

**IN THE SUPREME COURT OF
THE STATE OF NEVADA**

DAVID SAXE PRODUCTIONS, LLC,
SAXE MANAGEMENT, LLC AND
DAVID SAXE

Plaintiff(s),

v.

The EIGHTH JUDICIAL DISTRICT
COURT of the State of Nevada, In and
For the COUNTY OF CLARK, the
Honorable ERIKA BALLOU, District
Judge, Department XXIV,

Respondent.

ALEXANDER MARKS,

Real Party In Interest

Electronically Filed
Nov 12 2021 10:31 a.m.
Elizabeth A. Brown
Clerk of Supreme Court
Supreme Court Case No.:
District Court Case No.: A-17-757284-C

**APPENDIX IN SUPPORT OF DAVID SAXE PRODUCTIONS, LLC, SAXE
MANAGEMENT, LLC, AND DAVID SAXE'S PETITION FOR A WRIT OF
MANDAMUS, OR IN THE ALTERNATIVE, A WRIT OF PROHIBITION
(VOLUME I OF III)**

JACKSON LEWIS P.C.

/s/ Joshua A. Sliker

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Jackson Lewis P.C. and that on this 10th day of November, 2021, I caused to be served a true and correct copy of **APPENDIX IN SUPPORT OF DAVID SAXE PRODUCTIONS, LLC, SAXE MANAGEMENT, LLC, AND DAVID SAXE’S PETITION FOR A WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, A WRIT OF PROHIBITION (VOLUME I OF III)** , via the methods set forth below, to the following:

Via U.S. Mail, First Class, Postage Prepaid

Hon. Erika Ballou
Eighth Judicial District Court
Clark County, Nevada
Department 24, Courtroom 12C
Phoenix Building, 12th Floor
330 S. 3rd St.
Las Vegas, Nevada 89101

Respondent

Via Electronic Mail

Jeffrey Gronich, Esq.
Jeffrey Gronich, Attorney at Law, P.C.
1810 E. Sahara Ave., Suite 109
Las Vegas, Nevada 89104

Attorney for Real Party in Interest / Plaintiff

/s/ Joshua A. Sliker
Employee of Jackson Lewis P.C.



COMP

JEFFREY GRONICH, ATTORNEY AT LAW, P.C.
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jgronich@gronichlaw.com
Attorney for Plaintiff Alexander Marks

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ALEXANDER MARKS an individual;

Plaintiff,

vs.

DAVID SAXE PRODUCTIONS, LLC;
SAXE MANAGEMENT, LLC; DAVID
SAXE, an individual; EMPLOYEE(S) /
AGENT(S) DOES 1-10; and ROE
CORPORATIONS 11-20, inclusive;

Defendants.

Case No. A-17-757284-C

Dept.: Department 23

COMPLAINT

(JURY DEMAND)

COMPLAINT

COMES NOW Plaintiff Alexander Marks ("Plaintiff"), by and through his attorney of record Jeffrey Gronich, Esq., and hereby complains of Defendants David Saxe Productions, LLC, Saxe Management, LLC, and David Saxe (collectively "Defendants") as follows:

PARTIES

1. At all times relevant to this suit, Plaintiff was a resident of the County of Clark, State of Nevada.
2. Plaintiff is informed and believes and thereon alleges that at all times relevant, the individual defendant, David Saxe, was a resident of the County of Clark, State of Nevada.
3. Plaintiff is informed and believes and thereon alleges that at all times relevant, the

1 named Corporate Defendants were doing business in this Judicial District in Clark County,
2 Nevada, were registered with the Nevada Secretary of State, and were operating at 5030 W.
3 Oquendo Rd., Suite 100, Las Vegas, NV 89118.

4 4. The named corporate Defendants operate as a show production company in Las
5 Vegas, and are owned and operated by the named individual defendant, David Saxe ("Saxe").

6 5. Based on information and belief, at all relevant times, Defendants were the
7 partners, joint ventures, agents, co-conspirators, servants, and employees of each of the other
8 Defendants herein, and were acting at all relevant times within the scope, purpose and authority of
9 said partnership, joint venture, agency, service, employment, and conspiracy, and with the
10 knowledge, consent, permission, acquiescence, and ratification of their co-defendants.

11 6. At all times relevant, each Defendant was Plaintiff's employer as such term is
12 defined in 29 U.S.C. §203 *et. seq.*, and NRS Chapter 613 *et. seq.* and are joint employers under
13 those Acts.

14 7. At all times relevant, Plaintiff was an employee of each Defendant as that term is
15 defined in 29 U.S.C. §203 *et. seq.*, and NRS Chapter 613 *et. seq.*

16 8. Defendants are licensed to do business in this jurisdiction, and are an "enterprise" as
17 that term is defined in Section 3(r)(1) of the Fair Labor Standards Act, 29 U.S.C. §203 ("FLSA").
18 More specifically, Defendants were an enterprise engaged in commerce or in the production of goods
19 for commerce within the meaning of Section 3(s)(1)(A) of the FLSA, in that Defendants have
20 engaged in annual gross volume of sales made or business done in excess of the \$500,000.00
21 minimum threshold requirement of the FLSA, exclusive of excise taxes. §201 *et. seq.*

22 9. The true names and capacities, whether individual, corporate, associate or
23 otherwise of other Defendants hereinafter designated as Does 1-10 and Roe Corporations 11-20,
24 inclusive, who are in some manner responsible for the injuries described herein, who are

1 Plaintiff's employer, are unknown to Plaintiff at this time who therefore sues said Defendants by
2 such fictitious names and will seek leave of the Court to amend this Complaint to show their true
3 names and capacities when ascertained.

4 10. Plaintiff seeks a jury trial on all issues triable by jury.

5 **JURISDICTION AND VENUE**

6 11. This Court has jurisdiction over Plaintiff's claims pursuant to 29 U.S.C. §216
7 which states in relevant part that this action may be maintained in any Federal or State court of
8 competent jurisdiction.

9 12. This Court also has jurisdiction over the Nevada State Law claims.

10 **FACTUAL ALLEGATIONS**

11 13. Plaintiff repeats and realleges all the allegations contained in Paragraphs 1 through
12 12 of this Complaint as though fully set forth herein.

13 14. Plaintiff began his employment with Defendants in or about April of 2015 as its
14 General Counsel.

15 15. At the time he was hired, Defendants promised to pay Plaintiff a salary of
16 \$55,000.00 per year.

17 16. In September of 2015, Plaintiff decided to run for a position in the Nevada
18 Assembly.

19 17. In late September 2015, Plaintiff informed Saxe that he was going to pursue this
20 endeavor, and asked for Saxe's permission. Saxe approved without hesitation.

21 18. In November of 2015, Plaintiff was given a raise to \$60,000.00 per year.

22 19. In January of 2016, Plaintiff was not endorsed for the Assembly seat he was seeking
23 in October of 2015.

24 20. However, also in January of 2016, Plaintiff was informed by his political aides of

1 an opportunity for a seat in the Nevada State Senate.

2 21. After further discussions with his political aides, Plaintiff decided to run for the
3 Nevada State Senate.

4 22. Plaintiff informed Saxe of this new development for his campaign for State office.

5 23. Saxe approved of Plaintiff's decision to pursue the seat in the State Senate.

6 24. On January 30, 2016, Plaintiff was endorsed for the seat he sought in the Nevada
7 State Senate.

8 25. On or about February 1, 2016, Plaintiff informed Saxe of his endorsement.

9 26. At that time, Plaintiff asked Saxe if there would be any problem with him running
10 for election while simultaneously employed.

11 27. Plaintiff informed Saxe, and Saxe was aware based on Plaintiff's previous political
12 activity, that Plaintiff would need to be away from the office for a few hours periodically to attend
13 meetings and fundraisers.

14 28. Saxe told Plaintiff that he did not have a problem with Plaintiff's decision, and
15 again told Plaintiff that he supported his run for election.

16 29. Saxe further confirmed that time away from the office would not be a problem.

17 30. Thus, over the months of January and February of 2016, Plaintiff continued to
18 perform work as Defendants' General Counsel, and was able to take time to attend meetings and
19 events related to his election campaign.

20 31. At no point did Plaintiff ever take a full day of work off.

21 32. At no point did Plaintiff ever fail to perform the work required of him as a result of
22 his political activity.

23 33. At no point in January or February of 2016 was Plaintiff ever informed by Saxe or
24 any other of Defendants' employees that his political activity was problematic or causing work

1 disruptions.

2 34. During the month of February 2016, Plaintiff became aware that Saxe and his
3 Executive Assistant were directing stagehands and crew workers to perform unsafe welding
4 procedures at the V Theater and Saxe Theater without proper permits.

5 35. This was not only in direct violation of Defendants' lease with the theater's
6 landlord, but Plaintiff believed that it was in violation of federal and state safety standards.

7 36. Plaintiff reported these violations directly to Saxe and his Executive Assistant, but
8 Saxe refused to correct the behavior.

9 37. In late February 2016, Plaintiff realized that Saxe was not correcting the issue, and
10 he told Saxe that he would have to report the violations to OSHA.

11 38. On or about February 25, 2016 Plaintiff reported to work, but after a few hours fell
12 ill and had to leave early.

13 39. On February 26, 2016, Plaintiff returned to work.

14 40. On that day, Plaintiff was informed by Defendants' Controller that Saxe informed
15 him not to pay Plaintiff for February 25, 2016.

16 41. 29 CFR 541.602 does not allow an employer to deduct pay from salaried exempt
17 employees for absences related to sickness for less than a full-day absence.

18 42. Plaintiff was aware of this regulation, and told the Controller to pay him for the full
19 day.

20 43. Plaintiff then asked the Controller if Saxe had ever made this request of him for
21 other salaried employees.

22 44. The Controller indicated that he had.

23 45. Plaintiff decided to perform an investigation into this matter to ensure that his
24 employer was in compliance with the provisions of the Fair Labor Standards Act.

1 46. As part of that investigation, Plaintiff discovered that Defendants were not paying
2 hourly employees proper overtime wages.

3 47. On Monday, February 29, 2016, the Controller told Plaintiff that Saxe still objected
4 to paying Plaintiff for February 25, 2016.

5 48. Plaintiff asked the Controller to provide him with three years of payroll records to
6 review.

7 49. The Controller refused to provide that information.

8 50. On or about March 1, 2016, Saxe discovered that Plaintiff was performing an
9 investigation.

10 51. On March 2, 2016, Saxe sent Plaintiff an email stating that he was unwilling to pay
11 Plaintiff's salary on days that Plaintiff left early because of his political activity.

12 52. Later that day, Plaintiff met with Saxe in person to discuss the email.

13 53. At that conversation, Saxe informed Plaintiff that he was upset that Plaintiff was
14 taking time off to campaign.

15 54. Plaintiff asked Saxe if he was upset about the campaign, or about the investigation
16 into payroll practices.

17 55. Without answering, Saxe told Plaintiff that he was not going to pay him for
18 February 25, 2016.

19 56. In response, Plaintiff stated that he would take it up with the Labor Commissioner,
20 and report all of Saxe's wrongful payroll practices related to other employees.

21 57. Plaintiff also stated that he was going to report the continued safety violations to
22 OSHA.

23 58. After hearing this, Saxe immediately terminated Plaintiff's employment.
24

FIRST CLAIM FOR RELIEF
RETALIATION
29 U.S.C. § 215

59. Plaintiff repeats and realleges all the allegations contained in Paragraphs through 58 of this Complaint as though fully set forth herein.

60. Pursuant to 29 U.S.C. § 215(a)(3) it is a violation of the Fair Labor Standards Act for any person to discharge or to discriminate in any other manner or to retaliate against an employee who has filed any complaint or instituted or caused to be instituted any proceeding under the Fair Labor Standards Act.

61. Pursuant to 29 U.S.C. § 216(b) any employer who violates the provisions of 29 U.S.C. § 215(a) (3) shall be subjected to such legal and equitable relief as appropriate.

62. As detailed above, Defendants retaliated against Plaintiff by discharging him from his employment because he complained that he was not being paid his proper salary as was Defendants' obligation under the FLSA.

63. Defendants also retaliated against Plaintiff by discharging him from his employment because he instituted an investigation into whether Defendants were compliant with the provisions of the Fair Labor Standards Act, and threatened to report such findings to a government agency.

64. As a direct and proximate result of Defendants' conduct described hereinabove, Plaintiff has sustained damages in excess of Fifteen Thousand Dollars (\$15,000.00).

65. As a result of Defendants' conduct, as set forth herein, Plaintiff has been required to retain the services of an attorney, and, as a direct, natural, and foreseeable consequence thereof, has been damaged thereby, and is entitled to reasonable attorneys' fees and costs.

66. Defendants have acted willfully and maliciously, and with oppression, fraud, or

malice, and as a result of Defendants' wrongful conduct, Plaintiff is entitled to an award of exemplary or punitive damages.

SECOND CLAIM FOR RELIEF
NRS 613.040

67. Plaintiff repeats and realleges all the allegations contained in Paragraphs 1 through 66 of this Complaint as though fully set forth herein.

68. NRS 613.040 states: "It shall be unlawful for any person, firm or corporation doing business or employing labor in the State of Nevada to make any rule or regulation prohibiting or preventing any employee from engaging in politics or becoming a candidate for any public office in this state."

69. As more fully set forth above, Plaintiff informed Defendants that he was running for political office and as a result would periodically need to take some time off of work.

70. At no point did his political activity cause Plaintiff to lapse or fall behind on his work duties.

71. Defendants terminated Plaintiff because he was running for Nevada State Senate, which is a violation of NRS 613.040.

72. As a direct and proximate result of Defendants' conduct described hereinabove, Plaintiff has sustained damages in excess of Fifteen Thousand Dollars (\$15,000.00).

73. As a result of Defendants' conduct, as set forth herein, Plaintiff has been required to retain the services of an attorney, and, as a direct, natural, and foreseeable consequence thereof, has been damaged thereby, and is entitled to reasonable attorneys' fees and costs.

74. Defendants have acted willfully and maliciously, and with oppression, fraud, or malice, and as a result of Defendants' wrongful conduct, Plaintiff is entitled to an award of exemplary or punitive damages.

THIRD CLAIM FOR RELIEF
TORTIOUS DISCHARGE – PUBLIC POLICY TORT
PUBLIC POLICY OF PROTECTING WHISTLEBLOWERS

75. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1-74 of this complaint as though fully set forth herein.

76. An employer commits a tortious discharge by terminating an employee for reasons that violate public policy. *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 970 P.2d 1062 (Nev. 1998).

77. Nevada has a strong public policy favoring employees being able to expose illegal or unsafe practices. *Id.*

78. As explained more fully hereinabove, Plaintiff informed Defendants that he was going to expose Defendants' illegal employment practices to the Nevada Labor Commissioner, and the Occupational Safety and Health Administration.

79. Immediately after he made this statement, and because of this statement, Defendants terminated Plaintiff's employment.

80. As a direct and proximate result of Defendants' conduct described hereinabove, Plaintiff has sustained damages in excess of Fifteen Thousand Dollars (\$15,000.00).

81. As a result of Defendants' conduct, as set forth herein, Plaintiff has been required to retain the services of an attorney, and, as a direct, natural, and foreseeable consequence thereof, has been damaged thereby, and is entitled to reasonable attorneys' fees and costs.

82. Defendants have acted willfully and maliciously, and with oppression, fraud, or malice, and as a result of Defendants' wrongful conduct, Plaintiff is entitled to an award of exemplary or punitive damages.

1 **WHEREFORE**, Plaintiff prays for a judgment against Defendant as follows:

- 2 1. For compensatory damages in excess of \$15,000.00;
- 3 2. For special damages in excess of \$15,000.00;
- 4 3. For an award of punitive damages in excess of \$15,000.00;
- 5 4. For attorneys' fees and costs incurred in this action; and
- 6 5. For such other additional relief as the Court deems just and proper.

7

8 Dated this 22nd day of June, 2017.

9 Respectfully submitted,

10

11 By: 

12 Jeffrey Gronich, Esq.

13 Jeffrey Gronich, Attorney at Law, P.C.

14 1810 E. Sahara Ave.

15 Suite 109

16 Las Vegas, NV 89104

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19

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*Attorneys for Defendants
 David Saxe Productions, LLC, Saxe
 Management, LLC and David Saxe*

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ALEXANDER MARKS, an individual,

Plaintiff,

vs.

DAVID SAXE PRODUCTIONS, LLC;
 SAXE MANAGEMENT, LLC; DAVID
 SAXE, an individual; EMPLOYEE(S) /
 AGENT(S) DOES 1-10; and ROE
 CORPORATIONS 11-20, inclusive,

Defendants.

Case No.

**NOTICE TO FEDERAL COURT OF
 REMOVAL OF CIVIL ACTION FROM
 STATE COURT**

Pursuant to 28 U.S.C. § 1332(d), Defendants DAVID SAXE PRODUCTIONS, LLC;
 SAXE MANAGEMENT, LLC; and DAVID SAXE (“Defendants”), hereby notifies the Court of
 the removal of *Alexander Marks, an individual vs. David Saxe Productions, LLC; Saxe
 Management, LLC; David Saxe*, Case No. A-17-757284-C, which was filed in the Eighth Judicial
 District Court in Clark County, Nevada. In support of said removal, Defendants state as follows.

1. On June 22, 2017, an action was commenced in the Eighth Judicial District Court
 of Clark County, Nevada, entitled *Alexander Marks, an individual vs. David Saxe Productions,
 LLC; Saxe Management, LLC; David Saxe; Employee(s)/Agent(s) Does 1-10; and Roe
 Corporations 11-20, inclusive*. A copy of the Complaint is attached hereto as **Exhibit A**.

2. Defendants were served on July 17, 2017 with a copy of the Complaint and a
 Summons issued by the state court on or about June 23, 2017. A copy of the Summons is

1 attached hereto as **Exhibit B**.

2 3. This action is properly removed to federal court under federal question jurisdiction
3 because Plaintiff's Complaint contains claims which arise under federal law, specifically the Fair
4 Labor Standards Act, 29 U.S.C. § 215(a)(3). *See* 28 U.S.C. § 1331, 1441(a). The remaining state
5 law claims are also properly removed pursuant to the Court's supplemental jurisdiction. 28
6 U.S.C. § 1367, 1441(a).

7 4. This Notice of Removal is being filed within thirty (30) days of the receipt of any
8 pleadings setting forth the claim for relief upon which the action is based and is, therefore, timely
9 under 28 U.S.C. § 1446(b).

10 5. This action is a civil action of which this Court has original jurisdiction under 28
11 U.S.C. § 1331, and is one which may be removed to this Court pursuant to the provisions of 28
12 U.S.C. § 1441(b), in that it is a civil action arising under the Constitution, laws, or treaties of the
13 United States. Specifically, Plaintiff alleges conduct in violation of the Fair Labor Standards Act,
14 29 U.S.C. § 215(a)(3). The Court has jurisdiction over any separate and independent claims as
15 provided in 28 U.S.C. § 1367(a).

16 6. Venue is proper in this Court as this is the court for the district and division
17 embracing the place where the action is pending in state Court. 28 U.S.C. § 1391.

18 WHEREFORE, Defendants pray that the above-referenced action now pending in the
19 Eighth Judicial District Court of the State of Nevada in and for the County of Clark be removed
20 therefrom to this Court.

21 Dated this 4th day of August, 2017.

22 JACKSON LEWIS P.C.

23 /s/ Kirsten A. Milton

24 Kirsten A. Milton, Bar No. 14401
25 Mahna Pourshaban, Bar No. 13743
26 3800 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

27 *Attorneys for Defendants*
28 *David Saxe Productions, LLC, Saxe*
Management, LLC and David Saxe

CERTIFICATE OF SERVICE

I hereby certify that I am an employee Jackson Lewis P.C. and that on this 4th day of August, 2017, I caused to be sent via U.S. Mail, a true and correct copy of the above and foregoing **NOTICE TO FEDERAL COURT OF REMOVAL OF CIVIL ACTION FROM STATE COURT** properly addressed to the following:

Jeffrey Gronich, Esq.
Jeffrey Gronich, Attorney At Law, P.C.
1810 E. Sahara Ave., Suite 109
Las Vegas, Nevada 89104


Attorney for Plaintiff Alexander Marks

/s/ Kelley Chandler
Employee of Jackson Lewis P.C.

EXHIBIT A

EXHIBIT A

Electronically Filed
6/22/2017 1:50 PM
Steven D. Grierson
CLERK OF THE COURT



COMP

JEFFREY GRONICH, ATTORNEY AT LAW, P.C.
Jeffrey Gronich, Esq. (#13136)
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Attorney for Plaintiff Alexander Marks

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ALEXANDER MARKS an individual;

Plaintiff,

vs.

DAVID SAXE PRODUCTIONS, LLC;
SAXE MANAGEMENT, LLC; DAVID
SAXE, an individual; EMPLOYEE(S) /
AGENT(S) DOES 1-10; and ROE
CORPORATIONS 11-20, inclusive;

Defendants.

Case No.
Dept.:

A-17-757284-C
Department 23

COMPLAINT

(JURY DEMAND)

COMPLAINT

COMES NOW Plaintiff Alexander Marks ("Plaintiff"), by and through his attorney of record Jeffrey Gronich, Esq., and hereby complains of Defendants David Saxe Productions, LLC, Saxe Management, LLC, and David Saxe (collectively "Defendants") as follows:

PARTIES

1. At all times relevant to this suit, Plaintiff was a resident of the County of Clark, State of Nevada.
2. Plaintiff is informed and believes and thereon alleges that at all times relevant, the individual defendant, David Saxe, was a resident of the County of Clark, State of Nevada.
3. Plaintiff is informed and believes and thereon alleges that at all times relevant, the

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1 named Corporate Defendants were doing business in this Judicial District in Clark County,
 2 Nevada, were registered with the Nevada Secretary of State, and were operating at 5030 W.
 3 Oquendo Rd., Suite 100, Las Vegas, NV 89118.

4 4. The named corporate Defendants operate as a show production company in Las
 5 Vegas, and are owned and operated by the named individual defendant, David Saxe ("Saxe").

6 5. Based on information and belief, at all relevant times, Defendants were the
 7 partners, joint ventures, agents, co-conspirators, servants, and employees of each of the other
 8 Defendants herein, and were acting at all relevant times within the scope, purpose and authority of
 9 said partnership, joint venture, agency, service, employment, and conspiracy, and with the
 10 knowledge, consent, permission, acquiescence, and ratification of their co-defendants.

11 6. At all times relevant, each Defendant was Plaintiff's employer as such term is
 12 defined in 29 U.S.C. §203 *et. seq.*, and NRS Chapter 613 *et. seq.* and are joint employers under
 13 those Acts.

14 7. At all times relevant, Plaintiff was an employee of each Defendant as that term is
 15 defined in 29 U.S.C. §203 *et. seq.*, and NRS Chapter 613 *et. seq.*

16 8. Defendants are licensed to do business in this jurisdiction, and are an "enterprise" as
 17 that term is defined in Section 3(r)(1) of the Fair Labor Standards Act, 29 U.S.C. §203 ("FLSA").
 18 More specifically, Defendants were an enterprise engaged in commerce or in the production of goods
 19 for commerce within the meaning of Section 3(s)(1)(A) of the FLSA, in that Defendants have
 20 engaged in annual gross volume of sales made or business done in excess of the \$500,000.00
 21 minimum threshold requirement of the FLSA, exclusive of excise taxes. §201 *et. seq.*

22 9. The true names and capacities, whether individual, corporate, associate or
 23 otherwise of other Defendants hereinafter designated as Does 1-10 and Roe Corporations 11-20,
 24 inclusive, who are in some manner responsible for the injuries described herein, who are

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1 Plaintiff's employer, are unknown to Plaintiff at this time who therefore sues said Defendants by
2 such fictitious names and will seek leave of the Court to amend this Complaint to show their true
3 names and capacities when ascertained.

4 10. Plaintiff seeks a jury trial on all issues triable by jury.

5 **JURISDICTION AND VENUE**

6 11. This Court has jurisdiction over Plaintiff's claims pursuant to 29 U.S.C. §216
7 which states in relevant part that this action may be maintained in any Federal or State court of
8 competent jurisdiction.

9 12. This Court also has jurisdiction over the Nevada State Law claims.

10 **FACTUAL ALLEGATIONS**

11 13. Plaintiff repeats and realleges all the allegations contained in Paragraphs 1 through
12 12 of this Complaint as though fully set forth herein.

13 14. Plaintiff began his employment with Defendants in or about April of 2015 as its
14 General Counsel.

15 15. At the time he was hired, Defendants promised to pay Plaintiff a salary of
16 \$55,000.00 per year.

17 16. In September of 2015, Plaintiff decided to run for a position in the Nevada
18 Assembly.

19 17. In late September 2015, Plaintiff informed Saxe that he was going to pursue this
20 endeavor, and asked for Saxe's permission. Saxe approved without hesitation.

21 18. In November of 2015, Plaintiff was given a raise to \$60,000.00 per year.

22 19. In January of 2016, Plaintiff was not endorsed for the Assembly seat he was seeking
23 in October of 2015.

24 20. However, also in January of 2016, Plaintiff was informed by his political aides of

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1 an opportunity for a seat in the Nevada State Senate.

2 21. After further discussions with his political aides, Plaintiff decided to run for the
3 Nevada State Senate.

4 22. Plaintiff informed Saxe of this new development for his campaign for State office.

5 23. Saxe approved of Plaintiff's decision to pursue the seat in the State Senate.

6 24. On January 30, 2016, Plaintiff was endorsed for the seat he sought in the Nevada
7 State Senate.

8 25. On or about February 1, 2016, Plaintiff informed Saxe of his endorsement.

9 26. At that time, Plaintiff asked Saxe if there would be any problem with him running
10 for election while simultaneously employed.

11 27. Plaintiff informed Saxe, and Saxe was aware based on Plaintiff's previous political
12 activity, that Plaintiff would need to be away from the office for a few hours periodically to attend
13 meetings and fundraisers.

14 28. Saxe told Plaintiff that he did not have a problem with Plaintiff's decision, and
15 again told Plaintiff that he supported his run for election.

16 29. Saxe further confirmed that time away from the office would not be a problem.

17 30. Thus, over the months of January and February of 2016, Plaintiff continued to
18 perform work as Defendants' General Counsel, and was able to take time to attend meetings and
19 events related to his election campaign.

20 31. At no point did Plaintiff ever take a full day of work off.

21 32. At no point did Plaintiff ever fail to perform the work required of him as a result of
22 his political activity.

23 33. At no point in January or February of 2016 was Plaintiff ever informed by Saxe or
24 any other of Defendants' employees that his political activity was problematic or causing work

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1 disruptions.

2 34. During the month of February 2016, Plaintiff became aware that Saxe and his
3 Executive Assistant were directing stagehands and crew workers to perform unsafe welding
4 procedures at the V Theater and Saxe Theater without proper permits.

5 35. This was not only in direct violation of Defendants' lease with the theater's
6 landlord, but Plaintiff believed that it was in violation of federal and state safety standards.

7 36. Plaintiff reported these violations directly to Saxe and his Executive Assistant, but
8 Saxe refused to correct the behavior.

9 37. In late February 2016, Plaintiff realized that Saxe was not correcting the issue, and
10 he told Saxe that he would have to report the violations to OSHA.

11 38. On or about February 25, 2016 Plaintiff reported to work, but after a few hours fell
12 ill and had to leave early.

13 39. On February 26, 2016, Plaintiff returned to work.

14 40. On that day, Plaintiff was informed by Defendants' Controller that Saxe informed
15 him not to pay Plaintiff for February 25, 2016.

16 41. 29 CFR 541.602 does not allow an employer to deduct pay from salaried exempt
17 employees for absences related to sickness for less than a full-day absence.

18 42. Plaintiff was aware of this regulation, and told the Controller to pay him for the full
19 day.

20 43. Plaintiff then asked the Controller if Saxe had ever made this request of him for
21 other salaried employees.

22 44. The Controller indicated that he had.

23 45. Plaintiff decided to perform an investigation into this matter to ensure that his
24 employer was in compliance with the provisions of the Fair Labor Standards Act.

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1 46. As part of that investigation, Plaintiff discovered that Defendants were not paying
2 hourly employees proper overtime wages.

3 47. On Monday, February 29, 2016, the Controller told Plaintiff that Saxe still objected
4 to paying Plaintiff for February 25, 2016.

5 48. Plaintiff asked the Controller to provide him with three years of payroll records to
6 review.

7 49. The Controller refused to provide that information.

8 50. On or about March 1, 2016, Saxe discovered that Plaintiff was performing an
9 investigation.

10 51. On March 2, 2016, Saxe sent Plaintiff an email stating that he was unwilling to pay
11 Plaintiff's salary on days that Plaintiff left early because of his political activity.

12 52. Later that day, Plaintiff met with Saxe in person to discuss the email.

13 53. At that conversation, Saxe informed Plaintiff that he was upset that Plaintiff was
14 taking time off to campaign.

15 54. Plaintiff asked Saxe if he was upset about the campaign, or about the investigation
16 into payroll practices.

17 55. Without answering, Saxe told Plaintiff that he was not going to pay him for
18 February 25, 2016.

19 56. In response, Plaintiff stated that he would take it up with the Labor Commissioner,
20 and report all of Saxe's wrongful payroll practices related to other employees.

21 57. Plaintiff also stated that he was going to report the continued safety violations to
22 OSHA.

23 58. After hearing this, Saxe immediately terminated Plaintiff's employment.
24

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FIRST CLAIM FOR RELIEF
RETALIATION
29 U.S.C. § 215

59. Plaintiff repeats and realleges all the allegations contained in Paragraphs through 58 of this Complaint as though fully set forth herein.

60. Pursuant to 29 U.S.C. § 215(a)(3) it is a violation of the Fair Labor Standards Act for any person to discharge or to discriminate in any other manner or to retaliate against an employee who has filed any complaint or instituted or caused to be instituted any proceeding under the Fair Labor Standards Act.

61. Pursuant to 29 U.S.C. § 216(b) any employer who violates the provisions of 29 U.S.C. § 215(a) (3) shall be subjected to such legal and equitable relief as appropriate.

62. As detailed above, Defendants retaliated against Plaintiff by discharging him from his employment because he complained that he was not being paid his proper salary as was Defendants' obligation under the FLSA.

63. Defendants also retaliated against Plaintiff by discharging him from his employment because he instituted an investigation into whether Defendants were compliant with the provisions of the Fair Labor Standards Act, and threatened to report such findings to a government agency.

64. As a direct and proximate result of Defendants' conduct described hereinabove, Plaintiff has sustained damages in excess of Fifteen Thousand Dollars (\$15,000.00).

65. As a result of Defendants' conduct, as set forth herein, Plaintiff has been required to retain the services of an attorney, and, as a direct, natural, and foreseeable consequence thereof, has been damaged thereby, and is entitled to reasonable attorneys' fees and costs.

66. Defendants have acted willfully and maliciously, and with oppression, fraud, or

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malice, and as a result of Defendants' wrongful conduct, Plaintiff is entitled to an award of exemplary or punitive damages.

SECOND CLAIM FOR RELIEF
NRS 613.040

67. Plaintiff repeats and realleges all the allegations contained in Paragraphs 1 through 66 of this Complaint as though fully set forth herein.

68. NRS 613.040 states: "It shall be unlawful for any person, firm or corporation doing business or employing labor in the State of Nevada to make any rule or regulation prohibiting or preventing any employee from engaging in politics or becoming a candidate for any public office in this state."

69. As more fully set forth above, Plaintiff informed Defendants that he was running for political office and as a result would periodically need to take some time off of work.

70. At no point did his political activity cause Plaintiff to lapse or fall behind on his work duties.

71. Defendants terminated Plaintiff because he was running for Nevada State Senate, which is a violation of NRS 613.040.

72. As a direct and proximate result of Defendants' conduct described hereinabove, Plaintiff has sustained damages in excess of Fifteen Thousand Dollars (\$15,000.00).

73. As a result of Defendants' conduct, as set forth herein, Plaintiff has been required to retain the services of an attorney, and, as a direct, natural, and foreseeable consequence thereof, has been damaged thereby, and is entitled to reasonable attorneys' fees and costs.

74. Defendants have acted willfully and maliciously, and with oppression, fraud, or malice, and as a result of Defendants' wrongful conduct, Plaintiff is entitled to an award of exemplary or punitive damages.

THIRD CLAIM FOR RELIEF
TORTIOUS DISCHARGE – PUBLIC POLICY TORT
PUBLIC POLICY OF PROTECTING WHISTLEBLOWERS

75. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1-74 of this complaint as though fully set forth herein.

76. An employer commits a tortious discharge by terminating an employee for reasons that violate public policy. *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 970 P.2d 1062 (Nev. 1998).

77. Nevada has a strong public policy favoring employees being able to expose illegal or unsafe practices. *Id.*

78. As explained more fully hereinabove, Plaintiff informed Defendants that he was going to expose Defendants' illegal employment practices to the Nevada Labor Commissioner, and the Occupational Safety and Health Administration.

79. Immediately after he made this statement, and because of this statement, Defendants terminated Plaintiff's employment.

80. As a direct and proximate result of Defendants' conduct described hereinabove, Plaintiff has sustained damages in excess of Fifteen Thousand Dollars (\$15,000.00).

81. As a result of Defendants' conduct, as set forth herein, Plaintiff has been required to retain the services of an attorney, and, as a direct, natural, and foreseeable consequence thereof, has been damaged thereby, and is entitled to reasonable attorneys' fees and costs.

82. Defendants have acted willfully and maliciously, and with oppression, fraud, or malice, and as a result of Defendants' wrongful conduct, Plaintiff is entitled to an award of exemplary or punitive damages.

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EXHIBIT B

EXHIBIT B

Electronically Issued
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SUMM

JEFFREY GRONICH, ATTORNEY AT LAW, P.C.
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jgronich@gronichlaw.com
Attorney for Plaintiff Debra Gomez

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ALEXANDER MARKS an individual;

Plaintiff,

vs.

DAVID SAXE PRODUCTIONS, LLC;
SAXE MANAGEMENT, LLC; DAVID
SAXE, an individual; EMPLOYEE(S) /
AGENT(S) DOES 1-10; and ROE
CORPORATIONS 11-20, inclusive;

Defendants.

Case No. A-17-757284-C
Dept.: Department 23

SUMMONS

SUMMONS - CIVIL

**NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU
WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS.
READ THE INFORMATION BELOW.**

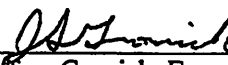
TO THE DEFENDANT(S): A Civil Complaint has been filed by the plaintiff against you for the
relief set forth in the Complaint.

1. If you intend to defend this lawsuit, within 20 days after this Summons is served
on you exclusive of the day of service, you must do the following:

Jeffrey Gronich, Attorney at Law, P.C.
1810 E. Sahara Ave., Suite 109
Las Vegas, Nevada 89104
(702) 430-6896 FAX: (702) 369-1290

- a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.
 - b. Serve a copy of your response upon the attorney whose name and address is shown below.
2. Unless you respond, your default will be entered upon application of the Plaintiff(s) and failure to so respond will result in a judgment of default judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.
 3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.
 4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members and legislators each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the Complaint.

Submitted by:


Jeffrey Gronich, Esq.
Jeffrey Gronich, Attorney at Law, P.C.
1810 E. Sahara Ave.
Suite 109
Las Vegas, NV 89104
Tel (702) 430-6896
Fax (702) 369-1290

CLERK OF COURT

By:  6/23/2017
Deputy Clerk Date

Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Michelle McCarthy

*NOTE: When service is by publication, add a brief statement of the object of the action. See Rules of Civil Procedure, Rule 4(b).

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Alexander Marks

(b) County of Residence of First Listed Plaintiff Clark
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Jeffrey Gronich, Esq., 1810 E. Sahara Ave., Suite 109, Las Vegas,
Nevada 89104

DEFENDANTS

David Saxe productions, LLC; Saxe Management, LLC; David Saxe,

County of Residence of First Listed Defendant Clark
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

Kirsten A. Milton, Jackson Lewis, P.C., 3800 Howard Hughes
Parkway, Suite 600, Las Vegas, Nevada 89169

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question
(U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|---------------------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding
- ☒ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

US Civil Statute: 29 USC 215(a)(3)

Brief description of cause:

Fair Labor Standards Act

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

08/04/2017

SIGNATURE OF ATTORNEY OF RECORD

/s/ Kirsten A. Milton

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

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1 Kirsten A. Milton
Nevada State Bar No. 14401
2 Mahna Pourshaban
Nevada State Bar No. 13743
3 **JACKSON LEWIS P.C.**
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5 Email: kirsten.milton@jacksonlewis.com
Email: mahna.pourshaban@jacksonlewis.com

6 *Attorneys for Defendants*
7 *David Saxe Productions, LLC,*
Saxe Management, LLC and David Saxe

10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

12 ALEXANDER MARKS, an individual,
13
14 Plaintiff,

15 vs.

16 DAVID SAXE PRODUCTIONS, LLC;
17 SAXE MANAGEMENT, LLC; DAVID
18 SAXE, an individual; EMPLOYEE(S) /
AGENT(S) DOES 1-10; and ROE
CORPORATIONS 11-20, inclusive

19 Defendants.

Case No. 2:17-cv-02110-KJD-CWH

**DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S THIRD CLAIM FOR
RELIEF**

20 Defendants David Saxe Productions, LLC; Saxe Management, LLC; and David Saxe
21 ("Defendant Saxe") (collectively, "Defendants") move the Court for an order dismissing Plaintiff
22 Alexander Marks' ("Plaintiff") third claim for relief because he fails to state a claim upon which
23 relief may be granted. Specifically, Plaintiff's Third Claim for Relief for tortious discharge should
24 be dismissed because Plaintiff cannot show that he qualifies for an exception under Nevada's at-

1 will employment doctrine. As discussed in more detail below, Plaintiff's tortious discharge claim
2 should be dismissed with prejudice.¹

3 This Motion ("Motion") is based on Rule 12(b)(6) of the Federal Rules of Civil Procedure,
4 the papers and pleadings on file with the Court, the following memorandum of points and
5 authorities and any oral argument the Court may consider.

