

1 Catherine Ventola  
2 Missouri State Bar No. 43320  
3 National Labor Relations Board  
4 1301 Clay Street, Suite 300N  
5 Oakland, California 94612-5224  
6 Telephone: (510) 671-3049  
7 Fax number: (510) 637-3315  
8 catherine.ventola@nlrb.gov

9 Noah Garber  
10 California State Bar No. 259708  
11 National Labor Relations Board  
12 1301 Clay Street, Suite 300N  
13 Oakland, California 94612-5224  
14 Telephone: (510) 671-3021  
15 Fax number: (510) 637-3315  
16 noah.garber@nlrb.gov

17 Attorneys for Petitioner

18 UNITED STATES DISTRICT COURT  
19 FOR THE DISTRICT OF NEVADA

20 VALERIE HARDY-MAHONEY, Regional )  
21 Director of the Thirty-Second Region of the )  
22 National Labor Relations Board, for and on ) Civil No. 17-CV-00216 MMD-VPC  
23 behalf of the National Labor Relations )  
24 Board )  
25 ) PETITIONER'S REPLY TO  
26 ) RESPONDENT'S OPPOSITION TO  
27 ) PETITIONER'S PETITION FOR  
28 ) TEMPORARY INJUNCTION UNDER  
29 ) SECTION 10(j) OF THE NATIONAL  
30 ) LABOR RELATIONS ACT, AS  
31 ) AMENDED [29 U.S.C. SECTION 160(j)]  
32 )  
33 ) Hearing Date: May 8, 2017  
34 ) Hearing Time: 9:00 AM  
35 ) Judge: Hon. Miranda M. Du

36  
37  
38

**TABLE OF CONTENTS**

<b>TABLE OF CONTENTS</b>	<b>ii</b>
<b>TABLE OF AUTHORITIES</b>	<b>iii</b>
<b>I. STATEMENT OF THE CASE AND BACKGROUND</b>	<b>1</b>
<b>II. THE STANDARD UNDER WHICH INJUNCTIVE RELIEF IS GRANTED</b>	<b>1</b>
<b>A. Petitioner Has a High Likelihood of Success on the Merits</b>	<b>1</b>
<b>1. Respondent Unlawfully Suspended and Terminated Johna May</b>	<b>2</b>
<b>2. Respondent Unlawfully Granted Wage and Benefits Increases</b>	<b>4</b>
<b>B. Irreparable Harm Will ensue Absent Injunctive Relief</b>	<b>7</b>
<b>C. The Balance of Equities Decidedly Tips in Favor of Injunctive Relief</b>	<b>9</b>
<b>D. The Public Interest is Best Served by Granting Injunctive Relief</b>	<b>10</b>
<b>III. Any Delay in This Matter Does Not Preclude Injunctive Relief</b>	<b>11</b>
<b>IV. CONCLUSION</b>	<b>12</b>

**TABLE OF AUTHORITIES**

**Federal Cases**

<i>Aguayo v. Tomco Carburetor Co.</i> , 853 F.2d 744, 750 (9th Cir. 1988)	11
<i>Alliance for the Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir. 2011)	1
<i>Arlook v. S. Lichtenberg</i> , 952 F.2d 367, 374 (11th Cir. 1992)	11
<i>Bloedorn v. Francisco Foods, Inc.</i> , 276 F.3d 270 (7th Cir. 2001)	7
<i>Brown v. Pacific Telephone &amp; Telegraph Co.</i> , 218 F.2d 542 (9th Cir. 1954)	10
<i>Danielson v. Joint Board</i> , 494 F.2d 1230, 1245 (2nd Cir. 1974)	2
<i>Eisenberg ex rel. NLRB v. Wellington Hall Nursing Home, Inc.</i> , 651 F.2d 902 (3d Cir. 1981)	9
<i>Frankl v. HTH Corp.</i> , 650 F.3d 1334 (9th Cir. 2011)	1
<i>Gottfried v. Mayco Plastics</i> , 472 F. Supp. 1167, 1168 (E.D. Mi. 1979)	12
<i>Hirsch v. Dorsey Trailers, Inc.</i> , 147 F.3d 243, 249 (3d Cir.1998)	12
<i>Miller v. California Pacific Medical Center</i> , 19 F.3d 449 (9th Cir. 1994)	2, 3, 7, 9, 11
<i>Muffley v. Spartan Mining Co.</i> , 570 F.3d 534 (4th Cir. 2009)	12
<i>NLRB v. Electro-Voice, Inc.</i> , 83 F.3d 1559, 1573 (7th Cir. 1996)	8, 9
<i>NLRB v. Exchange Parts Co.</i> , 375 U.S. 405 (1964)	4, 5
<i>Overstreet ex rel. NLRB v. El Paso Disposal, LP</i> , 625 F.3d 844, 856 (5th Cir. 2010)	11
<i>Pye ex rel. NLRB v. Excel Case Ready</i> , 238 F.3d 69, 75 (1st Cir. 2001)	9
<i>Scott v. Stephen Dunn &amp; Associates</i> , 241 F.3d 652 (9th Cir. 2001)	2, 3, 7, 9
<i>University of Texas v. Camenisch</i> , 451 U.S. 390 (1981)	2
<i>Winter v. Natural Resources Defense Council, Inc.</i> , 555 U.S. 7 (2008)	1

