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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CORNELE A. OVERSTREET, Regional Director of the Twenty-Eighth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Petitioner, vs. DAVID SAXE PRODUCTIONS, LLC and V THEATER GROUP, LLC, Respondents.	Case No. 2:18-cv-02187-APG-NJK

RESPONDENTS' DAVID SAXE PRODUCTIONS, LLC AND V THEATER GROUP, LLC'S OPPOSITION TO PETITIONER'S PETITION FOR TEMPORARY INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT (ECF NO. 1)

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. PROCEDURAL BACKGROUND 2

III. LEGAL STANDARD 5

IV. LEGAL ARGUMENT 7

A. The Balance of Equities Strongly Favors Respondents 7

1. The Requested Relief is an Improper End Run Around 29 U.S.C. § 160(c) .. 7

2. The Requested Relief Violates Respondents' First Amendment Rights 9

3. Petitioner's Request Causes Irreparable Harm to Respondents 11

B. Petitioner Fails to Demonstrate the Likelihood of Irreparable Harm 15

C. Petitioner Fails to Establish a Likelihood of Success on the Merits 18

1. Prior Management Failed to Properly Discipline and Manage Employees Leading to Several Employee Terminations Two Weeks After the Prior Manager's Termination 19

2. Respondents Had No Knowledge of Union Activity Until April 9, 2018 22

3. Taylor Benavente Bohannon and Nathaniel Franco—Performance Issues . 22

4. Alanzi Langstaff, Jasmine Glick, and Kevin Michaels—Attendance Issues and Policy Violations 25

5. Zachary Graham—Job Abandonment 29

6. Leigh-Ann Hill—Scheduling Issues Caused by Hill 30

7. Chris Suapaia—Scheduling Issues and Unwillingness to Perform Shows 32

8. Michael Gasca—Poor Job Performance and Restructuring of Operations . 33

9. Scott Tupy and Darnell Glenn 35

10. Steven Urbanski—Recent Job Abandonment 37

11. Petitioner's Reliance on Alterations to Respondents' Operations to Support the Requested Relief and the Underlying Unfair Labor Practice Charges is Misplaced 38

12. Petitioner's Other Allegations Do Not Support a Finding of a Likelihood of Success on the Merits 41

D. Injunctive Relief in this Matter is Not in the Public Interest 43

V. CONCLUSION 44

TABLE OF AUTHORITIES

CASES **Page**

Advanced Masonry Assocs., LLC d/b/a Advanced Masonry Sys. & Bricklayers & Allied Craftworkers, Local 8 Se., 366 N.L.R.B. No. 57 (Apr. 13, 2018) 24, 28

Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053 (9th Cir. 2014) 15

Arpro Co. m/v Arctic Producer, 265 N.L.R.B. 313 (1982) 40

Beverly Enters., Inc. v. NLRB, 139 F.3d 135 (2d. Cir. 1998) 38, 41

Cambridge Chemical Corp., 259 N.L.R.B. 1374 (1981) 28, 32, 35

Coca Cola Bottling Co., 132 N.L.R.B. 481 (1961) 41

Columbian Distribution Servs., Inc., 320 N.L.R.B. 1068 (1996) 19

Excel Corp., 324 N.L.R.B. 416, 420 (1997) 18

Fed'n of Teachers Welfare Fund, 322 N.L.R.B. 385 (1996) 18

Frankl v. HTH Corp., 650 F.3d 1334, 1355 (9th Cir. 2011) 6

Fresh & Easy Neighborhood Market, Inc., 356 N.L.R.B. 546 (2011) 30

Guard Publ'g Co., 344 N.L.R.B. 1142 (2005) 40

Hall Constr. v. N.L.R.B., 941 F.2d 684 (8th Cir. 1991) 18

Health Management, Inc., 326 N.L.R.B. 801 (1998) 28, 32, 35

Ideal Elec. & Mfg. Co., 134 N.L.R.B. 1275 (1961) 39

Janus v. American Federal of State, County, and Municipal Employees, Council 31, 138 S. Ct. 2448 (2018) 9

Longview Fibre Paper & Packaging, Inc., 356 N.L.R.B. 796 (2011) 39

Mazurek v. Armstrong, 520 U.S. 968 (1997) 5

McDermott v. Ampersand Pub., LLC, 593 F.3d 950 (9th Cir. 2010) 6, 17

McDermott v. Veritas Health Servs., Inc., No. CV 11-2852 PA OPX, 2011 WL 2693922 (C.D. Cal. May 9, 2011), aff'd, 469 F. App'x 544 (9th Cir. 2012) 17

Miller v. Cal. Pac. Med. Ctr., 19 F.3d 449 (9th Cir. 1994) 6

N.L.R.B. v. Transportation Management, 462 U.S. 393 (1983) 18

N.Y. Univ. Med. Ctr., 324 N.L.R.B. 887 (1997) 18, 19

Nev. Rest. Serv., Inc. v. City of Las Vegas, No. 2:15-cv-2240-GMN-GWF, 2016 WL 4721100 (D. Nev. Sept. 8, 2016) 15

NLRB v. Circo Resorts, 646 F.2d 403 (9th Cir. 1981), enforcing as modified 244 N.L.R.B. 880 (1979) 40

NLRB v. Elec. Workers Local 1229, 346 U.S. 464 (1953) 8

NLRB v. Gissel Packing Co., Inc., 395 U.S. 575 (1969) 5

NLRB v. Knuth Bros., Inc., 537 F.2d 950 (7th Cir. 1976) 8

NLRB v. Marina City Co., 428 F. Supp. 1090 (C.D. Cal. 1977) 17

NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261 (9th Cir. 1995) 18

North Hills Office Servs., Inc., 346 N.L.R.B. 1099 (2006) 42

Office of the General Counsel, Memorandum GC 18-05 (June 20, 2018) 16

Orange County Publications, 334 N.L.R.B. 350 (2001) 35

Overstreet v. Gunderson Rail Servs., LLC, No. 14-15713, 587 Fed. Appx. 379 (9th Cir. Oct. 16, 2014) 7, 11

Overstreet v. IGT, Case No. 2:17-cv-01436-APG-NJK (ECF No. 19) (June 7, 2017) 2

Overstreet v. United Bhd. of Carpenters and Joiners of Am., Local Union No. 1506, 409 F.3d 1199 (9th Cir. 2005) 10

Peavey Co. v. N.L.R.B., 648 F.2d 460 (7th Cir. 1981) 18

Pittsburgh S.S. Co. v. NLRB, 180 F.2d 731 (6th Cir. 1950) 9

Quiroga v. Chen, 735 F. Supp. 2d 1226 (D. Nev. 2010) 6

R. Dakin & Co., 191 N.L.R.B. 343 (1971) 39

Register Guard, 344 N.L.R.B. 1142 (2005) 42

Rent-A-Center, Inc. v. Canyon Tele. & Appliance Rental, Inc., 944 F.2d 597 (9th Cir. 1991) 15

Sammartano v. First Judicial Dist. Court, 303 F.3d 959 (9th Cir. 2002) 10

Sears, Roebuck & Co. v. N.L.R.B., 349 F.3d 493 (7th Cir. 2003) 18

Serv. Employees Local 434-B, 316 N.L.R.B. 1059 (1995) 18

Sewell Mfg. Co., 138 N.L.R.B. 66 (1962) 39

Small v. Avanti Health Sys., LLC, 661 F.3d 1180 (9th Cir. 2011) 6

South Carolina Industries, 181 N.L.R.B. 1031 (1970) 28, 32, 35

Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009) 6

TNT Logistics N. Am., Inc., 354 N.L.R.B. 290 (2005) 39

Walmart Stores, Inc., 340 N.L.R.B. 637 (2003) 39

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008) 1, 6

Wright Line, 251 N.L.R.B. 1083, 1089 (1980), enforced, 662 F.2d 899 (1st Cir. 1981) 18, 24

Zurich Am. Ins. Co. v. Bowman, No. 2:10-CV-00988-RLH,
2010 WL 5239239 (D. Nev. Dec. 16, 2010) 6

STATUTES **Page**

29 U.S.C. § 158 ..... 9, 36, 42

29 U.S.C. § 160 ..... 6, 7, 8

I. INTRODUCTION.

Respondents David Saxe Productions, LLC ("DSP") and V Theater Group, LLC ("V Theater") (collectively "Respondents"), by and through their counsel of record, the law firm of Kamer Zucker Abbott, oppose Petitioner's Petition for Temporary Injunction Under Section 10(j) of the National Labor Relations Act ("NLRA") ("the Petition) (ECF No. 1). The Petition should be denied in its entirety because Petitioner fails to demonstrate: (1) a likelihood of success on the merits; (2) irreparable harm; (3) that the balance of equities favors a temporary injunction; or (4) that a temporary injunction is in the public's interest. As injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief," Petitioner is tasked with a heavy burden of proof—a burden it cannot overcome in the present case. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).

As set forth more fully *infra*, Petitioner fails to demonstrate a likelihood of success on the merits because all the alleged discriminatees were disciplined and/or terminated from employment for good cause and legitimate business reasons wholly unrelated to any alleged protected, concerted activity. Additionally, the other alleged conduct of Respondents was clearly lawful. Furthermore, Petitioner fails to demonstrate a likelihood of irreparable harm, given that an adequate remedy is available through the standard National Labor Relations Board ("NLRB") procedures in this case and Petitioner's near seven-month delay in filing the Petition negates any allegation of imminent harm. Specifically, if it is determined that Respondents' good cause employment terminations and other actions constitute unfair labor practices, then an order for reinstatement, back pay, and the counting of challenged ballots to determine if the outcome of the election should be changed may be imposed by the administrative law judge in the immediate future. Petitioner's employer is in complete control of the timing of those actions and relief. Petitioner does not need to invoke this Court's equitable power to secure such relief if it is found to be legally warranted.

In addition to Petitioner's failure to demonstrate a likelihood of success on the merits and irreparable harm, Petitioner's requested injunctive relief is not warranted here because the balance of equities weighs heavily in favor of Respondents and no public interest is served in imposing such extraordinary relief. Attempting to rewind the clock on legitimate business decisions made by Respondents and not challenged by Petitioner in a Section 10(j) proceeding for nearly seven months would cause unnecessary disruption, hardship, and potential devastation to not only Respondents' business operations, but also to the other individuals currently working for Respondents. Petitioner's near seven-month delay in seeking Section 10(j) relief coupled with the fact that the 23-day administrative trial is now complete with post-trial briefs to be submitted by January 8, 2019 and a decision and order from administrative law judge imminently thereafter makes the requested relief unjust and improper.

Petitioner's injunctive relief request is further belied by the fact that such relief would disregard the statutory prohibition against reinstating employees who have been terminated for good cause, improperly infringe on Respondents' constitutional and statutory rights of free speech, and cause irreparable harm to Respondents' business operations and the other employees who are currently relying on Respondents for employment and who would be displaced by the requested injunction. Ultimately, as this Court has noted in other proceedings, the "serious questions raised by this petition are best decided after careful evaluation by an Administrative Law Judge with expertise in this area." See Overstreet v. IGT, Case No. 2:17-cv-01436-APG-NJK (ECF No. 19) (June 7, 2017). Accordingly, Respondents request that the Petition be denied in its entirety.

II. PROCEDURAL BACKGROUND.

Respondent DSP is a consulting company that provides accounting, legal, human resources, and other support services to various entertainment related companies. The DSP facility is located on Oquendo Road in Las Vegas, Nevada and the complex includes offices and a warehouse

space. Respondent V Theater is a company that leases and operates the V Theater, a live entertainment venue, which is located inside the Miracle Mile Shops at the Planet Hollywood Hotel and Casino in Las Vegas, Nevada. The relevant employees in this case were employed as audio technicians, lighting technicians, and stagehands ("Production Employees") at the V Theater. Throughout the multi-month administrative and trial proceedings before Region 28 of the National Labor Relations Board ("NLRB") and administrative law judge set forth below, Respondents denied any unlawful conduct and have provided legitimate non-discriminatory, and non-retaliatory reasons for the alleged disciplinary actions taken by Respondents.

