

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

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

and

Case 28-CA-075461

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

and

Case 28-CA-084151

ANNE TRACY CARTER, an Individual

RE: *DAVID SAXE PRODUCTIONS, LLC v. NLRB*, 888 F.3d 1305 (D.C. Cir. May 4, 2018), *judgment entered June 11, 2018, enforcing in part and remanding in part*, 364 NLRB No. 100 (August 26, 2016)

RESPONDENTS' POSITION STATEMENT

Respectfully Submitted,

Dated: October 26, 2018

By: 

Bruno W. Katz
Wilson, Elser, Moskowitz,
Edelman & Dicker LLP
401 West A Street, Suite 1900
San Diego, CA 92101
Telephone: 619-321-6200
Facsimile: 619-321-6201
Email: Bruno.Katz@wilsonelser.com

Attorneys for David Saxe Productions, LLC
Vegas! The Show, LLC and Fab Four Live,
LLC

TABLE OF CONTENTS

RESPONDENTS' POSITION STATEMENT1

I. CASE BACKGROUND AND PROCEDURAL HISTORY.....2

II. SUMMARY OF UNDISPUTED MATERIAL FACTS4

III. THE ALJ CREDIBILITY FINDINGS8

IV. THE BOARD ON REMAND MUST HONOR THE ALJ'S CREDIBILITY
FINDINGS AND ISSUE A DECISION THAT THE DISCHARGE DID NOT
VIOLATE THE ACT.....9

V. THE BOARD ON REMAND MUST FOLLOW THE BOEING PRECEDENT AS
TO EMPLOYMENT CONTRACT CLAUSES11

VI. CONCLUSION.....14

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

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

and

Case 28-CA-075461

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

and

Case 28-CA-084151

ANNE TRACY CARTER, an Individual

RE: *DAVID SAXE PRODUCTIONS, LLC v. NLRB*, 888 F.3d 1305 (D.C. Cir. May 4, 2018), *judgment entered June 11, 2018, enforcing in part and remanding in part*, 364 NLRB No. 100 (August 26, 2016)

RESPONDENTS' POSITION STATEMENT

In accordance with 29 C.F.R. § 102.46(h), DAVID SAXE PRODUCTIONS, LLC (“DSP”), VEGAS! THE SHOW, LLC (“Vegas!”) and FAB FOUR LIVE, LLC (“BeatleShow”) (collectively referred to herein as “Respondents”) hereby submit their Position Statement in response to the Office of the Executive Secretary of the National Labor Relations Board letters of August 29, 2018 and September 12, 2018. As set forth in summary below, based on the remand before the National Labor Relations Board (“the Board”), Respondents submit that the Board must issue a new decision as follows: 1) upholding the portion of the Administrative Law Judge (“ALJ”)’s Decision of May 7, 2013 under which the ALJ found the discharge of Anne Tracy Carter (“Carter”) by Respondents did not violate the National Labor Relations Act (the “Act”) and 2) Respondents non-disclosure and non-union contractual clauses in its employment contract are not in violation of Section 8(a)(1) based on the new framework for

workplace rules announced by the Board in *The Boeing Company*, 365 NLRB No. 154 (December 10, 2017).

I. CASE BACKGROUND AND PROCEDURAL HISTORY

Vegas! The Show pays homage to Las Vegas entertainers of the 1940s through the 1970s, such as the Rat Pack, Sammy Davis, Jr., Tom Jones, and Elvis; it features singers and showgirl dancers. *BeatleShow* is a Beatles tribute show that features four men as the Beatles with other characters such as Ed Sullivan, a hippie, a befeater and some dancers. Charging party Anne Tracy Carter worked as a dancer in both shows between April 27, 2010 and January 2, 2012. Carter asserts that she was discharged from the shows in violation of Section 8(a) (1) of the National Labor Relations Act ("the Act"), 29 U.S.C. §158(a) (1).

