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MEDICAL GROUP and KAISER FOUNDATION HOSPITALS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| JAMES F. SMALL, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,<br>Petitioner,<br><br>vs.<br><br>SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP AND KAISER FOUNDATION HOSPITALS,<br>Respondents. | No. CV 10-7395 GAF (FMOx)<br><br>**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE PETITION FOR TEMPORARY INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT**<br><br>Date: December 6, 2010<br>Time: 9:30 a.m.<br>Courtroom: Roybal 740 |

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Respondents Southern California Permanente Medical Group and Kaiser Foundation Hospitals ("Respondents" or "Kaiser") file this memorandum of points and authorities in opposition to the Petition for Temporary Injunction under National Labor Relations Act Section 10(j) (the "Petition") filed by James F. Small, Regional Director of Region 21 of the National Labor Relations Board ("Small").

In the Petition, Small asks this Court to impose by way of temporary injunctive relief all of the economic relief that is being sought by the National Union of Healthcare Workers (the "Union") in the underlying proceedings before the Administrative Law Judge ("ALJ") and the National Labor Relations Board (the "NLRB") and to order that Kaiser pay immediately an across-the-board 2% pay increase, that it pay for time spent on union steward training, and that it reimburse employees for their expenses in pursuing continuing education credits.

## I. INTRODUCTION

In January, 2010, the Union won elections in three bargaining units previously represented by another union. The NLRB certified those election results in early February and less than ten days later, Kaiser and the Union met and began bargaining with the Union making various proposals. Transcript of the Hearing ("Tr.") 40:12-41:18.[1] At the second meeting, on February 22, 2010, Kaiser announced its positions with respect to the three matters at issue in this case, (including its position that the

[1] References to the Exhibits from the Hearing before the ALJ are in the format presented there, thus "Respondents Exhibits" or "GC Exhibits."

across the board pay increase, a future event (scheduled to occur on April 1, 2010), paid union steward training and tuition reimbursement for continuing education credits was subject to bargaining. Tr. 43:23-45:5. The parties bargained over several of the issues at this meeting.[2] The Union asked for additional information on Kaiser's positions, and Kaiser presented the additional information both by way of written correspondence and face to face at the third bargaining session on March 22, 2010. Tr. 46:13-49:18. The Union filed its original charge in the matter on March 30, 2010. G.C. Exhibit 1(a). The NLRB investigated and on August 27, 2010, it filed the Complaint and Notice of Hearing. G.C. Exhibit 1(g). Finally on October 1, 2010 the NLRB authorized the filing of this 10(j) action.

Section 10(j) is extraordinary relief. According to the Ninth Circuit:

> The district court is given authorization to grant such temporary relief or restraining order as it deems just and proper, keeping in mind that the underlying purpose of Section 10(j) is to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge. To decide whether granting a request for interim relief under Section 10(j) is "just and proper," district

[2] In fact Kaiser agreed to extend the deadline on the continuing education issue from the certification date (Kaiser's original position) to a later date based on the bargaining. Tr. 160:7-162:8. G.C. Exhibit 8.

> courts consider the traditional equitable criteria used in deciding whether to grant a preliminary injunction.

*McDermott v. Ampersand Publishing LLC*, 593 F.3d 950, 957 (9th Cir. 2010) (internal quotations and citations omitted.)

Here, the parties conducted the hearing before the ALJ on October 18 and 19, 2010. Both Kaiser and Counsel for the Acting General Counsel asked Administrative Law Judge William L. Schmidt for an expedited ruling on the NLRB Complaint. Tr. 216:1-3. The post hearing briefs are due to Judge Schimdt on November 17, 2010. His decision is expected shortly thereafter. Thus one of the fundamental reasons for section 10(j) relief (protracted proceedings by the NLRB, Petition p. 3:8-9) is simply not present here.

By his Petition, Small is asking this Court for a preliminary injunction ordering Kaiser to pay over $2,000,000, without any mechanism to return the money to Kaiser should Kaiser eventually prevail in the underlying proceedings. Critically, Small is asking this Court to grant the temporary relief in direct contravention to the NLRB's own precedent, precedent that fully supports Kaiser's conduct in connection with the underlying facts: *Neighborhood House Association*, 347 NLRB 553 (2006).[3] In other words, Small asks this Court for an injunction ordering Kaiser to pay several million

[3] The failure to even reference this authority is shocking given that it is the NLRB's closest decision on the issue and not only arose in this region but was handled (and lost before the NLRB) by the very NLRB attorney that signed the moving papers here – Robert MacKay.

dollars to its employees on his hopes that the Region will eventually persuade the NLRB to reverse its own case law.