**Federal Statutes**

National Labor Relations Act (29 U.S.C. §151 et seq)	.passim
--	---------

**Administrative Cases**

<i>Atlantic Limousine, Inc.</i> , 316 NLRB 822 (1995)	3
<i>Curwood Inc.</i> , 339 NLRB 1137 (2003)	5
<i>Donaldson Brothers Ready Mix, Inc.</i> , 341 NLRB 958 (2004)	5

1	<i>Hampton Inn-JFK Airport</i> , 348 NLRB 16 (2006)	5
2	<i>Hogan Transports, Inc.</i> , 363 NLRB No. 196, slip op. at 4 (May 19, 2016)	5
3	<i>Holly Farms Corp.</i> , 311 NLRB 273 (1993)	5
4	<i>Mckesson Drug Co.</i> , 337 NLRB 935 (2002)	3
5	<i>Nortech Waste</i> , 336 NLRB 554 (2001)	3
6	<i>Tipton Electric, Co.</i> , 242 NLRB 202 (1979)	5

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **I. STATEMENT OF THE CASE AND BACKGROUND**

2 On April 28, 2017, Prime Healthcare Services d/b/a Saint Mary’s Regional Medical  
3 Center, Reno (Respondent) filed an Opposition to Petitioner’s Petition for Temporary Injunction  
4 Under Section 10(j) of the Act (the Opposition). As discussed below, Respondent’s arguments  
5 are without merit and the Court should grant Petitioner’s Petition for Temporary Injunction.  
6

7 **II. THE STANDARDS UNDER WHICH INJUNCTIVE RELIEF IS GRANTED**

8 As noted in Petitioner’s Memorandum of Points and Authorities, to obtain a  
9 preliminary injunction, the Regional Director must establish (1) a likelihood of success on the  
10 merits, (2) a likelihood of irreparable harm absent preliminary relief, (3) that the balance of  
11 equities tips in the Board’s favor, and (4) that an injunction is in the public interest. *Frankl v.*  
12 *HTH Corp.*, 650 F.3d 1334, 1355 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1821 (2012) (citing  
13 *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374 (2008)).  
14 Respondent’s suggestion that Petitioner has misstated the applicable standard is simply  
15 incorrect. These elements are evaluated on a sliding scale, *see Alliance for the Wild Rockies v.*  
16 *Cotrell*, 632 F.3d 1127, 1131-1134 (9th Cir. 2011), that permits district courts to grant an  
17 injunction where it cannot determine with certainty that the Director is more likely than not to  
18 prevail on the merits, but the costs outweigh the benefits of not granting the injunction.  
19 *Alliance for the Wild Rockies*, 632 F.3d at 1133 (quotations omitted).  
20

21 **A. Petitioner Has a High Likelihood of Success on the Merits<sup>1</sup>**

22 A likelihood of success on the merits is established by showing that the Board will likely  
23 find, and the Ninth Circuit would likely affirm, that Respondent committed the alleged unfair  
24 labor practices. *Frankl*, 650 F.3d at 1355; *see also Small*, 661 F.3d at 1187. Contrary to  
25

26  
27  
28 

---

<sup>1</sup> “Aff.” references are to the page numbers printed on the lower right hand corner of each document in  
Petitioner’s April 7, 2017 Index of Exhibits and Affidavits filed in support of the Petition for Temporary  
Injunction Under Section 10(j). “Name Decl. ¶” references are to the declarations in support of Respondent’s  
Opposition. “Opp” references are to Respondent’s Opposition.

