kelsey “kept the integrity” of the Show and were the first level supervisors of the dancers throughout Carter’s employment. (Tr. 287) Pursuant to consultation with Martina and their own observations of videos, they gave dancers “notes,” which are corrections to their performance. (Tr. 326) These notes were generally given at the 6:00 PM meeting. (Tr. 98, 143, 171, 227, 244, 291, 326) Saxe consulted with Kelsey and Mitria as well as Martina about each dancer before determining whether to renew a dancer’s contract. (Tr. 299, 349, 367, 507) Although both Mitria and Kelsey performed in The Show, witness after witness testified that they reported to Kelsey and Mitria. After Nowak became a part-time employee, Mitria and Kelsey told her when she was scheduled to work. (Tr. 246)

Before Ryan’s discharge, Mitria and Kelsey performed some scheduling. (Tr. 326) However, their supervisory role expanded after Ryan was discharged. At that time, Kelsey and Mitria took over all of the scheduling. (Tr. 326) As Mitria testified, it was the dance captains’ responsibility to make sure that there was a complete cast to perform each night. (Tr. 326) Mitria and Kelsey were the only dance supervisors at the Theater on a daily basis. Saxe was at the Theater only about twice per month and Martina was not present consistently. (Tr. 97, 151, 655, 677) Mitria and Ryan were also paid a premium for their position. While Carter and Nowak were paid \$70.84 per show (GCX 14-15, 30-31), Mitria and Ryan were paid \$83.34 and \$100 per show, respectively. (Tr. 251) While not dispositive of the requirements of supervisory status, *In re Ferguson Electric Co., Inc.*, 335 NLRB 142, 147 (2001), it does reflect that Mitria and Ryan had a separate status within The Show’s hierarchy.

Mitria and Ryan were supervisors because they responsibly directed and effectively recommended employment actions including whether employees’ contracts were renewed.

As discussed throughout the instant record, these were not routine duties, but rather duties that had to be performed well or The Show “would not go on.”

## **2. Ryan was a supervisor and agent of Fab Four**

Ryan was the supervisor of the dancers in The Beatles Show. Because of her position with The Show, she was in the dressing room and available for dancers of The Beatles Show. She informed employees that Saxe wanted them to dance in The Show and informed Carter and Mask that they were hired as dancers in The Show. (Tr. 101-02) There was no testimony that anyone other than Ryan actually decided to hire Carter and Mask. She directed employees to show up for rehearsals and took Carter’s questions about being paid for rehearsals and whether they had to move the arrow. (Tr. 103, 112) Carter’s testimony regarding this subject is unrebutted and supported by McCoy’s testimony. Although McCoy was a partner in The Show, he only had two conversations with Carter during her employment with The Beatles Show. (Tr. 441) Thus, McCoy was not engaged in the day-to-day supervision dancers. Although Ryan might have been the company manager for The Show, she also supervised the dancers of The Beatles Show.

## **C. Carter was an employee of The Beatles Show**

Respondent contends that Carter is not an employee of Fab Four, but rather an independent contractor. In order to determine whether an employee is an employee or an independent contractor, the Board applies a common-law agency test. *Lancaster Symphony Orchestra*, 357 NLRB No. 152, at slip opinion page 4 (December 27, 2011).

The relevant factors include (1) whether the putative employer has the right to control the manner and means of performance of the job; (2) whether the individual is engaged in a distinct occupation or business; (3) whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain; (4) whether the employer or the individual supplies the instrumentalities, tools, and

place of work; (5) the skill required in the particular occupation; (6) whether the parties believe they are creating an employment relationship; (7) whether the work is part of the employer's regular business; (8) whether the employer is "in the business"; (9) the method of payment, whether by time or by the job; and (10) the length of time the individual is employed. *Id.*

These criteria are not exhaustive. *Id.* The party seeking to exclude individuals from the protection of the act has the burden of proving that the employees are independent contractors. *BKN, Inc.*, 333 NLRB 143, 144 (2001). In *Lancaster Symphony Orchestra*, supra, the Board found that that the musicians were employees because the orchestra had the right to control the manner and means by which the performances were accomplished. Specifically the Board found that the orchestra chose the music, decided how it would be played, when and how it was rehearsed and the how the musicians appeared on stage. The Board also found that the musicians did not bear any entrepreneurial risk or gain and the employees were paid on a modified hourly basis. The musicians' ability to play for other orchestras and are highly skilled did not remove the musicians from the protection of the Act. The Board reached a similar result in *American Federation of Musicians*, 275 NLRB 677, 682 (1985).