Because his position is directly contrary to the decisional law of the NLRB in the area, Small cannot show a likelihood of success on the merits. Further, because the remedy sought – the payment of money – is *per se* not irreparable harm, *Sampson v. Murray,* 415 U.S. 61, 90 (1974),[4] Small does not, and indeed cannot show a likelihood of irreparable harm. Similarly, the balancing of the equities and the weighing of the public interest strongly oppose the issuance of the temporary relief Small seeks.

## II. FACTUAL BACKGROUND

Although Small sets forth the chronology of events, Small omits a number of critical facts and seems confused as to the meaning and source of others. Thus Kaiser will discuss those factual points which Small either omitted or where there appears to be some significant confusion.

First and foremost, although claiming that the Union is somehow suffering a loss of support, Small neglects to mention the Union's significant election margins. According to the lead negotiator for the Union, the Union's majority in the AFN Unit was "about 95 percent," in the Psych-Social Worker Unit "[a]bout 84, 85 percent, and in

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[4] "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." 415 U.S. 61, 90 (citations and internal quotations omitted).

the Healthcare Professional Unit "86 percent." Tr. 58:10-17. As Mr. Cornejo told Kaiser on the first day of bargaining, the vote was "overwhelming" and the margin of victory "unheard of." Respondents' Exhibit 1. In light of such "overwhelming," indeed, "unheard of" majorities in late January of this year, Small's claims that the Union's support has deteriorated to the point of needing injunctive relief to compel Kaiser to pay money which is the subject of on-going negotiations seem far-fetched to say the least.

Second, Small devotes much of his factual argument to a lengthy discussions of the various agreements in place between Kaiser and the predecessor union and Small's interpretation and application of those agreements. These discussions need not distract the Court. By law, those agreements all terminated upon the election of the Union as the employees' bargaining representative. *RCA Del Caribe, Inc.,* 262 NLRB 963, 966 (1982) ("If the challenging Union prevails, however, any contract executed with the incumbent will be null and void.") Hence, the lengthy analysis Small undertakes of these agreements is useless.

In fact, there are really only three issues presented in this case, and the origin of each of the three issues is quite different. The 2% across-the-board pay increase is contained in the 2008 Reopener Bargaining Memorandum of Agreement Between Kaiser Permanente and the Coalition of Kaiser Permanente Unions, September 12, 2008 (the "Reopener"), G.C. Exhibit 7. The steward training pay originates in Section 1: Privileges and Obligations of Partnership, E. Education and Training, 4. Steward

Education, Training And Development of the National Agreement, G.C. Exhibit 3. The third issue, the reimbursement for continuing education, arises out of Kaiser's Tuition Reimbursement Policy, Respondents' Exhibit 3. Thus each issue has its source in a different document and must, necessarily, be analyzed independently based on the individual source.

Next, Small tries to make much over the number of bargaining sessions. What Small chooses to ignore is that Kaiser and the Union began bargaining in February, and have continued bargaining even during the so-called "hiatus" following the third bargaining session in March. Tr. 209:23-211:6 (describing negotiations during April and May 2010 over whether there would a single bargaining table for all three units or whether there would be three separate tables). So too the parties discussed staffing issues during the so-called "hiatus." Tr. 118. Further Kaiser repeatedly pressed to begin bargaining as rapidly as possible following the third bargaining session, but was foreclosed from doing so by the Union.[5] Perhaps most tellingly for the purposes of this Motion, at the bargaining session in July where the Union made its "comprehensive" proposal in connection with the AFN Unit (the very Unit in which the Union is

