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	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 II OF III)

JACKSON LEWIS P.C.

/s/ Joshua A. Sliker
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DOCUMENT	VOLUME	DATE	PAGE(S)
Order Granting in Part Defendants' Motion for Summary Judgment As To Second And Third Causes of Action and Remanding Action To State Court	II	8/20/2020	0453 – 0460
Clerk's Judgment In Favor Of Defendant And Against Plaintiff On Claim Retaliation Under FLSA	II	8/20/2020	0461
Transcript of June 29, 2021 Hearing on Defendants' Motion for Summary Judgment	II	06/29/2021	0462 – 0475
Transcript of July 13, 2021 Hearing on Defendants' Motion for Summary Judgment	II	07/13/2021	0476 – 0499
Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment	III	07/26/2021	0500 – 0508
Docket Sheet	III		0509 – 0510

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 II 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.

4890-8754-7394, v. 1

EXHIBIT I

EXHIBIT I

OFFICE USE ONLY	STATE OF NEVADA Department of Business and Industry **OFFICE OF THE LABOR COMMISSIONER** 555 E. Washington Ave. #4100, Las Vegas, Nevada 89101, (702) 486-2650 675 Fairview Drive Suite 226, Carson City, Nevada 89701, (775) 687-4850 **EMPLOYMENT COMPLAINT** (DO NOT USE THIS FORM TO CLAIM UNPAID WAGES OR COMMISSIONS)	OFFICE USE ONLY

COMPLAINANT INFORMATION

Name _____
First MI Last

Address _____
Number Street Apt.#

_____
City State ZIP

Home phone (____) _____

Email Address _____

Job title _____

Department _____

1. Does this employer currently employ you? Yes No

2. Did this employer previously employ you? Yes No

3. Do you agree to be present at any pre-hearing conferences or administrative or judicial hearings scheduled, if necessary, to present testimony and other evidence related to your complaint? Yes No

4. Do you have or are you aware of any documentary evidence that will substantiate your complaint? Yes No
If so, please provide copies. If you cannot provide copies, explain where the information is located.

5. Do you know of any witnesses that could provide additional information? Yes No
If so, please provide names and information that will enable us to contact your witnesses.

6. Are you now or have you been involved in any lawsuits or other legal proceedings with this employer? Yes No
If so, please explain on an attached sheet of paper.

7. Do you have the financial ability to hire an attorney to assist you with your complaint? Yes No

EMPLOYER INFORMATION

Business Name V THEATER GROUP, LLC & DAVID SAXE PRODUCTIONS

Location 5030 W. Oquendo Road
Number Street

Las Vegas NV 89118
City State ZIP

Mailing Address _____
(If different) Number Street or PO Box

_____
City State ZIP

Business phone (702) 243-9820

Email Address DAVID@DAVIDSAXE.COM

Owner/Manager/Supervisor Name:

DAVID SAXE
First Last

Type of Business THEATER COMPANY

Subject of Complaint JOINT EMPLOYMENT; OVERTIME ISSUES

Is the activity upon which your complaint is based:

_X_ Company policy _X_ Department policy

_X_ Problem with a particular manager/co-worker

MARKS00013

STATEMENT OF COMPLAINT (Please provide a short description of the employment practice that is the reason for your complaint. Be complete as to what the policy is, how it is communicated to the employees, when the incident(s) took place or whether it is ongoing and so forth. Use additional pages if necessary.)

V Theater and David Saxe Productions share employees, but are not compensating for overtime. Based on the FLSA, there appears to be a joint employment situation occurring. This situation has been brought to management's attention, but has been ignored in an effort to avoid paying overtime. V THEATER and DAVID SAXE PRODUCTIONS are both managed by Saxe Management/David Saxe. These companies have the same officers, common management, common insurance, and common payroll system, which are relevant factors in joint employment situations. When the some of the non-exempt workers (such as the call center/box office agents, and the warehouse workers/stagehands) at David Saxe Productions finish their 8-hour shift at that company, they then head over to work at V Theater Group at its theater. The tasks and responsibilities for various workers are roughly the same, with some minor variations. Regardless of the facility these employees work, David Saxe/Saxe Management exercises control over them; therefore both David Saxe Productions and V Theater Group are in control of those employees. This is systemic and done so only so that these workers do not receive any overtime. Many non-exempt workers work up to 8 hours at the other facility after their first 8-hour shift. Management has been informed that despite being separate legal entities, there is a common management, which leads to the likelihood of a joint employment situation. David Saxe/Saxe Management preferred to roll the dice at the expense of these workers.

I CERTIFY THAT THE INFORMATION CONTAINED IN THE FOREGOING COMPLAINT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF. (SIGNATURE NOT NEEDED FOR ANONYMOUS OR FIELD COMPLAINTS)

Signed _____ Date_____

OFFICE USE ONLY

COMPLAINT TAKEN BY: _____

___ VERIFIED COMPLAINT ___ANONYMOUS COMPLAINT ___TELEPHONE/FIELD COMPLAINT

INVESTIGATOR, IF ASSIGNED _____

ALLEGED VIOLATION(S): _____ STATUTE: NRS _____

_____ STATUTE: NRS _____

_____ STATUTE: NRS _____

_____ STATUTE: NRS _____

HAS THIS EMPLOYER BEEN CONTACTED CONCERNING THE SAME OR SIMILAR VIOLATIONS IN THE PAST? YES ___ NO ___ UNKNOWN ___

DISPOSITION _____

Rev. 6/13

OFFICE USE ONLY	STATE OF NEVADA Department of Business and Industry **OFFICE OF THE LABOR COMMISSIONER** 555 E. Washington Ave. #4100, Las Vegas, Nevada 89101, (702) 486-2650 675 Fairview Drive Suite 226, Carson City, Nevada 89701, (775) 687-4850 **EMPLOYMENT COMPLAINT** (DO NOT USE THIS FORM TO CLAIM UNPAID WAGES OR COMMISSIONS)	OFFICE USE ONLY

COMPLAINANT INFORMATION

Name _____
First MI Last

Address _____
Number Street Apt.#

_____
City State ZIP

Home phone (____) _____

Email Address _____

Job title _____

Department _____

1. Does this employer currently employ you? Yes No

2. Did this employer previously employ you? Yes No

3. Do you agree to be present at any pre-hearing conferences or administrative or judicial hearings scheduled, if necessary, to present testimony and other evidence related to your complaint? Yes No

4. Do you have or are you aware of any documentary evidence that will substantiate your complaint? Yes No
If so, please provide copies. If you cannot provide copies, explain where the information is located.

5. Do you know of any witnesses that could provide additional information? Yes No
If so, please provide names and information that will enable us to contact your witnesses.

6. Are you now or have you been involved in any lawsuits or other legal proceedings with this employer? Yes No
If so, please explain on an attached sheet of paper.

7. Do you have the financial ability to hire an attorney to assist you with your complaint? Yes No

EMPLOYER INFORMATION

Business Name David Saxe Productions

Location 5030 W. Oquendo Road
Number Street

Las Vegas NV 89118
City State ZIP

Mailing Address _____
(if different) Number Street or PO Box

_____
City State ZIP

Business phone (702) 243-9820

Email Address legal@davidsaxe.com

Owner/Manager/Supervisor Name:

DAVID SAXE
First Last

Type of Business PRODUCTION COMPANY

Subject of Complaint WRONGFUL WAGE DEDUCTION OF EXEMPT and NON-EXEMPT WORKERS

Is the activity upon which your complaint is based:

_X_ Company policy _X_ Department policy

_X_ Problem with a particular manager/co-worker

MARKS00016

STATEMENT OF COMPLAINT (Please provide a short description of the employment practice that is the reason for your complaint. Be complete as to what the policy is, how it is communicated to the employees, when the incident(s) took place or whether it is ongoing and so forth. Use additional pages if necessary.)

Mr. Saxe has instructed his payroll department to wrongfully deduct wages from exempt and non-exempt workers. For Exempt employees, they are not receiving their full salary amount each and every week. Mr. Saxe is systemically ensuring that partial day workdays are not compensated. If an employee leaves sick, he immediately instructs the payroll department to not pay that individual for that partial day. Further, if an Exempt employee has PTO time off in his/her bank, and that Exempt employee calls in sick, the internal Company policy is to deduct salary wages, and not replace them with the PTO (which likely means the PTO policy is not a bona fide sick leave policy). This contradicts the written policy, which follows state and federal guidelines for appearances only. For non-exempt employees, wages are deducted to keep employees under 40 hours, despite time worked beyond that. If an employee does not take a lunch break and continues working through it, the managers have been instructed to deduct 30 minutes from that non-exempt employee's wages due. With all employees, for any issue that may arise, the Company's policy is to deduct as necessary to resolve the issue. For example, this has been done with the payment of health benefits. In order to catch up on payments, double or triple the amount has been deducted from employees' wages without authorization. All of these issues were brought to Mr. Saxe's attention, and Mr. Saxe's response was simply to terminate those inquiring, and continue on with the practice.

I CERTIFY THAT THE INFORMATION CONTAINED IN THE FOREGOING COMPLAINT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF. (SIGNATURE NOT NEEDED FOR ANONYMOUS OR FIELD COMPLAINTS)

Signed _____ Date_____

OFFICE USE ONLY

COMPLAINT TAKEN BY: _____

___ VERIFIED COMPLAINT ___ANONYMOUS COMPLAINT ___TELEPHONE/FIELD COMPLAINT

INVESTIGATOR, IF ASSIGNED _____

ALLEGED VIOLATION(S): _____ STATUTE: NRS _____

_____ STATUTE: NRS _____

_____ STATUTE: NRS _____

_____ STATUTE: NRS _____

HAS THIS EMPLOYER BEEN CONTACTED CONCERNING THE SAME OR SIMILAR VIOLATIONS IN THE PAST? YES ___ NO ___ UNKNOWN ___

DISPOSITION _____

Rev. 6/13

MARKS00017

EXHIBIT J

EXHIBIT J

U. S. Department of Labor
Occupational Safety and Health Administration

Notice of Alleged Safety or Health Hazards

For the General Public:

This form is provided for the assistance of any complainant and is not intended to constitute the exclusive means by which a complaint may be registered with the U.S. Department of Labor.

Sec 8(f)(1) of the Williams-Steiger Occupational Safety and Health Act, 29 U.S.C. 651, provides as follows: Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employee or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists, he shall notify the employees or representative of the employees in writing of such determination.

NOTE: Section 11(c) of the Act provides explicit protection for employees exercising their rights, including making safety and health complaints.

For Federal Employees:

This report format is provided to assist Federal employees or authorized representatives in registering a report of unsafe or unhealthful working conditions with the U.S. Department of Labor.

The Secretary of Labor may conduct unannounced inspection of agency workplaces when deemed necessary if an agency does not have occupational safety and health committees established in accordance with Subpart F, 29 CFR 1960; or in response to the reports of unsafe or unhealthful working conditions upon request of such agency committees under Sec. 1-3, Executive Order 12196; or in the case of a report of imminent danger when such a committee has not responded to the report as required in Sec. 1-201(h).

INSTRUCTIONS:

Open the form and complete the front page as accurately and completely as possible. Describe each hazard you think exists in as much detail as you can. If the hazards described in your complaint are not all in the same area, please identify where each hazard can be found at the worksite. If there is any particular evidence that supports your suspicion that a hazard exists (for instance, a recent accident or physical symptoms of employees at your site) include the information in your description. If you need more space than is provided on the form, continue on any other sheet of paper.

After you have completed the form, return it to your local OSHA office.

NOTE: It is unlawful to make any false statement, representation or certification in any document filed pursuant to the Occupational Safety and Health Act of 1970. Violations can be punished by a fine of not more than $10,000. or by imprisonment of not more than six months, or by both. (Section 17(g))

Public reporting burden for this voluntary collection of information is estimated to vary from 15 to 25 minutes per response with an average of 17 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. An Agency may not conduct or sponsor, and persons are not required to respond to the collection of information unless it displays a valid OMB Control Number. Send comment regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Directorate of Enforcement Programs, Department of Labor, Room N-3119, 200 Constitution Ave., NW, Washington, DC; 20210.

OMB Approval# 1218-0064; Expires: 08-31-2017

Do not send the completed form to this Office.

MARKS00028
OSHA-7(Rev. 9/93)

U. S. Department of Labor
Occupational Safety and Health Administration

Notice of Alleged Safety or Health Hazards

			Complaint Number	
Establishment Name	DAVID SAXE PRODUCTIONS & V THEATER GROUP			
Site Address	5030 W. OQUENDO LAS VEGAS, NEVADA 89118 & 3663 S LAS VEGAS BOULEVARD #360			
	Site Phone	702-243-9820	Site FAX	702-384-2288
Mailing Address	5030 W. OQUENDO ROAD LAS VEGAS NEVADA 89118			
	Mail Phone		Mail FAX	
Management Official	DAVID SAXE		Telephone	702-243-9820
Type of Business	PRODUCTION COMPANY/THEATER			

HAZARD DESCRIPTION/LOCATION. Describe briefly the hazard(s) which you believe exist. Include the approximate number of employees exposed to or threatened by each hazard. Specify the particular building or worksite where the alleged violation exists.

David Saxe is the manager and owner of the V Theater Group and David Saxe Productions. Within the last few weeks, the following items have been brought to his attention for prompt resolution, but have not been addressed or resolved:

The V Theater, located at the Miracle Mile Shops at the Planet Hollywood Resort and Casino, does not have a hot works permit. Despite that, excessive welding has been taken place in preparation of its new show. Further, the individuals who are welding are not currently certified and many have never been certified. This practice was brought to Mr. Saxe's attention by both the internal staff as well as the chief engineer of the Miracle Mile Shops. They have likely continued doing so in secret (after hours so no one notices). Being in a hotel, this is a major issue. The improper welding set off a fire alarm a few weeks ago. This is the second time an employee was caught doing it in the last 45 days or so. That employee was told to never do it again; the advice was disregarded.

David Saxe Productions, which is under common ownership and management, does hold a hot works permit; however, again, there is no one who is actually certified to use the welding machines in a safe manner. If an agent showed up today and asked them to produce credentials as to certifications, they would not be able to provide them.

Similarly related, along without having any certifications for welding, the workers also do not hold any certifications for the operation of any forklifts or heavy machinery. David Saxe Productions contains a massive warehouse with various items on a 4 tiered shelf. A quick site inspection will make clear that these shelves house items in an unsafe and dangerous manner. Large items hang off the shelves, held on by nothing more than what appears to be saran-wrap-like sheet. If these items fall, they will cause injury and likely death due to their size and weight. These shelves are not nailed down in compliance with any regulation, so they could also tip over. The warehouse likely needs, but does not have, any sort of permit to store items at the height that it currently does.

Again, all of these items have been recently brought to the attention of David Saxe, the common owner and manager of David Saxe Productions and V Theater Group within the last month. None of these problems have been resolved.

Has this condition been brought to the attention of: ☒ Employer ☐ Other Government Agency(specify)

Please Indicate Your Desire: ☒ Do NOT reveal my name to my Employer ☐ My name may be revealed to the Employer

The Undersigned believes that a violation of an Occupational Safety or Health standard exists which is a job safety or health hazard at the establishment named on this form. (Mark "X" in ONE box)
☒ Former Employee ☐ Current Employee ☐ Federal Safety and Health Committee ☐ Representative of Employees ☐ Other (specify) _____

Complainant Name	ALEXANDER MARKS	Telephone	7025011486
Address(Street, City, State, Zip)	7100 GRAND MONTECITO PKWY		
Signature		Date	3/4/2016

If you are an authorized representative of employees affected by this complaint, please state the name of the organization that you represent and your title:

Organization Name: Your Title:

MARKS00029
OSHA-7(Rev. 3/96)

EXHIBIT K

EXHIBIT K

Kirsten A. Milton
Nevada State Bar No. 14401
Lynne K. McChrystal
Nevada State Bar No. 14739
JACKSON LEWIS P.C.
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Email: kirsten.milton@jacksonlewis.com
Email: lynne.mcchrystal@jacksonlewis.com

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. 2:17-cv-02110-KJD-DJA **DECLARATION OF LYNNE MCCHRYSTAL IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I, Lynne McChrystal declare:

1. I am an attorney licensed to practice law in the State of Nevada and am currently an attorney with the law firm of Jackson Lewis P.C., counsel for Defendants David Saxe Productions, LLC, Saxe Management, LLC, and David Saxe (hereinafter "Defendants"), in the above-captioned litigation. I have personal knowledge of the facts set forth below in this declaration. I am competent to testify as to the facts stated herein in a court of law and will so testify if called upon.

2. This declaration is submitted to assist the Court in verifying the authenticity of exhibits attached to Defendants' Motion for Summary Judgment ("Motion").

3. Exhibit A to the Motion contains relevant portions of the transcript from Andrew August's deposition ("August Dep."); the court reporter's certificate of authenticity is contained at

the end of Exhibit A. Exhibit A to the Motion also contains a true and correct copy of the Declaration of Andrew August ("August Decl."). The August Decl. is Exhibit 3 to the August Dep. and is authenticated therein at 65:4-23.

4. Exhibit B to the Motion contains relevant portions of the transcript from Defendant David Saxe's deposition ("Saxe Dep."); the court reporter's certificate of authenticity is contained at the end of Exhibit B.

5. Exhibit C to the Motion contains relevant portions of the transcript from Plaintiff Alexander Marks' deposition ("Marks Dep."); the court reporter's certificate of authenticity is contained at the end of Exhibit C.

6. Exhibit D to the Motion is a true and accurate copy of an email produced by Plaintiff in the course of discovery as MARKS-00001. *See* 31 Wright & Gold, Federal Practice and Proc: Evidence § 7105 ("[a]uthentication can also be accomplished through judicial admissions such as stipulations, pleadings, and production of items in response to subpoena or other discovery request").

7. Exhibit E to the Motion contains relevant portions of the transcript from Larry Tokarski's deposition ("Tokarski Dep."); the court reporter's certificate of authenticity is contained at the end of Exhibit E.

8. Exhibit F to the Motion is a true and correct copy of Veronica Duran's Declaration.

9. Exhibit G to the Motion is a true and correct copy of David Saxe's Declaration.

10. Exhibit H to the Motion is a true and accurate copy of an email produced by Plaintiff in the course of discovery as MARKS-00019.

11. Exhibit I to the Motion contains true and accurate copies of documents produced by Plaintiff in the course of discovery as MARKS-00013-00017.

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12. Exhibit J to the Motion contains true and accurate copies of documents produced by Plaintiff in the course of discovery as MARKS-00028-000029.

I declare under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct.

EXECUTED this 20th day of December, 2019.

LYNNE MCCHRYSTAL

4829-6949-0863, v. 1

JEFFREY GRONICH, ATTORNEY AT LAW, P.C.
Jeffrey Gronich, Esq. (#13136)
1810 E. Sahara Ave.
Suite 109
Las Vegas, Nevada 89104
Tel: (702) 430-6896
Fax: (702) 369-1290
jgronich@gronichlaw.com
Attorney for Plaintiff Alexander Marks

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

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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

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 for Summary Judgment.

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

DATED this 24th day of January, 2019

Respectfully submitted,
By: __/s/ Jeffrey Gronich_ __
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

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants argue that Plaintiff concocted a tale of wrongful termination a year after being terminated because he was merely a disgruntled employee. Certainly, Plaintiff was disgruntled, but only because he was terminated unlawfully. Within his rights, Plaintiff filed this lawsuit within the appropriate statutes of limitations and seeks justice from this Court for retaliation under the Fair Labor Standards Act, 29 U.S.C. §215 ("FLSA"), a violation of NRS 613.040 for being terminated because he was running for political office, and a violation of Nevada Public Policy for protecting whistleblowers.

Defendants contend that Plaintiff did not engage in any protected activity because his notice and report of violations were done within his role as General Counsel and could not have put Defendants on notice of a claim. However, this is an untenable argument as the Defendants were put on notice of Plaintiff's investigation independent of his role as General Counsel.

Defendants further contend that Plaintiff's reported OSHA violations occurred after his termination and therefore were not the cause of his termination. However, this contention ignores Plaintiff's repeated internal complaints and threats to his employer that he would make a claim to OSHA.

Defendants also claim that Plaintiff was terminated because he failed to meet deadlines and complete tasks required of him and was a disruptive employee. However, Defendants have failed to produce any credible evidence showing that Plaintiff failed to meet his performance expectations, despite requests to do so.

Contrary to Defendants' assertions, there is a material question of fact as to whether Defendants were aware of Plaintiff's protected activity (wage investigation, his campaign for public office, and his threats to report OSHA violations) and whether his termination was because of such protected activity.

II. FACTUAL BACKGROUND

Defendants have included a plethora of information in their Motion which they state are undisputed material facts. However, Defendants' Motion is littered with hearsay, unverified, and non-credible information. For example, Defendants cite on page 5 of their Motion part of David Saxe's

testimony about what he was told by other individuals concerning Marks' behavior. The actual behavior was not witnessed by Saxe, nor were any of those statements corroborated, nor those witnesses listed as likely to have discoverable information. Plaintiff's own deposition testimony is also taken out of context and as such Plaintiff has offered a Declaration in Support of this Motion attached hereto as Exhibit I. Plaintiff offers the following list of undisputed material facts.

a. UNDISPUTED MATERIAL FACTS

The following facts are material to the substantive law and are undisputed:

i. Plaintiff Alexander Marks was hired by Defendants as their General Counsel in April of 2015. Exhibit II.

ii. Under the terms of his employment, Plaintiff was classified as a salaried employee pursuant to the Fair Labor Standards Act. At the time he was hired, Plaintiff was paid $828.21 per week ($55,000.00 per year) and as General Counsel was categorically exempt from overtime under 29 CFR §541.304. *Id.*, Exhibit I, ¶2.

iii. David Saxe was Plaintiff's direct supervisor throughout his employment with Defendants. Exhibit XIV, p89:20.

iv. On or about November 20, 2015, Plaintiff received a raise to $892.97 per week. Exhibit III.

v. During Plaintiff's employment, David Saxe was able to monitor and record his employees through audio/visual cameras set up in each office. Exhibit XIV p95:7-14; 97:13-25; 153:9-21; Exhibit XV p96-99; Exhibit IV SAXE-109-110; Exhibit V, SAXE-0021

vi. David Saxe was also able to monitor and record his employees' work activity through keystroke tracking software and monitor screen capture software. Exhibit XIV p100-102; Exhibit XV p99-101; Exhibit IV SAXE-109-110; Exhibit V, SAXE-0021

vii. David Saxe frequently utilized the various monitoring systems to watch his employees at work and see what they were working on. He also frequently disciplined employees when he observed activity he did not approve of through these monitoring systems. Exhibit I ¶8.

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

viii. Plaintiff never received any discipline or write ups while an employee of Defendants. Exhibit I ¶9[1]

ix. In or about October of 2015, Plaintiff first spoke with Saxe about his intention to run for the Nevada legislature. In January of 2016, Plaintiff again spoke with Saxe about his run for Nevada State Senate. Plaintiff informed Saxe that there would be certain times where he would have to be away from the office to attend certain functions. Saxe approved and stated that the time away from the office would not be a problem. Exhibit I ¶

x. At no point during his employment did Plaintiff ever take a full day off in order to tend to his campaign. Exhibit I ¶12

xi. At no point did Plaintiff ever fail to perform the work required of him as a result of his political activity. Exhibit I ¶13-16.

xii. In or about November of 2015, Plaintiff observed uncertified employees were performing welding procedures at Defendants' theater without proper permits. Plaintiff reported that activity to Saxe and told him that if it were not corrected, he would have to file a report with OSHA. Saxe agreed to get those employees certified and agreed to have employees cease welding activity at the theater. He placed that task in his to-do list. As of late February, 2016, Saxe had yet to comply with those promises. Marks again told Saxe that if it wasn't fixed it would have to be reported. Exhibit I ¶17

xiii. Although he was supposed to be exempt from overtime as a salaried employee, on February 25, 2016, Plaintiff arrived at work and performed work for a short time before feeling ill and leaving. He notified Saxe that he had to leave the office and go home. Exhibit VI, SAXE-0141

xiv. When Saxe was informed that Plaintiff had left the office early, minutes later, he called his Controller, Larry Tokarski, and instructed him to not pay Plaintiff for that day, even though Plaintiff was a salaried exempt employee. Exhibit XV p25:3-5

[1] This is also supported by the absence of any write ups or disciplinary forms which were requested by Plaintiff. Exhibit DISCOVERY REQUESTS

Jeffrey Gronich, Attorney at Law, P.C.
1810 E. Sahara Ave., Suite 109
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xv. On or about February 26, 2016, Tokarski informed Plaintiff that Saxe was not going to pay him for February 25, 2016. Exhibit XV p56-57

xvi. Plaintiff told Tokarski that if he was not paid for that day, there would be a violation of the FLSA, and he asked Tokarski to relay that message to Saxe. Exhibit I ¶19

xvii. Plaintiff thereafter initiated an investigation into whether Saxe had done this before to either himself or other employees. Exhibit I ¶20-22

xviii. Marks did not miss any work after February 25, 2016 for any reason. Exhibit I ¶23

xix. Marks did not fail to perform any of his tasks after February 25, 2016 for any reason. Exhibit I ¶24

xx. Despite that, on February 29, 2016, Saxe wrote himself an email purporting that Marks was not devoting his full attention to work. This email was never sent to Marks. Exhibit VII; Exhibit I ¶25.

xxi. At no point prior to March 2, 2016 did Saxe ever tell Marks that he was spending too much time on his political campaign or that the campaign was interfering with his work. Exhibit 1 ¶25.

xxii. On March 2, 2016, Saxe terminated Marks' employment. Exhibit I ¶26.

b. DISPUTED MATERIAL FACTS

Rather than pick apart each of the facts listed in Defendants' Motion line by line, Plaintiff's Response will show which of Defendants' alleged undisputed facts are in fact in dispute as well as the basis for that dispute within the context of the legal framework.

III. LEGAL ARGUMENT

a. STANDARD FOR SUMMARY JUDGMENT

In civil cases, the summary judgment standard is well-known. "Summary judgment is appropriate where no genuine issue of material fact exists and a party is entitled to prevail in the case as a matter of law." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). The reviewing court "must view the evidence on summary judgment in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party." *Bank of New York v. Fremont Gen. Corp.,* 514 F.3d 1008, 1014 (9th Cir. 2008).

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The quantum of evidence required to successfully oppose a motion for summary judgment is not high. "The non-moving party need not show the issue will be resolved conclusively in its favor. All that is necessary is submission of sufficient evidence to create a material factual dispute, thereby requiring a jury or judge to resolve the parties' differing versions at trial." *Anderson*, 477 U.S. at 248-249.

b. MARKS' CLAIM FOR FLSA RETALIATION DOES NOT FAIL

i. Marks Engaged in Statutorily Protected Activity

Under 29 U.S.C. §215(a)(3), an employer may not "discharge or in any other 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, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." In order to be considered protected activity under that statute, a complaint must be "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection "*Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14, 131 S. Ct. 1325, 1335, 179 L. Ed. 2d 379 (2011). Defendants argue that because reporting legal issues was within the purview of his job duties as Defendants' General Counsel, that Plaintiff cannot as a matter of law be protected as a whistleblower when he makes such reports. This is an untenable position.

Oftentimes, profitability and legal compliance are not mutually supporting positions. Imagine a law firm terminating an employee for reporting ethics violations to the Bar, or for informing a partner about a client who is sexually harassing her. Just because such obligations are within the purview of those attorneys' job duties does not make them unprotected from wrongful termination claims. By this logic, no general counsel could ever be allowed to protect his or her own rights or the rights of their coworkers. The Ninth Circuit actually rejected Defendants' argument in *Rosenfield v. GlobalTranz Enterprises, Inc.*, 811 F.3d 282, 287 (9th Cir. 2015). The Court there stated:

> Because *Kasten* requires consideration of the content and context of an alleged FLSA complaint, the question of fair notice must be resolved on a case-by-case basis. An employee's managerial position is only one consideration, and the Supreme Court's general rule provides adequate

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> guidance for considering that fact. Moreover, an employee's status as a "manager" is not entirely binary. A different perspective on fair notice may apply as between a first-level manager who is responsible for overseeing day-to-day operations and a high-level manager who is responsible for ensuring the company's compliance with the FLSA. Refining the general rule to focus on only one specific factual element may obscure important nuances.
>
> We solicited the views of the Department of Labor and the Equal Employment Opportunity Commission because the views of those agencies are entitled to some weight when interpreting § 215(a)(3). *Kasten,* 131 S.Ct. at 1335. The agencies submitted a helpful joint brief urging us to apply *Kasten's* "fair notice" rule as the rule of decision. Having found their view persuasive on that point, we turn now to the task of applying *Kasten's* rule to the record in this case.

Because each case must be viewed in its own context and circumstances, this Court may not rule as a matter of law that merely because Plaintiff served as General Counsel that his actions are not protected.

Despite Defendants' generalization of what a company attorney might be tasked with, there is not a single shred of evidence to suggest that Defendants hired Plaintiff to audit the FLSA system nor that he was assigned that task. While some companies probably hire legal counsel to ensure that they are in compliance with certain laws, it is also true that some companies hire counsel to help them hide or justify unlawful activity. For example, it is undisputed that David Saxe tried to use Plaintiff's services to get out of his civil obligation of performing jury duty through definitively unscrupulous means. Exhibit VIII. In fact, Saxe did not even expect Marks to be performing many legal related tasks at all as he was not licensed in the state of Nevada. Exhibit XIV, p102-105. Specifically, at p103:8-22:

> Q: What were Mr. Marks' duties, job duties?
> A: Well originally I wanted him to do a lot of the legal stuff, but he didn't have a license so it started less in the legal and more on the just miscellaneous stuff.
> Q: Can you be more specific with me?
> A: Sure, he ended up doing, throughout his time there he ended up doing some HR related stuff, some compliance related stuff. He liked -- he liked the showbiz aspects of things, so he dealt with some of the entertainers for just some of the entertainment stuff related to visas and some other things. Insurance. I think he dealt with the insurance companies. That's all I can think of right now.

Nowhere in his testimony does Saxe ever indicate that he expects Marks to be researching legal compliance on his own initiative – especially concerning payroll practices. Rather, the investigation

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was done not out of Marks' concern for the company, but because he was attempting to protect not only himself, but the employees of the company from being swindled out of their fair and legal earnings. Exhibit I ¶21.

ii. There is a Genuine Issue of Fact as to Whether Defendants were on Notice of the Complaint

Defendants assert that there is no dispute that Marks never "lodged any complaint." However, that issue is exactly what is in dispute. Specifically, Defendants state that Marks "never assisted any employees in asserting FLSA claims against DSP, never encouraged any employees to file their own claims, never filed any claims with the U.S. Department of Labor before his employment was terminated, and, by his own admission, never even put Saxe on notice of any behavior that could possibly form the basis of a retaliation claim – as he must to be found to have engaged in protected activity under the FLSA." *Defendants Motion for Summary Judgment, p13, 15-21.* However, this assertion ignores the complete timeline of events and the fact that Plaintiff was retaliated not because he went to the labor commission or filed a lawsuit, or helped other employees file their own claims; but because 1) he complained about the FLSA violation as it related to himself and 2) because he attempted to perform an investigation into deeper violations in order that he could then make an official complaint but was terminated before he completed that investigation – before he had the opportunity to make the complaint.

The question then goes back to the original one – whether Defendants were on notice of Plaintiff's complaint and/or investigation. Here there is a genuine issue of material fact. Defendants assert that Marks never lodged any complaint sufficient to rise to the level of necessary protected activity. However, that belies the entire point. There is no question that Defendants attempted to violate the FLSA by docking Plaintiff's pay on a day that he performed work.[2] Exhibit XV p25:3-5. Plaintiff discussed this with the controller, Larry Tokarski and discovered that Saxe had routinely instructed Tokarski to dock pay for salaried employees in violation of the FLSA. Exhibit 1 ¶20; Exhibit XV p52-53. Plaintiff then asked Tokarski for payroll records to perform an investigation into how often the

[2] Pursuant to the salary basis test…When Saxe told Tokarski not to pay Plaintiff for DATE, he was at risk of making Plaintiff a non-exempt employee who would be eligible for overtime under the FLSA.

violations had occurred. Exhibit I ¶20.

Tokarski did not recall speaking to Saxe, but there is an email between Tokarski, Saxe, and Duran in which it is said that Marks knows he should be paid for the day by law. Exhibit VI. At the very least, this email shows that Marks had made a legal complaint which was then communicated to Saxe. Suspiciously, that email is missing at least one or more pages which could contain pertinent and relevant information which show more precise wording by Tokarski about a legal claim. Those pages were never produced, despite a request. Exhibit XIII (Request Nos. 8 & 19). Nevertheless, the context of that email makes it clear that Saxe was on notice of Marks' legal complaint. To the extent that Defendants insist that Marks needed to go to Saxe himself with his complaint, that argument also fails. Defendants had an "open door" policy which allowed Marks to first make his complaint to the appropriate department head. Exhibit IV, SAXE-0113.

The *Kasten* Court recognized that a "complaint" protected by the FLSA can take many forms and cannot merely be limited to an official written notice, but rather can encompass informal notice to the employer of FLSA violations. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 131 S. Ct. 1325, 1328, 179 L. Ed. 2d 379 (2011)("The Act relies for enforcement of its substantive standards on information and complaints received from employees and its antiretaliation provision makes the enforcement scheme effective by preventing fear of economic retaliation from inducing workers quietly to accept substandard conditions…a limiting reading [of the antiretaliation provision] would discourage using informal workplace grievance procedures to secure compliance with the Act" – *internal citations omitted*).

There is no question that Saxe was aware that Plaintiff "complained" about his own FLSA violation. There is no question that Plaintiff intended to make Saxe aware of his complaint by telling Tokarski to speak to Saxe about it. Thus, there is no question that Plaintiff intended to put his employer on notice of his own claim for an FLSA violation. The reason there is no question is because Saxe ended up paying Marks for that day. Had Saxe not been made aware that docking Marks' pay was in violation of the FLSA, why would he have independently changed his mind? It is only logical that Saxe must have been put on notice of the complaint.

The next question is whether or not Saxe was aware of the investigation. Although Saxe

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testified that he was not, Defendants have refused to provide information central to this issue during the discovery process.

Specifically, after Marks spoke with Tokarski about his FLSA complaint, he began an investigation into the company payroll records. To do so, he used his company computer to access payroll records and reports. Exhibit C of Defendants' Motion, p 88-90. There is no question that Saxe monitors his employees with video and audio surveillance. Exhibit IV (SAXE109-110) & Exhibit V. Saxe also admitted that he has a TV in his office with a multi-view of the surveillance cameras which he can listen to audio on – and does so at any given time. Exhibit XIV p95:7-14; 97:13-25; 153:9-21. Tokarki testified at length about how he watched Saxe sit in his office and watch employees work and listen in on their conversations, and how Saxe would confront him about his own private conversations that could only have been overheard via the camera monitoring. Exhibit XV p96-99;

Saxe also utilizes keystroke tracking software and screenshot capturing software to monitor employee activity. Exhibit XIV 100-102; Exhibit XV p99-101; Exhibit IV SAXE-109-110; Exhibit V. Marks himself was aware of a number of occasions on which Saxe told him that he wanted to discipline certain employees because of what he saw on the monitoring system. Exhibit I ¶8. In fact, one of the top complaints by former employees is the constant computer monitoring that Saxe does. *See generally https://www.glassdoor.com/Reviews/David-Saxe-Productions-Reviews-E709138.htm*.

This is not merely some conspiracy theory, it is well known throughout the company that Saxe spends a significant amount of time monitoring the employees via the audio/visual cameras and computer tracking software, and then disciplines employees based on what he sees. It is not unreasonable under these conditions for Saxe to have been aware of Marks' conversation with Tokarksi by reviewing the video records and listening to their conversation – as he had done previously. It is not unreasonable to believe that Saxe also saw Marks' research activities through both video surveillance and keystroke monitors. Unfortunately, despite a request for the audio/visual records and the computer tracking software records, Defendants failed to provide such information. Exhibit XIII (Request Nos. 6, 7, 13, & 16). Defendants stated reason for not providing the material is that it was not kept after a short amount of time. However, Defendants did produce a video from the day

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Marks was terminated. Exhibit IX.[3] This begs the question, why was that video kept, but not any others from the same time period?

Whether Saxe was on notice of Plaintiff's investigation is a material question which cannot be determined by summary judgment. Presuming that he was aware, the fact that he terminated Plaintiff before Plaintiff could confront him about it does not absolve Defendants of liability for retaliation. *See* Section D(1) below.

i. Marks Suffered Adverse Employment Action

There is no question that Marks suffered adverse employment action because he was terminated within days of his complaint and investigation.

ii. There is a Genuine Issue of Material Fact as to the Reason Marks' Employment Was Terminated

Proximate cause is a question of fact for the jury and becomes a matter of law "only where reasonable minds could not differ. *Smith v. Ingersoll-Rand Co.*, 139 F.3d 908 (9th Cir. 1998). Defendants claim that under *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), the causation standard in retaliation claims is more vigorous than discrimination claims. Defendants cite to a plethora of cases for this proposition. However, none of Defendants cited cases actually stand for that proposition in FLSA retaliation cases. Indeed, in one of the cases cited by Defendants, *Knickerbocker v. City of Stockton*, 81 F.3d 907, 911 (9th Cir. 1996), the Court specifically held that under an FLSA retaliation claim, the Court must use a dual motive test under which the protected activities need only be a substantial factor in the adverse action, but not the sole factor. As recently as 2014, the Ninth Circuit specifically chose not to apply the *Nasser* test on FLSA cases, instead continuing to apply the mixed motive/motivating factor standard. *Avila v. Los Angeles Police Dep't*, 758 F.3d 1096, 1107 n3 (9th Cir. 2014). *See also McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1484 (10th Cir. 1996) *(*the mere existence of a non-retaliatory motive that would justify an employee's discharge does not absolve an employer of liability for a retaliatory employment decision; rather, the employer must *actually rely* on that nonretaliatory reason as the sufficient, motivating reason for the

[3] Rather than produce the video itself, Plaintiff has produced a screenshot of the video for the convenience of the Court.

employment decision.)

