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9 UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA
11

12 JAMES F. SMALL, Regional Director)
of Region 21 of the National Labor)
13 Relations Board, for and on behalf of)
the NATIONAL LABOR)
14 RELATIONS BOARD,)

15 Petitioner;

16 and

17 SOUTHERN CALIFORNIA)
PERMANENTE MEDICAL GROUP;)
18 AND KAISER FOUNDATION)
HOSPITALS,)
19

20 Respondents.
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Civil No. CV 10 7395 GAF FMOx

**PETITIONER'S REPLY TO
RESPONDENTS' OPPOSITION TO
PETITION FOR INJUNCTIVE
RELIEF UNDER SECTION 10(j) OF
THE NATIONAL LABOR
RELATIONS ACT**

Date: December 6, 2010

Time: 9:30 a.m.

Judge: Hon. Gary A. Feess

Courtroom: Roybal 740

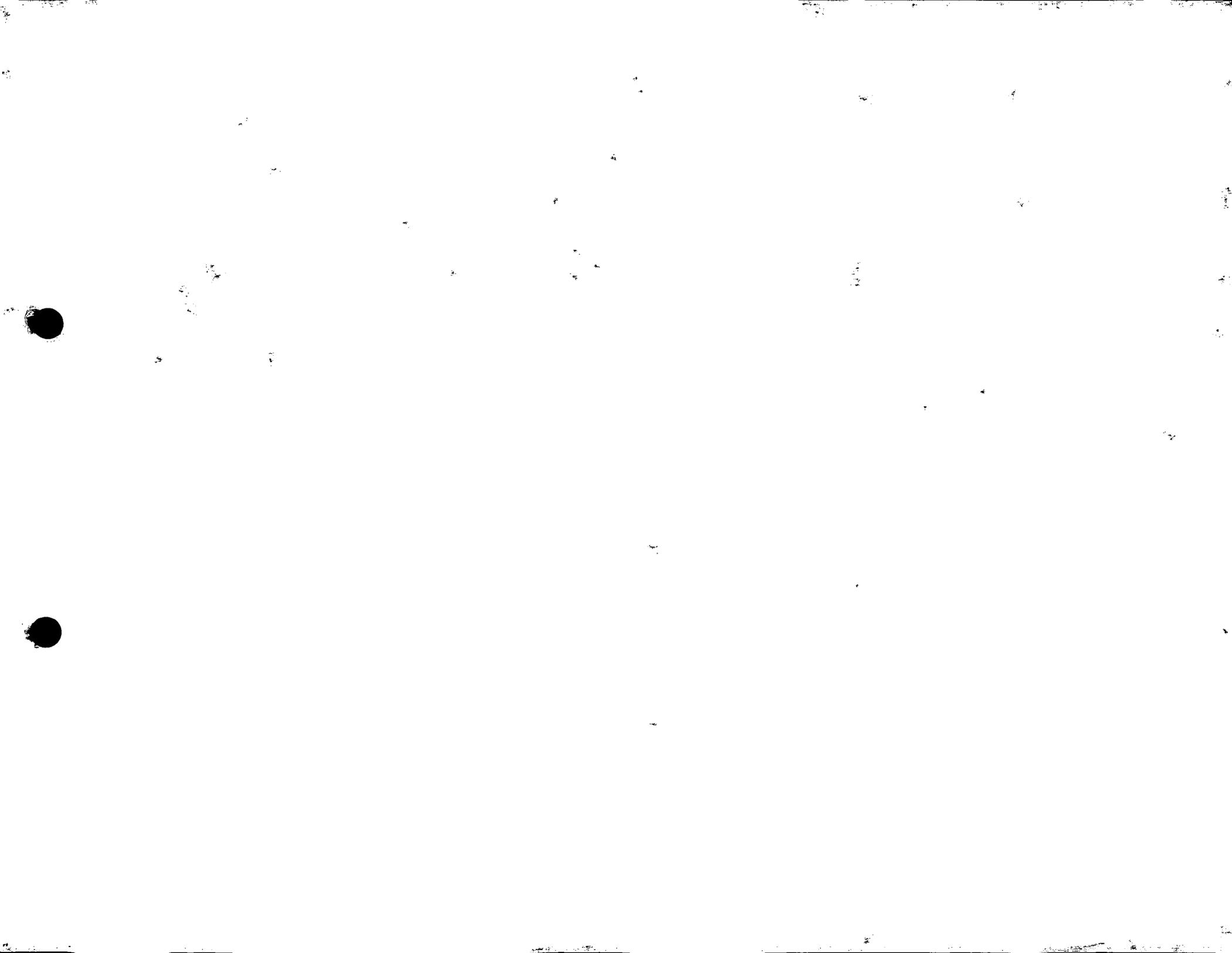


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17	<i>Eisenberg v. Suburban Transit Corp.</i> , 112 LRRM 2708	
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1	<i>More Truck Lines, Inc.</i> , 336 NLRB 772 (2001),	
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10	<i>S&I Transportation</i> , 311 NLRB 1388 (1993)	11, 17
11	<i>Winter v. Natural Res. Def. Council, Inc.</i> , ---U.S.---	
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National Labor Relations Act, Section 10(j),
[29 U.S.C. Sec. 160(j)]