[5] *See* March 18, 2010 memo from Ms. Peasnall to Mr. Cornejo, G.C. Exhibit 11: Kaiser "wishes to commence good faith bargaining with NUHW to achieve agreements covering each of the bargaining units its represents." The memo also acknowledged that, while the parties may not see eye-to-eye on the status quo, "[t]his disagreement should not delay the commencement of bargaining, or be used by either party as an excuse to avoid bargaining in good faith to reach an agreement. [Kaiser] believes that many of the issues in dispute can and should be resolved at the bargaining table, and we look forward to beginning negotiations when NUHW is ready." (*Id.*)

supposedly suffering a deterioration of support over the across the board pay increase), the Union did not include any reference to the 2% pay increase and the continuing education benefits, although it did seek to have steward training adopted, albeit on different terms than those contained in the National Agreement. Tr. 175:12-176:1. Respondents' Exhibit 4. Clearly, the Union is not nearly as concerned about the pay increase or the continuing education benefits as Small suggests. Finally and directly contrary to the intimations made by Small in his presentation of the facts, bargaining is continuing. There have been hearing sessions all summer long and as of the date of the hearing before the ALJ, October 19, 2010, there were three additional bargaining dates already scheduled for the AFN Unit alone. Tr. 176:2-4.

## III. ARGUMENT

In 2008, the United States Supreme Court significantly altered the standards for preliminary injunctive relief. *See Winter v. Natural Res. Def. Council*, --- U.S. ----, 129 S.Ct. 365, 374-76, 172 L.Ed.2d 249 (2008). The Ninth Circuit has held that this change created new standards for injunctive relief under section 10(j) of the National Labor Relations Act (the "NLRA") as well. *McDermott*, 593 F.3d at 957. In *McDermott* the Ninth Circuit explained "a party seeking a preliminary injunction 'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *McDermott*, 593 F.3d at 957 (*quoting Winter*, 129

S.Ct. at 374). As a result according to the Ninth Circuit in *McDermott,* in evaluating Small's request for Section 10(j) relief, this is to "consider the traditional equitable criteria used in deciding whether to grant a preliminary injunction. . . and employ the Supreme Court's recent interpretation of the threshold showing necessary for granting such an 'extraordinary remedy'." *Id.*

**A. Small Cannot Show That He Is Likely To Succeed On The Merits.**

**1. Small urges this Court to err by disregarding the Ninth Circuit's mandate in *McDermott.***

While paying lip service to the Ninth Circuit's standards in his moving papers, Small quickly proposes that this Court ignore *McDermott* and apply instead the now repudiated standards set forth in *Scott v. Stephen Dunn & Assocs,* 241 F.3d 652 (9th Cir. 2001) and *Miller v. California Pacific Medical Center*, 19 F.3d 449 (9th Cir. 1994) *overruled in part, Winter* 129 S. Ct. 374-76. *See* Petition, Section V. A. While it is understandable why Small prefers these pre-*Winter* cases, they are no longer good law to the extent that they suggest, as Small urges, that he need not show that "he is likely to succeed on the merits. . ." as required in *McDermott and Winter.* Indeed Small urges this Court to err by claiming that the standard is "sustain[ing]" Small's "views . . .however novel." Petition at 8, lines 25-26. Such standards are not good law following *McDermott,* and under *McDermott*, Small's motion should be denied.

**2. Small cannot show that he is likely to succeed on the merits as to the across the board pay increase.**

Small simply cannot show he is likely to succeed on the merits because the applicable decisional law on this precise issue from the NLRB is directly contrary to his position. Under controlling NLRB precedent, there is an ***exception*** to the general rule about an employer having to maintain the "status quo" during bargaining. *TXU Electric Co.*, 343 NLRB 1404 (2004). And that exception applies with full force here.

In *Neighborhood House Association*, 347 NLRB 553 (2006)[6], applying that exception, the Board upheld exactly the conduct undertaken by Kaiser here. In *Neighborhood House*, this very Region (hence, Small's predecessor) issued a complaint alleging that the employer violated Section 8(a)(5) and 8(a)(1) of the NLRA by withholding a regularly scheduled cost of living increase during its bargaining with a union for a contract. On appeal, the Board overturned the Administrative Law Judge's decision and dismissed the complaint, holding:

> As a general rule, where parties are engaged in negotiations for a collective-bargaining agreement, the employer must maintain the status quo of all mandatory bargaining subjects absent overall impasse. [Citations omitted.] However, as explained more fully in our recent decision in TXU Electric

[6] The failure of Small and his counsel to address or even cite *Neighborhood House* in the moving papers is questionable conduct at the very least, particularly as it appears they are somehow asking this Court to reverse current NLRB law.