On or around April 24, 2018, the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, Local 720, AFL-CIO ("the Union") filed the initiating unfair labor practice charge in this case (28-CA-219225), alleging the unlawful termination of ten employees: Scott Leigh, Chris Suapaia, Kevin Michaels, Jasmine Glick, Zachary Graham, Taylor Bohannon, Nathaniel Franco, Leigh-Ann Hill, Michael Gasca, Alanzi Langstaff, and Michael Koole.[1] See **PX 1**.[2] Petitioner first put Respondents on notice on May 23, 2018 that Section 10(j) relief might be sought, but ultimately did not seek Section 10(j) relief at that time.

On or around April 26, 2018, the Union filed a Petition for Representation of all Production Department Employees, including stagehands, audio technicians, and lighting technicians (28-RC-219130). **PX 68**. A stipulated election agreement was entered on May 9, 2018, scheduling the election for May 17, 2018. **PX 69**. Ultimately, Respondents prevailed in the secret-ballot election with a vote of 19 in favor of the Union and 22 opposed to the Union. **PX 73**. There were also seven

[1]The allegations pertaining to Michael Koole were not included in the subsequent complaint and, thus, were not pursued by the NLRB at the hearing. Additionally, the allegations pertaining to Scott Leigh were part of the consolidated hearing before the administrative law judge, but are not at issue in the Petition (ECF No. 1).

[2]References to "PX" refers to the exhibits attached to the Petition (ECF No.1).

challenged ballots cast by former employees who were alleged to be unlawfully terminated in Charge No. 28-CA-219225. **PX 74**. Thereafter, a first amended charge in Case 28-CA-219225 was filed on or around June 29, 2018. **PX 2**. Region 28 of the NLRB issued a complaint based on the amended charge on July 9, 2018. **PX 17**. Then, on July 10, 2018, the complaint was consolidated with the Hearing on Challenged Ballots and Election Objections from the Election in Case No. 28-RC-219130. **PX 18**. Petitioner did not seek Section 10(j) relief at that time.

The Union filed four additional unfair labor practice charges with the NLRB. First, on or around July 9, 2018, the Union filed Charge No. 28-CA-223339, alleging that Respondents changed terms and conditions of employment by issuing a last-minute work call on March 13, 2018, and enforcing previously unenforced rules. **PX 5**. Second, on or around July 10, 2018, the Union filed Charge No. 223362, alleging that Respondents refused to recognize and bargain in good faith with the Union and requesting a bargaining order for an unidentified unit. **PX 9**. Third, on the same day, the Union filed Charge No. 223376, alleging that Respondents surveilled or created the impression of surveillance of employees' union activities, interrogated employees about their union activities, threatened employees with job loss and closure, maintaining overly broad handbook rules, altering employee schedules around the time of an election, posting anti-union propaganda and failing to post NLRB election notices. **PX 11**. Charge No. 223376 also alleged that Respondents reduced the hours of current employees Scott Tupy and Darnell Glenn and issued Tupy a discipline to discourage union activities. Id. Finally, on or around July 20, 2018, the Union filed Charge No. 28-CA-224119 alleging that Respondents discriminated against current employee, Steven Urbanski, by delaying his return to work following a work-related injury and subjecting him to stricter work standards and discipline. **PX 15**. Petitioner still did not seek Section 10(j) relief at that time.

On or around August 20, 2018, the Union's four additional charges were eventually consolidated with the initial charge, complaint, and the Hearing on Challenged Ballots and Election

Objections from the Election in Case No. 28-RC-219130. **PX 19**. Subsequently, Region 28 scheduled a trial on the consolidated matter before an administrative law judge to begin on August 27, 2018; however, Region 28 later unilaterally moved the trial to September 11, 2018. **PX 17**; **PX 19**. Notably, the trial lasted for 23 non-consecutive days, with 32 witnesses and over two hundred exhibits. The trial concluded on November 13, 2018. The parties are now obligated to provide a post-trial brief to the administrative law judge by January 8, 2018.

Of note, Petitioner did not seek Section 10(j) relief at any time during the pendency of the charges or during the majority of the 23-day trial—a period of almost seven months. When Petitioner's counsel finally confirmed to Respondents that Petitioner would be seeking Section 10(j) relief on November 2, 2018, Petitioner waited another twelve days before actually filing its Petition. Furthermore, during the trial, Petitioner abandoned seeking a Gissel bargaining order for the Production Employees (lighting technicians, audio technicians, stagehands, and wardrobe attendants) at the V Theater. Gissel bargaining orders are based on the U.S. Supreme Court case NLRB v. Gissel Packing Co., Inc., 395 U.S. 575 (1969). Gissel bargaining orders can only issue where the NLRB determines that a free and fair election can no longer be held because the employer has committed hallmark unfair labor practices that preclude employees from voting in an uncoerced environment. If a Gissel bargaining order is issued, the secret ballot election process is bypassed, and, upon issuance, the employer must immediately commence negotiations of the first collective bargaining agreement. As Region 28 is no longer seeking such an order for the Production Employees, the status of the parties' secret ballot election as amongst the Production Employees in the present matter will be properly determined by the administrative law judge who is tasked with resolving any election objections, challenges, and the discipline issues affecting the same.

III. LEGAL STANDARD.

"Section 10(j) permits a district court to grant [injunctive] relief it deems just and proper."

Frankl v. HTH Corp., 650 F.3d 1334, 1355 (9th Cir. 2011) (citing 29 U.S.C. § 160(j)) (internal quotation marks omitted), cert. denied, 566 U.S. 904 (2012). "A preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. Nat. Res. Defense Council, Inc., 555 U.S. 7, 24 (2008). Indeed, "[e]ven though § 10(j) is an exception to the primary jurisdiction of the NLRB over labor disputes, it reflects an intention that the district court will exercise judgment rather than simply sign off on Board requests…." Miller v. Cal. Pac. Med. Ctr., 19 F.3d 449, 458 (9th Cir. 1994), abrogated on other grounds as recognized by Frankl, 650 F.3d at 1355.

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (quotations and emphasis omitted). Courts within the Ninth Circuit must rely on traditional equitable principles to determine if Section 10(j) relief is appropriate. Accordingly, the petitioner must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary injunctive relief; (3) that the balance of equities tips in the petitioner's favor; and (4) that the injunction is in the public interest. Small v. Avanti Health Sys., LLC, 661 F.3d 1180 (9th Cir. 2011); Frankl, 650 F.3d at 1355; see also McDermott v. Ampersand Pub., LLC, 593 F.3d 950, 957 (9th Cir. 2010) (rejecting the more lenient standard of "possibility of irreparable harm."). "Applying Winter, the Ninth Circuit has since held that, to the extent previous cases suggested a lesser standard, 'they are no longer controlling, or even viable.'" Zurich Am. Ins. Co. v. Bowman, No. 2:10-CV-00988-RLH, 2010 WL 5239239, at *2 (D. Nev. Dec. 16, 2010) (quoting Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009)). "The Supreme Court has made clear that a movant must show both 'that he is *likely* to succeed on the merits [*and*] that he is *likely* to suffer irreparable harm in the absence of preliminary relief…'" Quiroga v. Chen, 735 F. Supp. 2d 1226, 1229 (D. Nev. 2010) (quoting Winter and explaining that "[t]he movant must…show that there are serious questions as to the merits of the case such that success on the

merits is likely…[T]he chance of success on the merits cannot be weaker than 'likely.'")

IV. LEGAL ARGUMENT.

A. *The Balance Of Equities Strongly Favors Respondents.*

As a threshold matter, the balance of equities in this case tips sharply in favor of Respondents. Petitioner's present request is improper as it violates the NLRA's express provision prohibiting the reinstatement of employees for cause, infringes upon Respondents' First Amendment rights, and would cause irreparable harm to Respondents. In considering the balance of equities, a district court has a duty to "balance the interests of all parties and weigh the damage to each." Overstreet v. Gunderson Rail Servs., LLC, No. 14-15713, 587 Fed. Appx. 379, 381 (9th Cir. Oct. 16, 2014) (quoting L.A. Mem'l Coliseum v. Nat'l Football League, 634 F.2d 1197, 1203 (9th Cir. 1980)). Here, the interests of Respondents clearly outweigh the purported interests of Petitioner thus requiring the denial of Petitioner's requested injunctive relief.

1. The Requested Relief is an Improper End Run Around 29 U.S.C. § 160(c).

Petitioner's proposed injunctive relief requests the compelled reinstatement of Respondents' former employees discussed in detail *infra* who were terminated from employment for good cause and, correspondingly, the displacement of any current employees who may have been hired to take their places. See Petition (ECF No. 1) at ¶ 1(b)(2). Additionally, Petitioner requests an injunction requiring Respondents to remove from its files all references to the discipline and/or discharges and notify the employees that the termination and/or disciplines will not be used against them in any way. Id. at ¶ 1(b)(4). Notably, not only is the requested injunction an undeniable overreach consisting of relief more akin to that of a final judgment on the merits, but it also constitutes an improper end run around the NLRA, which prohibits the reinstatement of employees who have been terminated for good cause.

Section 10(c) of the NLRA provides in relevant part, "No order of the Board shall require

the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U.S.C. § 160(c). The NLRA does not "interfere with the employer's normal exercise of its right to select or discharge employees," nor does it "immunize an employee from discharge for acts of disloyalty or misconduct merely because those acts were associated with protected activity." NLRB v. Knuth Bros., Inc., 537 F.2d 950, 953 (7th Cir. 1976); see also NLRB v. Elec. Workers Local 1229, 346 U.S. 464 (1953). As one Circuit Court of Appeals aptly noted:

> Section 10(c), 29 U.S.C. s 160(c), of the Act protects the employer's right to protect its business interests and, if necessary, to discharge an employee for cause. Congress, while safeguarding in section 7 the right of employees to engage in concerted activities for the purpose of collective bargaining, did not intend to weaken the underlying contractual bonds and loyalties essential to a suitable employer-employee relationship. It was the purpose of the Act to strengthen, rather than weaken, the cooperation and cordial relationship between the employer and his employees. The power of the Act cannot be used as a pretext for infringing the employer's rights.

Knuth Bros., Inc., 537 F.2d at 956-57.

Here, Petitioner's requested injunctive relief is wholly improper as it violates provisions of the NLRA intended to preserve the rights of employers to make disciplinary and employment termination issues regarding its employees. Notably, as set forth *infra*, Respondents disciplined and/or terminated the employment of the individuals in question based on valid factors unrelated to any alleged protected, concerted activity and is consistent with Respondents actions in other similar circumstances. The valid concerns considered by Respondents included employee attendance issues, job abandonment, missed cues, and other subpar performance issues negatively impacting Respondents' shows and operations. Nevertheless, Petitioner is incredibly asking this Court to essentially wipe from existence Respondents' valid and lawful decisions regarding employee discipline and terminations. Petitioner's requested action fails to meet either the spirit or the letter of the NLRA and should be denied.

2. The Requested Relief Violates Respondents' First Amendment Rights.

Plaintiff's requested injunctive relief unlawfully interferes with Respondents and a segment of its employees' constitutional First Amendment rights and the statutory free speech rights set forth in the NLRA. Recently, the U.S. Supreme Court reiterated the primacy of First Amendment Rights, even in the realm of labor relations. Specifically, the Supreme Court stated:

> The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all. The right to eschew association for expressive purposes is likewise protected... ("Freedom of association...plainly presupposes a freedom not to associate"); ("[F]orced associations that burden protected speech are impermissible"). As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31, 138 S. Ct. 2448, 2463 (2018) (internal citations and emphasis omitted).