1 Respondent’s arguments regarding the proper standard, and as noted in Petitioner’s  
2 Memorandum, the Regional Director need only produce “some evidence” in support of the unfair  
3 labor practice charge “with an arguable legal theory.” *Stephen Dunn & Associates*, 241 F.3d at  
4 664 (quoting *California Pacific Medical Center*, 19 F.3d at 460. This is not a preponderance of  
5 the evidence standard, *see id.* at 662, as that would improperly equate likelihood of success with  
6 success. *University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981). In sum, the Court should  
7 sustain the Regional Director’s factual allegations if they are rational and “be hospitable to the  
8 views of the [Regional Director], however novel.” *Danielson v. Joint Board*, 494 F.2d 1230,  
9 1245 (2nd Cir. 1974) (cited with approval in *California Pacific Medical Center*, 19 F.3d at 460).

12 1. Respondent Unlawfully Suspended and Terminated Johna May

13 Here, the Petitioner has established a likelihood of success on the merits because the  
14 Board will likely find that Respondent violated Section 8(a) (1) and (3) of the Act by suspending  
15 and terminating hospice nurse Johna May (May) because the California Nurses  
16 Association/National Nurses Organizing Committee/National Nurses United (the Union) refused  
17 to withdraw the Representation Petition. It is undisputed that at the August 3, 2015 hearing  
18 regarding the Representation Petition, after May’s alleged misconduct transpired, Union  
19 Attorney, Micah Berul (Berul), and Respondent Attorney, Mary Schottmiller (Schottmiller), had  
20 multiple off-the-record conversations. (Aff. 4, 6-7, 12).<sup>2</sup> In those conversations, Schottmiller  
21 instructed Berul that if the Union “pulled” the Representation Petition, Respondent would not  
22 terminate hospice nurse John May (May). (Aff. 4, 12, 17-19, 23). Board Law is clear, an  
23 employer violates Section 8(a)(1) and (3) of the Act when—as Schottmiller did here—it  
24 conditions continued employment, or an adverse action, on withdrawal of a Board proceeding.

---

28 <sup>2</sup> All affidavits filed by Petitioner are Board sworn, under oath, and under penalty of perjury. In contrast, Respondent relies upon declarations that are neither Board sworn, nor notarized under penalty of perjury.

1 See *Mckesson Drug Co.*, 337 NLRB 935, 937-938 (2002); see also *Atlantic Limousine, Inc.*, 316  
2 NLRB 822, 828-29 (1995); *Nortech Waste*, 336 NLRB 554, 554 fn. 2 (2001).

3  
4 Respondent's Opposition attempts to characterize this as a one-on-one conversation that  
5 cannot support injunctive relief and describes the issue before the Court as a credibility  
6 determination. This argument is misguided. Conflicting evidence does not preclude a Regional  
7 Director from making the requisite showing for Section 10(j) injunctive relief. See *Frankl*, 693  
8 F.3d at 1063). In this regard, Petitioner respectfully notes that it is not the duty of district courts  
9 to resolve factual disputes or legal issues involved. See *Garcia v. Sacramento Coca-Cola*  
10 *Bottling Co., Inc.*, 733 F.Supp.2d 1201, 1208 (E.D. Cal. 2010). In fact, district courts are not to  
11 resolve discrepancies in the facts presented or determine the credibility of witnesses. *Ahearn v.*  
12 *House of Good Samaritan*, 884 F.Supp 654, 659 (N.D.N.Y. 1995) (citations omitted). Rather, as  
13 noted above, the Court must defer to the Regional Director's findings regarding unfair labor  
14 practice allegations so long as they are rational, *Danielson*, 494 F.2d at 1245 (2nd Cir. 1974)  
15 (cited with approval in *California Pacific Medical Center*, 19 F.3d at 460), and accompanied by  
16 evidence with a legal theory. See *Stephen Dunn & Associates*, 241 F.3d at 664 (quoting  
17 *California Pacific Medical Center*, 19 F.3d at 460).