6 Respectfully submitted this 1st day of September, 2017.

7 JACKSON LEWIS P.C.

8 /s/ Kirsten A. Milton

9 Kirsten A. Milton, Bar #14401
10 Mahna Pourshaban, Bar #13743
3800 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

11 *Attorneys for Defendants*
12 *David Saxe Productions, LLC,*
Saxe Management, LLC and David Saxe

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. STATEMENT OF FACTS ALLEGED IN THE PLEADINGS²**

15 In or about April 2015, Defendants hired Plaintiff as General Counsel. ECF No. 1 at 7 ¶
16 14. Plaintiff contends that in February 2016 he learned that Defendant Saxe and his Executive
17 Assistant were directing employees to perform "unsafe welding procedures . . . without proper
18 permits." *Id.* ¶34. Plaintiff believed such actions not only violated Defendants' lease, but also
19 "federal and state safety standards." *Id.* ¶ 35. According to the Complaint, "Plaintiff reported these
20 violations directly to Sax and his Executive Assistant, but Saxe refused to correct the behavior."
21

22 ¹ Nevada district courts agree with the majority of courts interpreting Fed. R. Civ. P. 12(a) that "filing a partial
23 motion to dismiss will suspend the time to answer those claims or counterclaims that are not subject to the motion." *See*
24 *Gamble v. Boyd Gaming Corp.*, No. 2:13-cv-01009, 2014 U.S. Dist. LEXIS 44561 (D. Nev. Mar. 31, 2014) (internal
25 citations omitted); *Talbot v. Sentinel Ins. Co., LTD.*, No. 2:11-cv-01766, 2012 U.S. Dist. LEXIS 43340 (D. Nev. Mar.
26 29, 2012); *see also* Charles Alan Wright & Arthur R. Miller, 5B Fed. Prac. & Proc. Civ. 3d § 1346 (West 2006).

27 ² Defendants do not admit any of Plaintiff's allegations of wrongdoing and intend to vigorously defend
28 themselves against all claims asserted. However, for the purposes of this Motion only, Defendants accept as true the
allegations set forth in the Complaint and re-state the facts as Plaintiff has alleged. The Court is required to consider
only the allegations set forth in the pleadings. *See, e.g., Morris v. Bank of Am.*, 110 Nev. 1274, 886 P.2d 454 (1994).
Defendants reserve their rights to dispute Plaintiff's allegations in the event that the Motion is not granted, and deny
and dispute Plaintiff's allegations for all other purposes.

1 *Id.* ¶ 36. Therefore, in late February 2016, Plaintiff claims “he told Saxe that he would have to
2 report the violations to OHSA.” *Id.* ¶¶ 37, 57, 78.

3 In addition, Plaintiff claims Defendants violated the Fair Labor Standards Act, 29 U.S.C. §
4 215 (“FLSA”), when they deducted pay from his salary for less than a full day’s absence on
5 February 25, 2016 in violation of 29 C.F.R. 541.602.³ *Id.* ¶¶ 38, 40-41. Plaintiff alleges that the
6 Controller told him that Defendant Saxe had instructed the Controller not to pay other salaried
7 employees for absences less than a full-day absence. *Id.* ¶¶ 43-44. Plaintiff, Defendants’ then-
8 General Counsel, further alleges that he conducted “an investigation in this matter” and “discovered
9 that Defendants were not paying hourly employees proper overtime wages.” *Id.* ¶¶ 45-46. Plaintiff
10 alleges that, as a result, he told Defendant Saxe “he would take it up with the Labor Commissioner,
11 and report all of Saxe’s wrongful payroll practices related to other employees.” *Id.* ¶¶ 56, 63, 78.

12 In or about March 2016, Defendant Saxe terminated Plaintiff’s employment. *Id.* ¶ 57.

13 **II. ARGUMENT**

14 **A. Legal Standard.**

15 A court should grant a motion to dismiss pursuant to Rule 12(b)(6) where a complaint does
16 not allege facts that, accepted as true, state a claim for relief that is plausible on its face. Fed. R.
17 Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*,
18 550 U.S. 544, 570 (2007)). A properly pled complaint must provide “[a] short and plain statement
19 of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2);. While Rule 8
20 does not require detailed factual allegations, it demands “more than labels and conclusions” or a
21 “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
22 (2009) (citation omitted). A claim is facially plausible when the plaintiff’s complaint alleges facts
23 that allow the court to draw a reasonable inference that the defendant is liable for the alleged
24 misconduct. *Id.* at 678. Because Plaintiff has not done so here, the Court should grant Defendants’
25 Motion and dismiss Plaintiff’s Third Claim for Relief.

26
27
28 ³ Noticeably absent from Plaintiff’s Complaint is the fact that Plaintiff was in fact paid for February 25, 2016.

B. Plaintiff's Third Claim For Relief For Tortious Discharge Should Be Dismissed Because He Fails To Plead Sufficient Facts That Qualify For An Exception Under Nevada's At-Will Employment Doctrine.

Plaintiff's claim for tortious discharge fails to state a claim for a public-policy exception to the at-will employment doctrine. While certain exceptions to the at-will employment doctrine exist, "these exceptions are 'severely limited to those rare and exceptional cases where the employer's conduct violates strong and compelling public policy.'" *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 560, 216 P.3d 788, 791 (2009) (quoting *Sands Regent v. Valgardson*, 105 Nev. 436, 440, 777 P.2d 898, 900 (1989)); *Wayment v. Holmes*, 112 Nev. 232, 236, 912 P.2d 816, 818 (1996) ("public policy tortious discharge actions are severely limited to those rare and exceptional cases where the employer's conduct violates strong and compelling public policy"). In fact, the Nevada Supreme Court has recognized only four public-policy exceptions to the at-will employment rule: (1) retaliation for filing a workers' compensation claim (*Hansen v. Harrah's*, 100 Nev. 60, 64, 675 P.2d 394, 397 (1984)); (2) refusing to work in unreasonably dangerous conditions (*D'Angelo v. Gardner*, 107 Nev. 704, 719, 819 P.2d 206, 216 (1991)); (3) engaging in whistleblowing activities (*Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 293, 774 P.2d 432, 433 (1989)); and (4) refusing to participate in illegal activities (*Allum v. Valley Bank*, 114 Nev. 1313, 1322-24, 970 P.2d 1062, 1067-68 (1998)). In sum, "there must be some action by the employee amounting to 'a refusal to violate the public policy of [Nevada].'" *Biesler v. Prof'l Sys. Corp.*, 321 F.Supp.2d 1165, 1171 (D. Nev. 2004) (quoting *Bigelow v. Bullard*, 111 Nev. 1178, 1185, 901 P.2d 630, 634 (1995) (alteration in original)).

Here, Plaintiff alleges no facts that fall under the first, second, or fourth basis for the exception to the at-will employment presumption. Thus, Plaintiff's claim could survive only if he has pled sufficient facts to demonstrate that he is a whistleblower. Although Plaintiff titles his Third Claim for Relief as "Tortious Discharge – Public Policy Tort; Public Policy of Protecting Whistleblowers," Plaintiff is not a whistleblower as defined by Nevada law. That is, to state a whistleblower claim which leads to an exception to the presumption of at-will employment, the employee must report the unlawful activity to the "appropriate authorities" *outside of his employment*. *Wiltsie*, 105 Nev. at 293, 774 P.2d at 433. Internal complaints to management or the

1 employee's boss do not suffice as such activity is deemed as "merely acting in a private or
 2 proprietary manner," and does not qualify an employee as a whistleblower. *Id.* Nowhere in
 3 Plaintiff's Complaint does he allege that he reported any conduct to "appropriate authorities"
 4 outside of his employer as required to state a claim in Nevada. ECF No.1 ¶¶ 37, 56, 57, 78. To the
 5 contrary, Plaintiff specifically admits that he merely told Defendant Saxe that he was "going to"
 6 report Defendants to the Nevada Labor Commissioner, and OSHA. *Id.* This specific allegation,
 7 even assuming it is true, is insufficient as a matter of law to establish a whistleblower claim. *Wiltsie*,
 8 105 Nev. at 293, 774 P.2d at 433. No amount of re-pleading can cure this deficiency because
 9 inherent in this statement is plaintiff's own admission that he did not complain to any outside
 10 "appropriate authorities." Thus, his Third Claim for Relief should be dismissed on this basis alone.

11 Moreover, even if Plaintiff were technically a whistleblower, the Nevada Supreme Court,
 12 as well as the U.S. District Court for the District of Nevada, have clearly established that Plaintiff
 13 is legally precluded from asserting a retaliatory or tortious discharge claim if that claim circumvents
 14 the full panoply of remedies available to Plaintiff pursuant to another statutory scheme. *Herman v.*
 15 *United Broth. Of Carpenters and Joiners of Am., Local Union No. 971*, 60 F.3D 1375, 1385 (9th
 16 Cir. 1995) ("The Nevada Supreme Court has held that Nevada's public policy against impermissible
 17 discrimination cannot be vindicated through a tortious discharge public policy tort, but rather, must
 18 be pursued through statutory remedies.) For example, in *Robinson v. Westinghouse Air Brake*
 19 *Techs. Corp.*, No. 3:09-CV-00202-LRH-VPC, 2010 U.S. Dist. LEXIS 32395, at **7-8 (D. Nev.
 20 Apr. 1, 2010), the court dismissed Plaintiff's tortious discharge claim because Title VII provided
 21 adequate remedy for plaintiff's discrimination and retaliation claims. *See Canada v. Boyd Group,*
 22 *Inc.*, 809 F. Supp. 771, 781-782 (D. Nev. 1992) (explaining that no additional court remedies need
 23 be made available to plaintiff in tortious discharge case when statutory remedies for sexual
 24 harassment exist); *Chavez v. Sievers*, 118 Nev. 288, 293-94, 43 P.3d 1022, 1025-26 (Nev. 2002)
 25 (refusing to recognize a common law tortious discharge action based upon alleged racial
 26 discrimination); *see also Reyes v. Southwest Gas Corp.*, No. 2:07cv-0068-BES-LRL, 2007 U.S.
 27 Dist. LEXIS 57421 **13-14 (D. Nev. Aug. 2, 2007) ("The Nevada Supreme Court considers the
 28 remedies provided by federal and state statutes to be sufficiently comprehensive to bar a tortious

1 discharge claim based on racial discrimination”); *Turnbull v. Memeo*, No. 03:06-CV-00656-LRH-
 2 VPC, 2008 U.S. Dist. LEXIS 50873 **14-15 (D. Nev. June 30, 2008) (“this district has found that
 3 a claim for wrongful termination [in violation of public policy] does not lie where statutory
 4 remedies exist, as in the case of age and sex discrimination”); *Sands Regent*, 777 P.2d at 899-900
 5 (1989) (refusing to allow common law public policy tort action in age discrimination case); *Lund*
 6 *v. J.C. Penney Outlet*, 911 F. Supp. 442, 445 (D. Nev. 1996); *Nolan v. Cleland*, 686 F.2d 806, 815
 7 (9th Cir. 1982) (dismissing “due process” tort claim because “the factual predicate . . . [was] the
 8 same discrimination which [was] the basis of [the] Title VII claim”).

9 There is no dispute that the FLSA and OSHA provide Plaintiff with a full panoply of rights
 10 and remedies such that additional tortious discharge remedies are neither necessary nor proper. 29
 11 U.S.C. § 216(b); 29 U.S.C. § 651 *et seq.*; ECF No. 1 ¶ 61, 78. Therefore, because Plaintiff’s tortious
 12 discharge claim is based on his allegations that he was discharged in retaliation for “threaten[ing]
 13 to report” Defendants’ alleged “employment practices to the Nevada and Labor Commissioner, and
 14 the Occupational Safety and Health Administration,” federal and state statutes provide adequate
 15 remedies for this type of conduct and Plaintiff’s Third Claim for Relief should be dismissed for this
 16 additional reason.

17 **III. CONCLUSION**

18 For each and all of the reasons set forth above, Defendants respectfully request the Court
 19 dismiss Plaintiff’s Third Claim for Relief.

20 Dated this 1st day of September, 2017.

21 JACKSON LEWIS P.C.

22
 23 /s/ Kirsten A. Milton

24 Kirsten A. Milton, Bar #14401
 25 Mahna Pourshaban, Bar #13743
 26 3800 Howard Hughes Parkway, Suite 600
 27 Las Vegas, Nevada 89169

28 *Attorneys for Defendants*
David Saxe Productions, LLC,
Saxe Management, LLC and David Saxe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 1st day of September, 2017, I caused to be served via the Court's CM/ECF Filing, a true and correct copy of the above foregoing **DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S THIRD CLAIM FOR RELIEF** properly addressed to the following:

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Attorneys for Plaintiff
Alexander Marks

/s/ Emily Santiago
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ALEXANDER MARKS an individual;

Plaintiff,

vs.

DAVID SAXE PRODUCTIONS, LLC;
SAXE MANAGEMENT, LLC; DAVID
SAXE, an individual; EMPLOYEE(S) /
AGENT(S) DOES 1-10; and ROE
CORPORATIONS 11-20, inclusive;

Defendants.

Case No. 2:17-cv-02110

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO
DISMISS PLAINTIFF'S THIRD CLAIM
FOR RELIEF**

Plaintiff Alexander Marks, by and through his attorney Jeffrey Gronich, Esq. of Jeffrey Gronich, Attorney at Law, P.C., and hereby submits this Response to Defendants' Motion to Dismiss Plaintiff's Third Claim for Relief.

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1 This response is submitted based upon the Memorandum of Points and Authorities below,
 2 the papers and pleadings on file in this matter, and any oral argument the Court may allow.

3
 4 DATED this 29th day of September, 2017

5 Respectfully submitted,

6 By: /s/ Jeffrey Gronich
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10 MEMORANDUM OF POINTS AND AUTHORITIES

11 **I. INTRODUCTION**

12 Defendant argues that Plaintiff's Third Claim for Relief must be dismissed as a matter of
 13 law. Specifically, while Defendants acknowledge that Nevada law does recognize a claim for
 14 public-policy discharge for retaliation for engaging in whistleblowing activities, in this case, they
 15 assert that Plaintiff did not engage in *protected* whistleblowing activities. Defendants claim that in
 16 order for an employee to be protected under Nevada's limited exception to the at-will employment
 17 doctrine for whistleblowing, that employee must have actually "blown the whistle" – not merely
 18 threaten to – to an outside agency. However, this misstates the purpose and intent of the at-will
 19 exceptions.

20 First, Plaintiff need not have actually made the report to an outside agency as long as
 21 Defendants were aware that he was *going* to make such a report and terminated him before he had
 22 the ability to do so. To hold that a defendant can escape liability for a preemptive termination
 23 would frustrate the entire purpose of Nevada's exception to the at-will doctrine
 24

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Second, as noted in Defendant's brief, "public policy tortious discharge actions are severely limited to those rare and exceptional cases where the employer's conduct violates strong and compelling public policy." *Wayment v. Holmes*, 112 Nev. 232, 236, 912 P.2d 816, 818 (1996). The key here is that the exception to the at-will doctrine is described as one that violates strong and compelling public policy. It does not matter to whom Plaintiff reported the unsafe or unlawful conduct that he alleged, what matters is his motive for doing so. Here, it is clear that the safety and well-being of the employees and theater patrons was paramount to his threat to report unsafe and unlawful conditions. Plaintiff's motives were not based on a proprietary reason, but rather for the public good.

Finally, Defendant argues that Plaintiff had an adequate statutory remedy to cover his retaliation claims and as such may not bring a claim in tort. While this theory is generally true, that doctrine is only applicable if Plaintiff is able to obtain the same relief in statute that he could in tort. In this case, as Plaintiff will demonstrate below, the relevant statutory schemes do not provide for tort-like damages and thus the availability of a statutory remedy does not preclude a claim in tort.

II. RELEVANT FACTS

Under FRCP 12(b)(6), "all allegations of material fact are taken as true and construed in the light most favorable to plaintiff." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). Defendants have accurately described most of the relevant factual allegations listed in Plaintiff's complaint and therefore those will not be repeated here.

However, Defendants left out one important point. On March 2, 2016, Plaintiff informed Defendant that he was going to report Defendant's wrongful payroll practices to the Labor Commissioner, and that he was going to report the continued safety violations to OSHA. *See* Plaintiff's Complaint, ECF No. 1, Exhibit A, ¶¶56-57, ¶78. **Immediately** after hearing this,

1 Defendants terminated Plaintiff's employment. *Id.* ¶58, ¶79.

2 **III. LEGAL ARGUMENT**

3 Defendants moved to dismiss based on Federal Rule 12(b)(6). Defendants moved to
 4 dismiss based on Federal Rule 12(b)(6). "To survive a motion to dismiss, a complaint must
 5 contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its
 6 face" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). As
 7 stated in *Gliman v. Davis*, 690 F. Supp.2d 1105, (E.D. Cal. 2010), "'plausibility,' as it is used in
 8 *Twombly* and *Iqbal*, does not refer to the likelihood that a pleader will succeed in proving the
 9 allegations. Instead, it refers to whether the non-conclusory factual allegations, when assumed to
 10 be true, allow the court to draw the reasonable inference that the defendant is liable for the
 11 misconduct alleged."

12 FRCP 8(a) dictates that the Complaint shall contain a "short and plain statement of the
 13 claim showing that the pleader is entitled to relief." This Rule "generally requires only a
 14 plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal
 15 argument." *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 899 (9th Cir. 2013) (citing *Skinner*
 16 *v. Switzer*, 131 S. Ct. 1289, 1296, 179 L. Ed. 2d 233 (2011)). Under *Bell Atlantic Corp. v.*
 17 *Twombly*, 550 U.S. 544, 555, (2007), the Complaint must give Defendant "fair notice of what the
 18 claim is and the grounds upon which it rests."

19 In reviewing Plaintiff's Complaint under FRCP 12(b)(6), "all allegations of material fact
 20 are taken as true and construed in the light most favorable to plaintiff." *Epstein v. Wash. Energy*
 21 *Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). Additionally, when deciding a motion to dismiss
 22 pursuant to FRCP 12(b)(6), this Court must "take all allegations of material fact as true and
 23 construe them in the light most favorable to the nonmoving party." *Burgert v. Lokelani Bernice*
 24 *Pauhi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000).

A. Plaintiff Engaged in Protected Activity

1. Plaintiff Need Not Have Actually Filed a Claim with Outside Authorities

Plaintiff's Third Claim for Relief is for Tortious Discharge in violation of Nevada's public policy protecting whistleblowers. As mentioned in Defendant's Motion, an employer commits a tortious discharge by terminating an employee for reasons which violate public policy. *D'Angelo v. Gardner*, 107 Nev. 704, 712, 819 P.2d 206, 212 (1991). That case specifically stated that it is against the great weight of public policy to terminate an individual's employment for seeking a safe and healthy working environment, *Id. at 719* ("There can be no doubt but that the public policy of this state favors safe employment practices and the protection of the health and safety of workers on the job... This being the case, we hold that dismissal of an employee for seeking a safe and healthy working environment is contrary to the public policy of this state.") Nevada has recognized that employees who expose unsafe or unlawful activity for the purpose of serving the public good are protected from retaliation by their employer. *See Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 970 P.2d 1062 (1998); *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d 432, (1989).

The Court affirmed in *D'Angelo v. Gardner*, 107 Nev. 704, 819 P.2d 206, 216 (Nev. 1991), "the essence of a tortious discharge is the wrongful, usually retaliatory, interruption of employment by means which are deemed to be contrary to the public policy of this state." Contrary to Defendant's argument, none of the Nevada cases cited stand for the proposition that the employee must have filed a claim *prior* to being terminated. Consider what the Nevada Supreme Court stated in *Hansen v. Harrah's*, 100 Nev. 60, 63 675 P.2d 394 (Nev. 1984) when discussing retaliation for filing a claim for workers' compensation:

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1 It would not only frustrate the statutory scheme, but also provide employers with
 2 an inequitable advantage if they were able to intimidate employees with the loss of
 3 their jobs upon the filing of claims for insurance benefits as a result of industrial
 4 injuries.

5 The issue in this case is causation – that is whether or not Defendants terminated Plaintiff
 6 because Plaintiff threatened to make a claim to both OSHA and the Labor Commissioner. The
 7 Ninth Circuit, when discussing retaliatory discharge under Title VII, has stated, “[c]ausation
 8 sufficient to establish a prima facie case of unlawful retaliation may be inferred from the
 9 proximity in time between the protected action and the allegedly retaliatory discharge” *Miller v.*
 10 *Fairchild Indus., Inc.*, 797 F.2d 727, 731 (9th Cir. 1986); *see also, Yartzoff v. Thomas*, 809 F.2d
 11 1371, 1377 (9th Cir.1987). There is no case that Plaintiff is aware of, in the Ninth Circuit or
 12 Nevada, in which a court states that termination MUST occur after the employee actually files a
 13 claim in order to make out a prima facie case of retaliation.

14 In fact, there are cases which state precisely the opposite. In a Tenth Circuit case
 15 analyzing retaliation under a Title VII claim, the court said, “[a]ction taken against an individual
 16 in anticipation of that person engaging in protected opposition to discrimination is no less
 17 retaliatory than action taken after the fact; consequently, we hold that this form of preemptive
 18 retaliation falls within the scope of 42 U.S.C. § 2000e–3(a)” *Sauers v. Salt Lake Cnty.*, 1 F.3d
 19 1122, 1128 (10th Cir. 1993). A California Federal District court held similarly, saying “An
 20 employer's generalized concern that an employee might complain or assist in another's complaint
 21 about discrimination is sufficient to meet the prima facie element” *E.E.O.C. v. California*
 22 *Psychiatric Transitions, Inc.*, 725 F. Supp. 2d 1100, 1109 (E.D. Cal. 2010).

23 Although these cases concern retaliation under Title VII, the reasoning behind the
 24 Courts’ decisions is applicable to all kinds of retaliation claims, including for whistleblowing.

As explained hereinabove, Marks made his threats to file a complaint to both OSHA and
 the Labor Commissioner on March 2, 2016 and was immediately thereafter terminated before he

1 had the opportunity to make that claim. Marks alleges that Defendant was aware that he was
 2 going to file such a claim, but terminated his employment before he had that chance. *See*
 3 Plaintiff's Complaint at ¶78-79.

4 In this case Defendants terminated Plaintiff before he had a chance to file his claims with
 5 any outside agency, but not before they feared that he would do so. Allowing an employer to
 6 escape liability for tortious discharge by preemptively terminating a Plaintiff would encourage
 7 employers to fire their employees the very moment the employee discusses any safety issue or
 8 threatens to make a claim unless the problem gets corrected first. This would completely go
 9 against the Court's reasoning set forth in *Hansen* where the court discussed the importance of
 10 ensuring that employees need not have to choose between having a job and making a rightful
 11 claim protecting some public interest. By terminating employees preemptively, the employer
 12 sends a message to other employees that they should keep their mouths shut.

13 Accordingly, because Plaintiff has properly pled that he told Defendants that he was
 14 going to expose the illegal employment practices to both the Nevada Labor Commissioner and
 15 the Occupational Safety and Health Administration, but was terminated before he had the chance
 16 to actually make that claim, Defendants should not be able to escape liability. Plaintiff has pled
 17 enough facts to show that Defendants were aware that there would be an impending claim to an
 18 outside agency. This is different from merely making an internal complaint. As such, Plaintiff's
 19 Third Claim for Relief should not be dismissed.

20 **2. Defendant Misinterprets the holding of the *Wiltsie* Case**

21 Defendants, citing to *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d 432, (1989),
 22 contend, that in order for the employee to be protected as a whistleblower, he must have reported
 23 the illegal conduct to an outside authority other than the employer. However, Defendants
 24 misconstrue this standard and the holding of *Wiltsie*.

1 In *Wiltsie*, the Nevada Supreme Court stated:

2 No public policy is more basic than the enforcement of our gaming
3 laws. “We believe that whistleblowing activity which serves a
4 public purpose should be protected. So long as employees' actions
5 are not merely private or proprietary, but instead seek to further the
6 public good, the decision to expose illegal or unsafe practices should
7 be encouraged.” *Wagner v. City of Globe*, 150 Ariz. 82, 722 P.2d
8 250, 257 (1986). In this case appellant alleged that he was
discharged for reporting illegal activity to his supervisor. Because
appellant chose to report the activity to his supervisor rather than the
appropriate authorities, he was merely acting in a private or
proprietary manner. *Cf. Zaniecki v. P.A. Bergner & Co.*, 143
Ill.App.3d 668, 97 Ill.Dec. 756, 493 N.E.2d 419 (1986) (reporting
suspected illegal activity to a supervisor is a purely private action)

9 *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 293, 774 P.2d 432, 433–34 (1989). The
10 Court in that case did not delve into any analysis of why the Plaintiff in that case chose to report
11 the illegal conduct to his supervisor rather than an outside agency. In fact, the case does not even
12 describe what the illegal conduct the employee was reporting, other than an allusion to gaming
13 laws. The key takeaway from *Wiltsie* is not that an employee must go to an outside agency to be
14 protected, but rather that the employee is protecting a **public** interest, as opposed to a proprietary
15 one.

16 In that particular case, the Court decided that because the employee only reported the
17 illegal conduct to a supervisor and not an outside agency, it was a proprietary concern, not a
18 public one. However, that does not mean that every instance in which the employee fails to
19 report illegal conduct to an outside agency is proprietary. The question should not be to whom
20 was the report made, but rather why did the employee feel compelled to report it. If the answer is
21 to protect his own interests (license, wages, reputation, employer’s reputation, etc.), then it is a
22 proprietary interest, not a public one. If however, the employee intends to protect a public good,
23 such as safety, public well-being, or community interest, then it is not purely proprietary, but
24

1 rather the employee is looking out for the good of others. This is the intent of the “public policy”
2 doctrine, to protect an employee looking out for a public interest.

3 *Wiltsie* itself based its ruling on the Illinois case *Zaniecki v. P.A. Bergner & Co.*, 143
4 Ill.App.3d 668, 97 Ill.Dec. 756, 493 N.E.2d 419 (1986). In that case, an employee reported to his
5 employer’s chief security office that his supervisor had been stealing wood from the company.
6 The reporting employee was subsequently terminated. The Illinois Appellate Court stated,
7 “[a]lthough there is no precise line of demarcation dividing matters that are the subject of public
8 policies from matters purely personal...a matter must strike at the heart of a citizen's social
9 rights, duties and responsibilities before the tort will be allowed.” *Id.* at 670. However, the Court
10 then went on to characterize the matter in that specific case as a purely internal matter which did
11 not concern the public well being. *Id.* at 671. The Court did acknowledge that had the employee
12 involved a public authority, the matter might have been converted to one of public concern. *Id.*
13 However, because the matter initially only involved internal theft within the company, there was
14 no public concern.

15 The Illinois Supreme Court later went on to overturn *Zaniecki*, holding that a complaint
16 of retaliatory discharge is not precluded based on an employee’s failure to report unlawful
17 activity to a public official. *Lanning v. Morris Mobile Meals, Inc.*, 308 Ill. App. 3d 490, 493, 720
18 N.E.2d 1128, 1131 (1999). Thus, the case *Wiltsie* was originally based on has been overturned,
19 effectively negating the principles on which *Wiltsie* stands.

20 Many other states and circuits have held, similar to *Lanning* – that reports to internal
21 personnel do not transform public issues into private disputes Consider, *Aiken v. Bus. & Indus.*
22 *Health Grp., Inc.*, 886 F. Supp. 1565, 1571 (D. Kan. 1995), *aff’d sub nom. Aiken v. Employer*
23 *Health Servs., Inc.*, 81 F.3d 172 (10th Cir. 1996) (In order to prevail on his claim, plaintiff must
24 show he was discharged because he “reported to superiors or to public authorities serious

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misconduct that constitutes a violation of the law and of ... well established and clearly mandated public policy.); *Belline v. K-Mart Corp.*, 940 F.2d 184, 187 (7th Cir. 1991) (To hold otherwise would be to create perverse incentives by inviting concerned employees to bypass internal channels altogether and immediately summon the police); *Liberatore v. Melville Corp.*, 168 F.3d 1326, 1331 (D.C. Cir. 1999); *Kearl v. Portage Envtl., Inc.*, 205 P.3d 496, 499 (Colo. App. 2008);

Probably the best logical reasoning for extending protection to internal whistleblowers comes from Oklahoma. In *Barker v. State Ins. Fund*, 2001 40 P.3d 463, 468, *as corrected* (Nov. 7, 2001), the Court stated:

...one of the primary goals of protecting whistle-blowers from retaliatory discharge is to reduce wrongdoing in a speedy, efficacious manner. In that respect, it makes sense to recognize claims of whistle-blowers who report wrongdoing within the employing organization to a person in a position to investigate and remedy the wrongdoing. Second, internal disclosures are much less disruptive to the company than external disclosures. Loyal employees, who do not go outside their organizations, should not have less protection than employees who could be considered more disruptive by complaining outside their organizations (internal citations omitted).

Whether or not the employee went to a public official is not conclusive of whether a dispute concerned a public or proprietary interest. The Federal District Court for the District of Nevada recently stated:

Defendants also assert that the context and form of Plaintiff's complaints should weigh against finding that her speech involves matters of public concern. Defendants emphasize that the Medical Staff Issues spreadsheet was presented only to the Board, and not to any public outlet. In a close case, when the subject matter of a statement is only marginally related to issues of public concern, the fact that it was made ... to co-workers rather than to the press may lead the court to conclude that the statement does not substantially involve a matter of public concern. This is not a close case. Plaintiff's complaints involve matters of public concern, including patient care at HGH. This content is not outweighed by the fact that the Medical Staff Issues spreadsheet was an internal document.

1 *Kim v. Humboldt Cty. Hosp. Dist.*, No. 3:12-CV-00430-MMD, 2015 WL 1330192, at *6
 2 (D. Nev. Mar. 25, 2015) (internal citations omitted). Thus, within Nevada, courts have
 3 recognized that safety standards DO involve matters of public concern.

4 In this case, there is no doubt that Marks spoke with Defendant David Saxe about the
 5 safety and wage issues. The issue is not whether such complaint was made to an outside agency,
 6 rather the question is whether such report was made for personal proprietary reasons, or for the
 7 public benefit. This is a question of fact to be more fully fleshed out through the course of
 8 discovery. At this juncture, it is inappropriate to merely presume that Marks' intentions were to
 9 protect a proprietary interest.

10 If, through discovery, Defendants determine that Plaintiff was acting in a proprietary
 11 interest, at that point they should file a Motion for Summary Judgment on this issue. Until then,
 12 however, at the very least Plaintiff's claim must be allowed to proceed. If this Court requires
 13 Plaintiff to amend his Complaint to include a sentence clarifying that the purpose of his
 14 complaints to Saxe were to protect the safety and well being of the other employees and patrons,
 15 he will agree to amend his complaint to add such information. However it would be
 16 inappropriate to dismiss this claim with prejudice.

17 **B. There is No Statutory Remedy to Adequately Compensate Plaintiff**

18 Defendants next argue that when a statutory remedy is available, a plaintiff cannot
 19 maintain an action in tort for wrongful termination. Defendants are partially correct, but leave
 20 out an important caveat to that doctrine.

21 In *D'Angelo v. Gardner*, 107 Nev. 704, 720 (1991), the Court explained that where a state
 22 or federal employment statute concerning wrongful termination expressly provides for the same
 23 remedies that can be had in tort, that a tortious discharge claim may not be maintained. To be
 24 clear, that Court clarified a previous decision (*Sands Regent v. Valgardson*, 105 Nev. 436

(1989)) which explained that although it is against public policy to terminate an employee because of age, the Age Discrimination in Employment Act (“ADEA”) already provided for tort-like damages and thus the Court would not recognize a tortious discharge claim for age discrimination. Like the plaintiff in *Valgardson*, the Plaintiff in *D’Angelo* also had a separate statutory remedy under the Occupational Safety and Health Act. However, unlike the ADEA, neither NRS 618 nor 29 USC §660 provide for tort damages, only for an administrative claim with a potential recovery for reinstatement and past wages – not general damages.

The issue came before the Court again a few years later where a plaintiff alleged he was terminated as a result of testifying against his employer as a witness and brought a claim for tortious discharge. *Shoen v. Amerco, Inc.*, 111 Nev. 735, 744, 896 P.2d 469, 475 (1995). In that case, the Court compared *D’Angelo* and *Valgardson* and found that where the statutory remedy (NRS 50.070) allowed for reinstatement, recovery of lost wages and benefits, recovery of attorney’s fees, and recovery of an additional amount equal to the lost wages and benefits in liquidated damages, that such damages were the same tort-type damages that preclude recovery on a theory of tortious discharge. *Id.* The difference, then, is that where a plaintiff can bring relief under a statute, the Court will not recognize a claim for tortious discharge unless the statute does not provide for similar damages that the plaintiff could obtain in tort

Defendants come to this Court and attempt to say that Plaintiff’s claim should be barred because he had a statutory remedy through that Occupational Safety and Health Act, even though the Nevada Supreme Court has already ruled that a potential claim through OSHA does not extinguish a plaintiff’s right to bring the claim in tort because OSHA does not provide for tort-like remedies. Accordingly, that aspect of Defendant’s argument is without merit.

Next, neither NRS Chapter 607 or Chapter 608 – regarding the duties and obligations of the Nevada Labor Commissioner – speak to claim for retaliation for filing a claim. Nowhere in

1 those statutory schemes is there any remedy or procedure for making a claim for retaliation for
2 bringing a claim to the labor commissioner. Accordingly, there is no adequate statutory remedy
3 available for Plaintiff to otherwise bring this claim.

4 Therefore, contrary to Defendants' argument, there are no relevant statutes that provide
5 adequate remedies for this type of conduct, and Plaintiff's claim should not be dismissed.

6 **IV. CONCLUSION**

7 For the above stated reasons, this Court should deny Defendants' Motion to Dismiss
8 Plaintiff's Third Claim for Relief for failure to state a claim. Alternatively, should this court grant
9 Defendant's Motion, Plaintiff asks that such dismissal should be without prejudice so that Plaintiff
10 may be able to amend and correct any deficiencies.

11
12 Dated this 29th day of September, 2017

13 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of September, 2017, I caused to be served a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S THIRD CLAIM FOR RELIEF** on the following person(s) by electronically filing via the CM/ECF system utilized by this Court:

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ALEXANDER MARKS, an individual,

Plaintiff,

vs.

DAVID SAXE PRODUCTIONS, LLC;
SAXE MANAGEMENT, LLC; DAVID
SAXE, an individual; EMPLOYEE(S) /
AGENT(S) DOES 1-10; and ROE
CORPORATIONS 11-20, inclusive

Defendants.

Case No. 2:17-cv-02110-KJD-CWH

**REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S THIRD CLAIM FOR
RELIEF**

I. INTRODUCTION

Defendants David Saxe Productions, LLC; Saxe Management, LLC; and David Saxe ("Defendant Saxe") (collectively, "Defendants") file this reply in support of their Motion to Dismiss Plaintiff Alexander Marks' ("Plaintiff") Third Claim for Relief pursuant to Federal Rule of Civil Procedure 12(b)(6) because Plaintiff fails to state a claim upon which relief can be granted. The Nevada Supreme Court has clearly held that tortious discharge claims are rare, and severely limited, and that they are not appropriate when, as here, Plaintiff, an alleged whistleblower, admittedly never complained to any outside authority, as he must to state a claim for tortious discharge. Moreover, Plaintiff's Third Claim for Relief should be dismissed for the additional reason that, even if he were

1 a whistleblower, his claim cannot stand because adequate statutory remedies are available to him.
 2 *Sands Regent v. Valgardson*, 105 Nev. 436, 439-440, 777 P.2d 898, 900 (1989) (emphasis added).
 3 There is simply no dispute that federal statutory schemes provide a full panoply of remedies for
 4 alleged retaliation. *See* 29 U.S.C. § 216(b) (allowing reinstatement, back pay, compensatory
 5 damages, liquidated damages, as well as attorney’s fees reinstatement); 29 U.S.C. § 660(c)(2));
 6 U.S. Dep’t of Labor, OSHA Instruction, “Whistleblower Investigations Manual,” CPL 02-03-007,
 7 at 6-1-6-10 (Jan. 28, 2016) (allowing reinstatement, back pay, compensatory and punitive
 8 damages). Accordingly, Plaintiff’s tortious discharge claim should be dismissed.

9 **II. ARGUMENT**

10 **A. Plaintiff’s Claim For Tortious Discharge Must Be Dismissed Because He** 11 **Failed To Complain Outside The Company.**

12 Despite Plaintiff’s suggestion to the contrary, the Nevada Supreme Court has “*severely*
 13 *limited* [public policy tortious discharge actions] to those *rare and exceptional cases* where the
 14 employer’s conduct violates strong and compelling public policy.” *Valgardson*, 777 P.2d at 900
 15 (emphasis added); *see also State v. Eighth Judicial District Court (Anzalone)*, 118 Nev. 140, 151-
 16 52, 42 P.3d 233, 240-41 (Nev. 2002). Indeed, the law in Nevada regarding tortious discharge is
 17 clear: there are only four scenarios in which the court will entertain such claims—retaliation for
 18 filing a workers’ compensation claim, refusing to work in unreasonably dangerous conditions,
 19 retaliation for engaging in whistleblowing activities, and refusing to participate in illegal activities.
 20 *Hansen v. Harrah’s*, 100 Nev. 60, 64, 675 P.2d 394, 397 (Nev. 1984); *D’Angelo*, 107 Nev. at 719,
 21 819 P.2d at 216; *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 293, 774 P.2d 432, 433 (Nev. 1989);
 22 *Allum v. Valley Bank*, 114 Nev. 1313, 1322-24, 970 P.2d 1062, 1067-68 (Nev. 1998).

