

# **EXHIBIT A**

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19 UNITED STATES DISTRICT COURT  
20 FOR THE DISTRICT OF NEVADA

21 VALERIE HARDY-MAHONEY, Regional  
22 Director of the Thirty-Second Region of the  
23 National Labor Relations Board, for and on  
24 behalf of the National Labor Relations Board

25 Petitioner

26 v.

27 NEVADA GOLD MINES LLC DBA  
28 NEVADA GOLD MINES

Respondent

and

NEWMONT USA LIMITED DBA  
NEWMONT MINING CORP

Party-In-Interest

Case No. 3:20-cv-00331

PROPOSED BRIEF OF INTERNATIONAL  
UNION OPERATING ENGINEERS LOCAL  
3 AS AMICUS CURIAE IN SUPPORT OF  
PETITION FOR TEMPORARY  
INJUNCTION UNDER SECTION 10(j) OF  
THE NATIONAL LABOR RELATIONS  
ACT

Oral Argument Requested

Date:

Time:

Judge: Hon. Larry Hicks

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1 p. 3. The bargaining unit covers mine operations technicians, surface operations technicians,  
2 surface maintenance technicians and mechanics, underground maintenance technicians and  
3 mechanics, mill operators, equipment operators, truck drivers, and custodians. *Id.* Since 1965,  
4 ownership of these mines has changed from time to time, but the Union’s representation of these  
5 employees has remained constant.

6 The most recent CBA was negotiated between Newmont and OE3 in early 2019 and  
7 expires in 2022. Ex. 1, App. 1 p.15. Under this CBA, bargaining unit employees were protected  
8 by an established grievance procedure, seniority rights, scheduled wage increases, and discipline  
9 procedures, and enjoyed a variety of other benefits. *See* Ex. 1, App. 1 pp. 15-57. The CBA also  
10 contains a successorship clause, which provides in pertinent part:

11 This Agreement shall be binding upon the ... successors, purchasers, lessees and  
12 assigns of the parties hereto. In the event of the sale or other transfer of the  
13 business, the Company shall provide that the Agreement shall continue in full force  
14 and effect and that transferee shall continue to recognize Union as the proper  
15 bargaining representative of the Employees at the facility.

16 Ex. 1, App. 1 p. 38.

17 **2. Newmont forms a joint venture with Barrick Gold Corporation.**

18 During CBA negotiations in early 2019, Newmont’s representatives did not inform the  
19 Union of any impending changes to management or operation of the mines. However, during  
20 those negotiations, Newmont was fighting off a hostile takeover by Barrick Gold Corporation.  
21 NGM Opp. to NLRB 10(j) Petition Exhibit (“NGM Ex.”) B, App. I p. 007. To avoid the hostile  
22 takeover, Newmont and Barrick agreed to form a “joint venture,” *id.* pp. 007-8, to which  
23 Newmont “contributed” its only union-represented workforce, *see* Newmont Resp. to NLRB  
24 10(j) Petition at 4.

25 In forming the joint venture, all parties involved promised to recognize the Union and the  
26 CBA as to the historic bargaining unit. On March 10, 2019, Barrick and Newmont executed an  
27 “Implementation Agreement” to establish the joint venture, which is now NGM. Ex. 24, App. 4,  
28 pp. 6-83. The Implementation Agreement provided that NGM will retain all operations

1 employees of the transferred Newmont properties, Sec. 5.14(b), and continue to honor the CBA  
2 in effect for employees as defined in 2019-2021 CBA, Sec. 5.14 (c). *Id.* pp. 45-46.