Therefore, while Defendants may assert non-retaliatory reasons for Plaintiff's termination, it is a genuine issue of fact for the jury to determine whether Plaintiff's protected activity was also a substantial factor into the decision to terminate his employment. In other words, while Saxe may assert that he terminated Plaintiff's employment because he was frustrated with Plaintiff's attitude or work performance, that does not preclude the fact that Marks' protected activity was also a substantially motivating factor in the decision to terminate.

Moreover, and perhaps more importantly, Defendants cannot show the absence of a genuine issue of fact that their proffered explanation for terminating Plaintiff's employment was not pretextual.

When analyzing causation in a wrongful termination case, the US Supreme Court has stated that the significance of any given action should not be judged on an objective standard, but that the context of the surrounding circumstances should be acknowledged. *Burlington Northern and Santa Fe Ry. Co. v. White* 548 U.S. 53, 69 (2006). Further, causation may be inferred from circumstantial evidence, such as the relation in time between the protected activity, and the retaliatory activity. *Yartzoff v. Thomas* 809 F.2d 1371, 1376 (9th Cir. 1987).

Here, there is no question that Plaintiff's employment was terminated within days of reporting the FLSA violation and beginning his investigation. Not weeks or months or years, but days. Such a close temporal proximity provides sufficient evidence of causality. *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 1511, 149 L. Ed. 2d 509 (2001). *See also Koutseva v. Wynn Resorts Holding, LLC*, No. 217CV3021JCMCWH, 2018 WL 3731085, at *8 (D. Nev. Aug. 6, 2018) (two week period between filing of EEOC claim and adverse activity close enough to show prima facie claim for causation). Even more suspicious is that on February 29, 2016, just after Marks began his investigation, Saxe sent an email to himself – not to Marks – that was stylized as a termination letter to Marks. Exhibit VII. Why would Saxe write a termination email to himself three days before terminating Marks, and just after Marks started the payroll investigation? The most obvious answer is because Saxe decided to terminate Marks after he saw what Marks was doing and wanted to cover his reasoning.

Tokarski himself asserted that Saxe believed he was above the law and ran his company in the

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same way. Exhibit XV 52:18-24; 95:17-19. This is not the only case in which Saxe is being or has been sued for retaliatory termination. *See* David Saxe Productions, LLC and Vegas! The Show, LLC, Joint Employers, 28-CA-075461 (N.L.R.B-ALJ May 7, 2013) (allegation of wrongful termination for engaging in protected union activity). It is entirely reasonable for a factfinder to conclude that Saxe's motivation for terminating Plaintiff was because of the FLSA complaint and subsequent investigation.

Turning to Defendants' proffered explanation for Marks' termination – that Marks had unsatisfactory job performance – there is not enough credible evidence to show that Marks' job performance was in fact substandard, and even if it were, that it was not so substandard as to terminate his employment.

Defendants had a policy in place regarding expectations of employee and reviews. Exhibit IV is an excerpt from Defendants' Employee Handbook which goes over the standards of conduct. That policy states in relevant part, "Where the company determines it to be appropriate in the exercise of its discretion, it may attempt to give an employee a prior written or oral warning (which may be documented) and an opportunity to improve or correct a performance and/or attitude problem before termination." *Id.*, SAXE-0099. The handbook also provides that each employee is to be given an evaluation on their performance within ninety days of starting. *Id.* SAXE-0089. Defendants admit that Plaintiff was not given any formal evaluations, reviews, or appraisals. Exhibit XIII(Interrogatory No. 2). Defendants also admit that Plaintiff was not disciplined, but rather was given suggestions and/or reprimanded. *Id*. Interrogatory No. 8. Defendants have not produced any evaluation of Marks' performance nor any prior written or documented verbal warnings. There is also no question that Marks was never given and written or oral documented warnings about performance or attitude problems. Certainly, the Employer is not required to evaluate or write up an employee before termination, but the absence of doing so when the employers' own policy provides for that raises a material question of fact as to whether Marks was actually underperforming.

Defendants have offered a few emails which ostensibly show Saxe supervising and coaching his employee, as any good manager should. *See generally* Exhibits 1-6 to Exhibit G of Defendants' Motion. But there are only a handful of these such emails and most of them occur well before Plaintiff

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was terminated. There is one in June of 2015, two in August of 2015, and one in October of 2015. There are few emails from January of 2016 concerning one specific assignment and there appears to be no urgency on the issue as there is first an email on January 4, 2016 and then no follow up until January 23, 2016.

However, each of these emails lack context and appear to be nothing more than a manager giving guidance on a project. One of those emails – Exhibit 2 to Exhibit G, Saxe-0151 – was actually in response to Plaintiff's refusal to send a racist and sexist letter on behalf of Saxe in order to help him get out of jury duty. The e-mail chain giving context to this is attached hereto at Exhibit VIII.

Exhibit 3 to Exhibit G completely goes against Defendants intent to show that Saxe was unhappy with Marks' performance because merely three weeks after that email, Marks was given a raise. Exhibit III. Had Saxe been disappointed with Marks' performance, he would not have thereafter increased his salary.

Additionally, Exhibit 5 to Exhibit G also lacks context. Attached hereto are additional emails in that thread which show that Saxe is not only giving feedback to Marks, but also to Veronica Duran. Exhibit X, SAXE-0076-0078. Notably, Ms. Duran was not terminated for her failure to perform in that instance. To the extent that she was disciplined at all, Plaintiff is unaware as Defendants failed to produce her personnel file in response to a request for it. Exhibit XIII (Request No. 24).

Exhibit 5 to Exhibit G are two halves of two separate emails. The other halves of those emails have not been produced and therefore no context can be gleaned from it.

In fact, Defendants have refused to produce all of the emails between Marks and Saxe which would tend to show more than merely emails where Saxe was giving negative feedback. Plaintiff made a request for such documents and Defendants have only produced a select few Exhibit XIII (Request No .8). There is at least one example of Saxe sending Marks an email with a request and Marks responds in only six minutes, showing that Marks did respond to his assignments. Exhibit X, SAXE-0070.

Plaintiff had also requested documents that he worked on during his employment which would tend to show whether or not he was doing those tasks, when they were completed, and whether they were completed properly. Plaintiff even offered to enter into a protective order and allow for certain

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redactions to protect attorney-client privilege. Nevertheless, Defendants refused to produce any such documents. Exhibit XIII (Request Nos. 7, 8, 9, 19, & 20); Exhibit XVII ¶6

Plaintiff also requested copies of his keystroke and smart sheet records. Exhibit XIII (Request No. 6 & 13). Although it is undisputed that Saxe uses software to monitor employee work and productivity, Defendants insisted, without providing any policy or affidavit of any IT employee that such records had been deleted naturally. Exhibit XVII ¶7

As to Ms. Duran's affidavit, such affidavit should be excluded as Ms. Duran was not properly named as a witness in this matter. Specifically, although her name was disclosed as a potential witness on May 10, 2019, the disclosure stated only that she was "expected to testify regarding her knowledge and information of the facts and circumstances at issue in this matter." Exhibit XI This is hardly complaint with the requirements of FRCP 26 (b) which requires a disclosure of "the name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b), including for impeachment or rebuttal, ***identifying the subjects of the information***." (emphasis added). Plaintiff should not be placed in a position to guess as to what information Ms. Duran is likely to testify to and should not have to bear the cost of deposing her just to find out. Plaintiff even asked for her personnel file, but Defendants refused to produce it. Exhibit XIII (Request No. 24).

Furthermore, her statements in her affidavit are incorrect. While Plaintiff was employed, Defendants had no VP of Operations. Marks asserts that Ms. Duran was the Executive Assistant. Exhibit I ¶4. This is also shown by her signature line in her emails. Exhibit VI. In that role, she did not supervise Marks and did not share an office with him. Exhibit I ¶4. Ms. Duran also implies that Marks announced his candidacy right after he began his employment, however, this is impossible as he was hired in April of 2015 – right in the middle of a legislative session. It would not have been possible for Plaintiff to begin his campaign until at least mid-October of 2015. Ms. Duran's affidavit is merely speculation and conjecture without any support.

It is not a coincidence that Saxe chose to terminate Marks on the day that he did. The timing alone should raise enough of an issue to survive summary judgment. Even if it were not enough, there are significant questions as to whether Marks' work performance was really substandard, or at least

substandard enough to justify termination on its own. It is easy for Defendants to claim that there is no issue of fact when they are withholding facts which are contrary to their stated position. Defendants cannot be allowed to ask for a ruling that there are no issues of fact concerning Plaintiff's work performance when they have refused to produce all relevant documents related to his work performance. Accordingly, at the very least, the reason for Marks' termination, and thus the issue of proximate causation, must survive summary judgment.

c. MARKS' NRS 613.040 CLAIM

Defendants suggest that because NRS 613.040 does not use the phrase "an employer may not terminate an employee" for running for political office, that such an interpretation cannot be encompassed by the plain meaning of the statute. Indeed, this Court has previously found that "if an employer attempts to prevent an employee from engaging in politics it is…unlawful in Nevada." *Nevadans For Fairness v. Heller*, No. A385931, 1998 WL 357316, at *2 (Nev. Dist. Ct. June 10, 1998). The statute does not require a written rule or policy which states that an employee will be terminated for running for office. Rules and policies can be formed and understood to exist by the actions of the employer.

By terminating Marks because Marks became a candidate for public office, Defendants were intimidating other employees from similarly engaging in politics by showing them that if they were to do so, they would face termination. It is an untenable position that NRS 613.040 does not specifically prohibit terminating an employee because that employee runs for public office as doing so sets a precedent for the action and implies a rule.

Next, Defendants attempt to compare NRS 613.040 to a similar, but not identical California Statute, Section 1101(a) of the California Labor Code. In doing so, Defendants use an unpublished case to suggest that the California statute is interpreted to mean that the purpose of the statute is ONLY to protect employees' political freedoms when the employer holds differing political viewpoints. This interpretation has not been upheld, nor even suggested by any Nevada Court. Nor can it because it is an interpretation of a California law. Defendants have cited no discussion or legislative history behind the implementation of the Nevada law. The plain text of the law, as Defendants state, is very clear. There is no caveat that the statute only applies if the employer

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disagrees with the Employee's position and Defendants cite no authority to show that the legislature intended such a caveat to exist.

Furthermore, Defendants take their quoted statement from that case out of context. The Court there was discussing whether an employer could have an apolitical policy that, as a side effect, might inhibit certain political activity, but acknowledges that courts had traditionally interpreted the statute as being intended to defend employees engaged in traditional political activity from reprisal by their employer. *Couch v. Morgan Stanley & Co.*, No. 1:14-CV-10-LJO-JLT, 2015 WL 4716297, at *12 (E.D. Cal. Aug. 7, 2015), aff'd, 656 F. App'x 841 (9th Cir. 2016). In other words, if, for example, Defendant had a policy that required an employee to be at work between 8-5 Monday through Friday and required a request form be filled out and approved by a manager prior to taking time off, then they could prohibit Plaintiff from taking a longer lunch break for a political meeting as it would violate their policy.

But there is no evidence that Defendants had any such apolitical or neutral policy. In fact, Defendants' policy on working hours states that while hourly employees are expected to be in the office for eight hours per day, the policy specifically excluded salaried employees like Marks from that eight-hour rule. Exhibit IV, SAXE-0092 Moreover, Defendants' business model required odd hours as it was a theater and entertainment company which had nighttime shows. There were many occasions where Plaintiff was required to stay late to tend to theater issues or answer phone calls. Defendants have not shown even one instance where Marks' presence was required and he was unavailable.

In essence, the question here is whether Defendants terminated Plaintiff because he was shirking his work responsibilities to work on his campaign. As explained hereinabove, Defendants have not provided any relevant evidence to show that Marks was in fact shirking his responsibilities. They have provided to time records showing when Marks was or was not in the office. Most of Marks' political meetings and activities occurred after the work day was over. Exhibit 1 ¶12 Attached hereto as Exhibit XII is a true and correct copy of Marks' personal calendar which show various political appointments, nearly all of which either occur after work or during Marks' lunch period. Moreover, as a salary employee, Marks could easily make up time used for a political meeting on a different day

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with no or inconvenience to his employer. As long as his work was completed – and there's no evidence it wasn't – Marks' political activity was not in violation of any of Defendants' policies.

Further, to the extent Defendants contend that Marks was working on his campaign during work hours, this amounted to nothing more than the usual social interaction employees might have with coworkers. Exhibit XVI p38-42; 49-51. Specifically, August stated:

> Q: You said politics. What kind of politics did you talk?
> A: He informed me he was some city council or state council. I don't know. I'm not too familiar with politics, so.
> Q. So did you consider all of those topics of conversation to be just social interactions with him?
> A. Yes.
> Q. Did any of those social interactions with Alex affect your ability to do your job?
> A. Did they affect my ability to do my job?
> Q. Correct.
> A. Could you rephrase that?
> Q. Did they interfere with your ability to work?
> A. No.

Tokarski spoke in depth about having social interactions with his coworkers about his outside activities and was never disciplined for it. Exhibit XV p105-109. There is not a single shred of evidence that Plaintiff's political discussion at the office was anything more than minimal social conversation. Saxe himself even admitted that he would have social conversations with Marks about television. Exhibit XIV p111:16-21. If Saxe were to terminate Marks for minimal social conversation at the office, he would need to terminate any other employee who engaged in social conversation at the office as well – but he did not. This indicates that it was not the discussion that Saxe objected to, but rather the content of the discussion; namely, Plaintiff's candidacy.

Most importantly, however, until the date of his termination, Saxe had not once told Plaintiff that his political activity was affecting his work. There is not a single shred of evidence that Saxe made any attempt to reprimand Plaintiff or coach him on the alleged affects his political aspirations were having on his work. Saxe had never told Plaintiff to stop discussing his campaign at work and never told him that he was spending too much time outside of the office.

Again, at the very least, Defendants have not shown an absence of a genuine issue of fact to preclude summary judgment on causation and thus the matter is not appropriate for summary

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judgment.

d. MARKS' PRE-TERMINATION THREATS REGARDING SAFETY ARE PROTECTED ACTIVITY UNDER NEVADA PUBLIC POLICY

i. Marks Qualifies as a Whistleblower

Plaintiff has already argued once that Plaintiff is not a whistleblower as a matter of law in its Motion to Dismiss and this Court has rejected that contention. *See* Dkt #26 page 3, lines 11-22.

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:

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

The issue in this case is causation – that is whether or not Defendants terminated Plaintiff

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because Plaintiff threatened to make a claim to OSHA. The Ninth Circuit, when discussing retaliatory discharge under Title VII, has stated, "[c]ausation sufficient to establish a prima facie case of unlawful retaliation may be inferred from the proximity in time between the protected action and the allegedly retaliatory discharge" *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731 (9th Cir. 1986); *see also, Yartzoff v. Thomas,* 809 F.2d 1371, 1377 (9th Cir.1987). There is no case that Plaintiff is aware of, in the Ninth Circuit or Nevada, in which a court states that termination MUST occur after the employee actually files a claim in order to make out a prima facie case of retaliation.

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

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

Despite Defendants' characterization, Plaintiff did believe that he was putting Defendants on notice of his intent to report claims to OSHA in the week before he was termination. Specifically, Plaintiff informed Saxe that there was uncertified and unsafe welding occurring in the theater in or about November of 2015. Exhibit I ¶17. Saxe had discussed getting certain employees certified for welding with Saxe and the task was placed in the Smartsheets program. *Id.* Although the task was not assigned to Marks, it was listed in his Smartsheet and as such he could see whether it had been completed or not. *Id.* By late February of 2016, the task was still pending. *Id.* Marks had multiple discussions with Ms. Duran and Saxe about why it had not been completed and that they were reportable violations. *Id.*

As explained hereinabove, Marks made his threats to file a complaint to OSHA and was

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terminated before he had the opportunity to make those complaints. Allowing an employer to escape liability for tortious discharge by preemptively terminating a Plaintiff would encourage employers to fire their employees the very moment the employee discusses any safety issue or threatens to make a claim unless the problem gets corrected first. This would completely go against the Court's reasoning set forth in *Hansen* where the court discussed the importance of ensuring that employees need not have to choose between having a job and making a rightful claim protecting some public interest. By terminating employees preemptively, the employer sends a message to other employees that they should keep their mouths shut.

Accordingly, Defendants should not be able to escape liability merely because they terminated Plaintiff before he could make his claim official. There is at least a genuine issue of fact as to whether Defendants were on notice of Plaintiff's intent to make a claim prior to his termination.

ii. Defendant Misinterprets the holding of the *Wiltsie* Case

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

In *Wiltsie*, the Nevada Supreme Court stated:

> No public policy is more basic than the enforcement of our gaming laws. "We believe that whistleblowing activity which serves a public purpose should be protected. So long as employees' actions are not merely private or proprietary, but instead seek to further the public good, the decision to expose illegal or unsafe practices should be encouraged." *Wagner v. City of Globe,* 150 Ariz. 82, 722 P.2d 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)

Wiltsie v. Baby Grand Corp., 105 Nev. 291, 293, 774 P.2d 432, 433–34 (1989). The Court in that case did not delve into any analysis of **why** the Plaintiff in that case chose to report the illegal conduct to his supervisor rather than an outside agency. In fact, the case does not even describe what

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the illegal conduct the employee was reporting, other than an allusion to gaming laws. The key takeaway from *Wiltsie* is not that an employee must go to an outside agency to be protected, but rather that the employee is protecting a ***public*** interest, as opposed to a proprietary one.

In that particular case, the Court decided that because the employee only reported the illegal conduct to a supervisor and not an outside agency, it was a proprietary concern, not a public one. However, that does not mean that every instance in which the employee fails to report illegal conduct to an outside agency is proprietary. The question should not be to whom was the report made, but rather **why** did the employee feel compelled to report it. If the answer is to protect his own interests (license, wages, reputation, employer's reputation, etc.), then it is a proprietary interest, not a public one. If however, the employee intends to protect a public good, such as safety, public well-being, or community interest, then it is not purely proprietary, but rather the employee is looking out for the good of others. This is the intent of the "public policy" doctrine, to protect an employee looking out for a public interest.

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

The Illinois Supreme Court later went on to overturn *Zaniecki,* holding that a complaint of retaliatory discharge is not precluded based on an employee's failure to report unlawful activity to a public official. *Lanning v. Morris Mobile Meals, Inc.*, 308 Ill. App. 3d 490, 493, 720 N.E.2d 1128,

1131 (1999). Thus, the case *Wiltsie* was originally based on has been overturned, effectively negating the principles on which *Wiltsie* stands.

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

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> 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.

Kim v. Humboldt Cty. Hosp. Dist., No. 3:12-CV-00430-MMD, 2015 WL 1330192, at *6 (D. Nev. Mar. 25, 2015) (internal citations omitted). Thus, within Nevada, courts have recognized that safety standards ***DO*** involve matters of public concern, in this case, there has been nothing to suggest that Marks' intention in reporting the safety issues was made for personal proprietary reasons, but rather for the public benefit.

iii. Marks Had a Good Faith Suspicion That Defendants Were Performing Unsafe Conduct

Defendants contend that Marks cannot show that he had a good faith belief that Defendants participated in illegal unsafe conduct and base such assertion on one of Marks' statements during his deposition. However, once again, Defendants attempt to escape liability because they have conveniently refused to produce relevant documents contrary to their position.

Defendants admit that Marks observed an employee welding in the theater, learned that certifications were required to perform welding, and discovered that the employee did not have the proper certifications. Motion at p 28;25-27. Despite a discussion with Saxe regarding the certifications, Marks never saw Saxe follow up on getting the certifications. Exhibit I ¶17. As explained hereinabove, the task was placed in the Smartsheets program and was never completed. *Id*. Additionally, Marks worked in an office miles away from the theater, the fact that he did not observe unsafe conduct after January of 2016 does not change the fact that because Saxe never provided any evidence to him that any certifications were obtained, he had no reason to believe the problem was fixed.

Moreover, Plaintiff asked for the certifications as well as a copy of the theater lease agreement (which Plaintiff believes prohibit welding in the theater) in a discovery request and Defendants refused to produce them. Exhibit XIII (Request No. 17 & 21) In a meet and confer

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telephone conversation, Defendants' counsel Kirsten Milton assured Plaintiff's counsel that they were not going to contend that Plaintiff did not have a good faith belief about the unsafe conduct and therefore the actual certifications and the lease agreement were unnecessary. Exhibit XVII ¶8

Defendants should not be able to hide behind this argument when they have failed and refused to produce documents which would go against it.

iv. There is a Material Question of Fact Regarding Causation of Plaintiff's Termination

As explained more fully hereinabove, whether Marks was terminated for legitimate work related reasons is a material question of fact. There is no question that Marks had discussions with Saxe about the potential safety violations in the week leading up to his termination. There is clearly a temporal proximity between those discussions and his termination. Defendants have alleged that Plaintiff was terminated for poor work performance but they have not offered any credible testimony to show that Plaintiff's overall work performance was substandard.

Accordingly, Defendants have not shown the absence of a material issue of fact as to the timing of Plaintiff's threat to report safety violations, Defendants' notice of such threat, and whether such threat was the proximate cause of his termination.

IV. CONCLUSION

It is clear that there are a plethora of disputed material issues of fact such that this matter is not appropriate for summary judgment. For the above stated reasons, this Court should deny Defendants' Motion for Summary Judgment.

Dated this 24th day of January, 2020

Respectfully submitted,

By: /s/ Jeffrey Gronich

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January, 2020, I caused to be served a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** on the following person(s) by electronically filing via the CM/ECF system utilized by this Court:

Kristen A. Milton, Esq.
Lynne K. McChrystal, Esq.
JACKSON LEWIS P.C.
3800 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169

Attorneys for Defendants

/s/ Jeffrey Gronich
An Employee of Jeffrey Gronich, Attorney at Law, P.C

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EXHIBIT I

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Attorney for Plaintiff Alexander Marks

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

DECLARATION OF ALEXANDER MARKS IN SUPPORT OF HIS RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I, ALEXANDER MARKS, hereby declare as follows:

1. I am the Plaintiff in this matter. I am over the age of eighteen years old, I have personal knowledge of the facts and circumstances set forth in this Declaration and could and would competently testify thereto in a court of law.
2. I was hired by Defendants as their General Counsel in April of 2015. In that position was paid a salary of $828.21 per week and was exempt from overtime under the Fair Labor Standards Act, 29 CFR 541.304.
3. David Saxe was my direct supervisor throughout my employment with Defendants.
4. Veronica Duran was never my supervisor, nor did she observe or independently assign my work, nor did she share an office with me.
5. On or about November 20, 2015, I received a performance related raise to $892.97 per week ($5,000.00 annually).

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6. During my employment, David Saxe was able to monitor and record all of his employees, including me, through audio/visual cameras set up in each office.
7. David Saxe was also able to monitor and record his employees' work activity, including mine, through keystroke tracking software and monitor screen capture software.
8. David Saxe frequently utilized the various monitoring systems to watch his employees at work and see what they were working on. He also frequently disciplined employees when he observed activity he did not approve of through these monitoring systems. For example, I recall one incident in which Saxe wanted to write up an employee for using Facebook during work hours. He was able to pull up her computer information through the monitoring software, printed out what time she was on Facebook and asked me to write her up for it. When I looked at the timestamp, I realized that she had accessed Facebook during her mandatory break pursuant to NRS 608.019. I told Saxe not to write her up because it was during her break. He initially refused, telling me he did not care about legal break times. However, I was able to convince him not to write her up.
9. I never received any discipline or write ups while an employee of Defendants.
10. In or about October of 2015, I spoke with Saxe about my intention to run for the Nevada legislature. He appeared to be excited and expressed his support.
11. In early 2016, having officially been endorsed by the Nevada Senate, Saxe and I had a conversation pertaining to my official run for office wherein Saxe asked what help I needed from him as my employer. I informed Saxe that there would be certain limited times where I would have to be away from the office to attend certain meetings. I clarified that this would never be excessive and would be done thoughtfully, ensuring work was completed first. I emphasized my work history and my availability via cell phone. Saxe approved and stated that my time away from the office would not be a problem.
12. At no point during my employment did I ever take a full day off in order to tend to my campaign. Nearly all of my campaign events or activities occurred either after work or during my lunch break. On the few rare occasions when I did have to leave work early, I arrived early that day to make up the time, or I stayed late a different day.

13. At no point did I ever fail to perform any of my assigned tasks for my employer.
14. At no point did Saxe, or anyone acting on behalf of Saxe, ever tell me that I was spending too much time away from the office because of my campaign.
15. Although I did have discussions with my coworkers about my campaign, those discussions were never more than a few minutes while on break and never interfered with either my, or their ability to get our work done.
16. I frequently observed other employees having social conversations and interactions throughout the office and those individuals were not disciplined or terminated for it. I also had many social discussions with Saxe throughout my employment.
17. In or about November of 2015, I observed uncertified employees performing welding procedures at Defendants' theater without proper permits. I reported that activity to Saxe and told him that if it were not corrected, I would have to report it to OSHA. Saxe agreed to get those employees certified and agreed to have employees cease welding activity at the theater. He placed that task in his and my to-do list, which I was able to see through the Smartsheets program. As of late February, 2016, Saxe had yet to comply with those promises. I again told him that if it wasn't fixed it would have to be reported.
18. Although I was supposed to be exempt from overtime as a salaried employee, on February 25, 2016, I arrived at work and performed work before feeling ill in the morning. I told the Controller, Larry Tokarki that I had to leave and I also called Saxe to let him know I was leaving due to illness.
19. When I returned to work the following day, February 26, 2016, Larry Tokarski came into my office and closed the door. Larry told me that Saxe had called him minutes after I spoke with Saxe the day before. I was told by Mr. Tokarski that Saxe had told him not to pay me for the previous day. I told Mr. Tokarski that by law he needed to pay me and I asked him to relay that message to Saxe.
20. I asked Mr. Tokarski if this was the first time that Saxe had instructed him to do this and he told me it was not. I told Mr. Tokarski I would have to do an investigation and asked him for three years worth of payroll records.

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21. I was not assigned this task by Saxe and it was not in the normal scope of my duties. I was concerned that if I had not been paid properly, there were probably other employees who had also not been paid properly. My intent in that investigation was to protect those employees from wage theft, not to protect the company from liability.
22. Although Mr. Tokarski did not get me those records, I was able to use my computer to access the paycheck and payroll system to review those records. I began this investigation on February 26, 2016.
23. I did not miss any work after February 25, 2016 for any reason.
24. I did not fail to perform any of my tasks after February 25, 2016 for any reason.
25. I never received an email or verbal discussion from Saxe prior to March 2, 2016 telling me that he thought my campaign was interfering with my work.
26. On March 2, 2016, Saxe terminated my employment.

I declare that the foregoing is true and correct under the penalty of perjury under the laws of the United States of America.

Dated: January 24, 2020

Alexander Marks

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EXHIBIT II

COMPANY: David Saxe Productions

EMPLOYEE FILE NOTE

EMPLOYEE INFORMATION

Employee Name: Alexander Marks

Rate: $55,000 ☑ Salary ☐ Hourly

Status: ☑ F/T ☐ P/T ☐ On-Call ☐ Temp

NEW HIRE / RE HIRE

☒ New Hire Job Title: IN-HOUSE LEGAL Effective Date: 4/7/2015

☐ Re-Hire Job Title: _____ Effective Date: _____

☐ Temporary Job Title: _____ Effective Date: _____

CHANGE

Change	Old Information	New Information Effective:
☐ Rate:	$ ☐ Salary ☐ Hourly	$ ☐ Salary ☐ Hourly
☐ Title:		
☐ Status:	☐ F/T ☐ P/T ☐ On-Call ☐ Temp	☐ F/T ☐ P/T ☐ On-Call ☐ Temp
☐ Transfer:		
☐ Address:		
☐ Other:	Date of Last Increase	% of Increase 0%

SEPARATION (CHECK ONE)

☐ Resigned With Notice (attach letter of resignation)

☐ Resigned With No Notice

☐ Retirement

☐ Dismissal

☐ Other (Explain): _____

REASON FOR SEPARATION

☐ Absenteeism/Tardiness

☐ Performance

☐ Job Change or Personal

☐ Violation of Policies/Procedures

☐ Other (Explain): _____

Separation Date: _____

Final Hours To Be Paid: _____

Last Day Worked: _____

Amount of Notice Given: _____

VERIFICATION OF CHANGES

Supervisor Signature

DAVID SAXE

Supervisor Printed Name

Company Rep Signature

VERONICA DUM

Company Rep Printed Name

EXHIBIT III

Bank of America

Your checking account

ALEXANDER J MARKS | Account # 1900 | November 6, 2015 to December 9, 2015

Deposits and other additions

Date	Description			Amount
11/06/15	DAVID SAXE PRODU DES:PAYROLL ID:9008244760 PPD	ID:63231900000045X INDN:MARKS, ALEXANDER	CO	828.21
[redacted]				
11/13/15	DAVID SAXE PRODU DES:PAYROLL ID:9008244760 PPD	ID:63347400006124X INDN:MARKS, ALEXANDER	CO	828.21
11/20/15	DAVID SAXE PRODU DES:PAYROLL ID:9008244760 PPD	ID:63443100036396X INDN:MARKS, ALEXANDER	CO	892.97
11/27/15	DAVID SAXE PRODU DES:PAYROLL ID:9008244760 PPD	ID:63528300016039X INDN:MARKS, ALEXANDER	CO	892.97
12/04/15	DAVID SAXE PRODU DES:PAYROLL ID:9008244760 PPD	ID:63634100027843X INDN:MARKS, ALEXANDER	CO	735.87
[redacted]				

Total deposits and other additions [redacted]

EXHIBIT IV

EMPLOYEE HANDBOOK

DAVID SAXE PRODUCTIONS, LLC

REVISED MAY 2015

Job Duties

Your supervisor will explain your job responsibilities and the performance standards expected of you. Please be aware that your job responsibilities or job location may change at any time during your employment. From time to time, you may be asked to work on special projects or to assist with other work necessary or important to the operation of your department or the Company. This is a collaborative work environment; as such, your cooperation and assistance in performing such additional work is expected.

The Company reserves the right, at any time, with or without notice, to alter or change job responsibilities, reassign or transfer job positions, or assign additional job responsibilities. The Company has the right, within the limits of the law, to change any condition of employment under our sole discretion.

Performance Review Process

The performance review process is an important aspect of employee performance management. Managers may provide guidance, coaching, and feedback to their staff throughout the year on job responsibilities and expectations.

Aside from providing guidance, coaching, and feedback throughout the year, managers are expected to formally review their employees' performance. The performance review provides opportunities for the manager to acknowledge an employee's achievement, discuss how to improve and maintain her or his performance, and for the manager and employee to establish future goals.

Introductory Period Performance Review:

A newly hired employee's first few months on the job are critical. The first ninety (90) days of employment serves as a formal Introductory Period. During this time period, managers are asked to communicate position roles and responsibilities to the new employee, as well as provide informal performance management. Prior to or upon completion of the Introductory Period, the manager will normally evaluate the new employee's performance and determine if employment beyond the Introductory Period will continue. If the new employee's performance is not meeting expectations, employment may be terminated. If the manager determines that the designated Introductory Period does not allow sufficient time to thoroughly evaluate the employee's performance, the Introductory Period may be extended by David Saxe Productions, LLC in its sole discretion.

Annual Performance Review:

During the annual performance review, the manager reviews the employee's work during the prior year of service for effectiveness, and contribution to departmental and organizational objectives and goals.

The annual performance review will normally be due within the month of the year that the employee celebrates the anniversary of their hire date. For example, an employee hired on August 22nd will have a performance review due date in the month hired of that current year (August 1 –August 31).

Access to Employee Files and Retention Policy

David Saxe Productions, LLC maintains a personnel file on each employee. The personnel file includes such information as the employee's job application, resume, records of training, documentation of performance appraisals and salary increases, and other employment records and notes.

Working Hours

The basic day of work for hourly employees is eight (8) hours, exclusive of the meal period. This policy excludes those employees working on a per show or salary basis. Various factors, such as workload, operational efficiency, and staffing needs, may require variations in an employee's starting and quitting times and total hours worked each day and each week. The Company reserves the right to assign employees to jobs other than their usual assignments when required based on business need. In addition, employees may be required to work over-time or hours other than those normally scheduled, whenever necessary. If any overtime hours are worked, employees will be paid in accordance with local, state, and federal laws. Failure to obtain authorization to work overtime may result in corrective action, up to and including termination.

Overtime

Employees may occasionally be asked to work beyond their normally scheduled hours. When this occurs, supervisors should attempt to provide as much advance notice as possible. Non-exempt employees who are required or permitted to work overtime will receive overtime pay in accordance with the requirements of the Fair Labor Standards Act (FLSA), and State laws.

All overtime must be approved in advance, by the employee's immediate supervisor. Failure to obtain authorization to work overtime may result in corrective action, up to and including termination.

Non-exempt employees shall be paid one and one-half (1 ½) times their regular rate for all hours worked in excess of eight (8) hours per day or forty (40) hours in each work week (depending on the employee's rate of pay).

Timekeeping

David Saxe Productions, LLC maintains accurate timekeeping in order to calculate employee pay and benefits.

Hourly employees, as well as certain salaried employees are required to clock in and out at their designated areas. All time records represent legal documents that are used to accurately document and record working time and to compensate non-exempt employees properly. Time records remain the sole property of the Company.

Employees are required to record all working time fully and accurately on the time records that they submit at the conclusion of each pay period. Employees should not clock in until they are actually beginning their scheduled work shift. Likewise, employees should immediately clock out upon the completion of their shift. Employees should clock in for their work shift no more than five (5) minutes before their shift begins. Similarly, employees should clock out for their work shift no more than five (5) minutes after their work shift ends. If employees are found to be clocking in earlier or clocking out later in effort to accumulate over-time, failure to obtain such approval may result in corrective action, up to and including termination. Lastly, Employees should also clock out when they are taking their thirty (30) minute meal period.

Exempt/salaried employees should accurately record exceptions to their normal workday, such as paid or unpaid time off.

It is the responsibility of each employee to accurately and completely report his/her time worked, meal periods (if non-exempt), and/or leaves for each pay period. Employees away from the office are expected to enter their time prior to leaving, or communicate their entries via email.

As explained elsewhere in this Handbook, employment will continue only at the mutual consent of the employee and the employer. Employment is therefore terminable at will, at any time, either by the employee or the employer, with or without cause or advance notice. The intent of this Handbook is to create a framework for the grounds upon which employees may be disciplined. Where the Company determines it to be appropriate in the exercise of its discretion, it may attempt to give an employee a prior written or oral warning (which may be documented) and an opportunity to improve or correct a performance and/or attitude problem before termination.

While, it is impossible to identify and anticipate every type of possible misconduct, infraction, or performance problem that can result in discipline, the following represents a partial list of the types of conduct that may result in disciplinary action, up to and including the possibility of immediate termination:

- Refusal or failure to follow instructions, or perform work assigned.
- Unexcused and/or repeated tardiness or absenteeism.
- Mishandling, misappropriation, or unauthorized removal or possession of the funds and/or property of the employer and/or any co-worker.
- Working unauthorized overtime.
- Failure to work assigned overtime.
- Unsatisfactory work performance and/or work attitude.
- Violation of any employer policy, including policies described in this Handbook, as revised from time to time.
- Unauthorized possession or use of weapons, explosives, recording devices or cameras on company property (including parking facilities).
- Falsifying or destroying any record of the employer, including timekeeping records.
- Engaging in rude or discourteous conduct towards employees, guests, and others.
- Engaging in "horseplay" or otherwise causing or contributing to a disturbance on or near the premises.
- Threatening, intimidating, and coercing other employees or guests.
- Use of profane or abusive language or engaging in lewd, obscene, or other unbecoming conduct.
- Reporting to or being at work while under the influence of alcohol, legal substances negatively impacting your ability perform your job tasks, or unlawful drugs, or possessing such drugs while on the employer's premises or while on duty or operating a vehicle or potentially dangerous equipment of the employer.
- Falsifying or making erroneous entries or material omissions on an employment application or other company record.
- Sleeping on the job.
- Entering unauthorized areas without permission.
- Entering or leaving the facility through any entrance/exit other than designated by the Company.
- Failure to cooperate with or identify yourself at the request of any company official, security officer, or at the request of a patron (at the request of a patron, employees are only required to provide their first name).
- Leaving workstation or the Company premises during assigned working hours without permission of supervisor or department head.
- Soliciting, procuring, or engaging in any immoral and or questionable acts on the premises.
- Making false, vicious, profane or malicious statements to or about another employee, patron, the company, or its facilities.
- Inappropriate signature lines on company provided email addresses (quotes, etc.)
- Suggesting that a tip or token is expected or required for any service.
- Failure to report dishonest conduct or activity.