In addition to the First Amendment, Section 8(c) of the NLRA provides that, "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). Section 8(c) "was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct." Pittsburgh S.S. Co. v. NLRB, 180 F.2d 731, 735 (6th Cir. 1950).

> Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely. Thus, if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct, the Board may say that the official's misconduct warranted his being discharged, but 'infer,' from what the employer said, perhaps long before, that the discharge was for union activity, and reinstate the official with back pay. It has similarly abused the right of free speech in abolishing and penalizing unions of which it disapproved but which workers wished as their bargaining agents. The bill corrects this, providing that nothing that anyone says shall constitute or be evidence of an

> unfair labor practice unless it, by its own express terms, threatens force or economic reprisal. This means that a statement may not be used against the person making it unless it, standing alone, is unfair within the express terms of section 7 and 8 of the amended act.

Id. at n.2 (quoting House Report No. 245 at p. 33). Significantly, "where, as here, there is at least some risk that constitutionally protected speech will be enjoined, only a particularly strong showing of likely success, and of harm to the defendant as well, could suffice." Overstreet v. United Bhd. of Carpenters and Joiners of Am., Local Union No. 1506, 409 F.3d 1199, 1208 n.13 (9th Cir. 2005); see also Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 974 (9th Cir. 2002) (requiring an especially strong demonstration on other preliminary injunction factors in view of the "significant public interest in upholding First Amendment principles").

Here, the requested relief improperly coerces an associational relationship on employees who voted against union representation, which should not be countenanced. Furthermore, the requested relief infringes on Respondents' free speech rights in at least two additional ways. First, Petitioner seeks to use non-coercive and non-threatening speech to bolster its claims. For example, Petitioner's describe an interaction between Saxe and an employee in which the employee directly told Saxe of his support for the Union and Saxe responded that the employee's support for the Union was fine and that he too used to be a member of the Union. Saxe stated that the fact the employee supported the Union was not a problem between them. Such non-coercive and non-threatening statements cannot support injunctive relief and, instead, constitute the exercise of the free speech rights of Respondents. Respondents, their managers, and employees deny making any threatening or coercive statements to employees, including any comments allegedly made by Stage Manager Estrada. Kostew Tr. at 2964:9-25; 2965:1-14; Estrada: 3110:11-18; 3112:18-22; 3114:20-24.

Second, the requested injunctive relief significantly infringes upon Respondents' free speech rights by obligating them to: (1) post a copy of the requested injunctive relief order where notices are customarily posted and at each of the time clocks that employees use; (2) deliver an electronic

copy of the requested injunctive relief order to all employees employed by Respondents; and (3) schedule a mandatory meeting for all employees of Respondents during which the requested order will be read to employees by Saxe in the presence of a Board agent. See Petition (ECF No. 1) at 15 ¶¶ 1(b)(5)-(7). Such a request forces Respondents to, at a minimum, appear guilty despite a final determination on the merits, or supportive of the respective positions of Petitioner and the Union. Furthermore, such a course of action would create confusion about the status of the underlying dispute and the ultimate obligations of the parties, especially among employees who are not involved in the underlying dispute. In the absence of a final determination on the merits, Respondents should not be compelled to engage in the speech dictated by Petitioner.

3. Petitioner's Request Causes Irreparable Harm to Respondents.

While Petitioner argues that injunctive relief is needed to preserve the national policy encouraging collective bargaining, employee rights to choose union representation, and the NLRB's remedial power, "such equities have less weight in this context because they can be vindicated after a final judgment." Gunderson Rail Servs., LLC, No. 14-15713, 587 Fed. Appx. at 381. If it is determined that good cause employment terminations and other actions constitute unfair labor practices, then an order for reinstatement, back pay, and counting of the challenged ballots to determine if the outcome of the election should be changed may issue following the administrative law judge's decision and order. Petitioner's proffered equities are outweighed by the potential irreparable harm caused by reinstating validly disciplined employees who undisputedly detrimentally impaired Respondents' shows and operations in the very recent past. Indeed, Petitioner's request is improper because it has the potential to destroy or significantly impair Respondents' operations and shows.

Over the last seven months, Respondents have been operating their business and making necessary business decisions, including decisions on the staffing of shows, show mechanics and

procedures, training employees, and employee discipline. Forcing Respondents to now unwind those decisions and/or to displace individuals from employment imposes a significant hardship on Respondents—especially as no final determination has been made on the merits. The employees terminated by Respondents were terminated for good cause such as subpar performance, missed cues, and attendance violations. The employees' subpar performance and/or outright misconduct worsened the quality of the shows. Reinstatement of such employees will again lessen show quality and negatively impact the theater and shows' reputation. In show business, the reputation of the show is critical. Respondents should not be compelled to reemploy employees who detrimentally impact Respondents' shows and operations. Additionally, the reinstatement of employees terminated for good cause would result in potentially unnecessary training costs so that individuals could teach the reinstated employees the new cues that have changed since their employment terminations. A further undue financial cost would result in restoring operational work hours to employees since their hours were cut, along with those of others, because extra work call hours were not needed operationally. **RX 1**, Saxe Affidavit.

Furthermore, the terminated employees in question themselves undermined the NLRB's proceedings by violating the administrative law judge's sequestration order. **RX 2**, Anzalone 9/11/18. Tr. at 7:1-25; 8:1-25; 9:1-6; **RX 3**, Demirok 9/17/18 Tr. at 773:10-22. Specifically, immediately after receiving the sequestration order, the employees in question left the hearing and either individually or as a group met at a bar on Fremont Street and discussed the underlying matter in violation of the order on multiple occasions. See, e.g., **RX 3**, Demirok 9/17/18 Tr. at 770:21-25; 771:1-25; 772:1-4; **RX 4**, Hill 9/18/18 Tr. at 1072:1-25; 1073:1-24; **RX 5**, Gasca 9/19/18 Tr. at 1176:14-25; 1177:1-18; **RX 6**, Michaels 9/21/18 Tr. at 1539:1-9; 1541:1-25; 1543:1-7; **RX 7**, Langstaff 10/2/18 Tr. at 1847:13-25; 1846:1-6; 1847:13-25; 1848:1-9; 1884:8-25; 1885:1-25; 1849:2-25; 1850:1-3; 1881:15-25; 1882:1-9; **RX 8**, Graham 10/1/18 Tr. at 1722:1-25; 1723:1-8.; **RX 9**,

Bohannon Tr. 1249:3-25; 1250:1-25; 1251:23-25; 1252:1-6; 1254:14-25; 1255:1-8; 1256:1-25; 1257:15-25; 1258:1-8; 17-25; 1259:1-5; **RX 10**, McCambridge Tr. 3147:23-25; 3148:1-25; 3179:1; **RX 11**, Glick 9/20/18 Tr. at 1393:23-25; 1394:1-15; 1396:8-25; 1397:1-25; 1398:1-7; **RX 12**, Franco 9/20/18 Tr. at 1304:24-25; 1305:1-25; 1304:1-12; 18-21. Such improper behavior by the employees in question weighs against the equitable remedy sought by Petitioner. If the employees are unwilling to abide by the administrative law judge's order, surely they will not comply with Respondents' lawful directives and expectations.

In another instance, former employee Alanzi Langstaff also displayed aggressive and bullying behavior during his employment at the V Theater. Specifically, Langstaff engaged in numerous altercations with another stagehand, Ivan Barrera. The unprofessional behavior started after a performance of *Vegas! The Show* when Barrera complained to Stage Manager Thomas Estrada that Langstaff would aggressively launch prop arches at Barrera that would leave abrasions on Barrera's hands when he caught the arches.[3] Barrera asked Estrada if he could talk to Langstaff about handing off the arches in manner that would not result in physical injuries to Barrera. **RX 13**, Barrera 10/26/18 Tr. at 3286:9-21. Immediately thereafter, Langstaff aggressively approached Barrera backstage and called him a "little b****" for complaining about him. Id. at 3287:14-17; 3291:23-25. Barrera attempted to disengage from the altercation, but Langstaff intercepted him and stopped him from leaving while he continued calling Barrera names. Id. at 3293:9-22. In response, Barrera explained that all he wanted was for Langstaff to pass him the prop arches in a way that would not injure his hands or ankle. Id. at 3294:4-17. Estrada intervened and separated the two. Id. at 3294:22-25; 3295:1-3. Despite management's intervention, Langstaff continued to taunt Barrera at the time clock and even followed him out to the parking lot, which led to another employee having to break

[3]Given the comparative size difference between the two employees, Langstaff could have injured Barrera by such actions. Barrera is 5'9", 190 pounds. **RX 13** at 3288:13-16. Langstaff is 6'5" and 290 pounds; His nickname is "Bear." **RX 7** at 1851:15-16; 1856:25.

them up. Id. at 3303:2-4; 3304:16-20. Barrera wrote a statement to management about this interaction and requested to be transferred to other shifts so that he would not have to work with Langstaff. **RX 14,** Barrera's Complaint about Langstaff; **RX 13** at 3300:17-23; 3301:18-22; 3302:5-8. Eventually, due to business needs, Barrera was transferred back to work with Langstaff again and Langstaff continued to regularly threaten Barrera saying things like "let's go man to man" and "do you want to get slapped?" Id. at 3302:17-25; 3306:1-11. Langstaff's intimidating behavior continued until the end of his employment. Id. at 3305:24-25. The reinstatement of an employee engaged in such conduct would have a clear negative impact on Respondents' workplace.

Finally, it is noteworthy that Petitioner is asking to displace Respondents' current employees when Petitioner altogether fails to provide any evidence that the terminated employees in question are able or even want to return to work for Respondents. Such a request is especially detrimental as current employees (who may assume they will now be terminated) may immediately resign, leaving the shows and performances without the necessary personnel to complete. The failure to complete performances and shows would also result in lost revenue, including payments to performers who are paid regardless of whether the shows move forward, and potential liability to third-party shows who contract with and rely upon the staffing at the theaters. Further, if the Court orders the temporary reinstatement of employees who have been terminated for good cause and the corresponding displacement of the employees hired as their replacements, but then it is later determined that the terminations were lawful, Respondents will then be in a position where they will re-terminate the previously properly terminated employees and either hope that the replacement employee is still available for work and wishes to be re-employed or will have to find another replacement employee and incur the time and expense of training the new employee. In that regard, the balance of equities favors Respondents and do not support the imposition of an injunction in this matter.

B. Petitioner Fails To Demonstrate The Likelihood Of Irreparable Harm.

Petitioner fails to demonstrate that "irreparable harm" is likely or imminent in the absence of an injunction. "Irreparable harm" is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages. Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1068 (9th Cir. 2014). In that regard, irreparable harm cannot be "economic injury alone…because such injury can be remedied by a damage award." Rent-A-Center, Inc. v. Canyon Tele. & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991). Furthermore, a petitioner must sufficiently establish a claim for irreparable harm that consists of more than vague and speculative allegations. See Nev. Rest. Serv., Inc. v. City of Las Vegas, No. 2:15-cv-2240-GMN-GWF, 2016 WL 4721100, at *3 (D. Nev. Sept. 8, 2016).

Here, the Petition ignores the NLRB's ability to provide make-whole relief to any employee should the NLRB ultimately find a violation of rights. Indeed, any alleged harm can be adequately remedied by the NLRB through its standard procedures. Respondents ultimately prevailed in the secret-ballot election with a vote of 19 in favor of the Union and 22 opposed to the Union. **PX 73**. Accordingly, no collective bargaining obligation currently exists between Respondents and the Union. The 19 employees who voted in favor of the Union are presumably (given that it is a secret-ballot election and Respondents do not know how employees voted) still employed by Respondents and can continue with their organizational activities if so inclined.