3 The joint venture was slated to begin operations on July 1, 2019, but it was not ready by  
4 then to assume payroll responsibilities for employees. Newmont and NGM accordingly executed  
5 an “employee lease agreement,” by which NGM would “lease” Newmont’s bargaining unit  
6 employees from July 1 to December 31, 2019 (the “leasing period”). Ex. 1, App. 1 p. 193. This  
7 agreement also provided that “Newmont and the JV company acknowledge and agree that the  
8 [CBA] remains in full force and effect ... and that the Union is the proper bargaining  
9 representative of the Newmont Leased Employees covered by the [CBA].” *Id.*

10 **3. Newmont and NGM made repeated assurances that the CBA would be recognized,**  
11 **and NGM did in fact recognize the CBA.**

12 OE3 and employees first heard of the attempted hostile takeover and joint venture deal  
13 through the news media. *See, e.g.*, Ex. 1, App. 1 p. 4 (Fullerton Aff.); Ex. 17, App. 3 p.50  
14 (Hatfield Aff.). As early as March 13, 2019, the Union sought and obtained assurances from  
15 Hiliary Wilson, then Newmont’s head of labor relations and now NGM’s general counsel, that  
16 the CBA would continue to be recognized and remain in effect. Ex. 1, App. 1 p. 4. In fact, after  
17 the formation of the joint venture, *Newmont and NGM* repeatedly assured employees and the  
18 Union that the new joint venture would continue to honor the CBA.

19 Following the announcement, supervisors at the mines communicated to their respective  
20 teams that the joint venture would only affect salaried employees and not bargaining unit  
21 employees, and that the new company would honor the collective bargaining agreement.  
22 “Managers, supervisors, and foremen assured us that we would be covered by the contract at  
23 least ten times. Anytime anyone ever asked the question about it we were assured that we were  
24 the most protected because we were covered by the contract.” Ex. 7, App. 2 p. 105 (Wilson  
25  
26  
27  
28

1 Aff.).<sup>1</sup> The employee affiants named multiple supervisors who provided such assurances. *See*  
2 *e.g.*, Ex. 12, App. 2 p. 193; Ex. 17, App. 3 p. 51.<sup>2</sup> NGM does not dispute this evidence.

3 In April 2019, Newmont distributed answers to “Frequently Asked Questions” on the  
4 Nevada Joint Venture. Eileen Goldsmith Declaration (attached), Ex. A. This document, which  
5 addressed how employment terms and benefits would change after the joint venture, quotes the  
6 successor provision from the OE3 CBA and refers bargaining unit employees to the CBA “or  
7 their union representative” for information about their terms and benefits. *Id.* p. 002.

8 On April 12, Greg Walker – who had been tapped to become NGM’s Executive  
9 Managing Director – sent an email to all Nevada Barrick employees, stating that “[w]e have  
10 committed, in writing, to honor the terms and conditions of the collective bargaining agreement  
11 ratified on January 31, 2019 by the members of [OE3].” Goldsmith Dec. Ex. B p. 008.

12 On May 10, 2019, NGM sent a “welcome” letter to all Newmont employees, signed by  
13 Walker, stating that their employment with NGM would start on July 1, 2019. Ex. 1, App. 1 p.  
14 60. This letter assured bargaining unit employees that: “[y]our compensation and benefits will  
15 not change while the labor agreements are in place unless [NGM] and the Union mutually  
16 agree otherwise.” *Id.* (emphasis in original).

17 NGM also distributed “Employee Standards” to hourly employees in May 2019. Ex. 17,  
18 App. 3 p. 54. The Standards stated that “[t]o the extent there is a conflict between the Standards  
19 and the collective bargaining agreement, the benefits, terms and conditions described in the  
20 collective bargaining agreement apply rather than those in the Standards.” Goldsmith Dec. Ex. C  
21 p. 017. An accompanying PowerPoint presentation described all of the NGM standards that  
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23 <sup>1</sup> *See also* Ex. 17, App. 3 p. 51 (Hatfield Aff.) (“Supervisors from Newmont.... said that they  
24 were going to honor the collective-bargaining agreement.”); Ex. 9, App. 2 pp. 135-36 (Carney  
25 Aff.); Ex. 11, App. 2 p.182 (Merck Aff.); Ex. 12, App. 2 pp. 192-93 (Robison Aff.).