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1 On October 4, 2010, Petitioner filed its Petition seeking a preliminary
2 injunction pursuant to Section 10(j) of the National Labor Relations Act (herein
3 Act), as amended, 29 U.S.C. Sec. 160(j) (herein Section 10(j)), against
4 Respondents. By its petition, Petitioner is seeking to *prospectively*¹ restore the
5 *status quo ante* that existed prior to Respondents' commission of the unfair labor
6 practices alleged in Case 21-CA-39296, pending the National Labor Relations
7 Board's (herein Board's) final disposition of that case.
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10 On November 3, 2010, Petitioner filed a Supplemental Memorandum in
11 support of its Petition. Respondents filed their Memorandum in Opposition to the
12 Petition on November 15, 2010. Petitioner now files this Reply, and respectfully
13 requests that Respondents' arguments in opposition to the petition be rejected based
14 on established Board and Federal law.
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17 I. INTRODUCTION

18 Petitioner has presented evidence establishing that Respondents have
19 violated 29 U.S.C. Section 158(a)(5)(herein Section 8(a)(5)) and 29 U.S.C. Sec.
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26 ¹ Respondents mistakenly believe that the injunction seeks the Court to order relief
27 from the date of the violations to the date of the Court's Order and beyond.
28 However, the relief being sought is *prospective* only, i.e. restoring the status quo
ante beginning on the date of the Court's Order.



1 158(a)(1)(herein Section 8(a)(1)²) of the Act by making unilateral changes to the
2 terms and conditions of employment of the employees in the three units involved
3 in this case. This evidence establishes that Respondents unilaterally cancelled a
4 scheduled wage increase, and unilaterally discontinued the employees' benefits of
5 tuition reimbursement for continuing-education courses/units (herein CEUs), and
6 providing regular (paid time off) shop-steward training.
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9 With respect to the status of the underlying administrative proceeding before
10 the Board, a hearing (trial) was held before an administrative law judge (herein
11 ALJ) on October 18 and 19, 2010. Post-hearing briefs were filed with the ALJ on
12 November 17, 2010. Inasmuch as briefs were just filed, the ALJ has not yet issued
13 a *Recommended* Decision and Order.
14

15 Concurrent with the underlying administrative proceeding, the Petitioner has
16 filed a Petition for injunctive relief with this Court, seeking an order compelling
17 Respondents to (prospectively): grant the scheduled wage increase, reinstate tuition
18 reimbursement for CEUs, and reinstate regular (paid time off) for shop-steward
19 training, pending the Board's final disposition of the administrative case.
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22 Petitioner submits that the issuance of injunctive relief is just and proper to
23 prevent the irreparable harm that will otherwise render the Board's ultimate
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27 ² Under Board law, any violation of Section 8(a)(5)(e.g. unilateral change) is also
28 a derivative violation of Section 8(a)(1) of the Act. The guiding legal principles in
this case center on Section 8(a)(5).

1 decision ineffective. Although Respondents argue that injunctive relief is not
2 warranted, their arguments are unpersuasive and frequently misguided.

3 II. RESPONDENTS ARE INCORRECT ABOUT MILLER

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5 Respondents' Opposition states that pursuant to *Winter v. Natural Res. Def.*
6 *Counsel*, ___ U.S. ___, 129 S.Ct. 365, 127 L.Ed.2d 249 (2008), and *McDermott v.*
7 *Ampersand Publishing LLC*, 593 F.3d 950 (9th Cir. 2010), the *Miller v. California*
8 *Pacific Medical Center*, 19 F.3d 449 (9th Cir. 1994) *likelihood of success* standard
9 is no longer good law.
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12 However, *Winter* did not address the likelihood of success prong of the
13 equitable standard. *Garcia v. Sacramento Coca-Cola Bottling Co., Inc.*,
14 ___ F. Supp.2d ___, 2010 WL 3294384 at *5 n.3 (E.D. Cal. August 20, 2010) (the
15 "*Miller* standard was overruled regarding its analysis of irreparable injury . . . but
16 *not* likelihood of success on the merits")(emphasis in original). Indeed, *Winter* did
17 not comment "at all, much less negatively, upon the application of a preliminary
18 injunction standard that softens a strict 'likelihood' [of success] requirement in
19 cases that warrant it." *Alliance for the Wild Rockies v. Cottrell*, ___ F.3d ___,
20 2010 WL 2926463 at *6 - *7 (9th Cir. September 22, 2010), quoting *Citigroup*
21 *Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30,
22 35-38 (2d Cir. 2010). Thus, neither "*Winter*, nor the Ninth Circuit's cases
23 interpreting its applicability to labor disputes, substantially changes the standard
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1 applied in determining the likelihood of success on the merits for purposes of a
2 Section 10(j) injunction." *Garcia*, 2010 WL 3294384 at *5 n.3.

3 III. PETITIONER HAS ESTABLISHED A HIGH LIKELIHOOD OF
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5 SUCCEEDING BEFORE THE BOARD

6 Under clear and applicable Board law, the evidence presented establishes the
7 high likelihood of success that Petitioner has of succeeding before the Board.