Co.[, 343 NLRB 1404 (2004)], the Board in Stone Container[, 313 NLRB 336 (1993)], set forth an exception to the general rule. Under this exception, if a term or condition of employment concerns a discrete recurring event, such as an annually scheduled wage review, and that event is scheduled to occur during negotiations for an initial contract, the employer may lawfully implement a change in that term or condition if it provides the union with reasonable advance notice and an opportunity to bargain about the intended change in past practice. [Citations omitted.]

. . .

[W]e find that the Stone Container exception governs here. The COLA increase constituted a discrete recurring event that was scheduled to occur during bargaining for an initial contract. The Respondent provided the Charging Party with ample advance notice of, and an opportunity to bargain over, its position on a COLA increase for 2003. . . . Accordingly, Respondent did not violate Section 8(a)(5) and (1) by withholding the COLA increase from its bargaining unit employees.

347 NLRB at 554-55. *See also The Republican Company, NLRB GC Memorandum,* 2006 WL 5054722, at *4-5 (2006) (employer's unilateral discontinuance of annual bonus due during bargaining does not violate Section 8(a)(5) where employer gives notice to union and offers to bargain). Both *TXU Electric* and *Stone Container* cited by the NLRB in *Neighborhood House* plainly stand for the proposition that future pay increases, such as the across-the-board increase, are not "terms and conditions" of employment that must be maintained once an employer has announced its position on the matter and has offered to bargain about it.

What happened in *Neighborhood House* is exactly what happened here. The 2% across-the-board pay increase comes from the Reopener. (The Reopener actually provided for three separate across the board pay increases, one on October 1, 2008, one on October 1, 2009 and one on April 1, 2010 as well as the creation of Healthcare Reimbursement Accounts for the covered employees effective January 1, 2010. Kaiser provided the employees in the three units with both of the October pay increases and the Healthcare Reimbursement Accounts on the appropriate effective date.) And, following the election of the Union, Kaiser did not roll back the pay increases or deny the Healthcare Reimbursement Account benefit to the employees represented by the Union. It did so because these matters were part of the so-called "status quo" to be maintained during the bargaining process for a new collective bargaining agreement after an election.

By contrast, Kaiser did not provide the pay increase on April 1, 2010, because it

was scheduled to take place during the bargaining, and it was in the NLRB's own language in *Neighborhood House,* a "discrete recurring event" that was "scheduled to occur during negotiations for an initial contract." 347 NLRB at 554. Furthermore, well before the effective date of the scheduled increase, Kaiser announced its position to the Union that the across the board pay increase was subject to bargaining. Tr. 44:8-11. This announcement was made on February 26, at the parties' second bargaining session and less than a month following certification. It was also more than one month before the effective date of the pay increase. Therefore, under the NLRB's own law, Kaiser "lawfully implement[ed] a change in that term or condition if it provides the union with reasonable advance notice and an opportunity to bargain about the intended change." *Id. at* 555. Given this plain and simple fact – that the NLRB's own law upholds Kaiser's conduct with respect to the pay increase – the Court can readily understand why Small urges that this Court disregard the applicable standards set forth by the Ninth Circuit in *McDemott* and the Supreme Court in *Winter* and instead utilize the repudiated suggestion that on a 10(j) motion "on an issue of law, the district court should be hospitable to the views of the (Regional Director), however novel. [Citations to a 1974 case omitted.]" Petition at 8, lines 24-25. Because where as here, a Regional Director of the NLRB is taking a position directly contrary to the NLRB's own law, his position is "novel" indeed.[7]

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[7] Small's citation to *More Truck Lines*, 336 NLRB 772 (2001), which arose not in connection with the bargaining for a new contract, but out of comments made by an

In short, *Neighborhood House Association* is directly on point and mandates the dismissal of the underlying complaint by both the ALJ and the NLRB.[8] There is no dispute that Kaiser provided the Union with advance notice of its position on the pay increase and granted the Union the opportunity to bargain over that (and any other issue). Accordingly, Kaiser's conduct is in accordance with NLRB's controlling case law. Thus, Small cannot show that he is "likely to succeed on the merits" as to the 2% across the board pay increase issue, and the Motion should be denied.