- On-duty or off-duty conduct that reflects adversely on the Company or which materially affects employee's job performances, or affects employee's ability to report for scheduled shift.
- Violation of any federal, state or local law while on duty or while on the premises or off the premises which in any way reflects unfavorably on the Company's reputation.
- Smoking or use of tobacco products in unauthorized areas. Smoking is only allowed outside of the building.
- Violation of appearance and dress code standards.
- Unauthorized removal or sharing of proprietary Company information.
- Failure to maintain a pattern of behavior that reflects a positive attitude relating to the Company, management, personnel, co-workers, and patrons.
- Failure to return to work as scheduled after an approved leave of absence.
- Lending money to or borrowing money from other employees or patrons.
- Failure to notify your supervisor of any circumstances that affect your ability to perform your job.
- Failure to attend mandatory general meetings, special meetings or training sessions as directed by Company management without the approval of your supervisor.
- Unsatisfactory job performance.

Respect, Professionalism, and Business Practices

We are committed to an environment in which all employees are treated with respect and dignity. We expect all employees to conduct themselves in a civil and cooperative manner in the workplace or in work-related settings, including off-site events at which employees are present. This policy prohibits disruptive and disrespectful workplace conduct that interferes with an employee's ability to work efficiently and productively. This may include, but is not limited to:

- Rude, unprofessional, or otherwise inappropriate verbal comments;
- Inappropriate visual displays, including emails, screensavers, calendars, and similar items;
- Spreading rumors or intentionally conveying maliciously false information about another individual;
- Refusing to cooperate with legitimate work-related requests;
- Bullying or shouting; or
- Using abusive language and/or engaging in intimidating behavior.

If you believe someone has violated this policy, please contact your Supervisor, Manager, or Human Resources so we may address the situation.

The successful business operation and reputation of the Company is built upon the principles of fair dealing and ethical conduct of employees. The Company's reputation for integrity and excellence requires careful observance of the spirit and letter of all applicable laws and regulations, including a scrupulous regard for the highest standards of conduct and personal integrity. The Company's continued success is dependent upon maintaining the trust of their customers. David Saxe Productions, LLC is dedicated to preserving that trust. Employees have a duty to the Company and to their customers to act in a manner that will merit the continue trust and confidence of the public.

As an organization, the Company will comply with all applicable laws and regulations. The Company expects directors, officers, and employees to conduct business in accordance with the letter, spirit and intent of all relevant laws. Moreover, those same directors, officers, and employees will refrain from any illegal, dishonest, or unethical conduct. It is the responsibility of all employees to comply with the Company's policy of business ethics and

facilities for any purpose, including authorized blogging. The Company reserves the right to edit or amend any misleading or inaccurate content depicted in blog posts.

In addition to the foregoing, Employee expressly acknowledges that although they are entitled to privacy rights when not on company time and not actually engaged in work for David Saxe Productions, LLC by virtue of their social media connections and acquaintances, they are identifiable in cyberspace at all times as Employees of David Saxe Productions, LLC. Accordingly, even outside of normal working hours, employee should not to utilize social media as an outlet to disseminate business information or make maliciously false statements which may cause injury to David Saxe Productions, LLC or any company or affiliate with whom David Saxe Productions, LLC has contracted. Should such a situation occur, David Saxe Productions, LLC will use efforts to independently verify information found from social media with other credible sources, if available, before confronting the employee. David Saxe Productions, LLC therefore reserves the right to hold any Employee offending this policy responsible for any such maliciously false and defamatory comments broadcast or otherwise posted into cyberspace via social media of any and all kinds, without limitation. Any Employee found to be in violation of this policy, which violation shall be determined in David Saxe Productions, LLC's sole and exclusive discretion, shall be subject to disciplinary action up to and including termination.

Best Practices for Employees: Employees are to be respectful and professional to co-workers, clients, customers, business vendors, and other third party affiliates on social media platforms. David Saxe Productions, LLC has a legitimate business interest in having employees act in such a manner with their various business dealings. Employees are encouraged to bring any issues or concerns to their immediate supervisor so that the possible issue can be addressed and resolved. Should any maliciously false statements or postings be traced back to a specific employee, disciplinary actions may be necessary. In hiring each employee, David Saxe Productions, LLC has put its faith in each employee to execute their tasks to the best of their ability. As such, each employee's personal and professional reputation (both online and in the workplace) is as important to David Saxe Productions, LLC as it should be to each individual employee.

Employees should be thoughtful in all communications and dealings with others, including email and social media. Never harass (as defined in the David Saxe Productions, LLC Harassment Policy above), threaten, libel, or defame fellow professionals, employees, guests, or other third parties. David Saxe Productions, LLC reminds you that it is wise to consider that what is said on social media can often be seen by any one. As such, harassing comments, obscenities, or similar conduct that would violate these Company policies is discouraged in general and never allowed while using David Saxe Productions LLC's equipment or during your work shift.

David Saxe Productions, LLC requests and strongly urges employees to report any violations or possible or perceived violations to supervisors or the Human Resources Representative. Violations include any discussion of proprietary information and any unlawful activity related to blogging. David Saxe Productions, LLC investigates and responds to all reports of violations of the social computing policy and other policies. Violation of the Company's social media computing policy may result in disciplinary action, up to and including termination of employment.

Workplace Surveillance Policy

This surveillance policy is intended to be as broad and as inclusive as permitted by the laws of the State of Nevada. The company utilizes electronic surveillance and retains the right, without limitation, to monitor the following: movement and activity on any property associated with Company or any of its affiliated entities, correspondence,

written documents, voicemail, telephone conversations/usage, email, radio/wireless transmissions, and other electronic messages. This surveillance may be accomplished by utilizing a variety of electronic media, including without limitation, the electronic capturing of imagery and other data. Except in areas wherein there is a reasonable expectation of privacy during the normal course of operations, employees and independent contractors are monitored and observed from time to time and should make no assumptions of privacy. As an employee, this expectation of privacy is limited to restrooms and designated/assigned dressing rooms. Tampering with surveillance or security equipment, taking measures to avoid observation or monitoring, or interfering with security or surveillance activities, is strictly prohibited, and may result in disciplinary action up to and including termination.

All electronic communication systems and all information transmitted, received, or stored in the Company's systems and computers are deemed "company property." Employees are to use such systems solely for job-related purposes and not personal uses outside any permissible and limited use stated herein. As such, Employees should have no expectation of privacy in connection with the use of company equipment/property or the transmission, receipt, or storage of information in such equipment/property. As part of the New Hire packet, each employee agrees not to code, access any files, or retrieve any stored communication unless authorized to do so by his or her supervisor. Employees are required to consent to the Company's monitoring the Employee's through use of this equipment at any time during his or her work period. Such monitoring may include printing and reading all emails entering, leaving, or stored in these systems.

Personal Property

David Saxe Productions, LLC does not accept any responsibility for personal property. It is suggested that all personal property be kept locked in a secure location or be removed from the premises.

In the event that a maintenance/shop/warehouse employee is storing tools on Company premises, they should be aware that the Company does not provide any insurance protecting their personal property from fire, theft, or damage of any kind. It is the responsibility of the employee to insure the safety of their personal property stored on Company premises.

Workplace Investigations

David Saxe Productions, LLC is concerned with promoting a safe work environment for all employees and others on the premises. In light of this concern, while the Company hopes there will rarely be a need to conduct such a search, the Company has adopted the following policy on workplace searches. All employees are expected to comply with this policy and to indicate their agreement to comply by the Handbook acknowledgment page.

David Saxe Productions, LLC reserves the right to conduct non-random searches for legitimate, business-related reasons, including (but not limited to) prevention or detection of:

- Theft or the removal of Company property or proprietary information;
- Workplace substance abuse;
- Workplace violence;
- Harassment; and
- Violation of company policies and rules or violation of State and Federal law(s).

Searches may include computers, computer files, email, offices or work spaces, desks, file cabinets, any other property or space belonging to David Saxe Productions, LLC. Depending on the specific circumstances, employee

documentation of any mitigating circumstance(s). No call/no show days will be unpaid (PTO cannot be used due to lack of notice) and is considered an unexcused absence. The Company may consider any one (1) instance of a no call/no show as job abandonment and voluntary termination. If any employee is absent for two (2) consecutive days without notifying the Company, the Company will consider that employee to have resigned voluntarily.

Open Door/Dispute Resolution Procedure

Employees have a duty to report any violation of the Company Policies. Further, employees who have any questions or problems are encouraged to bring them to the attention of their immediate supervisor. In most cases, supervisors will have the knowledge and insight to help employees resolve the issue. If that does not work, employees are encouraged to follow the "chain of command" below so that each level of management has an opportunity to resolve the matter.

1. Immediate Supervisor
2. Manager
3. Human Resources
4. David Saxe, CEO and President

Human Resources can be contacted at any time to assist in facilitating the communication or conflict resolution. If any employee is unable to resolve these questions or concerns after the discussion, you may contact David Saxe directly to discuss the questions or problems further.

The Company will attempt to investigate the employee's concerns and provide the employee with a response as soon as reasonably possible. An effort will be made to provide employees an opportunity to raise their questions or problems in confidence and without fear of reprisal, retaliation, or discrimination. The Company will make every effort to investigate and settle an employee's problem on a fair and equitable basis.

Safety

Common sense and personal interest in safety are the greatest guarantees of your safety at work, on the road, and at home. We take your safety seriously and any willful or habitual violation of safety rules will be considered cause for termination of employment. The personal safety and health of each employee of David Saxe Productions, LLC is of primary importance. Prevention of occupationally-induced injuries and illnesses is of such consequence that it will be given priority over productivity, whenever necessary. To the greatest extent possible, management will provide necessary equipment, procedures, and training required for personal safety and health.

The cooperation of every employee is necessary to make this company a safe place in which to work. All employees are expected to report unsafe conditions or hazards immediately to a supervisor or to Human Resources. It is essential to our employees, customers, and bottom line that we maintain a safe and healthy workplace. Managers and supervisors will ensure that the policies adopted in this Handbook are implemented and adhered to by all employees.

Accident reporting: Any injury at work, however minor, must be reported immediately to a supervisor and receive first aid attention. Serious conditions often arise from small injuries if they are not cared for at once.

Specific safety rules and guidelines: To ensure your safety, and that of your coworkers, please observe and obey the following rules and guidelines:

EXHIBIT V

DAVID SAXE PRODUCTIONS

Electronic Surveillance Waiver

The company may utilize electronic surveillance and retains the right to randomly monitor movement and activity on the property, correspondence, written documents, voicemail, telephone conversations/usage, email, radio transmissions, and other electronic messages. Accordingly, during the normal course of operations, employees and independent contractors are monitored or observed from time-to-time and should make no assumptions of privacy. Tampering with surveillance or security equipment, taking measures to avoid observation or monitoring, or interfering with security or surveillance activities, is strictly prohibited and may result in disciplinary action up to and including termination.

I have been notified that David Saxe Productions utilizes surveillance equipment in the ordinary course of its business operations. I understand and agree that I may be recorded by video or other means by David Saxe Productions.

Date: 4/6/15

Print Name: Alexander J. Marks

Signature: Alexander Marks

EXHIBIT VI

DAVID SAXE PRODUCTIONS

David Saxe <david@davidsaxe.com>

marks out sick

3 messages

Veronica Duran <veronica@davidsaxe.com> Thu, Feb 25, 2016 at 9:34 AM
To: David Saxe <david@davidsaxe.com>
Cc: Larry Tokarski <Laurence@davidsaxe.com>

Thank you

Veronica Duran
Executive Assistant
David Saxe Productions
5030 W. Oquendo Road
Las Vegas, Nevada 89118
Email: veronica@davidsaxe.com
Main: (702) 243-9820 ext. 106
Direct: (702) 318-6478
Mobile: (702) 510-9151

On Feb 25, 2016, at 8:32 AM, David Saxe <david@davidsaxe.com> wrote:

> Alex marks called me at 8:17 to call out sick. Just letting you know for hr/accounting/payroll purposes. Not sure who keeps track of all that.
>
> —
> David Saxe
> 702-243-9820
> David@davidsaxe.com
>
>

Larry Tokarski <Laurence@davidsaxe.com> Thu, Feb 25, 2016 at 9:38 AM
To: David Saxe <david@davidsaxe.com>, Veronica Duran <veronica@davidsaxe.com>

Alex was here this morning and let me know he was going home sick

He knows if he sits down and does a little work we are "Suppose" to pay him.

Do we pay him for the day?

Veronica

Veronica Duran

Executive Assistant

David Saxe Productions

5030 W. Oquendo Road

Las Vegas, Nevada 89118

Email: veronica@davidsaxe.com

Main: (702) 243-9820 ext. 106

Direct: (702) 318-6478

Mobile: (702) 510-9151

From: Larry Tokarski
Sent: Thursday, February 25, 2016 9:39 AM
To: David Saxe; Veronica Duran
Subject: RE: marks out sick

[Quoted text hidden]

EXHIBIT VII

DAVID SAXE PRODUCTIONS

marks

David Saxe <david@davidsaxe.com> Mon, Feb 29, 2016 at 10:28 AM
To: David Saxe <david@davidsaxe.com>

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

EXHIBIT VIII

-----Original Message-----
From: David Saxe
Sent: Tuesday, August 11, 2015 10:18 AM
To: Alexander Marks
Subject: Re: How to Get Out of Jury Duty: 12 Steps (with Pictures) - wikiHow

Never mind. I handled it. I'm out of jury duty.

I didn't realize I had to motivate you to do your job. I will dangle a cookie next time and pat you on your head and talk baby talk.

Sent from my iPhone

On Aug 11, 2015, at 8:19 AM, Alexander Marks <amarks@davidsaxe.com> wrote:
Quite the motivation...
-----Original Message-----
From: David Saxe
Sent: Tuesday, August 11, 2015 7:58 AM
To: Alexander Marks
Subject: How to Get Out of Jury Duty: 12 Steps (with Pictures) - wikiHow
This is what I wanted you to do.
Research ways to get out of it then to accomplish it.
Your letter was terrible. I wouldn't have let me out either.
"Hi I'm rich and powerful and can't go just because I am a big shot".
That was lame.
I have RP opening and will have to postpone (huge impact on other people. Have to fire them. I can't go. Figure it out. Your job is to get the result and not just put something together to check it off your list that you tried.
Make it happen. I know you can't take criticism and I can't not give it. Needed you to know that Alex Carrera commented on it (unsolicited) how it was lame. You know it's bad when he chimes in.
Swallow your pride, put your mind to it and get r done.
Thanks.
David
http://m.wikihow.com/Get-Out-of-Jury-Duty
Sent from my iPhone

Alexander Marks
Tuesday, August 11, 2015 at 11:26 AM
To: David Saxe

This message is high priority.

On 8/11/15, 10:19 AM, "Alexander Marks" <amarks@davidsaxe.com> wrote:

David Saxe Productions, LLC is my employer. That job does not entail getting you out of things you have a civic obligation to do.

-----Original Message-----
From: David Saxe
Sent: Tuesday, August 11, 2015 10:18 AM
To: Alexander Marks
Subject: Re: How to Get Out of Jury Duty: 12 Steps (with Pictures) - wikiHow

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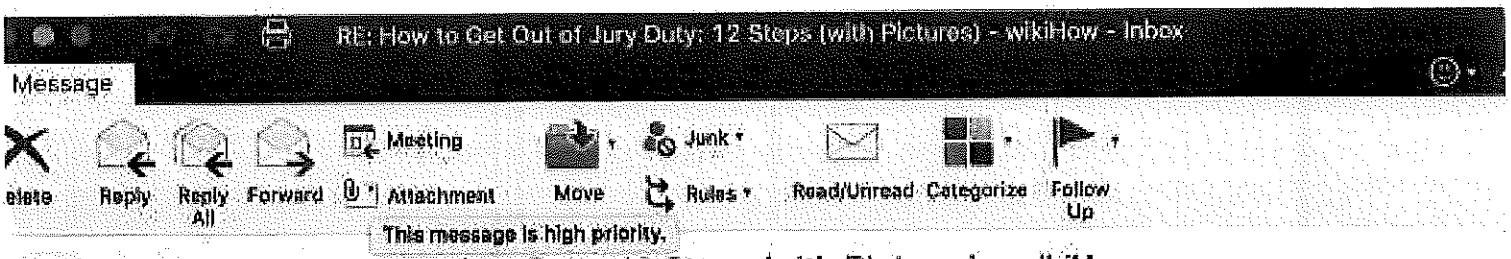
"Hi I'm rich and powerful and can't go just because I am a big shot".
That was lame.
I have RP opening and will have to postpone (huge impact on other people. Have to fire them. I can't go. Figure it out. Your job is to get the result and not just put something together to check it off your list that you tried.
Make it happen. I know you can't take criticism and I can't not give it. Needed you to know that Alex Carrera commented on it (unsolicited) how it was lame. You know it's bad when he chimes in.
Swallow your pride, put your mind to it and get r done.



RE: How to Get Out of Jury Duty: 12 Steps (with Pictures) - wikiHow

AM

Alexander Marks
Tuesday, August 11, 2015 at 11:26 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 ask 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

Confidentiality Notice: This message, including any attachments, contains confidential information intended for a specific individual and purpose, and is protected by law. If you are not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this message, or any attachment, is strictly prohibited. If you have received this message in error, please notify the original sender or David Saxe Productions at 702-243-9820 immediately by telephon or by return E-mail and delete this message along with any attachments, from your computer.
Thank you.

Re: Jury Duty Excusal

David Saxe

Fri 7/24/2015 1:31 AM

To: Alexander Marks <amarks@davidsaxe.com>;

Not good enough. Needs to read more like this.

Good afternoon. Thank you for selecting me to jury duty. I am so excited. I can't wait to fry me some niggers, spics, chinks, jews, midgets, handicapped and women. They are always guilty cuz they are da scum of the earf.
I do have a raving case of lice and tuberculosis but I doubt my itchin and coffin will interupt the court too much. On account of my condition, I can't stop masterbating in front of people but I do have a doctors note lettin everyone know its ok I can do it cuz I just can't help myself anyways. If I do accidentally sling some jizz on the judges face, remember I have a doctors note so he can't take me to jail. I'm kind of like a male version of a squirter. My jizz can hit 30 feet away.
Well, can't wait to meet you and shake your hand. I'm excited to serve on da jury.
If for any reason i aint gonna be selected please respond to this email lettin me know so.
Thanks, and remember what my daddy always said, "always bring a gun to a courtroom".
Yeehaw. Its gonna be fun to meet u.

That should do it!
:)

From: Alexander Marks <amarks@davidsaxe.com>
Date: Thursday, July 23, 2015 at 10:28 AM
To: David Saxe <david@davidsaxe.com>
Cc: Alex Carrera <acarrera@davidsaxe.com>
Subject: Jury Duty Excusal

There is not a place online to send this pursuant to the rule listed. You can email the following text to the below email address to request excusal based upon undue hardship and extreme inconvenience.

Good morning. My request for excusal is being sent pursuant to NRS 6.030. Because of the nature of my business, serving on a jury is an extreme inconvenience and will likely cause an undue hardship on me and my business. David Saxe Productions, LLC is a business and consulting company doing work with about 16 stage productions throughout the Las Vegas area. Being that the business takes place in a 24/7 city, decisions need to be made quickly and often. I am actively involved in all areas of the business, so many of these important decisions rest upon my shoulders. Serving on a jury for any length of time would result in a standstill of the business, as well as the businesses we work with on a daily basis. Further, my absence for jury duty would create an undue financial burden for the company and will more likely than not put at risk the continued operations of David Saxe Productions, and the entities with whom it has contracted. Thank you.

Send to:

EJuror@clarkcountycourts.us

Alexander J. Marks
In-House Counsel
David Saxe Productions, LLC
5030 W. Oquendo Rd.
Las Vegas, Nevada 89118
Office: (702) 243-9820

EXHIBIT IX

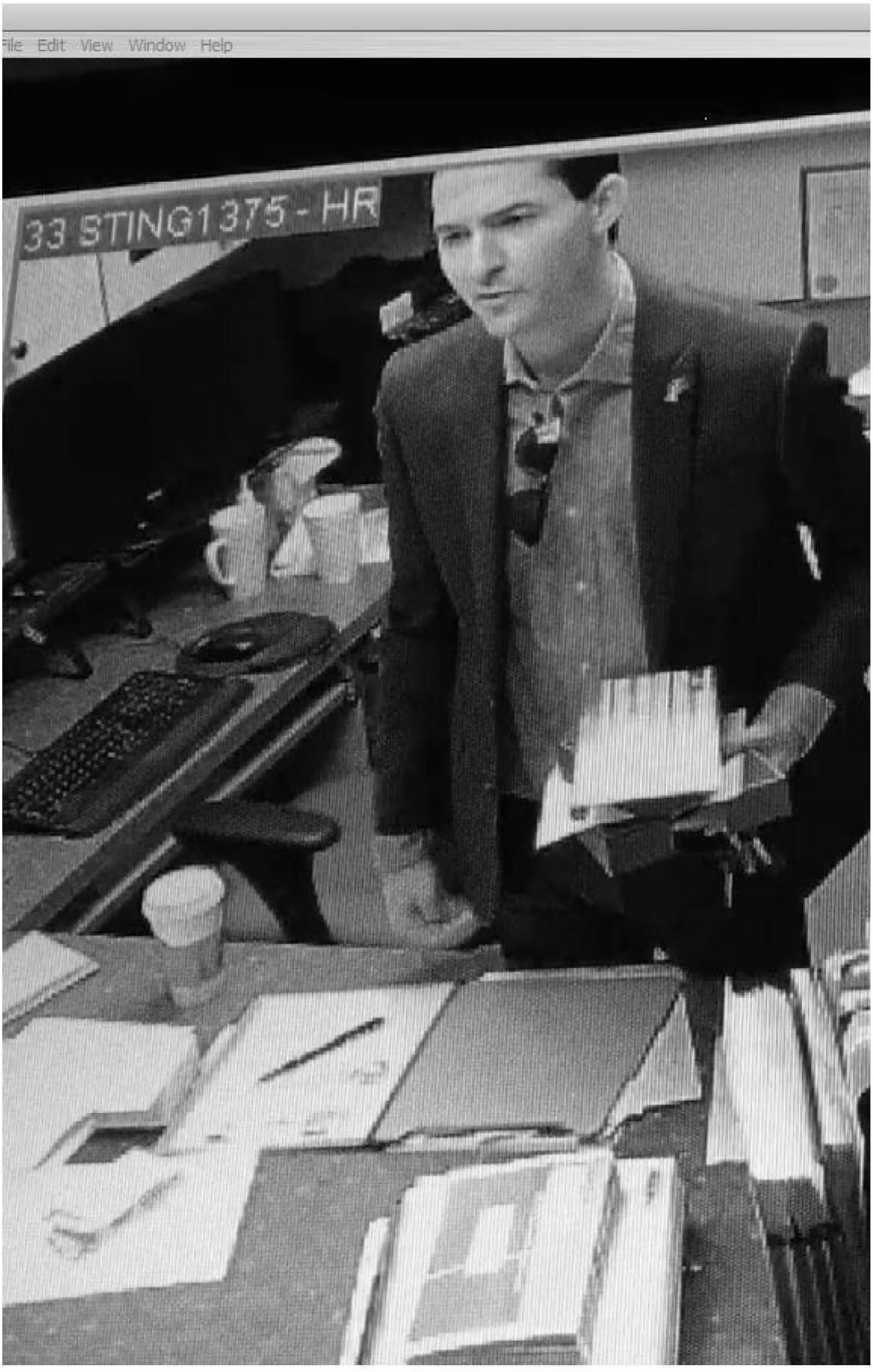

File Edit View Window Help
33 STING1375 - HR

EXHIBIT X

From: David Saxe
Sent: Thursday, January 28, 2016 9:54 AM
To: Alexander Marks
Subject: Spoofical contract

I meant one that was executed so I can see the dates you filled in. When the show was supposed to start etc.

Sent from my iPhone

> On Jan 28, 2016, at 9:51 AM, Alexander Marks <amarks@davidsaxe.com> wrote:
>
>
>
> -----Original Message-----
> From: David Saxe
> Sent: Thursday, January 28, 2016 9:45 AM
> To: Alexander Marks
> Subject: Spoofical contract
>
> Send me a copy of a spoofical performer contract.
>
> Sent from my iPhone
> <2016 Sin City Spoof Performer Agreement.pdf>

From: Alexander Marks
Sent: Thursday, January 28, 2016 9:47 AM
To: David Saxe
Cc: Veronica Duran
Subject: robot boys status?

There is nothing to schedule though. Yes, we have 15 days from 1/26/2016, but with the interview that's needed at the consulate in Denmark, there could be delays that are out of our control. I've been In contact with them any time there is an update. Everything was done right, but if the USCIS requests more information for whatever reason (or there is something in their background they don't like), I can't account for that. We should be good by the 15th.

From: David Saxe
Sent: Thursday, January 28, 2016 9:41 AM
To: Alexander Marks
Cc: Veronica Duran
Subject: Re: 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: Alexander Marks
Sent: Tuesday, January 05, 2016 8:24 AM
To: David Saxe
Cc: Veronica Duran
Subject: Robot boys

I responded to your email on 12/31 (and we discussed it for a bit too - I needed your green light on the management fee deduction). In any event, I am on top of it. They're comfortable, and per Henriette yesterday, they are signing today. We did not lose them, so there is no need to call them.

-----Original Message-----
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

EXHIBIT XI

Kirsten A. Milton, NV Bar No. 14401
Donald P. Paradiso, NV Bar No. 12845
JACKSON LEWIS P.C.
300 South Fourth Street, Suite 900
Las Vegas, Nevada 89101
kirsten.milton@jacksonlewis.com
donald.paradiso@jacksonlewis.com
Tel: (702) 921-2460
Fax: (702) 921-2461

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 CORPORATRIONS 11-20, inclusive, Defendants.	Case No. 2:17-cv-02110 **DEFENDANTS' AMENDED FIFTH SUPPLEMENTAL INITIAL DISCLOSURES IN COMPLIANCE WITH FED. R. CIV. P. 26(a)(1)**

Pursuant to Federal Rules of Civil Procedure 26(a)(1), Defendants David Saxe Productions, LLC; Saxe Management, LLC; and David Saxe ("Defendants"), hereby amend their fifth supplemental list of persons who may be called as witnesses and documents that may be used at trial. **New information is provided in bold below.**

A. LIST OF WITNESSES

1. Alexander Marks
c/o Jeffrey Gronich, Esq.
1810 E. Sahara Ave., Suite 109
Las Vegas, Nevada 89104

Mr. Marks is expected to testify regarding his knowledge of the facts at issue herein.

2. David Saxe
c/o Jackson Lewis P.C.
300 South Fourth Street, Suite 900
Las Vegas, Nevada 89101

Mr. Saxe is expected to testify regarding his knowledge of the facts at issue herein, including Defendants' defenses.

Mr. Saxe should only be contacted through his counsel.

3. Andrew August
c/o Jackson Lewis P.C.
300 South Fourth Street, Suite 900
Las Vegas, Nevada 89101

Mr. August is expected to testify regarding his knowledge of the facts at issue herein, including Defendants' defenses.

4. **Veronica Duran**
c/o Jackson Lewis P.C.
300 South Fourth Street, Suite 900
Las Vegas, Nevada 89101

Ms. Duran is expected to testify regarding her knowledge and information of the facts and circumstances at issue in this matter.

5. All custodians of records necessary to authenticate documents.

6. All witnesses identified by Plaintiff.

Defendants reserve the right to supplement this list of witnesses to add additional names of persons who may have relevant information, if subsequent information and investigation so warrant. Defendants also reserve the right to identify expert witnesses and to call any necessary impeachment and/or rebuttal witnesses.

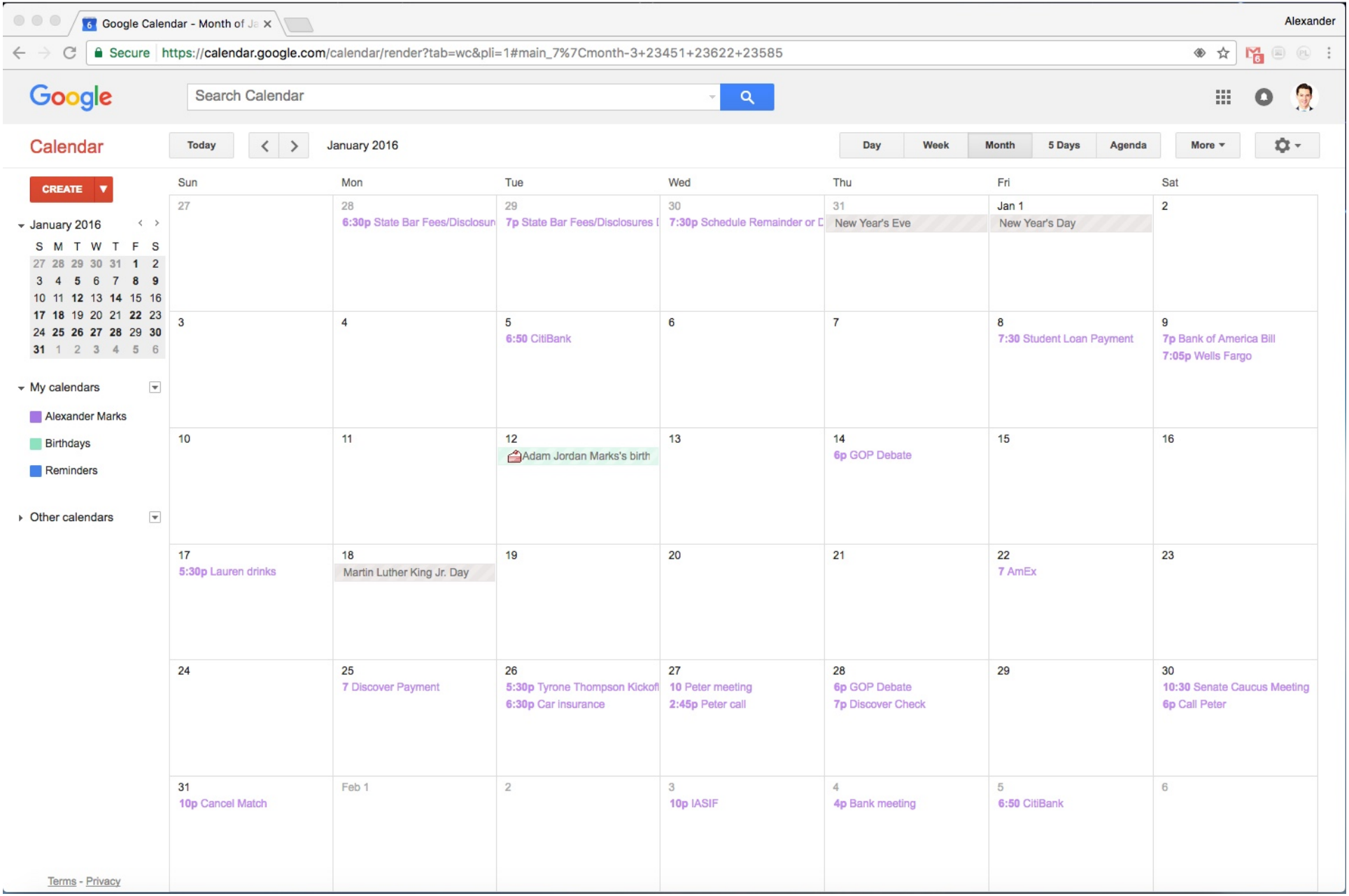
B. LIST OF DOCUMENTS

1. Personnel records regarding Plaintiff, Bates Numbered SAXE-0001 through SAXE-0032.

2. Time Off Request Forms regarding Plaintiff, Bates Numbered SAXE-0033 through SAXE-0035.

3. Termination Document regarding Plaintiff, Bates Numbered SAXE-0036.

EXHIBIT XII


Google Calendar - Month of Ja
Alexander
Secure https://calendar.google.com/calendar/render?tab=wc&pli=1#main_7%7Cmonth-3+23451+23622+23585
Google
Search Calendar
Calendar
Today
January 2016
Day
Week
Month
5 Days
Agenda
More
CREATE
January 2016
S M T W T F S
27 28 29 30 31 1 2
3 4 5 6 7 8 9
10 11 12 13 14 15 16
17 18 19 20 21 22 23
24 25 26 27 28 29 30
31 1 2 3 4 5 6
My calendars
Alexander Marks
Birthdays
Reminders
Other calendars
Terms - Privacy
Sun Mon Tue Wed Thu Fri Sat
27 28 6:30p State Bar Fees/Disclosun 29 7p State Bar Fees/Disclosures I 30 7:30p Schedule Remainder or D 31 New Year's Eve Jan 1 New Year's Day 2
3 4 5 6:50 CitiBank 6 7 8 7:30 Student Loan Payment 9 7p Bank of America Bill 7:05p Wells Fargo
10 11 12 Adam Jordan Marks's birth 13 14 6p GOP Debate 15 16
17 5:30p Lauren drinks 18 Martin Luther King Jr. Day 19 20 21 22 7 AmEx 23
24 25 7 Discover Payment 26 5:30p Tyrone Thompson Kickoff 6:30p Car insurance 27 10 Peter meeting 2:45p Peter call 28 6p GOP Debate 7p Discover Check 29 30 10:30 Senate Caucus Meeting 6p Call Peter
31 10p Cancel Match Feb 1 2 3 10p IASIF 4 4p Bank meeting 5 6:50 CitiBank 6

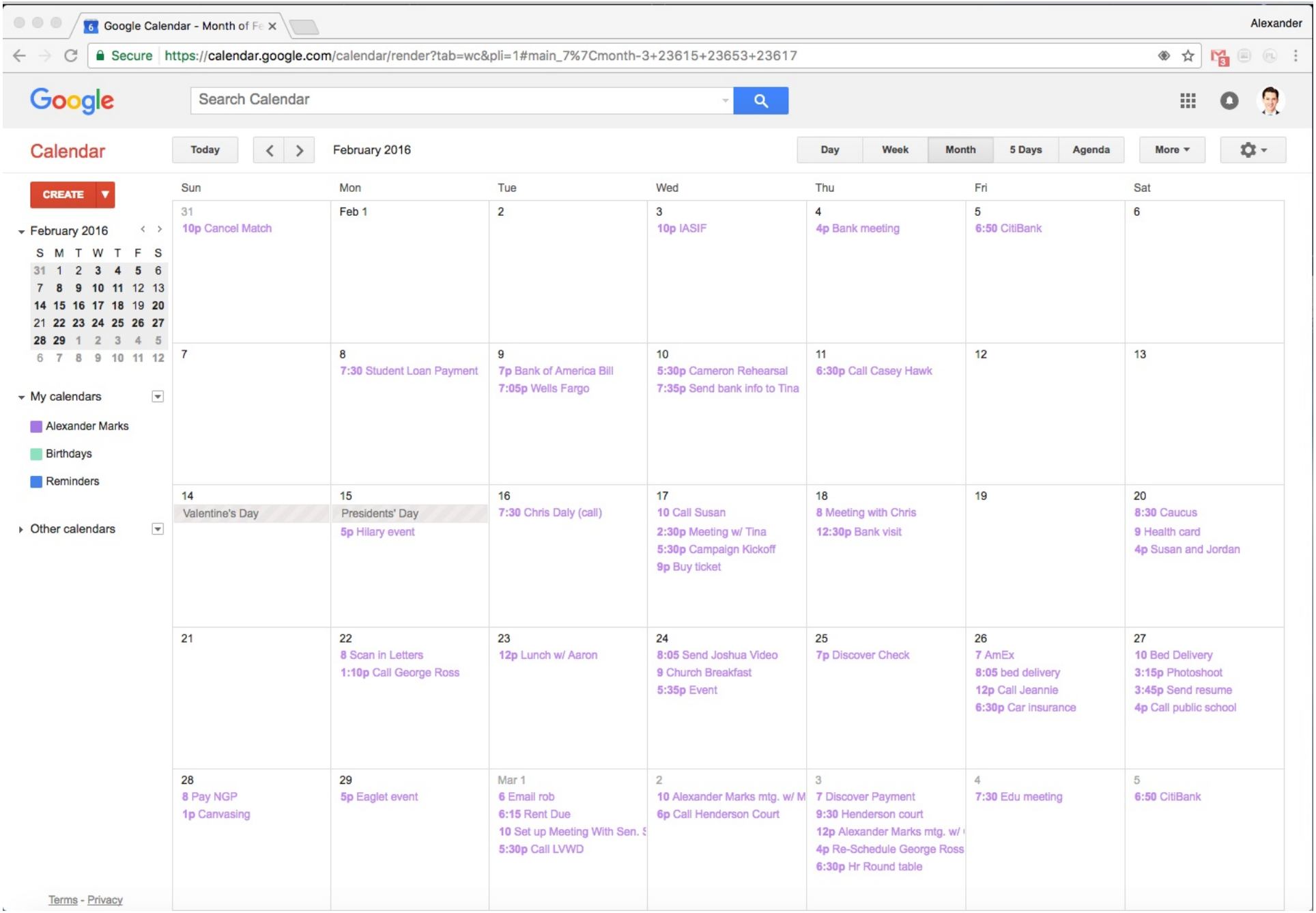

Google Calendar - Month of Fe
Alexander
Secure https://calendar.google.com/calendar/render?tab=wc&pli=1#main_7%7Cmonth-3+23615+23653+23617
Google
Search Calendar
Calendar
Today
February 2016
Day
Week
Month
5 Days
Agenda
More
CREATE
February 2016
S M T W T F S
31 1 2 3 4 5 6
7 8 9 10 11 12 13
14 15 16 17 18 19 20
21 22 23 24 25 26 27
28 29 1 2 3 4 5
6 7 8 9 10 11 12
My calendars
Alexander Marks
Birthdays
Reminders
Other calendars
Terms - Privacy
Sun
Mon
Tue
Wed
Thu
Fri
Sat
31
10p Cancel Match
Feb 1
2
3
10p IASIF
4
4p Bank meeting
5
6:50 CitiBank
6
7
8
7:30 Student Loan Payment
9
7p Bank of America Bill
7:05p Wells Fargo
10
5:30p Cameron Rehearsal
7:35p Send bank info to Tina
11
6:30p Call Casey Hawk
12
13
14
Valentine's Day
15
Presidents' Day
5p Hilary event
16
7:30 Chris Daly (call)
17
10 Call Susan
2:30p Meeting w/ Tina
5:30p Campaign Kickoff
9p Buy ticket
18
8 Meeting with Chris
12:30p Bank visit
19
20
8:30 Caucus
9 Health card
4p Susan and Jordan
21
22
8 Scan in Letters
1:10p Call George Ross
23
12p Lunch w/ Aaron
24
8:05 Send Joshua Video
9 Church Breakfast
5:35p Event
25
7p Discover Check
26
7 AmEx
8:05 bed delivery
12p Call Jeannie
6:30p Car insurance
27
10 Bed Delivery
3:15p Photoshoot
3:45p Send resume
4p Call public school
28
8 Pay NGP
1p Canvasing
29
5p Eaglet event
Mar 1
6 Email rob
6:15 Rent Due
10 Set up Meeting With Sen.
5:30p Call LVWD
2
10 Alexander Marks mtg. w/ M
6p Call Henderson Court
3
7 Discover Payment
9:30 Henderson court
12p Alexander Marks mtg. w/
4p Re-Schedule George Ross
6:30p Hr Round table
4
7:30 Edu meeting
5
6:50 CitiBank

EXHIBIT XIII

Kirsten A. Milton, Bar No. 14401
JACKSON LEWIS P.C.
3800 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Kirsten.milton@jacksonlewis.com
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Fax: (702) 921-2461

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 CORPORATRIONS 11-20, inclusive, Defendants.	Case No. 2:17-cv-02110-KJD-CWH **DEFENDANT DAVID SAXE PRODUCTIONS, LLC'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**

Defendant David Saxe Productions, LLC ("Defendant"), by and through its counsel of record, Jackson Lewis P.C., in accordance with Rule 26 and 33, in response to Plaintiff's First Set of Interrogatories, states as follows:

DEFENDANT'S PRELIMINARY STATEMENT

Defendant responds to Plaintiff's Interrogatories as it interprets and understand them. In the event that Plaintiff subsequently asserts an interpretation of any of the Interrogatories that differs from Defendant's interpretations or understanding, Defendant reserves the right to supplement or amend its objections and/or answers. Further, Defendant reserves the right to object as to the competency, relevancy, materiality and/or admissibility of the information disclosed pursuant to their answers to the Interrogatories. In addition, these responses are made solely for

INTERROGATORIES

INTERROGATORY NO. 1:

Identify, with specificity Plaintiffs compensation including all benefits, pay scale, expected pay increases, and all fringe benefits (for example holiday/vacation pay, pension pay, health insurance), and any other arrangements received as of his last day of employment.

