UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DAVID SAXE PRODUCTIONS, LLC and
VEGAS! THE SHOW, LLC, a Single Employer

and **Case 28-CA-075461**

DAVID SAXE PRODUCTIONS, LLC, and
FAB FOUR LIVE, LLC, a Single Employer

and **Case 28-CA-084151**

ANNE TRACY CARTER, an Individual

COUNSEL FOR ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' CROSS-EXCEPTIONS

Respectfully submitted,

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I. INTRODUCTION

On May 8, 2013, Administrative Law Judge Eleanor Laws (ALJ) issued a decision in this matter. The ALJ found, and the record supports, that Respondents Vegas! The Show, LLC and David Saxe Productions, LLC, a single employer: (1) enforced contract provisions prohibiting employees from discussing their wages and working conditions; (2) enforced contract provisions requiring employees to acknowledge they are non-union and threatening penalties for breach; (3) prohibited employees from engaging in protected concerted activities; (4) threatened employees with adverse consequences for engaging in protected concerted activities; and (5) demeaned employees for engaging in protected concerted activities.

The defenses raised by Respondents are not sufficient to overturn the Section 8(a)(1) violations found by the ALJ. Respondents' cross-exceptions provide no basis for the Board to overrule the ALJ's findings, and Respondents' cross-exceptions 4 through 9 should be deemed waived as they do not meet the requirements of the Board's Rules and Regulations for filing exceptions. Most of Respondents' cross-exceptions are attempts to overturn the ALJ's credibility findings to which the Board generally defers. Counsel for Acting General Counsel (CGC) urges the Board to adopt the ALJ's findings that Respondents violated the Act as alleged, except as argued in CGC's Exceptions. For these reasons, the Board should affirm the violations of law that the ALJ found.

II. RESPONDENTS' CROSS-EXCEPTIONS ARE WITHOUT MERIT

A. The ALJ correctly concluded that Respondents' contractual provision indicating that Vegas! The Show, LLC was a non-union employer violated the Act (Cross-Exception 1)

Respondent Vegas! The Show, LLC required employees to sign contracts including the following "non-union" clause, which the ALJ found to be a violation of Section 8(a)(1):

> 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)
>
> (ALJD, p. 15, lines 24-25)

In addition, to the non-union clause, the ALJ also found the contracts' non-disclosure clause to violate Section 8(a)(1).

> 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 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)
>
> (ALJD, p. 14, lines 27-29)

The contract also provides for a termination clause that states in part:

> C. Company shall have the right to terminate this Agreement without notice in the event of breach by Employee of any covenant contained herein or for insubordination. Artist shall not be entitled to any further compensation. (GCX 14, p. 2; GCX 15, p. 4; GCX 31, p. 2; GCX 32, p. 3)

The ALJ correctly concluded that while the non-union clause itself does not explicitly express Respondents' opinion or its desire to forever remain non-union. (ALJD, p. 14, lines12-13), that the clause is coercive "in light of the non-union provision's juxtaposition with the non-disclosure clause, along with the threat of contract termination and/or financial penalty for breach of any provision or for insubordination." (ALJD, p. 15, lines 13-15) The ALJ further

noted that "the contract requires dancers to acknowledge that Vegas! The Show, LLC is non-union as a term of employment and would reasonably believe that they faced termination and/or monetary penalty if they organized a union." (ALJD. p. 15, lines. 16-19)

The non-union clause, when read in conjunction with the termination clause, created a threat of discipline for not abiding by the clause. These threats of loss compensation or employment remove the non-union clause from a statement protected by Section 8(c) to a rule that prohibits union organizing. See e.g. *Noah's New York Bagels, Inc.*, 324 NLRB 266, 267 (1997); *Leather Center, Inc.*, 312 NLRB 521, 528-29 (1993); *Matheson Fast Freight, Inc.*, 297 NLRB 63, 74-75 (1989); *LaQuinta Motor Inns, Inc.*, 293 NLRB 57, 60-61 (1989); *Heck's Inc.*, 293 NLRB 1111, 1120 (1989). The non-union clause is an enforceable contract clause that has consequences for its breach, and, thus, as the ALJ found, is a violation of Section 8(a)(1) of the Act.

Respondents' reliance on *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 637-39, n. 7 (5th Cir. 2003), is misplaced. In *Brown & Root*, supra at 637, an Employer representative responded to an employee's question by stating, "we are a non-union company." The court held that the statement was not a violation because it was a fact at the time. *Id.* The court did not interpret this momentary statement to be a condition of employment or an enforceable statement with the threat of discharge. In the instant case, the non-union clause is an enforceable contractual clause for the duration of the contract with the threat of termination for violating it. Thus, it is not protected by Section 8(c), and is a violation of Section 8(a)(1).