8
9 A. *Applicable law*

10 Petitioner's initial (October 4th) Points & Authorities in support of the
11 Petition cited the relevant legal authority the National Labor Relations Board
12 ("Board") will apply in resolving the issues in this case. In brief summary of that
13 authority:
14

15 Under Section 8(a)(5) of the Act, an employer is prohibited from making
16 unilateral changes to the existing (status quo) terms and conditions of employment
17 of its union-represented employees.
18

19 Existing terms and conditions of employment may come about through
20 contracts, agreements, policies, and/or past practices. Regardless of their origin,
21 however, the employer may not make unilateral changes to these existing terms
22 and conditions of employment.
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25 An employer's obligation to refrain from making unilateral changes extends
26 to the time period immediately following a change in bargaining representatives,
27 e.g. when one union supplants another. If, at the time of that change, the employer
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1 and predecessor union had been signatories to a collective-bargaining agreement
2 (herein contract), that contract becomes null and void. However, most
3 contractually-established terms and conditions of employment survive and
4 continue to serve as the employees' status quo terms and conditions of
5 employment. An employer may not, therefore, unilaterally change (discontinue)
6 these surviving terms and conditions of employment. To do so violates Section
7 8(a)(5) of the Act.
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10 *B. The facts of this case*

11 In this case, it is undisputed that following the Union's certifications on
12 February 3, 2010, Respondents cancelled the April 1st wage increase, and
13 discontinued tuition reimbursement for CEUs and regular (paid time off) shop-
14 steward training for the employees in the three units.
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17 Respondents specifically, clearly, and unmistakably explained to the Union
18 and Region 21 of the National Labor Relations Board that the wage increase and
19 benefits at issue in this case were cancelled/discontinued because they did not
20 survive the nullification of the contracts following the change in bargaining
21 representatives. Respondents' reasoning centered around their view that
22 contractually-established terms and conditions of employment set forth in the
23 National Agreement sections of the contracts do not survive nullification because
24 the Union (NUHW) was not a member of the Coalition of Kaiser Permanente
25 Unions — and therefore only terms and conditions from the Local Agreement
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sections of the contracts carried over. (Tr. 43-44, 67, 73; GCx. 11; GCx. 17;
GCx. 18).³

Contrary to Respondents' reasoning, and as explained in Petitioner's initial Points & Authorities, the origin of these provisions is irrelevant. The April 1st wage increase and other benefits at issue in this case are mandatory subjects of bargaining that survived the nullification of the contracts. They had been applied to the employees and become the employees' set and expected terms and conditions of employment. Although the contracts are null and void, these terms and conditions of employment survive and continue to serve as the employees' status quo terms and conditions of employment. Furthermore, determinations regarding survivability are based on Board precedent and policy, not based on what the employer and the predecessor union (or nullified contracts) say on that issue.⁴

Thus, and under the clear weight of authority, Petitioner has a high likelihood of succeeding on the merits of the case before the Board.

³ Throughout the remainder of this brief, references to the transcript of the administrative hearing will be referred to as Tr., followed by the appropriate page number. References to exhibits introduced at the hearing will be referred to as GCx. (General Counsel Exhibit) or Rx. (Respondent Exhibit), followed by the appropriate exhibit number.

⁴ See More Truck Lines, 336 NLRB 772-73 (2001)(employer's statements to employees that contractually established terms and conditions of employment do not survive nullification of contract not controlling on that issue). Note that in More Truck Lines, the Board, in rejecting certain of the employer's arguments, explained that the employer's argument would "allow, or arguably compel, an employer to reset employees' then existing conditions of employment."

1 C. *The unilateral changes were NOT bargained for*

2 Respondents' Opposition suggests that Respondents' discontinuation
3 decision was somehow bargained over during the three meetings with the Union in
4 February/March 2010. However, when Respondents told the Union about the
5 discontinuation of the wages and benefits at issue in this case (at the second of the
6 three meetings), that decision had already been made. Furthermore, Respondents
7 told the Union that this decision was non-bargainable — that Respondents were
8 compelled and obligated to take the wage increase and benefits away. (Tr. 43-44,
9 67, 73; GCx. 11; GCx. 17; GCx. 18).⁵

10 Contrary to Respondents' assertion, the record is devoid of evidence
11 establishing that this decision was the product of bargaining with the Union.

12 D. *Neighborhood House Assoc. is inapplicable*

13 In defense of Respondents' elimination of the April 1, 2010 wage increase,
14 Respondents cite to the Board's decision in *Neighborhood House Assoc.*

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22 ⁵ Respondents' own bargaining notes for the February 26 meeting further reflect
23 that their decision was non-bargainable. See GCx. 17 (attachment); Rx. 2 (same
24 notes), wherein the following exchange is noted:

25 Ralph Cornejo (RC): We need to understand what will continue. Your
26 response is not though[t] out. I said everything in
27 the agreement continues except grievance[,]
28 arbitration[,], dues [,] ? recognition
Arlene Peasnall (AP): I am not bargaining with you. Simply responding
to the requests you made at the last meeting.