26 <sup>2</sup> “They said that Newmont or NGM would have to continue to honor the collective-bargaining  
27 agreement. Among the supervisors giving us such assurances were Josh Morgan, Scott Wilkie,  
28 Dave Thornton, Grayden Colby, Ben Lupercio ..., Lance Steelman ..., Walt Cleveland, ...  
Albert Keim, Dennis Zimmerman, Jim Hicks..., Keith Preston, Amy Armstrong, Duane Shomer  
..., and ... Derek Dominguez.” Ex. 12, App. 2 p. 193.

1 would become effective January 1, 2020, but promised that, “[f]or those employees whose job  
2 classifications are subject to a **collective bargaining agreement** (“CBA”), the agreement shall  
3 control wages, benefits and other terms of employment and to the extent there is a conflict  
4 between the standards and the CBA, for those subject to the CBA, the CBA will control.” *Id.*,  
5 Ex. D p. 096 (emphasis in original); *see also id.* at 085.

6 In a July 2019 “town hall meeting,” Walker told employees “that NGM would honor the  
7 collective-bargaining agreement between Newmont and the Union until the end of the contract.”  
8 Ex. 9, App. 2 p. 142 (Carney Aff.).

9 After July 1, 2019, employees’ jobs at the Newmont-legacy mines proceeded as usual.  
10 There were barely any noticeable changes in employees’ work assignments, supervisors,  
11 working conditions, or pay and benefits.<sup>3</sup> Through its representatives Hiliary Wilson, Lisa  
12 Boman, and Anthony Hall, NGM processed grievances that the Union filed on behalf of  
13 bargaining unit employees in accordance with the CBA through the fall of 2019. Ex. 1, App. 1 p.  
14 8; Ex. 17, App. 3 pp. 58, 69.

15 **4. Newmont and OE3 execute a “Memorandum of Understanding” to maintain the**  
16 **status quo of union representation for the historic bargaining unit.**

17 In August, Hall (then counsel for Newmont) met with Union representatives to discuss a  
18 Memorandum of Understanding (“MOU”) that Newmont wanted the Union to sign. Ex. 1, App.  
19 1 pp. 6-7; NGM Ex. K, App. II p.168-72. At this meeting, Hall represented that the MOU was  
20 intended to cover travel by bargaining unit employees to the legacy Barrick sites for some work.  
21 Ex. 2, App. 1 pp. 222-23 (Fullerton Aff. Apr. 16, 2020).<sup>4</sup> OE3 asked about supervision of the

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22 <sup>3</sup> The employee affiants described how their work remained the same after July 1, 2019. *See* Ex.  
23 5, App. 2 pp. 70, 72 (Peters Aff.); Ex. 6, App. 2 pp. 82-83 (Carter Aff.); Ex. 7, App. 2 pp. 95-99;  
24 Ex. 8, App. 2 pp. 113, 116, 122-23 (Fleenor Aff.); Ex. 10, App. 2 pp. 151-58 (Tangreen Aff.);  
25 Ex. 11, App. 2 pp.169-72 (Merck Aff.); Ex. 12, App. 2 pp. 189-90, 197 (Robison Aff.); Ex. 13  
26 App. 2 pp. 212-16, 220 (K.Burwell Aff.); Ex. 14, App. 2 pp. 235-39 (J.Burwell Aff.); Ex. 15,  
27 App. 3 pp. 3-8, (Spring Aff.).

28 <sup>4</sup> Hall did not specify the type of work at issue when asked by the Union because “they were  
going to use the MOU to determine what works.” Ex. 2, App. 1 p. 223 (Fullerton Aff. Apr. 16,  
2020). OE3 received confirmation from workers that “Newmont operators were taking Newmont  
trucks, driving to Barrick property, and hauling everything back to Mill 5,” a Newmont property.