Likewise, Respondents' citation to *National Association of Manufacturers v. NLRB*, 717 F.3d 947, 959-60 (2013), is not applicable. In that case, the Board asked the employer to post employees' section 7 rights per Board regulations. The case has nothing to do with contractual

provisions or whether a reasonable employee would find a contractual provision to be coercive. As described above, the non-union clause is an enforceable contract clause that renders any attempts to organize a union, an offense that could result in termination.

B. Respondents' cross exceptions 4-9 should be deemed waived and disregarded because they do not meet the Board's requirements for filing cross-exceptions (Cross-Exceptions 4-9)

Respondents' cross-exceptions 4 through 9 are very general (often encompassing an entire section or multiple pages), and, in their Brief in support, they only argue that the ALJ's credibility findings should be overturned without reference to how that would affect the ALJ's legal conclusions. Section 102.46 of the Board's Rules and Regulations requires that exceptions be set forth with specificity. Namely, each exception must set forth the questions of procedure, fact, law, or policy to which exception is taken, with designations to the relevant part of the ALJD, and citations to supporting portions of the record. Exceptions failing to meet those specifications are deemed waived and should be disregarded. Section 102.46 (b)(1) and (2). See *Howard K. Sipes Co.*, 319 NLRB 30 (1995); *Valentine Painting and Wallcovering,* 331 NLRB 883, n. 2 (2000), enfd. mem. 8 Fed. Appx. 116 (2d. Cir. 2001); *W-L Molding Co.*, 272 NLRB 1239 (1984).

In the instant case, not only are Respondents' cross-exceptions very general, but the supporting brief does not indicate any basis for overturning the ALJ's conclusions other than general credibility arguments.[1] Respondents have failed to indicate specifically why the ALJ's conclusions should be overturned other than stating that David Saxe's (Saxe) testimony should be credited. Respondents do not explain upon which portion of Saxe's inconsistent testimony the Board should rely or how the ALJ's credibility findings would change the ALJ's legal

[1] In the alternative, CGC responds below to the arguments Respondents do make with respect to cross-exceptions 4 through 9 as well as cross-exceptions 2 and 3.

conclusions that Respondents repeatedly violated Section 8(a)(1) of the Act. This is particularly problematic with respect to the cross-exceptions 8 and 9, which assert that statements in Saxe's email to Carter regarding the nonrenewal of her contract do not violate the Act. (GCX 20) Obviously, credibility is not relevant to an undisputed email that facially violates Section 8(a)(1) of the Act. These cross-exceptions as well as cross-exceptions 4 through 7, only cite the ALJ's discussion of the issue, and Respondents have failed to indicate in its brief how adopting its arguments would result in changes to the ALJ's findings. As such, CGC requests that the Respondents' cross-exceptions 4 through 9 be deemed waived and disregarded.

C. The ALJ's conclusion that Saxe was not credible is well supported by the record (Cross-Exceptions 2-9)

Respondents argue that the ALJ's credibility determination should be overturned. However, the Board defers to an ALJ's credibility findings unless "the clear preponderance of all of the relevant evidence convinces the Board that the resolutions are incorrect." *Standard Drywall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Respondents argue that a clear preponderance of the evidence does not support the ALJ's finding that Saxe was not credible. However, Respondents only describe a sliver of the evidence rather than all of it. Saxe amply demonstrated his lack of credibility, and the ALJ's credibility findings are supported by her review of witness demeanor and the record as a whole. As such, the Board should defer to them.

In her decision, the ALJ spent over a page describing the multiple reasons Saxe was not credible regarding the reasons he asserted for Carter's termination. Those reasons include his shifting defenses and the ALJ's description of his "stated rationale" for not renewing Carter's contract as "somewhat of a moving target." (ALJD, p. 20, lines 11-12) The ALJ discredited David Saxe's assertions that Carter received several write-ups, one of which was supposedly at a

meeting that Respondent David Saxe Productions, LLC's General Manager Matt Resler attended but did failed to mention in his testimony. (ALJD, p. 20, lines 34-36, p. 21, lines 1-3) The ALJ noted that Saxe was not certain about the chain of events and testified inconsistently with an email he sent to Carter. (ALJD, p. 21, lines 6-10) The ALJ discredited Saxe because he claimed that Carter screamed into the phone so loud that Chief Financial Officer Robert Smith heard her, but Smith did not testify about this supposed event at trial. (ALJD, p. 21, lines 11-15) Similarly, the ALJ discredited Saxe's testimony that he feared Carter would do something violent based on her tone during the conversation he had with her about her termination, because it was not consistent with his request that she finish her contract. (ALJD, p. 21, lines 15-17)