Here, the dancers in The Beatles Show performed at the Theater, which is owned and operated by the company of which Saxe is the principal. (GCX 45) Dancers have no control over the start time of the show and Ryan directed dancers to be there at 5:00 PM. (Tr. 104) The dancers wore costumes provided by the Fab Four and were required to move props. (Tr. 105, 113) Martina told the dancers the style of their make-up and instructed them on a set choreography. (Tr. 105<sup>14</sup>) The dancers were paid per performance and were given a

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<sup>14</sup> Much has been made about whether the dancers had occasional moments of freestyle dancing with members of the audience, but the time and placement of these moments was directed. (Tr. 152, 331)

1099 form at the end of the year. Saxe and McCoy are the partners in the show, and thus, the dancers did not have any risk or reward in the success of The Beatles Show. Fab Four was in the business of producing and performing The Beatles Show. The employees' term of their "employment" with The Beatles Show was indefinite. Although the dancers are permitted to work at other jobs, this is a common practice in the entertainment industry. *Lancaster Symphony Orchestra*, supra at slip opinion, p. 7. Moreover, performing with The Beatles Show was an extension of employment with The Show for some of the dancers<sup>15</sup>. While receiving a 1099 and having other jobs points to a finding of independent contractor status, the other criteria strongly support a finding that the dancers were employees of Fab Four.

**D. Violations of Section 8(a)(1)**

**1. Overbroad Rules**

The Contract with the dancers contains overbroad and discriminatory rules. In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. *Palms Hotel and Casino*, 344 NLRB 1363, 1367 (2005); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 146 (2004). The Board should decide whether the rule explicitly restricts activities protected by Section 7. *Id.* at 646. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Palms Hotel and Casino*, supra at 1367; *Lutheran Heritage Village-Livonia*, supra. at 646. Any ambiguity in the rule must be construed against the employer who promulgated it. *Palms Hotel and Casino*, supra at 1368.

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<sup>15</sup> Carter and other dancers were hired to perform because they were dancers with The Show and already had dressing room space. (Tr. ) They also were permitted to skip the 6:00 PM meeting for The Show on nights that they were dancing in The Beatles Show. (Tr. 104-05)

Section 9 of the Contract prohibits employees from disclosing or soliciting information about the contents of others' agreements and compensation:

NONDISCLOSURE/NONDISPARAGEMENT. Artist agrees not to disclose the terms of this Agreement to third parties or fellow Artists without Company's prior written consent. Once again, Artist may not disclose Artists compensation or solicit information regarding anyone else's compensation or other terms of their agreements. If this occurs, Company shall not have the right to immediately terminate this agreement and collect damages as set forth in section 6 of this agreement. Artist shall agree not to disparage each other to any person in the media or any manor during the terms of this agreement and continuing for ten (10) years thereafter. (GCX 15, p. 4; GCX 16; GC 32, p. 4; Tr. 72)

Here, Respondent The Show has explicitly restricted Section 7 activity. Employees have a right to speak to each other about terms and conditions of employment and prohibiting employees from doing so is a violation of Section 8(a)(1). *Danite Sign Co.*, 356 NLRB 124, at slip opinion at p. 1 (2010).

NON-UNION. Artist acknowledges that the Show is not under the jurisdiction of any labor union. (GCX 15, p. 4; GCX 16; GC 32, p. 4; Tr. 72)

This language is similar to the long-prohibited "yellow dog contracts." "Any promise by a statutory employee to refrain from union activity . . . would be void under operation of law." *Barrow Utilities & Electric*, 308 NLRB 5, 11 fn. 5 (1992). The Board has previously held that in addition to express "yellow dog contracts," employers are prohibited from *implying* within employment documents that an employment is conditioned on agreeing not to join a union. See e.g. *Leather Center, Inc.*, 312 NLRB 521, 528-29 (1993); *La Quinta Motor Inns, Inc.*, 293 NLRB 57, 60-61 (1989). By signing the Contract containing this provision, the acknowledgment requires employees to agree not to engage in union activities and implies that in the future, employees of The Show could not be represented by a union.