1 employees, and Hall responded that the former Newmont supervisors would continue to  
2 supervise bargaining unit employees and former Barrick supervisors would supervise legacy  
3 Barrick workers. *Id.* p. 223. When asked about employee discipline, Hall said that discipline  
4 would be handled according to the CBA for bargaining unit employees and under Barrick’s  
5 policies for legacy Barrick workers. *Id.* OE3 asked where the employees would be working, and  
6 Hall responded that Newmont employees would work on Newmont property and Barrick  
7 employees would work on Barrick property. *Id.*

8 Hall assured the Union that the company’s goal in presenting the MOU was to “preserve  
9 jobs and prevent possible layoffs.” Ex. 2, App. 1 p. 222. Because 120 people were laid off in  
10 January 2019 due to a slide that disrupted operations at two Newmont sites, the Union was  
11 interested in this possibility and “viewed the MOU as providing protection for our people.” *Id.* p.  
12 222. The Union agreed to the MOU based on these representations. Ex. 1, App. 1 p. 7.

13 The MOU memorialized the parties’ understanding that “when former Barrick employees  
14 were on former Newmont property they were not covered by the CBA, and when former  
15 Newmont employees were working at a former Barrick property, they would be covered under  
16 the CBA for their work there.” Ex. 1, App. 1 p. 6. The MOU covered the leasing period, July 1 to  
17 December 31, 2019. *Id.* p.68. The MOU provided that: (1) “the Status Quo shall be maintained  
18 with regard to OE3’s right to represent the Newmont employees specified in the CBA at Section  
19 04.01.00”; (2) “during the Lease Period the Newmont unionized employees shall not be deemed  
20 to be accreted into a non-union group”; and (3) “[t]his MOU shall not limit or restrict the parties’  
21 rights under the existing CBA during the Lease Period[.]” *Id.*

22 The MOU also provided that “no events or facts occurring during the Lease Period shall  
23 be used in any manner to alter the Status Quo, including to argue or demonstrate accretion, alter-  
24 ego or any other successorship principle or doctrine.” *Id.* While Newmont and OE3 signed the  
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26 *Id.* p. 224. This confirmed the Union’s “understanding ... that the MOU was really limited to this  
27 interchange, because everyone else remained working in their respective areas as Hall had  
28 represented during the call.” *Id.*

1 MOU, NGM and Barrick were named as “intended third-party beneficiaries.” *Id.* p. 69.

2 **5. NGM withdraws recognition from the Union.**

3 Representatives of OE3 and NGM met on November 15, 2019, ostensibly to discuss  
4 recent changes to the company health plan. Ex. 1, App. 1 pp. 8-9. At this meeting, Hall (by now  
5 counsel for NGM) blindsided the Union by announcing that “NGM would officially become its  
6 own separate company on December 23, 2019” and that it wanted the Union to agree to a vote to  
7 determine whether it could continue representing employees. *Id.* Hall presented no evidence of  
8 loss of Union support in the historic bargaining unit. *Id.* The Union did not agree to the vote. *Id.*

9 At a further meeting on November 19, Hall dropped another bombshell: that NGM’s  
10 proposed vote would be conducted in a combined unit of the former Newmont employees and  
11 former Barrick employees. Ex. 1, App. 1 p. 9; Ex. 2, App. 1 p. 226. On November 29, 2019, Lisa  
12 Boman sent a letter to OE3 representative Scott Fullerton stating that NGM was “refus[ing] to  
13 recognize IUOE3.” Ex. 1, App. 1 p. 75. The letter also claimed that NGM “has no obligation to  
14 recognize IUOE3” and referred to NGM’s proposed vote amongst all combined employees,  
15 although the Union had not agreed. *Id.* pp. 75-76.<sup>5</sup> In a December 4 phone call, Hall insisted that  
16 the Union agree to the proposed vote by December 22 or a later date, but in either case NGM  
17 would cease to recognize the CBA on December 23. *Id.* p. 11; Ex 2, App. 1 p. 226.