The ALJ also discredited Saxe and credited Charging Party Anne Carter's (Carter) and Amanda Nowak's (Nowak) testimony about the December 13, 2011 meeting. (ALJD, p. 16, lines 1-3) The ALJ noted that Saxe could not recall the specific date of the meeting and repeatedly strayed from what was said at the meeting. (ALJD, p. 15, lines 40-42) The ALJ noted that Dance Captains Ryan Kelsey and Claudia Mitria and dancer Jennaia Roussel did not testify with specificity about what happened at the meeting. (ALJD, p. 15, lines 42-47; p. 16, line 1)

As Respondents assert, the ALJ did incorrectly conclude that Nowak was employed by Respondent Vegas! The Show, LLC at the time of her testimony. However, the ALJ noted other reasons for crediting Carter and Nowak in addition to the reasons for crediting the other witnesses described above. The ALJ noted that Nowak and Carter provided "highly corroborative and far more specific and credible than Saxe's recollection." (ALJD, p. 16, lines 2-3) The ALJ further noted that Nowak "testified in a calm and open-ended manner and appeared sincere." (ALJD, p. 16, lines 3-4). The ALJ's conclusions regarding the credibility of Nowak

and Carter are sound, as evidenced from the transcript as well the ALJ's observation of their demeanor.

Respondents quibble with the ALJ's credibility findings arguing that Saxe was on medication that affected his testimony. It is true that on October 18, 2012, Saxe testified that he was on medication at that time. However, Saxe's testimony, and Respondents' entire case changed during the break between October 18, 2012 and December 11, 2012. There is no evidence that Saxe was on any medication when he testified on December 11, 2012. When he testified the second time, Saxe rejected his earlier testimony by stating that employee concerns about Carter's complaining in the dressing room were not a basis for discharging her. (Tr. 591-92) During this second session, Saxe testified that he made the decision to terminate Carter in October 2011, well before the December 13, 2011 meeting when he supposedly talked to employees of Carter's complaining in the dressing room. If his earlier testimony when he was on medication is not true, then the testimony of the other employees about Carter's negativity in the dressing room is irrelevant. It was not just Saxe's testimony, but Respondents' entire case that shifted after the break in litigation. Regardless of what medication Saxe was taking on October 18, 2012, it should not have completely changed Respondents' case.

Respondents argue that it is undisputed that Saxe had an "open door policy," and, thus, he did not discharge Carter because of her protected concerted activities. However, as the ALJ concluded that despite these assertions, "the feedback he gave on December 13 violated the Act." (ALJD, p. 17, lines 7-8) Saxe's hollow statements about being open to employee feedback are further evidence that Saxe was not credible. Carter was the most vocal employee at the December 13, 2011 meeting, and due to her protected concerted feedback to him, Saxe terminated her.

Respondents' citations to *NLRB v. Arkema*, 710 F.3d 308, 314 (5th Cir. 2013); *Valmont Ind., Inc. v. NLRB*, 244 F.3d 454, 463-64 (5th Cir. 2001); *Albertson's Inc. v. NLRB*, 161 F.3d 1231, 1236 (10th Cir. 1998); *Rockwell Intern Corp. v. NLRB*, 814 F.2d 1530, 1533 (11th Cir. 1987); *NLRB v. Malta Const. Co.*, 806 F.2d 1009, 1010 (11th Cir. 1986) and *NLRB v. Laredo Packaging Co.*, 730 F.2d 405, 407 (5th Cir. 1984), are irrelevant to this case. Respondent cited them for the proposition that United States Circuit Courts of Appeals can overturn the Board's findings of fact if they are not supported by substantial evidence. It is the Board's review of the ALJD that is at issue here. These citations do not apply to Respondents' arguments that the Board should overrule the ALJ's credibility findings

III. CONCLUSION

Based upon the foregoing, CGC submits that the ALJ correctly found that Respondents violated Section 8(a)(1) of the Act as set forth above. Accordingly, CGC respectfully urges the Board to reject Respondents' Cross-Exceptions and to adopt the ALJ's findings and recommended order, consistent with CGC's Exceptions.

Dated at Las Vegas, Nevada this 7th day of August 2013.

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CERTIFICATE OF SERVICE

I hereby certify that the **COUNSEL FOR ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' CROSS-EXCEPTIONS** 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 7th day of August 2013, on the following:

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