Carter filed the charge against David Saxe Productions, LLC and Vegas! The Show, LLC in Case 28-CA-075461 on February 27, 2012; the National Labor Relations Board ("the Board") issued the complaint on April 30, 2012. Carter filed the charge against David Saxe Productions, LLC and Fab Four Live, LLC in Case 28-CA-084151 on June 28, 2012; an order consolidating Carter's two charges was issued on August 23, 2012. Over five days, the case was tried in Las Vegas before Administrative Law Judge Eleanor Laws on October 16-18 and December 11-12, 2012. On May 7, 2013, the ALJ issued her decision dismissing the unfair labor practice charges relating to Carter's discharge from both shows. *David Saxe Prods., et al*, 2013 L.R.R.M. (BNA) ¶ 139954, at 21 (N.L.R.B. Div. of Judges May 7, 2013) ("ALJ Dec."). The ALJ concluded that although the non-renewal of Carter's contract was motivated by her protected concerted activity, the Company did not violate the Act because it had shown, by a preponderance

of the evidence, that Respondents' principal David Saxe would have let Carter's contract expire notwithstanding her protected activity. In sum, based on credibility determinations, the ALJ found the Respondents would have not renewed her Vegas! contract and would have discharged her from BeatleShow even absent any protected activity by Carter. In the ALJ Dec., she found under a since overruled standard that non-disclosure and non-union provisions in the dancers' contract violated the Act. The ALJ Dec. was transferred to the Board by operation of law.

The Board issued its 2-1 decision and order on August 26, 2016. (*David Saxe Prods., LLC, et al.*, 364 NLRB No. 100 (2016) ("Board Dec."). The Board majority reversed the ALJ Dec. and found Carter was discharged from both shows because of her protected activity. *Id.* Respondents filed their petition for review to the United States Court of Appeals for the District Of Columbia Circuit ("D.C. Cir.") on September 9, 2016. The Board filed its cross-application for enforcement of its order on September 27, 2016. After briefing and oral argument, on May 4, 2018, in a unanimous panel decision the D.C. Circuit granted the petition in part remanding the alleged violations of the Act based on the non-renewal of Carter's contract with Vegas! and discharge from BeatleShow based on the Court's concerns of the Board majority's treatment of the Respondents' evidence as to non-pretext and have great credit to the Board's dissent Member's analysis of the evidence. See *DAVID SAXE PRODUCTIONS, LLC v. NLRB*, 888 F.3d 1305 (D.C. Cir. May 4, 2018). The D.C. Cir. also at the request of the Board's counsel also sent for remand as to the whether the non-disclosure and non-union contractual clauses are in violation of the Act. *Id.*

The D.C. Circuit upheld the rest of the Board Dec. and Judgment was issued on June 11, 2018. Respondents after given notice by the Board's Region 28, complied with the D.C. Cir. Judgment. See Exhibit "1". Respondents have fully complied with the Judgment requirements and all notice and posting requirements have been fulfilled.

On August 29, 2018, the Office of the Executive Secretary of the Board invited all parties to file position statements if they desire. Upon application by Board Region 28, the deadline was extend to file position statements to October 26, 2018 as evidenced by the September 12, 2018 letter from the Executive Secretary of the Board. It is Respondents' understanding that Board Region 28 will not be filing a position statement.

Given the extensive record which is clear and unambiguous, Respondents submit this brief Position Statement. Specifically, Respondent assert that on remand the Board must issue a new decision that gives the appropriate deference to the credibility findings of the ALJ and uphold the ALJ Dec. that the nonrenewal of Carter as to Vegas! and the discharge from BeatleShow were not in violation of the Act, specifically Section 8(a) (1). In addition, the Board must issue a decision that the employment clauses as to non-disclosure and non-union are not in violation of Section 8(a) (1) of the Act.

II. SUMMARY OF UNDISPUTED MATERIAL FACTS

The following facts are undisputed:

On April 27, 2010, Carter signed a six-month contract to dance in Vegas!, which was produced by David Saxe, owner of DSP. He continued her contract twice. Also, in spring 2011, Carter began dancing part-time in the BeatleShow, produced by Fab Four Live, LLC, co-owned by Saxe and Mick McCoy; she did not have an employment

contract for this show. In December 2011, Carter was informed her employment for both shows would not be continued.