RESPONSE NO. 1:

Defendant objects to Interrogatory No. 1 on the grounds that the phrases "benefits," "pay scale," "expected pay increases," "fringe benefits," and "any other arrangements received" are not defined, rendering the Interrogatory vague, ambiguous, and, as such, susceptible to a multitude of different interpretations. Subject to and without waiving these and the general objections, Defendant states that, during Plaintiff's employment with David Saxe Productions, LLC, other than his salary, Plaintiff was also eligible for health insurance and paid holidays. *See also* documents produced at Bates-stamped Nos. SAXE-0023; SAXE0040 – 47; SAXE-0080 – 128.

INTERROGATORY NO. 2:

Identify whether Plaintiff was ever evaluated/reviewed/appraised, and if so, the dates of such evaluation/review/appraisal and the outcome of such evaluation/review/appraisal.

RESPONSE NO. 2:

Defendant objects to Interrogatory No. 2 on the grounds that it is vague and ambiguous; for example, the phrase "whether Plaintiff was ever evaluated/reviewed/appraised" is not defined rendering the Interrogatory vague, ambiguous, and, as such, susceptible to a multitude of different interpretations. Subject to and without waiving these and the general objections, Defendant states that Plaintiff was not given any formal evaluations, reviews, or appraisals, but, throughout the course of employment, Plaintiff was reprimanded by Defendant David Saxe ("Defendant Saxe") and coached on ways to improve his performance. *See also* documents produced at Bates-stamped Nos. SAXE-0051 – 55; SAXE-0060 – 70; SAXE0075 – 79.

INTERROGATORY NO. 8:

Identify every incident, including a description of the infraction and date of infraction, in which Plaintiff was given disciplinary action during his employment, describe what disciplinary action was taken against Plaintiff for each incident, and list the names of individuals who have knowledge of the underlying infraction.

RESPONSE NO. 8:

Defendant objects to Interrogatory No. 8 on the grounds that it is vague and ambiguous; for example, the phrase "disciplinary action" is not defined rendering the Interrogatory vague, ambiguous, and, as such, susceptible to a multitude of different interpretations. Subject to and without waiving these and the general objections, Defendant states that Plaintiff given suggestions and/or reprimanded by Defendant Saxe for failing to adequately perform his job. *See also* documents produced at Bates-stamped Nos. SAXE-0051 – 55; SAXE-0060 – 70; SAXE-0075 – 79.

INTERROGATORY NO. 9:

Identify each and every employee who was employed by you from March 2, 2013 through March 2, 2016 and for each employee please indicate whether such employee was paid on an hourly basis or salary basis.

RESPONSE NO. 9:

Defendant objects to Interrogatory No. 9 on the grounds that it seeks information that is not relevant to any party's claim or defense and is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties' relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Defendant also objects to this Interrogatory on the grounds that producing such information would violate the privacy rights of third parties not parties to this action.

Jeffrey Gronich, Attorney at Law, P.C.

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Las Vegas, NV 89104

Phone: 702-430-6896
Fax: 702-369-1290
Email: jgronich@gronichlaw.com
www.gronichlaw.com

Jeffrey Gronich, Esq.

June 15, 2018

VIA US EMAIL
Kirsten A. Milton, Esq.
JACKSON LEWIS P.C.
3800 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169
Kirsten.Milton@jacksonlewis.com

Re: Marks v. Saxe et. al. – Meet & Confer

Dear Ms. Milton:

This letter is in response to Defendant David Saxe Productions, LLC's responses to Plaintiff's written discovery requests. Unfortunately, some of these responses are deficient. Many of these deficiencies concern clarification of details or expanding answers and I believe can be addressed without the need for motion practice. While some of these responses might be clarified through deposition testimony, there are some responses which will require supplements. To that end, please provide updated responses to the written discovery by June 29, 2018.

To the extent that there are certain documents which by their nature contain sensitive or private information, Plaintiff is willing to work with Defendants on a suitable protective order to ensure that these documents will not be improperly used.

INTERROGATORIES

Interrogatory No. 3: Identify all written and/or oral employment policies and/or procedures that Defendant had in place from the date Plaintiff was hired with Defendant through March 3, 2016 including but not limited to the following policies and/or procedures:

(a) Employee discipline;
(b) Cause for Termination;
(c) Retaliation

Answer: Defendant objects to Interrogatory No. 3 on the grounds that it seeks information that is not relevant to any party's claim or defense and is not proportional to the needs of the case, considering the importance of the issues at

stake in this litigation, the amount in controversy, the parties' relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving these issues. Defendant also objects to this Interrogatory on the grounds that the phrase "oral employment policies and/or procedures" is not defined rendering the Interrogatory vague, ambiguous, and, as such, susceptible to a multitude of different interpretations. Subject to and without waiving these and the general objections, Defendant refers Plaintiff to documents produced at Bates-stamped Nos. SAXE-0051-55; SAXE-0060-70; SAXE0075-79.

This response refers Plaintiff to emails regarding Plaintiff's tasks and other communication between Plaintiff and Saxe. If this is your intention to refer to these documents, please state as such. Otherwise, please supplement to include all written and oral policies relevant to this question. For clarification, oral employment policies and/or procedures include any rule, instruction, policy or procedure enforced by Defendant upon its employees that was not published in writing but was instead communicated to the employees verbally.

Interrogatory No. 7: Have you ever been sued by anyone other than Plaintiff within the five (5) years preceding this lawsuit for wrongful termination or wrongful employment practices? If the answer is in the affirmative, state the name and address of the Plaintiff, and court caption of each such action.

Answer: Defendant objects to Interrogatory No. 7 on the grounds that it is neither relevant to any party's claim or defense nor proportional to the needs of the case, as any prior, unrelated complaints and lawsuits have no bearing on the facts, allegations, or defense raised in this lawsuit. Defendant also objects to the Interrogatory to the extent it seeks information for the past five years as overbroad. Moreover, such information is readily available to Plaintiff through a PACER search for any federal lawsuits, and through other online websites/systems for state courts. Subject to and without waiving these and the general objections, Defendant states that, in the last five years, David Saxe Productions, LLC has not been sued by a current or former employee for alleged retaliation pursuant to 29 U.S.C. §215, a claim under NRS 613.040, or a claim for tortious discharge.

Please supplement your response to include whether Defendant was sued for ANY wrongful termination or wrongful employment practices. This information is relevant for purposes of showing that Defendants should be liable for punitive damages, that the actions of Defendants were willful, and that Defendant have a proclivity for violating laws related to the treatment of employees. Further, this request is reasonably calculated to lead to admissible evidence, even if the information in and of itself is otherwise inadmissible. Further, the time and expense to Plaintiff to do a PACER or court search for each and every court in the entire United States for cases filed against Defendant and then determine whether those cases were related to employment or wrongful termination matter is greater than the burden on Defendant to merely provide that information. Further, many smaller courts and venues do not have online search functions. Therefore, please supplement this response.

Interrogatory No. 9: Identify each and every employee who was employed by you from March 2, 2013 through March 2, 2016 and for each employee please indicate whether such employee was paid on an hourly basis or salary basis

Answer: Defendant objects to Interrogatory No. 9 on the grounds that it seeks information that is not relevant to any party's claim or defense and is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties' relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Defendant also objects to this Interrogatory on the grounds that producing such information would violate the privacy rights of third parties not parties to this action.

Contrary to Defendant's assertion, this request is entirely relevant and necessary to Plaintiff's claims. Specifically, Plaintiff has alleged that in late February of 2016, Plaintiff discovered that Defendants were not paying their employees properly under the Fair Labor Standards act and attempted to initiate an investigation (Complaint ¶38-50). Plaintiff further alleges that Defendants impeded his attempt at that investigation and terminated him because of such investigation (Complaint ¶59-66). This information is relevant to show that Plaintiff's investigation was being made in good faith. Further, these individuals are likely to have discoverable information related to Defendant's payroll practices. Further, this information is relevant to show that Defendants' should be liable for punitive damages, that the actions of Defendants were willful, and that Defendants have a proclivity for violating laws related to the treatment of employees. Moreover, Plaintiff objects to the characterization that this information is so inherently personal such that it would violate the privacy rights of those employees. Therefore, please supplement.

REQUESTS FOR PRODUCTION

Request No. 3: Produce all employee handbooks and all documents which discuss or concern employment expectations or policies (including internal memos, policies, or procedures) that were in existence at any point from the date Plaintiff began his employment through the present.

Response: Defendants object to Request No. 3 on the grounds that it seeks information that is not relevant to any party's claim or defense and is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties' relative access to information and resources, the burden and expense of the proposed discovery and the importance of discovery in resolving the issues. Subject to and without waiving these and the general objections, Defendants refer Plaintiff to documents produced at Bates-stamped documents SAXE-0080-128. Defendants state that, subject to the above objections, responsive company policies beyond those included in the aforementioned documents are being held back.

This response is incomplete. Defendants objections here are improper as the request seeks documents relevant to employment expectations / policies. This is a lawsuit based on wrongful employment practices. To that end, either produce all responsive company polies or provide a description of the documents which are being held back such that Plaintiff can properly determine whether the documents are actually relevant or not.

> **Request No. 4:** Produce all documents concerning policies and procedures regarding internal accounting procedures and/or accounting manuals.
>
> **Response:** Defendants object to Request No. 4 on the grounds that it is overbroad, not limited in temporal scope, and seeks documents which are neither relevant to either party's claims or defenses nor proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Defendants further object to this Request to the extent it seeks documents protected by the attorney-client privilege or work product doctrine. Defendants state that, subject to the above objections, documents are being held back.

This response is incomplete. Defendants objections here are improper as the request seeks documents relevant to internal accounting procedures which are relevant to show whether Defendants acted unlawfully under the Fair Labor Standards Act with regard to payroll practices. Further, this information is relevant to show that Defendants' should be liable for punitive damages, that the actions of Defendants were willful, and that Defendants have a proclivity for violating laws related to the treatment of employees. Finally, Defendants response to Request No. 1 was that no documents are being withheld pursuant to any privileges. To that end, either produce all responsive company polies or provide a privilege log.

> **Request No. 5:** Produce all documents concerning policies and or procedures regarding internal company document/email retention.
>
> **Response:** Defendants object to Request No. 5 on the grounds that it is overbroad, not limited in temporal scope, and seeks documents which are neither relevant to either party's claims or defenses. Subject to and without waiving these and the general objections, Defendants stat that they have not implemented a record retention policy. Defendants further state that, subject to the above objections, documents are being held back.

This response is incomplete. This request seeks relevant information that is likely to lead to admissible evidence. To that end, either produce all responsive company polies or provide a description of the documents which are being held back such that Plaintiff can properly determine whether the documents are actually relevant or not.

> **Request No. 6:** Produce all Keystroke records for the computer used by Plaintiff during the entirety of his employment, and Keystroke software consent forms.

Response: Defendants object to Request No. 6 on the grounds that it seeks information that is not relevant to any party's claim or defense and is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Subject to and without waiving these and the general objections, Defendants state that they are not aware of any responsive documents.

This response is incomplete. Plaintiff avers that a program called "Keystroke" was installed on his computer by Defendants for the purpose of tracking his computer activity. This information is relevant to show that Defendant was aware that Plaintiff was researching FLSA/wage law/labor law information just prior to his termination. It is also relevant to show that Defendants' reasoning for terminating Plaintiff's employment was merely pretextual. If Defendants refuse to properly produce these records, Plaintiff requests that the computer used by him while an employee for Defendant be turned over for a forensic analysis.

Request No. 7: Produce all audio/visual recording of Plaintiff from February 24, 2016 through March 2, 2016.

Response: Defendants object to Request No. 7 on the grounds that it seeks information that is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Defendants also object to this Request on the grounds that it is vague and ambiguous; for example, to the extent it is not limited in scope to Plaintiff's employment with David Saxe Productions, LLC. Subject to and without waiving these and the general objections, Defendants will produce responsive documents.

These documents have not yet been produced. Please supplement.

Request No. 8: Produce all email correspondence from November of 2015 through March of 2016 between Plaintiff and David Saxe, Plaintiff and Larry Tokarski, and any email to or from David Saxe and any sender/recipient which mentions Plaintiff.

Response: Defendants object to Request No. 8 on the grounds that it seeks information that is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Defendants also object to this Request on the grounds that it is overbroad and seeks documents which are neither relevant to either party's claims or defenses. Defendants also object to this Request on the grounds that producing such information would violate the privacy rights of third parties not parties to this

action. Subject to and without waiving these and the general objections, see documents produced at Bates-stamped Nos. SAXE-0051-70. Defendants further state that, subject to the above objections, documents are being held back.

This response is incomplete. Specifically, this request is extremely relevant to Plaintiff's claims as these documents are likely to contain information regarding Plaintiff's communication with Defendants and its employees regarding payroll practices, safety practices, retaliation, and communications regarding Plaintiff's political activity. Further, Defendants' own employee handbook states that Employees should have no right or expectation of privacy on the computer or systems which include e-mail or the internet (SAXE 0104). Therefore, no third parties have any privacy rights in the information requested. Therefore, please supplement this response to include all responsive documents.

Request No. 9: Produce all documents which contain Plaintiff's signature from January of 2016 through March of 2016 (including but not limited to legal documents Plaintiff signed on behalf of the company, HR documents, correspondence, etc.).

Response: Defendants object to Request No. 9 on the grounds that it seeks information that is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Defendants also object to this Request on the grounds that it is overbroad and seeks documents which are neither relevant to either party's claims or defenses. Defendants further object to this Request on the grounds that producing such information would violate the privacy rights of third parties not parties to this action. Defendants also object to this Request to the extent it seeks documents protected by the attorney-client privilege or work product doctrine. Defendants further state that, subject to the above objections, documents are being held back.

This response is incomplete. Specifically, this request is extremely relevant to Plaintiff's claims as these documents are inherently relevant to show Defendants' reasons for terminating Plaintiff were pretextual. To the extent that any of these documents concern third parties, Plaintiff is willing to discuss a suitable protective order. Therefore, please supplement this response to include all responsive documents.

Request No. 13: Produce an un-redacted and accurate copy of Plaintiff's SmartSheet from 2015 through 2016.

Response: Defendants object to Request No. 13 on the grounds that it seeks information that is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Defendants also object to this Request on the grounds that it is overbroad and

seeks documents which are neither relevant to either party's claims or defenses. Defendants further object to this Request to the extent that it seeks documents protected by the attorney-client privilege or work product doctrine. Subject to and without waiving these and the general objections, Defendants are not aware of any responsive documents.

This response is incomplete. Plaintiff avers that a program called "SmartSheet" was installed on his computer by Defendants which contains to-do lists / task lists created by Defendants for Plaintiff. This information is relevant to show Plaintiff's day-to-day job duties and tasks. It is also relevant to show that Defendants' reasoning for terminating Plaintiff's employment was merely pretextual. If Defendants refuse to properly produce these records, Plaintiff requests that the computer used by him while an employee for Defendant be turned over for a forensic analysis.

Request No. 16: Produce any and all search history records from Plaintiff's work computer that relate to HR Information System Access throughout Plaintiff's employment.

Response: Defendants object to Request No. 16 on the grounds that it is overbroad and seeks documents which are neither relevant to either party's claims or defenses nor proportional to the needs of the case. Defendants further object to this Request on the grounds that it is vague and ambiguous; for example, the phrase "all search history records" and "relate to HR Information System Access" are vague and ambiguous, and as such, susceptible to a multitude of different interpretations. Defendants further object to this Request to the extent that it seeks documents protected by the attorney-client privilege or work product doctrine. Defendants state that, subject to the above objections, documents are being held back.

This response is incomplete. Plaintiff avers that a program called "HR Information System Access" was installed on his computer by Defendants for the purpose of calculating payroll. This information is relevant to show that Defendant was aware that Plaintiff was researching FLSA/wage law/labor law information just prior to his termination. It is also relevant to show that Defendants' reasoning for terminating Plaintiff's employment was merely pretextual. If Defendants refuse to properly produce these records, Plaintiff requests that the computer used by him while an employee for Defendant be turned over for a forensic analysis.

Request No. 17: Produce all permits that you obtained to allow welding at the theater and warehouse from 2015 through 2016, including certifications from each individual who was certified to perform the work during that time period

Response: Defendants object to Request No. 17 on the grounds that it is overbroad and seeks documents which are neither relevant to either party's claims or defenses nor proportional to the needs of the case. Defendants state that, subject to the above objections, documents are being held back.

This response is incomplete. Specifically, this request is extremely relevant to Plaintiff's claims (paragraphs 34-37; 75-82) as these documents are likely to contain information regarding whether Defendants were operating under proper OSHA/safety standards and/or were operating within the terms of their lease. Therefore, please supplement this response to include all responsive documents.

> **Request No. 19:** Produce all documents, including electronic data, relating to any discussions and/or communications between the Defendants and its agents/employees relating to Plaintiff from the beginning of his employment through the present
>
> **Response:** Defendants object to Request No. 19 on the grounds that it seeks information that is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Defendants also object to this Request on the grounds that the phrase "relating to Plaintiff" is not defined, rendering the request overbroad, vague and ambiguous, and, as such, susceptible to a multitude of different interpretations. Defendants also object to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine. Subject to and without waiving these and the general objections, Defendants refer Plaintiff to documents produced at bates-stamped Nos. SAXE-0051-79. Defendants further state that, subject to the above objections, documents are being held back.

This response is incomplete. Specifically, Defendants have not stated a valid reason for withholding any documents responsive to this request. The request seeks relevant information related to Plaintiff's employment, including Plaintiff's work performance, his claims, and Defendants' defenses. To that end, either produce all responsive company polies or provide a description of the documents which are being held back such that Plaintiff can properly determine whether the documents are actually relevant or not.

> **Request No. 20:** Produce all documents, including electronic data, relating to any discussions and/or communications between the Defendants (including its agents/employees) and Plaintiff from the beginning of his employment through the present – note this request differs from Request No. 19.
>
> **Response:** Defendants object to Request No. 20 on the grounds that it seeks information that is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Defendants also object to this Request on the grounds that the phrase "relating to any discussions and/or communications" is not defined, rendering the request overbroad, vague and ambiguous, and, as such, susceptible to a multitude of different interpretations. Defendants also object to this Request to the extent it

seeks information protected by the attorney-client privilege and/or work product doctrine. Subject to and without waiving these and the general objections, see documents produced at Bates-stamped Nos. SAXE-0051-79. Defendants further state that, subject to the above objections, documents are being held back.

This response is incomplete. Specifically, Defendants have not stated a valid reason for withholding any documents responsive to this request. The request seeks relevant information related to Plaintiff's employment, including Plaintiff's work performance, his claims, and Defendants' defenses. To that end, either produce all responsive company polies or provide a description of the documents which are being held back such that Plaintiff can properly determine whether the documents are actually relevant or not.

Request No. 21: Produce copies of lease agreements Defendants were a party to with Boulevard Invest, LLC (Miracle Mile) from 2015 through 2016.

Response: Defendants object to Request No. 21 on the grounds that it seeks information that is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Defendants also object to this Request on the grounds that it is overbroad and seeks documents which are neither relevant to either party's claims or defenses. Defendants also object to this Request to the extent it seeks information protected by the attorney-client privilege or work product doctrine. Defendants further state that, subject to the above objections, documents are being held back.

This response is incomplete. Specifically, this request is extremely relevant to Plaintiff's claims (paragraphs 34-37; 75-82) as these documents are likely to contain information regarding whether Defendants were operating under proper OSHA/safety standards and/or were operating within the terms of their lease. Therefore, please supplement this response to include all responsive documents.

Request No. 22: Produce all payroll records (including paystubs and time card data) for each employee listed on Interrogatory No. 9.

Response: Defendants object to Request No. 22 on the grounds that it seeks information that is not relevant to any party's claim or defense and is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Defendants also object to this Request on the grounds that producing such information would violate the privacy rights of third parties not parties to this action. Defendants further state that, subject to the above objections, documents are being held back.

Contrary to Defendant's assertion, this request is entirely relevant and necessary to Plaintiff's claims. Specifically, Plaintiff has alleged that in late February of 2016, Plaintiff discovered that Defendants were not paying their employees properly under the Fair Labor Standards act and attempted to initiate an investigation (Complaint ¶38-50). Plaintiff further alleges that Defendants impeded his attempt at that investigation and terminated him because of such investigation (Complaint ¶59-66). This information is relevant to show that Plaintiff's investigation was being made in good faith. Further, these individuals are likely to have discoverable information related to Defendant's payroll practices. Further, this information is relevant to show that Defendants' should be liable for punitive damages, that the actions of Defendants were willful, and that Defendants have a proclivity for violating laws related to the treatment of employees. Moreover, Plaintiff objects to the characterization that this information is so inherently personal such that it would violate the privacy rights of those employees. Therefore, please supplement.

> **Request No. 24:** Produce the complete personnel file of Larry Tokarski and Veronica Duran.
>
> **Response:** Defendants object to Request No. 24 as calling for information which not both (a) relevant to Plaintiff's claims remaining for resolution at trial or Defendants' defenses to those claims; and (b) proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Defendants also object to this Request on the grounds that producing such information would violate the privacy rights of third parties not parties to this action. Further, "the court generally regards personnel files of employees to be confidential by their nature…" *U.S.E.E.O.C. v. Pioneer Hotel, Inc.*, 2014 WL 5045109 (D. Nev. 2014). "Such filed commonly contain addresses, phone numbers, income information, medical histories, employment discipline, criminal records, and other sensitive, personal information having little or no relevancy to the issues in litigation." *Id.* To permit wide dissemination of personnel files would result in a clearly defined, serious, and unnecessary injury to the privacy of the employee…" *Id.* Defendants further state that, subject to the above objections, documents are being held back.

This response is incomplete and gives an incorrect reading of the case law. Specifically, the Court in *U.S.E.E.O.C. v. Pioneer Hotel, Inc.*, 2014 WL 5045109 (D. Nev. 2014) granted Plaintiff's motion to compel production of personnel files of employees who were not parties to the lawsuit, subject to a suitable protective order. As indicated earlier, Plaintiff is willing to allow Defendants to produce this information subject to a suitable protective order.

///

///

Thank you for your anticipated cooperation in updating and supplementing these responses. If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Jeffrey Gronich, Esq.

EXHIBIT XIV

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

or time periods in an employee's employment?
MS. MILTON: Object to form, vague.
THE WITNESS: I'm aware that we say that you're under a 90-day -- we'll do a 90-day review or -- there's a 90-day review and I think an annual review, but I don't know if the word you used, I don't know if it means you have to get it or not, but...
BY MR. GRONICH:
Q. How do you interpret it?
A. I interpret it as we will do a 90-day review and an annual review at -- or close to that as we can. It doesn't necessarily mean it's a formal. We don't always get to them. So for, especially with Alex, he was legal, so...
Q. Do you ever do written reviews or evaluations with other employees?
MS. MILTON: Object to form, vague.
THE WITNESS: For the most part the hourly employees and their managers I think are probably more on that. Since I directly supervised him and he was a higher level, I think I -- and he knew I was busy. I think mine was more verbal. I kept telling him about it.
BY MR. GRONICH:
Q. Are there any other employees that you

see him inside. He would be in my office. He -- I would call his extension, if he answered or not. There's video, security video of the building. So if I saw him on the camera in the marketing room or something, I'd see he was there. It just depends.

BY MR. GRONICH:

Q. Are there security cameras in all of the offices in the building?

A. At the time Alex was working?

Q. Yes, at the time, so in 2015 and 2016.

A. I believe so.

Q. And did those cameras record audio and video?

A. Some do, some don't. I can't say all.

Q. Do you know which ones recorded audio and which ones didn't?

A. Somewhat. There's -- there's cameras -- I mean, I don't know which ones didn't. The exterior security cameras I presume don't. I don't know though. I'm presuming which ones do and don't. I don't have knowledge for sure if they do. You know, I'd have to go through a list.

Q. Do you have a list of all the cameras?

MS. MILTON: Object to form, vague.

THE WITNESS: No, I don't have a list of all

the cameras, but I could probably -- what was there at the time, I could probably figure out the positions or which ones had them or not. I'm sure there's something we could look through to figure it out, but I don't know technical. I don't know which ones were which brands and if they had audio or not.

BY MR. GRONICH:

Q. Do you know how many cameras were in Alex's office?

A. I think Alex moved offices a couple times, I'm not sure. But either way I think there's only one camera in each office.

Q. Were there any offices that had more than one camera in them?

MS. MILTON: Objection, vague.

THE WITNESS: There's -- I don't know if it's called an office. It's an open work area with a lot of different desks and, like, the main floor entryway. When Alex was there, we were all sort of crammed in some area.

Now the building is built out, so back then it was different. So there's multiple cameras in a large area with a lot of open desks. I don't know if that's an office or not.

BY MR. GRONICH:
Q. How many cameras were there?
A. In that area?
Q. Uh-huh.
A. Two or three. I'd have to go through the layout.
Q. Okay. Was Larry Tokarski in his own office at that time or was he in the general floor area?
MS. MILTON: Objection, vague. What time?
BY MR. GRONICH:
Q. In 2015 and 2016.
A. Yes, he was in his own office.
Q. Do you remember how many cameras were in Larry's office?
A. I think just one.
Q. Do you know if it recorded video and audio or just video?
A. I'm pretty sure audio and video.
Q. Okay. The cameras, are they constantly rolling or do you have to turn them on in the morning and turn them off at night?
A. My understanding, from what IT has explained, I don't know if that's exactly right or not, but they're on motion sensors. So they don't record unless there's motion in that room or area.

THE WITNESS: The policy that we go by is for the videos is, and I don't know if it's in writing, to be honest, I'm not sure what it says there, it just -- but no one is instructed to delete anything. So I think it's just whatever is on there.
BY MR. GRONICH:
Q. Do you ever delete any footage?
MS. MILTON: Object to form, vague.
THE WITNESS: No, I have not deleted footage.
BY MR. GRONICH:
Q. Okay. So you mentioned that sometimes you would see Alex on the surveillance, that's sometimes how you knew that he was in the office; is that right, to go back a little bit?
A. Yes.
Q. Okay. Was there also internet tracking software on the computers?
A. I don't know if it was on his, but there was on some people's, yes.
Q. Okay. What was that software?
A. I don't know what the software name is, but I remember two words. One is Sonar Central and another word, InterGuard. I don't know which one is company, which one is software.

Q. InterGuard?
A. InterGuard.
Q. Now, whose computers was the software installed on?
A. I don't know.
Q. How did the software work?
A. I don't know.
Q. Fair enough. I don't mean how is the code written, I mean what does the software do?
A. I think it tracks websites those particular users are on. I think there's a keystroke thing, like it records keystrokes, but I don't know technically all the -- how that goes. I don't know.
Q. So are you able to see what the employees are doing on their computers?
A. Not realtime. I think -- oh, there's a screen shot thing I think it took. I don't know what it's capable of, but the IT guys, what they set it up to do, or maybe it's just settings. I'm not sure what the software's capabilities are, but for my purposes I would see -- I could see screen shot. There's a thing for me to see screen shots that it did randomly every, I don't know, five minutes or something.
And, what else? You can sort by, like,

websites and it would show websites they visited. And there's like a screen shot of the website, or whatever page they were on on the website I guess.

Q. Do you know how long it stores that information?

A. I don't know, but if -- I think it's just based on what one of the IT guys said once, it's only a few weeks.

Q. Is this program, is it internet-based? Is it, like, in the cloud?

A. I don't know. I think so, yes. I'm pretty sure, but I don't know.

Q. Okay. Do you know if Mr. Marks ever worked more than 40 hours in any week while he was employed with you?

A. Do I know that he did? No, I don't.

Q. You don't know if he ever, if there was any ever -- you don't know if there was ever a week in which he worked more than 40 hours?

A. I don't know, but he did stay past 5:00 and worked with me on several occasions. So if he was there at 8:30 every day that week, then it's possible, yes.

Q. Did you ever pay him overtime?

A. I don't know. I don't think so. I hope

not.

Q. Why do you hope not?

A. Because that would -- that wouldn't be the right way to pay him.

Q. Why do you believe that?

A. Because that's not what he was hired -- he wasn't an hourly employee.

Q. What were Mr. Marks' duties, job duties?

A. Well, originally I wanted him to do a lot of the legal stuff, but he didn't have a license so it started less in the legal and more on the just miscellaneous stuff.

Q. Can you be more specific with me?

A. Sure. He ended up doing, throughout his time there he ended up doing some HR-related stuff, some compliance-related stuff. He liked -- he liked the showbiz aspects of things, so he dealt with some of the entertainers for just some of the entertainment stuff related to visas and some other things. Insurance. I think he dealt with the insurance companies. That's all I can think of right now.

Q. When you hired Mr. Marks, did you think that he was qualified for the position?

A. I hoped so, yes.

Q. But did you believe he was at the time?
A. Yes. I mean, yes.
Q. Now, you said he didn't have a license. At some point did that change?
MS. MILTON: Objection, calls for a legal conclusion.
THE WITNESS: Not to my knowledge. He still couldn't practice law, or he still couldn't practice law in Nevada.
BY MR. GRONICH:
Q. Were you still assigning him legal tasks?
MS. MILTON: Objection, calls for a legal conclusion.
THE WITNESS: Tasks that would be legal-related, but I'd have to hire a real attorney to do the work. So he could maybe prep something and give his opinion on something, but I'd have to hire an attorney to do the actual work.
BY MR. GRONICH:
Q. So you didn't consider him to be your lawyer?
MS. MILTON: Object to form.
THE WITNESS: Well, I didn't consider him to be a licensed lawyer, after figuring out he couldn't do that.

BY MR. GRONICH:
Q. And when was that?
A. Early on --
Q. How often?
A. -- in his employment.
I'd say within the first few weeks.
Q. Okay. Are you familiar with any discipline policies that David Saxe Productions had in place during the time that Alex was employed?
MS. MILTON: Objection, vague.
THE WITNESS: You'd have to be specific which discipline policy.
BY MR. GRONICH:
Q. Well, were there any discipline policies?
A. Yes.
Q. What kind of discipline policies were there?
A. Are you referring to if you don't show up for work, you can get fired? I mean, I don't know which ones you're referring to.
Q. Well, it's your company so I don't know and that's why I'm asking you, because I don't know what your policies were.
A. Could I see the document you're talking about?
Q. I'm not specifically referring to a specific

A. Joking around meaning we didn't play or anything. We worked, but if there was something, his opinion about, I can recall him joking about Theresa Maines, and he would make sarcastic remarks about people, you know, but it was all in the course of work-related, you know.

Q. Did you ever have discussions about hobbies or interests or TV shows that were not work-related?

A. In his interview he told me he likes Family Guy, and I said "me too." Sometimes in interviews I asked people what books, not just standard questions, I'll also ask, just kind of get a feel who they might be personally. And I think I asked what books, TV shows, movies he likes, hobbies, what else, and he said Family Guy. So I like Family Guy too.

Q. So during his employment, did you ever talk about Family Guy?

A. We did voices as characters here and there as part of the, not just to entertain, it wasn't that, it was just in the course of something, he might say something in one of the character's voices.

Q. So sometimes you would have kind of an informal relationship with him, if you let your guard down a little bit? Does that sound about right?

MS. MILTON: Object to form, vague.

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:

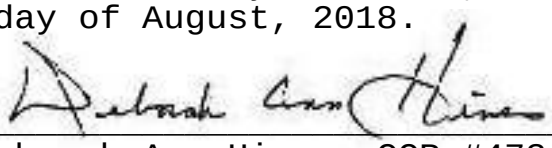
That I reported the taking of the deposition of the witness, David Saxe, commencing on Wednesday, July 11, 2018, at 1:47 p.m.;

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

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.

CERTIFIED COPY

Case No. 2:17-cv-02110

DEPOSITION OF DAVID SAXE

VOLUME 2

Taken at office of Jeffrey Gronich

1810 East Sahara Avenue

Las Vegas, Nevada

Taken on Wednesday, September 17, 2019

10:14 a.m.

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

A. Yes.
Q. So say that again. You're saying Alex went to his office and called Drew into his office?
A. I don't know how it happened; I just saw on the camera he Drew in his office.
Q. You said "Saw on the camera." How did you see that on the camera?
A. I have a TV in my office that has multiview of all the cameras.
Q. So you can see what's going on in each office --
A. Yes.
Q. -- at any given time?
A. Yes, for the most part.
Q. So did that -- did that video have an audio?
A. Yes.
Q. So you could hear what they were talking about?
A. Yes.
Q. What were they talking about?
A. Alex was -- I don't remember the specifics. It was just Alex talking about -- something like "David's a jerk." And, "Screw him,"

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:

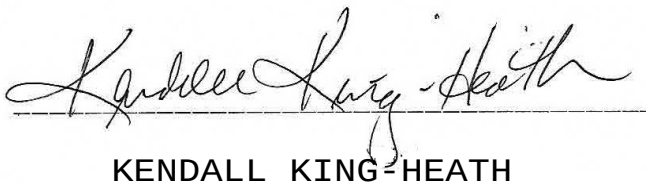
That I reported the taking of the deposition of the witness, DAVID SAXE, VOL. 2, commencing on the 17th day of October, 2019, at the hour of 10:14 a.m.