**3. Small cannot show that he is likely to succeed on the merits as to the union steward training time.**

Small's position with respect to the union steward training time is wrong. Initially, he fails to acknowledge as was shown at the hearing, this issue really only

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employer during an election campaign, need not distract. Factually statements made during a campaign are subject to a very different standard of review than conduct during bargaining. *General Shoe Corp.*, 77 NLRB 124 (1948)(conduct not so egregious as to violate Section 8(a) may still provide a basis for overturning an election result). Further *More Truck Lines* predates *Neighborhood House*. *Neighborhood House* is the most recent pronouncement by the NLRB on this subject and is both factually and legally directly on point.

[8] In addition to the clear and unmistakable authority of *Neighborhood House Association*, there is another distinct line of Board law that holds that if Kaiser had granted the across the board pay increase as Small seeks to have this Court order, based on the provisions of some prior contractual arrangement with the employees' previous union, Kaiser would have violated Section 8(a)(5) of the NLRA. In *Consolidated Fiberglass Products Co., Inc.*, 242 NLRB 10 (1979), the NLRB held that an employer violated Section 8(a)(5) when the employer gave employees, during its bargaining for a first contract with a new union, and prior to reaching an agreement with that new union, a pay increase that was based on the provisions of a contract with the employees' previous union representative. *See also Koening Iron Works, Inc.*, 276 NLRB 81, 811 (1985) (employer's abrogated contract with ousted union cannot justify or require wage increases); *American Seating Co.*, 106 NLRB 253 (1953) (same).

applies to the AFN unit. The employees in the Psych/Social Workers Unit and in the Healthcare Professionals Unit are salaried and paid by Kaiser for each day worked, regardless of how they spend their time. Tr. 64:24-65:9. Thus, the "union stewards" in those units have not lost any pay for any time they have spent on "union steward training." *Id.*

Next, Small is wrong because the basis for the claimed "steward training" is the National Agreement. When the applicable provision is reviewed, it readily becomes clear that such training is inextricably linked to the National Agreement and the related Labor Management Partnership.[9] The plain language of the steward leave provision makes clear that the leave is not granted to train stewards on any subject whatsoever, but rather time granted by Kaiser to allow stewards to be trained on the unique aspects

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"The parties agreed to support stewards in training and development such as:
education and training programs;
Steward's Council;
Labor Management Partnership Council;
Partnership environment.
"Training programs for stewards may be developed in the following areas:
foundations of Unit Based Teams;
improvement in Partnership principles;
contract training on the National Agreement;
fundamentals of Just Cause;
leadership skills;
effective problem solving; and
consistency and practice.
"Labor and management will work jointly on steward development. Accountability will rest with senior operational and union leaders on the Labor Management Partnership Council (or equivalent) in each region."

National Agreement, Section 1: Privileges and Obligations of Partnership, E. Education and Training, 4. Steward Education, Training And Development.

of the National Agreement and the related Partnership. Deliberately ignoring that the Union is not part of the Partnership and that the employees are not covered by the National Agreement so that the stewards hardly need training on something that is completely irrelevant to their activities, Small asks this Court to order Kaiser to pay for this training. Small never even tries to explain why training is needed for the Union's stewards regarding the provisions of the admittedly inapplicable National Agreement and/or the Partnership to which the Union does not belong.

Moreover, on an application for relief under section 10(j), Small cannot ask this Court to expand the scope of the law. He must show that he is likely to succeed on the merits of the underlying claim before both the ALJ and the NLRB. Without a single NLRB decision in his favor, he asks this Court to resolve the intricate issues between the National Agreement, the Partnership and the various local agreements even when the NLRB itself has not done so on a consistent basis.[10] There is no NLRB precedent (and Small makes no argument that there is any such authority) requiring an employer to pay for steward training time, let alone on the implementation of an irrelevant contract, during the negotiations for a new contract. Thus, Small is left to urge this

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[10] Even when the various regions of the NLRB tried to resolve the intricacies of the meaning of the language between these various agreements in order to determine the expiration date of the agreements so as to determine the date on which an election could be held, they arrived at diametrically opposed dates. *See* Region 32's decision dismissing the petitions for election filed there No. 32-RC-5642, 5643, 5644 and 5646 and No. 32-RC-005764, 5766 and 5774 and the Decision and Direction for Election in Cases No. 21-RC-21117, 21-RC-21118 and 21-RC-21157 in Region 21.