## 2. Saxe's Statements During the December 13, 2011 meeting

Counsel for the Acting General Counsel has alleged several of Saxe's statements during the December 13, 2011 meeting and in the December 21, 2011 email discharging Carter to be violation of Section 8(a)(1) of the Act. The basic test for a violation of the Act is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees rights guaranteed under the Act. *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). The test of whether unlawful interference with the right of self-organization has occurred is whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of their Section 7 rights. *KSM Industries*, 336 NLRB 133, 133 (2001). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *Id.; Concepts & Designs*, 318 NLRB 948, 954 (1995). Thus, threats need not be explicit if the language used by the employer can reasonably be construed as threatening, and in circumstances where employees could reasonably conclude the employer was threatening them with economic reprisals. *Id.*

On December 13, 2011, Saxe conducted an employee meeting at the request of Carter and other employees. Carter's and Nowak's testimony regarding that meeting should be credited due to their detail as well as their continued reliability discussed throughout this brief. Dancer Roussel and Dance Captains Mitria and Kelsey<sup>16</sup> testified in very general terms about what happened at the meeting. Kelsey did not "exactly recall" any profanity was used and then rambled about how problems were solved and included the word "bitching" in his description. (Tr. 306) During their testimony, all of the employees and dance captains appeared very nervous and seemed as though they were trying to impress Saxe, their boss,

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<sup>16</sup> Dancers Sambeck and Tara Palsa did not testify about what occurred at the meeting.

who was present in the hearing room. For example, Tara Palsa volunteered that Martina was one of her “favorite people on earth” and Mitria and Kelsey were “great dance captains.”

(Tr. 404)

Saxe’s testimony should not be credited as described throughout this brief. However, his testimony regarding what occurred at the meeting was jumbled at best, and it was difficult to determine whether he was discussing what was actually said or his feelings regarding the issues. In addition, Saxe referred to Natasha Boychoure’s requests for holiday pay as an “attack” (Tr. 511) rather than the “feedback” he repeatedly claimed to love. He stated repeatedly that employees were rolling their eyes behind Carter during the meeting (Tr. 512), despite Carter sitting in front of a wall during the meeting. (Tr. 701; GCX 47) The following are the allegations from the December 13, 2011 meeting pursuant to the complaint and factual basis and analysis for each allegation:

**a. Coercive Interrogation and prohibition from engaging in protected concerted activities (paragraphs 4(c)(1) and (2) of the Complaint (GCX 1(p))**

In response to concerns about holiday pay, Saxe said, “why are you bitching, what does your contract say about rehearsal and holiday pay?” (Tr. 117, 228) Employees were confronting Saxe, the owner of The Show, and he described interrogated them about their concerns which he characterized as “bitching.” This sort of language when used in reference with protected activities reasonably tends to interfere with protected activity. See e.g. *Orbit Lightspeed Courier Systems, Inc.*, 323 NLRB 380, 394 (1997); *Domsey Trading Corp.*, 310 NLRB 777, 793 (1993), 16 F.3d 517 (2d Cir. 1994).

- b. **Disparagement of employees from engaging in concerted activities; threatening its employees with unspecified reprisals because they engaged in concerted activities; and threatened employees with unspecified reprisals because they engaged in concerted activities. (paragraphs 4(c)(3) and (4) of the Complaint (GCX 1(p))**

Carter said, “David, you must get away with no paying for rehearsals because it says that it is up to his discretion.” (Tr. 117) Saxe said, “all you do is bitch, bitch, bitch. I give you a job and all you do is bitch.” (Tr. 117, 180, 228) Saxe responded to the employees in a hostile manner that reminded the employees that he gave them a job and could take it away. This disparagement is the same as in *Orbit Lightspeed*, supra and *Domsey Trading*, supra., but the addition of the reminder about who determines if they are employed creates an implied threat.

- c. **Disparagement of employees because they engaged in concerted activities and impliedly threatened employees with discharge. (paragraph 4(c)(5) of the Complaint (GCX 1(p))**

Saxe said that he wanted dancers with a positive attitude and that The Show was their top priority. (Tr. 118) This statement equates the dancers as having a bad attitude due to their protected concerted activities and that these protected activities were indicia of them not wanting their jobs, jobs he could take away. The Board has long considered statements accusing an employee of having a “bad attitude,” to be a veiled reference to the employee’s protected activities. See, e.g., *Children’s Studio School Public Charter School*, 343 NLRB 801, 805 (2004); *Climatrol, Inc.*, 329 NLRB 946 n.4 (1999); *Promenade Garage Corp.*, 314 NLRB 172, 179-180 (1994).