18 **6. After withdrawing recognition, NGM began to actively undermine the Union.**

19 After unlawfully withdrawing recognition from OE3, NGM began a campaign to actively  
20 undermine the Union in the eyes of the employees. Without prior notice to the Union, NGM  
21 publicly posted Boman’s November 29 letter on the Union’s bulletin board for all employees to  
22 see, in a move that employees understood as calculated to “badmouth the Union.” Ex. 2, App. 1  
23 p. 226; Ex. 11, App. 2 p. 183. Later, NGM posted a copy of its petition for an election on the  
24

25 \_\_\_\_\_  
26 <sup>5</sup> Boman claims in her declaration that she began her role with NGM on December 23, 2019,  
27 NGM Ex. C, App. I, p.017, but she signed the November 29 letter as “Head, Business HR  
28 Nevada Goldmines,” and participated in meetings with the Union in November and early  
December in this role on behalf of NGM.

1 bulletin boards, which, predictably, spurred negative rumors about the Union, *id.* p.184, even  
2 though the Regional Director dismissed the petition as meritless, NLRB Memo. 15 n.33.

3 Then, starting around December 12, 2019, NGM delivered letters of employment to the  
4 bargaining unit workers. These letters stated, for the first time, that employment with NGM  
5 would be “at will,” and that the “offer of employment letter supersedes all prior discussions,  
6 negotiations, and agreements.” Ex. 1, App. 1, at 83-84. Bargaining unit employees were told that  
7 they had to sign the letters or lose their jobs. *See, e.g.*, Ex. 11, App. 2 p. 183. Predictably,  
8 employees panicked. Ex. 3, App. 2 p. 9.

9 In early December, NGM security called the police to bar Union representatives from a  
10 parking lot on former Newmont property where employees board busses to the mines in the  
11 mornings, thereby preventing OE3 from communicating with represented employees even  
12 though OE3 were routinely granted such access for this purpose for many years prior. Ex. 3,  
13 App. 2 pp. 6-7. Since December 23, NGM has refused to communicate with the Union regarding  
14 grievances or any other representational issues, it has flouted disciplinary procedures, and it has  
15 arbitrarily terminated some Union members for minor infractions. *See, e.g.*, Ex. 4, App. 2 pp. 21-  
16 22; Ex. 11, App. 2 p. 177; Ex. 12, App. 2 pp. 204-05. NGM removed all OE3 notices and posters  
17 from the Union bulletin boards in the employee areas. Ex. 9, App. 2 p. 138.

18 Supervisors have warned employees not to display Union stickers or literature,<sup>6</sup> and have  
19 discouraged employees’ support of the Union by telling them they do not need a union. Ex. 12,  
20 App. 2 p. 200. Union supporters, some of whom have been at the same job for many years, now  
21 live in a constant state of fear. Bargaining unit employees have testified as follows:

22  
23  
24 <sup>6</sup> *See, e.g.*, Ex. 11, App. 2 p. 179 (told by a supervisor, “you know those Union stickers on that  
25 hardhat aren’t a very good idea”); Ex. 9, App. 2 p. 139 (an employee was told to remove a copy  
26 of the OE3 CBA from his table while he was eating lunch, because “Amy Armstrong in Human  
27 Resources ... didn’t want the Union stuff around.”); *id.* p. 140-41 (employee was sitting at his  
28 lunch table with Union papers out, was told by his supervisor “that the Union papers had to be  
turned over or taken somewhere else so that the Union information would not show”; same  
employee was told he could not have Union papers on his toolbox).

1 A lot of people are scared...Personally, I'm scared shitless. Members are afraid,  
2 and I'm a steward for crying out loud and if I wasn't a specialist doing the jobs that  
3 I do, I'm not confident in how long I'll be employed. I'm really afraid they're going  
4 to start targeting the Union people.