Court that "Steward training is ***akin*** to the union privileges – paid time off for union matters and union bulletin boards – the Board held in *Arizona Portland* [*Cement, Co.,* 302 NLRB 36] must maintain." Motion, p. 10, lines 16-18, emphasis added.

*Arizona Portland* is not applicable here because Kaiser has granted paid time off for stewards to process grievances and the use of dedicated bulletin boards, the matters at issue in *Arizona Portland.* What Kaiser has not granted, and indeed what is not addressed whatsoever in *Arizona Portland,* is paid time for stewards to be trained on implementing the terms of an inapplicable National Agreement or performing duties in connection with an irrelevant Partnership as Small asks this Court to order by way of injunctive relief.

In short, Small asks this Court to do something by way of a preliminary injunction that the NLRB itself has never done, determine that an employer is obligated to pay union stewards for time spent training on the terms of a contract and a relationship that all concede have no application to the employees. Given that the Union is not part of the Partnership and is not a party to the National Agreement, granting the stewards time off with pay to be trained on these provisions is plainly not a part of the status quo to be maintained during negotiations.

Clearly, Small cannot show that he is likely to succeed on the merits as to the steward training.

**4. Small cannot show that he is likely to succeed on the merits as to the continuing education credits.**

Small's request for injunctive relief on the tuition reimbursement issue is misguided and based on a misunderstanding of the underlying facts. Here, tuition reimbursement for Union members is set forth by Kaiser's Tuition Reimbursement policy. Tr. 210:21-202:16. Respondents' Exhibit 3. Indeed, each of the three "local" union contracts specifically cite the applicability of that policy.[11] Under that policy, no Kaiser employee is entitled to reimbursement for continuing education expenses unless the employee is represented by a union that is part of the Labor Management Partnership with the Coalition of Kaiser Permanente Unions. Respondents' Exhibit 3. It is undisputed that the Union is not a Coalition member and not a participant in the LMP. Accordingly, the Union's members are "non-LMP employees." Kaiser thus attempt maintained the status quo by continuing to apply the policy to the employees. Under the policy, until the parties bargain otherwise, members of the three bargaining units are not currently entitled to reimbursement for tuition expenses for continuing education credits.

By contrast, Small asks this Court to order Kaiser not to follow the applicable policy that was in effect prior to certification, and instead to apply a different standard to the employees. Obviously, Small does not want this Court to maintain the status quo

[11] Section 2508 of the Healthcare Professional contract, GC Exhibit 4; Section 1908 of the AFN contract, GC Exhibit 5; and Section 4119 of the Psych-Social contract, GC Exhibit 6.

– instead he wants this Court to rewrite Kaiser's policies. There is simply no basis for such relief.

**B. Small Has Failed To Show That Irreparable Harm Will Occur.**

In order to establish a right to a preliminary injunction, Small must establish that the Union and its members are *likely* to suffer *irreparable* harm in the absence of preliminary relief. *McDermott*, 593 F.3d at 957. Irreparable harm is harm that cannot be addressed by damages. *Sampson,* 415 U.S. at 61.[12] Yet, damages are exactly what is at issue in this case.

The relief sought consists almost exclusively of pay for the allegedly missed pay increase, the unpaid educational expenses and the missed training time. Kaiser's entirely reasonable refusal to make these payments – given the current state of the law – cause no one irreparable harm. As one Union Representative testified at hearing:

> Q. Have any of the employees with whom you've communicated on a daily basis, these 50 to 100 employees, identified for you any adverse financial consequences . . . that they have experienced as a result of not getting the two percent [wage increase]?
>
> A. I don't think it's my business to be a financial counselor for

[12] "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." 415 U.S. 61, 90 (citations and internal quotations omitted).

employees. *Nurses, I mean, and I'll – to be frank, make a lot of money.* I mean, so I don't know that they would volunteer that information to me.

Tr. at 108:16-23.