23 In his Response to Defendant’s Motion to Dismiss Plaintiff’s Third Claim for Relief
 24 (“Response”), Plaintiff admits that his tortious discharge claim is based on alleged activities
 25 whistleblowing activities. ECF No. 15 at 5. He further admits that, to qualify for this narrow public
 26 policy exception, an employee’s actions must be for the public good, and not merely private or
 27 proprietary. Resp. at 7; *Wiltsie*, 105 Nev. at 293, 774 P.2d at 433. Contrary to Plaintiff’s contention,
 28 however, the “key takeaway from *Wiltsie*” is precisely that “an employee must report the

1 employer's allegedly illegal activity to the appropriate authorities *outside of the company*"

2 otherwise it is not an action for the public good.¹ ECF No. 15 at 8; *Scott v. Corizon Health Inc.*,

3 No. 3:14-CV-00004-LRH-VPC, 2014 U.S. Dist. LEXIS 65066, **6-7 (D. Nev. May 9, 2014)

4 (emphasis in original) (citing *Biesler v. Prof. Sys. Corp.*, 177 Fed. Appx. 655, 656 (9th Cir. 2006)

5 ("Nevada precedent is clear, therefore, that unless an employee reports the employer's allegedly

6 illegal activity to authorities outside of the company, he or she cannot claim protected

7 whistleblower status.")). Relying on *Wiltsie*, the Nevada Supreme Court, District Court of Nevada,

8 and U.S. Court of Appeals for the Ninth Circuit have all repeatedly dismissed plaintiffs' tortious

9 discharge claims specifically because the employee did not report the alleged illegal activities "to

10 the appropriate authorities *outside the company*." *Whiting v. Maxim Healthcare Servs., Inc.*, No.

11 56432, 2012 Nev. Unpub. LEXIS 1215, at *2 (Nev. Sept. 13, 2012); *Reuber v. Reno Dodge Sales,*

12 *Inc.*, No. 61602, 2013 Nev. Unpub. LEXIS 1658, at *3 (Nev. Nov. 1, 2013) (citation omitted)

13 ("While this court has recognized protections for whistleblowers, such protections are limited to an

14 employee who reports activity to an agency outside the company. . . ."); *Ainsworth v. Newmount*

15 *Mining Corp.*, No. 56250, 2012 Nev. Unpub. LEXIS 435, at *7-8 (Nev. Mar. 20, 2102) (same);

16 *Biesler*, 177 Fed. Appx. at 656 (same); *see Van Asdale v. Int'l Game Tech.*, No. 11-16538, No.

17 11016626, 549 Fed. Appx. 611, 2013 U.S. App. LEXIS 19843, at *5 (9th Cir. Sept. 27, 2013)

18 ("Nevada's tortious-discharge law states that an employee must expose an employer's illegal

19 activity to the proper authorities, not merely to a supervisor, to be entitled to protection for

20 whistleblowing."); *Wilson v. Greater Las Vegas Ass'n of Realtors*, Case No. 2:14-cv-00362-APG-

21 NJK, 2016 U.S. Dist. LEXIS 58595, at *18-19 (D. Nev. Mar. 9, 2015) (dismissing plaintiff's

22 tortious discharge claim because her conduct did not "seek to further the public good" because she

23 did not allege that she reported misconduct to the "appropriate authorities").²

24

25

26 ¹ Plaintiff's citation to *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (Nev. 1984), ECF No. 15, distracts.

27 Significant to that case, and unlike Plaintiff, Hansen actually complained outside the company by filing a workmen's

28 compensation claim. *Id.* at 62.

² Plaintiff's discussion of retaliation claims under Title VII is irrelevant. Title VII is a separate statute that provides for its own statutory scheme of procedures and remedies. 42 U.S.C. 2000e *et seq.* Because the Nevada Supreme Court has expressly held that a plaintiff must complain to authorities outside the company to state a claim for

1 Here, Plaintiff admits that he did not report any alleged violations to any “appropriate
2 authorities outside of the company.” ECF No. 1 ¶¶ 37, 56, 57, 78. And, his Response confirms
3 that: “Plaintiff informed Defendant that he was going to report Defendant’s wrongful payroll
4 practices to the Labor Commissioner, and that he was going to report the continued safety violations
5 to OSHA.” ECF No. 15 at 3. Thus, there is no dispute that Plaintiff did not complain to outside
6 authorities before his employment was terminated – as he must to state a claim for tortious discharge
7 based on whistleblowing allegations – and this ends the analysis as a matter of law.³

8 Recognizing his claim is doomed for this reason alone, in his Response, Plaintiff spends
9 four pages discussing the law in other circuits interpreting other state laws.⁴ ECF No. 15 at 8-14.
10 But, what courts have said in other circuits interpreting other state laws is irrelevant to Plaintiff’s
11 Nevada tortious discharge claim. Here, the Court must apply the law of the state of Nevada and
12 that law undisputedly requires Plaintiff to report the alleged violations “outside the company” to be
13 considered a whistleblower under Nevada’s tortious discharge law. In fact, in *Whiting* and
14 *Ainsworth*, the Nevada Supreme Court has twice expressly rejected the same argument Plaintiff
15 advocates for here – i.e., to expand the whistleblowing protection to cover internal reporting.
16 *Whiting*, 2012 Nev. Unpub. LEXIS 1215 at *2; 2012; *Ainsworth*, Nev. Unpub. LEXIS 435 at *7-8.
17 If the Nevada Supreme Court has expressly rejected Plaintiff’s argument, so should the Court here
18 and dismiss Plaintiff’s claim with prejudice. *See Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112,
19 1124 (Nev. 2008) (“[U]nder the doctrine of *stare decisis*, [this court] will not overturn [precedent]
20 absent compelling reasons for so doing. Mere disagreement does not suffice.”) (brackets in
21 original).

22 _____
23 tortious discharge based on whistleblowing activities, how courts have interpreted Title VII retaliation claims has
24 nothing to do with the instant litigation.

25 ³ Plaintiff asks the Court “to amend his Complaint to include a sentence clarifying that the purpose of his
26 complaints to Saxe were to protect the safety and well being of other employees and patrons,” ECF No. 15, but, for the
27 reasons previously discussed, such an allegation does not cure the deficiencies in Plaintiff’s Complaint, much less
28 establish that he complained to outside authorities sufficient to state a plausible claim for tortious discharge for alleged
whistleblowing activities.

⁴ Plaintiff’s argument that the Court should ignore the decision in *Wiltzie* because the *Illinois* case *Wiltzie*
considered has since been overturned is a make weight. ECF No. 15 at 9. Putting aside the fact that Nevada law is
clear, Nevada state and federal courts, as well as the Ninth Circuit, have all consistently upheld *Wiltzie* in the nearly 20
years since the Illinois case was overturned.

B. Plaintiff Has A Full Panoply Of Remedies Available To Him Under Other Statutory Schemes.

Assuming *arguendo* that Plaintiff could state a claim for tortious discharge for his alleged whistleblowing activities – he cannot – the parties agree that Plaintiff is precluded from asserting such a claim if other statutory remedies are available. ECF No. 15 at 11; ECF No. 7 at 5-7; *Herman v. United Broth. Of Carpenters and Joiners of Am., Local Union No. 971*, 60 F.3d 1375, 1385 (9th Cir. 1995) (“The Nevada Supreme Court has held that Nevada’s public policy against impermissible discrimination cannot be vindicated through a tortious discharge public policy tort, but rather must be pursued through statutory remedies.”). Plaintiff, however, misstates Nevada law, claiming that a tortious discharge claim cannot be maintained only where a state or federal statute provides for “the same remedies that can be had in tort.” ECF No. 15 at 11. While such is true, Nevada law goes even further precluding a plaintiff from asserting a tortious discharge claim if that claim circumvents a “comprehensive statutory [scheme] or other tort remedy available.” *D’Angelo v. Gardner*, 107 Nev. 704, 819 P.2d 206, 722 (Nev. 1991). In other words, where a “comprehensive statutory remedy exist,” a plaintiff cannot bring an action for tortious discharge. *Id.*

Here, there can be no dispute that the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“OSHA”), provides Plaintiff with a comprehensive statutory remedy. Although unclear from the allegations in his Complaint, a claim for alleged retaliatory discharge under OSHA is governed by Section 11(c), 29 U.S.C. § 660(c). *Id.* (providing in pertinent part, [n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter”). The law is clear that, under Section 11(c), an employee can recover back pay, compensatory and punitive damages, as well as reinstatement and other injunctive relief. 29 U.S.C. § 660(c)(2) (“United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.”); U.S. Dep’t of Labor, OSHA Instruction, “Whistleblower Investigations Manual,” CPL 02-03-007, at 6-1-6-10 (Jan. 28, 2016); https://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf; *see also Reich v.*

1 *Cambridgeport Air Sys. Inc.*, 26 F.3d 1187, 1191 (1st Cir. 1994) (by allowing the court to “order
 2 all appropriate relief,” the statute impliedly authorized compensatory and exemplary or punitive
 3 damages); *Perez v. Clearwater Paper Corp.*, 184 F. Supp. 3d 831, 843 (D. Idaho 2016) (awarding
 4 \$50,000 for emotional damages and doubling the plaintiff’s award for back-pay as punitive
 5 damages).

6 Similarly, under the FLSA, a plaintiff may be entitled to reinstatement, back pay,
 7 compensatory damages, liquidated damages, and reasonable attorneys’ fees. 29 U.S.C. § 216(b);
 8 *Lambert v. Ackerley*, 180 F.3d 997, 1017 (9th Cir. 1999) (allowing for recovery of emotional
 9 distress damages for FLSA retaliation claims); *Lagos v. Monster Painting, Inc.*, No. 2:11-CV-
 10 00331-LRH-GWF, 2013 U.S. Dist. LEXIS 158384, at *15-16 (D. Nev. Nov. 5, 2013) (permitting
 11 recovery of compensatory damages for emotional distress for plaintiff’s FLSA retaliation claim).

12 Thus, as discussed in more detail in Defendants’ Motion (ECF No. 7), because OSHA and
 13 the FLSA each undisputedly provide Plaintiff with a comprehensive scheme of statutory remedies
 14 he could obtain with respect to his claims that he was discharged in retaliation for exposing wage
 15 violations and unsafe working conditions, additional tortious discharge remedies are not proper.⁵
 16 Plaintiff’s tortious discharge claim should be dismissed for this additional reason. *Shoen v. Amerco*,
 17 *Inc.*, 111 Nev. 735, 896 P.2d 469, 475 (Nev. 1995) (precluding recovery for tortious discharge
 18 because the statutory remedy allowed for reinstatement, recovery of lost wages and benefits,
 19 recovery of attorney’s fees, and recovery of liquidated damages); *see also* ECF No. 7 at 5-6.

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 26 ⁵ Presumably because he recognizes he has a full panoply of statutory remedies available to him under federal
 27 law, Plaintiff wholly ignores his federal remedies and instead argues that his state law remedies are more limited. ECF
 28 No. 15 at 11-13. This argument does not save his claim. The law is clear, and Plaintiff himself concedes, that “where
 a state *or* federal” statute, as in the instant case, provides for comprehensive statutory remedies, a plaintiff does not
 have a claim for tortious discharge under Nevada law. ECF No. 15 at 11; ECF No. 7 at 5-6; *Sands Regent v. Valgardson*,
 105 Nev. 436, 440, 777 P.2d 898, 900 (Nev. 1989).

1 **III. CONCLUSION**

2 For each and all of the reasons set forth above, as well as those articulated in Defendants'
3 opening Motion, Defendants respectfully ask the Court to dismiss Plaintiff's Third Claim for Relief.

4 Dated this 13th day of October, 2017.

5 JACKSON LEWIS P.C.

6
7 /s/ Kirsten A. Milton

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 13th day of October, 2017, I caused to be served via the Court's CM/ECF Filing, a true and correct copy of the above foregoing **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S THIRD CLAIM FOR RELIEF** properly addressed to the following:

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Attorneys for Plaintiff
Alexander Marks

/s/ Kelley Chandler
Employee of Jackson Lewis P.C.

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5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 ALEXANDER MARKS, an individual,

10 Plaintiff,

v.

11 DAVID SAXE PRODUCTIONS, LLC; SAXE
12 MANAGEMENT, LLC; DAVID SAXE, an
13 individual; EMPLOYEE(S) / AGENT(S) DOES
14 1-10; and ROE CORPORATIONS 11-20,
15 inclusive,

Defendants.

Case No. 2:17-cv-02110-KJD-CWH

ORDER

16 Presently before the Court is Defendants' Motion to Dismiss Plaintiff's Third Claim for
17 Relief (#7). Plaintiff filed a response (#15) to which Defendants replied (#18).

18 **I. Background**

19 The present action involves Plaintiff's termination by David Saxe ("Saxe"). According to
20 the allegations of the complaint, Plaintiff worked as Defendants' General Counsel. During
21 February 2016, Plaintiff discovered violations of federal and state safety standards by
22 Defendants' employees. Plaintiff reported the violations to Saxe. Towards the end of February,
23 Plaintiff warned Saxe that he would have to report the violations to OSHA.
24
25
26

1 On February 26, 2016, Plaintiff found that Saxe had not paid him for a day he left early
 2 due to illness. Plaintiff believed this violated 29 CFR 541.602 and started an investigation on the
 3 matter. On March 2, 2016, Saxe learned about the investigation and met with Plaintiff. During
 4 their conversation, Plaintiff told Saxe that he would report workplace violations to the
 5 appropriate authorities. Saxe terminated Plaintiff after this comment.

6 On June 22, 2017, Plaintiff filed the present complaint alleging three causes of action:
 7 (1) a violation of 29 U.S.C. § 215 (FLSA); (2) a violation of NRS 613.040 (regarding political
 8 activity); and (3) a claim for common law public policy tortious discharge based on Plaintiff's
 9 whistleblower activity. Plaintiff's third cause of action actually consists of two separate claims:
 10 (1) a common law public policy tortious discharge claim based on Plaintiff reporting safety
 11 violations (OSHA) and (2) a common law public policy tortious discharge claim based on
 12 Plaintiff reporting illegal payroll practices. Defendants have now moved to dismiss both of these
 13 whistleblower claims.

14 **II. Legal Standard**

15 In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken
 16 as true and construed in a light most favorable to the non-moving party." Wyler Summit P'ship
 17 v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1988) (citation omitted). Consequently,
 18 there is a strong presumption against dismissing an action for failure to state a claim. See
 19 Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1998) (citation omitted).

20 "To survive a motion to dismiss, a complaint must contain factual matter, accepted as
 21 true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937,
 22 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Plausibility, in the
 23 context of a motion to dismiss, means that the plaintiff has pleaded facts that allow "the court to
 24

draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id.

The Iqbal evaluation illustrates a two-prong analysis. First, the court identifies the “allegations in the complaint that are not entitled to the assumption of truth,” that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. Id. at 1949–51. Mere recitations of the elements of a cause of action, supported only by conclusory statements, do not suffice. Id. at 1949. Second, the court considers the factual allegations “to determine if they plausibly suggest an entitlement to relief.” Id. at 1951. If the allegations state plausible claims for relief, such claims survive the motion to dismiss. Id. at 1950.

III. Analysis

A. Whistleblower Status

Under Nevada law, a tortious discharge claim arises “when an employer dismisses an employee in retaliation for the employee’s doing of acts which are consistent with or supportive of sound public policy and the common good.” D’Angelo v. Gardner, 819 P.2d 206, 215 (Nev. 1991). An employee reporting an employer’s illegal activities to the government is supportive of the common good. Ainsworth v. Newmont Mining Corp., 2012 WL 987222, at *1 (Nev. Mar. 20, 2012) (citing Wiltsie v. Baby Grand Corp., 774 P.2d 432, 433 (Nev. 1989)).

Defendant has moved to dismiss Plaintiff’s tortious discharge claim asserting that Defendant is not a whistleblower. To acquire whistleblower status, “an employee must affirmatively decide to expose illegal or unsafe practices.” Ainsworth, 2012 WL 987222, at *2. Plaintiff’s discussion with Defendant Saxe about his intention to report Defendants’ alleged illegal practices was an affirmative decision. Therefore, Defendants’ motion to dismiss based on Plaintiff’s lack of whistleblower status is denied.

1 B. Alternative Remedies

2 Under Nevada law, a court will not recognize a claim for tortious discharge when “a
3 comprehensive statutory remedy” provides a tort-type remedy. Shoen v. Amerco, Inc.,
4 896 P.2d 469, 475 (Nev. 1995); D’Angelo, 819 P.2d at 217. A statutory remedy that includes
5 “reinstatement, recovery of lost wages and benefits, recovery of attorney’s fees, and recovery of
6 ‘[damages] equal to the amount of the lost wages and benefits’” will be sufficient to establish a
7 tort-type remedy. Shoen, 896 P.2d at 475 (quoting Nev. Rev. Stat. § 50.070 (West 1995)).
8 However, a statutory remedy providing only “reinstatement and past wages and not general
9 damages” is insufficient to show a tort-type remedy. D’Angelo, 819 P.2d at 217.

10 Plaintiff possesses a separate common law public policy tortious discharge claim for each
11 instance of his whistleblower activity. Plaintiff’s whistleblower activity consists of his threats to
12 report Defendants’ OSHA and FLSA violations. Plaintiff’s termination over these threats allow
13 him to pursue two different causes of action under 29 U.S.C. § 660(c)(2) and 29 U.S.C. § 215.
14 Thus, this Court will consider Plaintiff’s common law public policy tortious discharge claim as
15 two separate causes of action.

16 *1. Common Law Public Policy Tortious Discharge - OSHA*

17 Here, Plaintiff correctly asserts that the remedy found in N.R.S. § 618 is
18 inadequate since it only provides for “reinstatement and reimbursement for lost wages and work
19 benefits.” Nev. Rev. Stat. § 50.070(4). While there is no adequate remedy under N.R.S. § 618,
20 29 U.S.C. § 660(c)(2) provides Plaintiff an opportunity for all “appropriate relief” which
21 includes reinstatement, back pay, compensatory damages, or punitive damages. 29 U.S.C. §
22 660(c)(2) (2018); see Reich v. Cambridgeport Air Sys. Inc., 26 F.3d 1187, 1191 (1st Cir. 1994)
23 (holding that “all appropriate relief” includes monetary damages); Perez v. U.S. Postal Serv., 76

1 F. Supp. 3d 1168, 1193 (W.D. Wash. 2015) (allowing plaintiff to recover compensatory
 2 damages). Although Plaintiff has a tort-type remedy under 29 U.S.C. § 660(c)(2), this remedy is
 3 insufficient since it requires the Secretary of Labor to bring the claim. This requirement restricts
 4 Plaintiff from sufficiently vindicating his rights. See D'Angelo, 819 P.2d at 217. Therefore,
 5 Defendants' motion to dismiss Plaintiff's common law public policy tortious discharge claim
 6 based on his intention to report Defendants' alleged OSHA violations is denied.

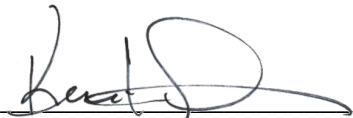
7 *2. Common Law Public Policy Tortious Discharge - FLSA*

8 Plaintiff's common law public policy tortious discharge claim for threatening to
 9 report Defendants' alleged FLSA violations has an alternative remedy. Plaintiff has already filed
 10 a cause of action relating to these violations under 29 U.S.C. § 215 in his complaint. The
 11 remedies for violation of this statute include "reinstatement, promotion, and payment of wages
 12 lost and the payment of wages lost and an additional equal amount as liquidated damages" and
 13 allow the court to award "reasonable attorney's fees paid by the defendant." 29 U.S.C. § 216(b)
 14 (2018). These remedies are sufficient to satisfy the requirements of a tort-type remedy.
 15 Therefore, Defendants' motion to dismiss Plaintiff's common law public policy tortious
 16 discharge claim based on his intention to report Defendants' alleged FLSA violations is granted.

17 **IV. Conclusion**

18 Accordingly, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Plaintiff's
 19 Third Claim for Relief (#7) is **GRANTED in part and DENIED in part**.

20 DATED this 12th day of June, 2018.

21 
 22 _____
 23 Kent J. Dawson
 24 United States District Judge

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ALEXANDER MARKS, an individual,

Plaintiff,

vs.

DAVID SAXE PRODUCTIONS, LLC;
SAXE MANAGEMENT, LLC; DAVID
SAXE, an individual; EMPLOYEE(S) /
AGENT(S) DOES 1-10; and ROE
CORPORATIONS 11-20, inclusive

Defendants.

Case No. 2:17-cv-02110-KJD-DJA

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Defendants David Saxe Productions, LLC; Saxe Management, LLC; and David Saxe ("Saxe") (collectively, "Defendants") move for summary judgment in their favor and against Alexander Marks ("Marks" or "Plaintiff"). This Motion is based upon Fed. R. Civ. P. 56, the following Memorandum of Points and Authorities, the exhibits attached hereto and such other

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argument the Court may wish to consider.

Respectfully submitted this 20th day of December, 2019.

JACKSON LEWIS P.C.

/s/ Kirsten A. Milton

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case is nothing more than the case of a disgruntled former General Counsel who, more than one year after the termination of his employment, concocted a tale of retaliation because he wanted to “get even with David Saxe for firing him.” **Exhibit A**, Deposition of Andrew August (“August Dep.”) 65:4-23-66:25 (Ex. 3 ¶ 4). From April 6, 2015 until March 1, 2016, Plaintiff served as DSP’s General Counsel until Defendants terminated his employment for poor performance and failure to sufficiently fulfill his duties as General Counsel. On June 22, 2017, more than one year following the termination of his employment, Marks filed the instant Complaint, alleging (1) retaliation pursuant to the Fair Labor Standards Act, 29 U.S.C. § 215 (“FLSA”); (2) violation of NRS 613.040; and (3) tortious discharge. None of Marks’ claims have legal merit and as set forth below, DSP is entitled to summary judgment as to each of Marks’ claims.

First, any actions Marks took regarding the FLSA were within the context of his role as DSP’s General Counsel, and, therefore, failed to rise to the level of FLSA protected activity. Moreover, even if he had not been the individual tasked with ensuring DSP’s compliance with wage and hour laws, no “reasonable, objective person would have understood” that Marks was putting him on notice that he was “asserting statutory rights under the FLSA” when, five minutes before his termination, he vaguely referred to a “wage investigation.” *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14 (2011). Further, the uncontroverted evidence

1 establishes that, throughout his employment, Marks failed to timely meet deadlines and complete
 2 the tasks required of him (well before he made any alleged wage complaints), culminating in the
 3 termination of his employment when he proved unable to campaign for office while at the same
 4 time meeting the responsibilities of his job at DSP. There can be no dispute, and there are simply
 5 no facts, to establish that “but for” Marks’ alleged wage complaints, Saxe would not have
 6 terminated Marks’ employment.

7 Second, Marks’ allegations fail to state a legally cognizable claim under NRS 613.040 based
 8 on the plain meaning of the statute, and the undisputed evidence demonstrates that Marks was
 9 terminated for apolitical reasons (job performance) and not because Saxe disagreed with Marks’
 10 political viewpoint. *See Couch v. Morgan Stanley & Co.*, No. 1:14-cv-10-LJO-JLT, 2015 U.S.
 11 Dist. LEXIS 104021 at *38 (E.D. Cal. Aug. 7, 2015) (“an employer cannot terminate its employee
 12 *solely for expressing his/her political viewpoints or disagreeing with an employee’s political*
 13 *viewpoint*”) (emphasis added). In fact, Marks, a Democrat, admits that he did not “know” and
 14 “never asked” Saxe’s political affiliation.

15 Finally, Marks’ tortious discharge claim fails a matter of law because he did not report the
 16 alleged violations outside of the company until after his termination, he cannot prove that his
 17 termination was proximately caused by any alleged complaint, and, under the circumstances, could
 18 not have held a reasonable, good faith belief that the alleged OSHA violations actually occurred.

19 **II. UNDISPUTED FACTS**

20 **A. MARKS’ EMPLOYMENT WITH DSP**

21 Plaintiff, Alexander Marks, is DSP’s former in-house, General Counsel. **Exhibit B**,
 22 Deposition of David Saxe (“Saxe Dep.”) 73:6-10. Defendant David Saxe is responsible for the
 23 day-to-day management of Defendant DSP and oversees DSP’s accounting, legal, and human
 24 resources departments. *Id.* at 58:21-59:14. Saxe hired Marks in April 2015 after Marks’ mother,
 25 who worked at a coffee shop frequented by Saxe, referred Marks to Saxe. *Id.* at 74:16-75:5. During
 26 the interview process, Saxe conveyed his expectation that Marks would be in the office, working,
 27 during DSP’s normal office hours of 8:30 a.m. to 5:00 p.m., Monday through Friday. *Id.* at 91:15-
 28 19, 92:9-14.

1 In his role as General Counsel, Marks was responsible for ensuring DSP was operating in
 2 compliance with the law, specifically, his “primary focus was contracts and fair labor.” **Exhibit C**,
 3 Deposition of Alexander Marks (“Marks Dep.”) 106:10-19. Plaintiff testified that in his “role as
 4 general counsel . . . [he] was supposed to talk to [Defendant Saxe] as an attorney about issues that
 5 [] [he] thought were in violation of wage and hour loss [sic].” *Id.* at 339:25-340:4. In preparation
 6 for his new role as General Counsel, before he even started working for DSP, Marks read about the
 7 “Fair Labor Standards Act . . . [because he knew] that that was going to be [his] primary focus . . .
 8 so [he] was pretty well prepped in terms of day one for what [he’d] be facing.” *Id.* at 106:10-19.
 9 Marks testified, “my job is compliance. If I find an issue, I have to fix it. I don’t look for issues
 10 but if they arise, that’s my job as general counsel, to look for the company’s best interest.” *Id.* at
 11 115:14-17. Marks further testified that “it was [his] job” as General Counsel to “keep[] [David
 12 Saxe] compliant” with the law. *Id.* at 51:16-25. As the General Counsel, Marks wrote the employee
 13 provision regarding “the process for investigating possible wage deduction issues” and as the
 14 General Counsel, Marks testified if “wage theft or wage deductions were improper were brought to
 15 my attention, I am to investigate that.” *Id.* at 54:7-55:3.

16 Shortly after Marks began working for DSP, he announced his intention to run for political
 17 office. **Ex. B**, Saxe Dep. 112:6-16. Marks spoke with excitement regarding his plans and described
 18 political office as “his dream” to Saxe. *Id.* at 114:11-15. Marks told Saxe not to worry about
 19 Marks’ ability to balance his duties at DSP with his upcoming campaign. *Id.* at 114:11-24. Saxe
 20 felt happy that Marks had found his purpose but was concerned about Marks’ ability to focus on
 21 his work at DSP while campaigning. *Id.* at 115:17-116:19. Nonetheless, Marks testified that Saxe
 22 was “absolutely” supportive of Marks running for office. **Ex. C**, Marks Dep. 31:12 – 32:3. Marks
 23 testified that Saxe even brought up the fact that he was running for political office in manager
 24 meetings because “it was an exciting thing for the office. . . It was kind of cool. Everybody was
 25 excited about it.” *Id.* at 176:23-177:7. Marks further testified that “the understanding that I had
 26 from my boss, who clearly was on board with my running for assembly and senate, was complete
 27 support.” *Id.* at 59:14-16; **Ex. B**, Saxe Dep. 115:17-116:19 (“I could understand that it was a big
 28 deal for him and he was excited, so there was a part of me that was, all right, good for you, you

1 know, I'm genuinely happy that you found your purpose and this is what you've always wanted, I
 2 was happy for him."). While Marks planned to run as a Democrat, he did not discuss political
 3 affiliation with Saxe or otherwise know Saxe's political affiliation. **Ex. C**, Marks Dep. 12:20-13:3.

4 **B. MARKS' JOB PERFORMANCE**

5 Despite his assurances to Saxe, Marks described running for political office as very time
 6 consuming and admitted he worked on his campaign during DSP work hours. *Id.* at 27:6-23,
 7 160:16-21. In fact, shortly after Marks told Saxe of his intention to run for political office, Saxe
 8 walked by Marks' office and observed him talking about his political goals on the telephone during
 9 the workday. **Ex. B**, Saxe Dep. 117:12-118:6. Saxe described another occasion where Marks
 10 appeared to be directing the marketing team to assist him with his campaign:

11 Q. Okay. What other instance?

12 ...

13 A: The time he was standing around the marketing team and giving them—pointing
 14 over their shoulder, giving them direction. And it was—I asked [Vice President of
 15 Operations] Veronica [Duran], I believe, why is he there? Why is Alex down there?
 And she said she didn't know, she was going to find out. And then I think she said,
 "I think he's got them doing his website or some graphics or something for his
 campaign."

16 *Id.* at 118:7-17. Saxe also testified that Ania Koslowski, the sales and marketing manager,
 17 approached Saxe, asked him to "get Alex away from people," and stated "[h]e's driving us
 18 [expletive] crazy with his political stuff." *Id.* at 120:5-9. DSP employee Andrew August
 19 ("August") testified that "Alex [Marks] must have called me into his office at least 20 times just to
 20 brag to me that he was running for state senate and to try to ask my opinion on things like his
 21 website [and] logo design." **Ex. A**, August Dep. 65:4-23 (Ex. 3 ¶ 4). Indeed, consistent with Saxe's
 22 February and March 2016 emails to Marks, August testified that "Alex admitted to me that David
 23 told him to stop working on his campaign at the office and to stop distracting and soliciting the
 24 employees with his political campaign, but Alex stated that he didn't 'give a shit' and was going to
 25 do it anyway." *Id.* at 65:4-23 (Ex. 3 ¶ 5). On an increasingly frequent basis, Saxe could not locate
 26 Marks in the office because Marks was leaving work in the middle of the day for campaign
 27 meetings. On one occasion, Saxe wished to discuss an issue with Marks, but could not find him in
 28 the office at 10:15 a.m. **Exhibit D** at MARKS-00001. Saxe sent Marks an email stating "I'm

1 happy for you about your political aspirations but I shouldn't have to pay for it. Constantly leaving
 2 the office early, not showing up, working on your campaign out of the office etc. doesn't work for
 3 me. Not sure why you aren't in office now but when/if you come back we need to discuss." *Id.*
 4 Marks admitted he was absent from the office that day because he was meeting with a lobbyist to
 5 solicit funds for his campaign. **Ex. C**, Marks Dep. 155:3-156:7.

6 Other DSP employees noticed that Marks seemed to spend a lot of the work day focused on
 7 his campaign activities. **Ex. A**, August Dep. 65:4-23 (Ex. 3 ¶ 7). For example, former DSP
 8 Controller¹ Larry Tokarski ("Tokarski") testified that Marks asked him his opinion about his campaign
 9 logo, discussed his campaign with him, worked on his campaign at the office, and even left the office
 10 to work on campaign-related activities. **Exhibit E**, Deposition of Larry Tokarski ("Tokarski Dep.")
 11 67:14-68:8. DSP's Vice President of Operations, Veronica Duran ("Duran"), also noticed that Marks
 12 would leave the office for two-hour lunches, arrive later in the mornings, and leave work early on an
 13 increasingly frequent basis as the campaign season progressed. **Exhibit F**, Declaration of Veronica
 14 Duran ("Duran Decl.") ¶ 7. When Duran walked by Marks' office, she often observed Marks working
 15 on his personal tablet rather than his work computer.² *Id.* at ¶ 8. Based on her observations, Duran
 16 estimated that Marks spent half of his time in the office working on his personal tablet. *Id.* at ¶ 9. Duran
 17 was heavily involved in assisting Saxe with the day-to-day management of all departments at DSP,
 18 including the legal department, and also noticed that Marks often failed to complete tasks in a timely
 19 fashion. *Id.* at ¶ 10. Duran believed Marks could have completed all of his assigned tasks if he had
 20 worked a forty-hour workweek. *Id.* at ¶ 11. Duran shared her concerns regarding Marks' lack of focus
 21 and overall job performance with Saxe. *Id.* at ¶ 12.

22 In fact, as early as June 2015, Saxe had already started to express frustration with Marks'
 23 failure to meet deadlines, as well as communicate his status on the projects to which he was
 24 assigned. **Exhibit G**, Declaration of David Saxe ("Saxe Decl.") ¶ 6, Ex. 1. Saxe testified that,

26 ¹ Tokarski was responsible for all financial accounting for DSP throughout the duration of Marks' employment. **Ex.**
 27 **E**, Tokarski Dep. 16:15-19, 32:20-21.

28 ² Marks' desk was arranged in a "U" shape, with his seat facing the wall and his work computer facing the office
 entrance, so any passerby could see whether Marks was utilizing his work computer or his personal tablet. *Id.* at ¶ 8.

1 during his employment, Marks was “**constantly**” missing deadlines. **Ex. B**, Saxe Dep. 120:18-25
 2 (emphasis added). For example, Marks was responsible for procuring work visas for performers
 3 coming from outside the United States to perform in one of Saxe’s productions. *Id.* at 131:7-12.
 4 Marks failed to procure the visas on time, which resulted in the performers having to arrive later
 5 than expected, as well as increasing the associated costs to DSP, which had to pay for expedited
 6 processing fees due to Marks’ delay. *Id.* at 132:2-9; **Ex. G**, Saxe Decl. ¶ 10, Ex. 5. In another
 7 example, in October 2015, Marks failed to timely secure a deposit for a show, did not notify Saxe
 8 of his failure to obtain the deposit, and still let the show open without securing the appropriate
 9 funds. **Ex. G**, Saxe Decl. ¶ 9, Ex. 4. Marks also failed to properly manage and coordinate with
 10 outside counsel regarding lawsuits those counsel were handling for DSP. **Ex. B**, Saxe Dep. 132:18-
 11 133:5

12 In fact, in as early as August 2015, Saxe told Marks that he was considering terminating
 13 Marks’ employment for performance issues, stating “[y]our attitude has been poor for a while now
 14 and your performance lackluster at best. This isn’t working for me. Let’s meet today at noon to
 15 discuss our options: [t]ermination, [quitting], [o]r getting on the same page!” **Ex. G**, Saxe Decl. ¶
 16 7, Ex. 2. During his deposition, Marks admitted he understood that at various points throughout
 17 his employment, Saxe had issues with his performance, and, only four months after Marks was
 18 hired, Saxe was considering terminating Marks’ employment. **Ex. C**, Marks Dep. 114:8-19;
 19 354:11-14.

20 Marks’ failure to communicate with Saxe was a persistent issue throughout his employment
 21 at DSP. **Ex. G**, Saxe Decl. ¶ 8, Ex. 3. Marks agreed that, throughout his employment, he needed
 22 to do a better job of communicating with Saxe and Saxe was already telling him he needed to do so
 23 in August 2015. **Ex. C**, Marks Dep. 351:5-12-352:6. Marks continued to struggle with
 24 communication until his termination, as evidenced by a January 28, 2016 email from Marks to Saxe
 25 wherein Marks promised to communicate more with Saxe in response to a request for the statuses
 26 of several outstanding projects. **Ex. G**, Saxe Decl. ¶ 11, Ex. 6. Ultimately, Saxe believed Marks’
 27 failure to perform his job duties “got progressively worse.” **Ex. B**, Saxe Dep. 134:13-19.
 28

1 **C. SAXE TERMINATED MARKS' EMPLOYMENT**

2 For Saxe, the last straw occurred in or around February 2016, when it became clear to him
3 that Marks “was clearly not into work for me” and his decision to run for political office was coming
4 at the expense of his ability to perform sufficiently his job duties as General Counsel. *Id.* at 150:4-
5 5; **Ex. G**, Saxe Decl. ¶ 12, Ex. 7. In a February 29, 2016 email recording his mental impressions
6 and observations regarding Marks’ performance, Saxe reiterated that Marks’ run for political office
7 had been and continued to “interfere with [] [his] obligations at work.” *Id.* On March 1, 2016,
8 Saxe once again told Marks, “I am very excited for you that you are running for office, but it is not
9 fair that you conduct your campaign business while at the office and during hours you are being
10 paid by dsp.” *Id.* at ¶ 13, Ex. 8. On March 2, 2016, Saxe decided to terminate Marks’ employment.
11 **Ex. B**. Saxe Dep. 149:7-15. Saxe made the decision after a conversation with Marks where Saxe
12 asked Marks to show up to the office and focus on work. *Id.* at 149:23-150:3. Saxe described the
13 impetus for this conversation:

14 Q: What prompted that conversation?

15 A: Alex [Marks] was clearly not into work for me. He was calling out more,
16 showing up late, distant in our conversation, steering conversations away from
17 whatever work topic we might be on. He was just acting very weird towards me.

18 Q: Is this something you noticed over a long period of time, or was there a specific
19 incident?

20 A: Growing over a period of time, so it had reared it’s [sic] head for a while, but it
21 was growing worse, and his attitude towards me was getting worse.

22 *Id.* at 150:4-15. Approximately 15 minutes after Saxe asked Marks to focus on work, Saxe observed
23 Marks call another employee into Marks’ office to complain about Saxe, rather than work on his
24 assigned tasks as Saxe had requested. *Id.* at 153:2-154:2. Saxe called Marks back into his office
25 and said, “All right. Apparently you didn’t do what I’m asking of you, and it doesn’t work for me,
26 and we have grown apart. . . . You’re not – you’re just not my guy, and I don’t trust you anymore,
27 and you have no respect for me or this job, so I’m going to let you go.” *Id.* at 155:20-156:8. When
28 asked about this conversation during his deposition, Marks testified, in part, that Saxe “said, you’re
just never here, this isn’t working for me, you’re fired.” **Ex. C**, Marks Dep. 388:11-15.

D. MARKS' CHARACTERIZATION OF ALLEGED RETALIATION WAS BASED ON HIS CLAIMS OF ALLEGED "WAGE THEFT," NOT POLITICS

Marks testified that he believed the reason for his termination was his alleged "wage investigation" which he described as the day he left work early, and received full pay, as the actual reason for his suit: "the Friday of him telling me not to pay me, that was the original comment he had made. So I kind of told [Tokarski] that that was the catalyst of everything. . . ." *Id.* at 216:8-21; 310:4-5. According to Marks, the alleged issue of "illegally deducting exempt workers' wages" and "wage theft" stemmed from a conversation he had with Tokarski on February 27, 2019, where Tokarski told Marks that Saxe had instructed him not to pay Marks for the previous day when Marks had left work early due to illness. *Id.* at 82:5-11. In response, Marks claimed he asked Tokarski for three years' worth of payroll records for exempt, salaried employees, and Tokarski responded that he could not pull the employee records going back three years because he was too busy. *Id.* at 82:12-21, 87:8-19. Tokarski, however, did not recall Marks' request for payroll records, which would he thought would have been an "unusual" request. **Ex. E**, Tokarski Dep. 126:21-127:5. Although Tokarski did not recall Marks' alleged request for three years' of payroll records for salaried employees, both Marks and Tokarski confirmed that Tokarski never communicated Marks' alleged request for payroll records to Saxe. **Ex. C**, Marks Dep. 87:20-88:10; **Ex. E**, Tokarski Dep. 129:12-17. In any event, Marks admits that regardless of Saxe's alleged instruction DSP did in fact pay Marks for that day and he never told Saxe of any threat of going to the labor commission. **Ex. C**, Marks Dep. 53:14-18, 53:25-54:8.