The evidence at the hearing before an ALJ showed that after the first few months of observing Carter in Vegas! The Show, the choreographer, Tiger Martina, was dissatisfied with the lack of versatility in Carter's performance because the show required dancers to portray different dancing and acting styles, and he asked the dance captains to work with her. (Hearing Transcript ("Hr'g Tr. 652, 653-654, 658-659, 660-662, 664-665, 666-668, 669-671, 672.) In fact, Tiger Martina expressed to David Saxe on many occasions that he wanted to not renew Anne Carter at the expiration of prior contracts. (Hr'g Tr. 653-654, 673-675.) It was David Saxe who convinced Tiger Martina to continue to work with Anne Carter. (Hr'g Tr. 654, 673, 675.) Those efforts were unsuccessful. *Id.* When Carter's initial contract neared completion in December 2010, Martina recommended to Saxe that Carter's contract not be renewed: Carter's dance performance was too wooden for the show and her behavior backstage, including criticizing other dancers' performance, upset other cast members. Saxe nonetheless renewed Carter's contract because he is "very loyal and, tr[ies] to keep people" and wanted to give her another chance to improve her performance. (Hr'g Tr. 499.) When this contract was set to expire on April 26, 2011, Saxe extended it to January 2, 2012 despite concerns from Martina and others.

In November 2011, Martina and Saxe held auditions for new dancers for Vegas! Martina was "looking for a replacement for Anne Carter" and had made this clear to Saxe. (Hr'g Tr. 676.) Martina thought Carter's dancing "was no different from day one . . . [in that] it was still the same stiff uninterested performance," even while "the show had

become much more established, we were getting a great deal of interest, even from other cities, people were starting to write to us and . . . we were getting [applications from] some pretty great dancers." (*Id.* at 677.) Martina concluded Saxe "was starting to see what was happening from [Martina's] standpoint." *Id.* Nevertheless, they "decided to let the contract ride out." *Id.*

Other undisputed evidence showed that Martina was not alone in his concerns about Carter's performance and attitude. Dance captains Ryan Kelsey told Saxe and Martina that Carter would usually become defensive when she received feedback on her performance, and he told Martina that Carter's performance did not match the style required for the show. (Hr'g Tr. 294-295, 300, 308, 313, 320-321, 350-351.) Additionally, Kelsey and dance captain Claudia Mitria were troubled by Carter's negative attitude backstage, which caused other cast members to complain. (Hr'g Tr. 287, 290-291, 309, 318-319, 325-326, 336-337, 366.) Toward the end of 2011, both Kelsey and Mitria shared their concerns with Saxe about Carter's negativity, poor dance quality. *Id.* Other dancers including some of Carter's friends told Saxe, Martina, Kelsey and Mitria that Carter was causing issues backstage and made the morale poor. (Hr'g Tr. 278-279, 365, 389, 405-406, 296, 679-680, 292-296, 300-301, 308, 313, 320-321, 339-340, 349, 358-359, 374-376, 381-385). Kelsey and Mitria were in the best position to know on a day to day basis which dancers were teachable and would take notes. Both stated that they told Tiger Martina and David Saxe they felt it was in the best interest of the show not to renew Anne Carter. (Hr'g Tr. 294-295, 300, 308, 313, 320-321, 350-351.)

At the BeatleShow, the dancers were independent contractors and not employees. (Hr'g Tr. 164, 238, 269, 435.) Mick McCoy no longer wanted to use Carter in the show because she did not fit the style. (Hr'g Tr. 440, 443.) He wanted to look at other dancers.

On December 13, 2011, Carter and the other dancers in Vegas! The Show met with Saxe to discuss pay and other terms and working conditions, such as time off for injuries and adequate time to prepare in between shows. Per Carter, Saxe responded positively at times that he understood her concern but he still did not "want all this bitching." (Hr'g Tr. 120.)

After the December 13 meeting, Kelsey and Mitria met with Saxe to recommend the non-renewal of Carter's contract. Saxe also conferred with Martina, and he heard complaints from dancers about Carter's attitude backstage. (Hr'g Tr. 294-295, 300, 308, 313, 320-321, 350-351, 652, 653-654, 658-659, 660-662, 664-665, 666-668, 669-671, 672). On December 21, Carter and Saxe exchanged emails: After other dancers had spoken with Saxe about renewing their contracts, Carter asked Saxe if they could discuss renewal of her contract and he responded that day that he was not renewing her contract for Vegas! The Show "[d]ue to [her] constant negative attitude and lackluster performance." He expressed the hope that she would respond professionally until her contract expired on January 2, 2012. Saxe was the one who communicated to Carter the decision to allow the agreement to expire. (Tr. 546-547, 552-554).