18  
19  
20 Contrary to Respondent's Opposition, Petitioner has put forth a legal theory that is  
21 supported by evidence and case law. Schottmiller threatened to terminate May unless the Union  
22 withdrew the Petition. Those facts are established by the testimony of Berul, the Union's  
23 Assistant Director of Collective Bargaining, Andrew Prediletto, and another Union Attorney,  
24 Jane Lawhon. Moreover, Schottmiller concedes that she attempted to barter with the Union.  
25 (Aff. 14). This conduct, conditioning employment on the withdrawal of an NLRB proceeding,  
26 violates the Act under established NLRB case law. See *Mckesson Drug Co.*, *supra*. Further,  
27  
28

1 based on Respondent's attempt to barter May's discharge in exchange for the withdrawal of the  
2 Representation Petition, it is clear that May's prior disciplinary history and the alleged gravity of  
3 the HIPAA incident were not barriers to her continued employment if the Union withdrew the  
4 Representation Petition. Thus, Respondent's extensive discussion of these matters in its  
5 Opposition is wholly irrelevant to the Court's consideration of whether Petitioner has  
6 demonstrated that she is likely to succeed before the Board in demonstrating that Respondent's  
7 conduct violated Section 8(a)(1) and (3) of the Act. Similarly, Respondent's arguments  
8 regarding alleged HIPAA infractions that surfaced during May's post-hearing investigatory  
9 meeting with Respondent are also irrelevant because Respondent already premised May's  
10 continued employment on the withdrawal of the Representation Petition. May's fate was sealed  
11 at the hearing when the Union refused to comply with Respondent's unlawful offer. This is clear  
12 through the record testimony of Berul, Prediletto, and Lawhon, and further evidenced through  
13 Respondent's termination notice to May that is silent regarding any evidence of further alleged  
14 HIPAA infractions. (Exhibit A, attached hereto). If the events of the August 4 meeting really  
15 played a part in May's termination, surely Respondent would have noted as such in its  
16 termination notice that it issued one week later. Further, May explained that she only utilized her  
17 personal cellphone because Respondent's cellphone did not function properly, and that this use  
18 was condoned by Respondent. (Aff. 39) In sum, Respondent's decision to terminate May was  
19 already made prior to the August 4 meeting, and as such, Respondent cannot establish that it  
20 would have taken the same action absent the protected conduct. *See, e.g., North Carolina*  
21 *Prisoner Legal Services*, 351 NLRB 464, 469 (2007) (the Employer must have *actually* relied on  
22 purported reason for discharge, not merely provide one).

23  
24  
25  
26  
27  
28  
2. Respondent Unlawfully Granted Wage and Benefit Increases

1           The grant of benefits, such as a wage increase, during an organizing campaign or prior to  
2 a union election violates the Act absent a showing that the action was governed by factors other  
3 than the pending election and that the benefits conferred were part of a previously established  
4 policy. *See NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409- 410 (1964); *see also Hampton Inn-*  
5 *JFK Airport*, 348 NLRB 16, 17 (2006); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993);  
6 *Donaldson Brothers Ready Mix, Inc.*, 341 NLRB 958, 961-962 (2004) (Footnotes omitted). A  
7 well-timed increase, just as easily as threats, impacts an employee’s choice of bargaining  
8 representative. *See Exchange Parts Co.*, 375 U.S. at 409. Employees are not likely to forget that  
9 the source of the benefit is the same source from which future benefits will flow, and may  
10 disappear, if not obliged. *See id.* (citations omitted). Because of this, in conferral of benefit  
11 cases during the pendency of a representation petition, the Board draws an unlawful inference.  
12 *Hogan Transports, Inc.*, 363 NLRB No. 196, slip op. at 4 (May 19, 2016). Moreover, a grant of  
13 benefits is still unlawful even when a representation election is not imminent. *See Curwood Inc.*,  
14 339 NLRB 1137, 1147-1148 (2003), *enfd. in pertinent part*, 397 F.3d 548, 553-54; *see also*  
15 *Tipton Electric, Co.*, 242 NLRB 202, 202-03 (1979).