**d. Promulgated an overly broad and discriminatory rule prohibiting employees from complaining about wages and hours. (paragraph 4(c)(6) of the Complaint GCX 1(p))**

Saxe said that he understood, but he did not want all this “bitching.” (Tr. 120) Saxe’s prohibition against “bitching” amounted to a rule that employees could not engaged in protected concerted activity. There is no issue as to what the “bitching” was other than protected concerted activity and thus, the statement violates Section 8(a)(1) of the Act. *Lutheran Heritage Village-Livonia*, supra. at 647. Particularly as Saxe had been using the term, “bitching” had become a synonym for protected activity and his prohibiting it is an overbroad rule that violated the Act.

**E. The Show Discharged Carter because of her Protected Concerted Activity**

The policy of the Act is to “protect the right of workers to act together to better their working conditions.” *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising his right to engage in protected concerted activity. *Id. Cleveland Construction, Inc.*, 325 NLRB 1052, 1055 (1998). Activity is protected in “those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers Industries*, 281 NLRB 882, 887 (1986), affd sub nom; *Prill v. NLRB*, 835 F2d 1481 (D.C. Cir. 1987). There are four elements to establishing a violation, which are analyzed below: (1) the activity must be concerted; (2) the employer must know of the concerted nature of the activity; (3) the activity must be protected by the Act, and (4) the adverse action taken against the employees must be motivated by the activity. *Meyers Industries*, 268 NLRB 493, 497 (1984).

**1. Carter was Engaged in Protected Concerted Activity**

As described in the discussion about the Section 8(a)(1) allegations above, Carter acted together with other employees and sought to have Saxe address a host of issues ranging from holiday and rehearsal pay to scheduling to having enough time in between shows. Carter requested the meeting of Saxe through Armando Macias and was the most vocal employee at the meeting. (Tr. 113-14, 245)

**2. Respondent Knew of the Concerted Nature of the Activity**

The protection of the Act attaches to employee conduct as soon as an employer is put on notice that the employees are making a concerted inquiry that affects the terms and conditions of their employment. Here, Carter and the other employees requested changes to their wages and working conditions to Saxe himself. There is no issue that Respondents were not aware of their protected concerted activity.

**3. Respondents Discharged Carter Because She Engaged in Protected Concerted Activity**

**a. Direct Evidence of Unlawful Motivation**

On December 21, 2011, Saxe discharged Carter by issuing the following email:

Hi Anne, Due to your constant negative attitude and lackluster performance I will not be renewing your contract for Vegas! The Show. Your contract ends January 2. I hope that you are professional enough to finish your contract and I would appreciate it if you could cease all of the complaining in the dressing room. Your fellow cast members would really appreciate it. Constant complaining and negativity just can't be tolerated anymore. Thank you for all of the good things you have done in the past. Call or email me any questions you might have. I tried to talk to you in person but you left last night. David Saxe (GCX 20)

As noted above, labeling Carter's attitude as "negative" and directing her not to complain is the promulgation of an overbroad rule in violation of Section 8(a)(1) as alleged in the Complaint and a threat that violating this would rule would result in the failure to renew

other employees' contracts as well. (GCX 1(p), (4)(d)(1-2)) Thus, the email is a violation of Section 8(a)(1) of the Act as well as evidence of Saxe's motivation.

In this email, Saxe states that Carter was discharged due to her negative attitude and "complaining." Saxe only makes a minimal reference to the asserted "lackluster performance." Where there is direct evidence of unlawful motivation, such evidence may be overcome only if it is "so destroyed by other facts and circumstances that it cannot be credited as crucial . . . [T]he employer's explanation [must be] so overwhelming that it [makes] this contrary evidence unacceptable as a matter of law." *NLRB v. L.C. Ferguson and E.F. Von Seggern*, 257 F.2d 88, 92 (5<sup>th</sup> Cir. 1958). Accord *NLRB v. John Langenbacher Co.*, 398 F.2d 459, 463 (2<sup>nd</sup> Cir. 1968).