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 XV

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

Q. Well, Alex always received his full paycheck, didn't he? 10:31:29 10:31:37

A. No. David told me specifically not to pay him when he came in to work for an hour early in the morning, and then went home sick. 10:31:38 10:31:40 10:31:44

Q. But Alex was paid for that particular instance, was he not? 10:31:49 10:31:53

A. I don't remember. 10:31:55

Q. But you're the controller. 10:31:55

A. I pay -- I pay lots of people. I don't know if we -- I don't believe we ended up paying him, but I could not state for the record. 10:31:57 10:31:58 10:32:02

Q. So if I showed you Alex's payroll records, would that refresh your memory as to whether you, as the controller who processed payroll during the time Alexander Marks was employed at David Saxe, paid Alex for that time? 10:32:04 10:32:09 10:32:12 10:32:21 10:32:35

A. Potentially. 10:32:36

(Defendants' Exhibit 2 was marked for identification.) 10:32:38 10:32:40

BY MS. MILTON: 10:32:40

Q. Larry, I'm showing you what's been marked as Defendants' -- I'm sorry, Jeff. Sorry. 10:32:40 10:32:43

I'm showing you what's been marked as Defendant's Exhibit 2. I want to -- if you flip 10:32:49 10:32:51

hypothetical, calls for speculation. 11:04:41
THE WITNESS: Yes. 11:04:42
BY MS. MILTON: 11:04:43
Q. Did Alex tell you specifically what law he 11:04:56
thought David was violating -- that David Saxe 11:05:04
Productions was violating? 11:05:08
A. Yes. Not paying salaried employees for days 11:05:09
they worked. 11:05:13
Q. Other than Alex, are you aware of any other 11:05:14
employees at David Saxe Productions who did not -- who 11:05:20
were salaried employees and did not get paid for days 11:05:26
that they worked? 11:05:29
A. I remember having generic conversations, but 11:05:32
I don't have a specific example, no. 11:05:36
Q. Generic conversations with David? 11:05:39
A. Yes. 11:05:43
Q. What were those generic conversations? 11:05:43
A. Those generic conversations was that salaried 11:05:47
employees have to be paid, even if they only work a 11:05:51
portion of the day. And David decided -- David is 11:05:53
very arrogant, and that has helped him build a very 11:05:59
good business, a very successful business, but at the 11:06:03
same time, he thinks he's above the law. And he says, 11:06:05
"I don't have to pay anybody if I don't want to." 11:06:08
Q. Give me the name of an employee who was a 11:06:11

salaried employee who David instructed you not to pay. 11:06:19

A. I don't have a -- 11:06:24

MR. GRONICH: Objection, asked and answered. 11:06:25

THE WITNESS: I don't have a name, other than Alexander Marks. 11:06:27 11:06:29

BY MS. MILTON: 11:06:30

Q. Did you ever complain to anyone at David Saxe Productions that employees were not being properly paid? 11:06:44 11:06:47 11:06:50

A. I had discussions with HR about it, yes. 11:06:52

Q. Who? 11:06:55

A. Again, Maria, Stephanie, Veronica. 11:06:57

But we all agreed that it's David's company and he's going to do what he wants to do. 11:07:01 11:07:04

Q. What was your conversation with Maria? 11:07:11

A. Probably the same thing, that we should be paying salaried employees if they work part of the day. 11:07:14 11:07:17 11:07:24

Q. How many conversations did you have with Maria about that? 11:07:24 11:07:26

A. No idea. 11:07:28

Q. Do you remember how long Maria and your employment overlapped at David Saxe Productions? 11:07:28 11:07:34

A. I don't. 11:07:36

Q. How many conversations -- did you have the 11:07:40

did you go into Alex's office? 11:10:14

A. I don't remember. 11:10:19

Q. At some point, Alex came to you and said that he wasn't feeling well and he was going home; is that correct? 11:10:25 11:10:29 11:10:32

A. Yes. 11:10:32

Q. And do you remember what time of day that was? 11:10:32 11:10:34

A. It was before most of the staff was there, and they get in about 8:30, so... 11:10:35 11:10:37

Q. So that day, you arrived at 7:30, and Alex was already there. Correct? 11:10:41 11:10:45

A. Yes. 11:10:47

Q. And Alex left sometime before 8:30 a.m. to go home sick? 11:10:47 11:10:53

A. Yes. 11:11:01

Q. Did -- the next day, Alex came back to work; is that correct? 11:11:01 11:11:07

A. Yeah, I assume so. 11:11:07

Q. Well, you had a conversation with him that day about whether he would be paid for February 25th when he was out, did you not? 11:11:08 11:11:11 11:11:16

A. That day or probably the next day? I'm not -- I'm not sure which day. 11:11:18 11:11:21

Q. So you -- did you -- when you had a 11:11:22

conversation with Alex either the 20- -- well, it was probably -- was it the 26th, which was a Friday, or the following Monday? Because I assume you didn't talk to him about it on Saturday. 11:11:28 11:11:32 11:11:35 11:11:37

A. Yeah, I don't remember when I talked to him. 11:11:39

Q. When you talked to him about it, when you talked to him about the day that he was out sick, why did you go in and talk to him about it? 11:11:41 11:11:45 11:11:48

A. To make him aware of it, that his check would be short, so there wasn't a question afterwards. 11:11:50 11:11:53

Q. So at some point when Alex goes out sick, your testimony is that David told you not to pay Alex for that day. 11:11:56 11:12:02 11:12:05

A. Yes. 11:12:06

Q. Did he tell you that in person or over email? 11:12:07

A. I don't remember. I don't know if it was in person or phone or email. 11:12:12 11:12:16

Q. What did you say in response to David's request? 11:12:20 11:12:24

A. I don't remember. 11:12:24

Q. And you felt -- you didn't think that was the right thing to do, so you went to tell Alex, right? 11:12:34 11:12:37

A. I probably told David, but it -- he was here; we should pay him. But I don't remember for sure. I would not swear to that under oath. I would think I 11:12:47 11:12:50 11:12:50

BY MR. GRONICH: 12:16:11

Q. When you say he's built a successful 12:16:11
business, have you ever perceived him to cut corners 12:16:15
when he's building his enterprise? 12:16:19

MS. MILTON: Objection, speculation, vague. 12:16:21

THE WITNESS: Yes. 12:16:24

BY MR. GRONICH: 12:16:24

Q. What kind of corners have you perceived him 12:16:24
to cut? 12:16:28

A. Just trying to do things as cheaply as 12:16:29
possible. 12:16:31

Q. Okay. As far as -- maybe let me rephrase 12:16:31
that. 12:16:34

When I say "cut corners," I mean doing things 12:16:34
maybe unethically, illegally, or immorally. 12:16:38

MS. MILTON: Objection, compound, vague. 12:16:42

THE WITNESS: I think David thinks he's above 12:16:44
the law and will do things that he thinks is right, 12:16:48
law be damned. 12:16:53

BY MR. GRONICH: 12:16:54

Q. And you have said that earlier as well. 12:16:54

Do you have any specific examples of that? 12:16:56
Other than the situation with Alex Marks, do you have 12:16:59
any other situations that you remember from your time 12:17:05
working there? 12:17:07

A. I don't. Not specific. 12:17:08

Q. Do you remember feeling -- while you were working there, do you remember feeling that some of the things that he was asking you to do were either unethical or unlawful? 12:17:10 12:17:12 12:17:15 12:17:17

MS. MILTON: Objection, vague, compound. 12:17:20

THE WITNESS: I remember just in general, not so much unethical, but just the total lack of trust in the whole building, you know, that it just made it a very toxic environment. 12:17:21 12:17:24 12:17:28 12:17:33

BY MR. GRONICH:

Q. What do you mean by "total lack of trust"? 12:17:35

A. Just the cameras being everywhere, the listening in on all conversations -- 12:17:37 12:17:40

Q. Okay, let's -- I'm sorry. Go ahead. 12:17:42

A. -- to him sitting in front of his big hundred-inch monitor, you know, that showed all the cameras everywhere. 12:17:45 12:17:47 12:17:49

Q. Okay, so let's talk about that. So you said there were cameras everywhere. 12:17:50 12:17:53

A. Yes. 12:17:55

Q. When you say "cameras everywhere," do you mean everywhere in the office? 12:17:56 12:17:58

A. Everywhere in the office, everywhere in the theater, everywhere. My camera -- my office had a 12:18:00 12:18:02

camera -- 12:18:06

Q. You saw the cameras? 12:18:06

A. -- HR -- 12:18:08

Q. You saw the cameras? 12:18:09

A. Oh, yes. And the cameras had audio, so he would come back to you and say, "I heard you say" this, this, and this. 12:18:11 12:18:14 12:18:17

Q. How often would David have a conversation with you about things that you said that he recorded on camera? 12:18:19 12:18:21 12:18:25

A. Occasionally. 12:18:26

Q. Okay. And how did you know that he had overheard you on camera as opposed to some other means of hearing your conversation? 12:18:27 12:18:31 12:18:34

A. Because it was only two of us in the office who were discussing something or it could be a phone conversation. 12:18:38 12:18:40 12:18:44

Q. Okay. Do you know if -- 12:18:46

A. And I watched him do it. 12:18:48

Q. Do what? 12:18:50

A. Watch people and listen to the conversations. 12:18:51

Q. So you sat in the office with David while he had -- you said he had a hundred-inch TV? 12:18:52 12:18:55

A. I'm guessing on the size. But, yeah, huge TV that had -- you know, you could zoom in on any one to 12:18:59 12:19:02

have bigger, but it had all the different -- he had two of them, actually. 12:19:08 12:19:09

Q. So you sat in his office while he would watch other people on the cameras and listen to their conversations? 12:19:11 12:19:14 12:19:16

A. Yes. 12:19:16

Q. Do you remember about how often that happened? 12:19:17 12:19:20

A. No. 12:19:20

Q. Do you -- do you know about how often David would -- let me rephrase the question. 12:19:21 12:19:28

How much time did David spend watching the cameras and listening to audios of other employees? 12:19:30 12:19:34

MS. MILTON: Objection, foundation, speculation. 12:19:38 12:19:39

THE WITNESS: I don't know how much time. I know, at his desk, that, you know, one was there and one was on the other wall (indicating), so -- but as to how much he was doing it, I don't know. 12:19:39 12:19:41 12:19:44 12:19:47

BY MR. GRONICH: 12:19:49

Q. Did -- when David was in the office, was his door open or closed, generally? 12:19:49 12:19:52

A. Generally open, unless he was meeting with people. 12:19:54 12:19:57

Q. When you walked by the office when the door 12:19:57

was open, did you ever per chance to take a peek inside as you were passing by? 12:20:02 12:20:07

MS. MILTON: Objection, relevance. 12:20:09

THE WITNESS: I mean, I guess, yeah, you just walk by (indicating). 12:20:10 12:20:13

BY MR. GRONICH:

Q. And on those occasions, did you see the cameras -- that the TV showing the cameras were on? 12:20:15 12:20:16

A. Well, the cameras was were always on, but -- 12:20:20

Q. I mean the TV showing the cameras. Were they on? 12:20:24 12:20:27

A. Yes, always. 12:20:28

Q. Even when --

A. The TVs showing the cameras were always on. 12:20:29

Q. Even when he was meeting with people in the office? 12:20:33 12:20:36

A. Yes, yes. 12:20:36

Q. Okay. Do you know how long the video and audio stayed on the -- on the company -- I don't know if I want to call it a server or -- how long did the tapes remain before they were taped over; do you know that? 12:20:37 12:20:46 12:20:51 12:20:56 12:20:59

A. I don't. 12:20:59

Q. Okay. What about was there a program that monitored your computer activity? 12:21:00 12:21:11

A. Yes. 12:21:14
Q. Do you know the name of that program? 12:21:14
A. I do not. 12:21:16
Q. What do you know about that program? 12:21:17
A. It would literally monitor every keystroke you did. 12:21:20
Q. Would it monitor the image on the computer as well? 12:21:23
A. I believe so, yes. 12:21:27
Q. How do you know about that program? 12:21:28
A. We talked about it. 12:21:30
Q. Who is "we"? 12:21:31
A. David and I. 12:21:33
Q. Okay. And I'm sorry, sometimes I may know what you mean -- 12:21:33
A. Okay. 12:21:37
Q. -- I just need it clear for the record. 12:21:37
A. No, no, that's fine. 12:21:38
Q. So when did you have a chance to talk with David about that program? 12:21:41
A. I don't remember any specific examples, but, you know, it was all just part of a general culture of distrust. 12:21:48
Q. Okay. Did -- were you told about the video recording and the keystroke recording software when 12:21:58

you were hired? 12:22:06

A. No. 12:22:07

Q. Okay. 12:22:07

A. Well, video recording, you could see that. I won't say that. But not the keystroke. Video recording might have been; I don't remember. We were in a different building then, so the cameras weren't as extensive when I was hired as they were in the new building. 12:22:08 12:22:11 12:22:14 12:22:16 12:22:20 12:22:23

Q. When was the move? 12:22:23

A. September of '14, I think. 12:22:26

Q. Okay. Do you know if anybody else's computer had the same keystroke software on it? 12:22:28 12:22:34

A. As far as I know, all the computers had it. 12:22:38

Q. When you say as far as you know, how do you know? 12:22:40 12:22:43

A. I don't think it was limited to specific people; I think it was all computers in the office. 12:22:43 12:22:45

Q. Okay. Do you know if Alexander Marks' computer had that software on it? 12:22:49 12:22:55

A. I'm sure, like every other computer, it did. 12:22:57

Q. Okay. Okay. Do you know why David wanted to have that kind of monitoring within the company? You said there was a lack of trust -- 12:23:02 12:23:10 12:23:14

A. Yes. 12:23:16

Q. You could take a break whenever you wanted? 12:26:25
A. I guess, in theory, yeah. The break-time 12:26:29
rules were more for the hourly employees. 12:26:32
Q. Okay. Were you ever counseled or disciplined 12:26:34
for the way you took breaks? 12:26:37
A. No. 12:26:39
Q. Were you ever disciplined for not doing as 12:26:39
much work as you should be doing in a given day? 12:26:44
A. No. 12:26:47
Q. Were you ever disciplined for lack of hustle 12:26:47
or lack of initiative? 12:26:49
A. No. 12:26:51
Q. Okay. How -- how often would you say, on a 12:26:51
given day, that you took a couple minutes to make a 12:26:59
personal phone call or write a personal text or an 12:27:04
email? 12:27:07
A. I mean, potentially every day, you know, 12:27:08
two-minute something, check your phone, whatever. 12:27:13
Q. Okay. 12:27:16
A. You know, I mean, I was a salaried employee 12:27:17
who had to get stuff done, and that's what I did. 12:27:20
Q. Okay. Do you know if David -- well, David 12:27:22
knew that you were doing this, right? Because he had 12:27:26
the cameras installed. 12:27:27
A. Yes. 12:27:29

MS. MILTON: Objection, speculation. 12:27:29
BY MR. GRONICH: 12:27:31
Q. So David could see from the cameras that you were sometimes taking a quick two minutes to be on your phone, and then go back to the computer; is that right? 12:27:31 12:27:34 12:27:38 12:27:39
MS. MILTON: Objection, speculation -- 12:27:39
THE WITNESS: Yes. 12:27:40
MS. MILTON: -- foundation. 12:27:40
BY MR. GRONICH: 12:27:41
Q. Okay. And he never said anything to you about it? 12:27:42 12:27:43
A. No. 12:27:44
Q. He never said, "Hey, I don't want you to be on your phone. You take this ten minutes, you take a break time, but I don't want you to be looking back and forth"; he never said that to you? 12:27:44 12:27:46 12:27:48
A. No. 12:27:50
Q. Okay. What about other employees; did you ever notice -- well, let me go back a second. 12:27:50 12:27:54
The -- you said you had your own office, right? 12:27:58 12:28:00
A. Yes. 12:28:01
Q. Was it -- 12:28:01
A. Well, I shared an office. 12:28:02

Q. Who did you share the office with? 12:28:03
A. With my purchasing manager. 12:28:05
Q. Okay. Was your purchasing manager also 12:28:07
salaried or was that person hourly? 12:28:10
A. I'm trying to remember. I want to say she 12:28:12
was hourly. 12:28:15
Q. Do you remember noticing when she would take 12:28:15
her breaks? 12:28:18
A. No. 12:28:19
Q. Do you ever remember seeing her check an 12:28:19
email or check a text message not during an approved 12:28:25
break period? 12:28:29
A. I don't remember. I'm sure she did, but I 12:28:31
don't remember. 12:28:34
Q. Why are you sure she did? 12:28:34
A. Because it's kind of human nature, I mean, 12:28:36
you know -- my work philosophy is you're there to get 12:28:43
the job done, get the job done. I'm not going to 12:28:47
micromanage you to make sure, you know, you're on your 12:28:49
exact ten-minute break at ten times. That's not the 12:28:54
type of environment I want to -- 12:28:57
Q. Did you -- I'm sorry. 12:28:59
A. -- work in. 12:29:01
Q. I'm sorry. 12:29:03
Did you ever -- I'm sorry; what was this 12:29:04

person's name? 12:29:06
A. Nan was one; Tina was before her. I mean, we 12:29:07
moved various offices all the time depending what was 12:29:11
going on. 12:29:14
Q. Okay. During the workday, did you ever have 12:29:16
any conversations with Nan or Tina that were anything 12:29:20
unrelated to David Saxe? 12:29:24
A. I don't remember specifics, but I'm sure we 12:29:27
did. 12:29:29
Q. Did you ever have conversations about your 12:29:29
kids? 12:29:32
A. Yeah.
Q. You showed them pictures of your kids on your 12:29:32
phone? 12:29:34
A. I'm sure we did, yeah. 12:29:35
Q. You may not remember specific dates or 12:29:36
incidents, but you remember generally doing that? 12:29:38
A. Yeah. 12:29:40
Q. And you remember that this was not a break 12:29:41
time? 12:29:43
A. We were work colleagues who converse as work 12:29:44
colleagues do. 12:29:46
Q. And your kids are important to you, I guess, 12:29:46
right? 12:29:48
A. Very much. 12:29:48

Q. Proud of your kids? 12:29:48
A. Yes. 12:29:49
Q. So you want to show off your kids to your coworkers, right? 12:29:49 12:29:51
A. Or complain about them when necessary. 12:29:53
Q. Or complain about them, okay. 12:29:55
And you never got in trouble for doing that; is that right? 12:29:57 12:30:00
A. No. 12:30:02
Q. What about any other employees; did you happen to notice other employees on occasion talking with their coworkers about things that were unrelated to David Saxe Productions or David Saxe? 12:30:02 12:30:06 12:30:08 12:30:12
MS. MILTON: Objection, speculation, vague. 12:30:13
THE WITNESS: Yes, I'm sure -- I'm sure they did. 12:30:16 12:30:18
BY MR. GRONICH: 12:30:19
Q. Okay. Okay. All right, I want to talk about -- let's go to Exhibit 3. 12:30:21 12:30:38
A. Okay. 12:30:41
Q. Okay. Exhibit 3, what I want to do, I want to go over some specifics about this document. Now, I want to get the timeline straight. 12:30:41 12:30:48 12:30:55
On the first page of that document, you see in the center of it, it says, "On February 25th at 12:30:56 12:30:59

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

Michelle C. Johnson, RPR-CRR, CCR No. 771

EXHIBIT XVI

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.

CERTIFIED COPY

Case No. 2:17-cv-02110

DEPOSITION OF ANDREW AUGUST

Taken at office of Jeffrey Gronich

1810 East Sahara Avenue

Las Vegas, Nevada

Taken on Wednesday, September 18, 2019

1:44 p.m.

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

Say they have a question, leave the window open. When we come back, we can respond, and it will pop up on their screen.

Q. So you would go through this throughout the day?

A. While I was working, yes.

Q. Then you said you ended either at 3:30 or 4:00; correct?

A. Correct.

Q. Did somebody come and relieve you for another shift, or was that the end of the day for the chat bubble?

A. That was the end of the day for the chat. They would leave online messages, and I would get back to them the next day.

Q. During the day, did you interact with any of the other employees at the corporate office?

A. Yes.

Q. How would you interact with them?

A. Socially amongst co-workers.

Q. Give me an example of a social interaction you had with co-workers.

A. Hey, "John, how's your day going? How about them Bears."

Q. Talk about football games? Movies?

A. Yes.
Q. How often would you have social conversations with your co-workers?
A. Every day.
Q. And often -- how many times during the day would you say you have a social conversation?
A. Depends on if we cross paths, if we said something or not. Multiple times a day.
Q. You said you were -- the coffee station was behind you; there was the microwave behind you. Did I understand that right?
A. Yes.
Q. So was your office at a place where a lot of other employees would congregate?
A. No.
Q. You sound like there's a little bit of clarification on that.
A. Well, there was -- this is the table I worked at. There's a fridge, microwave, coffee machine. The room over here with the Call Center, the rest of the hallway with other employees. That's where they would go to get their refreshments or put food in the fridge.
Q. So like a break room?
A. Essentially.

Q. There was a lot of traffic?
A. Yes.
Q. So all the traffic behind you allowed you to be a little more social with people?
A. Yes.
Q. Those social interactions, did that affect your ability to do your job?
A. No.
Q. How long were those social interactions generally?
A. Brief.
Q. How brief?
A. 30 seconds or so.
Q. Would you have to take a break longer than 30 seconds for something other than a restroom or lunch -- I'll rephrase the question.
Did you ever take a break to have a social interaction with a co-worker that was longer than 30 seconds?
A. Yes.
Q. How often would you take a break for a social interaction that was longer than 30 seconds?
A. You said how often?
Q. Uh-huh. How many times a day would you

estimate?

A. Depends on the circumstance.

Q. Just an average.

A. The average would vary depending on who's in the office.

Q. Explain to me how it could vary.

A. If me and you talk, we see each other everyday and we always interact and you're not in the office, well, that's an encounter I'm not going to have that day. It doesn't mean I'm going to start talking to someone else to make up for that encounter. That's just one less encounter I would have.

Q. I'm not talking about a specific day. I'm just talking about an average day.

So an average day, how many times would you estimate that you would take a social break?

A. If I pass by someone's office, "Hey, how you're doing," that's about the majority of the social breaks.

MR. GRONICH: One second, off the record.

(Brief pause.)

BY MR. GRONICH:

Q. You mentioned you took breaks that were

more than 30 seconds, like a social break. How often would you take those kind of breaks on average?

MS. MILTON: Objection. Vague; ambiguous; asked and answered.

THE WITNESS: Like I said, it varied.

BY MR. GRONICH:

Q. But you would take those kind of breaks on an average day?

A. Correct.

Q. And you said that didn't affect your ability to get your work done?

A. No.

Q. You said you would walk to someone else's office and say hi. Is that what you said?

A. Passing by.

Q. Would you ever go into someone's office for one of those social interactions, for one of those social breaks?

A. Yes.

Q. Were you ever disciplined about taking those social breaks?

A. No.

Q. Did you ever work with Mr. Saxe personally?

Q. Tell me the circumstances that you would see him in the office.

A. We were co-workers, so we worked in the same building, same time frame, so we would see each other and interact.

Q. How would you interact?

A. Socially.

Q. So you said you interacted with him socially. What kind of things did you socialize about?

A. Him being a lawyer, we're roughly around the same age. Me knowing how to draw.

Q. How did your knowing how to draw come up?

A. What do you mean?

Q. How did it come up in conversation with Alex?

A. He seen it.

Q. He complimented you on it?

A. Yes.

Q. What kind of things do you draw?

A. I like to draw animals and still objects, like a flower, for instance.

Q. Is that a hobby or is that a like a side gig that you do?

A. Hobby.
Q. Did Alex ever ask you to draw anything for him?
A. No.
Q. Did he ask to see your work?
A. He didn't have to.
Q. Why?
A. Because I set it on my desk where it was visible.
Q. So you had pictures of your art work on your desk?
A. Yes.
Q. But did he ask to see any other art work that you did that wasn't visible?
A. I can't recall.
Q. What other social interactions would you have with Alex?
A. Could you rephrase.
Q. Well, I guess you said that you talked about how he was a lawyer, you were the same age, about your art. What other kind of topics did you talk about?
A. We may have talked about sports or politics.
Q. What kind of sports?

A. I don't remember.
Q. You don't remember what specific sports or you don't remember the conversations themselves?
A. I don't remember what specific sports. I ask everyone I meet, "Hey, are you into sports? What teams do you like?" But I don't remember the contents of the conversation.
Q. You said politics. What kind of politics did you talk?
A. He informed me he was some city council or state council. I don't know. I'm not too familiar with politics, so.
Q. So did you consider all of those topics of conversation to be just social interactions with him?
A. Yes.
Q. Did any of those social interactions with Alex affect your ability to do your job?
A. Did they affect my ability to do my job?
Q. Correct.
A. Could you rephrase that.
Q. Did they interfere with your ability to work?
A. No.
Q. Comparing your social interactions with

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:

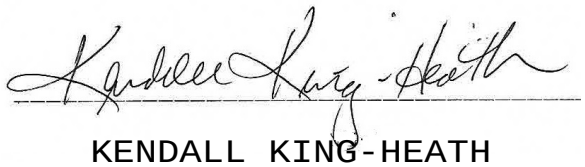
That I reported the taking of the deposition of the witness, ANDREW AUGUST, commencing on the 18th day of October, 2019, at the hour of 1:44 p.m.

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 XVII

JEFFREY GRONICH, ATTORNEY AT LAW, P.C.
Jeffrey Gronich, Esq. (#13136)
1810 E. Sahara Ave.
Suite 109
Las Vegas, Nevada 89104
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jgronich@gronichlaw.com
Attorney for Plaintiff Alexander Marks

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

DECLARATION OF JEFFREY GRONICH IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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

I, JEFFREY GRONICH, hereby declare as follows:

1. I am the Plaintiff in this matter. I am over the age of eighteen years old, I have personal knowledge of the facts and circumstances set forth in this Declaration and could and would competently testify thereto in a court of law.
2. On December 1, 2017 I served a first set of Interrogatories and first set of Requests for Production on Defendants. Defendants provided responses to those requests on March 9, 2018.
3. On June 15, 2018 I sent a letter to Defendants pointing out the deficiencies in their responses. Exhibit XIII to Plaintiff's Response contains a true and correct copy of that letter.
4. After over nine months, Defendants had not provided any supplement to their discovery, nor had they acknowledged my letter.
5. On March 29, 2019 I sent an email following up on the deficient responses. A true and correct copy of that email is attached to this Declaration as Exhibit (a). As a result of the email, Counsel

Jeffrey Gronich, Attorney at Law, P.C.
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(702) 430-6896 FAX: (702) 369-1290

for Defendants, Kirsten Milton and I had a telephonic meet and confer meeting on Tuesday, April 2, 2019 to discuss the issues in my letter.

6. During that meeting, I asked for production of documents containing evidence of Alexander Marks' work performed. Ms. Milton stated to me that Defendants would not produce such documents because they contained privileged information. Her rationale was that because Marks worked as Defendants' attorney, that any worked he performed would be covered under an attorney/client privilege or work product. I suggested that those documents be covered by a protective order could be designated as attorneys' eyes only. She declined.

7. I asked about production of the keystroke and computer monitoring software records for Marks' computer. Ms. Milton replied that the documents did not exist as they were deleted on their own. I asked if there was a document retention policy or IT policy regarding saving those documents. I was told there was none. I asked if that could be verified by Defendants' IT department. Ms. Milton told me she would follow up, but she never provided that information.

8. I inquired about the lease agreement and the certifications. Ms. Milton asked me why I believed those documents were relevant and I responded that it speaks to Mr. Marks' good faith belief that Defendants were in violation of the lease and of safety regulations. Ms. Milton told me that whether the documents existed would not affect Mr. Marks' good faith belief. She further stated that she did not believe there was a question as to Mr. Marks' good faith belief, but rather the issue was of notice to the employer and those documents would not speak to that notice. As a result of that conversation, I agreed that the lease and the certifications were not necessary.

9. Following our meet and confer, Defendants did not produce any additional emails or documents directly related to Mr. Marks' employment with Defendants.

10. Exhibit I to Plaintiff's Response is a true and correct copy of Alexander Marks' Declaration.

11. Exhibits II through XIII are true and authentic copies of documents produced by both the Plaintiff and the Defendants in the course of discovery.

    a. Exhibit IX is a screenshot I took of a video produced by Defendants and bates labeled SAXE-0129.

12. Exhibit XIV contains relevant portions of the transcript from David Saxe's deposition and continued deposition. It contains the court reporter's certificate of authenticity.
13. Exhibit XV contains relevant portions of the transcript from Larry Tokarski's deposition and contains the court reporter's certificate of authenticity.
14. Exhibit XVI contains relevant portions of the transcript from Andrew August's deposition and contains the court reporter's certificate of authenticity.

I declare that the foregoing is true and correct under the penalty of perjury under the laws of the United States of America.

Dated: January 24, 2020

Jeffrey Gronich, Esq.

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

EXHIBIT (a)

Gmail by Google

Jeffrey Gronich <jgronich@gronichlaw.com>

Marks v. Saxe et al - Meet and Confer

3 messages

Jeffrey Gronich <jgronich@gronichlaw.com> Fri, Jun 15, 2018 at 12:46 PM
To: "Milton, Kirsten A. (Chicago)" <Kirsten.Milton@jacksonlewis.com>

Hi Kirsten,

Please see the attached correspondence.

Thank you,

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

Meet & Confer - First Set of Written Discovery.pdf
60K

Jeffrey Gronich <jgronich@gronichlaw.com> Fri, Mar 29, 2019 at 1:06 PM
To: "Milton, Kirsten A. (Chicago)" <Kirsten.Milton@jacksonlewis.com>

Kirsten,

Last June I sent the attached letter to you via email and I have yet to hear a response. Obviously I would like to avoid having to file a motion to compel on the unanswered or deficient discovery responses and to that end please let me know if you are available to discuss the items in the letter next Tuesday at 2:00 pacific time (or if you have another time that would work better). Specifically, I would like to discuss whether you have any suggestions on alternate, less invasive means to obtain the requested information for the items you believe are overbroad; and what basis your client has for refusing to turn over certain other documents. To the extent that your client insists that certain documents do not exist (keystroke, smartsheet, etc.) please provide the basis for those assertions.

Also, to the extent your client will need additional time to produce the requested information, we can do another extension of discovery.

Thank you, I look forward to hearing from you.

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

[Quoted text hidden]

Meet & Confer - First Set of Written Discovery.pdf
60K

Milton, Kirsten A. (Chicago) <Kirsten.Milton@jacksonlewis.com> Fri, Mar 29, 2019 at 2:59 PM

To: Jeffrey Gronich <jgronich@gronichlaw.com>

Hi Jeff,

Thanks for your message. We will work on getting you dates for David and I will talk to my client about how they want to handle Mr. August's deposition.

Tuesday at 2 p.m. PT works for me. If you could send me a calendar invite, I'd appreciate it.

Many thanks,

Kirsten

Kirsten A. Milton
Attorney at Law
Jackson Lewis P.C.
150 North Michigan Avenue
Suite 2500
Chicago, IL 60601
Direct: (312) 803-2550 | Main: (312) 787-4949

3800 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169
Direct: (702) 921-2458 | Main: (702) 921-2460
Kirsten.Milton@jacksonlewis.com | www.jacksonlewis.com

From: Jeffrey Gronich <jgronich@gronichlaw.com>
Sent: Friday, March 29, 2019 3:06 PM
To: Milton, Kirsten A. (Chicago) <Kirsten.Milton@jacksonlewis.com>
Subject: Re: Marks v. Saxe et al - Meet and Confer

[Quoted text hidden]

Gmail by Google

Jeffrey Gronich <jgronich@gronichlaw.com>

Marks v. Saxe

2 messages

Jeffrey Gronich <jgronich@gronichlaw.com> Wed, Jun 5, 2019 at 12:42 PM
To: "Milton, Kirsten A. (Chicago)" <Kirsten.Milton@jacksonlewis.com>, "Paradiso, Donald P. (Las Vegas)" <Donald.Paradiso@jacksonlewis.com>

Kirsten and Don,

Following up on our conversation a few weeks ago. I believe you had indicated that you would have supplemental discovery and deposition dates by May 17, but I have not received anything yet. Please advise.

Thank you,

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

Milton, Kirsten A. (Chicago) <Kirsten.Milton@jacksonlewis.com> Wed, Jun 5, 2019 at 5:53 PM
To: Jeffrey Gronich <jgronich@gronichlaw.com>, "Paradiso, Donald P. (Las Vegas)" <Donald.Paradiso@jacksonlewis.com>

Hi Jeff,

I am out of the office for our partners' meeting, but will get back to you next week.

Thanks for your patience,

Kirsten

On: 05 June 2019 14:42,

Kirsten A. Milton
Attorney at Law
Jackson Lewis P.C.
150 North Michigan Avenue
Suite 2500
Chicago, IL 60601
Direct: (312) 803-2550 | Main: (312) 787-4949

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Kirsten.Milton@jacksonlewis.com | www.jacksonlewis.com
Jackson Lewis P.C. is honored to be recognized as the "Innovative Law Firm of the Year" by the International Legal Technology Association (ILTA) and is a proud member of the CEO Action for Diversity and Inclusion initiative

JEFFREY GRONICH, ATTORNEY AT LAW, P.C.
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Fax: (702) 369-1290
jgronich@gronichlaw.com
Attorney for Plaintiff Alexander Marks

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

INDEX OF EXHIBITS TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INDEX OF EXHIBITS TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Exhibit I – Declaration of Alexander Marks in Support of His Response

Exhibit II – Employee File Note (SAXE-0014)

Exhibit III – Bank Deposit (MARKS00005)

Exhibit IV – David Saxe Productions Employee Handbook (SAXE-0080, 0089, 0092, 0099-100, 109-110, 0113)

Exhibit V – Electronic Surveillance Waiver (SAXE-0021)

Exhibit VI – Email Chain Feb 25, 2016 (SAXE 0141-0142)

Exhibit VII – Email from David Saxe to himself, February 29, 2016 (SAXE 00133)

Exhibit VIII – Email chain re: Jury Duty (SAXE-0149-0151, MARKS00011-00012)

Exhibit IX – Video Screenshot (SAXE-0129)

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Exhibit X – Email re: work assignments (SAXE-0070, 0076-0078)

Exhibit XI – Defendants' Amended Fifth Supplemental Disclosures (p 1-2)

Exhibit XII – Marks' Personal Calendar January & February 2016 (MARKS00009-00010)

Exhibit XIII – Defendants' Responses to Plaintiff's First Set of Interrogatories (p1, 3, 7); Meet & Confer Letter dated June 15, 2018

Exhibit XIV – David Saxe Deposition Excerpts

Exhibit XV – Larry Tokarski Deposition Excerpts

Exhibit XVI – Andrew August Deposition Excerpts

Exhibit XVII – Declaration of Jeffrey Gronich, Esq.

DATED this 24th day of January, 2019

Respectfully submitted,
By: __/s/ Jeffrey Gronich_ __
Jeffrey Gronich, Esq.
Jeffrey Gronich, Attorney at Law, P.C.
1810 E. Sahara Ave.,
Suite 109
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Tel (702) 430-6896
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January, 2020, I caused to be served a true and correct copy of the foregoing **INDEX OF EXHIBITS TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** on the following person(s) by electronically filing via the CM/ECF system utilized by this Court:

Kristen A. Milton, Esq.
Lynne K. McChrystal, Esq.
JACKSON LEWIS P.C.
3800 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169

Attorneys for Defendants

/s/ Jeffrey Gronich
An Employee of Jeffrey Gronich, Attorney at Law, P.C

Jeffrey Gronich, Attorney at Law, P.C.
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Kirsten A. Milton
Nevada State Bar No. 14401
Lynne K. McChrystal
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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. 2:17-cv-02110-KJD-DJA **REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

In Plaintiff Alexander Marks' ("Plaintiff" or "Marks") Response to Defendants' Motion for Summary Judgment (the "Response"),[1] Marks downplays the significance his role as General Counsel has on the standard for establishing protected activity, ignores his obligations under the Federal Rules of Civil Procedure and Local Rule 56.1, fails to respond to Defendants' arguments, and offers speculation not supported by personal knowledge. None of Marks' contentions create a genuine dispute of material fact. Rather, there is no genuine dispute that:

- Marks was David Saxe Production, LLC's ("DSP") General Counsel and was hired generally to ensure compliance with the law, and, according to his own testimony, to ensure, among other things, "compliance with the FLSA," "fair labor" and to raise issues" he believed were "in violation of wage and hour" laws." Motion ("Mot."), Ex., C, Marks Dep. 51:16-25, 54:7-55:3, 83:8-12, 106:10-19, 115:14-17, 339:25-340:4.
- Marks' performance problems existed long before he allegedly raised any "wage

[1] Citations herein to Marks' Response shall be in the form "Opp. at X:X."

issue" or OSHA "violations." Mot., Ex. A, August Dep. 65:4-23 (Ex. 3 ¶ 4), 65:4-23 (Ex. 3 ¶ 5), 65:4-23 (Ex. 3 ¶ 7); Ex. B, Saxe Dep. 117:12-118:6, 118:7-17, 120:5-9, 120:18-25, 131:7-12, 132:2-9, 132:18-133:5; Ex. C, Marks Dep. 27:6-23, 114:8-19, 155:3-156:7, 351:5-352:6; Ex. D at MARKS-00001; Ex. E, Tokarski Dep. at 67:14-68:8; Ex. F, Duran Decl. ¶ 7-12; Ex. G, Saxe Decl. ¶ 8, Ex. 3, ¶ 9, Ex. 4, ¶ 10, Ex. 5. Marks conceded, as early as August 2015, Defendant David Saxe ("Saxe") was considering terminating Marks' employment based on performance and conveyed his dissatisfaction with Marks' performance and lack of communication. Ex. C, Marks Dep. 354:11-14; Ex. G. Saxe Decl. ¶ 7, Ex. 2, ¶ 8, Ex. 3.