16  
17  
18  
19           Petitioner has a high likelihood of success regarding Respondent’s unlawful grant of  
20 benefits. In this regard, although embedded in argument, Respondent’s Opposition admits to  
21 each and every alleged benefit increase and that the increases occurred only after Respondent’s  
22 Director of Hospice, Piper Gals (Gals), met with Respondent’s hospice nurses on September 14,  
23 2015, to discuss the hospice nurses’ requests for increases in wages and benefits.

24  
25           It is undisputed that Gals met with Respondent’s hospice nurses on that day to discuss the  
26 hospice the nurses’ grievances and requests. (Aff. 80, 83, 91-92). In its Opposition, Respondent  
27 concedes that, after the September 14 meeting between Gals and the hospice nurses, while the  
28

1 Representation Petition was still pending, Respondent changed its night-call procedures. (Opp.  
2 14). Respondent further concedes that after the hospice nurses' requests, Respondent changed  
3 the practice of hospice nurses finding their own coverage when they cannot work a scheduled  
4 shift. (Opp. 15; Gals Decl. ¶ 16). Although Respondent characterizes this as a misapplication of  
5 policy, the fact remains that before September 14 the hospice nurses had to find their own  
6 coverage if they could not work a scheduled shift, but after September 14, the practice changed,  
7 and they no longer needed to find their own coverage. (*Id.*). Respondent further concedes that,  
8 after the September 14 meeting, it granted shift differential to hospice nurses working certain  
9 shifts. (Opp. 16 – 17; Gals Decl. ¶ 20). While Respondent argues that this was in the making  
10 since 2012, Respondent only acted immediately in response to hospice nurses' requests. (Gals.  
11 Decl. ¶ 24). Its motive is clearly reflected by Gals' September 16, 2015 email to Respondent's  
12 Human Resources Director, Sheri Nill, stating that Respondent would not "find ourselves in this  
13 situation again if [Respondent] can make these changes." (Aff. 83, 93-95). Respondent also  
14 concedes that it granted hospice nurses the new benefit of 24 paid continuing education credits  
15 per year (Opp. 11 – 12, 16 – 17). Again, Respondent argues that this was the misapplication of a  
16 policy that should have been granted some time earlier. This argument attempts to hide its newly  
17 granted benefit. But for the hospice nurses' requests and Gals meeting with the nurses,  
18 Respondent would not have granted this benefit to the hospice nurses. Finally, Respondent  
19 concedes that it granted a wage increase to certain hospice nurses after the September 14  
20 meeting. (Opp. 18 – 19). While Respondent argues that these nurses were mistakenly paid  
21 lower, Respondent still granted a wage increase during the pendency of the Representation  
22 Petition without prior plans to do so. In its Opposition, Respondent erroneously characterizes the  
23 unlawful grant of benefits as a "unilateral change." Such a designation applies a different  
24  
25  
26  
27  
28

1 standard. Since these grants of benefits were solely precipitated by the hospice nurses' requests  
2 and then granted shortly after Gals meeting with the hospice nurses during the pendency of the  
3 Representation Petition, the granted wage and benefit increases are unlawful and only serve to  
4 dissuade employees from supporting the Union. As such, Respondent's granted wage and  
5 benefit increases violated Section 8(a)(1) and (3) of the Act.  
6

7 **B. Irreparable Harm Will ensue Absent Injunctive Relief**

8 In evaluating irreparable harm, district courts must consider the probability that declining  
9 to issue the injunction allows the alleged unfair labor practice to reach fruition and render the  
10 Board's remedial authority meaningless. *California Pacific Medical Center*, 19 F.3d at 460. The  
11 requisite showing of irreparable harm can be made either through evidence that such harm is  
12 occurring, *see., e.g., Stephen Dunn & Associates*, 241 F.3d at 667-668, or through the well-  
13 recognized legal principle that the same evidence establishing the "likelihood of proving a  
14 violation of the NLRA may provide evidentiary support for a finding of irreparable harm." *See,*  
15 *e.g., Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 297-298 (7th Cir. 2001). Generally, the  
16 likelihood of success to a Section 8(a)(3) violation with regard to union activists during an  
17 organizing drive largely establishes irreparable harm. *Frankl*, 650 F.3d at 1363.  
18  
19