**b. Additional Evidence of Illegal Motivation**

"Because employers rarely admit that an employee's discharge was due to her engagement in protected concerted activity, circumstantial evidence alone may be sufficient to support a finding of unlawful motivation." *NLRB v. Main Street Terrace Care Ctr.*, 218 F.3d 531, 541 (6<sup>th</sup> Cir. 2000).

**i. Shifting Defenses**

Respondents have offered shifting reasons for Carter's termination, thus providing additional evidence of Respondent's unlawful motivation. *Rogers Electric, Inc.*, 346 NLRB 508, 518 (2006). Saxe initially testified that the decision not to renew her contract was made after speaking with Martina, Mitria, and Kelsey, seeing the other dancer's reactions to Carter at the meeting and his discussions with employees about Carter's "negativity." (Tr. 519) However, after returning to testify in December, Saxe indicated that he made the decision not to renew Carter's based on conversations he had with Martina, Mitria and Kelsey in

October 2011. (Tr. 541) Saxe completely reversed his earlier position by testifying that employee complaints about Carter's complaining were not a reason for refusing to renew her contract. (Tr. 591-92) If that is Saxe's position, it renders much of the testimony from employees and the dance captains irrelevant. In addition, his testimony is contrary to the email that he issued to Carter (GCX 20) and to Mitria's testimony that she was not concerned about Carter's "dance ability". (Tr. 349-50)

### **ii. Timing**

Suspicious timing supports an inference of illegal motivation. *La Gloria Oil and Gas Company.*, 337 NLRB 1120, 1124 (2002), *affd.* 71 Fed.Appx. 441 (5<sup>th</sup> Cir. 2003); *Detroit Paneling Systems, Inc.*, 330 NLRB 1170, 1172 (2000) It is undisputed that Carter was terminated eight days after the December 13, 2011 meeting. Carter had never been written up or told that she had to improve in her dance ability or attitude or her contract would not be renewed. (Tr. 162) She was a valued employee who had multiple contracts renewed and was given an extra opportunity to perform at The Beatles Show. Despite general discussions about her "negativity and issues with her dancing, it was only after the meeting of December 13, that Saxe concluded that there were problems with her dancing and/or attitude and decided not to renew her contract.

### **iii. Condonation**

Martina testified that from the beginning of Carter's employment with The Show, he had concerns about Carter's performance. He and Saxe testified about pictures showing that Carter and other dancers were not in sync or had the wrong style. (RX 4-8, 9-14) Not only did Saxe not review these pictures<sup>17</sup> until just before the trial, many of these pictures were taken in August 2010, the month that The Show opened. (RX 6, 7, 9, 12, 13) After that time,

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<sup>17</sup> Ten pictures were chosen from 50,000 Saxe said that he had taken. (Tr. 483)

her contract had been renewed twice and Saxe and Ryan sought her participation in The Beatles Show. Obviously, any issues with Carter's performance had been condoned. "The doctrine prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven." *General Electric Co.*, 292 NLRB 843, 844 (1989). Using these pictures as a basis for Carter's discharge highlights how much Respondents have been working to find "legitimate" reasons to support Carter's discharge.

While Martina may have concerns about Carter's performance, it was not until after the December 13, 2011 meeting that Saxe decided not to renew Carter's contract. Saxe did not sufficiently explain why it was in December 2011, that Carter's contract was not renewed. The contracts always provided that with two weeks notice, The Show could release employees from their contracts. (GCX 14, p. 4, 15, p. 4) Previously, Martina had discharged employees on his own (Tr. 690), and employees had been discharged mid-contract. However, from Saxe's and Martina's perspective, there was never a reason to let Carter go until the December 13, 2011 meeting.

### **3. Respondents' *Wright Line* Defenses are Not Credible**

To establish an affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), *enfd.* 99 F.3d 1139 (6<sup>th</sup> Cir. 1996) (unpublished). Respondent must show by a preponderance of the evidence that the renewal of her contract would have occurred even in the absence of the protected concerted activity. *NLRB v. Transportation*

*Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1083 (1980), enfd 662 F2d 899 (1<sup>st</sup> Cir. 1981).