As to BeatleShow, Mick McCoy had asked Anna Van Samback the dancer who generally oversaw the scheduling of the dancers to cut back Carter's schedule. (Tr. 443-444). He felt Carter was not the best fit for the show and told Saxe he no longer wanted Carter in BeatleShow when Saxe asked him this question in December 2011. (Tr. 443). In

summary, McCoy found her qualified to dance in the show but preferred to use other dancers. (ALJ Dec., p. 10, lines 32-35; Tr. 443-445). After consulting with McCoy, who did not want Carter in his show because he thought that she lacked the proper appearance, Saxe informed Carter that she was no longer in the BeatleShow.

III. THE ALJ CREDIBILITY FINDINGS

The ALJ made the following credibility findings that support her decision that the decision to not renew and discharge Carter were not in violation of the Act:

The ALJ found Martina to be a “very credible witness based on his thoughtful and forthright demeanor as well as the detailed and consistent quality of his testimony.” Further, the ALJ stated that he is not beholden to Saxe since he choreographs other shows than Saxe’s. (ALJ DEC., p. 22, lines 12-17) The ALJ believes Martina’s desire to replace Carter due to her dance style as a primary concern and her attitude as secondary were legitimate and believable. (ALJ DEC., p. 22, lines 20-24). Further, the ALJ credited the testimony of Carter’s coworkers found all of this testimony clear and consistent and undisputed as to her negativity, and the ALJ found the dance captains’ recommendations not to renew also credible. (ALJ DEC., p. 22, line 34-p.23, line 10). Further, others dancers expressed statements at the December 13, 2011 meeting that Saxe perceived as an “attack” and no negative employment action was taken. (ALJ DEC., p. 23, lines 28-31). The credible testimony of Martina, Kelsey, Mitria and the other dancers, would have led to the non-renewal of Carter’s artist agreement even if she had not engaged in protected activity. (ALJ Dec, p. 23, lines 33-36). The ALJ also found that the “doctrine of condonation” was not applicable since there was nothing that Carter did which was forgiven and then used against her. (ALJ DEC., p.23, line 39-p.24, line 12).

As to BeatleShow, the ALJ found McCoy, the visionary behind the BeatleShow, was likewise credible and did not independently retaliate against Carter and her discharge did not violate the Act. (ALJ DEC., p. 26-27).

IV. THE BOARD ON REMAND MUST HONOR THE ALJ'S CREDIBILITY FINDINGS AND ISSUE A DECISION THAT THE DISCHARGE DID NOT VIOLATE THE ACT

The “Board itself has a long-established policy ‘not to over-rule a hearing officer’s credibility resolutions unless a clear preponderance of all the relevant evidence convinces [the Board] they are incorrect.’” *Id.* at 727, n. 5 (quoting *Robert F. Kennedy Med. Ctr.*, 336 NLRB 765, 765 n. 2 (NLRB 2001)).

This court is bound by the credibility choices of the ALJ, unless: (1) the choice is unreasonable; (2) the choice contradicts other findings of fact; (3) the choice is based on inadequate reasons or no reasons; or (4) the ALJ failed to justify the choice. *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463–64 (5th Cir. 2001). Absent extraordinary circumstances, a reviewing court does not substitute its view of credibility for that of the ALJ or weigh the credibility of one witness against another and search for contradictory inferences. *Id.*; see also *Albertson's, Inc. v. NLRB*, 161 F.3d 1231, 1236 (10th Cir.1998). Also a reviewing body must “defer to plausible inferences [the ALJ] drew from the evidence, even though we might reach a contrary result were we deciding this case de novo.” *Blue Circle Cement Co., Inc. v. NLRB*, 41 F.3d 203, 206 (5th Cir.1994) (internal quotation omitted).

The Board's findings of fact are conclusive only if supported by substantial evidence on the record considered as a whole. See 29 U.S.C. § 160(f); *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 326 (D.C. Cir. 2015). Further, the court's review of “[t]he

substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); see *DIRECTV, Inc. v. NLRB*, 837 F.3d 25, 33 (D.C. Cir. 2016).