20 In its Opposition, Respondent broadly argues that the Union will not suffer irreparable  
21 harm in this matter absent interim relief. Petitioner has presented testimonial evidence showing  
22 concrete evidence that irreparable harm is occurring with each passing moment. The Union  
23 Labor Representative in charge of the Union's organizing campaign at Respondent's facility, Jeff  
24 Welsh (Welsh), testified that in the weeks leading up to the filing of the Petition the Union  
25 enjoyed strong support from the hospice nurses. (Aff. 112-113, 129-130). However, the  
26 Union's support began to erode with May's termination. Despite the Union's attempt to keep the  
27  
28

1 hospice nurses strong by broadly distributing flyers protesting May's termination, hospice nurses  
2 began expressing their concerns. (Aff. 134, 158). The Union's loss of support became even  
3 greater once Gals began soliciting the hospice nurses' work concerns beginning in mid-August  
4 2015. (Aff. 132). Welsh testified that almost all communications with the hospice nurses ended  
5 at the beginning of September 2015, simultaneous with Respondent's request for, and  
6 consideration of, the hospice nurses request for better wages and benefits. (*Id.*). The Union's  
7 loss of support culminated in a letter from hospice nurses disavowing interest in the Union. That  
8 letter specifically cited Gals' conduct as the basis for why the nurses no longer wanted (or  
9 needed) Union representation "because management had met their demands." (Aff. 132, 156).  
10 This loss of support at Respondent's hands has been enduring. After the Petition was reinstated,  
11 Welsh's efforts to contact hospice nurses were not reciprocated save for one nurse who that  
12 stated that she was no longer interested in supporting the Union. (Aff. 133, 157, 161).

13  
14  
15 To argue that Respondent's unlawful termination of May and unlawful grant of wages  
16 and benefits did not create irreparable harm in the loss of Union support clearly ignores the  
17 reality of the situation. In this regard, May's interim reinstatement is of the utmost importance,  
18 not just to May, but for the Union's organizing drive. Interim reinstatement would stop this  
19 irreparable harm and give an affirmative signal to employees that their right to organize will be  
20 protected. *See NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573, 1575 (7th Cir. 1996). May's  
21 reinstatement would not just prove to the hospice nurses that the Union can represent them, but  
22 the Union would use her reinstatement as a catalyst to invest significant time and resources in the  
23 organizing drive and May would continue her pro-Union efforts. (Aff. 162-164, 181).

24  
25  
26 Here, irreparable harm is occurring with each passing moment. Injunctive relief would  
27 restore May to her position, mitigate the chilling effect caused by her discharge, and permit  
28

1 Respondent's employees to exercise their Section 7 rights free of coercion. In contrast, waiting  
2 for a Board order in due course will only continue to exacerbate the irreparable harm by  
3 increasing the campaign's loss of support in a way that will make such a Board order a nullity.  
4

5 **C. The Balance of Equities Decidedly Tips in Favor of Injunctive Relief**

6 Here, the Court must weigh the Board's ability to adjudicate disputes and balance that  
7 imperative need against harm to respondents (if any). *Stephen Dunn & Associates*, 241 F.3d at  
8 661 (quoting *California Pacific Medical Center*, 19 F.3d at 459-460). It is without question that  
9 the balancing of equities tips in favor of injunctive relief. May was an open Union supporter  
10 who publicly testified in an effort to gain Union representation. Due to May's termination and  
11 Respondent's subsequent grant of benefits, the Union has lost significant support among the  
12 hospice nurses. Interim reinstatement of May would give Respondent's employees the  
13 opportunity to reignite the organizing drive that was effectively derailed by Respondent's  
14 unlawful conduct during the time the Petition was being appealed and would prevent further  
15 erosion of support. In this regard, Reinstating May and issuing a cease and desist order far  
16 outweighs any interest held by Respondent since that merely resets the clock to where the parties  
17 were prior to Respondent's unlawful conduct. Equity dictates that the parties be placed where  
18 they were prior to Respondent's unlawful conduct.  
19  
20  
21

22 Respondent's equitable arguments cannot compare. Respondent argues that returning  
23 May to work would send the wrong message to its employees. However, May's conduct did not  
24 result in any disciplinary action by the Nevada State Board of Nursing. (Aff. 186- 189). And the  
25 reinstatement of May would not preclude Respondent from lawfully disciplining its employees  
26 for misconduct. *See Electro-Voice, Inc.*, 83 F.3d at 1573; *see also Pye ex rel. NLRB v. Excel*  
27 *Case Ready*, 238 F.3d 69, 75 (1st Cir. 2001); *Eisenberg ex rel. NLRB v. Wellington Hall Nursing*  
28