Thus, this case is like *Price v. Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers*, 927 F.2d 88 (2nd Cir. 1991), where certain employees sought to enjoin a union and employer from unlawfully over-deducting their dues. The Second Circuit refused to issue an injunction, stating: "[I]nsofar as the alleged injury is simply monetary, it does not rise to the required level of irreparable harm. . . . The possibility that adequate compensatory or other corrective relief will be available at a later date weighs heavily against a claim of irreparable harm." *Id.* at 94-95 (citations and quotations omitted). See also *Zipp v. Caterpillar,* 858 F.Supp. 794 (C.D. Ill 1994), (where the Board sought to enjoin an employer in a case involving the termination of an employee). The district court refused, stating: "if the Petitioner in this matter succeeds on the merits of the underlying charges the Board will have the authority make the injured parties whole at law. For example, the Board has the power to order [the employee] back to work and to order back pay." *Id.* at 801-02. *See, also, IUE-CWA v. Flowserve Corp.*, 239 F.Supp.2d 527, 533-34 (M.D. Penn. 2003)(refusing to issue injunction pending union arbitration where arbitrator could award the union members front pay or back pay, as appropriate).

Small reasons that the Court must nevertheless require Kaiser to make payments

in this case because its refusal to do so is threatening to erode the Union's bargaining unit support. However, the Union won the elections for these bargaining units by landslides. There is absolutely no evidence that so much "erosion" has occurred so that the Union is in danger of being unable to effectively represent its members. At most, Kaiser's refusal to make the payments makes the Union "look bad" as leaders because "they told people they would get the two percent [increase] and they're not receiving it." (Tr. at 107:21 – 108:1.) This does not constitute irreparable harm.[13]

Moreover, the purpose of 10(j) relief is "to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge." *Miller,* 19 F.3d 459-60 *overruled in part*, *Winter*, 129 S.Ct. 365 (2008). However, there is *no* evidence that Kaiser is unwilling to bargain about wages or any other term and condition of employment with the Union. Kaiser has a lengthy history of successful collective bargaining (including with the very union leaders who formed the Union). Rather, Kaiser is simply taking the position that the Union is not *already* entitled to the at-issue payments without bargaining *at all*. Given these facts, an

[13] Cases cited by Small in support of his argument are inapposite. For example, *NLRB v. Herman Sausage Co.* 275 F.2d 229 (5th Cir. 1960) and *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084 (8th Cir. 1969) both involved enforcement orders, not injunctions, and the unilateral change in employment conditions included wage *increases*. Thus, there was no potential for a damages recovery. *Silverman v. Major League Baseball Player Relations Committee, Inc.*, 880 F.Supp. 246,259 (S.D.N.Y. 1995) (Sotomayer, J.) arose in the unique context of professional sports and the at-issue remedy involved more than just damages. ("In professional baseball, whether to leave a team, where to go, and why are of 'deep concern' to the affected players and the loss of those choices in the terms and conditions of employment cannot be adequately recompensed by money.").

injunction is simply not necessary to protect the integrity of the collective bargaining process. Kaiser seeks to bargain. It is the Union that is attempting to obtaining relief though Small and the courts, instead of at the table.

Finally, this is not a situation in which court action is necessary to preserve the Board's remedial power. It is undisputed that Kaiser will be able to pay whatever amounts deemed necessary in the event of a conclusion that Kaiser has violated the Act.

In sum, it is not likely that irreparable harm will occur if the Court does not grant an injunction. It is, instead, extremely *unlikely* that irreparable harm will occur.

### C. A Balancing Of The Hardships Weighs Heavily Against Granting Small The Relief He Seeks.

To begin, any balancing of the hardships must consider that Small is asking this Court to Order Kaiser to pay money to its employees, while the NLRB undertakes to determine whether Kaiser actually owes that money. In the Motion, Small proffers no mechanism for Kaiser to obtain repayment of these sums in the event that Kaiser prevails in the underlying matter, and indeed none exists as California law specifically precludes Kaiser from offsetting the sums against any money earned by the employees under a collective bargaining agreement at some future date. Cal. Labor Code § 222. Plainly this point goes to the heart of why injunctive relief is not proper here, where the only real dispute is the payment of money.