The seven challenged ballots cast by former employees in the election will be resolved in the immediate future by the administrative law judge. If Petitioner prevails before the administrative law judge on some or all the challenged ballots, then an order for reinstatement of the employee(s), back pay, and the counting of the challenged ballots to determine the outcome of the election will be imposed. Furthermore, assuming Petitioner prevails, a collective bargaining obligation will be imposed on Respondents at that time. Consequently, contrary to Petitioner's arguments, the alleged

organizational effort is not doomed unless the alleged discriminatees are immediately reinstated because the decision of the administrative law judge will ultimately decide and resolve all those issues. Therefore, as an adequate remedy presently exits, Petitioner fails to demonstrate a likelihood of irreparable harm.

Petitioner also fails to demonstrate a likelihood of irreparable harm because its vague and speculative allegations are not supported by the evidence. Glaringly absent from Petitioner's request is any evidence that the terminated employees are able or even want to return to work for Respondents. The dearth of such affirmative evidence belies Petitioner's present request. Petitioner also fails to demonstrate any imminent or continuing diminution in support for the Union or other protected, concerted activities. However, Petitioner's efforts to end run the due process of a proper election will unfairly tip the scales in favor of the Union. Should a re-run election be ordered, admitted union supporters will be reinstated and individuals whose sympathies are not known, will be terminated. If anything, Petitioner's proffered evidence demonstrates that employees became more supportive of the Union and sought to accelerate their organizational activities once certain employees were terminated from employment. See **PX 36**. Petitioner's other vague conjectures and unsupported arguments of irreparable harm are insufficient to impose the extraordinary remedy sought by Petitioner.

Petitioner's delay in seeking Section 10(j) relief also weighs against granting the requested extraordinary remedy. Petitioner waited nearly seven full months from the time the initial unfair labor practice charge was filed through the end of trial before filing the present Petition. Such action by Petitioner seems contradictory to even its own internal practices. See, e.g., Office of the General Counsel, Memorandum GC 18-05 (June 20, 2018) (noting that "potential 10(j) cases should be submitted to [the Injunction Litigation Branch] in advance of the hearing before an Administrative Law Judge....it does not serve our purpose to delay seeking an injunction to strengthen the theory

of violation where the Regional Director has already found sufficient merit to issue a complaint. In fact, it works against us by creating additional delay."). If Petitioner's were truly concerned with the effect of Respondents' lawful discipline of several of its employees, it could (and should) have sought Section 10(j) relief at the outset of this matter in April 2018.

Petitioner's delay in seeking injunctive relief undermines the argument that irreparable harm is imminent and goes well beyond returning the parties to the status quo. This is not a case where the NLRB acted diligently to immediately restore the employment rights of alleged discriminatees through injunctive relief shortly after the alleged unlawful conduct took place. Instead, Petitioner pursued its standard procedures through the multi-month trial. Now, Petitioner is asking this Court to unwind nearly seven months of Respondents' legitimate business decisions and to displace other individuals employed by Respondents. Such delay is significant where, as here, "the harm has occurred and the parties cannot be returned to the status quo or if the Board's final order is likely to be as effective as an order for interim relief." McDermott ex rel. Ampersand Publ'g, LLC, 593 F.3d 950, 963 (9th Cir. 2010); McDermott v. Veritas Health Servs., Inc., No. CV 11-2852 PA OPX, 2011 WL 2693922, at *5 (C.D. Cal. May 9, 2011), aff'd, 469 F. App'x 544 (9th Cir. 2012) (denying Section 10(j) relief where employee disciplines forming the basis of the unfair labor practice charges occurred one year prior to the Section 10(j) petition); see also NLRB v. Marina City Co., 428 F. Supp. 1090, 1093 (C.D. Cal. 1977) (denying Section 10(j) relief because a "preliminary injunction could not preserve the status quo because the Board has waited three months since the alleged unfair labor practices occurred before filings its petition). Here, the matter has been tried, will be briefed to the administrative law judge in the immediate future, and ultimately determined by the administrative law judge soon. Awaiting the determination of the administrative law judge will certainly have no effect or impose irreparable harm given the nearly seven months of delay that has already elapsed since the inception of this matter.

C. *Petitioner Fails To Establish A Likelihood Of Success On The Merits.*

Petitioner's request for injunctive relief must be denied because Petitioner fails to demonstrate a likelihood of success in establishing that the employment separations of the employees in question were unlawful or that Respondents engaged in other unlawful conduct. In determining whether a discipline or termination is lawful under the Act, it is well-established that the Board applies the burden-shifting framework first adopted in Wright Line, 251 N.L.R.B. 1083, 1089 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), and later endorsed by the Supreme Court in N.L.R.B. v. Transportation Management, 462 U.S. 393, 401-03 (1983). See NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261, 267 (9th Cir. 1995). According to the Wright Line burden-shifting framework, to sustain an unfair labor practice charge, a charging party has the burden of proving a *prima facie* case by showing that his or her alleged protected activity was a substantial or motivating factor in the decision to discipline or terminate the employee. Peavey Co., 648 F.2d at 461; N.Y. Univ. Med. Ctr., 324 N.L.R.B. 887, 900 (1997).

The elements required to support a showing of discriminatory motivation are: (1) protected concerted activity by the employee; (2) employer knowledge of the protected activity; (3) timing; and (4) adverse action by the employer *because of* anti-union animus. Sears, Roebuck & Co. v. N.L.R.B., 349 F.3d 493, 503 (7th Cir. 2003); Fed'n of Teachers Welfare Fund, 322 N.L.R.B. 385, 392 (1996). The employee must prove not only that the employer knew of his or her protected concerted activities, but also that there was animus to link the factors of timing and knowledge to the improper motivation. See N.Y. Univ. Med. Ctr., 324 N.L.R.B. at 900 (citing Hall Constr. v. N.L.R.B., 941 F.2d 684 (8th Cir. 1991) and Serv. Employees Local 434-B, 316 N.L.R.B. 1059 (1995)); see also United Fed'n of Teachers Welfare Fund, 322 N.L.R.B. at 392 (stating that General Counsel is required to prove the timing of the alleged reprisal was proximate to protected activities). If such unlawful motivation is shown, the burden of persuasion shifts to the employer to prove its affirmative

defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. See Sears, Roebuck & Co., 349 F.3d at 503; Excel Corp., 324 N.L.R.B. 416, 420 (1997); N.Y. Univ. Med. Ctr., 324 N.L.R.B. at 900.

Here, Petitioner cannot establish a likelihood of success on the merits due to the dearth of evidence demonstrating discriminatory motivation—namely that there was protected activity known to Respondents and illegal animus. Indeed, Petitioner's demand for a temporary injunction is based on speculation and supposition, which cannot support such an extraordinary remedy. On the other hand, the direct evidence before this Court and the administrative law judge demonstrates that Respondents acted lawfully in making business decisions based on non-discriminatory and non-retaliatory factors. Consequently, as Respondents' termination of employment of the employees in question was for legitimate business reasons and not for any protected, concerted activity, the Petition should be denied.

As an initial threshold matter that applies to all the alleged discriminatees, Petitioner provides no evidence that Respondents harbored or acted with any illegal union animus toward these employees. Instead, the evidence demonstrates that Respondents' employees are free to choose for themselves whether to seek representation by a union. Furthermore, the evidence demonstrates that Respondents acted solely with the legitimate business interest of maintaining proper operations by ensuring that employees perform their job duties with the requisite skill. Absent evidence of illegal animus, Petitioner's assertions fall flat, and Petitioner fails to sustain its burden of proof on the 8(a)(3) allegations. Columbian Distribution Servs., Inc., 320 N.L.R.B. 1068, 1071 (1996). Consequently, as no express or implied evidence of animus has been presented to the tribunal in the present matter, the requested injunctive relief should be dismissed outright.

1. Prior Management Failed to Properly Discipline and Manage Employees Leading to Several Employee Terminations Two Weeks After the Prior Manager's Termination.

Former Production Manager Jason Pendergraft supervised the nine former employees for whom Petitioner is seeking injunctive relief. The V Theater hired Pendergraft on or around September 7, 2016. **RX 15**, Pendergraft's Termination Form. As Production Manager, Pendergraft supervised stagehands, audio technicians, lighting technicians, and wardrobe technicians; however, throughout his employment, Pendergraft failed to hold employees accountable, enforce company policies, or issue discipline for policy violations or job performance issues. **RX 16**, Saxe 9/12/18 Tr. at 192: 13-22. While he was repeatedly admonished about enforcing company policies and issuing discipline, Pendergraft refused to comply with the directives of Respondents' owner, David Saxe. **RX 17,** Emails to Pendergraft. Saxe even resorted to emailing Pendergraft pictures of policy violations in an effort to encourage him to enforce company policies and properly supervise his employees. Id. Nevertheless, Pendergraft continually failed to properly manage his employees and did not consistently issue discipline during his tenure with the V Theater. **RX 16**, Saxe 9/12/18 Tr. at 259:10-15; **RX 18**, DeStefano 10/22/18 Tr. at 2567:18-21. Instead, Pendergraft appeared to improperly and discriminatorily protect employees with whom he was friendly.

Immediately prior to Pendergraft's employment termination, Respondents noticed suspicious company account transactions and thereafter conducted an audit, which revealed unauthorized transactions by Pendergraft. Upon further investigation, Respondents discovered forged invoices, missing equipment, and stolen cash.[4] **RX 16**, Saxe 9/12/18 Tr. at 302:1-25; 303:1-7; **RX 20**, Ciulla 10/16/18 Tr. at 3358:17-19. Consequently, upon confirmation of the theft, Respondents terminated Pendergraft's employment on February 21, 2018. **RX 16**, Saxe 9/12/18 Tr. at 305:1-2; **RX 15**. During the investigation of Pendergraft's misconduct and following his termination, current Production Coordinator Tiffany DeStefano discovered and/or reported numerous cases of employee poor job performance and misconduct that Pendergraft allowed to take

[4] Respondents filed a police report against Pendergraft on March 16, 2018 and are currently pressing charges for theft of property and embezzlement. **RX 19**, Police Report.

place or concealed from Saxe. **RX 18**, DeStefano 9/13/18 Tr. at 475: 13-19; 481: 10-13. As a result, several employees were subsequently separated from employment on or around March 19, 2018 due to the serious performance, attitude, and attendance issues discovered when DeStefano was finally empowered to supervise the stagehands, audio technicians, lighting technicians, and wardrobe technicians. **RX 16**, Saxe 13/31/18 Tr. at 3469:13-25; Saxe 9/11/18 Tr. at 122:5-13; 15-17; Saxe 9/12/18 Tr. at 283:22-25; 284:1; **RX 18**, DeStefano 9/13/18 Tr. at 324:12; 418:14; 475: 13-19; 481: 10-13.

To remedy Pendergraft's failure to properly supervise his subordinates and to restructure in a way that allowed Respondents to remove underperforming employees, DeStefano approached Saxe on March 15, 2018 with a list of employees she recommended be terminated from employment. **RX 16**, Saxe 9/11/18 Tr. at 130:15; 19-21; 25. Prior to that date, on February 6, 2018, DeStefano provided Respondents with performance rankings of the stagehands and audio technicians. **RX 21**, 2/6/18 Stagehand Rankings; **RX 22**, 2/6/18 Audio Technician Rankings. DeStefano also followed up with emails memorializing the reasons for her decision to terminate the discussed employees. **PX 53** through **PX 59**. For the reasons set forth in detail *infra*, Taylor Benavente Bohannon, Kevin Michaels, Nathaniel Franco, Alanzi Langstaff, Jasmine Glick, Chris Suapaia, and Michael Gasca, were terminated from employment in an effort to replace poor performing employees and, in turn, increase the show quality. **PX 34** at 2-7, 9; **RX 16**, Saxe 10/31/18 Tr. at 3469:13-25; 3471:11-24. There is no evidence other than supposition by Petitioner to suggest otherwise. Those terminations primarily occurred on or around March 19, 2018, with Michaels not being terminated until April 2, 2018 because Respondents had to find a replacement for him who could perform his track. **RX 18**, DeStefano 10/23/18 Tr. at 2826:22-25; 2827:1. Notably, Leigh-Ann Hill and Zachary Graham were terminated on different dates for *specific misconduct* rather than general poor job performance and restructuring as discussed *infra*. At the time

that these decisions were made, there was no evidence of union activity or union organizing known to Respondents.