Further, Marks testified that "five minutes before" Saxe terminated his employment on March 2, 2016, Marks told Saxe he was doing a "wage investigation." *Id.* at 76:7-21; 81:8-13; 386:22-387:9, 388:11-15. Marks did not mention any wage issues regarding non-exempt employees or threaten to go to the Labor Commissioner. *Id.* During Marks' deposition he ultimately testified that he had no knowledge regarding Saxe's awareness of his alleged wage claims prior to Marks' termination. **Ex. C**, Marks Dep. 281:8-13; 451:21-452. Saxe also confirmed that neither Tokarski or Marks asked him for any employee payroll information. **Ex. B**, Saxe Dep. 137:10-25. And, Saxe's testimony is consistent with Marks' version of the last conversation he had

1 with Saxe, in which, according to Marks, he said to Saxe “this is about the wage investigation” and
 2 Saxe said, “I don’t know what you’re talking about.” **Ex. C**, Marks Dep. 56:14-57:15. Notably,
 3 Tokarski denied that there were any specific instances where DSP employees were not being paid
 4 properly. **Ex. E**, Tokarski Dep. 24:14-16.

5 Finally, the record evidence makes clear that Marks never thought his termination was
 6 related to his run for political office, but instead was about his alleged “wage investigation.” Marks
 7 testified that during his final conversation with Saxe, he “bluntly” told Saxe, “this isn’t about
 8 politics, this about the wage investigation, let’s not pretend. . . . it’s not about politics.” **Ex. C**,
 9 Marks Dep. 56:14-57:15. Tokarski also testified that Marks and he talked about “the genesis of
 10 everything was [Marks] not getting paid for the day he worked.” **Ex. E**, Tokarski Dep. 75:21-76:4.
 11 Marks also emailed another DSP employee and claimed “David [Saxe] and I had a slight
 12 disagreement over not illegally deducting exempt workers’ wages today, so I was let go. I went
 13 down fighting for workers, so that’s fine.” **Ex. C**, Marks Dep. 342:20-343:14; **Exhibit H** at
 14 MARKS-00019. He also told his friend, that he believed he “was terminated for looking into wage
 15 theft,” that he “was given the reason of political campaigning . . . but [] [he] believe[d] it was
 16 something else.” **Ex. C**, Marks Dep. 181:17-182:8.

17 **E. MARKS’ POST-TERMINATION COMPLAINTS TO THE LABOR** 18 **COMMISSIONER AND OSHA.**

19 The day after his termination, Marks filed two complaints with the Office of the Labor
 20 Commissioner for the State of Nevada (“Labor Commissioner”). *Id.* at 204:13-18; **Exhibit I** at
 21 MARKS-00013-00017. Marks completed the content of the complaints after his termination and
 22 delivered the complaints by hand. **Ex. C**, Marks Dep. 221:9-24, 223:13-224:7.

23 Like his complaint to the Labor Commissioner, Marks admitted that he “never actually filed
 24 a complaint with OSHA until after your employment was terminated” despite the fact that he did
 25 not observe a single DSP employee performing welding without certification after January 2016.
 26 **Ex. C**, Marks Dep. 271:16-272:7; 278:10-279:7; **Exhibit J**, MARKS-00028-00029. According to
 27 Marks, he first became aware of the OSHA “issue” in November 2015 when he arranged a theater
 28 tour for a group of students. **Ex. C**, Marks Dep. 250:18-251:13. As he walked the students through

1 the theater, Marks claims he noticed an employee welding, learned that certifications were required
 2 to perform welding, and discovered after the fact that the employee he observed during the tour did
 3 not have a certification. *Id.* at 251:14-24, 254:6-16, 260:24-261:11. Marks, Duran, and Saxe began
 4 working to resolve the issue by identifying employees had previous certifications and other
 5 employees whom it be would be cost-effective to have certified. *Id.* at 263:25-264:21. Marks’
 6 March 4, 2016 OSHA complaint also contained an allegation that the V theater did not have a hot
 7 works permit. *Id.* at 281:20-282:2. However, Marks admitted he never talked to anyone outside of
 8 DSP about the alleged permit issue and discussed the permits with Saxe at the same time as the
 9 welding issue. *Id.* at 268:8-16. Marks also admitted he never mentioned the alleged OSHA issues
 10 to Saxe in a context other than his role as General Counsel and that, his Complaint allegation,
 11 wherein he alleged he “told Saxe that he would have to report the violations to OSHA” was
 12 mischaracterized. *Id.* at 294:15-295:9; 297:4-13. Specifically, Marks testified:

13 Q: So which is it, Alex; that you told David that you were going to report the
 14 violations to OSHA, or that you never told him that?

15 A: I wasn’t explicit I’m going to OSHA. It was these are reportable violations.

16 ...

16 Q: You were telling him as—you were advising him as the general counsel that you
 17 thought these were violations of OSHA?

18 A: Right. And the point was if we don’t correct this, then this is something that has
 19 to get reported out so that it gets corrected. That’s the whole point.

20 Q: You never actually said that to him though?

21 ...

21 A: When I said—I did not specifically say I will report you to OSHA. I said, these
 22 need to get fixed or they will be reported to OSHA so that they do get fixed. That’s
 23 not I’m reporting you to OSHA. That’s different.

23 *Id.* at 297:14-18, 298:12-299:3.

24 **III. LEGAL ARGUMENT**

25 **A. Summary Judgment Standard.**

26 Summary judgment is proper in this matter because “the pleadings, the discovery and
 27 disclosure materials on file . . . show that there is no genuine issue as to any material fact.” Fed. R.
 28 Civ. P. 56(c). Summary judgment is proper in this matter because “the pleadings, the discovery

1 and disclosure materials on file ... show that there is no genuine issue as to any material fact.” Fed.
 2 R. Civ. P. 56(c). There is no genuine issue of material fact if the nonmoving party fails to make a
 3 sufficient showing on an essential element of its case as to which it would have the burden of proof
 4 at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322-23 (1986).

5 Defendants need not negate Marks’ claims, but only establish an absence of evidence to
 6 support them. *Celotex*, 477 U.S. at 322. Once Defendants satisfy their burden, Marks may not rest
 7 on mere allegations or denials but, rather, must present evidence demonstrating a triable issue of
 8 fact. *Id.* Marks is required “to go beyond the pleadings and by his own affidavits, or by the
 9 ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing
 10 that there is a genuine issue for trial.’” *Id.* at 324. He must adduce relevant, admissible evidence
 11 upon which the trier of fact could reasonably find in his favor; a mere “scintilla” of evidence, or
 12 evidence that is only colorable, is insufficient to defeat summary judgment. *Anderson v. Liberty*
 13 *Lobby, Inc.*, 477 U.S. 242, 252 (1986); Fed. R. Civ. P. 56(e). Where, as here, Marks cannot meet
 14 this burden, summary judgment must be granted in favor of Defendants.

15 **B. Marks’ Claim For Unlawful Retaliation Under The FLSA Fails As A Matter**
 16 **Of Law.**

17 1. Marks Cannot Make Out A *Prima Facie* Case of Retaliation Because He Did
 18 Not Establish His Employment Would Not Have Been Terminated “But For”
Having Engaged In Protected Activity.

19 The FLSA’s anti-retaliation provision, 29 U.S.C. § 215(a)(3), makes it unlawful for an
 20 employer:

21 to discharge or in any other manner discriminate against any employee because
 22 such employee has [1] filed any complaint or [2] instituted or caused to be instituted
 23 any proceeding under or related to this [Act], or [3] has testified or is about to testify
 in any such proceeding, or [4] has served or is about to serve an industry
 committee[.]

24 To establish a *prima facie* case of retaliation under the FLSA, Marks must demonstrate that (1) he
 25 engaged in statutorily-protected activity, (2) he suffered an adverse employment action, and (3)
 26 there is a causal connection between the two. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir.
 27 2000); *Lombardi v. Castro*, No. 15-55276, 2017 U.S. App. LEXIS 519, at *2 (9th Cir. Jan. 9, 2017).
 28 Marks must establish *all three prima facie* elements before the Court proceeds to the other stages

1 of the analysis. *Lombardi*, 2017 U.S. App. LEXIS 519 at *2. Because he cannot meet the first or
 2 third elements of his *prima facie* case, his FLSA retaliation claim (First Claim for Relief) fails.

3 **a. Any actions Marks took regarding the FLSA were within his role**
 4 **as DSP's General Counsel, and, therefore, failed to rise to the**
 5 **level of FLSA protected activity.**

6 Under the plain language of Section 15(a)(3) of the FLSA, there are only four types of
 7 protected activity for which an employee is covered and, here, there is no dispute that Plaintiff's
 8 alleged protected activity is that he "complained." Compl. ¶¶ 62 and 63. A "filing" is a "serious
 9 occasion, rather than a triviality," to the point "that the phrase 'filed a complaint' contemplates
 10 some degree of formality." *Kasten*, 563 U.S. at 21. The U.S. Supreme Court has made clear that
 11 "a complaint is 'filed' when 'a reasonable, objective person would have understood the employee'
 12 to have 'put the employer on notice that [the] employee is asserting statutory rights under the'"
 13 FLSA. *Id.* at 14. Specifically, to fall within the scope of Section 15(a)(3), a complaint must be
 14 "sufficiently clear and detailed for a reasonable employer to understand it [or be put on notice], in
 15 light of both content and context, as an assertion of rights protected by the statute and a call for
 16 their protection." *Id.* at 14. Here, there is no dispute that Marks never "lodged" any complaint
 17 sufficient to rise to the level of necessary protected activity under the FLSA. He never assisted any
 18 employees in asserting FLSA claims against DSP, never encouraged any employees to file their
 19 own claims, never filed any claims with the U.S. Department of Labor before his employment was
 20 terminated, and, by his own admission, never even put Saxe on notice of any behavior that could
 21 possibly form the basis of a retaliation claim – as he must to be found to have engaged in protected
 22 activity under the FLSA. *Id.* at 21. According to Marks, he told Tokarski, DSP's former Controller
 23 that he would "go to the labor commission" if he did not get paid for the day he went home sick, a
 24 day that he admittedly was paid for. **Ex. C**, Marks Dep. 53:25-54:8. But, Tokarski testified that he
 25 did not recall Marks making that "threat" and never told Saxe, or anyone else, anything he discussed
 26 with Marks relating to wage complaints. **Ex. E**, Tokarski Dep. 60:17-62:4. Even Marks' alleged
 27 amorphous statement to Defendant Saxe immediately prior to his termination, claiming that his
 28 termination was "about the wage investigation, let's not pretend," does not save Marks' claim. In
 fact, by Marks' own admission, Defendant Saxe did not even "know what [] [he was] talking about."

1 **Ex. C**, Marks Dep. 57:2-4; **Ex. B**, Saxe Dep. 137:10-25. No “reasonable” person would consider
 2 such a statement by its General Counsel, and completely devoid of any “content and context, to be
 3 an assertion of rights under the FLSA sufficient to constitute protected activity under the FLSA’s
 4 anti-retaliation provision.³ *Kasten*, 563 U.S. at 22; *Rosenfield v. Globaltranz Enters.*, 811 F.3d 282,
 5 286 (9th Cir. 2015) (citation omitted) (“not all amorphous expressions of discontent related to
 6 wages and hours constitute complaints filed within the meaning of § 215(a)(3)”; *Phelps v. City of*
 7 *Parma*, 705 Fed. Appx. 503, 504 (9th Cir. 2017) (upholding grant of summary judgment on FLSA
 8 retaliation claim where employee voiced payroll concerns but employer expected employee “to
 9 voice work-related concerns and to suggest changes in policy to [her] superiors”); *Flick v. Am. Fin.*
 10 *Res., Inc.*, 907 F.Supp. 2d 274, 282 (E.D.N.Y. 2012) (summary judgment granted in favor of
 11 employer where employee’s questions regarding her commission compensation were merely
 12 internal company complaints and not sufficiently clear and detailed).

13 Moreover, there can be no dispute that, as the General Counsel, Marks was “in a different
 14 position via-a-vis . . . [DSP] than . . . other employees” because, as the General Counsel, DSP would
 15 have “expect[ed] . . . [him] to voice work-related concerns and to suggest changes in policy” to
 16 Saxe. *Rosenfield*, 811 F.3d at 286 (recognizing that the distinction between managers and “other
 17 employees” “may be particularly true with respect to upper-level managers who are responsible for
 18 ensuring compliance with the FLSA”). It is undisputed that DSP hired Marks as its General Counsel
 19 to ensure DSP was operating in compliance with the law and to “keep[] [David Saxe] compliant”
 20 with the law. **Ex. C**, Marks Dep. at 51:16-25; 106:10-19. Specifically, Marks testified his “primary
 21 focus was contracts and fair labor” and in his “role as general counsel . . . [he] was supposed to talk
 22 to [Saxe] as an attorney about issues that [] [he] thought were in violation of wage and hour loss
 23 [sic].” *Id* at 106:10-19; 339:25-340:4. In fact, Marks testified that before he started working for
 24

25
 26 ³ Further, Marks did not file a complaint with the Labor Commissioner addressing non-exempt employee issues until
 27 after his termination. **Ex. C**, Marks Dep. 204:13-18. Even then, it is unclear whether the allegations contained within
 28 the two post-termination complaints implicate the FLSA. Indeed, Marks’ “lunch break” allegations are nearly identical
 to the allegations rejected by the *Yarbrough* court, and thus, on their face, cannot constitute protected activity. **Ex. I** at
 MARKS-00017; *Yarbrough v. Canyon Gate at Las Vegas, Inc.*, 2015 U.S. Dist. LEXIS 29750, *6, 2015 WL 1034413,
 2:14-CV-2216 JCM (CWH) (D. Nev. 2015).

DSP, he read about the “Fair Labor Standards Act . . . [because he knew] that that was going to be [his] primary focus . . . so [he] was pretty well prepped in terms of day one for what [he’d] be facing.” *Id.* at 106:10-19. Marks further testified that he wrote the employee provision regarding “the process for investigating possible wage deduction issues” and as the General Counsel, if “wage theft or wage deductions were improper were brought to my attention, I am to investigate that.” *Id.* at 54:7-55:3. Because his “job is compliance,” if he “[found] an issue . . . [he had] to fix it . . . [because] that’s [his] job as general counsel, to look for the company’s best interest.” *Id.* at 115:14-17. Thus, there can be no dispute that any alleged issue raised by Marks, the principal individual “tasked with ensuring the company’s compliance with the FLSA” surely did not rise to the level of a “complaint,” nor would a reasonable employer have understood it to be a “complaint.” Any issues Marks arguably raised to Saxe were nothing more than Marks “carrying out his . . . duties” as General Counsel and therefore, Marks’ First Claim for Relief, should be dismissed on this basis alone. *Rosenfield*, 811 F.3d at 286.

b. Even if Marks’ behavior constitutes FLSA protected activity, he has produced no evidence that such protected activity was the “but for” reason Saxe terminated his employment.

In *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 133 S. Ct. 2517 (2013), the Court unequivocally held that the causation standard in retaliation claims is more rigorous than discrimination claims. *Id.* at 2530-33. Therefore, to establish the “causal link” – the third element of an employee’s *prima facie* case – the employee must prove “the adverse actions would not have been taken ‘but for’ the protected activities.” *Knickerbocker v. City of Stockton*, 81 F.3d 907, 911 (9th Cir. 1996); *McBurnie v. Prescott*, 511 F. App’x 624, 624 (9th Cir. 2013) (unpublished) (citing *Gross v. FBL Fin. Servs., Inc.*, 577 U.S. 167 (2009); *Lombardi*, 2017 U.S. App. LEXIS 519, at *2 (citation omitted) (“[t]he third element of a *prima facie* case requires showing ‘but-for causation, not the lessened causation test stated in § 2000e-2(m),’ which applies to discrimination claims”); see *Serlin v. The Alexander Dawson School*, No. 14-15937, 2016 U.S. App. LEXIS 13744, at *2 (9th Cir. July 28, 2016) (applying the but-for causation standard in assessing whether or not the plaintiff established a *prima facie* case); *T.B. v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 473 (9th Cir. 2015), *cert. denied sub nom. San Diego Unified Sch. Dist.*

1 v. *T.B.*, 136 S. Ct. 1679 (2016), (applying *Nassar*'s "but-for" standard to the plaintiff's *prima facie*
 2 case and concluding that there were "many explanations why the district" may have made the
 3 decisions it did and "[r]etaliation was not one of them").

4 Marks offers no evidence whatsoever to suggest, much less establish, that Saxe was
 5 motivated by retaliatory animus when he made the decision to terminate Marks' employment.
 6 Rather, based on the extensive record concerning Marks' unsatisfactory job performance, there can
 7 be no reasonable dispute, and the material facts establish, that Saxe made the decision to terminate
 8 Marks' employment after months of Marks' failure to adequately and timely perform his job duties
 9 as DSP's General Counsel, and ultimately proving unable to run for office without having to
 10 sacrifice his duties as General Counsel. The record evidence establishes that Marks had
 11 performance problems long perform he allegedly raised any "wage issues." As early as June 2015,
 12 Saxe had already started to express frustration with Marks' failure to meet deadlines and
 13 communicate his status on the projects to which he was assigned. **Ex. G**, Saxe Decl. ¶ 6, Ex. 1.
 14 During his deposition, Marks conceded that, as early as August 2015, Saxe was considering
 15 terminating Marks' employment based on performance and had conveyed his dissatisfaction with
 16 Marks' performance and lack of communication. **Ex. C**, Marks Dep. 354:11-14; **Ex. G**, Saxe Decl.
 17 ¶ 7, Ex. 2; **Ex. G**, Saxe Decl. ¶ 8, Ex. 3 (stating "[I] hate having to ask and ask and remind. Please
 18 communicate better."). In August 2015, Saxe expressly told Marks, "[y]our attitude has been poor
 19 for a while now and your performance lackluster at best. This isn't working for me. Let's meet
 20 today at noon to discuss our options: Termination, Quitting Or getting on the same page!" *Id.* at ¶
 21 7, Ex. 2.

22 Throughout his employment, Marks also "constantly" missed deadlines for assignments.⁴
 23 **Ex. B**, Saxe Dep. 120:18-25; **Ex. F**, Duran Decl. ¶ 10. For example, Marks was responsible for
 24 procuring work visas for performers coming from outside the United States to perform in one of
 25 Saxe's productions. **Ex. B.**, Saxe Dep. 131:7-12. But, Marks failed to procure the visas on time,
 26 which resulted in the performers having to arrive later than expected, as well as increasing the

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 28 ⁴ Marks also failed to properly manage and coordinate with outside counsel regarding lawsuits those counsel were
 handling for DSP. **Ex. B**, Saxe Dep. 132:18-133:5.

1 associated costs to DSP, which had to pay for expedited processing fees due to Marks' delay. *Id.*
 2 at 132:2-9; **Ex. G**, Saxe Decl. ¶ 10, Ex. 5. In another example, in October 2015, Marks failed to
 3 timely secure a deposit for a show, did not notify Saxe of his failure to obtain the deposit, and still
 4 let the show open without securing the appropriate funds. **Ex. G**, Saxe Decl. ¶ 9, Ex. 4.

5 Thus, the unrefuted evidence shows there was clear criticism of Marks' performance before
 6 he engaged in any alleged protected activity, negating Marks' allegation of a retaliatory motive for
 7 his termination. *Wu v. Miss. State Univ.*, No. 14-60917, 2015 U.S. App. LEXIS 17354, at *6 (5th
 8 Cir. Sept. 29, 2015) (finding that a supervisor's criticism and negative view of plaintiff's
 9 performance before she filed her EEOC complaint "negat[ed] a retaliatory motive for his negative
 10 assessment [of her performance]" subsequent to the filing of her charge sufficient to establish a but-
 11 for causal connection to meet plaintiff's *prima facie* case). Indeed, executing managerial decision
 12 contemplated or undertaken before or "upon discovering" that an individual engaged in protected
 13 activity – which is not the case here, see *supra* Section III.B.1.a. – "is no evidence whatsoever of
 14 causality." *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001).

15 For Saxe, the last straw occurred in or around February 2016, when it became clear to him
 16 that Marks "was clearly not into working for me" and Marks' failure to perform his job duties as
 17 General Counsel had "got[ten] progressively worse." **Ex. B**, Saxe Dep. 134:13-19; 150:4-5; **Ex.**
 18 **G**, Saxe Decl. ¶ 12, Ex. 7. In a February 29, 2016 email recording his mental impressions and
 19 observations regarding Marks' performance, Saxe reiterated that Marks' run for political office had
 20 been, and continued to "interfere with [] [his] obligations at work." *Id.* On March 1, 2016, Saxe
 21 once again told Marks, "I am very excited for you that you are running for office but it is not fair
 22 that you conduct your campaign business while at the office and during hours you are being paid
 23 by dsp." *Id.* at ¶ 13, Ex. 8. Other DSP employees noticed that Marks was working on his campaign
 24 during the work hours when he was supposed to be working for DSP. **Ex. E**, Tokarski Dep. 67:14-
 25 68:8; **Ex. F**, Duran Decl. ¶¶7-9. August testified that "Alex [Marks] must have called me into his
 26 office at least 20 times just to brag to me that he was running for state senate and to try to ask my
 27 opinion on things like his website [and] logo design." **Ex. A**, August Dep. 65:4-23 (Ex. 3 ¶ 4).
 28 Indeed, consistent with Saxe's February and March 2016 emails to Marks, August testified that

1 “Alex admitted to me that David told him to stop working on his campaign at the office and to stop
 2 distracting and soliciting the employees with his political campaign, but Alex stated that he didn’t
 3 ‘give a shit’ and was going to do it anyway.” *Id.* at 65:4-23 (Ex. 3 ¶ 5).

4 Moreover, Saxe was not the only one who believed that as Marks got more involved in his
 5 run for political office, he neglected his duties as General Counsel. In fact, as time passed, other
 6 employees, including Tokarski, Duran, and August, all noticed not only that Marks was working
 7 on his campaign at the office, but was also leaving the office early to work on his campaign. **Ex. E**,
 8 Tokarski Dep. 67:14-68:8; **Ex. F**, Duran Decl. ¶7; **Ex. A**, August Dep. 65:4-23 (Ex. 3 ¶ 7) (“I
 9 noticed that Alex was missing from the office more and more and he admitted to me that he was
 10 leaving to go do his campaign duties.”)

11 Regardless, for purposes of summary judgment, the only opinion of Marks’ performance –
 12 or lack thereof – that matters is Saxe’s opinion and there is no dispute that Defendants’ proffered
 13 reason for his termination – i.e., Marks’ failure to adequately perform the duties as General Counsel
 14 – is a legitimate, non-retaliatory one. *Brooks*, 1 F. Supp. 3d at 1038 (holding that the school
 15 district’s proffered reason for not renewing the contract was a legitimate and non-discriminatory
 16 one because it “was based on reported incidents of poor judgment and inappropriate conduct”);
 17 *Dickerson v. Board of Trustees*, 657 F.3d 595, 602-03 (7th Cir. 2011) (affirming summary judgment
 18 because “Plaintiff’s own evaluation of his work cannot be imputed to the employer” and “even if
 19 the employer executed ‘inaccurate evaluations,’ it would not matter because the decision-maker
 20 acted with non-retaliatory motives”); *Mahomes v. Potter*, 590 F.Supp.2d 775, 782 (D.S.C. 2008)
 21 (“It is the employer’s perception of job performance, and not the employee’s perception, that is
 22 controlling.”). Indeed, Marks’ description of the conversation with Saxe where he was terminated
 23 corroborates Defendants’ legitimate, nondiscriminatory reason: “you’re never here, this isn’t
 24 working for me, you’re fired.” **Ex. C**, Marks Dep. 388:11-15. Because Plaintiff has failed to put
 25 forward even a scintilla of evidence to establish that, but for his alleged wage investigation, Saxe
 26 would not have terminated his employment, Marks has failed to meet the third element of his *prima*
 27 *facie* case, and therefore, his First of Claim of Relief must be dismissed.

2. If The Court Reaches The Issue Of Pretext, Marks' Claim Still Fails Because Marks Offers No Evidence That Saxe's Reasons For Terminating Marks Were Pretextual.

Assuming *arguendo* that Marks established a *prima facie* case of retaliation (he did not), DSP must articulate a legitimate, non-retaliatory reasons for its actions. *Lombardi*, No. 15-55276, 2017 U.S. App. LEXIS 519, at *2. Because Defendants have articulated a legitimate reason for the decision at issue – namely, his failure to adequately perform his duties as General Counsel – any presumption of retaliation drops from the case. *Supra* Section III(B)(1)(b); *see Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006) (citations omitted) (once the defendant produces a legitimate, nondiscriminatory reason for its challenged employment action, “the presumption of discrimination ‘drops out of the picture’”). Therefore, Marks, who offers no direct evidence of retaliatory animus, must show through “specific and substantial” evidence that Defendants’ explanation for his termination is “unworthy of credence” and that retaliatory animus was the but-for reason for his termination. *Nassar*, 133 S. Ct. at 2533; *Manatt v. Bank of America NA*, 339 F.3d 792, 801 (9th Cir. 2003); *Smith v. Bd. of Supervisors of S. Univ. & Agric. & Mech. College*, No. 16-30097, 2016 U.S. App. LEXIS 14777, at *7-8 (5th Aug. 11, 2016) (citations omitted) (“[s]howing pretext requires a plaintiff [] to produce substantial evidence indicating that the proffered legitimate nondiscriminatory reason is a pretext for discrimination . . . [,] [and] the plaintiff must show that the protected activity was the ‘but for’ cause of the retaliation.”); *Babarinsa v. Kaleida Health, Buffalo Gen. Hosp.*, No. 14-4555, 2015 U.S. App. LEXIS 20027, at *1-2 (2d Cir. Nov. 19, 2015) (citations omitted) (“[o]nce a defendant articulates a legitimate, non-retaliatory reason for an adverse employment action, the ‘presumption [] of retaliation’ aiding a plaintiff ‘dissipates,’ and the ‘plaintiff must prove that the desire to retaliate was the but-for cause of the challenged employment action’”).⁵ Marks has provided neither. *Chavez v. City of San Antonio*,

⁵ Since *Nassar*, courts have disagreed as to which stage in the analytical assessment the but-for causation standard applies. The Ninth Circuit applies *Nassar* to the causal connection requirement of the *McDonnell-Douglas prima facie* case. *Lombardi*, 2017 U.S. App. LEXIS 519, at *2 (citation omitted); *Serlin*, 2016 U.S. App. LEXIS 13744, at *2; *T.B.*, 806 F.3d at 473. Other courts agree. *Donald v. UAB Hosp. Mgmt., LLC*, No. 2:14-cv-727-WMA, 2015 U.S. Dist. LEXIS 83867, at *9-10 (N.D. Ala. June 29, 2015) (collecting cases). And, as Defendants previously explained, Marks has not established a *prima facie* case. *Supra* Section III(B)(1)(a). However, there are circuits that apply the “but for” standard “both ultimately and at the *prima facie* stage.” *Donald*, 2015 U.S. Dist. LEXIS 83867 at *9-10 (collecting cases). Thus, if the Court here reaches the pretext analysis, it is clear that the “but for” heightened standard still applies

1 No. 15-51111, 2016 U.S. App. LEXIS 13804, at *5 (5th Cir. July 29, 2016) (“[d]espite making
 2 conclusory arguments that there is abundant evidence of pretext, he cites to no evidence suggesting
 3 that his EEOC complaint was even a motivating factor in this transfer, much less that he would not
 4 have been transferred but for his filing of the complaint”); *Spata v. Smith's Food & Drug Ctrs.,*
 5 *Inc.*, 253 Fed. Appx. 648, 649, No. CV-04-00965-KJD (D. Nev. 2007) (plaintiff “presented
 6 unavailing circumstantial evidence of retaliatory animus. Such evidence did not amount to the
 7 “Specific and substantial” evidence of pretext required to avoid summary judgment.”)

8 Marks cannot create a material issue of fact, by merely relying on his own assertion that he
 9 was performing adequately. *Smith*, 2016 U.S. App. LEXIS 14777, at *9 (“[s]ubjective beliefs, no
 10 matter how sincere, simply cannot support a finding that” plaintiff’s protected activity “was a but-
 11 for cause of her termination”); *see Dickerson*, 657 F.3d at 602-03 (“[p]laintiff’s own evaluation of
 12 his work cannot be imputed to [the employer], and is insufficient to permit his case to survive past
 13 summary judgment.”). Marks also cannot rely on conjecture to establish a question of fact and, yet,
 14 this is all Marks can offer. *See, e.g. Brown v. Dep't of Pub. Safety*, 446 Fed. Appx. 70, 72 (9th Cir.
 15 2011) (Summary judgment affirmed where plaintiff “presented only his conclusions and
 16 speculation....”). Indeed, it does not matter whether Marks was actually present and engaged in
 17 the office; it only matters whether Saxe believed Marks was not and Marks has not raised a single,
 18 genuine issue of material fact to suggest that Saxe believed anything other than that Marks was not
 19 sufficiently performing his job duties as General Counsel. *See Villiarimo v. Aloha Air Inc.*, 281
 20 F.3d 1054, 1063 (9th Cir. 2002) (internal quotations omitted) (in determining pretext courts “only
 21 require that an employer honestly believe its reason for its actions, even if its reason is ‘foolish or
 22 trivial or even baseless’”); *see also Waggoner v. City of Garland*, 987 F.2d 1160, 1165 (5th Cir.
 23 1993) (pretext inquiry limited to whether employer believed allegation in good faith and whether
 24 decision to discharge was based on that belief); *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir.

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 28 – i.e., Marks must show “specific” and “substantial” evidence that but for his alleged complaints, his employment
 would not have been terminated.

1991) (even an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason).

Therefore, the Court "should not second guess an employer's exercise of its business judgment in making personnel decisions, as long as they are not discriminatory," *EEOC v. Republic Servs., Inc.* 640 F. Supp. 2d 1267, 1313, Nos. CV-S-04-1352 DAE(LRL); CV-S-04-1479-DAE(LRL) (D. Nev. 2009), because the Court does not sit as a "super personnel department" to second-guess whether Marks' job performance was sufficient. *Chapman v. AI Transp.*, 221 F.3d 1012, 1030 (11th Cir. 2000).

For all the reasons discussed above, Defendants respectfully request that the Court grant Defendants' motion for summary judgment and dismiss Plaintiff's First Claim for Relief.

C. MARKS' NRS 613.040 CLAIM IS FACIALLY DEFICIENT AND UNSUPPORTED BY ANY EVIDENCE

1. Marks' NRS 613.040 is Not Actionable Under the Plain Meaning of the Statute.

NRS 613.040, the basis of Marks' Second Claim for Relief, provides:

It shall be unlawful for any person, firm or corporation doing business or employing labor in the State of Nevada *to make any rule or regulation prohibiting or preventing any employee* from engaging in politics or becoming a candidate for any public office in this state.

NRS 613.040 (emphasis added). Under the plain meaning rule, "[the Nevada Supreme Court] will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended." *Szydel v. Markman*, 121 Nev. 453, 456-457, 117 P.3d 200, 202 (2005); *see also Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 81 P.3d 532 (2003) ("When the words of a statute have a definite and ordinary meaning, the courts should not look beyond the plain language of the statute."). Where, as here, the language of a statute is clear on its face, the Nevada Supreme Court will deduce the legislative intent from the words used. *Id.* The language of NRS 613.040 is clear: employers are prohibited from (1) making any "rule or regulation . . . [that] [2] prohibit[s] or prevent[s] any employee from engaging in politics or becoming a candidate" Marks' Second Claim for Relief fails for two reasons.

First, there is no evidence that DSP made "any rule or regulation" that prohibited Marks

1 from engaging in politics, and Marks does not allege one. *See* Compl. ¶¶ 67-74; *see also Couch*,
 2 2015 U.S. Dist. LEXIS 104021 at *33 (“As a matter of plain language, the prohibition applies only
 3 to an employer’s rule, regulation . . . preventing an employee from running for or holding public
 4 office . . .”). Second, even if the Court were to infer a “rule” where there was none, no one at DSP
 5 prevented Plaintiff from engaging in political activity. *See Spitzmesser v. Tate Snyder Kimsey*
 6 *Architects, Ltd.*, 2:10-cv-01700-KJD-LRL, 2011 U.S. Dist. LEXIS 68696, *8-9 (D. Nev. 2011)
 7 (denying motion to amend as futile where plaintiff alleged he was forced to participate in politics).
 8 To the contrary, the undisputed evidence, established through Marks’ testimony, is that Saxe “was
 9 [absolutely] supportive of [Marks] running for office.” **Ex. C**, Marks Dep. 31:12- 32:3. Marks
 10 further testified that “the understanding that I had from my boss, who clearly was on board with my
 11 running for assembly and senate, was complete support.” *Id.* 59:14-16; **Ex. B**, Saxe Dep. 115:17-
 12 116:19 (“I could understand that it was a big deal for him...I was happy for him.”). Indeed, for
 13 almost the entire time Marks was employed by DSP, he was running for some political office and
 14 DSP allowed him to do so until it ultimately interfered with his ability to do his job as General
 15 Counsel – the job DSP was paying him to do. *Id.* at 134:13-19; 150:4-5; **Ex. G**, Saxe Decl. ¶¶ 12-
 16 13, Exs. 7-8. Thus, Marks’ Second Cause of Action fails on its face and must be dismissed.

17 2. Even if The Court Were to Look Beyond the Plain Meaning of NRS 613.040,
 18 Marks Cannot Establish a Violation of the Statute Because His Employment
Was Terminated for an Apolitical Reason.

19 As discussed above, Defendants have provided legitimate, nondiscriminatory reasons for
 20 Marks’ termination – namely, his poor job performance, including his increased absence from work,
 21 lack of communication, and work on campaign activities during work hours. *See supra* Section
 22 III(B)(1)(b). Indeed, even Marks’ testified that he did not believe his termination was because he
 23 was running for office, telling Saxe “bluntly” during his termination meeting that “this isn’t about
 24 politics . . . let’s not pretend.” **Ex. C**, Marks Dep. 56:14-57:15.

25 While the Nevada Supreme Court has never addressed a NRS 613.040 claim from
 26 terminated employees, California courts have addressed nearly identical language in the California
 27 Labor Code and their decisions are instructive. Similar to NRS 613.040, Section 1101(a) of the
 28 California Labor Code provides, in part, “[n]o employer shall make, adopt, or enforce any rule,

1 regulation or policy . . . [f]orbidding or preventing employees from engaging or participating in
 2 politics or from becoming candidates for public office.” California courts interpreting this statute
 3 have held that “the purpose” of the statute is “to protect employees’ political freedoms from their
 4 employers . . . ‘in essence, forbid employers to attempt to control the political activities of
 5 employees . . . [by] prohibit[ing] employers from making decisions that adversely affect an
 6 employee (e.g., termination) *solely because of the employer’s disagreement with an employee’s*
 7 *political viewpoints and his/her expressing them.*” *Couch*, 2015 U.S. Dist. LEXIS 104021 at *33-
 8 34. In other words, “an employer cannot terminate its employee *solely for expressing his/her*
 9 *political viewpoints or disagreeing with an employee’s political viewpoint.*” *Id.* at *38 (emphasis
 10 added). In the instant case, there is not a single allegation, much less a *fact*, that even suggests that
 11 the basis for Marks’ claim is that Saxe terminated his employment *because he disagreed with*
 12 *Marks’ political viewpoint.* See Compl. ¶ 71 (“Defendants terminated Plaintiff because he was
 13 running for Nevada State Senate.”) In fact, Marks, a Democrat, testified that he did not “know”
 14 and “never asked” Saxe’s political affiliation. **Ex. C**, Marks Dep. 12:20-13:3.

15 California courts have also similarly concluded that “[a]n employer’s rule, regulation or
 16 policy that is enacted for legitimate, apolitical reasons, but has an unintended effect on an
 17 employee’s ability to run for or hold public office does not violate” the law. *Couch*, 2015 U.S.
 18 Dist. LEXIS 104021 at *33 (holding that if the employer terminated the plaintiff “solely due to his
 19 pursuing outside-of-work political activity *that had no bearing on his workplace performance*
 20 *solely because* the Firm disagreed with the politics of that activity, the Firm would have violated
 21 section 1101(a). But there is simply no evidence of a political motivation underpinning” the
 22 employment decision.) (emphasis added); *Ali v. L.A. Focus Publ’n*, 112 Cal. App. 4th 1477, 5 Cal.
 23 Rptr. 3d 791 (Ct. App. 2003) (holding that liability under the applicable statutes is triggered only if
 24 an employer fires an employee based on a political motive); *Nava v. Safeway Inc.*, No. F063775,
 25 2013 Cal. App. Unpub. LEXIS 5452, 2013 WL 3961328, at *7-8, (Cal. Ct. App. Jul. 31, 2013)
 26 (unpublished) (holding that an employer violates §§ 1101 and 1102 only if it terminates an
 27 employee for a political reason, as opposed to a legitimate non-political reason). Indeed, those
 28 courts have provided explicit examples of the types of behavior that do not violate the statute and

expressly found that where, as here, running for political office interferes with a person's ability to perform his job duties, such behavior is not protected by the statute. Specifically, while an employer "potentially" might violate the statute for terminating an employee who participated in a political rally for a political candidate who the employer did not support, "an employer *certainly would not* violate section 1101 for terminating a full-time employee who joined a political candidate's campaign as a full-time employee *if doing so meant the [] employee could not hold two full-time jobs.*" *Id.* at 38-39 (emphasis added).

In short, there is no genuine dispute of material fact that Saxe's decision to terminate Marks' employment had nothing to do with Marks' political affiliation and everything to do with the apolitical reason that Marks failed to perform sufficiently his job duties as the General Counsel and proved unable to run for office while at the same time fulfilling his obligations as DSP's General Counsel. *See also Couch*, 2015 U.S. Dist. LEXIS 104021 at *42 (holding that section 1102 of the California Labor Code does not provide an unqualified prohibition on an employer from terminating an employee due to his political activity, otherwise, an employer would violate section 1102 for terminating (or threatening to terminate) an employee who impermissibly misses work to participate in political activity during scheduled work hours and that is not the statute's purpose). In Marks' own words, his termination "[was]n't about politics . . . let's not pretend," **Ex. B**, Marks Dep. 56:25-57:4, and his Second Claim for Relief should be dismissed.