1 *Home, Inc.*, 651 F.2d 902, 906 (3d Cir. 1981). In fact, the Respondent ignores the “wrong”  
2 message that it sends to employees each day absent interim relief: that Respondent has, and will  
3 continue to, act in manner that coerces its hospice nurses’ free exercise of the rights protected  
4 under Section 7 of the Act. Therefore, the balance of equities strongly tips in favor of injunctive  
5 relief in this matter.  
6

7 **D. The Public Interest is Best Served by Granting Injunctive Relief**

8 The Ninth Circuit has recognized that an injunction is “sought for the protection of the  
9 public interest in aid of a policy which Congress, itself, has made plain.” *Brown v. Pacific*  
10 *Telephone & Telegraph Co.*, 218 F.2d 542, 544 (9th Cir. 1954). That Congressional policy is  
11 “to restore or preserve the status quo pending litigation” to prevent the respondent from  
12 “accomplish[ing its] unlawful objective before being placed under legal restraint.” Sen. Rep.  
13 105, 80<sup>th</sup> Congress, 1<sup>st</sup> Sess., pp.8, 27.  
14

15 It cannot be questioned that the public interest is best served by granting injunctive  
16 relief in this matter. Injunctive relief here ensures that Respondent’s unfair labor practices do  
17 not succeed, preserves the remedial power of the Board, and protects employees’ Section 7  
18 rights. Plainly obvious through its Opposition, Respondent can assert no real countervailing  
19 public interest that would be harmed. Rather, the public interest is best served by the defense  
20 of labor law as opposed to its defiance. The public interest would be served by interim  
21 reinstate of May as it would send a powerful message to the hospice nurses and the public-at-  
22 large that employees’ Section 7 rights to organize will not be infringed. Moreover, the public  
23 interest is best served when employees are allowed to have a fair and free election where their  
24 choice is unencumbered by any unlawful activity. Therefore, Petitioner asserts that the public  
25 interest is best served by the issuance of injunctive relief.  
26  
27  
28

1 **III. Any Delay in This Matter Does Not Preclude Injunctive Relief**

2 Respondent’s delay arguments are unavailing. Delay in initiating Section 10(j)  
3 proceedings does not preclude injunctive relief—delay is only relevant if it precludes a district  
4 court from restoring the lawful status quo or renders restoration of the status quo unnecessary.  
5 See *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 750 (9th Cir. 1988). In this regard, the  
6 appropriate inquiry is whether the return to status quo ante is necessary and still possible. See  
7 *Tomco Carburetor Co.*, 853 F.2d 744, 750 (9th Cir. 1988), *overruled on other grounds*,  
8 *California Pacific Medical Center*, 19 F.3d 449 (9th Cir. 1994). Here, despite any delay,  
9 injunctive relief will still prevent the alleged unfair labor practices from reaching fruition and  
10 rendering meaningless the Board’s remedial authority, and absent Section 10(j) injunctive relief,  
11 the Union and May will suffer irreparable harm.  
12

13  
14 The passage of time has not eliminated all possibility of the Union rebuilding its support.  
15 See *Arlook v. S. Lichtenberg*, 952 F.2d 367, 374 (11th Cir. 1992) (passage of time had not yet “so  
16 weakened the Union that even interim relief could not salvage it”). To that end, the Ninth  
17 Circuit, and other courts, have ordered injunctive relief in cases involving similar or greater  
18 passage of time between the violation and the petition for interim relief. See *HTH*, 650 F.3d at  
19 1363-1365 (9th Cir. 2011) (granting 10(j) relief almost three years after the unfair labor practice  
20 charge); see also, *Bloedorn*, 276 F.3d at 299 (more than two years); *Overstreet ex rel. NLRB v.*  
21 *El Paso Disposal, LP*, 625 F.3d 844, 856 (5th Cir. 2010) (19-months).  
22

23  
24 Here, the status quo may still be restored. Injunctive relief will place May back to work<sup>3</sup>  
25 and a cease and desist order will ensure that employees will have the free choice to support the  
26