1 As background before discussing this case, it is well settled that where
2 parties are negotiating an initial collective-bargaining agreement, an employer is
3 prohibited from unilaterally changing terms and conditions of employment unless
4 the parties have reached an impasse in overall contract negotiations, absent union
5 delay or economic exigency. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).
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7 In *Neighborhood House Assoc.*, 347 NLRB 553, 554-555 (2006), the Board
8 noted an additional exception to this rule, that being that an employer may lawfully
9 implement a change to a discrete recurring event scheduled to occur during
10 negotiations, as long as it provides the union with advance notice and an
11 opportunity to bargain about the intended change. Although Respondents attempt
12 to make much of the fact that the *Neighborhood House Assoc.* case originated in
13 Region 21, the reality is that the decision is inapplicable to the facts of this case.
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17 First, as Respondents explained to the Union and the NLRB, Respondents
18 had already cancelled the April 1st wage increase because they (erroneously)
19 asserted that the wages and benefits established through the National Agreement,
20 the "2008 wage re-opener agreement" (GCx. 17),⁶ or "any other agreement entered
21 into between partners of the LMP (GCx. 18), no longer applied to the employees
22 following the NUHW certifications; and because they were prohibited from
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26 ⁶ Assertions in Respondents' Opposition that they viewed terms from the 2008
27 Wage-Reopener as "surviving" are unfounded, and are completely contradicted by
28 Respondents' own communications and position statements. (GCx. 11, GCx. 17,
GCx. 18).

granting the wage increase under the rationale of *Consolidated Fiberglass*
(discussed below). (GCx. 11; GCx. 17; GCx. 18).

Thus, the elimination of the April 1st, 2010 wage increase had nothing to do with a discrete, recurring event that Respondents wanted to bargain over with the Union about after the certifications.⁷

Second, the *Neighborhood House Assoc.* exception still requires an employer to first provide a union with advance notice and an opportunity to bargain before the change. Here, Respondents announced the cancellation of the April 1st wage increase, as well as the elimination of the other benefits involved in this case, after they had already made the decision.

Board law does not require a union to request bargaining, as a condition precedent for a Section 8(a)(5) violation, where the employer has presented the union with a *fait accompli*, and/or where any request to bargain would be futile. *National Car Rental*, 252 NLRB 159, 163 (1980), *enfd. in rel. part* 672 F.2d 1182 (3d Cir. 1982). Thus, if the notice is not in advance of the decision, or if the evidence reveals that the employer had no intention of changing its mind, then the

⁷ See also Tr. 135, lines 7-11. The inconsistency between Respondents' *Neighborhood House Assoc* defense (i.e. that the wage increase did survive) and its explanations to the Union/NLRB during the relevant time period (contending that the wage increase was gone) reflects that the *Neighborhood House Assoc* argument is a shifting defense and pretextual. Given that Respondents' assertion of this defense is merely an afterthought, the Board is unlikely to find the case applicable.

1 notice is not timely and is ineffective. See *Intersystems Design Corp.*, 278 NLRB
2 759, 759 (1986).

3 Here, Respondents presented the Union with a fait accompli. When
4 Respondents first informed the Union that the wage increases and benefits at issue
5 in this case no longer applied to the employees in the three units, the decision⁸ had
6 already been made and acted upon. In Respondents' view, the overall decision
7 (that wages and benefits do not carry over) was effective as of February 3, 2010,
8 the date of the Union's certifications. Thus, the Union was not provided with
9 advance notice or an opportunity to bargain before the decision was made and
10 announced. Furthermore, the Union never acquiesced in or agreed with the
11 decision.
12

13 Respondents argue that the effective date of the wage increase was April 1,
14 2010 (the date it was due but not paid), and that the Union waived its right to
15 bargain by not requesting bargaining over the decision prior to April 1, 2010.
16 However, that Respondents followed through and failed to pay the wage increase
17 on April 1st does not take away from the fact that they had made that decision
18 before telling the Union. Furthermore, Respondents' reasoning for the
19 discontinuance of the April 1st wage increase was tied to the same reasoning as
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26 ⁸ Respondents informed the Union of a single legal position and decision they had
27 made (not a series of isolated and unrelated decisions) regarding the survivability
28 of wages and benefits that had been established through the National Agreement.
(GCx. 11, GCx. 17, GCx. 18).



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1 had been applied for the discontinuance of the other benefits involved in this case.

2 Finally, and as discussed next, Respondents viewed their decision as being non-
3 bargainable both before and after announcing it to the Union.

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5 In determining if a request to bargain would have been futile, the Board will
6 take into consideration evidence that the employer (erroneously) believed at the
7 time and contemporaneously (with that decision) asserted that the change did not
8 involve a bargainable issue. *AT&T Corp.*, 325 NLRB 150 (1997)(Board affirmed
9 alj's conclusion that the employer's announcement that state law required the
10 change implied that the change was not negotiable and any bargaining request
11 would have been futile); *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB
12 41, 42-43, n.6 (1997), enfd. 162 F.3d 513 (7th Cir. 1998)(in concluding that no
13 waiver had occurred, Board found relevant and significant the employer's
14 testimony expressing its view that it had no obligation to bargain with the union
15 over changes in company policies); *S&I Transportation*, 311 NLRB 1388, 1388 at
16 n.1 (1993)(finding fait accompli where employer's testimony at hearing revealed
17 employer's fixed position to implement changes).