Using this standard, it is clear that the Board Dec. as articulated by the majority was flawed and functionally set aside without basis the ALJ's credibility findings. ALJ considered and analyzed all of the testimony relied upon by the majority. Accordingly, the only way the majority could have reached the decision it did was to set aside the ALJ's credibility findings. The majority did not explain why it did so. Instead, the majority was silent on this critical point and stated only that it "disagreed" with the ALJ's findings and conclusions. It is axiomatic, however, that "the mere fact that conflicting evidence exists is insufficient to render a credibility determination patently unsupportable." *Raymond Interior Sys. v. N.L.R.B.*, 812 F.3d 168, 178 (D.C. Cir. 2016); see also, *Conair Corp. v. N.L.R.B.*, 721 F.2d 1355, 1367-1368 (D.C. Cir. 1983) which stated ("There is nothing inherently arbitrary, we note, in believing one side's witnesses and not the other's."). Because the majority rejected the ALJ's credibility findings and because it did not explain its reasons for doing so, its decision is entitled to a close and careful review which is more searching than the deference normally afforded to Board decisions. *DHL Express, Inc. v. N.L.R.B.*, 813 F.3d 365, 371 (D.C. Cir. 2016) ("deference is not warranted where the Board leaves critical gaps in its reasoning").

The Board Dec. majority failed to justify its findings. Moreover, the ALJ who is in the best position as the fact-finder to assess credibility found based on the credible testimony that the decision to not renew and discharge was warranted and not in violation of the Act. There is no contrary evidence, let alone any evidence sufficiently substantial

to discredit the ALJ observations and findings. *Slusher v. NLRB*, 432 F.3d 715 (7th Cir. 2005).

The Board should adopt the reasoning set forth in the Board Dec. dissent. In viewing the totality of the evidence, Board dissenter Miscimarra cogently opined:

[T]he fact that Carter had been given an opportunity to improve in the past does not mean that [petitioners] were obligated to disregard Carter's shortcomings indefinitely. Choreographer and Director Tiger Martina testified that he held auditions in November 2011 looking for a replacement for Carter and that Saxe had agreed around that time that Carter's contract should not be renewed when it ended on January 2, 2012. That decision may not have been finalized until late December 2011, but the record establishes that Carter's non-renewal was under serious consideration before she engaged in protected concerted activity on December 13. (Board Dec. at 9, Miscimarra, dissenting)

All of this was addressed and analyzed by the ALJ and support by the record.

When addressing the inconsistency in Saxe testimony, the Board Dec. dissent correctly and cogently pointed out that the ALJ evaluated all of the evidence and appropriately considered the credibility of all the witnesses, including Saxe and his inconsistencies and considered the record as a whole. (Board Dec. at 10, Miscimarra dissenting.)

The dissent correctly and following the precedent and law sets forth that the ALJ's credibility findings are appropriate and cannot be disturbed. When the record as a whole is viewed, the ALJ Dec. does not support a violation of Section 8(a)(1) of the Act as the decision to not renew the Vegas! contract and discharge Carter from BeatleShow were not based on valid, non-pretextual reasons. As such, on remand, the Board herein needs to adopt the ALJ finding that decision to move on from Carter was not a violation of the Act and adopt the ALJ Dec. of dismissal of these allegations.

V. THE BOARD ON REMAND MUST FOLLOW THE BOEING PRECEDENT AS TO EMPLOYMENT CONTRACT CLAUSES

The final artist agreement between Vegas! and Carter had an expiration date of January 2, 2012 and was an extension of a prior agreement and contained the following language in par. 15 “NON-DISCLOSURE.” Employee agrees not to disclose the terms of this Agreement to third parties or fellow employees, without Company’s prior written consent.” but contains no sanctioning language for a violation of this provision. (GC Exh. 14, 16 to the Hr’g Tr.). The artist agreement also had language in paragraph 10 which states: “NON-UNION. Artist acknowledges that the Show is not under the jurisdiction of any labor union.”

The Board in *The Boeing Company*, 365 NLRB No. 154 (December 14, 2017) set forth a balancing test to determine whether a workplace rule was unlawful if employees would “reasonably construe” it a prohibiting Section 7 activity. As set forth in its Exception briefing, Respondents set forth that the ALJ Dec. and the Board Dec. as to these two paragraphs of being in violation of the Act should be set aside. *Boeing* further supports Board’s Dec 1(a) and (b) should on remand be stricken and not affirmed. The Board itself on January 5, 2018 in a letter brief to the D.C. Cir. in this matter set forth that in like of *Boeing* it was no longer seeking affirmance of those findings.