**a. Respondents' Work Culture Did Not Tolerate Protected Concerted Activity**

Respondents' claims about Carter's negativity should be analyzed through the prism of what is permitted in the work place. The Show prohibited employees from discussing compensation and terms of their contracts. (GCX 15, p. 4; GCX 16; GC 32, p. 4; Tr. 72) The culture of the dressing room did not tolerate complaints. For example, Saxe testified Roussel was upset that Carter was complaining about not being paid for rehearsals because Carter was complaining about "money for something that did not exist<sup>18</sup>." (Tr. 517) Obviously, these are mutual concerns and bringing them up is protected, but bringing them up in the Theater's dressing room was considered "negativity." The record is replete with testimony that at least part of Carter's "negativity" was her complaining about issues of mutual concern. Obviously, these negativity comments fit in with the Board's long-standing view of the term "negativity" or a negative attitude as being indicative of protected concerted activities.

**b. Saxe's Testimony is not Consistent with other Evidence**

As noted above, Respondents' defenses are not credible. This is also the case regarding Saxe's description of the events surrounding her discharge. Saxe claimed that he first told Carter that her contract would not be renewed on the phone. This is inconsistent with Carter's description of events and the email he sent to Carter. In that email, Saxe indicated that he had tried to speak with her the night before. (GCX 20) The email does not mention the asserted conversation that, according to Saxe, would have taken place just

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<sup>18</sup> Roussel did not testify about this. Thus, this appears to be one more instance of Saxe exaggerating.

minutes before, a time when Carter would have been performing. (Tr. 716) The email was written as if this is the first communication of her contract not being renewed.

Similarly, Saxe asserted that he was concerned that Carter would not finish her contract. First, this is very odd considering that Saxe testified that Carter was speaking in a “satan voice” that was “creepy” and she was “screaming more than he heard in his entire life” and turned “psycho.” (Tr. 525) Saxe testified that he was concerned that she would come in with an “uzzi” and kill Mitria or Kelsey. (Tr. 525, 551) It was during this same conversation that Saxe supposedly said that he was wondering if she would finish her contract. If Saxe really had these concerns, he would have told her not to come in, particularly since her contract provided for its termination “without notice in the event of breach by the Artist of any covenant contained herein or for insubordination.” (GCX 15, p. 4) Obviously, Saxe could have terminated the agreement if he actually saw Carter as a violent threat. The only reason that justifies his failure to terminate Carter immediately is that she was not a threat and did not speak in a threatening way. This fact is further supported by Smith’s failure to testify about this conversation that Saxe alleges he heard. (Tr. 526) Because of Smith’s failure to testify about this conversation, an adverse inference should be drawn that the “crazed,” “satan voice” conversation did not occur. *See Colorflo Decorator Products*, 228 NLRB 408, 410 (1977) (an adverse inference is appropriate where respondent failed to question its own witness about matters which would normally be thought reasonable).

The second reason that Saxe sought to have Carter continue dancing through the end of her contract was because he needed her to dance in The Show. After resuming the trial in December, Saxe testified that the decision to not renew Carter’s contract was made in October because of Carter’s dancing ability, not because of employee complaints about her negativity.

(Tr. 592) In support of this claim, Saxe and Martina testified about a November 18, 2011 audition that was held to replace Carter. This audition did not any of the typical information that would be included regarding an audition for dancers in The Show. (RX 8) First, the audition did not note it was for The Show as many had in the past. Previous audition notices for The Show had described the intensity of the Show, the height requirements, the number of positions available, and included a video of The Show. (Tr. 709-10) Second, the audition notice is under the name DSP, which is completely contrary to the repeated testimony that The Show is its own company and has very little interaction with DSP. (RX 8) Saxe explained that sometimes he has auditions under DSP's name so that The Show's dancers or the public would not know that he was auditioning. However, that asserted practice does not refute that there would be some reference to qualities in The Show to put auditioning dancers on notice. Third, Saxe did not know who replaced Carter and did not provide any detail about how many dancers The Show hired from the audition. When asked about Carter's replacement, Saxe said that he did not know who replaced Carter or when she was hired or auditioned. (Tr. 579) Obviously, as he first testified, Saxe decided not to renew Carter's contract after the December 13, 2011 meeting and as a result, he needed her to finish her contract.

Saxe generally exaggerated about Carter's issues as an employee. Saxe testified that McCoy complained that Carter about some "weird make-up and hair" at The Beatles Show, but McCoy did not testify about this being a problem for Carter. (Tr. 548) Saxe testified contrary to other employees at the December 13, 2011 meeting that employees were standing behind Carter "rolling their eyes" (Tr. 512-13, 516), despite testimony that Carter was sitting at her dressing room station with a wall behind her. (Tr. 701; GCX 47) Saxe also referred to

issues with Carter's attendance without supporting documentation or corroboration from other witnesses. He testified as if Carter was the enemy, and he needed to come up with as many reasons to discharge her as possible.