18
19 In this case, Respondents told the Union that the wages and benefits
20 established through the National Agreement ceased to exist following the February
21 3, 2010 certifications; that Respondents were prohibited from continuing to apply
22 them; and that Respondents' hands were tied on this issue. Furthermore,
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1 Respondents argued that under *Consolidated Fiberglass*, they can not legally grant
2 the wage increase. (GCx. 11; GCx. 17; GCx. 18).

3 When the Union, which had requested continuation of the wages and
4 benefits at issue, objected to that position and argued otherwise, including citing
5 More Truck Lines, Respondents stuck to their legal position. Respondents never
6 agreed or accepted the Union's arguments that the discontinuation of the April 1st
7 wage increase (or other benefits at issue) was a mandatory subject of bargaining.
8
9 To the contrary, they told the Union that they had no choice on this issue.
10

11 As the record evidence demonstrates, Respondents' decision was presented
12 as a fait accompli. Thus, *Neighborhood House Assoc.* is inapplicable.
13

14 *E. Consolidated Fiberglass is also inapplicable*

15 Contrary to Respondents' assertions, the Board's decision in *Consolidated*
16 *Fiberglass Prods. Co., Inc.*, 242 NLRB 10 (1979) is also inapplicable to the facts
17 of this case.
18

19 *Consolidated Fiberglass* involved an employer which attempted to use the
20 predecessor union's contract as grounds for avoiding bargaining with the successor
21 union. The Board held that the employer could not unilaterally grant wage
22 increases without bargaining with the successor union because the wage increases
23 in that case were merely a proposal between the predecessor union and the
24 employer, not an established contract term. The Board further held that any
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1 agreement with the predecessor union could not exempt the employer from “full
2 collective-bargaining on all mandatory subjects” with the new union, in any event.

3 The Board’s recognition of the successor union’s bargaining rights in
4 *Consolidated Fiberglass* does not justify Respondents' failure to maintain terms,
5 especially given that the Union here specifically requested that the terms, including
6 the wage increases, be maintained. The Respondents' attempt to interpret
7 *Consolidated Fiberglass* more broadly to forbid the granting of established, future
8 wage increases is contrary to Board precedent.

11 *F. Respondents' arguments regarding shop-steward training are*
12 *misguided and unpersuasive*

14 Respondents' first argument, that there has been no change regarding this
15 benefit for employees in two of the units because employees in those two units are
16 salaried, is misguided. Although these employees receive a salary, they no longer
17 have the right to participate in steward training for which they are paid. Thus,
18 Respondents have unilaterally eliminated a benefit for them.

21 Respondents' second argument, that shop-steward training can be
22 unilaterally eliminated because it is linked to the National Agreement and Labor
23 Management Partnership (LMP), is also unpersuasive.

25 In support of their argument, Respondents claim that the provision in the
26 National Agreement on shop-steward training calls for training on the subjects of
27



1 LMP principles and the specific contract terms of the National Agreement, which
2 they submit do not apply to these units.

3 However, as explained before, and contrary to Respondents' contention,
4 terms and conditions of employment contractually established through the National
5 Agreement can and do survive the nullification of the contract following a change
6 in bargaining representative. Thus, steward training on the subjects of policing,
7 enforcing, and grieving the surviving terms, or educating employees about them,
8 would still be relevant and applicable.
9

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11 Next, there is no evidence establishing that there is a strict limitation on the
12 possible training subjects or topics for shop-steward training. And as the record
13 demonstrates, shop stewards do more than just enforce the terms of live contracts.
14 They make information requests, meet with supervisors/managers, serve as
15 *Weingarten* representatives, and serve as a liaison between the Union and the
16 bargaining unit as part of their duties (Tr. 123-124). Thus, possible training topics
17 and subjects encompass more than just enforcing the terms of contracts. In fact,
18 and among other possible subjects listed in the National Agreement section of the
19 contracts for training, are the subjects of leadership skills and problem solving.
20 Such subjects and topics would continue to be relevant and applicable.
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23 Thus, Respondents' arguments regarding regular (paid time off) shop-
24 steward training should be rejected.
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G. *The underlying representation cases do not excuse Respondents'*

conduct

Respondents' arguments about the determinations reached in the underlying representation cases before Region 21 and Region 32 of the National Labor Relations Board are misleading and irrelevant. The arguments suggest that Region 21 and Region 31 were reviewing the same contracts as one another; and were reaching conclusions over issues that are parallel to the issues in this case. However, neither suggestion is correct. There were different contracts before the two regions. Furthermore, the issue in those cases was limited to whether or not the contracts could serve as bars to the elections. With respect to the Region 21 cases, and due to ambiguity regarding the expiration dates of these agreements, the Regional Director for Region 21 concluded that the agreements could not serve as bars to the elections.

There was no determination or finding by the Regional Director of Region 21 that only terms of the Local Agreements, or sections of the Local Agreements that incorporate or reference sections of the National Agreement, applied to the units, or will "survive" expiration.⁹

⁹ What the representation cases in Region 21 do establish, however, is that the contracts were viewed, approved, and ratified as single, integrated documents. This undisputed fact cuts against the arguments that Respondents are making about the National Agreement sections being somehow distinguishable from the other sections of the contracts.