D. MARKS' TORTIOUS DISCHARGE CLAIM FAILS BECAUSE THE UNDISPUTED EVIDENCE DEMONSTRATES THAT HIS ONLY OSHA COMPLAINT WAS SUBMITTED POST-TERMINATION⁶

1. Marks Does Not Qualify as a Whistleblower Under Nevada Law Because He Did Not File a Complaint with OSHA Until After His Termination.

The Nevada Supreme Court has "*severely limited* [public policy tortious discharge actions] to those *rare and exceptional cases* where the employer's conduct violates strong and compelling public policy." *Sands Regent v. Valgardson*, 105 Nev. 436, 440, 777 P.2d 898, 900 (1989)

⁶ Pursuant to the Court's June 12, 2018 Order granting in part Defendants' Motion to Dismiss, Marks' third claim for relief for tortious discharge is limited to his alleged OSHA whistleblowing activity. ECF No. 26 at 5.

(emphasis added); *see also State v. Eighth Judicial District Court (Anzalone)*, 118 Nev. 140, 151-52, 42 P.3d 233, 240-41 (2002). Further, to state a whistleblower claim which leads to an exception to the presumption of at-will employment, the employee must report the unlawful activity to the “appropriate authorities” **outside of his employment**. *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 293, 774 P.2d 432, 433 (1989); *Scott v. Corizon Health Inc.*, No. 3:14-CV-00004-LRH-VPC, 2014 U.S. Dist. LEXIS 65066, *6-7 (D. Nev. 2014) (emphasis in original) (citing *Biesler v. Prof. Sys. Corp.*, 177 Fed. Appx. 655, 656 (9th Cir. 2006) (“Nevada precedent is clear, therefore, that unless an employee reports the employer’s allegedly illegal activity to authorities outside of the company, he or she cannot claim protected whistleblower status.”). Internal complaints to management or the employee’s boss do not suffice because such activity is deemed as “merely acting in a private or proprietary manner,” and do not qualify an employee as a whistleblower. *Wiltsie*, 105 Nev. at 293, 774 P.2d at 433. Relying on *Wiltsie*, the Nevada Supreme Court, District Court of Nevada, and U.S. Court of Appeals for the Ninth Circuit have all repeatedly dismissed plaintiffs’ tortious discharge claims specifically because the employee did not report the alleged illegal activities “to the appropriate authorities *outside the company*.” *Whiting v. Maxim Healthcare Servs., Inc.*, No. 56432, 2012 Nev. Unpub. LEXIS 1215, at *2 (Nev. Sept. 13, 2012); *Reuber v. Reno Dodge Sales, Inc.*, No. 61602, 2013 Nev. Unpub. LEXIS 1658, at *3 (Nev. Nov. 1, 2013) (citation omitted) (“While this court has recognized protections for whistleblowers, such protections are limited to an employee who reports activity to an agency outside the company. . . .”); *Ainsworth v. Newmount Mining Corp.*, No. 56250, 2012 Nev. Unpub. LEXIS 435, at *7-8 (2012) (same); *Biesler*, 177 Fed. Appx. at 656 (same); *see Van Asdale v. Int’l Game Tech.*, No. 11-16538, No. 11016626, 549 Fed. Appx. 611, 2013 U.S. App. LEXIS 19843, at *5 (9th Cir. 2013) (“Nevada’s tortious-discharge law states that an employee must expose an employer’s illegal activity to the proper authorities, not merely to a supervisor, to be entitled to protection for whistleblowing.”); *Wilson v. Greater Las Vegas Ass’n of Realtors*, Case No. 2:14-cv-00362-APG-NJK, 2016 U.S. Dist. LEXIS 58595, at *18-19 (D. Nev. 2015) (dismissing plaintiff’s tortious discharge claim because her conduct did not “seek to further the public good” because she did not allege that she reported misconduct to the “appropriate authorities”).

1 Here, there is simply no dispute that Marks did not report any conduct to “appropriate
2 authorities” *outside* of his employer as required to state a claim in Nevada until after his termination.
3 **Ex. C**, Marks Dep. 278:10-279:7; **Ex. J** at MARKS-00028-00029. This fact alone is fatal to Marks’
4 Third Claim for Relief.

5 Moreover, during his deposition, Marks confirmed not only did he not complain to any
6 outside authority, but he had not affirmatively decided to expose any alleged illegal OSHA practices
7 contrary to the allegations in his Complaint. Specifically, Marks testified that, in his discussions
8 with Saxe, he “wasn’t explicit I’m going to OSHA. It was these are reportable violations” and,
9 instead, was simply “advising [] [Saxe] as the general counsel that [] [he] thought these were
10 violations of OSHA.” **Ex. C**, Mark Dep. 297:14-298:18. Marks even further clarified to Saxe that
11 “that’s not I’m reporting you to OSHA. That’s different.” *Id.* at 298:24-299:3. The undisputed
12 material fact is clear: Marks never even threatened, much less actually reported – as he must under
13 the law – to report any alleged violation to OSHA during his employment. Accordingly, Marks’
14 conduct is insufficient as a matter of law to establish a whistleblower claim and thus, his Third Claim
15 for Relief fails as a matter of law and must be dismissed. *Wiltsie*, 105 Nev. at 293, 774 P.2d at 433.

16 2. Marks Cannot, As a Matter of Law, Establish That the Alleged Whistleblowing
17 Was the Proximate or Actual Cause For His Termination.

18 Assuming *arguendo* that Marks could bring a whistleblower claim for tortious discharge
19 under Nevada law (he cannot), Marks’ claim still fails because, for the reasons discussed in more
20 detail above, see *supra* Sections III.B.1. and 2, Marks has failed to present any facts sufficient to
21 establish that his employment was terminated for anything other than his inability to perform
22 sufficiently his duties as General Counsel – much less that the proximate cause of his termination
23 was retaliatory animus on the part of Saxe for Marks’ alleged OSHA complaints, complaints he
24 admittedly did not make, or even threaten to make, prior to the termination of his employment. **Ex.**
25 **C**, Marks Dep. 297:14-18; 298:12-299:3 (“That’s not I’m reporting you to OSHA. That’s
26 different.”). “The employee's burden at trial is to prove that the protected conduct was the
27 “proximate cause” of [his] discharge; a “mixed motives” theory is insufficient for tortious
28 discharge.” *Cummings v. United Healthcare Servs.*, 2014 U.S. Dist. LEXIS 44789, *17 (D. Nev.

2014) (citing *Allum v. Valley Bank of Nev.*, 114 Nev. 1313, 1318, 970 P.2d 1062 (1998) and discussing that “proximate” cause means “actual” cause); *see also Stephens v. One Nev. Credit Union*, 2016 U.S. Dist. LEXIS 75302, *11 (D. Nev. 2016) (“To prevail on his tortious discharge claim, [employee] must show that his complaint was the proximate or actual cause for his termination.”). In other words, Marks must demonstrate that DSP’s motivation was “purely wrongful.” *Sproul v. Washoe Barton Med. Clinic*, 2013 U.S. Dist. LEXIS 60054, *17, 2013 WL 1792187 (D. Nev. 2013) (citing *Allum*, 970 P.2d 1062).

In short, Marks cannot meet the heavy burden to establish proximate or *actual* cause, especially where the only instances wherein he allegedly mentioned OSHA to Saxe prior to his termination were in his advisory role as General Counsel. Marks testified his role at DSP was specifically to ensure that Defendants were in compliance with the law. **Ex C.**, Marks Dep. 115:14-17 (“my job is compliance... [because] that’s my job as general counsel, to look for the company’s best interest.”). Indeed, Marks testified that he never mentioned the alleged OSHA issues to Saxe in a context other than his role as General Counsel and that, his Complaint allegation, wherein he alleged he “told Saxe that he would have to report the violations to OSHA” was mischaracterized. *Id.* at 294:15-295:9; 297:4-13. As such, no reasonable person would have understood such a statement to mean that Marks filed, or even was threatening to file, a complaint with OSHA. In the absence of such a threat and the presence of multiple, undisputed performance issues, Marks cannot show that his OSHA-related discussions were a cause, let alone *the proximate cause*, of his termination. Further, there is no question that Marks is unable to establish “purely wrongful” motivation where the record is replete with evidence that the DSP’s motive for terminating Marks was his persistent inability to perform his job duties. *Sproul*, 2013 U.S. Dist. LEXIS 60054 at *17. Marks’ performance issues were evident as early as June of 2015, well before he allegedly became aware of a welding issue in November 2015. **Ex. G**, Saxe Decl. ¶ 6, Ex. 1; **Ex. C**, Marks Dep. 250:18-251:13. Saxe’s expressed dissatisfaction with Marks’ performance and contemplation of his termination before Marks engaged in any alleged protected activity sufficient to state a claim for tortious discharge, negates Marks’ allegation of a retaliatory motive for his termination, as does Mark’s characterization of the cooperative and advisory nature of the alleged OSHA discussions

1 with Saxe and Duran. **Ex. C**, Marks Dep. 263:25-264:21 (Duran, Saxe, and Marks worked together
 2 for “months” to resolve the welding certification issue); 298:12-18 (Marks advised Saxe as general
 3 counsel regarding possible OSHA violations).

4 Even if the Court were to look beyond the evidence in the record and conclude that Marks’
 5 discussions with Saxe regarding OSHA contributed in part to Saxe’s motive for termination, Marks
 6 could never establish, as a matter of law, that Saxe’s entire motive was based on these discussions.
 7 The court’s decision in *Blanck v. Hager*, 360 F. Supp. 2d 1137, No. CV-N-04-0051-PMP (RAM)
 8 (D. Nev. 2005) is instructive. The *Blanck* court found “even assuming Plaintiff’s actions were a
 9 motivating cause of his termination, *it is evident that his actions were but one of many reasons for*
 10 *his termination as General Counsel...*[i]n Nevada, a Plaintiff seeking relief under a theory of
 11 tortious or retaliatory discharge must demonstrate that his protected conduct was the proximate
 12 cause of his termination.” *Id.* at 1156 (citing *Allum*, 970 P.2d at 1066). Here, as in *Blanck*, Marks’
 13 tortious discharge claim must be rejected because he “fails to provide any evidence that his
 14 protected conduct was the proximate cause of his termination, and not one of many causes.” *Id.*

15 3. Marks Cannot Establish the Existence of A Reasonable, Good Faith Suspicion
 16 that Anyone at DSP Participated in Illegal Conduct.

17 Additionally, even in the unlikely event that Marks’ alleged internal discussions of OSHA
 18 violations could trigger whistleblower protection under Nevada’s public policy, and Marks could
 19 establish that these discussions were the proximate cause of his termination, Marks’ whistleblower
 20 claim must still be rejected because he must have reasonably suspected, in good faith, that DSP
 21 participated in illegal conduct. *Henderson v. Bonaventura*, 649 Fed. Appx. 639, 641, 2016 U.S.
 22 App. LEXIS 8838, *4-5 (9th Cir. 2016) (remanding to district court to assess whether employee
 23 possessed good faith belief pursuant to *Allum*, 970 P.2d at 1067). Marks’ testimony makes clear
 24 that, here, there can be no such finding. According to Marks, the sole basis for his OSHA claim is
 25 that, on one occasion, he noticed an employee welding in the theater, learned that certifications
 26 were required to perform welding, and discovered after the fact that the employee he observed
 27 during the tour did not have a certification. **Ex. C**, Marks Dep. 251:14-24, 254:6-16, 260:24-261:11.
 28 Marks testified that Marks, Duran, and Saxe began working to resolve the issue by identifying

1 which employees had previous certifications and other employees whom it be would be cost-
 2 effective to have certified. *Id.* at 263:25-264:21. And, after January 2016, Marks did not observe a
 3 single DSP employee performing welding without certification. *Id.* at 271:16-272:7. Despite the
 4 fact that Marks never observed a single instance of the alleged violation after January 2016, Marks
 5 filed a complaint with OSHA on March 4, 2016. **Ex. J**, MARKS-00028-00029. As such, there is
 6 simply no evidence to support a contention that Marks actually possessed a reasonable, good faith
 7 suspicion of participation in illegal conduct when he was terminated, or when he filed his OSHA
 8 complaint. In fact, the record evidence demands a contrary conclusion: Marks' OSHA complaint
 9 was submitted in bad faith, in an attempt to "get even with David Saxe for firing him." **Ex. A**,
 10 August Dep. 65:4-23-66:25 (Ex. 3 ¶ 4). For this reason, as well as all the reasons discussed above,
 11 the Court should reject Plaintiff's tortious discharge claim and dismiss Plaintiff's Third Claim for
 12 Relief.

13 **III. CONCLUSION**

14 For each and all of the above stated reasons, Defendants respectfully request that the Court
 15 grant summary judgment in their favor and against Marks on all claims raised, as well as any other
 16 relief the Court deems reasonable and appropriate.

17 Dated this 20th day of December, 2019.

18 JACKSON LEWIS P.C.

19 /s/ Kirsten A. Milton

20 Kirsten A. Milton, Bar #14401
 21 Lynne K. McChrystal Bar #14739
 22 900 S. Fourth Street, Suite 900
 23 Las Vegas, Nevada 89101

24 *Attorneys for Defendants*
 25 *David Saxe Productions, LLC,*
 26 *Saxe Management, LLC and David Saxe*
 27
 28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 20th day of December 2019, I caused to be served via the Court's CM/ECF Filing, a true and correct copy of the above foregoing **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** properly addressed to the following:

Jeffrey Gronich
Jeffrey Gronich, Attorney At Law, P.C.
1810 E. Sahara Ave., Ste. 109
Las Vegas, Nevada 89104

Attorneys for Plaintiff
Alexander Marks

/s/ Mayela E. McArthur
Employee of Jackson Lewis P.C.

EXHIBIT A

EXHIBIT A

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3
4 ALEXANDER MARKS, an
individual,

5 Plaintiff,

6 vs.

7
8 DAVID SAXE PRODUCTIONS, LLC;
SAXE MANAGEMENT, LLC; DAVID
9 SAXE, an individual;
EMPLOYEE(S)/AGENT(S) DOES
10 1-10; and ROE CORPORATIONS
11 11-20, inclusive;

12 Defendants.

CERTIFIED COPY

Case No.
2:17-cv-02110

13
14 DEPOSITION OF ANDREW AUGUST

15
16 Taken at office of Jeffrey Gronich
17 1810 East Sahara Avenue
18 Las Vegas, Nevada
19

20 Taken on Wednesday, September 18, 2019
21 1:44 p.m.
22

23
24 Reported by: KENDALL KING-HEATH, NV. CCR No. 475
25 CA. CSR No. 11861

ALEXANDER MARKS vs DAVID SAXE PRODUCTIONS
August, Andrew on 09/18/2019

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(Defendant's Exhibit 3 was marked
for identification.)

BY MR. GRONICH:

Q. I just handed you Exhibit 3. Take a quick
look at this.

Earlier today you mentioned you had
reviewed a declaration that you had signed. Is this
a copy of that declaration?

A. Yes.

Q. You recall signing this declaration?

A. Yes.

Q. Did you type up this declaration, or was
it given to you to sign?

A. It was given to me to sign.

Q. Were you asked about the information in
this prior to it being given to you to sign, or was
it given to you prior to asking you any
information?

A. Could you rephrase that.

Q. Did -- were you -- did you give the
information that's contained in this declaration to
somebody else who typed it up?

A. Yes.

Q. When did you give that information?

A. I don't remember the exact date.

ALEXANDER MARKS vs DAVID SAXE PRODUCTIONS
August, Andrew on 09/18/2019

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1 Q. Do you remember who you gave that
2 information to?

3 A. Tony.

4 Q. Mr. Cuilla?

5 A. Yes.

6 Q. Now, today you testified that after Alex
7 was terminated that you called him and you asked him
8 what happened. This declaration says that in
9 Paragraph 8, "After Alex was terminated, he
10 contacted me" -- 'he' being Alex, 'me' being you, --
11 "and told me that he was going to get even with
12 David Saxe for firing him."

13 "He said there was many ways he could fuck
14 with him like anonymous calls to OSHA."

15 Now, today your description of that
16 conversation is different. Why is it different?

17 MS. MILTON: Objection. Vague; misstates
18 witness's prior testimony, and there's no connection
19 between that conversation and what it says here.

20 THE WITNESS: I don't understand what
21 you're trying to say.

22 BY MR. GRONICH:

23 Q. Did Alex tell you that he was going to get
24 even with David Saxe for firing him?

25 A. Yes.

DECLARATION

Andrew ("Drew") August being first duly sworn, states:

1. My name is Andrew ("Drew") August and am employed by David Saxe Productions LLC as a Call Center Lead. I have been employed with the company since September 2, 2014.
2. I have personal knowledge of the facts stated below, and if called as a witness, could and would competently testify.
3. I worked at the company when Alexander Marks ("Alex") worked as an in house attorney for the company.
4. Alex must have called me into his office at least 20 times just to brag to me that he was running for state senate and to try to ask my opinion on things like his website, logo design and to pressure me into working on his campaign. He also tried to convince me to quit David Saxe Productions and come work for his mother who is a manager at a Coffee Bean.
5. Alex admitted to me that David told him to stop working on his campaign at the office and to stop distracting and soliciting the employees with his political campaign, but Alex stated that he didn't "give a shit" and was going to do it anyway.
6. Alex told me not to tell David what he said.
7. I noticed that Alex was missing at the office more and more and he admitted to me that he was leaving to go do his campaign duties.
8. After Alex was terminated he contacted me and told me that he was going to get even with David Saxe for firing him.
9. He said that there are many ways that he can "fuck with him", like lawsuits and anonymous calls to OSHA.

I verify under penalty of perjury under the law of the State of Nevada that this Declaration is true and correct.

Dated July 20, 2017

Submitted by:



Andrew (Drew) August

EXHIBIT: 3
WIT: A.AUGUST
DATE: 09/18/19
KK Health CCR, CSR

SAXE-0132

ALEXANDER MARKS vs DAVID SAXE PRODUCTIONS
August, Andrew on 09/18/2019

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REPORTER'S CERTIFICATE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, KENDALL KING-HEATH, CCR No. 475, a
Certified Court Reporter for the State of Nevada, do
hereby certify:

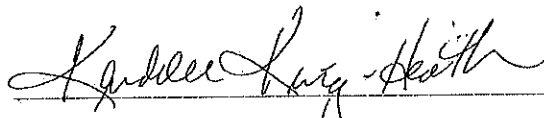
That I reported the taking of the
deposition of the witness, ANDREW AUGUST, commencing
on the 18th day of October, 2019, at the hour of
1:44 p.m.

That prior to being examined, the witness
was duly sworn by me to testify to the truth, the
whole truth, and nothing but the truth.

That I thereafter transcribed my said
shorthand notes into typewriting and that the
typewritten transcript of said deposition is a
complete, true and accurate transcription of my said
shorthand notes taken down at said time, and that a
request has been made to review the transcript.

I further certify that I am not a relative
or employee of an attorney or counsel of any of the
parties, nor a relative or employee of any attorney
or counsel involved in said action, nor a person
financially interested in the action.

IN WITNESS WHEREOF, I have hereunto
set my signature this 21st day of October, 2019.



KENDALL KING-HEATH
CCR No. 475

EXHIBIT B

EXHIBIT B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ALEXANDER MARKS an individual,

Plaintiff,

vs.

DAVID SAXE PRODUCTIONS, LLC;
SAXE MANAGEMENT, LLC; DAVID
SAXE, an individual; EMPLOYEE(S) /
AGENTS(S) DOES 1-10; and ROE
CORPORATIONS 11-20, inclusive;

Defendants.

CERTIFIED COPY

Case No.
2:17-cv-02110

DEPOSITION OF DAVID SAXE

Taken at the Offices of Jeffrey Gronich, Esq.

1810 E. Sahara Avenue, Suite 109

Las Vegas, Nevada

On Wednesday, July 11, 2018

At 1:47 p.m.

Reported by: Deborah Ann Hines, CCR #473, RPR

1 engaged a third-party texting company to do some
2 marketing for our own customers.

3 Q. What's the status of that case?

4 A. Still going.

5 Q. Any other claims that you personally have
6 been sued on?

7 A. Probably, but I can't think of any right
8 now. I don't know why.

9 Q. Do you have an estimate for the number of
10 lawsuits that have been filed against you in the last
11 ten years?

12 A. Me personally or my entities?

13 Q. Let's start with you personally.

14 A. This is speculation. I'm not sure when they
15 add me personally or not. If I had to speculate,
16 five. Three. I'm not sure.

17 Q. Do you remember, other than the Bauman --
18 other than the ones that you've already mentioned,
19 are there any others in those three to five?

20 A. Not that I can think of right now.

21 Q. Okay. Let's switch gears a little bit now.
22 Let's talk about your role in David Saxe Productions.
23 What is your role?

24 A. Well, I'm the manager.

25 Q. What do you do in that capacity?

1 A. Well, through -- just manage, manage
2 day-to-day, just could be a lot of different issues.

3 Q. I understand it's asking a lot of you, but
4 I'm not a manager, well, I guess I am a manager, but
5 I'm not a manager of a production company so I don't
6 know. When you say, you may know what that means,
7 but I don't know what that means. So I'm just trying
8 to get an idea of what do you do. What is your role
9 as the manager of DSP?

10 A. David Saxe Productions, LLC has an
11 accounting department, legal department, the HR
12 department. So these types of operations I will
13 inspect and make sure that they're doing their jobs,
14 so...

15 Q. How do you do that?

16 A. Sorry, I'm trying to -- it's hard to think
17 of so many things all at once. All right. There is
18 reviewing the settlements, show settlements. I will
19 help the accounting department review those and make
20 sure they're doing them right. I will meet with
21 counsel and go over any issues for any of the
22 companies, because David Saxe Productions, LLC is a
23 consulting company for a lot of different companies,
24 so we'll go over matters.

25 There are -- a typical thing, the runner

ALEXANDER MARKS vs DAVID SAXE PRODUCTIONS
Saxe, David on 07/11/2018

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1 doing now.

2 Q. You don't take a look at your deposits of
3 your bank account in your company?

4 A. No. I haven't seen a check for a long time.
5 That's all electronic, so, correct.

6 Q. Okay. Let's get into a little bit of some
7 of the meat of the lawsuit. Okay. Who is Alex
8 Marks?

9 A. Former in-house counsel for David Saxe
10 Productions, LLC.

11 Q. Was he in-house counsel for any other
12 companies owned or managed by Saxe Management, LLC?

13 A. No.

14 Q. Did he ever perform any legal work for Saxe
15 Management, LLC?

16 A. I mean, that's a legal conclusion, but it
17 would be for David Saxe Productions performing
18 services for other companies. So in his capacity at
19 David Saxe Productions, LLC through the agreements
20 with the other companies for the benefit of other
21 companies he performed services, yes.

22 Q. Well, just specifically on Saxe Management,
23 what legal -- what legal duties did he perform? And
24 I don't want you to get into, you know, specific
25 things or things like that. I just want generally.

ALEXANDER MARKS vs DAVID SAXE PRODUCTIONS
Saxe, David on 07/11/2018

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1 A. He should have done, like, the annual list
2 of officers for Saxe Management, LLC and other
3 filings.

4 Q. Corporate filings?

5 A. Yes.

6 Q. Okay. How did Mr. Marks apply for the
7 position?

8 MS. MILTON: Objection. If this witness
9 knows, speculation.

10 THE WITNESS: I'm not sure if he went
11 through -- I would have said because his mom sent him
12 to me, but in hearing his testimony at the
13 deposition, I think he said he was applying with the
14 company, so I don't know that though, but apparently.
15 BY MR. GRONICH:

16 Q. Okay. At the time that he applied, did you
17 know how he came to know of the job position?

18 A. Yes. His mother.

19 Q. So at the time he applied, you knew that his
20 mother told him to apply for the job?

21 A. I don't know if he put an application in
22 prior to his mother doing that. I don't know about
23 that. I'm just aware of his mother told me she
24 thought I should hire him.

25 Q. Are you friends with his mother?

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Saxe, David on 07/11/2018

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1 A. No.

2 Q. Were you friends with his mother in 2015?

3 A. No, we weren't friends. I just -- she
4 worked at the Coffee Bean I went to a lot, so I saw
5 her.

6 Q. How did it come up in conversation that she
7 told you that you should hire Alex?

8 A. I was at Coffee Bean ordering, and I think
9 she pulled me -- I think she got from behind the
10 counter and walked over and told me I got a -- she
11 talked to my wife and my wife went -- goes to the
12 same Coffee Bean, she said, "I've been telling your
13 wife, 'your husband's got to hire my son.'" So she
14 told me, You should hire him, he's great. Are you
15 looking?" I go, "I happen to actually be, so give
16 him my number." I don't remember how it went down,
17 but I probably just gave her my number to give to
18 him.

19 Q. Did you know him personally at that time?

20 A. No.

21 Q. Did any other candidates apply for that
22 position?

23 MS. MILTON: Objection, vague.

24 THE WITNESS: I'm not sure if we had an
25 application out at the time. I think we already had

ALEXANDER MARKS vs DAVID SAXE PRODUCTIONS
Saxe, David on 07/11/2018

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1 BY MR. GRONICH:

2 Q. Okay. Talking again about Mr. Marks, did he
3 have certain hours that he was expected to work?

4 MS. MILTON: Object to form, vague.

5 THE WITNESS: Pretty much 8:30 to 5:00 p.m.
6 is when everyone's in the office, so that's a good
7 framework to be so that we could all -- if somebody
8 has a legal question or something so he's there. So,
9 yes, pretty much 8:30 to 5:00.

10 BY MR. GRONICH:

11 Q. Would you say those are the office opening
12 hours?

13 A. The office is open -- well, that's when,
14 yeah, that's when most people work.

15 Q. What are the office hours?

16 A. 8:30 to 5:00 Monday through Friday, but
17 there's a call center in the building, and they --
18 that department shows up at 7:30, 7:00 or 7:30, I'm
19 not sure. It depends on the time of the year.

20 Q. Did Alex have a key to the office?

21 A. I don't know.

22 Q. Do you know the people who have keys to your
23 office?

24 A. I mean, if somebody -- if you said this
25 person has a key, I would know them, yes. But if

1 you're asking how many people and who exactly has a
2 key to the front door of the office, I'm not
3 positive. It should only be a handful I think, but I
4 don't know if he had one or not. I don't think he
5 did but could have.

6 Q. Did Alex have to clock in or sign in? Was
7 there a mechanism for him to track his hours?

8 A. No, he didn't have to clock in.

9 Q. How did you communicate to Alex the hours he
10 was expected to be in the office?

11 A. I believe in the interview process, I think
12 I told him just what would be expected of him, and it
13 would be, you know, what our office hours were and
14 when I was there.

15 Q. How late would you stay at the office
16 typically?

17 A. Typically. I'm typically 8:30 until around
18 10:00 p.m., Monday through Friday.

19 Q. 8:30 to 9:00 is when you get in. That's
20 what you testified earlier, right? You arrive
21 between 8:30 and 9:00?

22 A. No. I'm 8:30, but sometimes, like when my
23 kids are in school, I drop them off, so sometimes it
24 depends on if the kids are late or not. Sometimes
25 it's 8:40. You know, it's not -- 8:35, around -- not

1 THE WITNESS: Just, I don't know if that's
2 letting my guard down but it's certainly just it's
3 still work, but it's -- I liked his personality at
4 first and thought we were in sync.

5 BY MR. GRONICH:

6 Q. When did Alex tell you that he was starting
7 a political campaign?

8 A. Oh, I don't remember the dates. He was
9 going to run for state assembly first, so I can't
10 remember the date. It was 2015.

11 Q. Do you remember the month?

12 A. I can't remember. It seemed like a few
13 months into or pretty soon into his employment, so I
14 don't -- I don't remember exact month. So if he
15 started in April... May, June maybe. I don't
16 remember exactly.

17 Q. What was your reaction when he told you?

18 A. I asked him when his last day is and thought
19 he was quitting.

20 Q. Why did you think that?

21 A. Because he said "I'm going to" -- he kind
22 of, like, sat me down like it was a very big deal,
23 and usually that means to me, like, oh, gosh,
24 somebody's going to -- they're quitting or something
25 bad. And he said that he's going to run for office.

ALEXANDER MARKS vs DAVID SAXE PRODUCTIONS
Saxe, David on 07/11/2018

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1 And so I took his speech about he's going to go run
2 for office as, oh, okay, when's your last day here?
3 So I just -- that's what I said, like, okay, because
4 you're leaving.

5 Q. What did he say?

6 A. He said, "Well, no, no, not yet. I still
7 have to do -- I got to see if I win first."

8 Q. Then what did you say?

9 A. I said, well -- I don't know chronologically
10 exactly what was said right there, but during that
11 conversation it was, I think I was just saying, "I
12 don't understand. What do you mean you're going --
13 if you win?" Okay, so you're telling me if you win
14 you're quitting my company, but if you lose you're
15 not, like I'm chopped liver here, so...

16 Q. Were you -- let me ask you, how did you feel
17 about that conversation?

18 MS. MILTON: Objection, vague.

19 THE WITNESS: I didn't articulate all of
20 this to him because he wasn't grasping it, but it
21 was, okay, I'm looking for a new attorney now then,
22 because he's already -- why invest in him anymore?
23 He's already told me he's going to leave, and he
24 really wants to leave and this is really what he
25 wants to do.

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Saxe, David on 07/11/2018

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1 So he's -- I don't think he's grasping the
2 situation, like he's telling his boss he's leaving
3 him and he can't wait to leave him, and he can't wait
4 to go be in politics and do this. So in his head I
5 think it was all -- I don't think he was taking -- I
6 think he was so high on and excited that he could
7 possibly be an assemblyman that he wasn't looking at
8 it from another aspect, telling his employer he can't
9 wait to leave, so...

10 BY MR. GRONICH:

11 Q. Did he say he can't wait to leave?

12 A. No, he didn't say the words, "I can't wait
13 to leave." He said, you know, this is -- this is his
14 dream. This is what he wants to do. This is a big
15 deal. He's very excited. And, you know, the -- and
16 then I said, "Well, you're -- how would that work,
17 Alex?" I said, "You're going to be campaigning." He
18 said, "Don't worry about it." He goes, "We'll figure
19 it out."

20 And I just remember my head going, wow, he
21 doesn't even realize what he's saying. Like, he's
22 telling his employer, "Hey, I'm leaving you but don't
23 worry about it, we'll talk about it, like it will be
24 fine. Don't worry about it."

25 And he said -- then he asked -- so I don't

1 know if he said, "are you okay with it," but he saw
2 that I was like not happy, so he said, "Oh, don't
3 worry. It will be fine. I won't be off that much,
4 don't worry, just here and there. I'll make it
5 work." And I said, "Well, I'm not agreeing to that
6 and we'll have to see," like I'm not sitting here
7 agreeing that he's going to be -- I think his mindset
8 was he'll either show up or he won't show up but
9 don't worry about it.

10 And I said that, you know, that's not going
11 to work so we're going to have to talk. But he said
12 it's -- he also said, you know, "I've got more to
13 find out so let's not panic yet."

14 Q. Okay. Was that the end of that
15 conversation?

16 A. I think at that time, yes, probably.

17 Q. When did you first see him working on
18 campaign projects while at work?

19 MS. MILTON: Objection. To be clear, are
20 you talking about the assembly position or the state
21 senate position?

22 MR. GRONICH: Anything.

23 MS. MILTON: I don't think he campaigned for
24 the assembly position.

25 MR. GRONICH: The question stands.

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1 MS. MILTON: Okay.

2 THE WITNESS: Yeah, in my opinion whether
3 it's campaigning or just -- it wasn't about
4 campaigning, it was just he's very excited about
5 something other than work, and talking about
6 everything other than work. So which I try -- was
7 very happy for him ish.

8 I mean, I could kind of, you know, I could
9 understand that it was a big deal for him and he was
10 excited, so there was a part of me that was, all
11 right, good for you, you know, I'm genuinely happy
12 that you found your purpose and this is what you've
13 always wanted, I was happy for him.

14 But he seemed to be completely obtuse about
15 that it's not, it's not beneficial for me or the
16 company, it's just not beneficial for us, that his
17 brain is just so into that. And so I felt happy for
18 him but at the same time why can't you understand
19 that it's affecting your work?

20 BY MR. GRONICH:

21 Q. Well, how did it affect his work?

22 A. You know, conversations from going over our
23 projects or legal matters would start to turn more
24 into just, you know, it was such a big deal in his
25 life that things would just start turning towards

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1 that conversation and talking more about his own
2 stuff or turn whatever we have to talk about into his
3 own stuff going on. And it was like, okay, can we
4 talk about our work now?

5 You know, it was, I don't want to say
6 innocent at first, it was just we understood he was
7 happy but it was, like, can we please talk about our
8 projects? So it was, you know, slowly from that's
9 all he wanted to talk about to, you know, you could
10 walk by his office and he's on the phone doing
11 something obviously not work-related with my company.

12 Q. When did you -- tell me a specific instance
13 that you observed him being on the phone while on
14 work hours for issues related to his run, for either
15 state assembly or senate.

16 A. Pretty soon after he told me about the
17 assembly thing.

18 Q. And I want a specific instance.

19 A. I'm giving you one.

20 Q. Okay.

21 A. At the timeframe after he disclosed to me
22 that he's going to run for office, there's a specific
23 instance where I walked upstairs and passed, and he
24 was on the phone talking about, I forgot the term,
25 it's a political term, I can't think, but he was

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1 clearly talking about politics and his -- I don't
2 know the names of the assemblymen and stuff, but he
3 was talking politics, and I went oh, my...

4 Q. What was that date?

5 A. I don't know the date. It was sometime very
6 soon after he announced that he's going to do that.

7 Q. Okay. What other instance?

8 A. For political stuff?

9 Q. Uh-huh, yes.

10 A. The time he was standing around the
11 marketing team and giving them -- pointing over their
12 shoulder, giving them direction. And it was -- I
13 asked Veronica, I believe, why is he there? Why is
14 Alex down there? And she said she didn't know, she
15 was going to find out. And then I think she said, "I
16 think he's got them doing his website or some
17 graphics or something for his campaign."

18 Q. What else?

19 A. Where I noticed him or where he just called
20 out or --

21 Q. Specific instances that you saw him
22 performing tasks related to his run for political
23 office while on work hours.

24 A. Excluding all the conversations with other
25 counsel and going over things where he would

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1 It was Andrew August. And there were -- I don't know
2 the name. There's somebody else from the call center
3 in there. I don't know that -- I don't know that
4 employee's name.

5 And there was a -- there was Ania Koslowski.
6 She was the sales and marketing manager who came at
7 me, or came and told me once, "Can you get Alex away
8 from my people. He's driving us fucking crazy with
9 his political stuff." Veronica Duran -- and then I
10 came out and saw him doing it too. Veronica Duran
11 came to me numerous times and pointed out that he was
12 engaging in his political stuff again.

13 Q. Do you have a -- did you ever keep track of
14 the time, the amount of time that he was doing tasks
15 related to his political run as opposed to time spent
16 working on tasks related to David Saxe Productions?

17 A. I didn't do a formal analysis.

18 Q. A while back you had testified as far as
19 giving him tasks and assignments, and you mentioned
20 that some of these assignments would have specific
21 due dates. Do you remember we talked about that?

22 A. Yes.

23 Q. How often, if ever, did Alex ever miss a
24 deadline?

25 A. Constantly.

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CERTIFICATE OF REPORTER

STATE OF NEVADA)

SS:

COUNTY OF CLARK)

I, Deborah Ann Hines, RPR, Nevada CCR No. 473,
California CSR No. 11691, Certified Court Reporter,
certify:

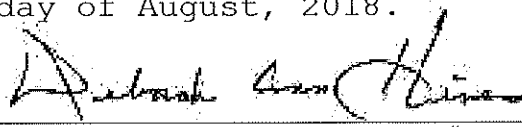
That I reported the taking of the deposition
of the witness, David Saxe, commencing on Wednesday,
July 11, 2018, at 1:47 p.m.;

That prior to being examined, the witness
was by me duly sworn to testify to the truth, the
whole truth, and nothing but the truth;

That I thereafter transcribed my shorthand
notes into typewriting and that the typewritten
transcript of said deposition is a complete, true and
accurate record of testimony provided by the witness
at said time to the best of my ability;

I further certify (1) that I am not a
relative, employee or independent contractor of
counsel of any of the parties; nor a relative,
employee or independent contractor of the parties
involved in said action; nor a person financially
interested in the action; nor do I have any other
relationship with any of the parties or with counsel
of any of the parties involved in the action that
may reasonably cause my impartiality to be
questioned; and (2) that transcript review pursuant
to FRCP 30(e) was requested.

IN WITNESS WHEREOF, I have hereunto set my
hand in my office in the County of Clark, State of
Nevada, this 10th day of August, 2018.


Deborah Ann Hines, CCR #473, RPR

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3
4 ALEXANDER MARKS, an
individual,

5 Plaintiff,

6 vs.

7
8 DAVID SAXE PRODUCTIONS, LLC;
SAXE MANAGEMENT, LLC; DAVID
9 SAXE, an individual;
EMPLOYEE(S)/AGENT(S) DOES
10 1-10; and ROE CORPORATIONS
11 11-20, inclusive;

12 Defendants.

CERTIFIED COPY

Case No.
2:17-cv-02110

13
14 DEPOSITION OF DAVID SAXE

15 VOLUME 2

16 Taken at office of Jeffrey Gronich

17 1810 East Sahara Avenue

18 Las Vegas, Nevada

19
20 Taken on Wednesday, September 17, 2019

21 10:14 a.m.

22
23
24 Reported by: KENDALL KING-HEATH, NV. CCR No. 475
25 CA. CSR No. 11861

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1 Marks's work performance. So I want to get in and
2 talk a little bit about that. You had mentioned
3 last time we spoke that Alex had problem getting
4 work done during his employment, but we were trying
5 to figure out specific examples of times that Mr.
6 Marks failed to get his work done for you.