- In his Response, Marks offered no *evidence*, much less "specific and substantial' evidence that Defendants' explanation for his termination is "unworthy of credence" and that retaliatory animus was the but-for reason Saxe terminated his employment. Defendants, on the other hand, pointed to numerous examples supported by record evidence that, as early as June 2015, Saxe was already frustrated with Marks' failure to meet deadlines and communicate his status on projects – problems that persisted throughout his employment. Mot., Ex. G, Saxe Decl. ¶ 6, Ex. 1, ¶ 9, Ex. 4, ¶ 10, Ex. 5; Ex. B, Saxe Dep. 120:18-25, 131:7-12, 132:2-9, 132:18.
- Marks has offered no evidence to establish that DSP made "any rule or regulation" that prohibited Marks from engaging in politics. To the contrary, the record evidence establishes that Saxe "was [absolutely] supportive of [Marks] running for office" and Marks further testified that "the understanding that I had from my boss, who clearly was on board with my running for assembly and senate was *complete support*." Ex. C, Marks Dep. 31:12 – 32:3, 59:14-16; Ex. B, Saxe Dep. 115:17 – 116:19. Nor is there even a scintilla of evidence to support Marks' claim that Saxe terminated his employment because he disagreed with Marks' political viewpoint. Indeed, Marks, a Democrat, testified that he did not "know" and "never asked" Saxe's political affiliation. Ex. C, Marks Dep. 12:20-13:3.
- Marks admits that he did not report any OSHA conduct to anyone outside of DSP until after his termination. Ex. C, Marks Dep. 278:10 – 279:7.

These undisputed facts demonstrate that Marks cannot create a genuine issue of material fact sufficient to make out a claim under the FLSA, NRS 613.040, or tortious discharge under Nevada law. Thus, the Court should grant Defendants' motion and dismiss Plaintiff's claims in their entirety.

II. PLAINTIFF'S "DENIALS" OF DEFENDANTS' UNDISPUTED MATERIAL FACTS AND ADDITIONAL "DISPUTED" FACTS FAIL TO CREATE ANY GENUINE DISPUTE OF MATERIAL FACT.

A. Plaintiff's Denials of Defendants' Undisputed Material Facts Are Non-Compliant And Defendants' Facts Should Be Deemed Admitted.

In his Response, "[r]ather than pick apart each of the facts listed in Defendants' Motion line by line," Plaintiff argues that he will "show which of Defendants' alleged undisputed facts are in fact in dispute." Opp. at 5:19. As the Court well knows, to survive summary judgment, Plaintiff

bears the burden of presenting admissible evidence demonstrating facts that exist that raise genuine issues of fact that should be reserved for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). Federal Rule of Civil Procedure 56(c) requires the non-moving party to support a denial by "citing to *particular parts* of materials in the record . . . ." Fed. R. Civ. P. 56(c)(1)(A)(emphasis added). Local Rule 56-1 is even more stringent, requiring each party to "set[] forth each fact material to the disposition of the motion that the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition . . . or other evidence on which the party relies." Yet, this is precisely what Plaintiff fails to do.

Thus,[2] there still remains no dispute that, in his role as General Counsel, Marks was responsible for ensuring DSP's compliance with the law.[3] Mot. at 3:20-5:3; **Exhibit A**, Defendants' Resp. to Interrogatories, No. 4. Further, there is no dispute that Saxe was dissatisfied with Marks' performance, and other DSP employees noticed Marks' performance issues.[4] Mot. at 5:4-7:27.[5] Saxe terminated Marks' employment after a conversation where Saxe asked Marks to focus on work, and Marks' immediately complained to another employee about Saxe instead of going back to work. *Id*. at 8:1-25. Finally, it is undisputed that Marks never threatened Saxe that he would complain to the Labor Commission or OSHA prior to his termination.[6] *Id*. at 9:1-11:23. Pursuant to Fed. R. Civ. P. 56(e), the Court should deem Defendants' facts as admitted and grant Defendants' Motion. *See* Fed. R. Civ. P. 56(e).

B. Plaintiff's "Undisputed Material Facts" Contradict Plaintiff's Deposition Testimony, Do Not Cite Record Evidence, And/Or Are Immaterial.

In the Ninth Circuit, "a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Ashcraft v. Welk Resort Grp., Corp*., No. 2:16-cv-02978-JAD-NJK,

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[2] Defendants incorporate each undisputed fact identified in their Motion as if fully stated herein; however, for the purposes of brevity, a limited summary is provided here.

[3] Ex. C, Marks Dep. 51:16-25, 54:7-55:3, 106:10-19, 115:14-17, 339:25-340:4; Ex. G, Saxe Decl. ¶5

[4] Ex. A, August Dep. 65:4-23 (Ex. 3 ¶ 5); Ex. B, Saxe Dep, at 120:5-9; Ex. C, Marks Dep. at 114:8-19; 354:11-14; Ex. F, Duran Decl.; Ex. G, Saxe Decl. ¶ 7, Ex. 2

[5] Marks argues "Defendant's Motion is littered with hearsay, unverified, and incredible information." Opp. at 2:27-28. Marks presumably characterizes these statements by Duran as a "litter[ing]." Duran's statements are admissible for the purposes of summary judgment because "a party need not present evidence in a form admissible at trial because at this stage, courts focus on the admissibility of the evidence's contents rather than on its form. *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003).

[6] Ex. B, Saxe Dep. 137:10-25; Ex. C., Marks Dep. 53:14-18, 53:25-54:8, 76:7-21; 81:8-13, 216:8-21, 137:10-25, 281:8-13, 310:4-5, 294:15-295:9; 297:4-13, 86:22-387:9, 388:11-15, 451:21-452; Ex. E, Tokarski Dep. 129:12-17.

2017 U.S. Dist. LEXIS 185470, *4-5 (D. Nev. 2017)(citing *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir.1991). "This sham affidavit rule prevents a party who has been examined at length on deposition from raising an issue of fact simply by submitting an affidavit contradicting his own prior testimony, which would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012)(internal citations omitted); *see also Van Asdale v. Int'l Game Tech*., 577 F.3d 989, 998 (9th Cir. 2009)(stating that some form of the sham affidavit rule is necessary to maintain the principle that summary judgment is an integral part of the federal rules). There is no dispute that Plaintiff was examined "at length on deposition," sitting for a deposition that spanned 10 hours. Yet, *not once* in his Response, does Plaintiff cite his own deposition testimony, much less refute his testimony with actual contradictory evidence other than his own declaration. Under the sham affidavit rule, Marks cannot submit an affidavit to subvert his own deposition testimony. *Yeager*, 693 F.3d at 1080. As such, Defendants attach as **Exhibit B**, a chart identifying statements in Plaintiff's declaration that are directly contrary to Plaintiff's deposition testimony. Under the sham affidavit rule, these statements should be stricken from Plaintiff's declaration.

The remainder of assertions in Marks' declaration either are not in dispute and/or fail to raise a genuine dispute of material fact. Paragraphs 2, 3, and 5 concern details of Marks' employment which, although not disputed, are immaterial to the viability of his claims. Paragraph 4 is largely immaterial, however, Marks' statement regarding what Duran "did not" observe lacks foundation and is rebutted by Duran's stated observations. Mot., Ex. F. Duran Decl. Paragraphs 6, 7, and 8, which discuss the presence of a monitoring system in the workplace, fail to create a genuine issue of material fact that David Saxe knew of any of Marks' alleged activities that form the basis of his Complaint. Paragraph 10 restates an undisputed fact – Saxe expressed excitement and support when Marks told him about his political aspirations. Ex. C, Marks Dep. 31:12 – 32:3. Paragraphs 9, 11, 12, 13, 14, 23, 24, and 25 are merely Marks' unsupported, self-serving statements regarding his own job performance. These statements are no more reliable than the allegations in Marks' pleadings and fail to raise a genuine dispute of material fact as to Defendants' legitimate reason for terminating Marks' employment. *Lewis v. Skolnik*, No. 2:09-CV-02393-KJD-GWF,

2013 U.S. Dist. LEXIS 6618, *4 (D. Nev. 2013)("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact."); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)("It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings."). Paragraphs 15 and 16 are irrelevant and lack foundation, because Marks could not know whether his talks with other employees interfered with their performance or whether these employees received discipline. Paragraphs 18, 19, and 22 merely restate Marks' testimony regarding his characterization of "wage theft" and Paragraph 26 restates the fact of his termination.

Marks' remaining "undisputed facts" parrot the conclusory, immaterial statements contained in his declaration. Opp. at 3:8-5:16. Notably, Marks' "undisputed facts" often repeat the exact text of his declaration. *See* Opp. at 3:14(Fact iii, "Saxe was Plaintiff's direct supervisor throughout his employment with Defendants."); Opp. Ex I at ¶ 3("Saxe was my supervisor throughout my employment with Defendants."). Facts ii, vii, viii, ix, x, xi, xii, xvi, xvii, xviii, xix, xx, xxi, and xxii do not cite to *any* record other than Mark's declaration and accordingly fail to raise a genuine of material fact. *Anderson*, 477 U.S. at 256. Facts ix, xii, and xii also contain subparts that do not cite to *any* record evidence. The Court need not consider these "facts" because it "has no obligation to 'scour the record in search of a genuine issue of triable fact.'" *Ryan's Express Transp. Servs., Inc. v. Caterpillar, Inc.*, No. 2:07-CV-KJD-GWF, 2009 U.S. Dist. LEXIS 29855, *18 (D. Nev. 2009).[7] Thus, none of Marks' "facts" controvert Defendants' properly supported facts, and no genuine dispute of material facts sufficient to preclude summary judgment exists.

III. LEGAL ARGUMENT.

A. Marks' FLSA Retaliation Claim Fails As A Matter Of Law.

1. Marks Cannot Make Out a *Prima Facie* Case of Retaliation Under the FLSA.

a. Marks, DSP's General Counsel, did not engage in FLSA protected activity.

The parties agree that Marks must establish a *prima facie* case of FLSA retaliation by showing (1) he engaged in statutorily-protected activity, (2) he suffered an adverse action, and (3)

[7] *See also Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996)(the party opposing summary judgment is required to "identify with reasonable particularity the *evidence* that precludes summary judgment")(emphasis added).

there is a causal connection between the two. Mot. at 12; Opp. at 6:7, 11:7, 11:10. The parties also agree that, in the instant case, to establish the first element of his claim, Plaintiff must prove that he "filed a complaint." *Id*. at 13:5-9; Opp. at 6:8-15. "A complaint is 'filed' when 'a reasonable, objective person would have understood the employee' to have 'put the employer on notice that [the] employee is asserting statutory rights under the'" FLSA. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14 (2011). In other words, to fall within the scope of Section 15(a)(3), a complaint must be "sufficiently clear and detailed for a reasonable employer to understand it [or be put on notice], in light of both content and context, *as an assertion of rights protected by the statute and a call for their protection*." *Id*. at 14. Marks fails to point to a single piece of evidence that establishes that Marks was asserting his rights under the FLSA and "call[ing] for their protection." In mere conclusory fashion without pointing to any evidence, Marks claims that "[t]here is no question that Saxe was aware that Plaintiff 'complained' about his own FLSA violation" because Plaintiff "*intended*" to make him aware by "telling Tokarski to speak to Saxe about it" and Plaintiff "*intended* to put his employer on notice of his own claim for an FLSA violation" Opp. at 9:21-27. This is problematic for two reasons. First, Plaintiff's "intent" without any record citation fails to create a genuine dispute of material fact as a matter of law. *Runvee, Inc. v. United States,* No. 2:10-CV-2260-KJD-GWF, 2013 U.S. Dist. LEXIS 42368, *26-27 (D. Nev. 2013)(To defeat summary judgment, "[e]vidence must be concrete and cannot rely on mere speculation, conjecture, or fantasy.") Second, Plaintiff's claims are directly contrary to Tokarski's testimony, who stated that he did not recall Marks ever threatening to go to the "labor commissioner," and never told Saxe, or anyone else, anything he discussed with Marks relating to wages. Ex. E, Tokarski Dep. 60:17-62:2.

Marks contends that an e-mail exchange between Tokarski, Saxe, and Duran is evidence that he "made a legal complaint which was then communicated to Saxe." Opp. at p. 9:2-5. In that e-mail, Saxe informed Tokarski and Duran that Marks called him at "8:17 to call out sick. Just letting you know for hr/accounting/payroll purposes. Not sure who keeps track of all that." Opp. Ex. XV, SAXE-0141. Tokarski responded, "Alex was here this morning and let me know he was going home sick" and Duran subsequently stated "He knows that if he sits down and does a little

work we are 'Suppose' [sic] to pay him. Do we pay him for the day?" *Id*. at SAXE-0141-42. It is undisputed that Marks was paid for this day. Mot., Ex. C, Marks Dep. 53:25-54:8. Nothing in this email shows that Plaintiff "complained," much less that he was "asserting . . . rights protected by" the FLSA *and* "calling for their protection," and no "reasonable, objective person would have understood him" to be doing so. *Kasten*, 563 U.S. at 14; *see also* Mot. at 13-14. Accordingly, Plaintiff's First Claim for Relief should be dismissed on this basis alone.

Plaintiff also misleads, pointing to *Rosenfield v. GlobalTranz Enterprises, Inc.*, 811 F.3d 282, 287 (9th Cir. 2015) and urging the Court not to adopt "Defendants' argu[ment]" that "as a matter of law that merely because Plaintiff served as General Counsel [] his actions are not protected." Opp. at 7:10-12. This is not Defendants' contention, the holding in *Rosenfield*, or the law in the Ninth Circuit. Rather, as Plaintiff admits, determining whether an employee has filed a complaint sufficient to put an employer on notice of FLSA protected activity "must be resolved on a case-by-case basis" and an employee's position with the company is one of the considerations a court should weigh. *Rosenfield*, 811 F.3d at 287; Opp. at p. 6:26-28. The *Rosenfield* Court further explained that "[a] different perspective on fair notice may apply as between a first-level manager who is responsible for overseeing day-to-day operations and a high-level manager, [like Marks], who is responsible for ensuring the company's compliance with the FLSA." *Id*. at 287; Opp. at 7:2-4. *Rosenfield* warrants dismissal of Marks' claims, because, here, unlike the record in *Rosenfield*, where the plaintiff was an HR Manager and "ensuring compliance with the FLSA was *not* [her] responsibility" the record is replete with a plethora of undisputed evidence that Plaintiff was DSP's General Counsel, **"**a high-level manager who [was] responsible for ensuring [DSP's] compliance with the FLSA." *Id*. at 287-88. As discussed in Defendant's Motion in more detail, Mot. at 13:3-15:13, during his deposition, Plaintiff made unequivocally clear that DSP hired him as its General Counsel to ensure DSP was operating in compliance with the law and to "keep[] [David Saxe] compliant" with the law. Mot., Ex. C, Marks Dep. at 51:16-25; 83:1-25; 106:10-19. He expressly testified his "primary focus was contracts and fair labor" and, in his "role as general counsel . . . [he] was supposed to talk to [Saxe] as an attorney about issues that [] [he] thought were in violation of wage and hour loss [sic]," including FLSA compliance. Ex. C, Marks Dep. at 106:10-19; 339:25-

340:4. In fact, he knew this was his role going into the job because, according to Marks, before starting at DSP, he read about the "Fair Labor Standards Act . . . [because he knew] that that was going to be [his] *primary focus* . . . ." *Id.* at 106:10-19(emphasis added). Once he was hired, he wrote "the process for investigating possible wage deduction issues," and testified that, as the General Counsel, if "wage theft or wage deductions were improper were brought to [] [his] attention," he was "to investigate that," since, "as the general counsel," he had to fix any problems because his job as the General Counsel was to "look for the company's best interest." *Id.* at 54:7-55:3; 83:1-25; 115:14-17.[8] *Id.* at 83:1-25.

Dismissing Plaintiff's FLSA claims for failure to engage in protected activity as DSP's General Counsel is not only consistent with the Ninth Circuit, but also Circuit Courts of Appeals and district courts throughout the country. *Starnes v. Wallace*, 849 F.3d 627, 633 (5th Cir. 2017)(noting summary judgment granted when plaintiffs acted in a 'managerial role' indisputably dealing with pay issues); *Lasater v. Tex. A&M Univ. Commerce*, 495 F. App'x 459, 462 (5th Cir. 2012)(affirming summary judgment because Director of the Office of Financial Aid 'had the obligation and the discretion and authority to keep the accumulated comp hours of her employees[,awarded as a substitute for overtime pay,] below the prescribed level' to ensure compliance with the FLSA); *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1481 (10th Cir. 1996) (affirming judgment as a matter of law for defendants where Personnel Director was responsible for "monitoring compliance with," among other employment issues, "wage and hour laws")[9]; *Claudio-Gotay v. Becton Dickinson Caribe, Ltd.*, 375 F.3d 99, 101 (1st Cir. 2004)(affirming summary judgment on FLSA claim when engineer approved security guard's 'invoices for payment); *Miller v. Metrocare Servs.*, 2015 U.S. Dist. LEXIS 13807 at *6 (N.D. Tex. Feb. 5,

[8] Thus, Marks' claim that "[d]espite Defendants' generalization of what a company attorney might be tasked with, there is not a single shred of evidence to suggest that Defendants hired Plaintiff to audit the FLSA system nor that he was assigned that task," Opp. at 7:13-15, is a gross misstate of the record evidence. Further, Marks' suggestion that because he was not licensed in Nevada, somehow he was absolved of any obligation to ensure DSP's legal compliance, defies logic and is contrary to his obligations as a licensed attorney, not to mention the record evidence.

[9] Although Marks cites to *McKenzie* in support of his argument, Opp. at 11:23-24, *McKenzie* warrants the exact opposite result. Because it is undisputed that Marks was responsible for monitoring DSP's legal compliance with, among others, wage and hour law, the *McKenzie* court would have dismissed his FLSA claim as a matter of law. *McKenzie*, 94 F.3d at 1478; Motion, Ex. C, Marks. Dep. 106:10-19; 339:25-340:4.

2015)(granting summary judgment because HR Director was responsible for ensuring compliance with employment laws).

b. Marks has produced no Evidence that the claimed protected activity was the "but for" reason Saxe terminated his employment.

Consistent with U.S. Supreme Court precedent, to establish the third element of his *prima facie* case – "causal link," Plaintiff should be required to prove that the termination of employment "would not have been taken 'but for'" his protected activity (assuming *arguendo* he had engaged in protected activity). *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 133 S. Ct. 2517 (2013). In *Nassar*, the Supreme Court addressed the causation standard applicable to retaliation claims under Title VII, concluding that such claims require proof of "but for" causation. The Court reasoned that because (1) Title VII, just like the ADEA, expressly prohibits taking an adverse employment action "because" of certain criteria; (2) the Court had previously interpreted the ADEA's "because of" language as requiring proof of but-for causation; and (3) there was no "meaningful textual difference" between the two statutes, the "but for" causation should apply to Title VII cases. *Id*. at 343. Like the ADEA and Title VII, the FLSA's anti-retaliation provision prohibits an employer from terminating or discriminating against an employee "because such employee has" engaged in protected activity. 29 U.S.C. § 215(a)(3); *cf. Munroe v. PartsBase, Inc.*, NO. 08-80431-CIV-MARRA/JOHNSON, 2008 U.S. Dist. LEXIS 97147, *4 (S.D. Fla. 2008)(citing cases for the proposition that "FLSA retaliation claims are governed by the same legal analysis applicable to retaliation claims under Title VII." (internal quotation marks omitted)). Because there is "no meaningful textual" basis on which to distinguish the language in Title VII's anti-retaliation provision and the language in the FLSA's provision, the Court should follow the lead of other circuits and apply the "but for" standard to FLSA retaliation claims. *Nassar*, 570 U.S. at 352; *see, e.g., Kubiak v. S.W. Cowboy, Inc.*, 164 F. Supp. 3d 1344, 1365 (M.D. Fla. Feb. 18, 2016)("Ultimately, in a [FLSA] retaliation case the plaintiff must present proof that the desire to retaliate was the but-for cause of the challenged employment action."); *Prosser v. Thiele Kaolin Co.*, 135 F. Supp. 3d 1342, 1360, n.109 (M.D. Ga. Sept. 30, 2015)(applying *Nassar* to FLSA retaliation claim); *Miller*, 2015 U.S. Dist. LEXIS 13807 at *14("The ultimate determination in an

FLSA retaliation case is whether the conduct protected by the FLSA was the but for cause of the adverse employment decision."); *Mould v. NJG Food Serv., Inc*., 37 F. Supp. 3d 762, 778 n.11 (D. Md. 2014)(section 15(a)(3) requires plaintiff to prove but for causation in FLSA retaliation claim); *see also Reich v. Davis*, 50 F.3d 962, 965-66 (11th Cir. 1995)(applying but for causation to FLSA retaliation claims).

Because he recognizes that this standard dooms his claim, Marks once again misrepresents, claiming that "the Ninth Circuit specifically chose not to apply the *Nasser* [sic] test on [sic] FLSA cases." Opp. at p. 11:20-23. To the contrary, in *Avila v. Los Angeles Police Department*, 758 F.3d 1096 (9th Cir. 2014), in its examination of the propriety of certain jury instructions, the Ninth Circuit expressly held that "we do not today address whether a 'but-for' instruction is now also required in FLSA retaliation cases." *Id.* at 1107 n.3(internal citations omitted). Nor does Plaintiff's incorrect interpretation of *Knickerbocker v. City of Stockton*, 81 F.3d 907 (9th Cir. 1996), a case decided 17 years before the Supreme Court's ruling in *Nassar*, merit a different result. In determining whether the district court's conclusion was "clearly erroneous" – the Court determined it was not – the *Knickerbocker* Court expressly held that "[a] conclusion about whether or not *Knickerbocker* would have been transferred *but for* his protected activities is a factual one reviewed for clear error . . . ." *Id*. at 911 (emphasis added). The Court further explained that, unlike the instant case, because the defendant-employer conceded that at least part of the motive for the employee's termination was based on a protected activity, when "an adverse employment action was based on protected and unprotected activities, courts apply the 'dual motive' test."[10] *Id.*

There is no genuine issue of fact that Marks cannot establish "but-for" causation as a matter of law. Marks offers no evidence whatsoever to suggest, much less establish, that Saxe was motivated by retaliatory animus when he made the decision to terminate Marks' employment. The record evidence establishes that Marks had performance problems long perform he allegedly raised any "wage issues." As early as June 2015, Saxe started to express frustration with Marks' failure to

[10] Regardless, even applying Marks' erroneous "dual motive" test in this context, would not change the result. Under the dual motive test, "protected activities are a 'substantial factor' where the adverse actions would have been taken 'but for' the protected activities. *Knickerbocker*, 81 F.3d at 911. For the reasons discussed above, Marks cannot establish he would not have been terminated but for the alleged protected activity.

meet deadlines and communicate his status on the projects to which he was assigned. Mot., Ex. G, Saxe Decl. ¶ 6, Ex. 1. Marks conceded that, as early as August 2015, Saxe considered terminating Marks' employment based on performance and had conveyed his dissatisfaction with Marks' performance and lack of communication. *Id*., Ex. C, Marks Dep. 354:11-14; Ex. G, Saxe Decl. ¶ 7, Ex. 2, ¶ 8, Ex. 3(stating "[I] hate having to ask and ask and remind. Please communicate better."). In August 2015, Saxe expressly told Marks, "[y]our 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!" *Id*. at ¶ 7, Ex. 2. Throughout his employment, Marks also "constantly" missed deadlines for assignments.[11] *Id.*, Ex. B, Saxe Dep. 120:18-25; Ex. F, Duran Decl. ¶ 10.

Marks' response to the extensive record concerning his unsatisfactory job performance is to proffer his suspicions, speculations, the existence of other lawsuits, and to blame his own discovery failures for the lack of evidence to support his claim.[12] Suspicions and speculation are not enough to survive summary judgment. *See, e.g., Brown v. Dep't of Pub. Safety,* 446 Fed. Appx. 70, 72 (9th Cir. 2011)(summary judgment affirmed where plaintiff "presented only his conclusions and speculation that the failure to investigate his claims was based on his race."). Further, the existence of another lawsuit and the pleadings therein are not admissible evidence and should not be considered by this Court. Fed. R. Evid. 404; *United States v. Bailey,* 696 F.3d 794, 801 (9th Cir. 2012)("a complaint is merely an accusation of conduct and not, of course, proof that the conduct alleged occurred.").

Moreover, Marks' grievances regarding the discovery process, Opp. at 10:24-11:1, 14:18-15:6, are untimely and irrelevant to the Court's summary judgment analysis. There is no dispute

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

[12] *See, e.g*., Opp. at 12:22-25("Even more suspicious is that . . . Saxe sent an email to himself . . . Why would Saxe write a termination email to himself . . . ?"); Opp. at 13:1-2("This is not the only case in which Saxe is being or has been sued for retaliatory termination."); Opp. at 14:11-12("Had Saxe been disappointed with Marks' performance, he would not have thereafter increased his salary."); Opp. at 16:2-5("Defendants cannot be allowed to ask for a ruling that there are no issues of fact concerning Plaintiff's work performance when they have refused to produce all relevant documents related to his work performance."). Further, the fact that Marks received a salary increase does not equate to a sufficient improvement in performance. Saxe testified Marks pestered him for a raise and he "gave in" without a review because he had "been giving [him] a review" and it was "not good." **Exhibit C**, Deposition of David Saxe at 87:12-88:15.

that discovery in this case closed on October 8, 2019. ECF No. 37. Any issue with Defendants' production should have been raised prior to that date. Rule 37 of the Federal Rules of Civil Procedure outlines the exact steps a party must take to address discovery disputes. *See* F.R.C.P. 37. Here, the parties met and conferred consistent with their obligation pursuant to Rule 37. If Marks did not agree with Defendants' position, the proper avenue to address this dispute was to file a motion to compel pursuant to Rule 37. Marks chose not to raise these issues; he cannot now complain when he failed to diligently pursue discovery before summary judgment, *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989), and ask the Court to draw any inferences based on alleged "missing" evidence to avoid summary judgment. Such argument fails because a negative inference cannot be supported by record evidence. Fed. R. Civ. Pro. 56(c)(1).

Finally, Marks' assertion that he was terminated "within days of reporting the FLSA violation and beginning his investigation" is unsupported by any record evidence and therefore cannot create a genuine issue of material fact as to causality. Opp. at 12:16-17. The undisputed record evidence is that Marks never "report[ed]" the alleged violation and/or investigation to Saxe prior to his termination. *See* Mot., Ex. C, Marks Dep. 53:14-18, 53:25-54:8, 87:20-88:10; Ex. E, Tokarski Dep. 129:12-17. And, even if he had, timing alone is insufficient to create a dispute of genuine material fact sufficient to preclude summary judgment.[13] *Rey v. C&H Sugar Co.*, 609 Fed. Appx. 923, 924 (9th Cir. 2015)("temporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination."); *Lige v. Clark Cty.*, 2018 U.S. Dist. LEXIS 26479, *13 (D. Nev. 2018)("close temporal proximity alone is not enough to meet the heightened but-for-causation standard required of retaliation claims.").

Marks' unsuccessful attempts to explain away the actual and substantial evidence presented by Defendants cannot save his own failure to present any evidence in support of his claim, particularly when, as Marks' own description of the conversation of his termination meeting with

[13] The only authority Marks cites in "support" of his argument that time alone is sufficient are distinguishable from the facts in this case, and in fact support rejection of his claims. *Clark County Sch. Dist. v. Breeden*, 121 S. Ct. 1508, 1511, 532 U.S. 268, 273, 149 L. Ed. 2d 509, 515 (2001) (summary judgment affirmed where "no indication" employer even knew about alleged protected activity prior to adverse action); *Koutseva v. Wynn Resorts Holding, LLC*, 2018 U.S Dist. LEXIS 135670 (D. Nev. 2018) (employee filed complaint with EEOC 20 days *prior* to her termination).

Saxe corroborates Defendants' legitimate, nondiscriminatory reason: "You're never here, this isn't working for me, you're fired." Mot., Ex. C, Marks Dep. 388:11-15. Because Plaintiff has failed to put forward even a scintilla of evidence to establish that, but for his alleged wage investigation, Saxe would not have terminated his employment, Marks has failed to meet the third element of his *prima facie* case, and therefore, his First of Claim of Relief must be dismissed.

2. **There is No Evidence of Pretext.**

Marks does not dispute that Defendants' proffered reasons for his termination, i.e. failure to adequately perform his duties as General Counsel are legitimate, non-discriminatory reasons. Opp. at 12:2. Nor does he dispute that the Court's inquiry on pretext is limited to "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. *Id*. at 19:10-23; *Nassar*, 133 S. Ct. at 2533 (emphasis added); *Manatt v. Bank of America NA*, 339 F.3d 792, 801 (9th Cir. 2003). Indeed, Marks' Response fails to fully and directly analyze the issue of pretext. Rather, in mere conclusory fashion, he states "Defendants cannot show the absence of a genuine issue of fact that their preferred explanation for terminating Plaintiff's employment was not pretextual." Opp. at 12:8-9. This is not evidence, not to mention it attempts to shift the burden to Defendants to "show the absence of a genuine issue of fact." *See, e.g. Brown*, 446 Fed. Appx. At 72 ((summary judgment affirmed where plaintiff "presented only his conclusions and speculation . . . ."). But, nothing changes the fact that it is Marks' burden to establish pretext and create a genuine dispute of material fact. Because Marks has done neither, and for the reasons discussed in greater detail in Defendants' Motion, Mot. at pp. 19-20, Marks' FLSA retaliation (First Claim for Relief) should be dismissed.

As a last resort, and, once again, without pointing to record evidence to contradict the documented trail of Marks' performance problems and failure to communicate effectively, which all began months before Marks allegedly raised any wage complaints, Marks claims that "there is not enough credible evidence to show that [his] job performance was in fact substandard [or] so substandard as terminate his employment." Opp. at 13:8-10. That is not the standard, however, for surviving summary judgment in the Ninth Circuit. "[W]hen ruling on a summary judgment motion, the district court is not empowered to make credibility determinations . . . ." *McGinest v. GTE Serv.*

Corp., 360 F.3d 1103, 1113 (9th Cir. 2004). Further, 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. A1 Transp*., 221 F.3d 1012, 1030 (11th Cir. 2000).

Recognizing his dilemma, the "evidence" that Marks points to is nothing more than a red herring. Opp. at 13:11-16-26. Marks cannot rely on evidence that is not in the record to create a dispute of fact, and fails to controvert the material facts presented by Defendants. Specifically, Marks suggests that Duran's Declaration should be excluded because the substance of her anticipated testimony was not disclosed in sufficient detail. Opp. at 15:7-17. Plaintiff is wrong. First, all that is required under Fed. R. Civ. P. 26(a)(1)(A) is a statement of the "subjects . . . the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." That is exactly what Defendants' provided – i.e., Defendants stated Duran is expected to "testify regarding her knowledge and information of the facts and circumstances at issue in this matter." Second, Marks' argument is disingenuous at best, as, on October 3, 2017, he listed Duran in his Rule 26(a)(1) initial disclosures and stated that she is "expected to testify regarding her knowledge of the facts and circumstances surrounding the issues in this case, specifically regarding Defendants' safety policies and practices, payroll policies and procedures, and Human Resources Policies and Procedures." **Exhibit D**, Plaintiff's Initial Disclosures. Additionally, Marks had sufficient opportunity during the course of discovery to depose Duran and chose not to. Marks cannot complain now for his own failure to "diligently pursue discovery before summary judgment." *Mackey,* 867 F.2d at 524. Finally, Marks' assertion that Duran's Declaration is "merely speculation and conjecture" is patently false; the Declaration is based on her personal knowledge as it must be pursuant to FRE 602. Mot., Ex. F, Duran Decl. The Court should not give any weight to Marks' various complaints regarding evidence he subjectively deems insufficient to support his termination. Marks' own subjective beliefs and complaints fail to create a genuine dispute that Saxe terminated his employment not based on performance, but because of retaliatory

animus. *Scalzi v. City of N. Las Vegas*, No. 2:08-cv-01399-MMD-VCF, 2013 U.S. Dist. LEXIS 25931, *14-16 (D. Nev. 2013)(even if court were to credit plaintiff as an effective employee, he had not raised specific or substantial evidence of pretext to avoid summary judgment).

B. There is No Reason the Court Should Look Beyond the Plain Meaning of NRS 613.040 And Create a Brand-New Cause of Action in Nevada.

Yet again, in an attempt to further obfuscate the issue, Plaintiff attributes arguments to Defendants that they never raised in their Motion. Defendants' argument regarding Plaintiff's NRS 613.040 is clear: Under NRS 613.040, 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 cannot escape the plain meaning of the statute and does not point to a single word or sentence therein that supports the viability of his Second Claim for Relief. Contrary to Plaintiff's contention, there is no evidence that DSP made "any rule or regulation" that prohibited Marks from engaging in politics, and Marks does not point to one – as he must under the plain language of the statute. *See* Compl. ¶¶ 67-74; *see also Couch v. Morgan Stanley & Co.*, No. 1:14-cv-10-LJO-JLT, 2015 U.S. Dist. LEXIS 104021 at *33 (E.D. Cal. Aug. 7, 2015)("As a matter of plain language, the prohibition applies only to *an employer's rule, regulation* . . . preventing an employee from running for or holding public office . . . .").

Even if the Court were to infer a "rule" where there was none, no one at DSP prevented Plaintiff from engaging in political activity. *See Spitzmesser v. Tate Snyder Kimsey Architects, Ltd.*, 2:10-cv-01700-KJD-LRL, 2011 U.S. Dist. LEXIS 68696, *8-9 (D. Nev. 2011)(denying motion to amend as futile where plaintiff alleged he was forced to participate in politics). To the contrary, the undisputed evidence, established through Marks' testimony, is that Saxe "was [absolutely] supportive of [Marks] running for office." Mot., Ex. C Marks Dep. 31:12- 32:3. According to Marks, "the understanding that I had from my boss, who clearly was on board with my running for assembly and senate, was complete support." *Id.* at 59:14-16; Mot., Ex. B, Saxe Dep. 115:17-116:19("I could understand that it was a big deal for him. . . . I was happy for him.").

Should this Court look beyond the plain meaning of NRS 613.040, there are only three cases in this jurisdiction that mention the statute. None of them support Marks' efforts to create a new

cause of action from a termination of employment that undisputedly 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 Spitzmesser*, 2011 U.S. Dist. LEXIS 68696 at *8-9(leave to amend denied where the plaintiff sought to allege "he was forced to participate in politics" because this allegation did not state a claim under the plain meaning of NRS 613.040); *Whitfield v. Trade Show Servs*., 2012 U.S. Dist. LEXIS 26790, *17-18 (D. Nev. 2012)(noting Nevada courts have yet to confront the question of whether terminating a worker for his stated voting preference, or for voting for a particular candidate for national office warrants an exception to the at-will employment doctrine); *Nunez v. Sahara Nevada Corp*., 677 F. Supp. 1471, 1473 (D. Nev. 1988)(discussing causes of action in a footnote).

In the absence of any applicable case law in this circuit, it makes sense to review decisions of other courts that have interpreted similar language in similar statutes and Plaintiff points to no meaningful differences between the statutes to warrant a different interpretation of NRS 613.040. As Defendants explained in their Motion, Mot. at 22:25-24:7, other jurisdictions have explored the intent of similar statutes and concluded the purpose of such statutes is to protect an employee from retaliation due to the expression of his political beliefs. "[T]he purpose" of the statute is "to protect employees' political freedoms from their employers . . . 'in essence, forbid employers to attempt to control the political activities of employees . . . [by] prohibit[ing] employers from making decisions that adversely affect an employee (e.g., termination) *solely because of the employer's disagreement with an employee's political viewpoints and his/her expressing them*.'" *Couch*, 2015 U.S. Dist. LEXIS 104021 at *33-34. Here, there is not a single allegation, much less a *fact*, that even suggests that the basis for Marks' claim is that Saxe terminated his employment *because he disagreed with Marks' political viewpoint*.[14] In fact, Marks, a Democrat, testified that he did not "know" and "never asked" Saxe's political affiliation. Mot., Ex. C, Marks Dep. 12:20-13:3.

Marks' Response goes far afield when, in reality, the analysis is simple. The plain meaning of the statue, and even the broadest construction of possible intent that this Court could import into

[14] *See* Compl. ¶ 71("Defendants terminated Plaintiff because he was running for Nevada State Senate.")

the statute, does not apply to a situation where an employee freely engages in politics, and is terminated for his lack of focus on and attention to his job duties rather than his expression of a certain political viewpoint. Marks' assertion that "the question here is whether Defendants terminated Plaintiff because he was shirking his work responsibilities to work on his campaign," Opp. at 17:21-22, is a fabrication that has no basis in the text of the statute or the limited, relevant judicial interpretation that exists. The Court need look no further than the statute itself, and Marks' own words, his termination "[was]n't about politics . . . let's not pretend," Mot., Ex. B, Marks Dep. 56:25-57:4, and his Second Claim for Relief should be dismissed.

C. Marks' Response Fails to Demonstrate a Genuine Issue of Material Fact Which Would Preclude Summary Judgment on His Tortious Discharge Claim Based on Alleged OSHA Violations.

In its June 12, 2018 Order granting in part Defendants' Motion to Dismiss Plaintiff's Third Claim for Relief, ECF No. 26, the Court found:

> [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." An employee reporting an employer's illegal activities **to the government** is supportive of the common good.

ECF No. 25 at 3:11-16 (emphasis added)(internal citations omitted). Here, discovery confirmed what the parties knew all along: Marks never reported any conduct to "appropriate authorities" (i.e., the government) *outside* of his employer as required to state a claim in Nevada until after his termination. Mot., Ex. C, Marks Dep. 278:10-279:7; Ex. J at MARKS-00028-00029.