1 H. *Respondents' argument about its corporate policy regarding tuition*
2 *reimbursement leave out a glaring, material fact*

3 Respondents contend that under their corporate policy, bargaining unit
4 employees that are not represented by a Coalition member union may not receive
5 tuition reimbursement for continuing-education courses/units (herein CEUs) and so
6 they discontinued this benefit following the February 3, 2010 certifications of the
7 Union. This argument is not persuasive.
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10 Prior to February 3, 2010, it is undisputed that the employees in the three
11 units were receiving tuition reimbursement for CEUs. Following the NUHW
12 certifications, this benefit was eliminated by Respondents for all these employees.
13

14 Respondents' argument that after February 3, 2010, the corporate policy,
15 standing alone, is the applicable policy for these employees, and that it obligated
16 Respondents to unilaterally discontinue wages and benefits because employees
17 replaced their union with another one, is merely a continuation and extension of
18 their previous arguments.
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20

21 In this regard, it ignores (and tries to hide) the fact that there were other
22 policies in place, including the National Agreement, prior to February 3, 2010, that
23 had established the benefit that Respondents took away. See GCx. 13 (internal e-
24 mail between Respondents, noting therein that Respondents had notified the Union
25 of Respondents' discontinuation of the CEU benefit that had been established by
26 and provided to the employees under the National Agreement).
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1 Furthermore, and as argued earlier in this Reply, the Board would give no
2 weight to a purported agreement between an employer and a predecessor union
3 calling for the employer to unilaterally discontinue existing wages and benefits if
4 the union is replaced by another union.
5

6 *I. Respondents mischaracterize their grace-period decision*

7 Respondents' grace-period argument is similarly unpersuasive. It is
8 irrelevant that Respondents, following their unilateral decision to eliminate tuition
9 reimbursement for CEUs, next decided that they would reimburse certain
10 employees that took courses between February 3 and March 1, 2010.
11

12 The granting of this grace period does not alter the fact that there has still
13 been a unilateral change, i.e. the discontinuing of the benefit. In fact, Respondents'
14 limiting of any discussion to just the issue of the grace period further reflects that
15 their decision to discontinue the benefit was not negotiable. See *S&I*
16 *Transportation*, 311 NLRB 1388, 1388 n.1 (1993)(agreement that change should
17 be phased in gradually doesn't alter fact that initial decision was unilateral change).
18
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21 *J. Whether Respondents are applying other terms that had been*
22 *established by the National Agreement is irrelevant*
23

24 Respondents' Opposition states that they continued to apply the terms of the
25 Healthcare Reimbursement Account following the change in bargaining
26 representatives. However, whether Respondents are applying other terms and
27 conditions of employment established through the National Agreement to
28

1 employees in the three units, besides the terms at issue here, was not litigated in the
2 administrative case. Thus, the specifics, timing, reasoning, and/or veracity of such
3 claims are unknown. Even if this were to be the case, however, it does not
4 somehow privilege Respondents' conduct, and only serves to undermine
5 Respondents' stated reasoning for eliminating the wages and benefits involved in
6 this case. Furthermore, the Union's questions about whether other terms and
7 conditions of employment are still being applied, and/or for Respondents'
8 explanations as to what would then be an inconsistency, went unanswered.
9
10 (Tr. 44-45, 69, 72-73, 75).
11

12
13 Based on the above, Petitioner submits that it has a strong likelihood of
14 succeeding on the merits before the Board, and that Respondents' arguments to the
15 contrary are unpersuasive and misguided.
16

17 IV. PETITIONER HAS SHOWN IRREPARABLE HARM

18 The evidence presented by Petitioner clearly demonstrates that there is a
19 serious threat of irreparable harm to the employees, the Union, and the Board's
20 remedial authority unless interim relief is granted. Respondents' arguments to the
21 contrary are without merit and unpersuasive.
22

23
24 First, and with respect to Respondents' argument that there is no need for the
25 requested injunctive relief because the case has already been presented to the
26 Administrative Law Judge (herein ALJ), and the parties have requested an
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28



1 expedited ruling,¹⁰ Respondents' argument leaves out the fact that the ALJ's
2 decision will not be the end of this case. The ALJ does not issue a final Order.
3 Rather, the ALJ will be issuing a Decision and *Recommended* Order.¹¹ The case
4 will then be transferred to the Board for their review.¹² There, the Board will
5 review the Decision and Recommended Order, along with any exceptions¹³ filed
6 by the parties, before issuing the final Decision and Order. Thus, it may take
7 several months, or longer, before the Board issues its Decision and Order.
8

9
10 Next, Respondents argue that at the time of the Union's election, the Union
11 enjoyed substantial support. Respondents suggest that this somehow favors not
12 granting an injunction. However, that fact clearly weighs in Petitioner's favor. At
13 the time of their certifications, the Union enjoyed substantial support. However,
14 and as Petitioner's evidence of irreparable harm reflects, support for the Union is
15 diminishing at a rapid pace, and employees have attributed this loss to the Union's
16 apparent inability to cease Respondents' unlawful unilateral changes. The
17 tremendous loss of support in such a short time reflects the impact Respondents'
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22 ¹⁰ Although the parties have requested an expedited ruling, there is no deadline by
23 which the ALJ will have to issue his decision. Thus, it may take several weeks
24 and/or months before a decision issues.