Saxe's credibility is also at issue with regard to the discussion of supposed counselings and write-ups. Saxe testified that Carter, Resler, and Ryan had a meeting at the signing of the second contract while he was in the office. (Tr. 169, 696) Saxe testified that Resler and Ryan told Carter that she needed to improve her dancing and attitude. At one point, Saxe said that a written counseling was issued to her at that time and at another that she was "counseled" about her performance and attitude. (Tr. 481) At first, Saxe said that he was present for part of the meeting, but did not say anything, and then later, he spoke to Carter about how she needed to improve. (Tr. 718) Despite not being able to locate any of them, Saxe also testified that Carter had received several write-ups. This evolving story should not be credited particularly in light of Carter's specific testimony that she did meet at DSP regarding the signing of her contract with Resler and Ryan, but that they asked her about her concerns and nothing was said about her performance. Witness after witness testified that they did not communicate their asserted concerns about Carter's attitude or dance performance to Carter. Respondents' tale of write-ups and counselings should be discredited.

**c. Mitria's and Kelsey's Testimony Is Not Consistent With Each Others' Testimony Or Their Conversations With Carter**

Regardless of whether Mitria and Kelsey are found to be supervisors and/or agents, their failure to refute Carter's testimony about her conversations with them warrants an adverse inference. See *Colorflo Decorator Products*, supra. Kelsey's references Carter not having the right style as a dancer are contrary to Carter's un rebutted testimony about her

conversations with Kelsey and Mitria. Kelsey testified that at the end of Carter's employment with The Show, her style had changed and she was not able to make the changes required by the note regarding her style. (Tr. 313) This testimony is contrary to Mitria's testimony that Carter did not have any "dance ability" issues (Tr. 349), and contrary to the statements that Carter was "amazing" and always "gave" great energy and a great show. (Tr. 125) Similarly, Carter stated in unrebutted testimony that Kelsey said that unfortunately Saxe "flies off the handle and doesn't like it when people talk back to him". (Tr. 125, 215) In response to Carter saying that she could not believe that Saxe said that the entire cast hated her, Kelsey responded, "you know that's not true." Similarly, Carter stated in unrebutted testimony that when she approached Mitria after Carter's discharge, she said that she was "blindsided" by Saxe's failure not to renew Carter's contract. (Tr. 122) Carter's unrebutted testimony and adverse inferences regarding Mitria's and Kelsey's failure to testify about the post-renew conversations supports the conclusion that Saxe decided not to renew Carter's contract because of her statements at the meeting on December 13, 2011.

**F. Respondent Fab Four Discharged Carter because of her Protected Concerted Activity**

Saxe discharged Carter from Fab Four during the same conversation when he was discussing her discharge from The Show. He told her that he did not think that she was coming in that night so he took her off the schedule that night and did not schedule her again. (Tr. 123) Saxe had the knowledge an animus as described in reference to her discharge from The Show. He did not reference any discussions with McCoy and appears to have discharged her in the same process of discharging her from The Show.

In the alternative, if Saxe did rely on his conversation with McCoy before discharging her, the discharge was still a violation of the Act. McCoy testified that she was

“confrontational attitude” and not a “team player” and that he relied upon her asking to not move the arrow. (Tr. 441-42) Making inquiries or complaints about safety conditions is concerted activity under the Act. *Cleveland Construction, Inc.*, 325 NLRB at 1055; *Unico Replacement Parts*, 281 NLRB 309, 309 (1986). Carter knew that the arrow fall on dancer Sambeck, and was concerned about whether it was safe. McCoy discussed this as a reason not to discharge Carter.

McCoy discussed how he was not sure if Carter had the right style despite his seeing her dance during rehearsals six months earlier in his quest to have better dancers in The Show. (Tr. 452-53, 454) Martina conducted a series of rehearsals for the Beatles Show dancers and did not testify about his evaluation of Carter’s performance in that show. This failure warrants an inference that, if called, Martina’s testimony would have been adverse to Respondent’s case. *Colorflo Decorator Products*, supra. McCoy’s Thus, Martina should be considered to have testified that Carter had the right style and McCoy’s concern about Carter’s style should be discredited as pretextual.