2. Respondents Had No Knowledge of Union Activity Until April 9, 2018.

On or around April 9, 2018, Respondents first became aware that there may be a potential union presence when the V Theater received Glick's unemployment paperwork in which she claimed she was terminated for engaging in protected activity. **RX 16**, Saxe 10/31/18 Tr. at 3472:24-25; 3473:1-2. Thereafter, the union activity was confirmed to management on April 10, 2018 when Graham was on property in the V Theater parking lot passing out union cards or other union information. **RX 18**, DeStefano 10/22/18 Tr. at 2614:5-17; **RX 16**, Saxe 10/31/18 Tr. at 3473: 18-23; **RX 23**, Estrada 10/25/18 Tr. at 3101:20-23. Notably, however, all the employee terminations in question occurred prior to April 9, 2018. **PX 34**.

3. Taylor Benavente Bohannon and Nathanial Franco—Performance Issues.

Bohannon was hired by the V Theater as an audio technician on November 4, 2017. She received written discipline for poor job performance on December 27, 2017. **RX 24,** Bohannon 12/27/17 Discipline. In the beginning of March of 2018, within an approximate two-week period, Saxe received complaints from three performers, all complaining about Bohannon's job performance and lack of experience. **RX 16**, Saxe 9/11/18 Tr. at 111:12;16-17. Specifically, Gerry McCambridge, the star of *The Mentalist*, complained that when Bohannon was working, he ran his own audio to ensure that his show would not be messed up and claimed that Bohannon "was ruining his show" and she "was very unprofessional." Id. at 111:12-20. Indeed, during the hearing McCambridge described Bohannon as a "knob turner," and indicated that she was unable to correct errors on her own without the help of a manager. **RX 10**, McCambridge Tr. at 3145:5-16. Around that same time, Saxe received a complaint from the star of *Zombie Burlesque*, Enoch Scott, claiming that Bohannon did not have what it took to be an audio technician. **RX 16**, Saxe 9/11/18 Tr. at

112:3-6. Saxe also received a complaint from the host of *V the Ultimate Variety Show*, Wally Eastwood, also expressing that Bohannon was not qualified. Id. at 3474:16-17; 23-24. Bohannon's subpar work performance was investigated and confirmed by DeStefano on or around March 15, 2018, resulting in Bohannon's termination from employment on March 19, 2018. **RX 18**, DeStefano 10/22/18 Tr. at 2608:6-25; 2609:1-2. Importantly, Bohannon does not dispute that she missed cues and would be on her cell phone during shows. **RX 9**, Bohannon Tr. at 1238:22-23; 1239:7-12. Bohannon also agreed with McCambridge's complaints admitting that she understood why McCambridge did not think she should be running a show by herself because it was her first audio job outside of high school. Id. at 1247:17-20; 1259:18-23.

The V Theater hired Nathaniel Franco on December 4, 2017 as an audio technician. However, Franco was unable to effectively perform his job through his entire employment. During his employment, Respondents moved Franco through nine different shows to find a good fit and have him assigned to shows that he could adequately run. **RX 18**, DeStefano Tr. 10/23/18 Tr. at 2652:6-16. Despite Respondent's efforts, Franco was unable to execute his shows and continuously made significant mistakes despite receiving twice the amount of training of other employees. Id. at 2653:24-25; 2654:1-2; **PX 59**. Specifically, during shows, Franco missed the band's volume and played the wrong announcement on at least three occasions resulting in complaints from performers and management. **RX 18**, DeStefano 10/23/18 Tr. at 2654:14-19; 23-25; 2658:3-9. An error such as playing the wrong announcement is not only apparent to the audience, but also causes havoc backstage. Id. at 2655:6-8; 23-25; 2656:1-2. Accordingly, Respondents terminated Franco's employment on March 19, 2018. Id. at 2658:16-18. This terminable offense is not contested by Franco. Franco agreed that playing a wrong announcement is a "major disruption" and that he made that mistake "at least a couple times during his employment." **RX 12**, Franco Tr. at 1308:12-25; 1309:9-12. In fact, Franco admitted that he played the wrong announcement the week before his

termination and that it was a "disaster." Id. at 1321:2-4. Franco further testified that he had no real experience in audio and he knew that his job performance was subpar. Id. at 1307:17-25; 1308:1; 1319:23-25; 1320:1-2.

Here, Petitioner is unable to demonstrate a likelihood of success on the merits or even a *prima facie* case under the Wright Line analysis discussed *supra*. Specifically, Petitioner fails to demonstrate that Respondents had knowledge of Bohannon or Franco's alleged protected activity, suspicious timing, or that their terminations were the result of their alleged protected activity. Petitioner also cannot prove timing or causation because Bohannon's poor employment performance was being discussed as early as February 6, 2018, Franco was identified as one of the poorest performing audio technicians as early as February 6, 2018, and both were in fact terminated on March 19, 2018—several weeks prior to when Respondents first became aware of any potential union campaign and over a month prior to the filing of the Petition for a Representation Election on April 26, 2018. **PX 34**; **PX 68**; **RX 22**.

Furthermore, Bohannon and Franco were not terminated *because* of any union activity. Respondents terminated Bohannon for poor job performance after receiving multiple complaints about her subpar job performance. **RX 18**, DeStefano 10/22/18 Tr. at 2608:6-25; 2609:1-2. Respondents terminated Franco because of his poor job performance and failure to grasp the essential functions of his position despite being trained twice as much as any other audio technician. **PX 34**; **PX 59**. Importantly, both Bohannon and Franco admitted during their testimony that they had made serious errors during their employment and they understood the complaints against them. Respondents acted for legitimate business purposes that would have compelled termination regardless of any alleged protected activity. Respondents are in the business of providing high quality shows and positive guest experiences. In doing so, Respondents must employ hard working, professional employees that can efficiently complete their job tasks. Poor job performance that

disrupts the show experience and causes a star to claim that an employee "ruined his show" will not be tolerated and is a legitimate business reason for termination. See Advanced Masonry Assocs., LLC d/b/a Advanced Masonry Sys. & Bricklayers & Allied Craftworkers, Local 8 Se., 366 N.L.R.B. No. 57 (Apr. 13, 2018) (poor work performance is a legitimate business reason for termination). Moreover, other employees who did not engage in any known protected activity have been terminated for similar performance issues. **RX 25,** Poor Job Performance Comparators. Accordingly, the employment terminations of Bohannon and Franco were lawful and an injunction compelling their reinstatement should be denied.

4. Alanzi Langstaff, Jasmine Glick, and Kevin Michaels—Attendance Issues and Policy Violations.

During his employment, Alanzi Langstaff displayed significant attendance, timeliness, and work ethic issues. **RX 18**, DeStefano 10/23/18 Tr. at 2659:19-21. In fact, Langstaff constantly arrived late to work. He was tardy 31 times from January 2, 2018 through March 12, 2018. **RX 26,** Langstaff Attendance Summary. Mr. Langstaff was so late on at least one occasion that he did not arrive until after the show had already begun, resulting in a written discipline. **RX 27**, Langstaff 1/26/18 Warning; **RX 28**, Excerpts from Employee Handbook; **RX 7** at 1877:13-23 (Langstaff admitting he was late). DeStefano spoke to Langstaff on numerous occasions asking him to follow her schedule, but to no avail. **RX 18**, DeStefano 10/23/18 Tr. at 2667:4-12. Moreover, when Langstaff did come to work, he was unprepared and would often not bring the equipment necessary to do his job or wear the proper shoes. **RX 23**, Estrada 9/17/18 Tr. at 797:2-8. Langstaff's termination was recommended by his stage manager (Estrada) and DeStefano when she spoke to Saxe on or around March 15, 2018. **RX 18**, DeStefano 10/22/18 Tr. at 2578:10-19. Respondents terminated Langstaff's employment on March 19, 2018. **PX 34**.

Respondents employed Jasmine Glick as a spot light operator at the V Theater. **RX 18**,

DeStefano 10/23/18 Tr. at 2689:20-21. In January of 2018, DeStefano identified Glick as an employee with poor job performance due to Glick's unreliable attendance record and failure to follow company policies. Id. at 2695:12-13; 21-25; 2696: 1-4. DeStefano discussed the attendance issues with Glick, but those conversations were ultimately unsuccessful in remedying Glick's attendance issues. Id. at 2696:16-25; **RX 29,** Statement by DeStefano re: Glick. On numerous occasions during the last month of her employment (February 24, March 2, March 3, and March 13, 2018), Glick arrived late to work causing the cast and crew to panic. Id. Additionally, Glick was admonished by DeStefano on numerous occasions about not using her cellular telephone during shows. **RX 18**, DeStefano 10/23/18 Tr. at 2691:8-17. Despite receiving and being spoken to about the cellular telephone policy, Glick's continued cellular telephone usage interfered with her ability to properly and safely operate the spot light. **RX 16**; **RX 30**, Glick Receipt of Handbook; **RX 31**, Glick Receipt of Cell Phone Policy. In fact, performers regularly complained about Glick's work performance. She missed cues which would leave performers in the dark while up on poles in the air unable to see. **RX 18**, DeStefano 10/23/18 Tr. at 2693:7-13. Glick also missed spot lights for the star of the *Zombie Burlesque* show and failed to turn on the lights when the curtains opened. Id. at 2693:21-23; 2694:14-17. Respondents received those complaints around the end of February 2018. Id. at 2694:20-23. Ultimately, DeStefano terminated Glick's employment on March 18, 2018 and explained that Glick's attendance, cellular telephone usage, and Respondents' restructuring were the basis for Glick's termination. Id. at 2699:9-16; 2691:6-7.

The V Theater hired Kevin Michaels as a stagehand on August 26, 2015. Michaels' employment tenure exhibited consistent poor attendance, as well as substandard job performance and insubordination. **RX 18**, DeStefano 9/13/18 Tr. at 358:2-7; 17-19, 24-25; 359:8-10; 17-18; 25. The final straw, which ultimately led to Michaels' termination, revolved around scheduling and his insubordination. Id. at 360:3-4; 14-16. In late February and early March, Michaels refused to comply

with his assigned schedule. Instead, he would arrive at work anywhere between sixteen minutes early to two hours late and would leave anywhere between one hour and 31 minutes early to one hour and eight minutes late. **RX 32**, Michaels Clock In/Out Summary. Michaels did not deny these attendance issues. **RX 6** at 1563:20-25; 1564:1-25; 1565:1-15. This behavior is in direct violation of the applicable Timekeeping Policy requiring that employees clock in no earlier than five minutes prior to their shift and clock out no later than five minutes after their shift. **RX 28**, Handbook Excerpt; **RX 33**, Michaels Acknowledgment of Receipt of Employee Handbook. When DeStefano spoke to Michaels about his attendance issues, he was insubordinate, expressed an attitude, and displayed an overall rude demeanor. **PX 56**; **RX 18**, DeStefano 9/13/18 Tr. at 358:17-19; 24-25; 365:2-7. As a result of his repeated policy violations and insubordinate attitude toward his supervisor, Respondents terminated Michaels' employment on April 2, 2018. **PX 34**.