7 So can you give me some examples, some
8 specific examples of things that were assigned to
9 Mr. Marks that he did not perform?

10 A. Yes. There was procuring visas for Robot
11 Boys in the time frame that was allowed them to get
12 into the show.

13 Q. When did you assign that to him?

14 A. I'm not sure. Sometime, maybe January
15 2016.

16 Q. And when was -- did you give him a
17 deadline?

18 A. Yes. I think we had a target date.

19 Q. When was that deadline?

20 A. I think they were supposed to be in the
21 show some time in March. So we were going to try
22 and expedite a visa.

23 Q. But do you know when the deadline was
24 going to be?

25 A. Not exactly, but some time in March, I

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1 believe.

2 Q. The deadline to get the work done was
3 going to be in March?

4 A. No. To get the visas done, yes.

5 Q. So you said that Alex did not get that
6 done?

7 A. Alex delayed the visa.

8 Q. What did that mean for the performance?

9 A. They had to come in later than expected.

10 Q. How much later?

11 A. I don't recall.

12 Q. What were the names of those performers?

13 A. The stage name is Robot Boys. I don't
14 remember their real names.

15 Q. You don't remember the name those visas
16 were going to be taken care of?

17 A. I don't recall.

18 Q. What tasks did Alex not get done that he
19 was assigned to do?

20 A. Things like research. I asked him to
21 research how to do many things.

22 Q. Such as?

23 A. There's so many. Let's see. We have
24 the -- sorry, I'm just thinking of too many things
25 all at the same time. There was a lot of legal

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1 questions with our lawsuits that we had in order to
2 help out the house attorneys. There would be legal
3 issues that he would come up with, criticism for the
4 attorneys, and I would ask him to research and make
5 sure he had backup for those positions.

6 Also I would ask questions, like if there
7 was an employment-related thing. I remember one
8 time I wanted to -- I'm sorry, there was a
9 ticketing, our ticketing system. I wanted to do
10 dynamic pricing. I asked him to research if it's
11 legal.

12 Q. When did you assign him the research as
13 far as working with outside counsel in the pending
14 lawsuits? When was that assigned to him?

15 A. There's so many instances. I mean, we had
16 so many lawsuits and matters and compliance things
17 going on. So every day there was something. I
18 don't know if I assigned him something daily, but we
19 had so many different things we were working on. So
20 ...

21 Q. Can you give me something specific?

22 A. Okay. Just give me a minute. Let me
23 think.

24 Q. When did you assign him to do the legal
25 research regarding the dynamic pricing?

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1 A. I don't recall.

2 Q. Do you recall if he completed that task?

3 A. He did submit a report to me, yes.

4 Q. Do you remember when he did that?

5 A. No.

6 Q. Any other examples of tasks that you
7 assigned to Mr. Marks that he did not complete?

8 A. I know there's e-mails where I asked him
9 for updates on tasks several times. He just didn't
10 do it, so I would send him a reminder e-mail. Stuff
11 like that, my recollection. I'm drawing a blank
12 right now for some reason.

13 Q. Now, was this, this practice of what we'll
14 describe as failing to, what you allege is Mr.
15 Marks's failure to perform his job duties, was that
16 going on throughout his entire employment?

17 MS. MILTON: Objection; vague.

18 THE WITNESS: For the most part. I
19 believe it got progressively worse.

20 BY MR. GRONICH:

21 Q. When was the first time you noticed he was
22 failing to complete his tasks?

23 MS. MILTON: Objection; vague.

24 THE WITNESS: I don't recall the first
25 time, time frame.

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Saxe, David on 09/17/2019

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1 that he had showed up that day?

2 MS. MILTON: Objection; vague.

3 THE WITNESS: At that time I don't recall
4 him talking to me about it.

5 BY MR. GRONICH:

6 Q. At a later time, did Alex state he had
7 showed up that day?

8 A. I actually don't recall him ever talking
9 to me about it.

10 Q. Following that day, were you aware of an
11 investigation by Alex into your payroll practices?

12 A. No.

13 Q. Did Mr. Takarsky ever ask you to provide
14 payroll history for a specific time frame?

15 MS. MILTON: Objection; vague.

16 THE WITNESS: No.

17 BY MR. GRONICH:

18 Q. Did Alex ask you to provide any payroll
19 history for any of your employees during a specific
20 time frame?

21 A. No.

22 Q. At any time did Larry Takarsky tell you
23 that Alex had asked him for payroll records from
24 other employees?

25 A. No.

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1 just remember talking to them.

2 Q. Let's go to -- actually, can we take a
3 quick break?

4 MS. MILTON: Sure.

5 (Break taken.)

6 BY MR. GRONICH:

7 Q. So I want to talk about Mr. Marks's actual
8 termination of employment. Do you remember
9 terminating Mr. Marks?

10 A. Yes.

11 Q. Do you remember when that was?

12 A. I think it was March 2nd.

13 Q. When did you decide that you were going to
14 terminate his employment?

15 A. That day.

16 Q. Was it before or after your in-person
17 conversation with him?

18 A. I had in-person conversation with him that
19 morning, and ...

20 Q. That was different from the conversation
21 to terminate him?

22 A. Correct.

23 Q. What did you talk about at that first
24 conversation?

25 A. I told him enough was enough, to start

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1 doing as I asked, stop with the attitude, to show up
2 to work, and stop calling people into his office.
3 Want him to focus on work.

4 Q. What prompted that conversation?

5 A. Alex was clearly not into work for me. He
6 was calling out more, showing up late, distant in
7 our conversations, steering conversations away from
8 whatever work topic we might be on. He just was
9 acting very weird towards me.

10 Q. Is this something you noticed over a long
11 period of time, or was there a specific incident?

12 A. Growing over a period of time, so it had
13 reared it's head for a while, but it was growing
14 worse, and his attitude towards me was getting
15 worse.

16 Q. Did something happen on March 2nd or March
17 1st or February 29th, any of those few days before
18 that? Did something happen that caused you to
19 become -- that caused you to want to have that
20 conversation with him?

21 MS. MILTON: Objection; vague.

22 THE WITNESS: Near the end there, we --
23 any conversations we had, it was just getting more
24 and more argumentative about stuff. And I think --
25 won't say it's one specific thing. I think it was

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1 A. Yes.

2 Q. So say that again. You're saying Alex
3 went to his office and called Drew into his
4 office?

5 A. I don't know how it happened; I just saw
6 on the camera he Drew in his office.

7 Q. You said "Saw on the camera." How did you
8 see that on the camera?

9 A. I have a TV in my office that has
10 multiview of all the cameras.

11 Q. So you can see what's going on in each
12 office --

13 A. Yes.

14 Q. -- at any given time?

15 A. Yes, for the most part.

16 Q. So did that -- did that video have an
17 audio?

18 A. Yes.

19 Q. So you could hear what they were talking
20 about?

21 A. Yes.

22 Q. What were they talking about?

23 A. Alex was -- I don't remember the
24 specifics. It was just Alex talking about --
25 something like "David's a jerk." And, "Screw him,"

ALEXANDER MARKS vs DAVID SAXE PRODUCTIONS
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1 just talking crap about me. Nonsense, just
2 BS-ing.

3 Q. So you didn't like the fact that your
4 employees was talking badly about you?

5 A. It would just be him. And, no, actually
6 don't really care that he was talking bad about me.
7 I said, "Go back and work, please." Just work, no
8 more.

9 Q. What did Drew say during that
10 conversation?

11 A. I don't remember.

12 Q. Did you talk to Drew about it?

13 A. No.

14 Q. Did you discipline Drew?

15 A. I did not.

16 Q. You didn't counsel Drew about not being in
17 his own office doing his own work?

18 A. I don't remember if I told Veronica or
19 someone. Maybe it was the head of the Call Center,
20 but somebody to keep the Call Center people -- to
21 not let them go into Alex's office anymore to talk
22 to him.

23 Q. That was after that?

24 A. No. I had said that before.

25 Q. So was Veronica disciplined as a result of

ALEXANDER MARKS vs DAVID SAXE PRODUCTIONS
Saxe, David on 09/17/2019

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1 that?

2 MS. MILTON: Objection; vague.

3 BY MR. GRONICH:

4 Q. As a result of that conversation between
5 Drew and Alex?

6 A. No.

7 Q. You said Drew was not disciplined in that
8 conversation that he with Alex?

9 A. I don't know if he ultimately was from his
10 manager or not.

11 Q. But not from you?

12 A. Not from me, no.

13 Q. So you said you told Veronica to bring
14 Alex back to your office after 15 minutes from the
15 first conversation. You had already decided at that
16 point you were going to terminate his employment; is
17 that correct?

18 A. Unless -- yes, I made that decision at
19 that point. That's why I brought him down.

20 Q. So what did you talk about during the
21 second conversation?

22 A. I brought him, and I nicely, best I could,
23 kept calm, and I said, "All right. Apparently you
24 didn't do what I'm asking of you, and it doesn't
25 work for me, and we have grown apart." And I said,

ALEXANDER MARKS vs DAVID SAXE PRODUCTIONS
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1 "You're not -- you're just not my guy, and I don't
2 trust you anymore, and you have no respect for me or
3 this job, so I'm going to let you go."

4 Q. What did Alex say?

5 A. He said, "Okay."

6 Q. That was the end of it?

7 A. That was the end of that conversation
8 where I terminated him.

9 Q. Did he go to his office to get his stuff
10 and then leave, or was there any other conversations
11 you had with him?

12 A. He went to his office to get his stuff,
13 and I followed him up to make sure -- sometimes
14 employees, when they leave, they steal stuff or
15 delete files or something, so I just wanted to make
16 sure he didn't delete.

17 Q. Do you have a security officer that
18 handles that, or is it employees that watch?

19 A. We do not have security that handles that,
20 and it's not always me. But since I didn't have
21 time to tell anybody about it, so I just followed
22 him just to make sure he didn't do anything to
23 sabotage any of our files or anything.

24 Q. When did you post a job opening for his
25 replacement?

ALEXANDER MARKS vs DAVID SAXE PRODUCTIONS
Saxe, David on 09/17/2019

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REPORTER'S CERTIFICATE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, KENDALL KING-HEATH, CCR No. 475, a
Certified Court Reporter for the State of Nevada, do
hereby certify:

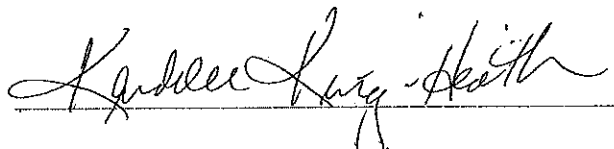
That I reported the taking of the
deposition of the witness, DAVID SAXE, VOL. 2,
commencing on the 17th day of October, 2019, at the
hour of 10:14 a.m.

That prior to being examined, the witness
was duly sworn by me to testify to the truth, the
whole truth, and nothing but the truth.

That I thereafter transcribed my said
shorthand notes into typewriting and that the
typewritten transcript of said deposition is a
complete, true and accurate transcription of my said
shorthand notes taken down at said time, and that a
request has been made to review the transcript.

I further certify that I am not a relative
or employee of an attorney or counsel of any of the
parties, nor a relative or employee of any attorney
or counsel involved in said action, nor a person
financially interested in the action.

IN WITNESS WHEREOF, I have hereunto
set my signature this 21st day of October, 2019.



KENDALL KING-HEATH
CCR No. 475

EXHIBIT C

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ALEXANDER MARKS, an)
individual,)
)
Plaintiff,)
) Case No. 2:17-cv-02110
vs.)
)
DAVID SAXE PRODUCTIONS,)
LLC; SAXE MANAGEMENT, LLC;)
DAVID SAXE, an individual;)
EMPLOYEE(S)/AGENT(S) DOES)
1-10; and ROE CORPORATIONS)
11-20, inclusive,)
)
Defendants.)
_____)

VIDEOTAPED DEPOSITION OF ALEXANDER MARKS
LAS VEGAS, NEVADA
MONDAY, JULY 9, 2018
at 10:05 a.m.

Reported By: LISA MAKOWSKI, CCR 345, CA CSR 13400
JOB NO: 2959975
Pages 1- 460

Page 1

1 when there's a window open, you kind of jump at it,
2 and that was the window.

3 Q. Let me ask a better question. When did
4 you actually start thinking about running for the
5 state assembly position?

6 A. When I was probably 11 years old. Maybe
7 not specifically the assembly, but running for
8 office.

9 Q. Being in politics?

10 A. Yes.

11 Q. So when you went to law school, you went
12 with the goal of thinking that one day you wanted
13 to be in politics --

14 A. Yes.

15 Q. -- is that correct?

16 A. Yes.

17 Q. Just I know you know sometimes where my
18 questions are going, but it's important to just let
19 me finish.

20 And you're a Democrat; right?

21 A. Yes.

22 Q. Do you know, was David a Democrat when
23 you were working at David Saxe?

24 A. I don't know.

25 Q. You have no idea what his --

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1 A. Never asked.

2 Q. -- political affiliation was?

3 A. No.

4 Q. When you were thinking about running for
5 the state assembly position, did you meet with
6 various organizations before you decided to run?

7 A. What do you mean "various organizations"?

8 Q. Did you meet with any church groups to
9 decide whether or not it made sense for you to run
10 for the state assembly --

11 A. No.

12 Q. -- position?

13 Did you meet with individuals to talk
14 about whether you were going to run?

15 A. Yes.

16 Q. How many people did you meet with?

17 A. Dietrich was one. There were various
18 phone calls more than in terms of meeting. But I
19 had talked with Speaker Jason Frierson, Assemblyman
20 Tyrone Thompson, Senator Aaron Ford, and that's
21 just probably the few I can think of off the top of
22 my head that I did consult with at that point.

23 Q. How many -- leading up to deciding to run
24 for the state assembly position, how frequently
25 were you talking with Dietrich?

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1 think the fifth sentence says, "I am an attorney by
2 trade, but I am also currently running for state
3 senate in my district in Las Vegas -- in Las
4 Vegas." Do you see that?

5 A. Yes.

6 Q. Do you see that you said, "Running for
7 office is very time consuming, so this part-time
8 position, especially with students, seems like an
9 excellent opportunity." Do you see that?

10 A. Yes.

11 Q. So at the time that you wrote this
12 e-mail, you believed that running for office is
13 very time consuming; right?

14 A. I think I said that earlier. I just made
15 it -- you made the difference between assembly and
16 the senate. This doesn't say that.

17 Q. That wasn't my question. I was asking
18 you about the state senate position before, and I
19 was asking you about the amount of time that it
20 took for the -- to run for the state senate
21 position and to run to the assembly position;
22 right?

23 A. Both are time consuming, yes.

24 Q. And so in this e-mail you thought that a
25 part-time position would be an excellent

1 Q. How far is that from Las Vegas?

2 A. I don't know the exact mileage, but I
3 mean it's outside of Reno. So it's about 45
4 minutes out of Reno.

5 Q. And so I assume you thought that if you
6 won you could -- you would be able to handle being
7 a state senator as well as continuing to work --

8 A. Yes. Sorry.

9 Q. -- as well as continuing to work in some
10 capacity at David Saxe?

11 A. Yes.

12 Q. And did you think that you would be able
13 to handle being full-time at David Saxe when you
14 were a state senator?

15 A. Yes. I think a lot of us, when we go up
16 to the legislative session, the whole hope is that
17 your employer understands. Again, that was why I
18 had that discussion with him several times. So
19 that was the hope, yes.

20 Q. And again, he was supportive of you
21 running for office; right?

22 A. Absolutely. He was always asking how
23 fundraising was going. We used to joke about how
24 bad it was knocking on doors in the heat. Like he
25 never said anything else.

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1 Q. And that was both for the state assembly
2 position as well as the state senate position?

3 A. Yes.

4 Q. I forgot to ask you before, did you
5 prepare for your deposition today?

6 A. Yes.

7 Q. What did you do to prepare?

8 A. I sat with my counsel, Jeff Gronich,
9 reviewed the complaint, and that was it.

10 Q. You didn't review any other documents?

11 A. Documents in terms of submissions, no. I
12 mean I have notes, I reviewed those as well, but
13 not formal documents. Just contemporaneous notes I
14 took.

15 Q. Contemporaneous notes you took, what do
16 you mean? Contemporaneous why?

17 A. March 4, 2016, which I believe were
18 submitted. And also --

19 Q. Are those handwritten notes?

20 A. Typed. There was also a review of the
21 OSHA complaints that I submitted. There was also
22 the -- both of the labor commission complaints that
23 I submitted I reviewed before today.

24 Q. Anything else?

25 A. No, that was it.

1 legal conclusion.

2 THE WITNESS: No.

3 BY MS. MILTON:

4 Q. You're a lawyer; right?

5 A. Yes. Not in Nevada.

6 Q. Right, but you passed a bar?

7 A. Uh-huh.

8 Q. And you went to law school?

9 A. I did.

10 Q. And is it illegal to be abrasive as an
11 owner?

12 MR. GRONICH: Same objection.

13 THE WITNESS: No.

14 BY MS. MILTON:

15 Q. You just didn't like David?

16 A. He and I got along real well until it was
17 about his money and not the business I was trying
18 to protect. When it became about the possible wage
19 theft which I was basically confirming day by day,
20 then he had an issue, because David doesn't like
21 when he gets a little too close to the law. And
22 that's what I was doing, was keeping him compliant.
23 It was my job.

24 Q. Right, as general counsel?

25 A. Yes.

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1 A. That sounds like retaliation to me.

2 Q. I didn't use the word "retaliation."

3 A. Well, if he's mad at me and he did
4 something in retaliation --

5 Q. I didn't use the word retaliation. I
6 said, He could have done that because he was mad at
7 you.

8 A. Okay. Well, then that's a repercussion
9 for an action that I was legally within my right to
10 do, which was go home sick.

11 Q. But the point is you don't know why he
12 instructed, if he did, Larry to do that?

13 A. I know he did. Larry told me he did.

14 Q. You were paid for that day, weren't you?

15 A. I was fired before I was able to do
16 anything, but yes, I was paid for that day.

17 Q. You were paid for that day?

18 A. Yes.

19 Q. And so nothing was deducted from the day
20 that you went home sick; correct?

21 A. At that point, no.

22 Q. Was it deducted later on?

23 A. I wasn't working there. He terminated my
24 employment.

25 Q. But it wasn't deducted; you were paid for

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1 that day that you went home sick?

2 A. Yeah, after the threat of going to the
3 labor commission.

4 Q. Well, but you told me that that threat,
5 you told that to Larry; right?

6 A. Yes.

7 Q. You never told that to David?

8 A. Not that specific one, no. But I think
9 in terms of being general counsel, if you look at
10 our handbook, it discusses the process for
11 investigating possible wage deduction issues. It's
12 right in there. I wrote it, I think. And it talks
13 about investigating. You don't necessarily have to
14 go to David. You go to either HR, which at that
15 point I was carrying several HR functions because
16 none was hired.

17 So I followed the process per the
18 handbook, which was if wage theft or wage
19 deductions that were improper were brought to my
20 attention, I am to investigate that. That
21 investigation led me to my Paychex account, and it
22 also led me to discussing that with Larry.

23 So per the handbook, I don't think it was
24 necessary that I had to go directly to David at
25 that point. And also, I didn't want to necessarily

1 go to David with allegations that were unfounded,
2 so I had to build up a little bit to say this is
3 what I know you're doing and here is the proof.

4 THE WITNESS: Do you mind if we take a
5 break after your next question?

6 MS. MILTON: Yeah. We can take a break
7 now actually.

8 THE VIDEOGRAPHER: We are now going off
9 the record. The time is approximately 10:54 a.m.

10 (A brief recess was taken.)

11 THE VIDEOGRAPHER: We are now back on the
12 record. The time is approximately 11:10 a.m.

13 MS. MILTON: Let's go back off the record
14 a moment. Sorry.

15 THE VIDEOGRAPHER: We are now going off
16 the record. The time is approximately 11:10 a.m.

17 (A brief off-the-record discussion was
18 held.)

19 THE VIDEOGRAPHER: We are now back on the
20 record. The time is approximately 11:20 a.m.

21 BY MS. MILTON:

22 Q. Alex, right before we went off the record
23 we were talking about David threatening not to pay
24 you for one day when you worked, and then you went
25 out sick; correct?

1 A. (No audible response.)

2 Q. So I just want to make sure that I
3 understood your testimony. Did you ever tell David
4 that you were going to report his failure to pay
5 you to any outside entity?

6 A. Yes.

7 Q. When was that?

8 A. There were -- so if we're specifically
9 talking about this Larry instance, it was the day I
10 was terminated.

11 Q. Was that after he told you, you were
12 terminated?

13 A. No. Before.

14 Q. What specifically did you tell him?

15 A. I had received an e-mail saying for the
16 record what we have said in terms of, you know,
17 your political -- I shouldn't have to pay for that
18 e-mail, and then he had requested a meeting. So
19 when I had returned from the office, I went down to
20 his office to discuss the e-mail, which I found a
21 little odd that he was sending an e-mail out of
22 nowhere, because nothing really had occurred that
23 would have kind of prompted that sort of e-mail
24 from him.

25 So when we sat, he said, You know, you're

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1 always out of the office, you're never leaving.
2 And bluntly I said, This isn't about politics, this
3 is about the wage investigation, let's not pretend.
4 He said, I don't know what you're talking about. I
5 said, Sure, you don't. And then he kind of just
6 spun it to the politics again.

7 And I said, It's not about politics. Two
8 days ago you asked me how fundraising was, three
9 days ago you asked me how canvassing went over the
10 weekend. This is the first time ever hearing about
11 any issues you've had with my politics in general.
12 And he says, I don't care. And I said, Well, if I
13 don't get paid by next Thursday, I'll go to the
14 labor commission. And at that point he said, You
15 know what, you're fired. And that was it.

16 And I walked upstairs with him to obtain
17 some of the items I could even get, because he was
18 uncomfortably close to my face yelling at me,
19 getting others to yell at me. When I had gone
20 upstairs, I walked into the controller's office and
21 told Larry I better be paid for my wages for the
22 day I missed or partially missed.

23 And Larry didn't know what was going on.
24 It was kind of a big scene. And then I went into
25 my office, we closed our door, words were said, but

1 I remember them specifically. It was more or less
2 the crux was what do you need from me, and I said I
3 just need the understanding that I will be taking a
4 couple of calls here and there, a couple meetings
5 here and there, nothing disruptive.

6 All my tasks were done. I was never
7 written up for anything. Everything was completed.
8 He had my calendar. He knew where I was at. There
9 were several instances where I'd handed him a sheet
10 about being out of the office for an hour, and he
11 looked at it and asked why I was even giving it to
12 him, to just take the time when I needed it, and
13 that was it.

14 So the understanding that I had from my
15 boss, who clearly was on board with my running for
16 assembly and senate, was complete support. He'd
17 never once said, you know, you're out of the
18 office, where are you. The last time -- the only
19 time I heard that was the e-mail right before I was
20 terminated.

21 Q. Who is Andrew August?

22 A. Andrew August worked in the box office at
23 David Saxe Productions, and he also worked at the
24 box office at V Theater.

25 Q. Do you know if he still works for David

1 pretending is for the last three months I had been
2 running there had been no issues, no disciplinary
3 write-ups, no verbal warnings, and then all of a
4 sudden two days after an investigation that I'm
5 doing on paychecks, now it's an issue. The
6 chronology didn't add up. That's why I say --

7 Q. But David didn't know you were doing that
8 investigation on paychecks; right?

9 A. I think he did.

10 Q. Did you ever tell him?

11 A. I didn't have to. His actions told me
12 the chronology --

13 Q. It wasn't my question. Did you ever tell
14 him that you were doing an investigation into
15 employees' paychecks?

16 A. Yes.

17 Q. When?

18 MR. GRONICH: I'll object to the extent
19 this was asked and answered previously.

20 THE WITNESS: Five minutes before I was
21 let go.

22 BY MS. MILTON:

23 Q. When you were in his office?

24 A. I believe so, yeah. And there may have
25 been an e-mail between Larry and myself about that

1 discovery that I believe would lead us to that we
2 hadn't received.

3 Q. Wait. I don't understand what you mean
4 by that.

5 A. We had requested certain items that I
6 believe would show personal knowledge, but they
7 have not been produced.

8 Q. Okay. So sitting here today, you do not
9 have personal knowledge that David knew about your
10 investigation into the employees' paychecks until
11 you told him at 10:45 a.m. at your meeting on
12 March 2nd; correct?

13 A. In terms of when I told him, yes.

14 Q. Yes. And the other things that you
15 talked to Larry, when you were talking about the
16 other things you talked to Larry about that you
17 believe David knew of, that was in reference to you
18 not getting paid for a day that you worked a
19 partial day and took off sick; correct?

20 A. Yes.

21 Q. Okay. So I want to talk about that
22 investigation a little bit. Okay. So I want to
23 just make sure I have the time frame right. So you
24 were out sick on Wednesday?

25 A. Thursday.

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1 Q. Thursday. So you were out sick Thursday,
2 February 26, 2016; correct?

3 A. Right. I left sick that day at around
4 8:30, 8:40-ish.

5 Q. And then you get back to the office on
6 Friday the 27th; right?

7 A. Yes.

8 Q. And I believe your testimony was that's
9 the day that Larry told you that David told him not
10 to pay you for Thursday, February 26; correct?

11 A. Yes.

12 Q. And I think that you said as a result of
13 Larry telling you that, you asked Larry for all
14 employees' payroll records going back three years;
15 is that right?

16 A. That's the -- I mean there was other
17 things said, but yeah, at the end of that was my
18 request to him.

19 Q. Did you ask for all employees, exempt
20 employees?

21 A. Exempt salaried.

22 Q. Because you wanted to see if this was
23 happening for employees who were in other positions
24 as yours -- I'm sorry. Let me ask that question --
25 that's a bad question.

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1 again, yes.

2 Q. What did he say that David said?

3 A. Again, not to pay you.

4 Q. Did he -- did he tell you if he talked to
5 David about what you told Larry was the law?

6 A. I don't know if he told -- if he said
7 that.

8 Q. Did he tell you that he -- let me ask
9 this in a different way. During that same
10 conversation on Monday, February 29, Larry told you
11 that he couldn't pull the employee payroll records
12 back for three years because he was too busy; is
13 that correct?

14 A. Yeah. It wasn't necessarily I can't do
15 it, it's just I don't have time and that's a lot of
16 work. And he was -- I think we were down probably
17 two accountants at that point, so all of their
18 tasks fell onto him because he was the manager of
19 the office.

20 Q. So am I correct that during that
21 conversation with Larry he did not tell you that he
22 talked to David about your request for the
23 employees' payroll records; correct? Right?

24 A. I can't say if -- I wasn't privy to that
25 conversation between them.

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1 Q. But am I correct that Larry never said
2 that to you?

3 A. He never said that to me, but that
4 doesn't mean it didn't happen. I just -- I wasn't
5 in that conversation, but yes.

6 Q. But my question is, Larry never said that
7 to you --

8 A. No, he never said that to me.

9 Q. -- correct?

10 A. Yes.

11 Q. Sorry. I'm trying not to get double
12 negatives on the record.

13 A. No, you're fine. You're fine. I get it.

14 Q. Okay. So then at some point you started
15 looking at -- through paychecks, at the payroll
16 records of other employees; is that right?

17 A. Yes.

18 Q. And when was that?

19 A. Partially on Friday, partially on Monday,
20 partially Tuesday.

21 Q. Okay. So on Friday what did you do?

22 A. In terms of just paychecks, or in
23 general?

24 Q. With respect -- yeah, that's a good
25 question.

1 A. I did a lot of stuff. I'm sorry.

2 Q. Let me start again. On Friday, what did
3 you do with respect to looking into the paychecks
4 of other employees?

5 A. So you can log onto the website.
6 Basically you can pull up a kind of spreadsheet
7 looking side of Paychex. You can go
8 alphabetically. I had clicked around on some of
9 the names of current employees, made some notes,
10 you know, took notes on my side. I had a notepad.
11 And any irregularities or names that I saw that I
12 might find problematic, and then that was
13 basically, you know, did they have sick leave, was
14 it taken out, was it relatively the same, that kind
15 of thing.

16 Q. When you say you were looking for
17 irregularities, specifically what do you mean by
18 that?

19 A. So if they're exempt and they're
20 salaried, every Friday it should be the exact same
21 amount. I think, you know, if you look at the bank
22 records I submitted for instance, it would show,
23 you know, about the 2100 each week. So if it was
24 dipping below that, it could be a possible issue.
25 It might be valid, you know, it might be, but that

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1 was certainly enough for me to look into because it
2 was being done.

3 Q. What about if they took a full day of
4 sick -- what if they didn't work one day of the
5 week and took sick leave?

6 A. I didn't have enough -- I was still
7 looking into it when I was doing that. That was
8 something I was going to look into with Larry,
9 because Larry had the back end information of sick
10 leave.

11 Q. Okay. So as you're looking at the
12 screen, if an exempt employee took an entire day
13 off, would their paycheck have looked different at
14 the end of the week?

15 A. Sometimes.

16 Q. And so if someone's paycheck did look
17 different at the time that you were looking on
18 Friday, February 26, 2016, am I correct that you
19 could not tell why the employee had been out that
20 week?

21 A. You would see it on the stub, but it
22 wouldn't necessarily indicate -- one of the issues
23 we were alerted to was sometimes if an employee
24 would call in sick and had PTO for instance, PTO
25 wouldn't automatically go over to supplement that.

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1 A. Yeah, sometimes. Yeah.

2 Q. And you interviewed with David for the
3 position at David Saxe Productions; right?

4 A. Yes.

5 Q. Prior to that time, other than the period
6 of time that you worked at the Arizona Students'
7 Association, you had never worked as a general
8 counsel; correct?

9 A. Just Arizona Students' Association, yes.

10 Q. Yes. Prior to the time that you started
11 working as the general counsel for David Saxe
12 Productions, did you do any outside reading for
13 entertainment on the Fair Labor Standards Act?

14 A. Yeah, at that point, knowing that that
15 was going to be my primary focus was contracts and
16 fair labor, you know, I reviewed all my
17 intellectual property notes, found my fair labor
18 notes, so I was pretty well prepped in terms of day
19 one for what I'd be facing.

20 Q. Okay. So -- go ahead. I didn't mean to
21 cut you off.

22 A. I was done.

23 Q. So after you got the job at David Saxe
24 Productions, you thought you wanted to read up on
25 some employment issues?

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1 A. Okay.

2 Q. Do you know what the administrative
3 exemption is?

4 A. I do, but I'd have to refresh my
5 recollection on it.

6 Q. You can't remember today?

7 A. Not today, no.

8 Q. Can you at some point?

9 A. I haven't practiced. It's been almost
10 about a year and a half since I practiced any type
11 of employment law, so ...

12 Q. But back then, a year and a half ago, you
13 were aware of the executive exemption?

14 A. I would have, but I can't recall today,
15 no.

16 Q. Were you aware of the exemption for truck
17 drivers?

18 A. No. We didn't have any truck drivers.

19 Q. Were you aware of the exemption for
20 dancers?

21 A. We're talking performers or are we
22 talking specific dancers? Because we label them
23 differently.

24 Q. Dancers.

25 A. No. If we're talking tips, we're talking

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1 A. Are we talking verbal warning or are we
2 talking an abrasive 2:00 a.m. e-mail?

3 Q. I'm not asking --

4 A. But no, the answer is no. In terms of an
5 actual discipline, no.

6 Q. That wasn't my question.

7 A. Okay.

8 Q. My question is, David told you at various
9 points in time during your employment that he
10 wasn't happy with your performance?

11 A. Yeah. But it depends at which points.

12 Q. Right. But he told -- so you were aware
13 that he had issues with your performance?

14 A. When?

15 Q. At various points throughout your
16 employment you were aware that he had issues with
17 your performance?

18 A. The answer would be yes, but it depends
19 when.

20 Q. And at the time that your employment was
21 terminated from David Saxe Productions, you weren't
22 getting along with David, were you?

23 A. I didn't see an issue. We were fine.

24 Q. You didn't see any problems with getting
25 along with David at that point in time?

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1 A. The day before I was let go he asked me
2 how my fundraising was. We were fine.

3 Q. So you didn't feel like you needed to
4 cloak yourself in protected activity?

5 A. No.

6 Q. So you weren't looking for issues for
7 violations of the law at David Saxe Productions?

8 A. No. I was trying to protect him if there
9 were issues.

10 Q. And you weren't looking for issues with
11 respect to legal compliance when you were at Safety
12 First?

13 A. I never had -- you're switching topics.
14 Safety First, my job is compliance. If I find an
15 issue, I have to fix it. I don't look for issues
16 but if they arise, that's my job as general
17 counsel, to look for the company's best interest.

18 Q. Did you ever talk to the owner at Safety
19 First about concerns you had with the way he was
20 running his business?

21 A. Several times.

22 Q. When was the first time you did that?

23 A. We could have had a weekly meeting
24 about it. It was a lot.

25 Q. You had concerns with insurance fraud?

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1 He and I walked into our office, words were said.
2 I specifically remember telling him that nobody is
3 as afraid of him as he thinks everybody is. I
4 remember that specifically. I don't know what else
5 was said. I'm sure I called him a prick. I'm sure
6 I told --

7 Q. Well, you guys kind of -- I mean that's
8 kind of how you guys talked to each other even when
9 you weren't upset with each other; right?

10 A. No.

11 Q. You didn't?

12 A. No.

13 Q. You didn't even swear when you were at
14 work?

15 A. We swore, but not at each other. In
16 terms of an aggressive behavior, I mean you can
17 swear and not have arguments.

18 Q. But you were -- you were insubordinate at
19 times the way you spoke to him, weren't you?

20 A. I think that was our relationship.

21 Q. You guys joked around about things like
22 Family Guy or --

23 A. Yep, talked about Family Guy quite often.

24 Q. There is some things in Family Guy that
25 people would think are offensive; right?

1 A. I'm sure there are.

2 Q. Maybe the workplace isn't the best place
3 to talk about those things?

4 MR. GRONICH: Objection; argumentative,
5 that's not a question.

6 THE WITNESS: I'm not answering. It
7 wasn't a question.

8 BY MS. MILTON:

9 Q. Do you agree with me that the workplace
10 probably isn't the best place to talk about those
11 things sometimes?

12 A. If it's --

13 MR. GRONICH: Objection, context.

14 THE WITNESS: If it was between he and I
15 and there was nobody else around, then I think
16 that's acceptable.

17 BY MS. MILTON:

18 Q. And that happened at times?

19 A. At times, yeah.

20 Q. Okay. So I want to -- we started talking
21 again about the day of your termination. I want to
22 go back to that. So we looked at an e-mail
23 before -- we looked at an e-mail before lunch that
24 David sent you about your campaign at 10:15 a.m.
25 Do you remember that e-mail?

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1 A. Let me just pull it up real quick. We're
2 talking Exhibit 5?

3 Q. Very likely. Okay. Looking at
4 Exhibit 5, the last sentence that says, "Not sure
5 why you aren't in office now, but when if you come
6 back we need to discuss." Do you see that?

7 A. Yes.

8 Q. Where were you at that point in time?

9 A. I was at a meeting with, her name is Mary
10 Kaye Cashman.

11 Q. Who is that?

12 A. She owns -- I believe it's just the
13 machinery, like farming machinery. Like CAT is one
14 of her like suppliers.

15 Q. So was that related to your state senate
16 campaign?

17 A. Yes.

18 Q. And where did you meet her?

19 A. We met on a Starbucks in Henderson.

20 Q. What time did you meet with her?

21 A. Our meeting was scheduled for
22 10:00 o'clock.

23 Q. How long did you meet with her?

24 A. Thirty minutes.

25 Q. Why were you meeting with her, for an

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1 endorsement for your campaign or?

2 A. I was instructed to -- so basically how
3 it works is when you're endorsed, they give you a
4 list of lobbyists. You set up coffee meetings with
5 them, you hear them, they hear about your campaign.
6 If they like you, sometimes they will donate to
7 your campaign.

8 Q. As soon as it's announced that you were
9 endorsed, I believe that was February 2016; is that
10 right?

11 A. I believe so, yes.

12 Q. It's at that point that you then start
13 meeting with lobbyists?

14 A. Not necessarily, no. It can be done
15 beforehand just in preparation to get momentum or
16 however it works, but I mean there's a select few
17 that do know, but in terms of publicly being
18 announced who will be filing in March, that kind of
19 thing.

20 Q. When do you -- to the best of your
21 recollection, when was the first time you met with
22 a lobbyist to talk about this state senate
23 campaign?

24 A. I honestly don't know the first time.

25 Q. Prior to being endorsed by the caucus

1 Q. Did you have any other meetings during
2 February 2016 with any lobbyists that aren't
3 recorded on here?

4 A. No. Only after hours.

5 Q. And so just so I understand your
6 testimony here today under oath, your testimony is
7 that while you worked for David Saxe you never
8 worked on your campaign during working hours while
9 at David Saxe Productions?

10 A. That's incorrect. That mischaracterizes
11 what I said.

12 Q. Okay. Then what is your testimony?

13 A. My testimony was he and I had several
14 conversations about what I would need if I was to
15 run for office, which I did.

16 Q. My question was, is your testimony today
17 under oath that you did not work on anything
18 related to your senate, state senate campaign while
19 you were employed by David Saxe during working
20 hours?

21 A. I did work on stuff.

22 Q. What did you work on?

23 A. Well, if you'll notice on the calendar, a
24 lot of it was around our break period, so
25 10:00 o'clock, 12:00 o'clock or 3:00 o'clock.

1 Q. Things done with your campaign?

2 A. Whether it's e-mails or just responding
3 to a text.

4 Q. And other employees during that time
5 would ask you about your campaign?

6 A. Very few, because nobody really knew
7 about it that much.

8 Q. Who knew about your campaign?

9 A. Andrew August knew about it. David Saxe
10 knew about it. If anybody knew about it, it wasn't
11 necessarily because I told them. It could have
12 just gotten around. It wasn't --

13 Q. As you sit here today, do you know of
14 anyone else who knew of your campaign that worked
15 at David Saxe in January through March of 2016?

16 MR. GRONICH: Objection, asked and
17 answered previously.

18 THE WITNESS: I would say Larry Tokarski
19 probably knew, but I don't remember specifically
20 telling him. I mean we would have managers
21 meetings, it would come up, it wasn't uncommon.