5 App. 2 Ex. 5, at 75-78.

6 The Union has been at Newmont since 1965 .... These guys know that they've  
7 always depended on the Union and their protection. They've always had the  
8 protection of the contract. Then they tell us we're at will and that's the way it goes  
9 after telling us we would be protected this whole time. That has really upset  
10 everybody a lot.

11 App. 2 Ex. 7, at 109.

12 They have the right to terminate you for any reason whatsoever. I am worried that  
13 if I bring up a legitimate safety concern, there could be repercussions. I could be  
14 viewed as stirring shit and they would say that I'm just a problem and get rid of me.  
15 With the Union, I could bring up numerous issues and they had proper channels to  
16 decide who is right and who is wrong. We no longer have anyone we can talk to  
17 that can represent us and dispute our case.

18 App. 2 Ex. 10, at 164.

19 NGM's campaign has caused employees to be "mad at ... the Union, because they feel  
20 like [the Union] betrayed them, because we told them we'd have the contract." Ex. 5, App. 2 p.  
21 78. Some employees have chosen to resign rather than work for a non-union company or have  
22 been terminated in the absence of the CBA's protections. "People have opted to quit instead of  
23 being bullied around by the company. Two employees quit before even getting the offer letter  
24 because as they put it, the writing is on the wall.... Another employee resigned after they put out  
25 the offer letters and his last day was December 22, 2019." *Id.* p. 76; *see also* Ex. 7, App. 2 p. 107  
26 ("Several people have told me they're going to look for other jobs."); Ex. 15, App. 3 pp. 19-22  
27 (employee was terminated during disciplinary meeting with no union representative present and  
28 after the period for disciplinary action specified in the CBA).

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## ARGUMENT

**I. The NLRB is Entitled to Deference on the Merits of the Alleged Unfair Labor Practices.**

In evaluating an NLRB request for §10(j) injunctive relief, courts grant considerable deference to the Regional Director’s legal theories regarding the merits of the alleged unfair labor practices. *Small v. Avanti Health Sys.*, 661 F.3d 1180, 1187 (9th Cir. 2011). The Regional Director need only produce “some evidence” along with an “arguable legal theory” in support of a §10(j) petition. *HTH*, 650 F.3d at 1356; *see also Bloedorn v. Francisco Foods*, 276 F.3d 270, 287 (7th Cir. 2001) (“The court’s inquiry is confined to the *probability* that the Director will prevail.”) (emphasis in original). This standard of review requires the District Court to find for the Regional Director where facts are in dispute. *See, e.g., Frankl v. HTH Corp.*, 825 F.Supp.2d 1010, 1037 (D. Haw. 2011).

Where, as here, the full NLRB authorizes the filing of a §10(j) petition, “the Director is owed special deference because likelihood of success is a function of the probability that the Board will issue an order determining that the unfair labor practices alleged by the Regional Director occurred.” *Small*, 661 F.3d at 1187; *see* Dkt. 12, Ex. H (NLRB authorization for this proceeding). Furthermore, “[t]he court must evaluate the traditional equitable criteria through the prism of the underlying purpose of section 10(j), which is to protect the integrity of the collective bargaining process and to preserve the Board’s remedial power.” *HTH*, 650 F.3d at 1355.

Under this properly deferential standard of review, the Regional Director has amply established an “arguable legal theory” supported by “some evidence” that NGM violated the NLRA by withdrawing recognition and refusing to bargain with OE3. *Id.* at 1356; *see also Chester v. Grane Healthcare Co.*, 797 F.Supp.2d 543, 562-65 (W.D. Pa. 2011) (granting injunctive relief of interim bargaining order against respondent likely liable under NLRA §8(a)(5) on single employer theory), *aff’d in pertinent part* 666 F.3d 87 (3d Cir. 2011). Even the