Here, Petitioner cannot demonstrate that Respondents had knowledge of any alleged protected activity by Langstaff, Glick, or Michaels, suspicious timing, or that their terminations were the result of any alleged protected activity. Langstaff was identified as the weakest stagehand on February 6, 2018 and his termination was effective March 19, 2018. **RX 21**; **PX 34; PX 62**. Glick's employment termination occurred on March 19, 2018. **PX 34**; **PX 62**. Michael's termination was discussed on March 16, 2018 and occurred on April 2, 2018. **PX 34; PX 56; PX 62**. Those employment terminations all occurred before Respondents first became aware of any potential union campaign and several weeks prior to the filing of the Petition for a Representation Election.

Furthermore, Respondents acted with legitimate business purposes that would have compelled termination regardless of any alleged protected activity. Michaels was terminated for his repeated violations of the applicable Timekeeping Policy, his insubordination in continuing to violate the policy when directed otherwise by management, and his attitude when spoken to by management. **RX 18**, DeStefano 9/13/18 Tr. at 358:2-7; 17-19, 24-25; 359:8-10; 17-18; 25; 360:3-4;

14-16. Michaels knowingly violated the policy as he acknowledged that he received the Timekeeping Policy and knew of the expectation that he comply with all the policies in the Employee Handbook. **RX 33**. Glick was terminated for her repeated violations of the Attendance and Tardiness Policies and Cellular Telephone Use Policy. **RX 28**; **RX 30**. Glick acknowledged that she received the Attendance and Tardiness Policies, the Cellular Telephone Use Policy, and was aware of Respondents' expectation that she comply with those policies and all the policies in the Employee Handbook. Id. Glick also admitted that she had been late on at least four occasions in her last month of employment and admitted that she had used her cell phone while on the clock multiple times. **RX 11** at 1425:2-3; 17-21; 1426:12-16; 1432:15-19. Glick's improper cellular telephone use resulted in missed cues and dangerous errors in the show. **RX 18**, DeStefano 10/22/18 Tr. at 2693:21-23; 2694:14-17. Langstaff was terminated for his repeated violations of the Attendance and Tardiness Policies. **RX 28**; **PX 34.** Langstaff acknowledged that he received the Attendance and Tardiness Policies and knew he was required to comply with all the policies in the Employee Handbook. **RX 34**, Langstaff Acknowledgment of Receipt

The entertainment shows put on by Respondents are scheduled for specific times. Employees are scheduled according to business needs and are expected to be present for their entire assigned shift. Employees who are unreliable interfere with Respondent's business operations. An employee's refusal to comply with schedules and refusal to comply with management's request cannot be tolerated and is a legitimate business reason for termination. Attendance issues and deficient job performance are both legitimate business reasons for termination. See Health Management, Inc., 326 N.L.R.B. 801 (employee lawfully discharged for just cause where employee had continuing attendance and tardiness problems); Cambridge Chemical Corp., 259 N.L.R.B. 1374 (same); South Carolina Industries, 181 N.L.R.B. 1031 (same); see also Advanced Masonry Assocs., 366 N.L.R.B. No. 57 (poor work performance is a legitimate business reason for termination).

Accordingly, the employment terminations of Langstaff, Glick, and Michaels were lawful and any injunctive relief requiring their reinstatement should be denied.

5. Zachary Graham—Job Abandonment.

The V Theater hired Zachary Graham as a stagehand on August 25, 2014. On February 21, 2018, Graham sustained a non-work-related injury which resulted in him seriously injuring his arm. **RX 18**, DeStefano 10/23/18 Tr. at 2646:7-17; 2647:1-6. On February 22, 2018, Graham visited the V Theater and informed DeStefano that he was unable to work due to his injury. Id. When DeStefano asked Graham for a doctor's note, he provided a one-page, vague document that released him to full duty on February 25, 2018. Id.; **RX 35**, Graham's Doctor Note. DeStefano explained to Graham that she needed further documentation—either FMLA or some sort of paperwork that provided a date when Graham would be able to return to work. **RX 18**, DeStefano 10/23/18 Tr. at 2646:7-17; 2647:1-6. DeStefano was particularly concerned because Graham told her that he had a surgery planned, but the note he provided released him to work on February 25, 2018—three days hence and before the scheduled surgery. Id. at 2647:19-25; 2648:1-9; **RX 35**. DeStefano emphasized that if he provided the necessary paperwork, Graham's job would be safe. **RX 18**, DeStefano 10/23/18 Tr. at 2646:13-16. DeStefano followed up with Graham the following day asking for the additional medical documentation. Id. at 2647:6-9. Graham again provided the same vague and ambiguous one-page note. Id.; **RX 35**.

Subsequently, having not received any updates or information about his condition, DeStefano called Graham every Monday when she did payroll to check on his status, but to no avail. **RX 18**, DeStefano 10/23/18 Tr. at 2648:10-21. Because Graham did not return to work on February 25, 2018, did not provide requested additional medical documentation about his work restrictions, and did not respond to any contact attempts made by DeStefano or Stage Manager

Estrada, Respondents terminated Graham's employment for job abandonment on March 23, 2018, with an effective date of March 1, 2018. **PX 34; RX 16**, Saxe 9/11/18 Tr. at 134:5-11; 20-24; **RX 18,** DeStefano 10/23/18 Tr. at 2648:8-9; 11-15; 23-25; 2649:1-11; **RX 8** at 1709:4-10 (admitting he did not provide any additional medical documentation). DeStefano texted Graham on March 21, 2018 to notify him of his termination. **RX 8** at 1711:16-25; 1712:1. Graham did not respond substantively to the termination message, contact anyone else with Respondents, or ever ask to be re-hired. Id.

Here, Petitioner is unable to show that Respondents had knowledge of any alleged protected activity prior to the decision to terminate Graham's employment. Further, Petitioner cannot show an adverse employment action since *Graham abandoned his job* by failing to return to work, failing to provide a requested doctor's note, and failing to respond to any agent of Respondents for nearly a month-long period. After Graham stopped reporting for work and ceased communication, Respondents were forced to separate him from employment. Even if his job abandonment termination is viewed as an adverse action, Graham cannot prove the requisite timing or causation because his termination occurred on March 23, 2018—weeks before Respondents first became aware of any potential union campaign and over a month before the Petition for a Representation Election was filed. **PX 34; PX 62**.

Respondents acted for legitimate business purposes that would have compelled termination of Graham regardless of any alleged protected activity. Graham could not return to work due to his alleged injury and refused to provide adequate medical documentation or respond to any attempted communications by Respondents. **RX 8** at 1709: 4-10; 1711:23-25; 1712:1. After nearly a month of trying to contact Graham to no avail, Respondents terminated his employment. Accordingly, the employment termination of Graham was lawful and any injunction seeking his reinstatement should be denied. See Fresh & Easy Neighborhood Market, Inc., 356 N.L.R.B. 546 (2011) (employee lawfully terminated for job abandonment).

6. Leigh-Ann Hill—Scheduling Issues Caused by Hill.

Respondents hired Leigh-Ann Hill on August 14, 2017 as part of the day crew. On February 26, 2018, Hill informed DeStefano that she had accepted another job with conflicting hours and that the new job took priority over her job with Respondents. **RX 18**, DeStefano 10/22/18 Tr. at 2587:5-8; 18-20; 24. As a result, DeStefano began arranging to replace Hill at that time based on Hill's representation that she would not be coming to work if her new job needed her. Id. DeStefano began training another employee on Hill's duties and began the replacement process. Id. at 2589: 3-4; 10-13; 19-20. Hill subsequently confronted DeStefano in her office on March 1, 2018 after she learned that a replacement employee was being trained for her track. Id. at 2588:9; 18-24. Hill screamed at DeStefano and asked if she was being fired. Id. at 2590:15-17. Hill also cursed at DeStefano admittedly using language such as "f***," "s***" and "bulls***." **RX 4** at 1084:24. DeStefano informed Hill that Respondents cannot maintain a full-time employee who is not able to commit to a consistent schedule. **RX 18**, DeStefano 10/22/18 Tr. at 2591:4-12. Consequently, the following day, Human Resources Manager Takeshia Carrigan called Hill and informed her of her employment termination. **RX 36**, Carrigan 9/14/18 Tr. at 721:17-19. Significantly, other employees have been terminated by Respondents for scheduling issues. **RX 37**, Comparators for Scheduling.

Here, Petitioner fails to demonstrate that Respondents had knowledge of any alleged protected activity, suspicious timing, or that Hill's employment termination was the result of any alleged protected activity. Hill's employment termination occurred on March 2, 2018—over a month before Respondents first became aware of any potential union campaign and prior to the filing of the Petition for a Representation Election. **PX 34**; **PX 62.** Further, Respondents terminated Hill's employment because she could no longer fulfill her obligations as a full-time employee and was unable to offer a consistent schedule—not for any alleged protected activity. **PX 34; RX 18**, DeStefano 10/22/18 Tr. at 2587:5-8; 18-20; 24. Hill admittedly worked three other jobs while she

was employed at V Theater, including two new jobs that she was hired for just a week before her termination. **RX 4** at 1076:16-24; 1077:8-10; 1079:4-7 (Hill was also employed at PRG and was hired at Production Theory and a community theater in late February 2018).

Respondents acted for legitimate business purposes that would have compelled termination regardless of any alleged protected activity. Employees are scheduled according to business needs and are expected to be present for their entire assigned shift. An employee who is unreliable or regularly unavailable interferes with Respondents' business. Attendance issues are a legitimate business reason for termination. See Health Management, Inc., 326 N.L.R.B. 801 (employee lawfully discharged for just cause where employee had continuing attendance and tardiness problems); Cambridge Chemical Corp., 259 N.L.R.B. 1374 (same); South Carolina Industries, 181 N.L.R.B. 1031 (same). Additionally, employees with no union affiliation have been terminated for similar scheduling conflicts and attendance issues. **RX 37**. Accordingly, the employment termination of Hill was lawful and any injunctive relief requiring her reinstatement should be denied.

7. Chris Suapaia—Scheduling Issues and Unwillingness to Perform Shows.

Chris Suapaia worked as a stagehand at the V Theater commencing October 26, 2017. **RX 18**, DeStefano 10/23/18 Tr. at 2702:1-2. Suapaia—almost immediately after being hired—was unable to run tracks in two of the four theaters. Id. at 2703:2-3. Respondents moved Suapaia to the Saxe Theater. Id. at 2703:3-5. However, in February 2018, Suapaia began complaining about his ability to perform his track in the Saxe Theater necessitating another move. Id. 2703:5-6; 10-15; 17-24. Ultimately, Respondents terminated Suapaia for his limited scheduling and availability as well as his lack of willingness to execute shows. Id. at 2702:22-25. Specifically, Suapaia kept "shrinking his availability" and could no longer work the six days a week that he was hired to work. Id. at 2704:19-22. To further exasperate that issue, Suapaia would not inform his employer of his unavailability until after the schedule went out for the week causing DeStefano to scramble to reschedule

stagehands. Id. at 2705:14-23; 2702:13-18; **RX 38**, Suapaia Tr. at 1491:1-9 (admitting he would call out of work, including once because he was incarcerated and in jail). In fact, the week prior to his termination. Suapaia called out from work for an entire week without any explanation. **RX 18** at 2707:12-18. Suapaia was also particular with which tracks he was willing to run because he had a fear of walking backward, which fear impeded the moving of props on the stage, rendering his service useless. Id. at 2704:2-3. Respondents attempted to accommodate his preference, but his inflexibility rendered him unqualified to continue in employment. Id. at 2708:7-9; 2703:17-19; 22-24. Suapaia was terminated on March 19, 2018. **PX 34**.