22 BY MS. MILTON:

23 Q. How would it come up in managers
24 meetings?

25 A. David would bring it up somehow. It was

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1 just -- you know, it was an exciting thing for the
2 office. It wasn't like, oh, you know, Alex is
3 running for office. It was exciting. It was kind
4 of cool. Everybody was excited about it. Like
5 anybody that knew wasn't like, oh, my God, he's
6 always doing something wrong. It was fun and
7 exciting.

8 Q. Alex, I'm a little confused about how
9 everyone could be excited about it when you just
10 told me that the only people who knew about it were
11 Andrew and David?

12 A. People I told, that's what I meant.
13 People I had specifically told.

14 Q. So if everyone was excited about it, you
15 were having conversations with people about your
16 campaign?

17 A. Periodically, but not -- that wasn't all
18 we were doing by any means. It was, you know,
19 we're allowed down time on breaks and lunch and
20 that's when it would come up.

21 Q. So your testimony today is you never --
22 other than Andrew and David, you did not speak to
23 anyone else at David Saxe Productions other than on
24 breaks about your campaign?

25 A. I think that's a fair characterization.

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1 Q. Five other people?

2 A. I'm sorry?

3 Q. Five other people?

4 A. Three or four at the most that I recall.

5 Q. The e-mail that you sent to Richard
6 Nongard, who is that?

7 A. Just a good friend. He's always got some
8 job opportunities that I was kind of in hope of him
9 having something.

10 Q. Where is -- what does he do?

11 A. Small business owner. He's got all kinds
12 of counseling classes. He was a hypnotist at one
13 point, running a better business kind of stuff.

14 Q. Did you tell him why you were looking for
15 a job?

16 A. Uh-huh. Yes.

17 Q. What did you tell him?

18 A. I told him I was terminated for looking
19 into wage theft. I told him that I was given the
20 reason of political campaigning, which could have
21 been the reason, but I believe it was something
22 else. And then I asked if he had -- what he had
23 going on, but he had no openings. But that was the
24 crux of our conversation.

25 Q. When you said that you were terminated

1 for wage theft, what did you mean by that?

2 A. Basically exactly how I've kind of said
3 it throughout, just found out about an issue, he
4 wasn't going to pay me, I started looking into it,
5 before I could find anything substantive in terms
6 of approaching him with it, I was let go for
7 political reasons that I believed were not the
8 actual reason, but that's the reason I was given.

9 Q. During your employment at David Saxe
10 Productions, did you personally talk to David about
11 any other concerns you had with wage violation?

12 A. Yes.

13 Q. What was that?

14 A. In the July of 2015, there was -- or
15 there were wrongful withdrawals of health
16 insurance -- actually, so I'm sorry. Health
17 insurance had not been withdrawn on about, I think,
18 11 or so wardrobe employees. They had discovered
19 that their health insurance had not been withheld,
20 and then all the sudden they started withholding
21 it.

22 So I had gotten calls. Stephanie had
23 forwarded me those calls from the wardrobe people
24 asking why their paychecks were less. And I looked
25 into it and it looked like they had not had their

1 Q. Do you think that if you report an
2 employer to the labor commissioner that the labor
3 commissioner comes in the next week to audit the
4 employer?

5 A. If it's egregious enough, I would imagine
6 they have a process for that.

7 Q. That's not the process, but --

8 A. Okay. It goes in the file. I get it.
9 They're a government agency.

10 Q. You just don't know?

11 A. Not specifically. I've never worked
12 there. I don't know the internal workings.

13 Q. Have you ever contacted the labor
14 commissioner?

15 A. Yes.

16 Q. When was that?

17 A. The day after I was terminated I sent
18 them two letters.

19 Q. What did you tell them in one of the
20 letters?

21 A. The wage theft issue that I became aware
22 of that I was not able to fully investigate even
23 though I had been working on it, the conversation
24 Larry and I had, the subsequent investigations,
25 what I believe was a systematic wage procedure in

1 Q. Because you didn't look into it any
2 further after you talked to Larry about it?

3 A. There were so many wage theft I was
4 looking into.

5 Q. What else that you haven't told me about?

6 A. The primary one is why we're sitting
7 here.

8 Q. What's the primary one?

9 A. The crux of the lawsuit.

10 Q. Which is what?

11 A. Wage theft.

12 Q. You said "the primary one." Of what wage
13 theft, that's what I'm asking you.

14 A. Mine.

15 Q. Yours. So you mean the day that you left
16 early and got paid for --

17 A. Yes.

18 Q. -- is that correct?

19 A. Uh-huh.

20 Q. Is that a yes?

21 A. Yes.

22 Q. And so your testimony is that you don't
23 know if you ever talked to David about the lunch
24 break issue?

25 A. No. It's dating back almost three years

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1 Q. Did you ever, you yourself talk to any of
2 the warehouse workers or stagehands?

3 A. Not directly, but it was more I spoke to
4 Veronica about it in the same context.

5 Q. And you told me before that after the one
6 instance with Andrew August, you're not aware of
7 him working basically for multiple companies?

8 A. No, not aware.

9 Q. Did you complete this document after you
10 were terminated?

11 A. Yes.

12 Q. When did you do that?

13 A. I believe I dropped it off that Thursday.
14 Thursday or Friday --

15 Q. You actually --

16 A. -- I went down there.

17 Q. I'm sorry. I interrupted you.

18 A. I went down there, yes. I dropped it
19 off.

20 Q. So you dropped it off the Friday after
21 your employment was terminated?

22 A. If it was Wednesday was the last day,
23 honestly it was probably Thursday or Friday. It
24 was that week.

25 Q. Did you sign and date the copy that you

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1 Q. Did you talk to anyone about it after you
2 filed it?

3 A. I don't recall if I had. I don't think I
4 would have, so I think the answer is no.

5 Q. Why?

6 A. I just -- I don't know who I would have
7 told. I'm just trying to think if there was
8 anybody I spoke to about it, but it wasn't in
9 relation to this at all.

10 (Exhibit 13 was marked for
11 identification.)

12 BY MS. MILTON:

13 Q. Please take a look at Defendant's
14 Exhibit 13. It's Marks 0016 through Marks 0017.
15 It says at the top, "Office of the Labor
16 Commissioner Employment Complaint." Is this the
17 other complaint that you submitted to the labor
18 commissioner?

19 A. Yes.

20 Q. Did you submit this complaint at the same
21 time that you submitted the complaint about joint
22 employment and the other issues we discussed?

23 A. Yes.

24 Q. Did anyone assist you in completing this
25 document?

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1 A. No.

2 Q. I didn't ask you that about the other
3 document. Did anyone assist you in completing that
4 document?

5 A. No.

6 Q. When did you start writing this document?

7 A. Around the same time.

8 Q. Sometime --

9 A. Well, it would have been after Thursday,
10 when I was instructed -- or when I was told that I
11 wouldn't be paid, because that was what kind of led
12 me to this whole thing. So this document was
13 likely prepped over that weekend.

14 Q. I want to go through this a little bit.
15 You said in the second line for exempt employees,
16 they are not receiving their full salary amount
17 each and every week. Do you see that?

18 A. Yes.

19 Q. And you said, "Mr. Saxe is systematically
20 ensuring that partial workdays are not
21 compensated."

22 Do you see that?

23 A. Yes.

24 Q. You told me before that when you
25 conducted your investigation into the paychecks of

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1 plaintiff realized Saxe was not correcting the
2 issue, he'd have to report the violations to OSHA."

3 Page 5, paragraph 37.

4 MR. GRONICH: I'm sorry, what? I'm
5 sorry. I'm not following.

6 BY MS. MILTON:

7 Q. Yeah, which -- which paragraph are you
8 referring to?

9 A. I was just referencing paragraph 37, just
10 in terms of one of the factual allegations.

11 Q. Thank you. So in paragraph 37 of your
12 complaint it says, "In late February 2016 plaintiff
13 realized that Saxe was not correcting the issue and
14 he told Saxe that he would have to report the
15 violations to OSHA."

16 Do you see that?

17 A. Yes.

18 Q. So and you said that what you were
19 referencing in your complaint are the alleged
20 welding violations?

21 A. Yes. So in, I want to say it was
22 probably around November or so --

23 Q. Of 2015?

24 A. -- of 2015, yes, I was giving a tour to
25 the -- it's the Henderson Therapeutic Recreational

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1 Center, they had reached out to me, because a lot
2 of the students and kids in that organization, they
3 have various disabilities, like global tics and
4 just Tourette's, that kind of thing. They cannot
5 actually sit in a theater.

6 So they said, you know, we would love to
7 just like come around so that they can see what a
8 production looks like. So I said absolutely, let
9 me know what time and what day. So we did and, you
10 know, I tried to make it the best experience for
11 them. I walked them by Popovich, which was a pet
12 show we had at that point, and they got to, you
13 know, pet the cat, which they all loved.

14 But then we walked into the V2 Theater
15 when I was giving them the tour there. I smelled
16 burning metal, and I thought that smelled odd. So
17 I walked into -- it was -- I think we called it V4.
18 It was -- it used to be a part of V2 Theater, but
19 then they built a wall. And there was, I believe
20 his name was Manny. He was the warehouse manager.
21 And he was welding the stripper poles for the adult
22 bachelorette party, you know, exotic dancing class
23 that we had there.

24 So he was welding inside of the theater.
25 So while the kids were kind of just looking up at

1 were aware of that we were lacking.

2 Q. When did you do that research?

3 A. It would have been November, and then for
4 the next couple months we looked into who can best
5 certify these people. It was a process --

6 Q. So I want to try to figure out how that
7 came about. Did David tell you that you needed to
8 look into whether or not the welders needed
9 certification?

10 A. No. I did when I realized they didn't
11 have them, because I asked to see them and I was
12 not provided with them.

13 Q. Right. But my question was, how did you
14 know that welders needed certifications?

15 A. I looked it up on the Clark County
16 building site.

17 Q. Why?

18 A. Because we were doing welding in a
19 theater we didn't have a permit for, and I was
20 looking to see if we could get one for the permit,
21 and per our lease I believe it says that there is
22 to be no welding taking place on the premises.

23 Q. So it started because -- I'm confused.
24 The research, you started down the path because
25 there was welding going on in the building?

1 Q. So during that period of time,
2 approximately how many welders would there have
3 been?

4 A. It honestly depends. Some people may
5 have been told to weld and they welded.

6 Q. Okay. But I'm trying to figure out how
7 many files you looked at.

8 A. In terms of people who were in the
9 warehouse that could have, I would say there's
10 anywhere from five to ten people who could have
11 been doing it.

12 Q. So you looked at five to ten files?

13 A. I would say that's probably a safe bet,
14 yes. I know it's speculative.

15 Q. No, no. I know it's getting long. Just
16 we can't talk over each other, that's the only
17 thing.

18 Okay. So you look at five to ten files.
19 Do you remember looking at Manny's file?

20 A. Yes.

21 Q. And you remember not seeing a
22 certification in Manny's file?

23 A. Right, no certification in his file.

24 Q. So then when you're walking through
25 with -- I'm sorry, who were you walking through

1 with? You said --

2 A. The Henderson Therapeutic Recreational
3 Center.

4 Q. That's when you see Manny welding?

5 A. Yes.

6 Q. And so as you're doing that, you say to
7 yourself, oh, wait, he doesn't have a welding
8 certification?

9 A. I didn't know if he did or not.

10 Q. You didn't know --

11 A. At that point I did not know if he did.

12 Q. Okay.

13 A. Which is, when I saw him welding at the
14 theater, what led me to think that he might not was
15 the fact that one, he was welding at the theater,
16 and the conditions of which would have set off a
17 fire alarm.

18 I mean, it was a little hole in the wall
19 where he's welding, which for ventilation purposes
20 was what kept setting the alarm off. So that led
21 me to believe that he might not be certified. So
22 that was what led to the Veronica conversation, the
23 David conversation. And then we spent a month or
24 two looking into certifications for everybody,
25 because nobody was certified.

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1 A. I didn't look too much -- I don't think I
2 looked into former because it wouldn't have made
3 any sense to at that point.

4 Q. Well, I was going by what you told me
5 earlier in your testimony.

6 A. All right. Well, we'll clarify. I
7 didn't look at former employers. I looked at
8 current employees to see if they were able to weld
9 on our premises.

10 Q. At the time that you were looking for
11 those certifications, did you have any idea what
12 was involved in obtaining a welder certification?

13 A. At that point, no.

14 Q. When did you learn what was involved in
15 that process?

16 A. It was probably a couple of weeks later I
17 think we all sat down and figured out who we could
18 ask, who we could have come visit. I don't think
19 any of us really knew what the actual certification
20 process was, which is why we were all working on it
21 together.

22 Q. And you were trying to figure out how to
23 resolve the issue; is that right?

24 A. Right. Yes.

25 Q. And then at some point you figure out

1 that some of those welders had certifications at
2 prior companies they worked at; is that right?

3 A. I believe so, yes.

4 Q. How did you find that out?

5 A. I think some of them had supplied them.
6 I think Veronica had requested them.

7 Q. Do you have any understanding as to how
8 long those certifications last?

9 A. I don't recall.

10 Q. Do you have any idea if those employees
11 have to get -- if those individuals have to get
12 recertified every time they change employers?

13 A. I believe that was our understanding that
14 they did.

15 Q. And so you, Veronica and David were
16 working on getting those individuals who were
17 welding for David Saxe Productions recertified?

18 A. Yes. And we were basically making a list
19 of employees we thought that it was more cost
20 effective to have certified so that we could keep
21 costs down.

22 Q. So if you're going to do it, do it all at
23 once, get more people certified than necessarily
24 were doing it?

25 A. That was the goal, yes. That was the

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1 Veronica was usually dealing with all that side of
2 things.

3 Q. What were those --

4 A. And they might have been to David too.

5 Q. What were those complaints?

6 A. I can't say. I never got any directly
7 from them that I recall.

8 Q. So other than -- your testimony was that
9 you talked about the permit issue when you talked
10 about everything else related to the welding with
11 David and Veronica; right?

12 A. Yes.

13 Q. Did you talk to anyone else -- did you
14 talk to anyone outside of David Saxe Productions
15 about the permit?

16 A. No.

17 Q. Did you talk to anyone at David Saxe
18 other than David and Veronica about the permit?

19 A. No, I don't think so.

20 Q. Do you have any idea -- with respect to
21 the recertification of the welders, isn't it true
22 that it's the owner, in other words David Saxe who
23 is supposed to certify that they are able to weld
24 on property?

25 A. I don't know.

1 A. We built sets. Sometimes it would take
2 four to five --

3 Q. What's that?

4 A. We built sets. Sometimes it would take
5 more than one, so it depends on the project.

6 Q. Did you go out -- as you knew this was an
7 issue as of November of 2015, after you discovered
8 that some of the welders didn't have
9 certifications, did you see them welding after
10 that?

11 A. We had gotten calls about the alarm going
12 off. I had checked the warehouse personally to see
13 if it was there, the machine. It was not, which
14 meant it was either in someone's truck or it was at
15 the theater.

16 Q. Did you see anyone -- after January 2016,
17 did you see anyone welding, did you personally see
18 anyone welding at David Saxe Productions who didn't
19 have a certification?

20 A. Not personally, no, I didn't see anybody
21 doing it. But the welding machine wasn't at David
22 Saxe.

23 Q. Excuse me?

24 A. But the welding machine wasn't at the
25 warehouse I worked at.

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1 Q. Where was it at?

2 A. I believe it was at the theater, because
3 it wasn't there.

4 Q. After January of 2016, did you see anyone
5 at the theater welding that didn't have a
6 certification?

7 A. No.

8 MS. MILTON: I'm going to have this
9 marked.

10 (Exhibit 15 was marked for
11 identification.)

12 BY MS. MILTON:

13 Q. Showing you what's been marked
14 Defendant's Exhibit 15, it's an e-mail produced by
15 us. It's Saxe 0137. It's an e-mail, it looks like
16 from you to info@certified-welding.com; is that
17 correct?

18 A. Yes.

19 Q. And in this e-mail you say, "A colleague
20 of mine spoke to Thomas Helm a few months back
21 about recertifying those same employees."

22 Do you see that?

23 A. Yes.

24 Q. Who is that colleague you're referring
25 to? Is that Veronica?

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1 with Mr. Helm, I think that's satisfactory.

2 Q. So you knew that in late February of
3 2016; right?

4 A. If I'm told by my employer that no
5 welding has taken place and I can't believe my
6 employer, I think that's a problem.

7 Q. Alex, I'm asking exactly when did it
8 change, because it sounds to me like --

9 A. Nothing changed.

10 Q. Let me finish. It sounds to me like in
11 February of 2016 you thought the issue was moving
12 forward?

13 A. Yes.

14 Q. After you're terminated you no longer
15 think the issue is moving forward?

16 A. This was the same time frame, the same
17 last week or so. We were still dealing with the
18 certification the last week.

19 Q. Right. And you just testified that you
20 didn't report it prior to your termination because
21 you thought that things were moving forward; right?

22 A. I thought they were, but obviously
23 letting me go for issues of labor and OSHA were
24 enough to say that they weren't going to be taking
25 this seriously, so a complaint should be filed.

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1 Q. But you never actually filed a complaint
2 with OSHA until after you were terminated --

3 A. I filed that evening.

4 Q. Let me finish. You never actually filed
5 a complaint with OSHA until after your employment
6 was terminated; correct?

7 A. That's correct.

8 (Exhibit 16 was marked for
9 identification.)

10 BY MS. MILTON:

11 Q. I'm showing you what's been marked as
12 Defendant's Exhibit 16. Sorry. This document is
13 marked Marks 00027 through 00029. You've seen this
14 document before?

15 A. Yes, I have.

16 Q. This is a document that you produced to
17 the defendants in this case; right?

18 A. Yes.

19 Q. If you turn to the very last page in this
20 document, at the top it says U.S. Department of
21 Labor, Occupational Safety & Health Administration,
22 Notice of Alleged Safety or Health Hazards.

23 Do you see that?

24 A. Yes.

25 Q. Do you see at the bottom where there is a

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1 Q. There's an e-mail at the very first page.
2 It looks like it's an e-mail from you to you; is
3 that right?

4 A. Yep.

5 Q. Was this e-mail -- the text of this
6 e-mail, was this forwarded on with a copy of your
7 complaint?

8 A. This is just internal for myself just so
9 I had it.

10 Q. You were just sort of drafting it before
11 you put it into the complaint itself?

12 A. Yeah.

13 Q. Did you ever hear back from OSHA about
14 this complaint?

15 A. No, I never heard back directly.

16 Q. Take a look at the first page --
17 actually, take a look at the last page, please. Do
18 you see the text in the largest box?

19 A. Yeah.

20 Q. Do you see the second full paragraph that
21 starts with the V Theater?

22 A. Yes.

23 Q. And it says, "The V Theater located at
24 the Miracle Mile Shops at the Planet Hollywood
25 Resort & Casino does not have a hot works permit."

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1 Do you see that?

2 A. Yes.

3 Q. You told me before that you never
4 actually talked to anyone about whether they had a
5 permit; isn't that right?

6 A. No.

7 Q. Who did you talk to?

8 A. I didn't talk to anybody. You can look
9 it up.

10 Q. So that was based on looking up on the
11 Nevada county website; is that right?

12 A. I believe that's what I did, yes.

13 Q. What did you look for?

14 A. I don't recall. It was where you look to
15 see if they have a certification. It was also
16 known internally that the theater didn't have one.

17 Q. So did you -- did you look to see if
18 David Saxe Productions -- or I'm sorry. Did you
19 look to see if the V Theater had a permit?

20 A. I believe so, yeah.

21 Q. Did you look to see if the Miracle Mile
22 Shops had a permit for the V Theater?

23 A. I'm not sure if it mattered. If I
24 recall, the lease agreement required us not to be
25 doing anything like that in the theater, so even if

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1 Wednesday, that's kind of what you're doing. You
2 have to make sure that you're keeping on these
3 people too.

4 I get it, it's a business, people are
5 doing other things, and you have to make sure that
6 you're keeping them compliant. That was my job.
7 If they didn't listen, then that's when the OSHA
8 recommendations would be discussed.

9 Q. Did you ever ask David if he got any
10 findings from the OSHA investigator's on-site
11 visit?

12 A. I didn't. I assumed if he had he would
13 have shared them with me, because it would have
14 stayed probably in my office.

15 Q. When was the last time you talked to
16 David about any OSHA related concerns you had?

17 A. It had to have been my last week there,
18 so February, what did we decide on, that was the
19 29th, 30th, or like 29th, 30th and the 2nd.

20 Q. What did you tell him?

21 A. I think it was just again a follow-up,
22 when are we getting certified, when is this stuff
23 getting done.

24 Q. What did he say?

25 A. What he usually did was it's getting

1 fixed and it will be done, not a sense of urgency.

2 Q. You never told him that you were going to
3 complain to OSHA if he didn't get it fixed, did
4 you?

5 A. Probably not explicitly. It was
6 definitely this is an OSHA violation if we don't
7 get it fixed and it's a liability to your company,
8 and wrongful death suits are bad, so let's get it
9 fixed.

10 Q. But you never -- am I correct that you
11 never said to David, David if these OSHA related
12 issues don't get fixed I am going to complain to
13 OSHA?

14 A. I don't think I said it just like that,
15 but it was definitely implied that was where I was
16 going.

17 Q. How is it implied? Tell me what you said
18 exactly to him.

19 A. I don't remember exactly what I said.

20 Q. But you were just concerned that some of
21 these issues were potentially violating OSHA;
22 right?

23 A. Yes.

24 Q. And you never told David that if these
25 issues weren't fixed you were going to report David

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1 A. Uh-huh. Yes.

2 Q. Do you see that?

3 A. Yes.

4 Q. So this statement in your complaint is
5 not correct?

6 A. It's correct. That was the conversation
7 that was instructing him that OSHA is the next
8 step.

9 Q. But your testimony was just that you
10 never told David that you were going to report him
11 to OSHA.

12 A. I think that's mischaracterized the way I
13 said it then.

14 Q. So which is it, Alex; that you told David
15 that you were going to report the violations to
16 OSHA, or that you never told him that?

17 A. It wasn't explicit I'm going to OSHA. It
18 was these are reportable violations.

19 Q. And you never told him that you were
20 threatening to go to OSHA?

21 A. If he felt it was threatening, that's
22 fine, but I wouldn't use the word threatening.

23 Q. So your paragraph in this complaint that
24 you verified is correct says you told -- it says
25 "he" referencing you, "Told Saxe that he would have

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1 to report the violations to OSHA." You never
2 actually told David that, did you?

3 A. I did.

4 Q. So tell me what is correct, your
5 testimony under oath here today where you said you
6 never told David that, or your complaint?

7 A. I think it's explicitly said, and you're
8 saying that it was explicit, in our conversations,
9 which were several, these are reportable issues,
10 this is an issue for us, and that's what that
11 means.

12 Q. You were telling him as -- you were
13 advising him as the general counsel that you
14 thought these were violations of OSHA?

15 A. Right. And the point was if we don't
16 correct this, then this is something that has to
17 get reported out so that it gets corrected. That's
18 the whole point.

19 Q. You never actually said that to him
20 though?

21 A. You're putting words in my mouth. That's
22 not what I said.

23 Q. I'm asking you a question.

24 A. When I said -- I did not specifically say
25 I will report you to OSHA. I said, These need to

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1 get fixed or they will be reported to OSHA so that
2 they do get fixed. That's not I'm reporting you to
3 OSHA. That's different.

4 Q. In paragraph 35 of your complaint --

5 A. Yes.

6 Q. -- it says, "This was not only in direct
7 violation of defendant's lease with the theater's
8 landlord, but plaintiff believes that it was in
9 violation of federal and state safety standards";
10 correct?

11 A. Yep.

12 Q. And paragraph 34 is talking about
13 permits; right?

14 A. Yes.

15 Q. So what -- with respect to permits, what
16 was the violation of federal law?

17 A. OSHA. We didn't have them and it was
18 unsafe to be doing it.

19 Q. Where specifically in OSHA does it talk
20 about having the right permits?

21 MR. GRONICH: Objection, calls for a
22 legal standard or a legal conclusion.

23 THE WITNESS: I don't know offhand.

24 BY MS. MILTON:

25 Q. Did you know at the time that you were

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1 original comment."

2 A. So his original -- the Friday of him
3 telling me not to pay me, that was the original
4 comment he had made. So I kind of told him that
5 that was the catalyst of everything, and then what
6 had happened that day with the random e-mail I got.
7 The e-mail is exhibit -- I'm sorry. I'll get the
8 right exhibit for you. Exhibit 5.

9 Q. What did you tell him about that e-mail?

10 A. I read it to him. I said -- I explained
11 why I thought that it didn't really make sense in
12 terms of the context of what had happened. He was
13 pretty agreeable. A lot of it was just me venting
14 and him saying absolutely, I'm really happy that
15 you're gone and can move on, and he wished that he
16 could have done the same. And then shortly
17 thereafter I believe he left the company.

18 Q. Did you talk about anything else during
19 that conversation related to the underlying
20 allegations in your complaint?

21 A. Not that I recall.

22 Q. When was the next time that you spoke to
23 Larry?

24 A. It would have been an e-mail about a job
25 application I was trying to apply for him online

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1 Q. And that e-mail was sent to you before
2 David terminated your employment in person in his
3 office; correct?

4 A. Correct.

5 Q. Did you talk to any of these people
6 listed in response to Interrogatory No. 1 about the
7 advice you had given to David about potential FLSA
8 violations?

9 A. No.

10 Q. Isn't that one of the issues raised in
11 your complaint?

12 A. In the complaint, but I didn't discuss
13 FLSA with anybody specifically right after that. I
14 hadn't filed the lawsuit. I didn't know what my
15 claims were going to be if I filed anything.

16 Q. Well, but you told them you thought that
17 you had been terminated for reporting -- talking
18 about wage theft; right?

19 A. Right, but not specifically FLSA.

20 Q. Okay. So you talked to them about
21 conversations that you had with David that you
22 thought constituted -- the practices constituted
23 wage theft?

24 A. Generally, yes.

25 Q. And in your role as general counsel at

1 David Saxe Productions, you were supposed to talk
2 to him as an attorney about issues that you thought
3 were in violation of wage and hour loss; correct?

4 A. Yes.

5 Q. And then you disclosed some of those
6 conversations to some of these individuals listed
7 in response to Interrogatory No. 1?

8 A. I don't want to say I did just because I
9 don't think -- at that point I was certainly
10 careful. I understand obligations of
11 confidentiality. But anything I did disclose, I
12 did not believe it was confidential. I can still
13 tell a story without going into details.

14 Q. How many other conversations did you have
15 with Senator Ford about your employment at David
16 Saxe Productions?

17 A. Probably just one or two throughout the
18 campaign.

19 Q. Was that -- were those conversations in
20 the summer of 2016?

21 A. Summer and fall. He knew I was still
22 looking for work, so that's the context it would
23 come up in.

24 Q. How long was that second conversation
25 that you had with him?

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1 hours depending on if the sun was still up, and
2 depending on how many doors were actually had
3 somebody home so that I could talk to you. I would
4 say six hours maybe, and that's average. I mean I
5 would say three to five is probably right in terms
6 of canvassing if there's no meetings.

7 Q. I assume it got busier as it got closer
8 to the election?

9 A. Yeah, that's a safe assumption, at least
10 in terms of door knocking.

11 Q. Did you have more meetings?

12 A. Most of the meetings will probably end
13 mid -- I would say October is kind of slow for
14 meetings and fundraisers. Walking into the general
15 election everybody's knocking doors to try to get
16 votes and fundraising is not as important, so ...

17 (Exhibit 19 was marked for
18 identification.)

19 BY MS. MILTON:

20 Q. Showing you what's been marked as
21 Defendant's Exhibit 19, this is a document
22 Bates-stamped Marks 00019. It's an e-mail from you
23 to Nann, N-A-N-N?

24 A. Yep.

25 Q. Is that correct?

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1 A. Yep.

2 Q. And it was sent on March 2, 2016;
3 correct?

4 A. Yes.

5 Q. Who is Nann?

6 A. Nann worked in, I believe she was
7 purchasing. I believe that was her title. She
8 worked in -- she worked under Larry.

9 Q. And so in this e-mail to Nann you said,
10 "David and I had a slight disagreement over not
11 illegally deducting exempt workers' wages today, so
12 I was let go."

13 Do you see that?

14 A. Yes.

15 Q. So you did talk to at least Nann about
16 discussions that you had with David?

17 A. Yes.

18 Q. Discussions where you were giving David
19 arguably legal advice; correct?

20 A. I don't know if I'd say that's legal
21 advice.

22 Q. Well, telling David that deducting exempt
23 workers' wages, you're telling me that's not legal
24 advice?

25 A. I think it was more of a legal

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1 Q. But you told people that?

2 A. Not on a consistent basis.

3 Q. But you told people that?

4 A. Yeah.

5 Q. During your employment, David did tell
6 you repeatedly that you needed to communicate
7 better with him with what you were doing; right?

8 A. I don't recall. He might have.

9 Q. You agreed that you needed to do a better
10 job of communicating with him, didn't you?

11 A. I'm sure I did. You can always increase
12 your communication skills with your employers.

13 (Exhibit 20 was marked for
14 identification.)

15 BY MS. MILTON:

16 Q. This is Exhibit 20.

17 A. Uh-huh.

18 Q. Bates-stamped Saxe 0148. Do you see
19 that?

20 A. Yes.

21 Q. And it's an e-mail from David to you
22 dated August 12, 2015. Do you see that?

23 A. Uh-huh. Yes.

24 Q. And it says, "Hate having to ask and ask
25 and remind. Please communicate better. Shouldn't

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1 have to keep asking."

2 Do you see that?

3 A. Yes.

4 Q. So in August of 2015, he was already
5 telling you, you needed to communicate better?

6 A. Yes.

7 (Exhibit 21 was marked for
8 identification.)

9 BY MS. MILTON:

10 Q. I'm showing you what's been marked as
11 Defendant's Exhibit 21. This is a document labeled
12 Saxe 0146. Do you see that?

13 A. Yes.

14 Q. And it's dated June 5, 2015. It's an
15 e-mail from David that I think went to you, but
16 it's actually unclear from this document.

17 A. Yeah, I'm not sure.

18 Q. Look at this list. Are these things that
19 are listed in this e-mail, are these things you
20 were working on?

21 A. Some of them, but not all of them.

22 Q. Were you working on them with Veronica?

23 A. No.

24 Q. Who -- what are some of the things that
25 you weren't working on?

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1 attitude has been poor for awhile now and your
2 performance lackluster at best. This isn't working
3 for me."

4 Do you see that?

5 A. Yep.

6 Q. "Let's meet today at noon to discuss our
7 options; termination, quitting or getting on the
8 same page."

9 Do you see that?

10 A. Yes.

11 Q. So as of August 2015, David was already
12 talking about potentially terminating your
13 employment; right?

14 A. Yes.

15 (Exhibit 23 was marked for
16 identification.)

17 BY MS. MILTON:

18 Q. I'm showing you a document that's been
19 marked Defendant's Exhibit 23. It's Bates-stamped
20 Saxe 0143 and goes to Saxe 0145. Can you turn to
21 the second page, please. Do you see that it's an
22 e-mail from you to David Saxe, and toward the very
23 bottom it appears to be highlighted. It says, "I
24 will make sure to communicate more."

25 Do you see that?

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1 about canvassing. I said, And then all of a sudden
2 politics is an issue all the sudden. I said, I
3 don't really understand that. I said, Is it about
4 that or did you find out about an investigation I'm
5 doing with Larry.

6 Q. What did he say?

7 A. He said, I don't know what you're talking
8 about, or very dismissive. And I said, You have to
9 know, I know you know. Because again, like I had
10 said previously, he sends these e-mails fairly
11 frequently to employees where he says you're never
12 doing XY and Z, and XY and Z is to kind of hide
13 whatever it is that his real issue is. So he's
14 fine with explicitly saying stuff like this, but
15 I've known him long enough to understand that
16 that's not the case.

17 Q. How long did you work for him?

18 A. I worked for him for about a year.

19 Q. Did you know him before you worked for
20 him?

21 A. Not personally, no.

22 Q. And after you mentioned the investigation
23 with Larry -- well, first of all, what
24 investigation were you referring to?

25 A. I was referring to my request for three

1 years of payroll records, but also my own internal
2 wage issue.

3 Q. And David told you that he did not know
4 what you were talking about; right?

5 A. I think he kind of -- I don't know
6 honestly if he -- I don't remember if he said
7 exactly I don't know what you're talking about, but
8 I think he just kind of spun it back to the
9 politics of no, it has nothing to do with this.

10 Q. Spun it back to what he had said --

11 A. Essentially, yeah.

12 Q. Hold on.

13 A. Sorry.

14 Q. Spun it back to what he had said in his
15 prior e-mail?

16 A. Generally, yeah.

17 Q. That's in exhibit, tell me what exhibit.

18 A. Five. I had kind of said I don't
19 understand the e-mail. I had explained that it
20 doesn't make sense that I -- I don't know how I'm
21 constantly leaving early if I'm never there. I
22 think that was a fair question. That I wasn't
23 working on my campaign out of the office, that he
24 understood what I was doing, that all the sudden it
25 was an issue and it hadn't been and the only thing

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1 that changed was what I was doing upstairs.

2 Q. And you're referring to requesting the
3 payroll records --

4 A. Yes.

5 Q. -- for the three years?

6 A. Yes.

7 Q. When you walked into David's office, did
8 you have anything in your hands?

9 A. I don't remember. If I had anything, it
10 would have been my cellphone probably.

11 Q. What did -- what did David then say to
12 you?

13 A. I think he just kind of again, spun back
14 and said, You're just never here, this isn't
15 working for me, you're fired.

16 Q. What did you say in response?

17 A. I said, If I don't get paid by Thursday,
18 I'm again going to the labor commission.

19 Q. You said that after he terminated your
20 employment?

21 A. It was likely discussed before that as
22 well, but that's why I was explaining the
23 investigation to Larry.

24 Q. But I thought the investigation with
25 Larry was about the three -- requesting the records

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1 Q. And David did that; right?

2 A. Yes.

3 MR. GRONICH: I'm sorry. Can you make it
4 audible.

5 THE WITNESS: Yes. Sorry. Got the water
6 stuck in my throat.

7 BY MS. MILTON:

8 Q. You testified that when -- your counsel
9 was asking you about the security systems at David
10 Saxe Productions; is that right?

11 A. Yes.

12 Q. And he was asking you about what you --
13 how you thought David was viewing video on the
14 security cameras based on your personal experience?

15 A. Yes.

16 Q. And so you said -- I believe your
17 testimony was that so looking at that, those
18 security systems might have tipped him off. Do you
19 remember saying that?

20 A. Yes.

21 Q. So other than your conversation with
22 Larry, you had -- you had -- sitting here today,
23 you have no personal knowledge of what David
24 actually knew with respect to the -- your wage
25 claims?

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1 A. Personal knowledge, I can't tell you what
2 he knew.

3 Q. You're just assuming based on your
4 experience there as an employee at David Saxe
5 Productions?

6 A. I'm assuming based on the technology he
7 had throughout the offices, the specific instances
8 he and I worked on together, that it would not be
9 completely out of the realm of him to know what
10 somebody was doing without ever actually
11 specifically saying it to someone.

12 Q. But you're making a lot of assumptions in
13 that statement; right?

14 A. No.

15 Q. You're not making assumptions?

16 A. Not a lot of them.

17 Q. You're making -- okay. So wait a minute.
18 So in that statement, which is more than one,
19 you're not making a lot of assumptions, but when
20 we're talking about welding, anything that's one or
21 more is excessive; is that your testimony?

22 A. That's not --

23 MR. GRONICH: Objection, context.

24 THE WITNESS: And assumptions aren't
25 against the law.

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REPORTER'S DECLARATION

STATE OF NEVADA)

COUNTY OF CLARK)

I, Lisa Makowski, CCR No. 345, declare as follows:

That I reported the taking of the deposition of the witness, ALEXANDER MARKS, commencing on Monday, July 9, 2018, at the hour of 10:05 a.m.

That prior to being examined, the witness was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth; that, before the proceedings' completion, the reading and signing of the deposition has been requested by the deponent or a party.

That I thereafter transcribed said shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true and accurate transcription of said shorthand notes taken down at said time.

I further declare that I am not a relative or employee of any party involved in said action, nor a person financially interested in the action.


Dated at Las Vegas, Nevada this 25th day of July, 2018.

A handwritten signature in cursive script, appearing to read "Lisa Makowski", written over a horizontal line.

Lisa Makowski, CCR 345

EXHIBIT D

EXHIBIT D

 All Inboxes (21)From: David Saxe 

Hide

To: Alexander Marks 

Not working

Today at 10:15 AM

I'm happy for you about your political aspirations but I shouldn't have to pay for it.

Constantly leaving the office early, not showing up, working on your campaign out of the office etc. doesn't work for me. Not sure why you aren't in office now but when / if you come back we need to discuss.

David

Sent from my iPhone



EXHIBIT E

EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ALEXANDER MARKS, an
individual,

Plaintiff,

vs.

Case No.:
2:17-cv-02110-KJD-CWH

DAVID SAXE PRODUCTIONS, LLC;
SAXE MANAGEMENT, LLC; DAVID
SAXE, an individual;
EMPLOYEE(S)/AGENT(S) DOES
1-10, and ROE CORPORATIONS
11-20, inclusive,
Defendants.