The Court's finding that an employee's reporting of activities to the government is supportive of the common good such that a tortious discharge claim for whistleblowing may be sustained, is in accord with all relevant authority in this jurisdiction. In contrast, internal complaints to an 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. To be a whistleblower, an employee must report the unlawful activity to the "appropriate authorities" **outside of his employment**. *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 . .

. unless an employee reports the employer's allegedly illegal activity to authorities outside of the company, he . . . cannot claim protected whistleblower status.")).

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* before the adverse action was taken. Mot. at 24:21-25:28; *McManus v. McManus Fin. Consultants, Inc.*, 2014 Nev. Unpub. LEXIS 2200, *3-4, (2014) (same); *Jackson v. Universal Health Servs.*, 2014 U.S. Dist. LEXIS 129490 at *13 (D. Nev. 2014) ("internal reporting or exposure is merely private and proprietary and is not sufficient to maintain a tortious discharge claim based on whistleblowing."). In each of these cases, internal reporting prior to termination was simply insufficient to support a tortious discharge claim as a matter of law, regardless of what actions the employee took after termination. Even though all of the courts whose decisions actually bind the Court in the instant case have clearly ruled on the issue, inexplicably, for nearly four pages of his brief, Plaintiff cites to cases in *other* jurisdictions interpreting *other* federal and state laws in an attempt to convince the Court to expand the scope of Nevada's tortious discharge claims. Opp. at 20:8-9, 20:12-13, 22:17, 23:3-4, 13-14. There is no need to look beyond the binding, precedential authority in this jurisdiction. Nor should the Court consider Marks' analysis of *Kim v. Humboldt Cty. Hosp. Dist.*, 2015 U.S. Dist. LEXIS 37840 (D. Nev. 2015)(analyzing freedom of speech principles rather than a tortious discharge claim). Because the law requires an employee to complain to an outside authority, it logically follows that the adverse action – i.e., termination – could not have been taken if the employee (never) actually complained prior to termination.

Moreover, during his deposition, Marks confirmed that not only did he not complain to any outside authority, but he had not affirmatively decided to expose any alleged illegal OSHA practices. Specifically, Marks testified that, in his discussions with Saxe, he "wasn't explicit I'm going to OSHA. It was these are reportable violations" and, instead, was simply "advising [] [Saxe] as the general counsel that [] [he] thought these were violations of OSHA." Mot., Ex. C, Mark Dep. 297:14-298:18. Marks even further clarified to Saxe that "that's not I'm reporting you to OSHA. That's different." *Id*. at 298:24-299:3. The undisputed material fact is clear: Marks never even threatened,

much less actually reported – as he must under the law – to report any alleged violation to OSHA during his employment.

Even if the Court were to look beyond Marks' failure to report the alleged OSHA issues outside of the company prior to his termination, Marks cannot meet the heavy burden to establish proximate or *actual* cause, especially where the only instances 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. Mot., 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.

Finally, Marks' whistleblower claim must also be rejected because he cannot establish the existence of a reasonable, good faith suspicion that DSP participated in illegal conduct. "Good faith" is reporting "not motivated by malice, spite, jealousy or personal gain as opposed to a good faith belief that an infraction has occurred." *Allum v. Valley Bank*, 114 Nev. 1313, 1321, 970 P.2d 1062, 1067 (1998). There can be no finding of good faith reporting here. The sole alleged basis for Marks' OSHA claim is that, on one occasion, he noticed an employee welding in the theater, learned that certifications were required to perform welding, and discovered after the fact that the employee he observed during the tour did not have a certification. Mot., Ex. C, Marks Dep. 251:14-24, 254:6-16, 260:24-261:11. Marks testified that he, Duran, and Saxe began working to resolve the issue. *Id.* at 263:25-264:21. Despite the fact that Marks never observed a single instance of the alleged violation after January 2016, Marks filed a complaint with OSHA on March 4, 2016, only a few days after his termination *Id.* at 271:16-272:7; Ex. J, MARKS-00028-00029. There is simply no

evidence to support a contention that Marks actually possessed a reasonable, good faith suspicion of participation in illegal conduct when he was terminated, or when he filed his OSHA complaint.[15] In fact, the record evidence demands a contrary conclusion: Marks' OSHA complaint was "motivated by malice, spite…or personal gain." *Allum*, 114 Nev. at 1321. Marks wanted to "get even with David Saxe for firing him." Ex. A, August Dep. 65:4-23-66:25 (Ex. 3 ¶ 4). For this reason, as well as all the reasons discussed above, the Court should reject Plaintiff's tortious discharge claim and dismiss Plaintiff's Third Claim for Relief.

IV. CONCLUSION

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

Dated this 18th day of February, 2020.

JACKSON LEWIS P.C.

/s/ *Kirsten A. Milton*
Kirsten A. Milton, Bar #14401
Lynne K. McChrystal Bar #14739
900 S. Fourth Street, Suite 900
Las Vegas, Nevada 89101

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

[15] Marks complains that he "asked for the certifications" in a discovery request. Opp. at 24:25-26. As discussed above, Marks' complaints regarding his own failure to pursue discovery are unavailing. Further, the *current certifications* are not probative of Marks' belief on the March 4, 2016, the day he filed his OSHA complaint. Finally, Marks' contention that counsel for Defendants affirmatively stated Defendants would not challenge an element of his tortious discharge claim is false and, in any event, do not create a genuine issue of material fact sufficient to survive summary judgment. *See* Opp. at 25:1-3; **Exhibit E**, Declaration of Kirsten Milton.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 18th day of February 2020, I caused to be served via the Court's CM/ECF Filing, a true and correct copy of the above foregoing **DEFENDANTS' REPLY IN SUPPORT OF 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/ *Lynne K. McChrystal*
Employee of Jackson Lewis P.C.

EXHIBIT A

Kirsten A. Milton, Bar No. 14401
JACKSON LEWIS P.C.
3800 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Kirsten.milton@jacksonlewis.com
Tel: (702) 921-2460
Fax: (702) 921-2461

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 CORPORATRIONS 11-20, inclusive, Defendants.	Case No. 2:17-cv-02110-KJD-CWH **DEFENDANT DAVID SAXE PRODUCTIONS, LLC'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**

Defendant David Saxe Productions, LLC ("Defendant"), by and through its counsel of record, Jackson Lewis P.C., in accordance with Rule 26 and 33, in response to Plaintiff's First Set of Interrogatories, states as follows:

DEFENDANT'S PRELIMINARY STATEMENT

Defendant responds to Plaintiff's Interrogatories as it interprets and understand them. In the event that Plaintiff subsequently asserts an interpretation of any of the Interrogatories that differs from Defendant's interpretations or understanding, Defendant reserves the right to supplement or amend its objections and/or answers. Further, Defendant reserves the right to object as to the competency, relevancy, materiality and/or admissibility of the information disclosed pursuant to their answers to the Interrogatories. In addition, these responses are made solely for

INTERROGATORY NO. 3:

Identify all written and/or oral employment policies and/or procedures that Defendant had in place from the date Plaintiff was hired with Defendant through March 3, 2016 including but not limited to the following policies and/or procedures:

(a) Employee discipline;

(b) Cause for Termination;

(c) Retaliation.

RESPONSE NO. 3:

Defendant objects to Interrogatory No. 3 on the grounds that it seeks information that is not relevant to any party's claim or defense and is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties' relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving these issues. Defendant also objects to this Interrogatory on the grounds that the phrase "oral employment policies and/or procedures" is not defined rendering the Interrogatory vague, ambiguous, and, as such, susceptible to a multitude of different interpretations. Subject to and without waiving these and the general objections, Defendant refers Plaintiff to documents produced at Bates-stamped Nos. SAXE-0051 – 55; SAXE-0060 – 70; SAXE0075 – 79.

INTERROGATORY NO. 4:

Describe/List Plaintiff s job duties as an employee of Defendant.

RESPONSE NO. 4:

Defendant objects to this Interrogatory on the grounds that it is vague and ambiguous; for example, the term "Defendant" is not defined, and is susceptible to a multitude of different interpretations as there are multiple Defendants in this case. Subject to and without waiving these and the general objections, Defendant states that Plaintiff was employed by David Saxe Productions, LLC and given the title of In-House Counsel. As In-House Counsel, Plaintiff was required to perform business- and legal-related services for David Saxe Productions, LLC and its

affiliated companies. By way of example only, and subject to the direction/approval of Defendant Saxe, Plaintiff was required to assist in the retrieval of documents and evidence requested by outside attorneys; review bills from outside attorneys; facilitate the filing and payment of licenses, permits, and policies; conduct legal research; draft documents; assist in Human Resources activities; advise the company on legal matters; and address any other legal matters that might arise.

INTERROGATORY NO. 5:

Set forth each and every reason that Defendant decided to terminate Plaintiffs employment in March of 2016.

RESPONSE NO. 5:

Defendant object to Interrogatory No. 5 on the grounds that it seeks information that is not proportional to the needs of the case, considering the importance of the issues at stake in this litigation, the amount in controversy, the parties' relative access to information and resources, the burden and expense of the proposed discovery and the importance of the discovery in resolving the issues. Defendant also objects to this Interrogatory on the grounds that it is vague and ambiguous; for example, the phrases "each and every reason" is not defined, and is susceptible to a multitude of different interpretations. Defendant further objects to this Interrogatory to the extent it calls for the production of information protected from disclosure by the attorney-client privilege and/or work product doctrine. Subject to and without waiving these and the general objections, Defendant states that Defendant Saxe made the decision to terminate Plaintiff's employment. Among other concerns, Plaintiff neglected his work duties. On multiple occasions, Defendant Saxe advised Plaintiff to focus on his job as In-House Counsel and to stop using company working hours and resources to work on his political campaign to the detriment of his job as In-House Counsel, but Plaintiff refused. Plaintiff frequently left work without permission to allegedly attend to certain campaign activities, while ignoring the tasks required of him at work. Plaintiff's behavior and insubordination resulted in his termination from the David Saxe Productions, LLC. *See also* documents produced at SAXE-0051 – 55; SAXE-0060 – 70; SAXE0075 – 79.

VERIFICATION

I, David Saxe, on behalf of David Saxe Productions, LLC, do hereby swear under penalty of perjury that I have read the foregoing **DEFENDANT DAVID SAXE PRODUCTIONS, LLC'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES** and know the contents thereof, and am informed and believe that the same is true and correct to the best of my knowledge.

Dated this 9th day of March, 2018.

DAVID SAXE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 9th day of March, 2018, I caused to be served via United States Mail, postage fully prepaid, a true and correct copy of the above foregoing **DEFENDANT DAVID SAXE PRODUCTIONS, LLC'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES** 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

Employee of Jackson Lewis P.C.

EXHIBIT B

EXHIBIT B

Paragraphs To Strike In Plaintiff's Declaration	Plaintiff's Contradictory Deposition Testimony
Opp. Ex. 1 ¶17: "In or about November of 2015, I observed uncertified employees performing welding procedures at Defendants' theater without proper permits. I reported that activity to Saxe **and told him that if it were not corrected, I would have to report it to** OSHA…[a]s of late February, 2016, Saxe had yet to comply with those promises. **I again told him that if it wasn't fixed it would have to be reported** (emphasis added).	Q: So which is it, Alex; that you told David that you were going to report the violations to OSHA, or that you never told him that? A: **I wasn't explicit I'm going to OSHA.** It was these are reportable violations. … Q: You were telling him as—you were advising him as the general counsel that you thought these were violations of OSHA? A: Right. And the point was if we don't correct this, then this is something that has to get reported out so that it gets corrected. That's the whole point. Q: You never actually said that to him though? … A: When I said—**I did not specifically say I will report you to OSHA**. I said, these need to get fixed or they will be reported to OSHA so that they do get fixed. **That's not I'm reporting you to OSHA. That's different.** Motion, Ex. C, Marks Dep. 297:14-18, 298:12-299:3 (emphasis added).
Opp. Ex. I ¶21: "I was not assigned this task by Saxe and **it was not in the normal scope of my duties**. I was concerned that if I had not been paid properly, there were probably other employees who had also not been paid properly. **My intent in that investigation was to protect those employees from wage theft, not to protect the company from liability**." (emphasis added).	A:…And that's what I was doing, was keeping [David Saxe] compliant. It was my job. Q: Right, as general counsel? A: Yes … Q: You wanted to see the payroll records for other employees who like yourself were exempt? A: Right. And I mean the crux of it was if this was happening to me, is this an internal policy. And I asked him is this being done to other people. [Tokarski] indicated yes, and then I made the request for three years. **Q: And part of your role as general counsel was to advise David Saxe and his companies as to whether they were compliant with, for example, the Fair Labor Standards Act; right?**

	A: Yes. … Q: What did you say to [Tokarski]? A: I went in and I said just as a reminder, I said, you know, I'd like my salary to be the same as it was last week to make sure that I am paid for that Thursday. He kind of protested again and said David said not to, and I said, I know, we've been through this. I said, But I'm going to need that, and I said I also need the three years of payroll records. **I said this is – I explained to him the liability that it could cause the company of the labor commission coming in and seeing that we were improperly paying people, and then possibly that's going to cost us hundreds of thousands of dollars as opposed to trying to just save 120.** … **Q. So you didn't feel like you needed to cloak yourself in protected activity?** **A: No.** **Q: So you weren't looking for issues for violations of the law at David Saxe Productions?** A: **No I was trying to protect him if there were issues.** Q: And you weren't looking for issues with respect to legal compliance when you were at Safety First? A: I never had -- you're switching topics. Safety First, my job is compliance. If I find an issue, I have to fix it. I don't look for issues if they arise, **that's my job as general counsel, to look for the company's best interest**. Motion, Ex. C, Marks Dep. 51:21-25, 83:1-84:24, 115:3-17. (emphasis added).
Opp. Ex. I, ¶19: "I was told by Mr. Tokarski that Saxe had told him not to pay me for the previous day. I told Mr. Tokarski that by law he needed to pay me and **I asked him to relay that message to Saxe**." (emphasis added).	Q. So am I correct that during that conversation with Larry [Tokarski] he did not tell you that he talked to David [Saxe] about your request for the employees' payroll records; correct? Right? A. I can't say if -- I wasn't privy to that conversation between them. Q. But am I correct that Larry never said that to you?

	A. He never said that to me, but that doesn't mean it didn't happen. I just -- I wasn't in that conversation, but yes. Q. But my question is, Larry [Tokarski] never said that to you -- A. No, he never said that to me. Q. -- correct? A. Yes Motion, Ex. C, Marks Dep. at 87:5-88:10.

4834-3706-9749, v. 1

EXHIBIT C

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

MS. MILTON: That's okay.

MR. GRONICH: If you can bear with me a couple more questions. Thanks.

BY MR. GRONICH:

Q. Because we talked about Alex's wages at $55,000 a year, did those wages stay at $55,000 a year throughout his employment?

A. No. At one point he went to 60,000.

Q. Do you remember when he went to 60,000?

A. Maybe November of 2016. 2015. Sorry. About eight months later.

Q. Okay. Why did you move his salary to 60,000?

A. Because Alex was -- Alex was begging for a review, and I said, "Do you want a review or do you just want more money?" And he said, "I just want more money." I said, "Become I've been giving you a review and it's not good." So he would just keep poking me for money and wanted more money. So after just poking me and poking me, I think I gave in finally, just I didn't have time to...

Q. Well, you said that the review was not good, so why did you decide to give him a raise?

A. Because Alex was -- I was very busy, and I didn't have time to look for another or hire another

attorney at the time. I was putting shows on and I just didn't have time. I did not want to give him a raise. He did not deserve a raise, by any means. He was just getting more -- he was getting agitated and poking constantly that he wants more money.

I think I even jokingly, there's a Family Guy reference that where Stewie is hunting down people who owe him money. He says, "Where's my money, man?" Or "where's my money? Where's my money?" So I'd jokingly say that to him like he's being a bully, just he wants more money, he wants more money. I'm, like, "I understand you want more money. It doesn't mean you deserve more money," but in the end I just didn't have time to find anybody else at the time and so I gave it to him.

Q. Now, you said that he was asking for a review. Did you ever do a written review or written evaluation of his work in November of 2015?

A. I don't remember if there's a formal one, but I remember telling him, "Your review is what I keep saying to you all the time, it's do this, do your job, quit with your attitude." I go, "Here's your review."

Q. Are you familiar with any policy in the handbook that requires a review at certain intervals

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

EXHIBIT D

JEFFREY GRONICH, ATTORNEY AT LAW, P.C.
Jeffrey Gronich, Esq. (#13136)
1810 E. Sahara Ave.
Suite 109
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Tel: (702) 430-6896
Fax: (702) 369-1290
jgronich@gronichlaw.com
Attorneys for Plaintiff Alexander Marks

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

PLAINTIFF'S INITIAL DISCLOSURES

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

TO: ALL DEFENDANTS

DATED this 3rd day of October, 2017

Plaintiff Alexander Marks ("Plaintiff"), by and through his attorney Jeffrey Gronich, Esq., and pursuant to FRCP 26 and L.R. 26-1, provides the following information:

WITNESSES

1. Alexander Marks
c/o Jeffrey Gronich, Esq.
Jeffrey Gronich, Attorney at Law, P.C.
1810 E. Sahara Ave, Suite 109
Las Vegas, Nevada 89104

Alexander Marks is the Plaintiff in this matter and is expected to testify regarding the allegations of the Complaint, his damages, all matters relating to his employment with Defendant, and all allegations in the Complaint.

2. Larry Tokarski
Phone Number Unknown
Address Unknown

Larry Tokarski was employed by Defendants at the same time as Plaintiff as the controller. This individual is expected to testify regarding his knowledge of the facts and circumstances surrounding the issues in this case, specifically regarding Defendants' payroll policies and procedures, and the allegations contained in paragraphs 38-49.

3. Veronica Duran
Phone Number Unknown
Address Unknown

Veronica Duran was employed by Defendants at the same time as Plaintiff as the Executive Assistant. This individual is expected to testify regarding her knowledge of the facts and circumstances surrounding the issues in this case, specifically regarding Defendants' safety policies and practices, payroll policies and procedures, and Human Resources Policies and Procedures.

4. PMK of David Saxe Productions, LLC
c/o JACKSON LEWIS P.C.
3800 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169
702-921-2460

Defendant and its PMK are expected to testify regarding its knowledge of the facts and circumstances surrounding the issues in this case

5. PMK of Saxe Management, LLC
c/o JACKSON LEWIS P.C.
3800 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169
702-921-2460

Defendant and its PMK are expected to testify regarding its knowledge of the facts and circumstances surrounding the issues in this case

6. David Saxe
c/o JACKSON LEWIS P.C.
3800 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169
702-921-2460

Defendant is expected to testify regarding his knowledge of the facts and circumstances

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

surrounding the issues in this case.

7. Any and all Custodians of Records.

8. Any and all witnesses named by any other party in this action.

9. Rebuttal witnesses, if necessary.

10. All witnesses disclosed by any of the Respondent.

11. All witnesses named in the document production.

Plaintiff hereby reserves his right to supplement the above list of witnesses as discovery in this matter continues.

DOCUMENTS

Plaintiff currently has documents in his possession and/or control which are responsive to FRCP 26 and which are currently available:

1. Email from David Saxe to Alexander Marks sent March 2, 2016, bates labeled MARKS 00001;

2. Bank Deposit Summaries from August, 2015 through March, 2016 showing payroll deposits from Defendants to Plaintiff (account numbers and irrelevant transactions redacted), bates labeled MARKS 00002-00008;

3. Plaintiff's campaign event calendar, showing December 27, 2015 through March 5, 2016, bates labeled MARKS 00009-00010;

4. Email chain between David Saxe to Alexander Marks, bates labeled MARKS 00011-00012;

5. Documents Plaintiff filed anonymously with the Nevada Office of the Labor Commission, bates labeled MARKS 00013-00017.

Plaintiff hereby reserves his right to supplement the above list of documents as discovery in this matter continues.

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

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

CALCULATION OF DAMAGES

Plaintiff is entitled to general damages, special damages, consequential damages and punitive damages which include but are not limited to:

1. Loss of wages:
   a. Loss of wages – Plaintiff earned a salary of $60,000 per year, resulting in an average weekly wage of about $1,153.85. Plaintiff's employment was terminated on March 2, 2016. Had he continued working for Defendant, he would have earned approximately $95,769.55 from his termination through the date of these disclosures (83 weeks).
   b. Plaintiff also received health insurance benefits through his employer. The value of these benefits will be determined through discovery and will be amended as discovery continues.
   c. Mitigation – Plaintiff has partially mitigated his damages and has earned wages in the amount of $21,533.95 since his employment with Defendants was terminated.
   d. Liquidated Damages under the FLSA, 29 USC §216(b) for an additional equal amount of the above stated damages.
   e. Total – The total estimated amount of lost wages is $$148,471.20.
2. Compensatory/Punitive Damages in an amount to be determined by a trier of fact for the stress, pain and suffering Plaintiff suffered as a result of the egregious, malicious, and knowing conduct by Defendant.
3. For Attorney's costs and fees in the amount of $300 per hour by lead counsel Jeffrey Gronich, Esq., and reasonable costs of suit.

4. Pre and Post Judgment Interest.

Plaintiff reserves his right to amend the above stated damages as discovery continues.

DATED this 3rd day of October, 2017.

By: /s/ Jeffrey Gronich

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
Attorneys for Plaintiff

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of October, 2017, I caused to be served a true and correct copy of the foregoing **PLAINTIFF'S INITIAL DISCLOSURES** on the following person(s), and by the following method(s):

☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☐ to be sent via electronic means; and/or

☐ to be hand-delivered to the attorneys at the address listed below:

Kristen A. Milton, Esq.
Mahna Pourshaban, Esq.
JACKSON LEWIS P.C.
3800 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169
Attorneys for Defendants

/s/ Jeffrey Gronich
An Employee of Jeffrey Gronich, Attorney at Law, P.C.

EXHIBIT E

Kirsten A. Milton
Nevada State Bar No. 14401
Lynne K. McChrystal
Nevada State Bar No. 14739
JACKSON LEWIS P.C.
300 S. Fourth Street, Suite 900
Las Vegas, Nevada 89101
Tel: (702) 921-2460
Email: kirsten.milton@jacksonlewis.com
Email: lynne.mcchrystal@jacksonlewis.com

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. 2:17-cv-02110-KJD-DJA **DECLARATION OF KIRSTEN MILTON**

I, Kirsten Milton declare:

1. I am an attorney licensed to practice law in the State of Nevada and am currently an attorney with the law firm of Jackson Lewis P.C., counsel for Defendants David Saxe Productions, LLC, Saxe Management, LLC, and David Saxe (hereinafter "Defendants"), in the above-captioned litigation. I have personal knowledge of the facts set forth below in this declaration. I am competent to testify as to the facts stated herein in a court of law and will so testify if called upon.

2. This declaration is submitted to correct Plaintiff's description of an April 2, 2019 telephone conversation between the parties' counsel regarding Defendants' discovery responses. Opp. at 24:28-25:3; Ex. XVII.

3. Regarding Plaintiff's discovery requests for welding certifications and a copy of the lease for the V theater, I reiterated Defendants' objections to these requests, explaining that the

requests were overbroad and sought documents which were neither relevant to either party's claims or defenses nor proportional to the needs of the case, and that some of the documents were protected by attorney-client privilege.

4. I did not state or otherwise "assure" Plaintiff's counsel that because Defendants would not produce the documents, they would not contend that Plaintiff did not possess a good faith belief sufficient to sustain his Third Claim for Relief of tortious discharge. Such an assertion is nonsensical because whether the welders had the proper certifications and what provisions were contained in a lease agreement, have nothing to do with whether Marks had a "good faith" suspicion – i.e., whether he ultimately made a report that was "not motivated by malice, spite, jealousy or personal gain as opposed to a good faith belief that an infraction has occurred." *Allum v. Valley Bank*, 114 Nev. 1313, 1321, 970 P.2d 1062, 1067 (1998).

5. I also further explained that whether the employees had proper certifications had nothing to do with whether Marks' employment was terminated under circumstances that violated strong and compelling public policy.

6. Plaintiff's counsel did not communicate with me again regarding these documents after the initial telephone conversation.

I declare under penalty of perjury under 28 U.S.C. § 1746 that the foregoing is true and correct.

EXECUTED this 18th day of February, 2020.

Kirsten Milton

KIRSTEN MILTON

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ALEXANDER MARKS, Plaintiff, v. DAVID SAXE PRODUCTIONS, LLC., *et al.*, Defendants.	Case No. 2:17-cv-02110-KJD-DJA **ORDER**

Presently before the Court is Defendants' Motion for Summary Judgment (ECF No. 41). Plaintiff Alexander Marks filed a response in opposition (ECF No. 44), to which Saxe replied (ECF No. 45).

I. Background

Defendant David Saxe hired Marks as in-house general counsel for Defendant David Saxe Productions, LLC ("Saxe") in April 2015, as a salaried employee. Compl. ¶¶ 14–15, ECF No. 1, Ex. 1. Besides overseeing certain departments within the company, Marks' responsibility included ensuring Saxe was compliant with fair labor practices. Mot. for Summ. J. 4, ECF No. 41. In September 2015, Marks announced his intention to run for political office. Id. Although Saxe supported Marks' aspirations, Saxe claimed he was concerned about Marks' ability to focus on his work while also campaigning. Id.

Although Marks worked on his campaign while at the office, he claimed it did not interfere with completing his assignments for Saxe. Marks Dep. 27:6-23, ECF No. 41, Ex. C. However, Saxe listed numerous tasks that either Marks failed to perform or performed unsatisfactorily during this time and Saxe blamed it on the extensive time Marks was putting toward his campaign. Mot. for Summ. J. 7, ECF No. 41. Saxe had sent emails to Marks indicating his dissatisfaction with Marks' campaign interfering with his work performance. Id. at

5–6. Saxe testified that as early as June 2015, he had started to express frustration with Marks' failure to meet deadlines and failure to communicate his status on the projects to which he was assigned. Id. at 6-7. In fact, Saxe stated he considered terminating Marks as early as August 2015 for poor attitude and lackluster performance. Id. at 7.

On February 25, 2016, Marks left work early after feeling ill. Compl. ¶ 38, ECF No. 1, Ex. 1. The next day, Larry Tokarski, Saxe's controller, informed Marks that Saxe instructed Tokarski to withhold pay for the missed day. Id. at ¶ 40. Marks told Tokarski that pursuant to 29 CFR 541.602, he was a salaried exempt employee and entitled to pay for taking less than a full day off while feeling ill. Id. at ¶¶ 41–42. Saxe eventually paid Marks for the missed day. Marks contemporaneously claimed he told Tokarski that withholding his pay would be a violation of the Fair Labor Standards Act ("FLSA"), that he wanted to see employee payroll records from the previous three years, and to relay the message to Saxe. Pl.'s Resp. 5, ECF No. 44. However, after Tokarski testified he never received or relayed the message, Marks admitted he did not know if Tokarski did in fact inform Saxe. Mot. for Summ. J. 9, ECF No. 41.

Marks claims that after February 26, 2016, he began to inspect payroll records through Saxe's Paychex portal to see if other employees were victims of similar FLSA violations. Pl.'s Resp. 5, ECF No. 44. Marks also claims that in late February, he began an OSHA investigation after dangerous welding practices were not yet listed as fixed. Id. at 4. Marks claims that Saxe must have been aware of both investigations. On March 2, 2016, Saxe terminated Marks' employment stating that he was unsatisfied with Marks' work performance. Mot. for Summ. J. 22, ECF No. 41. Marks testified that he did not believe his termination had anything to do with his political campaign, and, rather, the catalyst was his investigation into illegal payroll practices and safety violations. Marks Dep. 56:14-57:15, ECF No. 41, Ex. C.

Immediately following his termination, Marks filed an OSHA complaint and a complaint with the Labor Commission for FLSA violations. Mot. for Summ. J. 10. On June 22, 2017, Marks commenced this action in state court alleging three causes of action: (1) retaliation under the FLSA, 29 U.S.C. § 215, (2) a violation of NRS 613.040, which states that it is unlawful for an employer to prohibit or prevent an employee from engaging in politics or becoming a

candidate for public office; and (3) tortious discharge under Nevada common law.

On August 4, 2017, Saxe removed the action because original jurisdiction over the FLSA retaliation claim existed pursuant to 28 U.S.C. § 1331. 28 U.S.C. § 1441(b); Notice of Removal, ECF No. 1. The Court attained supplemental jurisdiction over the remaining state claims pursuant to 28 U.S.C. 1367(a).

II. Legal Standard for Summary Judgment

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Fed. R. Civ. P. 56(e).

All justifiable inferences must be viewed in the light must favorable to the nonmoving party. See Matsushita, 475 U.S. at 587. However, the nonmoving party may not rest upon the mere allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit or other evidentiary materials as provided by Rule 56(e), showing there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court need only resolve factual issues of controversy in favor of the non-moving party where the facts specifically averred by that party contradict facts specifically averred by the movant. See Lujan v. Nat'l Wildlife Fed'n., 497 U.S. 871, 888 (1990); see also Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 345 (9th Cir. 1995) (stating that conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat summary judgment). Evidence must be concrete and cannot rely on "mere speculation, conjecture, or fantasy. O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th Cir. 1986). "[U]ncorroborated and self-serving testimony," without more, will not create a "genuine issue" of material fact precluding summary judgment. Villiarimo v. Aloha Island Air Inc., 281 F.3d 1054, 1061 (9th Cir. 2002).

Additionally, a party cannot create an issue of fact precluding summary judgment by an affidavit contradicting his prior deposition testimony. Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217, 1225 (9th Cir. 2005) (citing Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir.1991).

Summary judgment shall be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Summary judgment shall not be granted if a reasonable jury could return a verdict for the nonmoving party. See Anderson, 477 U.S. at 248.

III. Analysis

A. FLSA Retaliation Claim

Section 215(a)(3) of the Fair Labor Standards Act provides that:

> It is unlawful for any person to discharge in any other manner, or in any other manner discriminate against any other employee because such employee has filed any complaint or instituted, or caused to be instituted, any proceeding under or related to the Fair Labor Standards Act.

29 U.S.C. § 215(a)(3) (2018).

The Court applies the McDonnell Douglas test in connection with these cases. See Knuf v. ATC/ANCOM, Inc., No. CV-N-97-33-HDM (PHA), 1998 WL 390076, at * 1 (D. Nev. 1998). The Court looks, first, to see if the plaintiff has established a prima facie case of retaliation. See Id. The defendant must then provide a legitimate, nondiscriminatory reason for the action. See Id. If the defendant does so, the plaintiff must show that the proffered reason is pretextual. See Id.

To establish a prima facie case of retaliation, a plaintiff must show that (1) he engaged in an activity which was protected by the FLSA, (2) that he suffered a contemporaneous, adverse action by the employer, and (3) that a causal connection exists between the employee's activity and the employer's adverse action. See Id.

If it is alleged that the adverse employment action was based on protected and unprotected activities, the plaintiff has the obligation to show that their protected activities were

a substantial factor in the adverse employment decision or action. Id. at *2. This standard can be satisfied where the adverse action would not have been taken, but for the protected activity. Id.

Saxe contends, that based on the evidence, Marks has failed to establish a prima facie case of retaliation because, although he suffered an adverse action, he did not engage in protected activity, nor did the alleged protected activity cause the adverse action. The Court finds no genuine issue of material fact exists as to whether Marks engaged in protected activity.

"To fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 14 (2011). This standard can be met by both written and oral complaints. Id. However, "not all amorphous expressions of discontent related to wages and hours constitute complaints filed within the meaning of § 215(a)(3)." Rosenfield v. GlobalTranz Enters., Inc., 811 F.3d 282, 286 (9th Cir. 2015) (citing Lambert v. Ackerley, 180 F.3d 997, 1007 (9th Cir. 1999)).

Additionally, when determining whether an employee has "filed any complaint," the employee's role or job title often is an important contextual element. Rosenfield, 811 F.3d at 286. Depending on the circumstances, a reasonable employer may not understand a "complaint", asserted by an employee tasked with ensuring FLSA compliance, as an assertation of rights protected by the statute. Id. However, unlike other circuits which adopted a manager-specific standard regarding complaints from employees charged with ensuring FLSA compliance, the Ninth Circuit maintains the "fair notice" rule of Kasten. Id. at 287. Compare with McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486–87 (10th Cir. 1996) ("[T]he employee must [take certain actions] or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA." (emphasis added)). Accordingly, an employee's position is only one consideration in the contextual analysis and the question of fair notice must be resolved on a case-by-case basis. Rosenfield, 811 F.3d at 287; see also Lambert, 180 F.3d at 1008 (whether a complaint has been filed that provides adequate notice to the employer is a question "to be resolved as a matter of factual analysis on a case-by-case basis.").

The Court agrees with Saxe's contention that both the content and context of Marks' alleged complaint failed to reasonably put Saxe on notice that Marks was asserting his rights protected by the statute. Regarding the context, Marks' role as general counsel was, among other things, to ensure Saxe was compliant with the FLSA. Although Marks' declaration attached to his response states the contrary, per the "sham affidavit" rule, Marks cannot create an issue of fact precluding summary judgment by an affidavit contradicting his prior deposition testimony. See Kennedy, 952 F.2d at 266; see Marks Dep. 106:10-19, ECF No. 41, Ex. C. However, although Marks' role – which indicates an investigation into FLSA violations is not an assertation of protective rights – is only a consideration in the contextual analysis, the "content" of his alleged complaint is founded on conclusory and speculative theory and is therefore insufficient to raise a genuine issue of fact to defeat summary judgment. See Anheuser-Busch, Inc, 69 F.3d at 345.

Marks' claim relies only on his assumptions that Saxe must have been aware that Marks was asserting his protective rights. Marks claimed that an email between Saxe and Tokarski, sent on February 25th – the day Marks left early – indicated that Saxe was aware Marks was asserting his rights. However, the content of the email was only a discussion of how to go about paying Marks for the day he left early. See ECF No. 44, Ex. IV. Additionally, the email could not have indicated Saxe was acknowledging the existence of Marks asserting his protective rights because it was sent before Marks was aware Saxe did not want to pay him for that day. Moreover, Marks' allegation that Saxe must have been aware of Marks' probe into the Paychex software because Saxe utilized cameras and employee data tracking software in the office is conclusory and speculative at most, and is insufficient to raise an issue of material fact.

Marks argues that Saxes' failure to produce additional emails or the audio/visual and the computer tracking software records, despite document requests, indicates this information would denote that Saxe was aware of Marks' assertion of rights. See ECF No. 44, Ex. XIII (Request Nos. 6, 7, 8, 13, 16, & 19). However, upon the close of discovery, Marks did not file a motion to compel pursuant to Fed. R. Civ. P. 37. Marks cannot now complain if he failed to pursue

discovery diligently before summary judgment to raise an issue of genuine fact. Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir.1986).

Furthermore, regarding Marks' conversation with Tokarski, a conversation Tokarski did not recall having, Marks agreed that he did not know if Tokarski ever relayed Marks' concerns to Saxe. Despite Marks' contention that this conversation showed his intent to put Saxe on notice, Marks' claim that Tokarski must have informed Saxe is again conclusory and speculative and is insufficient to raise an issue of material fact.

Lastly, Marks' contention that the fact that Saxe eventually paid him for February 25th indicates Saxe was aware Marks asserted his rights also fails. Beside being conclusory and speculative, the justifiable inference would be that Saxe was made aware that by law he had to pay Marks, not that Marks must have asserted protection under the retaliation provision. See Matsushita, 475 U.S. at 587. Accordingly, the Court finds that Marks failed to set forth specific facts demonstrating a genuine factual issue for trial as to whether his alleged complaint fell within the scope of the protected activity. Because the first element of the FLSA retaliation claim fails, the court will not address whether there was a causal connection between the alleged protected activity and the adverse action.

B. NRS 613.040 & Tortious Discharge Claims

Absent the federal claim, the Court no longer has original jurisdiction and only exercises supplement jurisdiction over the remaining state law claims. See 28 U.S.C. § 1367(a). The Court may decline to exercise supplemental jurisdiction over remaining state law claims when the only federal claims are extinguished. See 28 U.S.C. § 1367(c)(3); Parra v. PacifiCare of Az., Inc., 715 F.3d 1146, 1156 (9th Cir. 2013). Therefore, the Court declines to exercise supplemental jurisdiction over the state law claims and remands these claims back to state court.

IV. Conclusion

Accordingly, IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (ECF No. 41) is **GRANTED in part**;

IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Defendants and against Plaintiff on Plaintiff's claim for retaliation under the FLSA;

IT IS FURTHER ORDERED that Plaintiff's second and third causes of action for NRS 613.040 Violations and Tortious Discharge are **REMANDED** to state court.

Dated this 20th day of August, 2020.

Kent J. Dawson
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Alexander Marks,

Plaintiff,

v.

David Saxe Productions, LLC, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number: 2:17-cv-02110-KJD-DJA

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of Defendants and against Plaintiff on Plaintiff's claim for retaliation under the FLSA.

8/20/2020
Date

DEBRA K. KEMPI
Clerk

/s/ M. Reyes
Deputy Clerk

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

ALEXANDER MARKS,	)	
	)	
Plaintiff,	)	CASE NO. A-17-757284-C
	)	
vs.	)	DEPT. NO. XXIV
	)	
DAVID SAXE PRODUCTIONS LLC, et al,	)	
	)	**Transcript of**
Defendants.	)	**Proceedings**
_____	)	

BEFORE THE HONORABLE ERIKA BALLOU, DISTRICT COURT JUDGE

TUESDAY, JUNE 29, 2021

ARGUMENT: SUMMARY JUDGMENT

APPEARANCES:

FOR THE PLAINTIFF: JEFFREY S GRONICH, ESQ.