25 ¹¹ See *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000).

26 ¹² The Board is a panel (presently of 4) that reviews the Decisions and
27 Recommended Orders of administrative law judges.

28 ¹³ After the ALJ issues his decisions, and prior to the Board's review, the parties
may file exceptions (i.e. appeal) to the findings of fact and conclusions of law
reached by the ALJ. This appeal process protracts the litigation process.

1 unlawful unilateral changes have had. Absent interim relief, Respondents will
2 benefit as the Union's support continues to evaporate.

3 Next, Respondents erroneously assert that the only harm at issue in this case
4 is monetary in nature, and therefore can be made up by payment at the end of the
5 litigation. However, Respondents miss the point. Petitioner is not seeking interim
6 relief because the employees are impoverished and need immediate payment to
7 live. Rather, Petitioner is seeking interim relief because the unilateral changes in
8 this case (which happen to be financial) have resulted in an erosion of support, and
9 have placed the Union in a disadvantaged bargaining position. This is not
10 something that can be cured down the road by an eventual Board Order ordering
11 reimbursement.
12

13 Finally, Respondents argue that the fact that the parties are currently
14 bargaining somehow lends credence to their claim that Petitioner has failed to
15 prove irreparable harm. The fact that the parties are currently engaged in
16 collective-bargaining negotiations does not alter the need for injunctive relief – it
17 only reinforces it. Bargaining for a new contract takes a significant amount of
18 time, as the record in this case reflects. During this time period, the Union is
19 losing the support of the employees. To further complicate matters, the Union has
20 been left to bargain from a disadvantaged standpoint by having to seek to get back
21 what Respondents unlawfully took from employees.
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1 Thus, as demonstrated above, Petitioner has undoubtedly shown that
2 irreparable harm is likely in the absence of injunctive relief.

3 V. BALANCE OF HARDSHIPS WEIGHS IN FAVOR OF PETITIONER
4

5 It is evident that the balance of hardships tips in favor of granting the interim
6 relief and Respondents' arguments to the contrary should be disregarded. To begin
7 with Respondents endeavor to argue that their potential inability to recoup monies
8 paid, should they prevail in the underlying matter, will be a hardship to
9 Respondents. This argument fails in several respects.

10 As an initial matter, the chance of Respondents prevailing in the underlying
11 matter is slight at best. Next, it is unclear where the 2 million figure advanced by
12 Respondents throughout their Opposition derives from. Petitioner is not requesting
13 backpay for the affected employees, only the prospective payment, from the date
14 of the Court's order, to employees of the unlawfully withheld wage increase and
15 other benefits.¹⁴ Accordingly the actual monies potentially owed by Respondents
16 if injunctive relief is granted likely are not as significant as Respondents would like
17 the Court to believe.
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22 Moreover, Respondents fail to cite to any case authority which indicates that
23 they are entitled to automatic recoupment of money in the unlikely event that they
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26 ¹⁴ Further undercutting any claim of financial hardship is the fact that
27 Respondents, prior to the February 2010 elections of the Union, had committed to
28 and were financially prepared to pay the wage increases and provide the benefits at
issue to the same employees.

1 prevail in the underlying proceeding. Furthermore, relevant case authority proves
2 that District Courts regularly grant prospective remedies under Section 10(j) which
3 cost respondents money.¹⁵ Finally, although Respondents may not have an
4 automatic right to recoupment of money, they are free to bargain with the Union in
5 good faith and from a level playing field over pay rates as part of an overall
6 collective-bargaining agreement.
7

8
9 Respondents then argue that their reliance on *Neighborhood House Assoc.*,
10 347 NLRB 553 (2006) should somehow shield them from the injunctive relief
11 requested here and that an injunction would only confuse Board precedent. These
12 arguments are unconvincing. As demonstrated at detail in the foregoing pages,
13 *Neighborhood House Assoc.* is not applicable to this case. Respondents are
14
15

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17 ¹⁵ In addition to those cases cited at p.13 n. 14 of Petitioner's Points & Authorities,
18 see also *Aguayo v. South Coast Refuse Corp.*, 161 LRRM 2867 (C.D. Ca. 1999)
19 (requiring respondent to comply with terms of agreed-upon contract on an interim
20 basis); *Eisenberg v. Suburban Transit Corp.*, 112 LRRM 2708, 2712-2713 (D. N.J.
21 1983)(ordering rescission of unlawful mid-contract unilateral changes even though
22 order would cost respondent more than if it were allowed to continue its illegal
23 actions pending the Board's final order; court "unimpressed" with respondent's
24 claimed harm), *affd. mem.* 720 F.2d 661 (3d Cir. 1983); *Davis v. Servis Equipment*
25 *Co.*, 341 F. Supp. 1298, 1302 (N.D. Tex. 1972)(ordering employer to comply with
26 agreed-upon contract and implement the across-the-board wage increase contained
27 therein on an interim basis); *Fleischut v. Burrows Paper Corp.*, 162 LRRM 2719,
28 2724-2725 (S.D. Miss. 1999) (enjoining respondent from "(d) Failing to and
refusing to bargain in good faith with the [Union] by unilaterally withholding its
customary across-the-board raises to Respondent's employees in the unit....");
Ahearn v. Dunkirk Ice Cream Co., Inc., 133 LRRM 2088 (W.D.N.Y. 1989)(interim
compliance with labor contract ordered where reasonable cause existed that
respondent violated the Act by abrogating that agreement).