ORAL AND VIDEOTAPED DEPOSITION OF LARRY TOKARSKI
Thursday, August 16, 2018
Las Vegas, Nevada

Reported by:
Michelle C. Johnson, RPR-CRR
NV CCR 771, CA CSR 5962
Job No. 2985885
PAGES 1 - 137

Page 1

1 When you started at David Saxe, did you -- 10:19:30
2 how did you get that position? In other words, you 10:19:36
3 applied for the position, obviously. 10:19:40
4 A. Yes, I inter- -- oh. 10:19:42
5 Q. Did you see the position online or how did 10:19:44
6 you come to know of the position? 10:19:47
7 A. I don't remember. I would guess online, but 10:19:48
8 I'm not positive. 10:19:54
9 Q. And who did you interview with? 10:20:02
10 A. The CFO. 10:20:04
11 Q. Who was that at the time? 10:20:05
12 A. Bob Smith. 10:20:08
13 Q. Did you interview with David Saxe? 10:20:09
14 A. I don't remember. 10:20:14
15 Q. Were you hired in in the controller position? 10:20:14
16 A. Yes. 10:20:26
17 Q. As the controller at David Saxe Productions, 10:20:26
18 what were your responsibilities? 10:20:30
19 A. All financial accounting. 10:20:32
20 Q. So describe for me what you mean by that. 10:20:35
21 A. Doing the accounting for the 14 LLCs he had; 10:20:41
22 making sure, you know, money was coming in, bills were 10:20:46
23 being paid; we handled paying David's own personal 10:20:50
24 bills. 10:20:56
25 Q. Were you responsible for payroll? 10:20:58

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1 A. I discussed it with the HR -- prior HR 10:29:49
2 managers. 10:29:52
3 Q. Who was that? 10:29:54
4 A. Maria, Stephanie, Valerie. 10:29:56
5 Q. And you did that because, as the controller, 10:30:07
6 you wanted to ensure that employees were being 10:30:10
7 properly paid, right? 10:30:13
8 A. Yes. And to protect the company, that we 10:30:14
9 were not violating the law. 10:30:19
10 Q. Because that's one of your responsibilities 10:30:21
11 as the controller, to ensure that the company is 10:30:24
12 paying people properly, right? 10:30:27
13 A. Yes. 10:30:30
14 Q. And can you tell me specific instances where 10:30:39
15 you believed employees were not being paid properly? 10:30:43
16 A. Not specific, no. 10:30:48
17 Q. And other -- oh. 10:30:49
18 A. I guess basically, I don't think about David 10:30:54
19 Saxe, so it doesn't come to memory. 10:30:57
20 Q. Was there ever a time when you were working 10:30:58
21 for David Saxe Productions where you thought an 10:31:05
22 employee was not being paid properly, you raised the 10:31:11
23 issue, and the employee continued to not be paid 10:31:15
24 properly? 10:31:21
25 A. Yes, Alexander Marks. 10:31:22

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1 for February 25th, 2016, how would you do that, if you 10:40:31
2 were still employed at David Saxe Productions? 10:40:35
3 A. I would go back and look at the timesheet; I 10:40:39
4 would go back and look at the payroll we entered. I 10:40:43
5 would try and figure that out, why we didn't enter, 10:40:45
6 looking at the 3/4, the full amount of his gross pay, 10:40:50
7 which is what looks like didn't get entered. But it 10:40:55
8 also looks like there is a catch-up of health 10:40:58
9 insurance because it's a manual check. So it looks 10:41:03
10 like it's catching up a whole month. 10:41:07
11 Q. You just can't tell by looking at this 10:41:15
12 Compensation Report, correct? 10:41:18
13 A. No. 10:41:20
14 Q. Is that correct? 10:41:20
15 A. That is correct. 10:41:20
16 Q. So let's go back to the day that Alex was in 10:41:21
17 the office and went home sick. 10:41:29
18 Did you see him that day? 10:41:33
19 A. I did. He told me he was going home sick. 10:41:35
20 Q. You were friends with Alex, right? 10:41:38
21 A. We were work acquaintances, yes. 10:41:40
22 Q. How often -- since Alex has been terminated, 10:41:43
23 his employment was terminated, how often have you 10:41:47
24 spoken with Alex? 10:41:49
25 A. Occasionally. Up until getting this 10:41:51

1 Q. Did you do anything more with that 11:15:53
2 information that Alex told you? 11:15:57
3 A. No. 11:16:00
4 Q. You didn't talk to David about it? 11:16:00
5 A. No. 11:16:03
6 Q. Did you bring it to anyone else's attention? 11:16:03
7 A. No. 11:16:08
8 Q. Why not? 11:16:08
9 A. He was legal counsel; if he wanted to go 11:16:09
10 further, he could. That was just, we had the 11:16:12
11 discussion, it was just a general discussion. 11:16:17
12 Q. Well, but as the controller, you had an 11:16:19
13 obligation to ensure employees were being paid 11:16:21
14 correctly, right? 11:16:24
15 A. Yeah, and I felt the person who should be 11:16:25
16 responsible for it was investigating. 11:16:29
17 Q. Did Alex ever tell you that he told David 11:16:32
18 that he was concerned that people were changing pay 11:16:41
19 cards -- time sheets? 11:16:45
20 A. No. 11:16:47
21 Q. Did Alex ever tell you that he told anyone 11:16:47
22 else at David Saxe Productions that he thought 11:16:52
23 employees -- someone was changing time sheets? 11:16:56
24 A. Not that I remember. 11:17:00
25 Q. Other than what we've already talked about, 11:17:01

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1 did Alex raise any other concerns with you about how 11:17:09
2 employees were being paid at David Saxe Productions? 11:17:15
3 A. No, not that I remember. 11:17:21
4 Q. Did Alex ever tell you that he was going to 11:17:22
5 report David Saxe Productions to the Department of 11:17:26
6 Labor? 11:17:31
7 A. No. 11:17:31
8 Q. Did Alex ever tell you that he told David he 11:17:31
9 was going to report David Saxe Productions to the 11:17:37
10 Department of Labor? 11:17:41
11 A. No. 11:17:42
12 Q. Did Alex ever tell you that he was going to 11:17:42
13 report David Saxe Productions to the Nevada Labor 11:17:48
14 Commissioner? 11:17:52
15 A. No. 11:17:53
16 Q. Did Alex ever tell you that he told David 11:17:53
17 that he was going to report David Saxe Productions to 11:17:58
18 the Nevada Labor Commissioner? 11:18:01
19 A. No. 11:18:04
20 Q. Did Alex ever tell you that he was going -- 11:18:04
21 that he told anyone at David Saxe Productions that he 11:18:09
22 was going to report David Saxe Productions to the 11:18:13
23 Department of Labor? 11:18:16
24 A. No. 11:18:17
25 Q. Did Alex ever tell you that he told anyone at 11:18:18

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1 David Saxe Productions that he was going to report 11:18:23
2 David Saxe Productions to the Nevada Labor 11:18:27
3 Commissioner? 11:18:29
4 A. No. 11:18:30
5 Q. Did you and Alex ever talk about -- do you 11:18:30
6 know what OSHA is? 11:18:38
7 A. Yes. 11:18:40
8 Q. Did you and -- what is it? 11:18:40
9 A. Occupational safety hazard administration. 11:18:42
10 Q. What's your understanding of what that 11:18:46
11 agency's responsibility is? 11:18:48
12 A. OSHA is supposed to make sure workplace 11:18:50
13 environments are safe. 11:18:53
14 Q. And OSHA -- while you were employed at David 11:18:54
15 Saxe Productions, OSHA, I'm sure, at some point had 11:18:58
16 been on site at David Saxe Productions. Do you know? 11:19:01
17 A. I don't specifically, but it wasn't my -- 11:19:05
18 Q. That was -- 11:19:08
19 A. -- area.
20 Q. -- outside your purview? 11:19:08
21 A. Definitely. 11:19:09
22 Q. Did you and Alex Marks ever talk about OSHA? 11:19:11
23 A. I don't remember. 11:19:18
24 Q. Did you and Alex Marks ever talk about any 11:19:18
25 supposed welding violations that David Saxe 11:19:26

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1	Q. Did you?	11:37:31
2	A. No.	11:37:33
3	Q. Why not?	11:37:33
4	A. Because I was not in a financial position to	11:37:35
5	do so.	11:37:37
6	Q. When did Alex ask you -- did he ask you more	11:37:38
7	than once to contribute to his campaign?	11:37:43
8	A. No, just once.	11:37:45
9	Q. Do you know when he did that?	11:37:46
10	A. No.	11:37:48
11	Q. It was before his employment was terminated,	11:37:48
12	right?	11:37:52
13	A. Yes.	11:37:53
14	Q. Did Alex ever show you his logo for his	11:37:53
15	campaign?	11:37:59
16	A. Yeah, I think so.	11:38:00
17	Q. Did he ask you -- he asked you your opinion	11:38:01
18	on it, didn't he?	11:38:05
19	A. He probably did.	11:38:07
20	Q. In fact, he had multiple conversations with	11:38:08
21	you about his logo, didn't he?	11:38:17
22	A. I don't remember.	11:38:22
23	Q. He talked to you a lot about his campaign,	11:38:24
24	didn't he?	11:38:26
25	A. We did discuss it, yes.	11:38:27

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1 Q. And you knew that there were times where he 11:38:29
2 would leave the office to go work on things related to 11:38:36
3 his campaign? 11:38:41

4 A. Yes. 11:38:42

5 Q. And there were also times where he was 11:38:42
6 working on his campaign while he was at the office, 11:38:56
7 right? 11:39:00

8 A. Yes. 11:39:01

9 MR. GRONICH: Objection, calls for 11:39:01
10 speculation. 11:39:02

11 BY MS. MILTON: 11:39:03

12 Q. And in fact, David was very supportive of 11:39:03
13 Alex running for office, wasn't he? 11:39:06

14 A. Yes. 11:39:08

15 MR. GRONICH: Objection, calls for 11:39:09
16 speculation. 11:39:10

17 BY MS. MILTON: 11:39:12

18 Q. Did you ever hear that David offered to let 11:39:15
19 Alex use his, like, rolling billboard for his 11:39:19
20 campaign? 11:39:23

21 A. No. 11:39:24

22 Q. Alex asked -- Alex talked about his campaign 11:39:24
23 to other employees at the office, didn't he? 11:39:39

24 MR. GRONICH: Objection, calls for 11:39:43
25 speculation. 11:39:44

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1	A. Yes.	11:47:49
2	Q. Hold on.	11:47:50
3	-- sitting here today, you don't remember	11:47:51
4	what he told you; is that correct?	11:47:54
5	A. I don't remember why he was terminated.	11:47:56
6	Q. You don't remember Alex telling you what	11:47:58
7	David told him during that termination meeting; is	11:48:09
8	that right?	11:48:11
9	A. Correct.	11:48:12
10	Q. Did Alex -- during that conversation, did	11:48:30
11	Alex tell you that he thought he had been terminated	11:48:32
12	because he was running for office?	11:48:36
13	A. I don't remember.	11:48:39
14	Q. So sitting here today -- I just want to make	11:48:43
15	sure I have your testimony correct -- you don't	11:48:46
16	remember how long the conversation was with Alex the	11:48:48
17	day he was terminated. Is that correct?	11:48:51
18	A. That is correct. It was not a focal point in	11:48:54
19	my life that I remember a conversation from two and a	11:48:57
20	half years ago.	11:49:00
21	Q. And you also -- the only thing you remember	11:49:00
22	about that conversation, sitting here today, is that	11:49:03
23	Alex believed he had been terminated because he tried	11:49:08
24	to tell David something about the law, and David	11:49:12
25	thought he was above the law, according to Alex?	11:49:16

Page 75

1 A. I don't know if that's what Alex thought. I 11:49:19
2 know we talked about the genesis of everything was him 11:49:22
3 not getting paid for a day he worked and how that was 11:49:26
4 wrong. That is my total involvement in it. 11:49:30
5 Q. And sitting here today, you also don't know 11:49:34
6 if Alex did in fact get paid for that day, right? 11:49:38
7 MR. GRONICH: Objection, asked and answered. 11:49:41
8 THE WITNESS: I don't remember paying him for 11:49:46
9 that day. 11:49:48
10 BY MS. MILTON: 11:49:48
11 Q. But you don't know -- 11:49:49
12 A. But I don't know for sure -- 11:49:50
13 Q. -- sitting here today? 11:49:51
14 A. -- you are correct. 11:49:52
15 Q. After that conversation with Alex the day he 11:49:54
16 was terminated, when was the next time you spoke to 11:49:58
17 Alex? 11:50:02
18 A. Say that once more. I'm sorry. 11:50:04
19 Q. After the conversation you had with Alex the 11:50:06
20 day of his termination, when was the next time you 11:50:08
21 spoke to Alex? 11:50:11
22 A. I don't remember. 11:50:13
23 Q. How regularly were you communicating with 11:50:13
24 Alex after his employment was terminated from David 11:50:22
25 Saxe Productions? 11:50:25

Page 76

1 Q. And then you were also asked about whether or 12:47:57
2 not Alex asked you for payroll documents following 12:48:04
3 that conversation, but you did not remember that. Is 12:48:07
4 that right? 12:48:11
5 A. I don't remember that, no. 12:48:11
6 Q. Okay. Do you remember any other conversation 12:48:12
7 that you had with Alex between the day that you told 12:48:16
8 him that you were instructed not to pay him and the 12:48:20
9 day that he was terminated? 12:48:24
10 A. I don't. 12:48:28
11 Q. Do you remember going in and out of his 12:48:29
12 office more than usual? 12:48:31
13 MS. MILTON: Objection, vague. 12:48:34
14 THE WITNESS: I don't. 12:48:37
15 BY MR. GRONICH: 12:48:39
16 Q. Do you remember him coming in and out of your 12:48:40
17 office more than usual? 12:48:42
18 MS. MILTON: Objection, vague. 12:48:43
19 THE WITNESS: I don't. 12:48:44
20 BY MR. GRONICH: 12:48:45
21 Q. Had there ever been any other time when Alex 12:48:46
22 might have asked you for a large payroll sample? 12:48:50
23 MS. MILTON: Objection, vague, speculation. 12:48:55
24 THE WITNESS: No, I don't remember him asking 12:48:58
25 for that. 12:48:59

Page 126

1 BY MR. GRONICH: 12:49:00

2 Q. Would that have been something unusual or 12:49:00

3 outrageous? 12:49:03

4 MS. MILTON: Objection, speculation, vague. 12:49:05

5 THE WITNESS: Um, yeah, I would say unusual. 12:49:07

6 BY MR. GRONICH: 12:49:09

7 Q. Were there other things that you have been 12:49:09

8 asked to do in your job that were unusual? 12:49:11

9 MS. MILTON: Objection, vague. 12:49:15

10 BY MR. GRONICH: 12:49:17

11 Q. Or out of the ordinary. 12:49:17

12 MS. MILTON: Same objection. 12:49:18

13 THE WITNESS: By? 12:49:20

14 BY MR. GRONICH: 12:49:21

15 Q. By either Alex or -- well, we'll say by Alex. 12:49:21

16 A. Hmm, no, not by Alex. 12:49:25

17 Q. By David? 12:49:27

18 A. I don't know if unusual. I mean, you know, 12:49:28

19 he's the owner, he can ask me to do whatever. 12:49:32

20 Q. Well, do you think, as the corporate counsel, 12:49:34

21 that Alex could ask you to do whatever? 12:49:39

22 MS. MILTON: Objection, vague, speculation. 12:49:41

23 THE WITNESS: I would probably, if he asked 12:49:43

24 me to do something, still clear it with David, because 12:49:44

25 that was the environment there. 12:49:47

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1 A. Not at all. 12:50:32

2 MR. GRONICH: Okay. I think -- I think 12:50:40

3 that's all I have. 12:50:49

4 MS. MILTON: Okay. I have a few questions. 12:50:51

5 FURTHER EXAMINATION 12:50:52

6 BY MS. MILTON: 12:50:52

7 Q. Sitting here today, you do not remember 12:50:55

8 printing out or giving Alex three years' worth of 12:50:59

9 payroll records, correct? 12:51:03

10 A. I don't remember him asking for it. I 12:51:05

11 definitely remember not giving it to him. 12:51:07

12 Q. And you also never had any conversations with 12:51:09

13 David about giving that information to Alex, right? 12:51:13

14 A. No. 12:51:16

15 Q. Is that correct? 12:51:16

16 A. That is -- I don't remember having that 12:51:17

17 conversation with David. 12:51:18

18 MR. GRONICH: I'm sorry; can I just real 12:51:18

19 quickly. I didn't hear what you said the answer to 12:51:20

20 the previous one, I just want to make sure. 12:51:23

21 MS. MILTON: Let's have the court reporter -- 12:51:25

22 MR. GRONICH: Can you repeat what he said two 12:51:26

23 questions ago. 12:51:29

24 (Record read by the reporter as follows: 12:52:07

25 "QUESTION: And you also never had any 12:51:10

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REPORTER'S DECLARATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Michelle C. Johnson, CCR 771, declare as follows:

That I reported the taking of the deposition of the witness, LARRY TOKARSKI, commencing on Thursday, August 16, 2018 at 10:06 A.M.

That prior to being examined, the witness was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth.

That I simultaneously transcribed my said shorthand notes into typewriting via computer-aided transcription, and that the typewritten transcript of said deposition is a complete, true, and accurate transcription of said shorthand notes taken down at said time. That prior to completion of the proceedings, review of the transcript pursuant to FRCP 30(e) was requested.

I further declare that I am not a relative or employee of any party involved in said action, nor a person financially interested in the action.

Dated: 9/1/2018



Michelle C. Johnson, RPR-CRR, CCR No. 771

EXHIBIT F

EXHIBIT F

1 Kirsten A. Milton
Nevada State Bar No. 14401
2 Lynne K. McChrystal
Nevada State Bar No. 14739
3 **JACKSON LEWIS P.C.**
300 S. Fourth Street, Suite 900
4 Las Vegas, Nevada 89101
Tel: (702) 921-2460
5 Email: kirsten.milton@jacksonlewis.com
Email: lynne.mcchrystal@jacksonlewis.com

6 *Attorneys for Defendants*
7 *David Saxe Productions, LLC,*
Saxe Management, LLC and David Saxe

9
10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

12 ALEXANDER MARKS, an individual,
13 Plaintiff,

14 vs.

15 DAVID SAXE PRODUCTIONS, LLC;
16 SAXE MANAGEMENT, LLC; DAVID
17 SAXE, an individual; EMPLOYEE(S) /
AGENT(S) DOES 1-10; and ROE
CORPORATIONS 11-20, inclusive

18 Defendants.

Case No. 2:17-cv-02110-KJD- DJA

**DECLARATION OF VERONICA
DURAN IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

19
20 I hereby certify pursuant to 28 U.S.C. § 1746 that the factual statements set forth below
21 are true and correct to the best of my knowledge, information, and belief. I make this
22 Declaration in support of Defendants' Motion for Summary Judgment:

23 1. I was an employee of David Saxe Productions, LLC ("DSP"), with my last
24 position being Vice-President of Operations, during the period of time referenced in Plaintiff
25 Alexander Marks' ("Plaintiff") Complaint.

26
27 2. In my role as the Vice-President of Operations at DSP, I assisted DSP's manager,
28 David Saxe ("Saxe"), with the daily operation of DSP. During my employment I became

1 familiar with former General Counsel and Plaintiff and worked with him closely on many
2 different matters.

3 3. After Plaintiff began employment with DSP, he announced that he was going to
4 run for political office while working for DSP.

5 4. DSP has not promulgated any rule or policy that prevented Plaintiff, or any other
6 employee, from running for office or engaging in politics.

7 5. In fact, Saxe was very supportive of Plaintiff's decision to run for office and, I
8 believe, often too lenient and flexible with how much time he allowed Plaintiff to work on his
9 campaign and leave work early to attend to related activities.

10 6. During my employment at DSP, I never saw Saxe lose his cool with any
11 employee, including Marks. In fact, I believe Saxe was often too understanding and lenient with
12 his employees and often was taken advantage of.

13 7. After Plaintiff announced his intention to run for political office, I noticed
14 Plaintiff would leave the office for two-hour lunches, arrive to work later in the mornings, and
15 leave work early on an increasingly frequent basis. I also noticed him engaging other DSP
16 employees regarding his campaign during work hours.

17 8. In addition, when I walked by Plaintiff's office, I often observed him working on
18 his personal tablet rather than his work computer. Plaintiff's desk was arranged in a "U" shape,
19 with his seat facing the wall and his work computer facing the office entrance, so any passerby
20 could see whether Plaintiff was utilizing his work computer or his personal tablet.

21 9. Based on my observations, I estimate that, as Plaintiff's employment went on, he
22 began spending half his DSP work day working as DSP's General Counsel and half his DSP
23 work day working on campaign-related activities.

24 10. Further, as Vice-President of Operations at DSP, I was heavily involved in
25 assisting Saxe with the day-to-day management of all departments at DSP, including the legal
26 department. When reviewing the activity of the legal department, I noticed Plaintiff often failed
27
28

to complete tasks in a timely fashion.

11 I believed Plaintiff could have completed all his assigned tasks if he had worked a
12 forty-hour workweek, however, he failed to do so on a regular basis.

13 I shared my concerns regarding Plaintiff's lack of focus and overall job
14 performance with Saxe.

15 I declare under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and
16 correct.

17 EXECUTED this 20 day of December, 2019.

18 
19 VERONICA DURAN

20 4851 1842-5518, v. 1

EXHIBIT G

EXHIBIT G

1 Kirsten A. Milton
Nevada State Bar No. 14401
2 Lynne K. McChrystal
Nevada State Bar No. 14739
3 **JACKSON LEWIS P.C.**
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Email: lynne.mcchrystal@jacksonlewis.com

6 *Attorneys for Defendants*
7 *David Saxe Productions, LLC,*
Saxe Management, LLC and David Saxe

8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA**

10 ALEXANDER MARKS, an individual,

11 Plaintiff,

12 vs.

13 DAVID SAXE PRODUCTIONS, LLC;
14 SAXE MANAGEMENT, LLC; DAVID
SAXE, an individual; EMPLOYEE(S) /
15 AGENT(S) DOES 1-10; and ROE
CORPORATIONS 11-20, inclusive

16 Defendants.
17

Case No. 2:17-cv-02110-KJD-DJA

**DECLARATION OF DAVID SAXE IN
SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

18 I hereby certify pursuant to 28 U.S.C. § 1746 that the factual statements set forth below
19 are true and correct to the best of my knowledge, information, and belief. I make this Declaration
20 in support of Defendants' Motion for Summary Judgment:
21

22 1. My name is David Saxe. I have personal knowledge of the facts stated in this
23 Declaration and if called to testify to these facts, I would be competent to do so.

24 2. I am the owner and manager of David Saxe Productions, LLC ("DSP").

25 3. In my position, among other things, I am responsible for the day-to-day
26 management and operations of DSP, and supervise individuals employed in DSP's legal
27 department, including General Counsel, the position formerly held by Plaintiff Alexander Marks
28 ("Plaintiff").

1 4. As a General Counsel, Plaintiff was employed by David Saxe Productions, LLC.
2 Plaintiff was never employed by Saxe Management, LLC.

3 5. As a General Counsel, I expected Plaintiff to advise me on DSP's compliance with
4 all state, federal, and local labor and employment laws, including applicable wage-hour laws,
5 safety laws and regulations, and labor laws. I also expected Plaintiff to complete projects in a
6 timely fashion, be present during DSP's office hours, and communicate project statuses to me.

7 6. As early as June 2015, I had already started to express frustration with Plaintiff's
8 failure to meet deadlines, as well as communicate his status on the projects to which he was
9 assigned. Attached hereto as Exhibit 1 is a true and correct copy of a June 5, 2015 email I sent to
10 Plaintiff [SAXE-0146], which was kept in the ordinary course of business and was produced by
11 Defendants in this case in the normal course and scope of discovery. *See* 31 Wright & Gold,
12 Federal Practice and Proc: Evidence § 7105 ("[a]uthentication can also be accomplished through
13 judicial admissions such as stipulations, pleadings, and production of items in response to
14 subpoena or other discovery request").

15 7. As early as August 2015, I was considering terminating Plaintiff's employment
16 based on performance. Attached hereto as Exhibit 2 is a true and correct copy of an August 11,
17 2015 email I sent to Plaintiff [SAXE-0151], which was kept in the ordinary course of business and
18 was produced by Defendants in this case in the normal course and scope of discovery.

19 8. Attached hereto as Exhibit 3 is a true and correct copy of an August 12, 2015
20 email I sent to Plaintiff [SAXE-0148], which was kept in the ordinary course of business and was
21 produced by Defendants in this case in the normal course and scope of discovery.

22 9. Attached hereto as Exhibit 4 is a true and correct copy of an October 27, 2015
23 email I sent to Plaintiff [SAXE-0053], which was kept in the ordinary course of business and was
24 produced by Defendants in this case in the normal course and scope of discovery.

25 10. Attached hereto as Exhibit 5 is a true and correct copy of email correspondence I
26 sent and received from Plaintiff in January 2016 [SAXE-0065-0068], which was kept in the
27 ordinary course of business and was produced by Defendants in this case in the normal course and
28 scope of discovery

12. Attached hereto as Exhibit 7 is a true and correct copy of a February 29, 2016 email I drafted and sent to myself to record my mental impressions and observations regarding Plaintiff's work performance [SAXE-0133], which was kept in the ordinary course of business and was produced by Defendants in this case in the normal course and scope of discovery.

13. Attached hereto as Exhibit 8 is a true and correct copy of a March 1, 2016 email I sent to Plaintiff [SAXE-0134], which was kept in the ordinary course of business and was produced by Defendants in this case in the normal course and scope of discovery.

I declare under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct.

EXECUTED this 19 day of December, 2019.



DAVID SAXE

EXHIBIT 1

EXHIBIT 1

On Jun 5, 2015, at 2:22 PM, David Saxe <david@davidsaxe.com> wrote:

Soon we will meet to discuss all of your to do items. Please do what is necessary to complete all your projects. Complete means complete. If you cannot complete because you need clarification from me then please ask me those questions ASAP so you can complete.

I am still unclear as to the status of almost all of your to do items not have you brought them up to me. I realize we are always working on stuff but it is important for us to continually hit or project completion deadlines.

BMI?

Organization of all files etc. ?

Adita lawsuit?

Rena Fazzah?

Glassdoor and Indeed?

Hafal Poderes writ?

Proper transfer of assets?

Let tax audit?

Proper accounting procedures?

2014 tax return?

Proper inputs for close out of books 2014?

Employee handbook?

All policies and procedures?

Document management headings/categories etc.

And everything else.

David

Sent from my iPhone

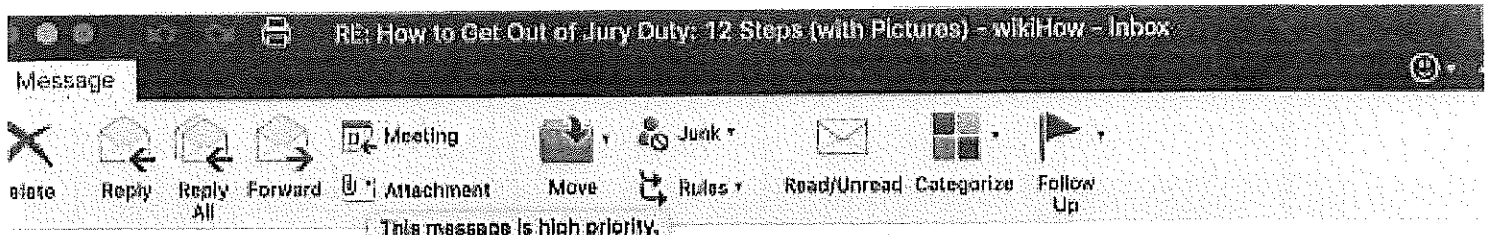
CONFIDENTIAL

SAXE-0146

0229

EXHIBIT 2

EXHIBIT 2



RE: How to Get Out of Jury Duty: 12 Steps (with Pictures) - wikiHow



Alexander Marks

Tuesday, August 11, 2015 at 11:28 AM

To: David Saxe

This message is high priority.

Yes, we should discuss.

-----Original Message-----

From: David Saxe

Sent: Tuesday, August 11, 2015 10:59 AM

To: Alexander Marks

Subject: Re: How to Get Out of Jury Duty: 12 Steps (with Pictures) - wikiHow

Because dsp, llc needs me to work now (show opens in 2 days and it won't if I am stuck in jury - I can complete my civil duty after I launch the show) so I can bring in money to pay your salary as well as everyone else's I asked you to handle a simple task. I wasn't asking for a personal favor. The fact that you are arguing which items you feel you should handle or not after I have asked you to do it is very telling.

Your attitude has been poor for a while now and your performance lackluster at best.

This isn't working for me.

Let's meet today at noon to discuss our options:

Termination

Quitting

Or getting on the same page!

+

David Saxe

702-243-9820

David@davidsaxe.com

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Thank you.

CONFIDENTIAL

SAXE-0151

0231

EXHIBIT 3

EXHIBIT 3

From: David Saxe
Sent: Wednesday, August 12, 2015 10:26 PM
To: Alexander Marks
Subject: communication

I hate having to ask and ask and remind. Please communicate better.
I shouldn't have to keep asking. So once again:

ATTORNEY-CLIENT PRIVILEGE

Show me the proof that we sent report (show the reports) sent to bmi for both theaters and that the amounts that should have been paid per the reports were actually paid, and not just the estimated payment.
Status of all items on your smartsheet?

Please send me an email every Friday at a minimum bringing me up to speed and asking whatever questions you need answered that you could not go throughout the week even after your amazing attempts.

Did you meet with the broker relations team for the confidentiality? Michelle?

David

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SAXE-0148

0233

EXHIBIT 4

EXHIBIT 4

From: David Saxe
Sent: Tuesday, October 27, 2015 3:26 PM
To: Alexander Marks
Subject: Deposit

It's on you to get the deposit, not Larry or mark.

You were supposed to get it or they didn't open. You failed to get it and to notify me that they did not pay it and you let them open.

Don't pawn it off on mark and Larry. That was a deal you were to explain to Jonathan.

David

Sent from my iPhone

EXHIBIT 5

EXHIBIT 5

From: David Saxe
Sent: Thursday, January 28, 2016 9:41 AM
To: Alexander Marks
Cc: Veronica Duran
Subject: robot boys status?

I'll "relax" when I can trust things that I ask you to do were done, and they were not done. They were not contacted, schedules coordinated, flights discussed and all the details ironed out so there is no wasted time, should the visa go through (provided everything was done right and there was no reason for denial). You and Veronica were not and still are not in sync. Pointing fingers at each other thinking the other was supposed to contact and handle was exactly the reason I asked you two to handle and be in sync or I would just do it. Not an appropriate response Alex.

David

Sent from my iPhone

On Jan 28, 2016, at 8:35 AM, Alexander Marks <amarks@davidsaxe.com> wrote:

Relax, it will get taken care of. I agree we are not in sync but her and I will chat today. It was delivered yesterday, so 15 days from now is February 4, 2016. We'll work on scheduling a flight around that time. They'll still need to go to the consulate in Denmark as well (5 day waiting period on that) but they're aware of that. They have not taken any other gigs.

From: David Saxe
Sent: Thursday, January 28, 2016 7:21 AM
To: Alexander Marks
Cc: Veronica Duran
Subject: Re: robot boys status?

Doesn't sound like you two are in sync. Once again, please don't make me takeover and handle just to make sure it gets done. CALL the robot boys. Organize it. Alex, you said the visa was guaranteed within 13 days so why don't we buy the tickets for shortly thereafter when they say is good for them. And if they took another gig or can't travel for a while, after I paid for expediting, due to nobody articulating or communicating that they need to get their ass here in 2 weeks, I'm going to be upset. So, either handle or get out of the way. Which will it be? Cuz it doesn't sound handled.
David

Sent from my iPhone

On Jan 28, 2016, at 6:38 AM, Alexander Marks <amarks@davidsaxe.com> wrote:

Everyone is updated; the petition was delivered yesterday. I have not discussed flights or anything. I thought Veronica was going to touch base about those details.

From: David Saxe
Sent: Thursday, January 28, 2016 6:29 AM
To: Alexander Marks; Veronica Duran
Subject: robot boys status?

Did you talk to them?
david

From: David Saxe
Sent: Monday, January 04, 2016 8:59 PM
To: Alexander Marks
Cc: Veronica Duran
Subject: Robot boys

I didn't get a response from either of you on my last email. Are you on top of the robot boys (you called and made them comfortable that all is good and they signed the contract?) or not? I'm positive we lost them if you haven't called and they think we are going to own their act according to our contract. I am going to call them first thing in the morning at the office unless you email me otherwise that it's done.

David

Sent from my iPhone

From: David Saxe
Sent: Saturday, January 23, 2016 9:36 AM
To: Veronica Duran; Alexander Marks
Subject: robot boys

I don't want to pay \$1,300 for an expedited visa then we drop the ball and don't purchase tickets or fail to communicate with them and they don't actually get here for whatever reason for another month or longer. Please contact them and get them ready to go no later than 1 week after they receive the visa. If the expedited fee guarantees they will get it within 13 days then they should be here no later than mid February. I haven't had contact with them so I've been going off what you have been telling me but my experience and gutt tell me that there is a chance they took another gig due to uncertainty of timing and they will not be available or ready to come here when we need them. Please line it all up.

Thank you,
David

EXHIBIT 6

EXHIBIT 6

thing you need to discuss or think I would like to know

a fazzah

off

..an

Status of the new hires I asked for? I haven't seen, heard of or interviewed anyone so I can only presume it isn't being handled. There is no way we haven't received inquiries from someone suitable for any of the positions I tasked you and

Veronica of find:

Personal Assistant

PR

Social Media

Internet Marketing

Graphic Design

Video Production

Accounting Dept. Controller

Production Manager (Theater Technical Dept.)

Technical Director

2 Lighting Board Operators

Lighting Designer / Programmer

Projection Technician

Audio Board operator

And so on.....

Also, please confirm that Larry is paying all the bills on time and hasn't skipped paying due to the credit card on file expiring or some other technical reason that would cause me to lose insurance coverage (life, GL etc.)

Please start communicating and updating me more. Thanks,

David

CONFIDENTIAL

SAXE-0143

0242

ates please

Alexander Marks

Thu 1/20/2016 8:50 AM

Re: David Saxe <david@davidsaxe.com>

1 attachment

MM Notification Letter 1.19.2016.pdf

We need to discuss:

- Hiscox's renewal (side note: Hiscox's reimbursement came through this morning so that's good)
- The Mall's amendment to the V2 lease (see the attached letter).
- I need the contact information for the Russian aerialists. They never came by, and no one seems to know how to contact them. I haven't run into them at the theater either. I have their contract and I was going to walk them through setting up a business.
- Hologram contract (not sure if he's contacted you again)
- Rima goes to trial tomorrow; as I stated last week, it'll last about 3-4 days. I plan on attending.
- Garin's office should be filing the arbitration this week; I worked with them on the contents of the Petitioner Agreement
- Nothing on Baumen that pertains to our case. The SCOTUS did hand down a decision on the Campbell case (that was the other case we almost based a motion to stay on; however, we opted for the Spokeo one instead). The case was not very favorable, so it's good we decided against that avenue.
- New Hires: You met the social media girl last week. I have two video and internet guys waiting on the sidelines. You have not been available to meet with them, so there's nothing I can do. We have received suitable candidates, but we cannot afford most of them. I have recommended several times to put the salary or hourly rate on the job posting's page so we can stop wasting everyone's time. We're getting candidates wholly over-qualified apply for entry level positions. Veronica is taking care of a lot of these; I was asked to help with PR, Receptionist, Call Center (hired one, interviewed a couple others that TC didn't like), BR, and Sales (Ania hasn't liked anyone I sent her).

~~I will make sure to communicate more.~~ I don't like interrupting your show mode during rehearsals is all. I try to respect that and not bug you with stuff that I'm handling and that we can chat about later.

I spoke with Larry, and from my end of things, it's all been paid. We just renewed a bunch of licenses (handbill, liquor, etc.) last week. They paid the trailer as well, and I am sending the decal to the marina so the boat guy can put that on it for us. No registrations until March now. Insurance wise, it's paid. We had that issue with the WC but they'd give us two addresses and of course we sent it to the "wrong" one. I have everything confirmed that the policy is in place with no issues.

From: David Saxe

Sent: Wednesday, January 27, 2016 11:58 PM

To: Alexander Marks

Subject: updates please

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SAXE-0144

0243

EXHIBIT 7

EXHIBIT 7



Copyright © 2016 David Saxe Productions

marks

Copyright © 2016

David Saxe <david@davidsaxe.com>
To: David Saxe <david@davidsaxe.com>

Mon, Feb 29, 2016 at 10:28 AM

Alex,

I understand you are excited about running for office, as you should be, but it can no longer interfere with your obligations at work. Please just work on all the projects and day to day duties for the company. It is not fair to your employer. While at DSP you need to only work on DSP. There is enough work to last more than 40 hours per week as well. Cutting out for rally's, fundraisers, to make phone calls, to design websites etc. is not going to work anymore.

Thank you,
David

—
David Saxe
702-243-9820
David@davidsaxe.com

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SAXE-0133

0245

EXHIBIT 8

EXHIBIT 8



David Saxe <david@davidsaxe.com>

Work

1 message

David Saxe <david@davidsaxe.com>
To: David Saxe <david@davidsaxe.com>

Tue, Mar 1, 2016 at 9:10 PM

Alex, I am very excited for you that you are running for office but it is not fair that you conduct your campaign business while at the office and during hours you are being paid by dsp.

Sent from my iPhone

CONFIDENTIAL

SAXE-0134

0247

EXHIBIT H

EXHIBIT H

5/5/2018

Gmail - Alex Marks here



Alexander Marks <alexanderjmarks@gmail.com>

Alex Marks here

2 messages

Alexander J. Marks <alexanderjmarks@gmail.com>
 To: nannabanana89110@hotmail.com

Wed, Mar 2, 2016 at 4:58 PM

Nann,

I hope the new job is treating you well. David and I had a slight disagreement over not illegally deducting exempt workers' wages today, so I was let go. I went down fighting for workers, so that's fine. I may have wrote your number wrong. Would you mind just shooting me a text so we can keep in touch. The campaign is going strong and I have more time to dedicate to things now, so that's great news. My cell is 702-501-1486. Thanks.

Alex

Sent from my iPad

Nannette Raue <nannabanana89110@hotmail.com>
 To: "Alexander J. Marks" <alexanderjmarks@gmail.com>

Wed, Mar 2, 2016 at 6:40 PM

Alex

The new job is going great. Sorry to hear that David let you go today. Its to bad that its always his way or the highway. Glad to hear that the campaign is going well. Let me know if there is anything I can do to help.

702-808-0689
 Nann Raue

Sent from my Sprint Samsung Galaxy S® 6.
 [Quoted text hidden]
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MARKS00019

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