Here, Petitioner is unable to show that Respondents had knowledge of any alleged protected activity, suspicious timing, or that Suapaia's termination was the result of his alleged protected activity. Respondents terminated Suapaia on March 19, 2018—several weeks prior to when Respondents first became aware of any potential union campaign and over a month before the Petition for a Representation Election was filed. **PX 34**; **PX 62**. Further, Suapaia was not terminated because of any union activity; he was terminated for poor job performance because he struggled with his job duties and was an unreliable employee. Respondents acted with legitimate business purposes. Employee dependability is a necessary and important attribute for employees in the entertainment business as all shows are only as strong as the people behind the scenes. Employers are not required to maintain the employment of employees with limited schedules or who fail to perform the functions of their positions. Accordingly, in view of the foregoing, and as Respondents would have terminated Suapaia regardless of any alleged protected concerted activity, the termination of Mr. Suapaia was lawful, and he should not be reinstated.

8. Michael Gasca—Poor Job Performance and Restructuring of Operations.

Michael Gasca worked as an on-call stagehand at the V Theater. **RX 18**, DeStefano 10/23/18 Tr. at 2709:11-12. At the time of his hire, Respondents employed only two on-call

stagehands, Gasca and Kostyantyn Melnichenko. Id. at 2718:1-2. During his employment, Gasca exhibited work performance issues. Specifically, Gasca would complain rather than focus on performing his job duties. Id. at 2715:21-22. Notably, however, DeStefano did not identify the issue as the complaining itself, but rather the impact Gasca's complaining had on his productivity. Id. at 2715:21-26; 2716:1-4. When Gasca was performing work, he would miss cues that had a detrimental effect on show quality. Id. at 2717:1-5 (DeStefano describing everything that Gasca had messed up on a show was "a disaster" and "a mess."); **RX 39**, Mecca Tr. at 3182:6-10; 16-17; 3169:11-24 (Mecca claiming that Gasca missed cues); **RX 40**, Sojak Tr. at 3195:21-22 (Sojak stating same). In addition to his subpar work performance, Respondents decided to terminate all on-call employees as they restructured the operations to be more efficient and on-call stagehands were therefore no longer needed. **RX 18**, DeStefano 10/23/18 Tr. at 2718:1-2. As a result, Gasca was terminated on March 19, 2018. **PX 34**.

Here, Petitioner fails to establish that Respondents had knowledge of any alleged protected activity, suspicious timing, or that Gasca's termination was the result of his alleged protected activity. Respondents terminated Gasca's employment on March 19, 2018—several weeks prior to when Respondents first became aware of any potential union campaign and over a month before the Petition for a Representation Election was filed. **PX 34; PX 62**. Additionally, although Petitioner claims that Gasca submitted a letter indicating that he would be participating in the Teamsters Union Apprentice Program, however, Petitioner presented no evidence that any decisionmaker in Gasca's termination had knowledge of the letter. Further, Petitioner is entirely unable to establish that the letter was indeed submitted to any member of management. **PX 44**; **RX 18**, DeStefano 10/23/18 Tr. at 2712:9-11; 2713:25; 2714:1; 8-13 (stating that she believed Gasca requested a leave of absence for a "school opportunity" and that she received no documentation from him); **RX 40** at 3199:3-9 (stating that he believed Gasca requested leave "to do outside work."). Even Gasca

admitted that he did not submit a letter directly to DeStefano, the decisionmaker in his termination. **RX 5** at 1165:13-16; 1166:6-7. Gasca was not terminated because of any union activity; he was terminated for poor job performance, undependability, and because Respondents decided to eliminate on-call stagehands to be more efficient. **PX 34**.

Respondents acted for legitimate business purposes. As noted *supra*, Respondents are in the business of providing high quality shows and positive guest experiences. In doing so, Respondents must employ hard working, professional employees that can efficiently complete their job tasks. Poor job performance that disrupts the show experience cannot be tolerated and is a legitimate business reason for termination. See Health Management, Inc., 326 N.L.R.B. 801 (employee lawfully discharged for just cause where employee had continuing attendance and tardiness problems); Cambridge Chemical Corp., 259 N.L.R.B. 1374 (same); South Carolina Industries, 181 N.L.R.B. 1031 (same); see also Advanced Masonry Assocs., 366 N.L.R.B. No. 57 (poor work performance is a legitimate business reason for termination). Further, all on-call stagehands were terminated as the result of Respondents' restructuring. Restructuring is a legitimate basis for termination. Orange County Publications, 334 N.L.R.B. 350, 351 & fn. 5 (2001) (finding no violation of Section 8(a)(3) where employer established that, even assuming it did harbor antiunion animus, the elimination of the union employee's position was an inevitable result of the restructuring of its operations). Accordingly, any injunctive relief requiring that Gasca should be reinstated should be denied.

9. Scott Tupy and Darnell Glenn.

Scott Tupy is currently employed by Respondents as a part-time lighting technician. **RX 41**, Tupy 10/2/18 Tr. at 1740:16-22. During the union campaign, Tupy was very vocal about his support for the Union and the fact that he had been a Union member for years. Id. at 1743:22-23; 1744:10-13; 1748:5-15. Tupy expressed that support directly to Respondent's Persuader following Saxe's lawful campaign speech on May 15, 2018. Id. at 1754:25; 1755:1-14; 1818:3-9. Following that

speech, Saxe had a conversation with Tupy in which Tupy again expressed his support for the Union. Id. at 1753:13-16. After that comment by Tupy, Saxe stated that Tupy's support of the Union was fine and that he too used to be a member of the Union. Saxe stated that the fact Tupy supported the Union was not a problem between them. **RX 16**, Saxe 10/31/18 Tr. at 3541:2-9. Glenn was also present during the foregoing conversation and asked Saxe if he fired his girlfriend, Jasmine Glick. Id. at 3541:16-23. Saxe responded that he could not discuss personnel matters of other employees with him, but indicated Glenn knew that Saxe had issues with Glick in the past. Id.

Notably, such dialogue constitutes protected speech under the NLRA. Indeed, Section 8(c) of the NLRA provides that, "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefits." 29 U.S.C. § 158(c). Here, there was no threat of reprisal or force or promise of benefits. While Petitioner alleges that Tupy received unlawful discipline on or about June 20, 2018, in reality, the discipline Tupy received was lawful and based on legitimate business concerns. Specifically, Respondents issued Tupy a discipline for multiple violations of its Timekeeping Policy after Tupy continually clocked-in a half hour before his shift. **PX 75**. As such discipline is clearly unrelated to any alleged protected activity, Respondents should not be compelled to remove the discipline from his file.

Petitioner attempts to utilize the foregoing conversations to bolster its claim that Respondents unlawfully reduced the work hours of Tupy and Glenn. However, the foregoing conversation consisted of protected employer speech and was wholly unrelated to the legitimate business decisions made by Respondents. In particular, following the representation election in which a majority of Respondents' employees elected to not be represented by the Union and, therefore, no bargaining obligations were created, Respondents changed the schedule of all part-time

employees. Specifically, all work calls were assigned to full-time employees and part-time employees began to only be assigned to show calls. **RX 18**, DeStefano 10/23/18 Tr. at 2722:9-19; 2723:2-9; 2724:7-8; 2729:16-17; 2741:9-18; 20-25; **RX 41** at 1813:11-17 (Tupy admitting that Saxe stagehands also had their hours cut). Additionally, Respondents changed the starting time for show calls for all employees by fifteen minutes. Id. Such business decisions are clearly within the lawful purview of Respondents and do not support Petitioner's request for injunctive relief.

10. Steven Urbanski—Recent Job Abandonment.

Petitioner's contention that Respondents discriminated against Steven Urbanski because he served as the Union's observer during the secret-ballot election is devoid of merit. Urbanski is currently employed by Respondents as a lighting maintenance technician. **RX 18**, DeStefano 10/23/18 Tr. at 2743:13-19. On or around April 5, 2018, Urbanski sustained a workplace injury when he cut his hand while grinding the bandstand. Id. at 2744:1-9; **RX 16**, Saxe 10/31/18 Tr. at 3485:4-5; 3486:18-19; 3487:1-3. Urbanski was placed on workers' compensation leave and offered light duty, which he initially accepted, but later informed Saxe that he did not want to work. **RX 36**, Carrigan 10/24/18 Tr. at 2873:23-25; 2874:1-2; 2877:19-25; 2879:18-20. As a result, Respondents returned Urbanski to work when he was fully released to work on July 8, 2018. Id. Significantly, however, during his leave, Urbanski's position as part of the "day crew" was eliminated and all former day crew members were either eliminated or placed on show calls. **RX 18**, DeStefano 10/23/18 Tr. at 2745:25; 2746:1-4. Additionally, Urbanski's supervisor terminated his own employment with Respondents, leaving no management in place or at Urbanski's work station during Urbanski's work hours. **RX 16**, Saxe 10/31/18 Tr. at 3489:21-25; 3488:1-9. Upon his release, Urbanski was returned to his position; however, Respondents substantially restricted its operations in Urbanski's absence. **RX 18**, DeStefano 10/23/18 Tr. at 2745:25; 2746:1-4. When Urbanski returned to work, there was no one to give him assignments or direct his work at his primary

assignment. **RX 16**, Saxe 10/31/18 Tr. at 3488:10-15. The supervision of Urbanski would have likely been delegated to DeStefano, but she was on vacation upon Urbanski's initial return. Id. As a result, Saxe emailed Urbanski a list of assignments to complete. Id. Currently, Mr. Urbanski is reporting to DeStefano.

Recently, Urbanski failed to report to work starting on November 25, 2018. In response, Respondents reached out to Urbanski on multiple occasions using multiple methods without garnering any response from Urbanski. **RX 42**, TC Carrigan Affidavit at ¶ 6-7. For example, on November 26, 2018, Respondents' Human Resources/Compliance manager e-mailed and texted Urbanski to inquire about his absence, but received no response. Urbanski was a no-call/no-show again on November 27, 2018. Id. Subsequently, on November 28, 2018, the Human Resources/Compliance manager sent Urbanski a follow-up e-mail noting his lack of response and his need to respond. Id. Additionally, Respondents also sent Urbanski letters via regular and certified mail, but did not receive a response from Urbanski. Id. Such recent conduct by Urbanski interferes with Respondents' business operations and exhibits the type of conduct that Respondents may lawfully address through discipline up to and including termination from employment. Id. at ¶ 8. In view of the foregoing, Respondents did not take any unlawful action towards Urbanski because of his protected activity and the requested relief on his behalf is both improper and unavailable considering his recent job abandonment.

11. Petitioner's Reliance on Alterations to Respondents' Operations to Support the Requested Relief and the Underlying Unfair Labor Practice Charges is Misplaced.

Petitioner alleges that several business-related actions taken by Respondents served as an unlawful detriment to the employees' selection of a bargaining representative and support its request for injunctive relief. Petitioner's allegations are erroneous because the laboratory conditions doctrine does not apply in the absence of a Petition for Representation Election. Importantly, the alleged

Section 8(a)(1) violations, including the granting of benefits, occurred in mid-March 2018, while the Petition for a Representation Election was not filed until April 26, 2018. **RX 16**, Saxe 10/31/18 Tr. at 3494:12-20; **PX 62**. As there was no petition at the time of the alleged violative acts, Respondents did not violate the NLRA. Indeed, the laboratory conditions doctrine only applies in times of election to conduct an election in "an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from the other elements which prevent or impede a reasoned choice." Sewell Mfg. Co., 138 N.L.R.B. 66, 70 (1962). Notably, the alleged conduct is only violative of the Act during the "pre-election period" or "critical period" defined as the period *between the filing of an election petition and the holding of the election itself.* Ideal Elec. & Mfg. Co., 134 N.L.R.B. 1275, 1278 (1961). Here, all the alleged conduct occurred, if at all, at a time when there was no petition and thus not during the "critical period." "The Board has consistently adhered to its initial conclusion that the length of the 'crucial period,' and hence the cutoff date, should be governed by considerations of equity and orderly administration...In our opinion it would be destructive...to consider conduct allegedly engaged in before the operative petition." R. Dakin & Co., 191 N.L.R.B. 343, 344 (1971). In fact, in R. Dakin & Co., the Board refused to evaluate conduct that occurred prior to the filing of a petition. Id.