#### **IV. CONCLUSION**

For the reasons advanced above, Counsel for the Acting General Counsel respectfully requests a finding that Respondents David Saxe Productions, LLC and Vegas! The Show, LLC as joint employers or a single employer, violated the Act by maintaining overly broad rules, threatening and making several statements in violation of 8(a)(1), and discharging Charging Party Anne Tracy Carter for her protected concerted activity. Counsel for the Acting General Counsel also respectfully requests a finding that Respondents David Saxe Productions, LLC and Fab Four Live, LLC, as joint employers or a single employer, discharged Charging Party Anne Tracy Carter. Counsel for the Acting General Counsel asks

for the traditional reinstatement, a make whole order (including backpay with interest), a cease and desist order, a notice posting,<sup>19</sup> and the rescission of the overbroad rules.

Dated at Detroit, Michigan this 8th day of February, 2013

/s/Patricia A. Fedewa  
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National Labor Relations Board  
Region Seven  
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<sup>19</sup> A proposed Notice to Employees is attached.

**Proposed Notice Language**

**(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** do anything to prevent you from exercising the above rights.

**WE WILL NOT** maintain or use employment contracts that make your wages and other terms and conditions of employment confidential and advise you that you cannot be represented by a union.

**WE WILL NOT** ask you about your protected concerted activities, including complaining to us about your wages, hours, and working conditions by requesting pay for rehearsal time, days off, holiday pay, time and half pay for nights when one show is performed, loosening “meet and greet” requirements in order to allow employees to properly stretch and take a break in between shows, and requesting additional assistance by hiring more full-time understudy employees as opposed to part-time or swing employees.

**WE WILL NOT** discharge you or threaten to discharge you or not renew your contract with us for engaging in these activities; **WE WILL NOT** disparage you for engaging in these activities; **WE WILL** prohibit you for engaging in these activities; **WE WILL NOT** make rules prohibiting you from engaging in these activities; and **WE WILL NOT** threaten you with unspecified reprisals for engaging in such activities.

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

**WE WILL** offer immediate and full reinstatement to Anne Tracy Carter to her former job or, if that job no longer exists, to a substantially equivalent position, without loss of seniority or other privileges and **WE WILL** make her whole with interest for any loss of wages and benefits resulting from our discharge of her.

**WE WILL** remove from our files any reference to the unlawful discharge of Anne Tracy Carter and notify her, in writing, that this has been done and that her discharge will not be used against her in any way.

**DAVID SAXE PRODUCTIONS, LLC and VEGAS!  
THE SHOW, LLC, Joint Employers or a Single  
Employer**

---

**Dated:** \_\_\_\_\_

**By:** \_\_\_\_\_  
(Representative) (Title)

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

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
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- Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising the above rights.

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**WE WILL** offer immediate and full reinstatement to Anne Tracy Carter to her former job or, if that job no longer exists, to a substantially equivalent position, without loss of seniority or other privileges and **WE WILL** make her whole with interest for any loss of wages and benefits resulting from our discharge of her.

**WE WILL** remove from our files any reference to the unlawful discharge of Anne Tracy Carter and notify her, in writing, that this has been done and that her discharge will not be used against her in any way.

**DAVID SAXE PRODUCTIONS, LLC and FAB FOUR  
LIVE, LLC, Joint Employers or a Single Employer**

**Dated:** \_\_\_\_\_ **By:** \_\_\_\_\_  
(Representative) (Title)

## CERTIFICATE OF SERVICE

I hereby certify that the ACTING GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE in DAVID SAXE PRODUCTIONS, LLC and VEGAS! THE SHOW, LLC, Joint Employers, Case 28-CA-075461; DAVID SAXE PRODUCTIONS, LLC, and FAB FOUR LIVE, LLC, Joint Employers, Case 28-CA-084151, was served via E-Gov, E-Filing, and electronic mail, on this 8<sup>th</sup> day of February 2013, on the following:

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

Honorable Gerald M. Etchingham  
Administrative Law Judge  
National Labor Relations Board  
Administrative Law Judge Division  
901 Market Street, Suite 300  
San Francisco, CA 94103-1779

***Via E-Mail:***

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/s/ Iliana Ferrance

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