FOR THE DEFENDANTS: KIRSTEN A. MILTON, ESQ.
(Via BlueJeans Video Conference)

RECORDED BY: SUSIE SCHOFIELD, COURT RECORDER
TRANSCRIPTION BY: LGM TRANSCRIPTION SERVICE

LAS VEGAS, NEVADA, TUESDAY, JUNE 29, 2021, 9:01 A.M.

* * * *

THE COURT: Page Number 4, Alexander Marks versus David Saxe Productions, LLC. Case Number A-17-757284-C.

Who do I have?

MR. GRONICH: Good morning, Your Honor. This is Jeffrey Gronich for plaintiff, Alexander Marks.

MS. MILTON: Good morning, Your Honor. This is Kirsten Milton for defendants.

THE COURT: Thank you. So this was the case where Mr. Gronich requested additional time to prepare for argument for the motion for summary judgment. I believe I had told everyone where my head was last time.

Can everybody else put themselves on mute besides the parties that are currently on. Everyone. Thank you.

So, Mr. Gronich, I believe I had told you where my head was last time. Is that correct, or do you want me to restate my -- [inaudible].

MR. GRONICH: I believe you had started to mention and then I kind of suggested that we postpone it before you had a chance to really give your full thoughts.

THE COURT: Right. Okay. So here's where I am. I was inclined to grant the motion for summary judgment as to the NRS 613.040 claim because I didn't see any rule or regulation that was prohibiting or preventing any employee

from engaging in politics or becoming a candidate for public office. But I am inclined to deny the motion for summary judgment as to the tortious discharge claim because I thought that there was a genuine issue of material fact as to whether the defendants were put on notice of the OSHA complaint and whether or not they acted -- [video interruption; inaudible].

Can everyone please put yourselves on mute unless this is your case. I'm not feeling well and I'm home, so it's hard for people to hear me, so please put yourselves on mute. Thank you.

And I also thought that there was a genuine issue -- [video interruption]. Really, seriously, everybody put yourselves on mute.

(Colloquy regarding video interruptions)

THE COURT: And then I also thought that there was a genuine issue of material fact as to whether Mr. Marks' protected activity was also a substantial factor in their decision to terminate him.

So, Mr. Gronich, go ahead and start.

MR. GRONICH: Okay. Thank you, Your Honor. So Your Honor mentioned that she's inclined to grant the motion as it relates to NRS 613.040 because there's no written rule that the defendant had that said that someone couldn't run for office. But in defendant's motion, essentially they argue that the plain language of the statute says that there has to

be some written rule and that the Court can only look at the plain language of the statute and that if the plain language of the statute is not ambiguous, then there's no reason to look any further.

But that's -- that's not at all how anything in the law works. Most of what we do as lawyers is we look at a statute, we look at the text and we try to say, okay, what is this really saying. And just because this specific statute does not discuss what the rule has to look like doesn't mean that it can only come in the form of some written policy. And the reason is because it would be absurd for that to be the rule because no employer is going to have some written policy in their handbook that says, by the way, if you want to work for us you can't run for office.

THE COURT: I'm sorry. Mr. Gronich --

MR. GRONICH: Yes.

THE COURT: -- you cut off.

MR. GRONICH: Sorry. Where did I cut off.

THE COURT: I don't know what just happened.

MR. GRONICH: Can you hear me now? I'm --

THE COURT: Can anyone hear me? Susie, Ro?

THE CLERK: Yes, we can hear you.

MS. MILTON: Your Honor, this is counsel for defendant. I'm not in the courtroom, but I can hear you.

THE COURT: Okay. I don't know what happened to

Mr. Gronich. He cut off.

MR. GRONICH: I'm in the courtroom, Your Honor. Can you hear me?

THE COURT: Okay. So for some reason it seems as if they muted the courtroom, so hold on for a second.

COURT RECORDER: Okay. Now can you hear us?

THE COURT: I can. Mr. Gronich, I apologize. You were saying just because there's no written rule or anything, so go ahead from there.

MR. GRONICH: Okay. So just because there's no written rule does not mean that a rule does not exist in practicality. Indeed, what most courts do is we look at the text of the law and we try to figure out, okay, what does this mean in practicality, what is its practical terms? Because no employer is going to practically have a rule in their handbook that says, by the way, if you work here you cannot run for office. That would be -- that would be absurd of an employer to do that in writing and actually have that there for everybody to see.

So what we have to look at is we have to look at the circumstances. We have to look at the context of what happened. And in this situation what happened was when Mr. Saxe terminated Mr. Marks because Mr. Marks was running for office, Mr. Saxe essentially created a rule that said, hey, because you're running for office you can't be an employee

here. That creates a de facto rule, even though it's not written down anywhere. It doesn't have to be written down anywhere. By doing so, it sends a message to every other employee there that if anybody else has any kind of inclination or intention of running for office, they better not do it because they can lose their job.

You know, we don't have to look very far. We can look at plenty of other laws that talk about whether or not there's a rule. I mean, we can go to just the First Amendment of the Constitution which says, Congress shall make no law respecting establishment of religion, prohibiting the exercise of free speech, abridging freedom of the press. So if we just look at the First Amendment of the Constitution it says Congress shall make no law doing all of those things. But we know that in order for a First Amendment violation to exist there doesn't need to be a specific law about it.

You know, for example, if we look at last year's Black Lives Matter protests where police officers were going around and harassing and arresting members of the press and violating their First Amendment rights, there was no rule that the police -- you know, the police departments didn't send out a memo or a rule that said, hey, make sure you violate the press, make sure you're arresting the press. It was just something that the police departments were doing. There didn't need to be an actual law on the books. As the First

Amendment says, Congress shall make no law; right? There didn't need to be anything specific on the books for when those officers did that action, when they took that action. They weren't doing so based on some written rule or regulation, they were doing so and they still violated the First Amendment.

So, you know, just because NRS 613.040 doesn't specifically say that, you know, the rule has to be -- it can't be in writing or whatever, you know, it's basic, it says the employer shall not make a rule prohibiting -- a rule or regulation prohibiting an employee from running for public office. But you have to look at the context. It's more than that. The statute can't -- we cannot look at a statute like this and say it has to be to the exact letter because no statute is. No statute is ever interpreted to the exact letter. That's all we do in law is look at statutes and figure out, okay, what does this really mean.

And through Saxe's actions, he enacted a policy that effectively made it impossible for someone to both run for office and be an employee. Now, Saxe says -- excuse me, sorry, before I get to that. Other states may have similar laws that defendant brought up in their pleadings that tried to -- defendant tried to kind of compare our law to those from other states. But the laws that defendant has compared this to aren't identical. They're somewhat similar but they're

not. They're not the same. And in other states the courts have kind of looked at those laws and rules and they've interpreted them to mean a certain thing. They specifically interpreted them to mean, well, it only matters if the employer has differing political viewpoints or is forcing the employee to do some kind of political action that they don't agree with or that's against their political view, but that's not what Nevada's law says.

Nevada's law says that the employer can't prohibit an employee from running for office. And by firing him because he was running for office, Saxe enacted a rule by saying if you run for office that is a terminable offense. We will fire you if you become a candidate for office. Now, Saxe said that it was because Marks was a bad employee that he was terminated, but defendants have not shown that Marks was a bad employee. They have not met their burden to show why they believe that Marks' behavior was worthy of termination.

They reference vaguely that he was just kind of bad at his job, that he was coming in late or that he was missing assignments, but we asked for documents to prove those things. We asked for work assignments, we asked for copies of his schedule, we asked for copies of things he didn't do, and none of that was produced. And certainly none of it -- you know, the only -- the few emails that were attached to defendants' motions are taken out of context. They're fractions of emails

that are missing pages, clearly missing pages, and they show that Mr. Marks was responding to requests in a realistic time.

Mr. Marks was a salaried employee, so because of that he had a -- I'm sorry, he did not have a fixed schedule. He had a very loose schedule. So he was allowed, he could come in late, he could stay late. And, in fact, he did. Very often he would come in late and he would stay late.

So, Mr. Saxe indicated that, well, he was being too distracting in the office. Well, as we explained in our motion, in deposition testimony it was no more than social interactions for which every employee engages. And because no other employee was terminated or even disciplined for general social interactions, we can only assume --

THE COURT: Mr. Gronich, you're gone again.

MR. GRONICH: I'm sorry? Muted again? Yeah, it says muted. No. Did she say I'm muted?

COURT RECORDER: She said you were. It's not.

Judge?

THE COURT: Ms. Milton, can you hear me?

MS. MILTON: Your Honor, I can.

THE COURT: And can you hear Mr. Gronich, because he stopped again.

MS. MILTON: Yes, he did stop for me as well. I can't hear him.

THE COURT: Okay.

MR. GRONICH: Can you hear me now? Is it working?

THE COURT: This is really frustrating and I don't feel well.

THE MARSHAL: Can you hear us, Judge?

THE COURT: So we just -- yeah, this is all very annoying.

COURT RECORDER: Nobody is muted.

MR. GRONICH: Can you hear me now, Your Honor? It's all the microphones?

COURT RECORDER: They were all muted before. Now they're not.

THE CLERK: Give us a second to call I.T.

THE COURT: I don't know what's happening, but clearly this should probably -- I'm sorry to waste your time, Ms. Milton, but this probably needs to happen when I'm able to be in court because this keeps getting him cut off and I can't figure out what's happening.

MS. MILTON: I understand, Your Honor.

THE COURT: I really apologize. I started not feeling well and it was too late to get anybody to cover me, so I was thinking, you know, I can just do this from home since we have the technology, but clearly the technology is not working today.

COURT RECORDER: Can you hear us now?

THE COURT: So as soon as I'm able to tell Mr.

Gronich that he cut off again, I'm going to probably just put you guys on for maybe next week or the week after.

MS. MILTON: Your Honor, will we still be able to participate by BlueJeans then?

THE COURT: Absolutely. I think it's something going on with him being in the courtroom because you're there and I can hear you.

MS. MILTON: Okay. Thank you, Your Honor.

THE COURT: I think what's happening is the mics in the courtroom are having an issue, and because I'm unable to hear him we're not able to make a proper record. And I'm sorry, my voice is going out.

(Colloquy regarding technical issues)

THE COURT: Ms. Milton, they are calling the Help Desk to find out what's going on.

MS. MILTON: Okay.

THE COURT: So I don't know if Mr. Gronich can hear me or if anybody in the courtroom can hear me. But if they can, I'm stopping this hearing right now.

(Colloquy regarding technical issues)

MR. GRONICH: Your Honor, can you hear us now?

THE COURT: Okay. So, yeah. So, Mr. Gronich, you cut off a long time ago.

THE MARSHAL: Pardon me, Your Honor. I just want to -- Ms. Milton, I think you might have two devices on. Do you

have two devices on?

THE COURT: I don't. I do not.

THE MARSHAL: We're getting a terrible echo.

THE COURT: I don't. I've only got my computer.

THE MARSHAL: No. Ms. Milton. Ms. Milton, do you have two devices on?

MS. MILTON: No, I do not. I'm just on my computer.

THE MARSHAL: Okay, because we seem to be getting the echo from when you speak.

MS. MILTON: I can try -- [inaudible] -- and calling back in, but I am just on my computer.

COURT RECORDER: Okay, try that, because we're getting so many echoes with you.

MS. MILTON: Okay. I can try that.

COURT RECORDER: Okay.

THE MARSHAL: Thank you, Your Honor.

(Pause in the proceedings)

THE COURT: So, Mr. Gronich, what I was telling Ms. Milton is you cut off awhile back ago.

MR. GRONICH: Yes, Your Honor. We actually -- we could hear you the whole time.

THE COURT: Okay. So -- okay, so you heard me tell her that I'm going to have this hearing in a couple weeks?

MR. GRONICH: Yes. I believe that's what you said.

THE COURT: Okay. I really apologize. I woke up

sick this morning and it was too late to get anyone to cover me.

MR. GRONICH: No, I appreciate it. We want you to be able to make an informed decision, and so absolutely we will -- we have no problem with that.

THE COURT: Okay. Are you the only person in the courtroom? Because I'm probably going to --

MR. GRONICH: No, there's two other attorneys here.

THE COURT: Oh.

MS. MILTON: This is Kirsten Milton. I'm back on the phone. Is this any better?

THE CLERK: It's not, Ms. Milton. It's still very echoing. I.T. is coming up here right now.

THE COURT: Well, what we're going to do is we're just going to stop this hearing and we're going to reset it in a couple weeks because he kept cutting off.

THE CLERK: Okay.

THE COURT: So what we're going to do is reset this in maybe two weeks. And I really -- I apologize so much, you all.

THE CLERK: Are we rescheduling everything or are we just doing this hearing?

THE COURT: What do you mean everything? What else do we have?

THE CLERK: Well, the rest of the calendar.

THE COURT: No, just this hearing, because I was fine with people who were on BlueJeans.

THE CLERK: That will be July 13th at 9:00 a.m.

THE COURT: Ms. Milton, were you able to hear that date?

MS. MILTON: Yes, I am, Your Honor, and that's fine.

THE COURT: Thank you. And again, I apologize.

MS. MILTON: I hope you feel better, Your Honor.

THE COURT: Thank you.

MR. GRONICH: Thank you, Your Honor.

(PROCEEDINGS CONCLUDED AT 9:22 A.M.)

* * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

Electronically Filed
11/5/2021 11:11 AM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

ALEXANDER MARKS, Plaintiff, vs. DAVID SAXE PRODUCTIONS, LLC, Defendant.	CASE NO. A-17-757284-C DEPT NO. XIV **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE ERIKA BALLOU, DISTRICT COURT JUDGE

TUESDAY, JULY 13, 2021

ARGUMENT: SUMMARY JUDGMENT

APPEARANCES:

FOR THE PLAINTIFF: JEFFREY S. GRONICH, ESQ.

FOR THE DEFENDANT: KIRSTEN A. MILTON, ESQ.
(via BlueJeans)

RECORDED BY: SUSAN SCHOFIELD, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

LAS VEGAS, CLARK COUNTY, NEVADA, JULY 13, 2021, 9:27 A.M.

*** * * * ***

THE COURT: Page Number 6, Alexander Marks versus David Saxe Productions, Case Number A-17-757284-C.

Who do I have?

MR. GRONICH: Good morning, Your Honor. Attorney Jeffrey Gronich for plaintiff Alexander Marks.

THE COURT: Thank you, Mr. Gronich.

MS. MILTON: Good morning, Your Honor.

THE COURT: And who else do I have?

MS. MILTON: Good morning, Your Honor. Kirsten Milton on behalf of defendants.

THE COURT: Thank you, Ms. Milton.

And again, last week, I'm sorry that I was having issues with the mics because I was home sick. So -- and I woke up sick. So they couldn't find anybody to cover for me.

MR. GRONICH: No worries. We're glad you're feeling better.

THE COURT: Thank you.

So, Mr. Gronich, you were arguing -- so I told you all my inclination on this was to grant the motion for summary judgment in relation to the NRS 613.040 claim because the -- to me, the plain reading of the statute was that there was no regulation or rule prohibiting an employee from engaging in the politics or becoming a candidate. Mr. Gronich was arguing

against that.

And I was also inclined to deny in part the motion for summary judgment as to the tortious discharge claim because I think that there is a genuine issue of material fact as to whether the defendant Saxe was put on notice of the OSHA complaint and acted in a retaliatory manner.

But because of the mic issue with the courtroom, all we had gotten to was the first part, and Mr. Gronich was arguing, and I had to stop you because I just -- I couldn't hear you.

So my notes are that Mr. Gronich was arguing that the plain language of the statute, that that's not how this works. Just because there's no written rule doesn't mean that a rule doesn't exist in practicality because an employee -- because no employer is going to have a rule in their handbook that says that if you work here you can't engage in politics. You can't look at the statute alone.

Let me see what else my notes say. No statute is ever interpreted just to the letter. And here, through the defendant's actions, they made it impossible to run for office and be an employee. The out-of-state laws that defendant relied on were not on point. Nevada law only says that you can't prohibit people from running here. The defendants created a rule that the termination was because of political office, and the defendants claimed they fired the plaintiff

because he was a bad employee, but they haven't proved anything. What they did provide is taken out of context and are only parts of e-mails.

And the last -- the last note I have is that you said that Mr. Marks was a salaried employee and didn't have a fixed schedule.

So do you want to continue from there, Mr. Gronich, or did you --

MR. GRONICH: Sure. My notes are a little bit jumbled on that as well. So what I'll do is I'll try to kind of expand a little bit on some of those thoughts and kind of go over them in turn.

Essentially, as I did mention previously, the plain language of the rule here is not clear. In defendant's motion, they cited to an unpublished case from a lower federal district court of California, and that is *Couch versus* -- it's just cited here as *Couch*, 2015 U.S. District, Lexis 104021. And in their motion, they cited, as a matter of plain language, the prohibition only applies to an employer's rule or regulation preventing the employer -- the employee from running for or holding public office. But that citation is actually taken out of context.

What that court continued to expand on was that the rule is not about -- the law is not about having a rule or regulation. The court explained that the purpose of the law is

to protect employees' political freedoms and forbids an employer to control the political activities of the employee. The plain language part of the court's interpretation was referring to whether or not the rule or regulation of the employer had any kind of a political basis -- so, in other words, whether it was pretext for controlling the political activity.

So it's the same here with NRS 613.040. Again, the statute says that an employer shall not have a rule or regulation. But, as I mentioned, no employer is going to have a written rule. No employer is going to have something written. We have to look at the actions of the employer to determine whether or not in practicality and in practice the employer's intent in their action was to control the political activity. And so we have to look at what in this case did Mr. Saxe do.

And it's very clear that Mr. Saxe, in terminating Mr. Marks, did so because of Mr. Marks's intent to run for political office. And we know that, as we explained in the motion, Saxe is trying to explain, No, no, we terminated him for legitimate business reasons; we terminated him because he was bad at his job. Well, he wasn't bad at -- number one, he wasn't bad at his job. Number two, defendants haven't even shown any issue of fact whether Mr. Marks was bad at his job. They've shown a few out-of-context e-mails, which we provided

context to, that show Saxe was merely getting some guidance in the many months before -- before the termination, but he was never given any discipline. He was never given any write-ups.

And, in fact, one of the e-mails that defendant had supplied in their motion to show that Marks was ostensibly not following instructions was an e-mail where the full context is that Mr. Saxe had instructed Mr. Marks to get him out of jury with a racist and sexist e-mail, which Mr. Marks refused to do. And that e-mail thread -- and that's Exhibit 8 of our response. That e-mail thread shows just how much disdain the defendant has for the civil process, the political process, the civil engagement process. And so it's very clear that the defendant in this case is -- did terminate Mr. Marks because of his political activity.

So, you know, one of the other things that I kind of compared this to was a First Amendment issue where the First Amendment says that Congress shall make no law respecting establishment of religion, prohibiting free exercise or abridging the right of the press.

So if we look at like a First Amendment issue, right, that just says Congress shall make no law, but there doesn't have to be a law on the books in order for a First Amendment violation to occur. If a police officer arrests a member of the press who is observing a protester or a riot, that would be an infringement of the First Amendment. There was no law that

said the police officer had to arrest that member of the press. The police officer did that on their own accord, but it's still a violation. Even if there is no law or rule or regulation prohibiting it, the practice of the person with authority to infringe on the right of that member of the press violated the First Amendment. So it's the same thing here.

The text of NRS 613.040 is very similar in text. The employer shall make no rule or regulation, but if the practicality, actions of the employer or the manager or somebody else working for the employer works to control or prohibit the employee from -- excuse me, from running for office, then there has been a violation. And, you know, we see that exact scenario happened here.

Additionally, there's no evidence that there was no written rule. Defendant didn't include in their motion the employee handbook. They didn't include the entire policies and procedures of the employer. They didn't include any evidence to show that there was no rule.

So if this Court is inclined to determine that their needs to be some written rule or policy, defendant here is just presuming that there's no written rule or policy. There's nothing in their motion to prove that, which creates a material issue of fact.

We should, at the very least, be able to take this to a jury or a factfinder to determine whether or not, number one,

there was a rule or regulation. Whether or not that was written or oral, it is certain possible that, even if there's no written rule or regulation, there can still be a verbal rule or regulation; number two, whether or not the actions of Mr. Saxe created an implied rule.

These are all issues for the factfinder. These are not issues for summary judgment.

So unless -- I believe unless Your Honor has any more questions about that issue, I believe I have gone over everything I have in my notes for that other than just the fact issue as for whether or not Mr. Marks was, we'll say, a good employee or a bad employee, which is certainly a fact issue of whether or not Mr. Marks (sic) terminated him because of the political activity or the OSHA notification or whether or not he was terminated because he didn't follow instructions or was a bad employee, which I think is a material issue of fact for a factfinder.

THE COURT: Thank you.

MR. GRONICH: So unless you have any other questions --

THE COURT: I don't. Thank you, Mr. Gronich.

Ms. Milton.

MS. MILTON: Your Honor, a few points in response to plaintiff's argument. So first, if we take plaintiff's argument on its face value, it essentially asks the Court to

disregard two principal canons of statutory construction.

It asks the Court to ignore, one, the plain language of the statute, which clearly says an employer is prohibited from preventing an employee from engaging in politics. The plain language of the statute says, It shall be unlawful for any person to make any rule or regulation prohibiting or preventing any employee from engaging in politics or becoming a candidate for public office in this state.

So not only is plaintiff asking the Court to ignore the plain language, which says it shall be unlawful to make a rule, but it's also ignoring a second principal of statutory interpretation, which is the Court should not construe words in a statute such that words or phrases become superfluous. And to ignore the language in the statute that says, To make any rule or regulation, would ignore that specific canon of construction.

With respect to plaintiffs's analogies to other laws, First Amendment rights, this law specifically says, It shall be unlawful. If the legislature had intended not to need an employer to have a rule or regulation, the legislature clearly could have written a statute to say it shall be unlawful for any person to prohibit or prevent an employee from engaging in politics, but that is not how the legislature wrote the statute.

So based on the plain language of the statute, as we

argued in our opening (video interference), plaintiff has not shown that defendant had a rule or regulation preventing him from running for office. In fact, what the record evidence shows us (video interference) own testimony is that defendant's acts absolutely supportive of him running for office. He testified that, Saxe was clearly on board with my running for Assembly and Senate. He gave complaint support. He thought it was exciting for the office. And Marks testified everyone thought it was kind of cool, were his language.

Saxe himself testified, I could understand it (video interference), and I was happy for him.

In fact, in Mr. Marks's testimony, he said, Let's not pretend this has anything to do with politics. And Judge Dawson (phonetic), in his ruling on defendant's motion for summary judgment with respect to the federal claim, also found that Marks testified he did not believe his termination had anything to do with his political campaign.

I want to address the second point in plaintiff's argument, which goes to analogizing to California law. I think it's completely disingenuous for the plaintiff to argue that California law here is not at least persuasive and instructive. In this instance, this statute, NRS 613.040 has only been looked at putting aside the federal decisions where the Court didn't make a decision (video interference). The courts have only looked at it in Nevada (video interference), and none of

those instances are on point.

The reason California law in this instance is instructive and persuasive is because, contrary to plaintiff's argument, California law is almost identical to the language that Nevada law loses -- uses. California law says, No employer shall make, adopt or enforce any rule, regulation or policy forbidding or preventing employees from engaging (video interference) politics or becoming candidates for public office.

In the *Couch* case that plaintiff reference that we cite in our brief, one of the things that is different from this case is the fact that the employer in that case actually did have a written policy related to what its employees could do with respect to running for office. And in that instance, they had a written policy that said employees had to obtain prior written approval to --

THE COURT: Ms. Milton. Ms. Milton. Ms. Milton. Your mic keeps going in and out. I'm not sure if it's because you're moving, but your mic is going in and out.

MS. MILTON: Oh, I'm sorry.

THE COURT: So, yeah, if you can stay -- stay still right there.

MS. MILTON: Sure. I'm sorry. Sorry. My chair is on wheels.

THE COURT: Yeah. So right there is the perfect

spot.

MS. MILTON: Sorry about that. Okay.

THE COURT: So the employer had -- the employer had a rule. Okay.

MS. MILTON: Yeah. In that -- in the *Couch* case, the employer actually had a rule that told its employees that they had to obtain written prior approval to seek or remain in political or governmental office. And even in that case where the employer had such a written policy, the court still found that the -- that the employer in that case did not violate the law.

Why is that? Well, they looked at what the purpose behind the statute was. The statute that had very similar language to what Nevada law has. And they said that the whole purpose of the statute is in order to prevent employers from making decisions solely because of the employer's disagreement with the employee's political views and expressing those political views.

And the other cases in California that we point to all go to this idea of whether the employer is disagreeing with the employee's political views.

Here, there is absolutely no evidence in the record, for example, to suggest Mr. Marks was a Democrat, Mr. Saxe -- I don't know his political affiliation, let's say he was a Republican and therefore made the decision to terminate

Mr. Marks's employment because they were of different political parties. That's the purpose of the statute. The purpose is to deter -- to prevent employers from their -- from making decisions about their employees based on political affiliation.

The fact that -- I just want to talk about a few other factual things with respect to plaintiff's claim that we have not met our burden that Marks wasn't doing his job well.

This whole thing about how much time he was spending in the office and that he was an exempt employee and didn't have set hours, that's directly contrary to the facts. In fact, in April of 2015, when Mr. Marks was interviewing for the position with Mr. Saxe, Mr. Saxe specifically told Mr. Marks that at David Saxe Productions all employees, regardless of your status, are expected to work normal office hours from 8:30 a.m. to 5:00 p.m., Monday through Friday.

And throughout the discovery process and then in our motion for summary judgment, defendants have cited multiple -- multiple concerns that Mr. Saxe expressed with Mr. Marks's performance. In fact, in June of 2015, he was already communicating with Mr. Marks about his failure to miss (sic) deadlines, that he wasn't completing tasks in a timely fashion. It wasn't only Mr. Saxe who said this, but it was also Veronica Durand (phonetic), who at the time was the vice president of operations.

In fact, this culminated in an incident in August

of 2015 where Marks is telling -- I'm sorry, where Mr. Saxe is telling Mr. Marx that his attitude has been poor, and his performance has been lackluster at best. He says, This isn't working for me. Let's meet today at noon to discuss our options: termination, quitting or getting on the same page.

In any event, all of that is irrelevant. Because if you focus on the plain language of the statute, the plain language of the statute clearly prohibits an employer from making any rule, and plaintiffs have failed to establish that the defendants made any rule preventing him from running for office. To the contrary, all of the record and the evidence shows that Mr. Saxe was supportive of Mr. Marks running for office, and Mr. Marks himself testified that his termination had nothing to do with politics.

THE COURT: And I'm still inclined with my first inclination to grant that motion for summary judgment on that issue.

Ms. Milton, would you please prepare the order on that one.

MS. MILTON: Yes, Your Honor.

THE COURT: And then as to the tortious discharge, who wants to be heard first on that?

MR. GRONICH: If you have any specific questions for me about that issue, I'd be happy to answer those.

THE COURT: I don't have any questions.

Ms. Milton, do you want to be heard on the tortious discharge? Because that one we -- yeah.

MS. MILTON: Yes, Your Honor. Yes, please.

Your Honor, I want to -- and I apologize if I am beating a dead horse here, but I'd like to go through sort of the -- first, the idea of a tortious discharge in Illinois -- I'm sorry, in Nevada, is severely -- the courts have said it's severely limited to rare and exceptional instances, and there are four instances where the courts have found in Nevada that tortious discharge could apply: One is retaliation for filing workers comp; two, refusing to work in unreasonable, dangerous conditions; three, engaging in whistleblowing activities; or, four, refusing to participate in illegal activities.

In this instance, we're talking about whether Mr. Marks's employment was terminated because he refused to engage in whistleblowing activities. The reason I mention there's four exceptions -- I want to focus on obviously the exception that applies here -- is because the standards are different for each four of those exceptions.

In the whistleblower context, the courts in Nevada have -- the Supreme Court of Nevada, district federal courts in Nevada in the Ninth Circuit have all said that for activity to be considered protected speech under the whistleblower exception the employee has to report that activity to a governmental agency outside the company.

There is no dispute that in this case Mr. Marks did not report any claims to OSHA until after his employment was terminated. Therefore, as a matter of law, Mr. Saxe could not have terminated him for engaging in whistleblower activities because Mr. Marks admits he did not complain externally until after the termination of his employment.

In 2012 and 2013 and in 2014, the Nevada Supreme Court has looked at, once again, whether internal complaints -- simply complaining to a supervisor, complaining to a boss -- are sufficient to constitute whistleblowing activities. And the court has said -- the courts have all said it is not sufficient to merely complain internally. Complaining externally is an element of that protected speech, and you do not have that protected speech such that you could be terminated for engaging in protected speech until you complain externally.

At that point, that's, in this case, that's where the analysis should end. Mr. Marks did not engage in protected activity prior to his termination; and therefore, he could not have been terminated based on any whistleblowing activities.

Even if he could bring a claim for tortious discharge, his claim still fails because the evidence shows that he was terminated for his inability to perform his job as general counsel. Why is that important? That's important because the law in Nevada is very clear that in order to

recover from tortious discharge you cannot do so unless you show that your employment was terminated -- that that reason for your termination (video interference) protected speech was the proximate or actual cause of your discharge.

The courts in Nevada have specifically found that mixed motive is not enough. In other words, if the employer can show that on sound judgment that there were multiple reasons that they terminated the individual's employment, that is sufficient to grant summary judgment for the employer.

I'm referring to the *Blanc (*phonetic*) versus* (video interference) case, which involved a general counsel. In that case, when the employer put forward multiple pieces of evidence, just as we have here --

For example, Mr. Marks was not communicating well with Mr. Saxe; Mr. Marx was missing deadlines; we gave specific instances where, for example, Mr. Marks failed to secure visas for performers, which delayed their ability to get into the United States and cost Mr. Saxe more money; he also failed to secure a deposit prior to a show opening and let the show open without that deposit.

And in the *Blanc* case, the plaintiff argued that it was a question of fact as to whether all of those reasons had anything to do with his termination or whether it was his whistleblowing activity because he actually complained outside the organization. And the court -- the court denied -- I'm

sorry. The court denied that argument and granted plaintiff -- defendant's motion for summary judgment saying the standard is proximate cause. It is not a mixed motive.

And the fact that defendant has shown multiple reasons as to why it terminated the general counsel's employment, that is sufficient to grant summary judgment.

So to the extent that the Court determines that -- well, let me just say it this way: Sure, there's no question here that Mr. Marks did not complain prior to the end of his employment. His employment therefore could not be terminated because of any protected activity because it did (video interference) activity for the Court to find differently.

The standard that the law required the Court to apply is a proximate cause or actual cause standard, not a mixed motive. And at a minimum, defendant has shown here that there is a -- there was potentially, we would argue, no mixed motive. It was clear that his employment and his performance was suffering, and those were the reasons we terminated his employment.

THE COURT: Mr. Gronich, any response?

MR. GRONICH: Yes. Thank you, Your Honor.

Defendant has talked a little bit about the standard for retaliation in Nevada, and the issue here is there is a difference between whether or not Mr. Marks just notified the employer that something needed to be done and whether or not he

threatened OSHA reporting. So in this case, this is not merely an issue of the employer just terminating the employee for just, you know, letting him know something is going on. But this is a termination for threatening to go outside of the company.

Now, Nevada law is admittedly a little bit wonky on this because most every other state has fixed their -- their enforcement of the whistleblower retaliation. But one of the key things is whether or not the employee had gone to a outside organization or had merely gone within the organization.

So in this case, the defendant is correct. Mr. Marks didn't actually go to OSHA until after the termination; however, he threatened to, and that's the key here, is he was terminated before he had the opportunity to go to OSHA. It's anticipatory retaliation. And as we've cited in our brief, anticipatory retaliation is still retaliation.

There is the Title VII claim, the 10th circuit. That would be *Sauers versus Salt Lake City*, 1 F.3d 1122, where action taken against an individual in anticipation of that person engaging in protected opposition of discrimination is no less retaliatory than action taken after the fact, and this form of preemptory retaliation falls within the scope.

Now, even though that was concerning a Title VII, the logic still applies. If an employee says to the employer, hey, I'm going to have to report this if this isn't taken care of,

and instead of taking care of it the employer just terminates the employee for even threatening that, that's still retaliatory because the employee didn't have an opportunity to go outside the company before they were terminated. So in that situation Mr. Marks is protected.

And, in fact, this argument had been made previously in a motion to dismiss in federal court, and the federal court denied that argument there already.

So the issue then goes to, as defendant has stated, whether or not it is the reason for the termination. So defendant is stating that, Well, no, he was terminated because he was a bad employee, because he made these mistakes. He did this. But again, that is an issue of material fact. Just because defendant says this is why we fired him doesn't mean that that's true.

And, in fact, as we've shown, all of those reasons are clearly pretextual. We asked for, we asked for documents that showed Mr. Marks's work. And even though, because he's general counsel, a number of those documents would have been considered privileged, and there are certainly issues as far as attorney-client relations, we attempted to agree we're going to do protective orders; we're going to enter stipulations here; we're going to make sure that everything stays confidential and privileged. And they were never -- they were never disclosed.

So they have a few, a handful, a handful of e-mails

over a year span that show general guidance of, hey, you missed -- we need you to take care of this, or you missed this. That's -- that's not enough. That's not enough to show that he was so bad at his job that that's the reason for his termination.

Again, as we've shown, we put context in those e-mails. The e-mails that were given to us out of context and that were in the motion out of context, we gave those e-mails context in our response, again, including the one where he is -- Mr. Marks is being reprimanded for not getting Mr. Saxe out of jury duty, and Mr. Saxe wanted him to send a racist and sexist e-mail to do that. If that's the reason for the termination, I mean, clearly that is pretextual. So the issue of whether or not Mr. Saxe terminated Mr. Marks because of an alleged bad work performance, that's a genuine issue of material fact.

They've offered some reasons for it, and we have rebutted those reasons. We have shown why those reasons are not, in fact, what they say they are. And they have not -- they have not met their burden to explain and to show what exactly it was that Mr. Marks did that was so egregious to get him fired. They haven't provided that information.

They didn't comply with that in discovery, and so now they are trying to just get by on this handful of e-mails where we suspect that there are plenty more documents that would have

shown that Mr. Marks was an exemplary employee, that he did his work, that he followed through with all of his obligations. And this really is, because they didn't provide any of those documents, it goes to a factfinder. So that issue is not appropriate for summary judgment.

And to the issue of whether or not Mr. Saxe was on notice of those OSHA claims, again, we asked for those documents too, and those were not provided to us. We asked for contracts. We asked for documents showing those -- you know, whether or not the OSHA items had been complied with, and those weren't given to us.

So, you know, Mr. Marks has alleged that he did, he put Mr. Saxe on notice of those discrepancies, and Mr. Saxe was on notice, and he knew that there were OSHA violations, and he knew that Mr. Marks was going to report him to OSHA if those weren't fixed. And instead of fixing them, he fired his lawyer and brought somebody new in who wasn't going to report him to OSHA. That's what he did, and that you cannot do.

So unless you have any further questions about that issue, I will rest.

THE COURT: So again, I'm still inclined with my first inclination. I do not think that the tortious discharge claim is ripe for summary judgment.

So, Mr. Gronich, would you prepare that order?

MR. GRONICH: Yes. Thank you.

THE COURT: Thank you.

And I thought you guys' was going to take longer than this one. So I called them first. So, Mr. --

MR. GRONICH: Actually, Your Honor.

THE COURT: Yes.

MR. GRONICH: While I'm here, and, Ms. Milton, before you leave, considering the denial of the portions, so that would put us on a need to probably get on a trial stack.

THE COURT: Okay.

MR. GRONICH: I don't know if you want to set -- just set this for a status check about that after we get the order in or what.

I also -- there -- I don't know. I would have to look into this. I don't know what the issue as far as the five-year rule is. This was originally filed in June of 2017, and then it was removed. So I'm not sure exactly how the five-year rule applies, especially with COVID and everything. So if you want, we can discuss that now, or we can put that on a status check.

THE COURT: We can give you guys a trial date now. We're looking at the end of 2022, beginning of 2023.

MR. GRONICH: Okay.

THE COURT: So September-November of 2022 or February of 2023.

MR. GRONICH: As long as there's no issue as far as

the five-year rule being violated by that date, September sounds fine to me.

THE COURT: Ms. Milton.

MS. MILTON: Your Honor, those dates are all fine with me. I don't know if they're okay with my client, but I imagine they would be. I just don't know sitting here today.

THE COURT: How about we put it on for the September date, and then if there's an issue, we can readdress it.

MR. GRONICH: Thank you, Your Honor.

THE COURT: Thank you, Your Honor.

THE CLERK: Calendar call August 30th, 2022, at 9:00 a.m.

Jury trial, September 6, 2022, at 1:00 p.m.

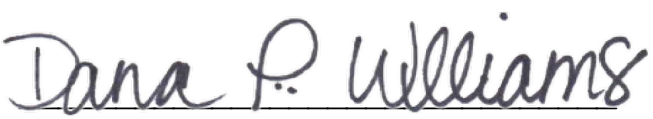
THE COURT: And we will issue a trial scheduling order.

So that was August 30th at 9:00 and September 6th at 1:00 o'clock.

(Proceedings concluded at 10:05 a.m.)

-oOo-

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Dana L. Williams
Transcriber