Prior to the filing of a petition, an employer has a right to speak with its employees, terminate employees for legitimate business reasons, and adjust wages. Even during the "critical period," the NLRB has held that employers may speak with employees and make changes accordingly so long as those changes are not tied to the employee's union support or vote. See TNT Logistics N. Am., Inc., 354 N.L.R.B. 290 (2005) (no violation during ongoing union organizing campaign where employer had past practice of soliciting grievances through an "open door" policy); Walmart Stores, Inc., 340 N.L.R.B. 637 (2003) (no violation where employer had past practice of soliciting grievances through "open door" policy"); Walmart Stores, Inc., 339 N.L.R.B. 1187 (2003)

(no violation where employer increased its use of existing job coaching practice during union campaign); Longview Fibre Paper & Packaging, Inc., 356 N.L.R.B. 796 (2011) (no violation where employer implemented a change to workplace schedules as a result of a brainstorming meeting consistent with past practice); see also Beverly Enters., Inc. v. NLRB, 139 F.3d 135 (2d. Cir. 1998) (holding that discussion of a potential pay increase was not an unfair labor practice because there was no suggestion that election outcome would affect determination of whether to increase pay). Additionally, the conferral of benefits during a union campaign (let alone before a Petition for a Representation Election is filed) is not *per se* unlawful, particularly if "the employer can show that its actions were governed by factors other than the pending election." Guard Publ'g Co., 344 N.L.R.B. 1142 (2005).

In the present matter, Respondents increased the wages of employees in the Production, Accounting, Box Office, and Call Center Departments on or around March 5, 2018. **RX 16**, Saxe 10/31/18 Tr. 3494:15-17; 3498:1-2. Those wage increases, particularly for the Production Department employees, were planned for months prior. The goal of the increase was to level the wages of newly hired employees and existing employees. Id. at 3494:22-25; 3495:1; 9-10. The timing of the increase was the result of former Production Manager Pendergraft's repeated failure to follow Saxe's directive to increase all wages to $17.00 in the Production Department. Specifically, newly hired employees were being hired at $17.00 an hour while existing employees were being compensated at only $15.00 to $16.00 an hour for the exact same work. **RX 16**, Saxe 10/31/18 Tr. at 3494:22-25; 3495:1-2.

Respondents had a legitimate business reason for their action. Specifically, the wage increase was essential to remain competitive regarding the attraction and retention of a stable work force. **RX 16**, Saxe 10/31/18 Tr. at 3494:15-17; 3498:1-2; see also NLRB v. Circo Resorts, 646 F.2d 403 (9th Cir. 1981), enforcing as modified 244 N.L.R.B. 880 (1979); Arpro Co. m/v Arctic Producer, 265

N.L.R.B. at 318 (recognizing industry practice as a legitimate business reason to grant a wage increase). Contrary to Petitioner's allegations, Petitioner never established that there was any link between the wage increase and the discouragement of union activities. Coca Cola Bottling Co., 132 N.L.R.B. 481, 483-84 (1961) ("the giving of things of value to individual employees for their own use, or for use in urging other employees to vote a certain way in the election, in circumstances which reasonably would lead the donees to believe that it was given to influence their vote, is conduct which interferes with employee free choice and is a ground for setting aside the election"). Importantly, there is no evidence of any insinuation or comment indicating that Respondents expected the employees to refrain from union activity in exchange for the wage increase. Rather, the wage increase was enacted to even out the compensation of new employees and existing employees and for Respondents to remain competitive in the industry and was completely unrelated to any union activity. Therefore, there was no violation of the NLRA. See Beverly Enters., Inc. v. NLRB, 139 F.3d 135 (holding that discussion of potential pay increase was not an unfair labor practice because there was no suggestion that election outcome would affect determination of whether to increase pay). Consequently, Respondents acted well within their rights for legitimate business reasons and such action belies Petitioner's request for injunctive relief.

12. Petitioner's Other Allegations Do Not Support a Finding of a Likelihood of Success on the Merits.

Petitioner offers no substantial evidence that Respondents or its managers surveilled employees in their alleged protected, concerted activity. Rather, Petitioner offers speculative conjecture and assertions made by a handful of disgruntled former employees, which Respondents, their managers, and employees have denied under penalty of perjury. **RX 43**, Kostew 10/24/18 Tr. at 2964:9-25; 2965:1-14; **RX 23**, Estrada 10/25/18 Tr. at 3110:11-18; 3112:18-22; 3114:20-24. Moreover, Respondents deny that Dan Mecca and Steve Sojack are "supervisors" under the NLRA. Sojack did not remember when he first heard of the union campaign and denied ever reporting any

union activity to upper management. **RX 40** at 3202:6-8. Mecca, although he was initially included in a Facebook chat with organizing employees, denied reading the chat and claimed that he did not become aware of any union organizing efforts until after March 19, 2018. **RX 39** at 3172:17-25; 3173:1; 3174:8-11.

As set forth above, employers are allowed to express their views on unions. See 29 U.S.C. § 158(c) (protecting employer speech opposing union organization so long as it "contains no threat of reprisal or force or promise of benefit."). Without more evidence, Petitioner cannot claim that it is likely to succeed on this allegation as it is essentially a credibility issue at this point, which should be decided by the administrative law judge. The allegations of surveillance pertaining to Saxe also fail as neither Saxe nor any member of management solicited any information on employees' union views. Rather, any information that Saxe acquired was provided to him directly by the employee or from other employees without any solicitation. Information that is provided to the employer and not sought by the employer is not evidence of surveillance. See North Hills Office Servs., Inc., 346 N.L.R.B. 1099, 1103–04 (2006) ("The gravamen of an impression of surveillance violation is that employees are led to believe that their union activities have been placed under surveillance *by the employer*. Volunteering information concerning an employee's union activities [received from] other employees…, particularly in the absence of evidence that management solicited that information, does not create an impression of surveillance.") (emphasis in original); Register Guard, 344 N.L.R.B. 1142, 1144 (2005) (finding that employer's statements indicating employees had volunteered information about coworkers' union activities did not create an impression of surveillance).

Regarding the allegations that DeStefano texted a handful of employees to inquire whether they would be transported to the election site via the company-provided bus, such an inquiry did not in any way elicit the employee's union views, inquire into whether that employee would vote, or insinuate that the employees should vote for in favor of the Union. There is no evidence that these

text messages were targeted at employees who would vote in favor of the Union or to discourage employees who were believed to be pro-union from voting. To the contrary, the texts messages were sent to every employee to remind them to bring an ID and to any employee who was not scheduled to work the day of the election and thus would not be on property. **RX 18**, DeStefano 10/23/18 Tr. at 2754:22-25; 2755:1. Moreover, the evidence shows that employees who openly expressed favor for the Union were offered transportation to the election site, thus belying any argument of employer bias or union animus. Id. The text messages were sent purely for logistical reasons to ensure that any employee who wanted to ride the bus to the election site would have the opportunity to do so and any employee who rode the bus down to the election site would have a ride back and would not be stranded downtown. **RX 18**, DeStefano 9/13/18 Tr. at 558:9-14.

In view of the foregoing evidence, Petitioner fails to demonstrate a likelihood of success of any part of its claims. Indeed, the evidence demonstrates that the alleged discriminatees were disciplined and/or terminated from employment with good cause, that any change to hours or other duties were the result of legitimate business concerns and decisions, and that the conduct of Respondents, its managers, and supervisors was well within their lawful authority. Consequently, as Petitioner fails to demonstrate a likelihood of success on the merits, the Petition must be denied.

D. Injunctive Relief In This Matter Is Not In The Public Interest.

Based on the foregoing, the public interest would not be served by issuing a preliminary injunction against Respondents in this matter. Petitioner's near seven-month delay in seeking Section 10(j) relief coupled with the fact that the 23-day administrative trial is now complete with post-trial briefs to be submitted by January 8, 2019, and a decision and order from administrative law judge imminently thereafter makes the requested relief unjust and improper. Furthermore, the displacement of employees who have relied on employment by Respondents and on whom Respondents have relied to fill positions vacated by employees terminated from employment for

good cause does not serve the public interest. The public interest is better served here by allowing the administrative procedure to run its course, especially where a final order by the NLRB if Petitioner prevails is likely to be as effective as an order for interim relief. Denying injunctive relief will avoid infringing on Respondents' free speech rights and avoid imposing unnecessary hardships on both Respondents and the individuals currently employed by Respondents. Furthermore, Petitioner fails to show any evidence that, absent an injunction, Respondents will be committing or continuing to commit an unfair labor practice charge. Accordingly, the public interest factor weighs in favor of denying the requested temporary injunction.

V. CONCLUSION.

For the foregoing reasons, Respondents respectfully request that Petitioner's Petition for Temporary Injunction Under Section 10(j) of the National Labor Relations Act (ECF No. 1) be denied in its entirety.

DATED this 10th day of December, 2018.

Respectfully submitted,

KAMER ZUCKER ABBOTT

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CERTIFICATE OF SERVICE

This is to certify that on the 10th day of December, 2018, the undersigned, an employee of Kamer Zucker Abbott, served a copy of the foregoing **RESPONDENTS' DAVID SAXE PRODUCTIONS, LLC AND V THEATER GROUP, LLC'S OPPOSITION TO PETITIONER'S PETITION FOR TEMPORARY INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT (ECF NO. 1)** through the Electronic Case Filing system of the United States District Court, District of Nevada to:

Sara S. Demirok, Esq.
National Labor Relations Board, Region 28
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By: /s/ Nicole A. Young
An employee of Kamer Zucker Abbott

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CORNELE A. OVERSTREET, Regional Director of the Twenty-Eighth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Petitioner, vs. DAVID SAXE PRODUCTIONS, LLC and V THEATER GROUP, LLC, Respondents.	Case No. 2:18-cv-02187-APG-NJK

DESCRIPTION	**EXHIBIT**
David Saxe Affidavit	1
Judge Anzalone Transcript Excerpts	2
Sara Demirok Transcript Excerpts	3
Laney Hill Transcript Excerpts	4
Michael Gasca Transcript Excerpts	5
Kevin Michaels Transcript Excerpts	6

Alanzi Langstaff Transcript Excerpts 7
Zachary Graham Transcript Excerpts 8
Taylor Bohannon Transcript Excerpts 9
Gerald McCambridge Transcript Excerpts 10
Jasmine Glick Transcript Excerpts 11
Nathaniel Franco Transcript Excerpts 12
Ivan Barrera Transcript Excerpts 13
Ivan Barrera's Complaint about Langstaff 14
Jason Pendergraft Termination PAF 15
David Saxe Transcript Excerpts 16
Emails to Jason Pendergraft 17
Tiffany DeStefano Transcript Excerpts 18
Police Report 19
Anthony Ciulla Transcript Excerpts 20
February 6, 2018 Email Ranking Stagehands 21
February 6, 2018 Email Ranking Audio Technicians 22
Thomas Estrada Transcript Excerpts 23
Bohannon December 27, 2017 Discipline 24
Poor Job Performance Comparators 25
Langstaff Attendance Summary 26
Langstaff 1/26/18 Warning 27
Excerpts from Employee Handbook 28
Glick Attendance Summary 29
Glick Handbook Receipt 30

Glick Acknowledgement of Cell Phone Policy 31
Michaels Clock in/out summary 32
Michaels Handbook Receipt 33
Langstaff Handbook Receipt 34
Graham's Doctors Note 35
TC Carrigan Transcript Excerpts 36
Comparators for Scheduling 37
Chris Suapaia Transcript Excerpts 38
Dan Mecca Transcript Excerpts 39
Steven Sojack Transcript Excerpts 40
Tupy Transcript Excerpts 41
TC Carrigan Affidavit 42
Courtney Kostew Transcript Excerpts 43

DATED this 10th day of December, 2018.

Respectfully submitted,

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