In brief, when applying the *Boeing* test, there is nothing unlawful about either paragraph. Under the *Boeing* standard, the Board must evaluate facially neutral policies as to whether they interfere with the exercise of NLRA rights by evaluating: “(i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule.” *Id.* at 3.

Herein, the NON-UNION provision is clearly not a rule that interferes with employees Section 7 rights. It is a simple statement of fact. Nowhere does it make any statement pro or con about labor unions. As to employment agreements/contracts, they need to be construed as any other contract would be. Specifically, it is the intent of the parties as expressed in the contract, not some unexpressed intention that controls the contract's construction as *Boeing* made clear. The ALJ also recognizes this: "The provision does not expressly restrict Section 7 activity, nor was evidence presented that it was promulgated in response to it, or that it was applied to restrict the exercise of Section 7 rights." (ALJ Dec, at 14). As the ALJ, correctly points out "absent the accompanying threat, the handbook provisions would be protected employer speech under Section 8(c) of the Act." (ALJ Dec. at 15). Section 8(c) of the Act "expressly precludes regulation of speech about unionization "so long as the communications do not contain a threat of reprisal or force or promise of benefit." *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (other internal quotation marks omitted). Therefore, the Board must issue a decision on remand finding this paragraph is lawful.

As to the NON-DISCLOSURE language, it further analysis must be given. The General Counsel's recent Memorandum GC 18-04 (Guidance on Handbook Rules Post-Boeing) provides important guidance about how the Board's *Boeing* decision should be applied. For example, rules that specifically state that employees are prohibited from discussing wages and benefits are deemed unlawful and the *Boeing* decision continues to support that. However, a confidentiality rule that does not refer to employee information or working conditions generally does not restrict employees from engaging in concerted

activities and should be expected to be found lawful under *Boeing*. The General Counsel Guidance memo states that rules protecting confidential, proprietary and customer information are categorically lawful. Further, a policy or rule should not be assumed as unlawful and affecting employees' rights unless employment terms at least are mentioned in the rule.

First of all, the NON-DISCLOSURE paragraph addresses confidentiality as to the Agreement terms. There is nothing in the paragraph that facially states any disciplinary action or reprisal. Further, the paragraph is devoid of any prohibition of discussing as to discussing working conditions or benefits. Moreover, an employer has a right to protect its trade secrets and proprietary information. This does not restrict any employees' rights to discuss anything about their working conditions. Given the facially neutral language and the guidance of *Boeing*, this paragraph facially is done to maintain confidentiality. Therefore, the Board on remand should likewise find this paragraph lawful.

V. CONCLUSION

For the foregoing reasons and for the reasons set forth in Respondents' prior filings with the Board, the D.C. Cir. as well as the ALJ Dec. and the D.C. Cir. Decision, Respondents David Saxe Productions, LLC and Vegas! The Show, LLC, joint/single employers, and David Saxe Productions, LLC and Fab Four Live, LLC, joint/single employers, respectfully request that the Board on its remand reverse its August 26, 2016 decision and order as to the following: 1) reinstate the May 7, 2013 order of the Administrative Law Judge that the nonrenewal by Vegas! and the discharge by BeatleShow did not violate the National Labor Relations Act and a dismissal of this

unfair labor practice; 2) find that the NON-UNION paragraph is not in violation of the National Labor Relations Act and is lawful and 3) find that the NON-DISCLOSURE paragraph is not in violation of the National Labor Relations Act and is lawful. Moreover, the Board should find Respondents have complied with the D.C. Cir.'s Judgment and Order. Overall, the Board's should clearly articulate that Respondents are required to offer no further relief to Anne Tracy Carter and that she recover nothing.