Next, Kaiser sought guidance from and followed the clear direction of the most recent Board decision applicable to Kaiser's facts– *Neighborhood House Association.*

In doing so, Kaiser bargained and continues to bargain with the Union over these and other issues, but the parties have not yet reached agreement. To impose, by way of section 10(j) relief, that which remains the subject of negotiations while also awaiting the NLRB's own internal processes which both sides have asked be expedited would severely harm the collective bargaining process. Further given that *Neighborhood House Association* arose out of Small's own Region, Kaiser's decision to rely upon it and to use it to guide and direct Kaiser's actions in connection with these issues can hardly be found lacking or suggestive of bad faith. In fact, were the Court to issue an injunction against Kaiser for following the Board's own case law, it would represent a significant hardship on Kaiser, and for that matter any other person who researches, reads, and attempts to follow the Board's own rule of law, because according to Small, the NLRB's decisions should not be relied upon by an employer.

Much of this dispute has its roots in the language of the National Agreement – an agreement that is unique in United States labor law – part of an effort between Kaiser and over thirty separate unions to create a new relationship that is not adversarial in nature, but is based on partnership and mutual advantage. Kaiser and these unions representing its employees have developed and fostered this relationship for over 13 years. To allow their carefully developed structure to be piecemealed into a new relationship based on arguments about the "status quo," but only to the extent sought by the Union in its original and amended charges, and on an interim basis by Court order in response to Small's motion, is a significant harm to the National Agreement, the spirit

behind it and the other unions who are parties to it.

To be clear, the grant of the relief sought by Small would serve as notice to the participating unions in the National Agreement that the employees they represent would be better served by voting for representation by some other union, because the employees could then enjoy the benefits of the National Agreement without any of the obligations, and the opportunity, with new union representation, to negotiate for yet additional benefits. Thus an injunction would damage the very fabric of the partnership underlying the National Agreement.

Against the hardships that would result from granting the relief Small seeks, the only alleged "harm" that Small identifies if relief is not granted is delay of receipt, assuming that such receipt is ever ordered of the payments, and some theoretical purported decline in Union support. Small fails to mention that the Union was selected by, "Unheard of majorities." In fact, the Union was selected by overwhelming majorities of the voters in the election. Small's suggestions that the Union has now lost its support in such a short period of time is speculative. Further, given that the Union's so-called comprehensive proposal at the July bargaining session did not even address the across-the-board increase or the continuing education benefits makes clear just how unimportant these points really are to the Union and its supporters, despite any self-serving declarations filed by Small.

Thus, a balancing of the hardships clearly weighs against the relief sought by Small.

**D. Public Interest Weighs Heavily Against Granting Small's Request.**

For many of the same reasons, public interest weighs heavily against granting Small's request. Public policy strongly favors consistency in the Board's decisional law and the actions of its Regional Directors. For Small to ask this Court to go against the NLRB's own well established law violates this policy at its most fundamental level. Further, public interest strongly favors negotiations at the bargaining table rather than having results imposed on the parties by the Board or the Courts.

The parties have asked that the ALJ expedite his handling of this matter and expect to make a similar request to the NLRB following the ALJ's decision. The "unheard of" majorities and the lengthy history of dealings between the principals at both Kaiser and the Union and the expedited handling requests weigh heavily against granting Small's requested temporary relief.

Finally, the policy rationale for considering Section 10(j) relief in connection with as identified in the various NLRB General Counsel's Memoranda governing when Section 10(j) relief should be sought are simply not present here. This is not a discharge case. (*See* NLRB General counsel Memorandum 10-07.) Kaiser has a long history of collective bargaining with a large number of unions. This history includes many years of bargaining with the Union's leaders and negotiators when they previously represented the prior incumbent union in these exact bargaining units. There are no allegations of surface bargaining, threatened job loss or discharge of union supporters. Instead, Kaiser has comported itself in accordance with the express decisional law of the

Board and has bargained and will continue to bargain in good faith over the matters presented at the bargaining table.

Accordingly, the temporary relief sought by Small is not in the public interest.

## IV. CONCLUSION

For the foregoing reasons, Respondents, Southern California Permanente Medical Group and Kaiser Foundation Hospitals respectfully request that this Court deny Small's request for temporary relief under Section 10(j) of the National Labor Relations Act.

DATED: November 15, 2010

Respectfully submitted,

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