1 mandated by established case law to continue the terms and conditions of
2 employment from the predecessor union's collective-bargaining agreement, and
3 yet they failed and refused to do so.

4
5 Lastly, Respondents argue that injunctive relief would cause harm to the
6 National Agreement as well as the unions who are parties to it. This argument also
7 fails. First, the contracts have been nullified. Second, Respondents' obligation,
8 like that of any other employer in comparable circumstances (i.e. when one union
9 supplants another), is to continue to apply the surviving terms and conditions of
10 employment of the nullified contracts. Respondents attempt to avoid their
11 obligations by claiming their previous contracts are special, but this does not shield
12 Respondents from the fact that they are required by law to abide by Board
13 precedent.

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17 Consequently, Respondents have failed to show that any alleged harm they
18 might suffer if subjected to injunctive relief is significant enough to tip the scales
19 in their favor.

20
21 VI. THE PUBLIC INTEREST WEIGHS HEAVILY IN FAVOR OF
22 GRANTING PETITIONER'S REQUEST FOR INJUNCTION

23
24 Respondents cite primarily to the same arguments already refuted by
25 Petitioner in support of the notion that the public's interest weighs against the
26 granting of an injunction. Respondents additionally assert that the public interest
27 favors negotiations at the bargaining table as opposed to Board or Court
28

1 interference. Respondents, however, neglect to recognize that productive and fair
2 bargaining is impossible where a union, as is the case here, is left to bargain from
3 an unequal and severely disadvantaged bargaining position due to Respondents'
4 unlawful conduct.
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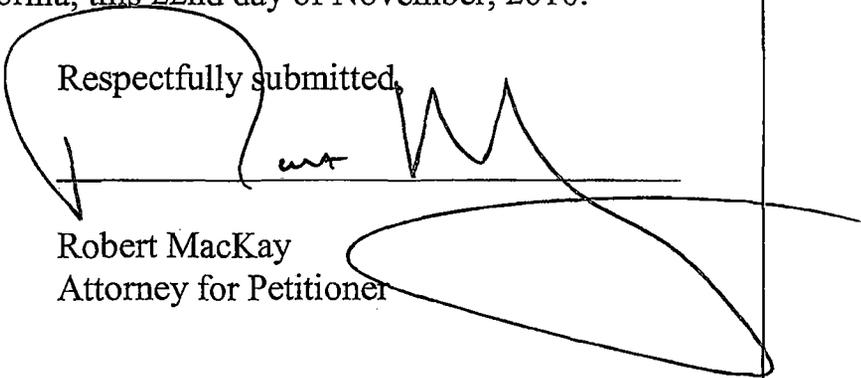
6 Additionally, Respondents point to the fact that they have had several years
7 of positive bargaining history with other unions. However, the union involved in
8 this case is the NUHW. Respondents and the NUHW are bargaining for what will
9 be their first contracts for the units. Moreover, bargaining for first contracts
10 constitutes a critical stage of the negotiation process because it forms the
11 foundation for the parties' future labor-management partnership and thus
12 relationships of this nature warrant special attention from the NLRB. In effort to
13 protect these delicate new bargaining relationships and preserve employee free
14 choice, the NLRB endeavors to carefully investigate, prosecute, and where
15 appropriate seek injunctive relief. Here, the harm suffered by the Union and the
16 employees is great. The grant of temporary injunctive relief in this case serves the
17 public interest by ensuring that Respondents' unfair labor practices do not succeed.
18 Interim relief preserves the remedial power of the Board, protects the employees'
19 Section 7 rights, and safeguards the parties' collective-bargaining process.
20 Therefore, it is in the public interest to grant injunctive relief in the instant case.
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VII. CONCLUSION

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2 Interim relief is just and proper to prevent further frustration of the policies
3 and remedial purposes of the Act. The Petitioner has shown that he has a strong
4 likelihood of prevailing in the administrative proceeding before the Board and
5 establishing that Respondents have violated the Act. Unless enjoined by this
6 Court, Respondents' unlawful conduct will continue to undermine the collective-
7 bargaining process and the Board's remedial powers. Accordingly, Petitioner
8 respectfully requests that this Court grant the requested relief.
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10

11 Dated at Los Angeles, California, this 22nd day of November, 2010.
12

13 Respectfully submitted,
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16 Robert MacKay
17 Attorney for Petitioner
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Responses, Replies and Other Motion Related Documents

2:10-cv-07395-GAF -FMO James F. Small v. Southern California Permanente Medical Group et al

(FMOx), DISCOVERY

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

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Case Number: 2:10-cv-07395-GAF -FMO

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REPLY Reply to Respondents' Opposition to Petition for Injunctive Relief MOTION for Order for Petition for Injunction Under section 10(j) of the National Labor Relations Act [2] filed by Petitioner James F. Small. (MacKay, Robert)

2:10-cv-07395-GAF -FMO Notice has been electronically mailed to:

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