Respectfully Submitted,

Dated: October 26, 2018

By: 

Bruno W. Katz
Wilson, Elser, Moskowitz,
Edelman & Dicker LLP
401 West A Street, Suite 1900
San Diego, CA 92101
Telephone: 619-321-6200
Facsimile: 619-321-6201
Email: [Bruno.Katz@wilsonelser.com](mailto: Bruno.Katz@wilsonelser.com)

Attorneys for David Saxe Productions, LLC
Vegas! The Show, LLC and Fab Four Live,
LLC

EXHIBIT 1

CERTIFICATION OF COMPLIANCE
(PART ONE)

RE: David Saxe Productions, LLC and Vegas! The Show, LLC, Joint Employers
Case 28-CA-075461 and 28-CA-084151

(If additional space is needed to provide a full response, attach a sheet(s) with the necessary information.)

As required by the court judgment in this matter, this document is a sworn certification of the steps that Respondent has taken to comply with the court judgment.

Physical Posting

The signed and dated Notice to Employees in the above matter was posted on

(date) 7/31/18 at the following locations: (List specific places of posting)

3663 Las Vegas Blvd S Unit 954, Las Vegas, NV 89109, Saxe Theater, backstage dressing rooms (4 notices)

5030 West Ogden Road, Las Vegas, NV 89119, David Saxe Productions LLC offices Breakrooms (2 notices)

A copy of the signed Notice is attached.

Intranet Posting

Employer does not communicate notices to employees via the intranet/website.

The signed and dated Notice to Employees in the above matter was posted on the Respondent's intranet/website on (date) N/A. A copy of the intranet/website posting is attached.

Electronic Mailing

The signed and dated Notice to Employees in the above-captioned matter was e-mailed on (date) 8/2/18 to all current employees and former employees who were employed at any time since September 27, 2011. A copy of the list of names and addresses of employees to whom the Notices were e-mailed is attached. The electronic mailing transmitting the Notice to Employees was sent to the undersigned on 8/3/18.

Mailing

The signed and dated Notice to Employees in the above captioned matter was mailed on (date) NA to all current employees and former employees who were employed at any time since September 27, 2011. A copy of the list of names and addresses of employees to whom the Notices were mailed is attached.

Employer still in business.

David Saxe Productions, LLC and Vegas! The
Show, LLC, Joint Employers - 2 -
Case 28-CA-075461 and 28-CA-084151

June 21, 2018

I have completed this Certification of Compliance, Part One and state under penalty of perjury that it is true and correct.

RESPONDENT

By:



Title:

Manager

Date:

8/3/18

This form should be returned to Board Agent Christopher J. Giardina. If the Certification of Compliance Part One is returned via e-file or e-mail, no hard copy of the Certification of Compliance Part One is required.



NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE
UNITED STATES COURT OF APPEALS

AN AGENCY OF THE UNITED STATES GOVERNMENT

ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board has found that we violated Federal labor law
and has ordered us to post and obey this notice.

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 prohibit you from engaging in protected concerted activities.

WE WILL NOT disparage you for engaging in protected concerted activities.

WE WILL NOT threaten you with unspecified reprisals because you engaged in protected concerted activities.

WE WILL NOT impliedly threaten you with discharge for engaging in protected concerted activities.

WE WILL NOT instruct you that your failure to cease complaining about protected activity will result in the non-renewal of your employment contracts and thereby result in your discharge.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

David Saxe Productions, LLC and Vegas! The
Show, LLC, and David Saxe Productions, LLC
and Fab Four Live, LLC

(Employer)

Date: 7/31/18 By: [Signature] Manager
(Representative) (Title)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

RE: *DAVID SAXE PRODUCTIONS, LLC v. NLRB*, 888 F.3d 1305 (D.C. Cir. May 4, 2018, judgment entered June 11, 2018, enforcing in part and remanding in part, 364 NLRB No. 100 (August 26, 2016))

CERTIFICATE OF SERVICE

I certify that a copy of the POSITION STATEMENT WAS served electronically on October 26, 2018 to the following parties:

Cornele A. Overstreet
Regional Director
National Labor Relations Board
Region 28
2600 N. Central Avenue
Suite 1400
Phoenix, AZ 85004-3099
Email: Cornele.Overstreet@nlrb.gov
Email: Rachel.Harvey@nlrb.gov

Ms. Anne Tracy Carter
2564 Diplomacy Pointe Court
Henderson, NV 89052-5911
Email: annetcarter@gmail.com

Dated this 26th day of October, 2018.

By:



Bruno W. Katz