27  
28 <sup>3</sup> Respondent’s argument that May no longer seeks reinstatement is, at best, misleading to the Court. Gals  
unsworn declaration merely states that May doesn’t “appear to have a desire to return to work.” (Gals Decl ¶ 4).  
In reality, May testified—under oath—that she wants to return to her former position. (Aff. 179). Even if May

1 Union absent Respondent's coercion. This will return hospice nurses back to where they were  
2 prior to Respondent's unlawful acts and allow the Union to resume its campaign as if  
3 Respondent's conduct had not tainted the support of the hospice nurses.  
4

5 Respondent fails to acknowledge that it contributed to the delay in this matter by failing  
6 to timely cooperate with the Region's investigation, which led to the issuance of investigative  
7 subpoenas. As such, Respondent cannot argue delay when their tactics were a contributing  
8 factor. *See Muffley v. Spartan Mining Co.*, 570 F.3d 534, 544 (4th Cir. 2009). Finally, even  
9 assuming delay occurred, the Court should not punish wronged employees because of  
10 displeasure with any perceived delay by the Board. *See Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d  
11 243, 249 (3d Cir.1998); *see also Gottfried v. Mayco Plastics*, 472 F. Supp. 1167, 1168 (E.D. Mi.  
12 1979), *aff'd. mem.* 615 F.2d 1360 (6th Cir. 1980) and cases there cited.  
13

14 **IV. CONCLUSION**

15 Contrary to Respondent's Opposition, Petitioner has demonstrated that injunctive relief in  
16 this matter is just and proper. Therefore, Petition respectfully urges the Court to grant the  
17 injunctive relief sought in this matter.  
18

19 DATED AT Oakland, California, this 5th day of May 2017.

20 Respectfully submitted,

21  
22 

23  
24 \_\_\_\_\_  
25 Noah Garber  
26 Field Attorney  
27 Attorney for Petitioner

28 did not want reinstatement, which is not true, interim reinstatement is just and proper because May should be given the opportunity under the protection of Section 10(j). *See Gottfried*, 472 F. Supp. at 1166 (E.D. Mich. 1979) (requiring interim reinstatement offers even when a company's action creates an atmosphere inhospitable to union adherents so they may be reluctant to subject themselves to those conditions).

# Exhibit A

**PERFORMANCE IMPROVEMENT FORM**

Name Johna May

Position RN

Dept Hospice

Date Aug 11 2015

This notice is being issued to call your attention to the following deficiencies in your job performance

<b>Type of Action</b>	<input type="checkbox"/> Verbal Warning <input type="checkbox"/> Notice of Disciplinary Suspension _____ days from _____ to _____ <input type="checkbox"/> Written Warning <input type="checkbox"/> Notice of Investigatory Suspension _____ days from _____ to _____ <input type="checkbox"/> Final Written Warning <input checked="" type="checkbox"/> Termination Effective Date 8/11/2015 <span style="padding-left: 150px;">Final Paycheck attached</span>
<b>Reason for Action</b>	Explain the nature of performance deficiency and/or unacceptable behavior and how it affects the Department Violation of Company policies – In regards to Confidentiality and HIPAA
<b>Facts and Events</b>	State the facts leading to this action    be specific ( second page may be required) Release of Patient Confidential Personal and Medical information without authorization
<b>Previous Action</b>	Has the employee been counseled or received counseling action for the same or similar reasons? Yes <input checked="" type="checkbox"/> <input type="checkbox"/> No    Unknown as prior employee file is not available to this manager If yes what type    Written    Final Written    Date Action was taken 1/27/2015 and 2/9/2015 Documented? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
<b>Performance Improvement Plan</b>	State the accepted minimum standards of performance and corrective action steps which must be met by the employee N/A
<b>Improvement Period</b>	Indicate the maximum amount of time allowed for improvement N/A
<b>Further Action To Be Taken</b>	Continued failure to meet the minimum standards of the job may result in the following disciplinary action N/A

Employees Comment

*Employee Refused to sign*

Your signature is not an acknowledgement of fault but a receipt of notice only

Employee Signature \_\_\_\_\_

Date \_\_\_\_\_

Supervisors

*Piper Crals*

Date

*8/11/15*

*Ben Hill, HRD 8/11/15*