1 arguments on which NGM most heavily relies are entirely meritless.<sup>7</sup>

2 **A. The Union Did Not “Waive” its Right to Post-Lease Period Recognition.**

3 As explained above, Newmont and OE3 executed a MOU, wherein Newmont and NGM  
4 promised to recognize OE3 as the representative of employees in the historic bargaining unit.  
5 *Supra* 5-7. The MOU’s stated purpose is that the “legal rights” of the parties and employees  
6 “remain as they existed before the Lease Period.” Ex. 1, App. 1 p. 68. The parties agreed that,  
7 “[d]uring the Lease Period the rights and obligations of OE3, Newmont, Barrick and the JV  
8 Company concerning the CBA, the duty to bargain, and the rights of the union to be recognized  
9 as the bargaining representative ... shall not be altered,” regardless of any changes to working  
10 conditions or interchange of employees. *Id.* All parties, including NGM as a third-party  
11 beneficiary, agreed that “no events or facts occurring during the Lease Period shall be used in  
12 any manner to alter the Status Quo, including to argue or demonstrate accretion, alter-ego or any  
13 other successorship principle or doctrine.” *Id.*

14 No language in this MOU could reasonably construed as waiving any statutory rights  
15 under the NLRA. “The waiver of a statutory right ... must be clear and unmistakable.”  
16 *TransMontaigne, Inc.*, 337 NLRB 262, 263 (2001). For example, where the claimed “waiver”  
17 does not expressly refer to the employer’s “independent, statutory duty to recognize the Union,”  
18 it does not meet this standard. *Id.* There is no such language here. Notably, *all* parties to the  
19 MOU disavowed any reliance on events during the lease period to support any accretion  
20 argument; therefore, even if NGM’s portrayal of the MOU were correct (it is not), NGM’s *own*  
21 arguments that the Newmont legacy bargaining unit is no longer appropriate would be waived.  
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24 <sup>7</sup> The Union does not address every single one of NGM’s arguments, but joins in the Regional  
25 Director’s responses to those arguments. We note, however, that the facts amply support not only  
26 the Regional Director’s single employer theory, but also her alternative successorship theory of  
27 liability. NGM is a “perfectly clear successor” that must recognize the Union and adopt the CBA  
28 because it operates the same business and from the outset promised to retain virtually of the  
bargaining unit employees and honor the CBA’s terms and conditions of employment. *See NLRB*  
*v. Burns Int’l Sec. Serv., Inc.*, 406 U.S. 272, 294-95 (1972).

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Moreover, the MOU is not binding on the NLRB. “Board-ordered remedies serve a public purpose, as the courts have recognized, and the Board does not give effect to private agreements that purport to limit the exercise of its remedial powers in the public interest.” *Esplanade Partners*, 369 NLRB No. 62, at \*2-3 (2020); *cf. EEOC v. Waffle House*, 534 U.S. 279, 297-98 (2002) (private arbitration agreement not binding on the EEOC, which has independent statutory authority to enforce the law). The Board’s analysis of whether NGM is a single employer with, or alternatively a successor of, Newmont is statutory, not contractual. *See Burns*, 406 U.S. at 287 (“The source of [Burns’s] duty to bargain with the union is not the collective-bargaining contract, but the fact that it voluntarily took over a bargaining unit that was largely intact and that had been certified within the past year.”); *TransMontaigne*, 337 NLRB at 263 (“[T]he law is clear that the Union’s right to recognition, as well as the Respondent’s corresponding duties, are statutory, not contractual, in nature, regardless of whether the Respondent is regarded as a successor or the continuation of the same legal entity.”); *cf. Marion Power Shovel*, 230 NLRB 576, 577-78 (1977) (“The determination of questions of representation, accretion, and appropriate unit do[es] not depend upon contract interpretation but involve[s] the application of statutory policy, standards and criteria.”).

Lastly, just as the Board would not credit NGM’s evident bad faith in negotiating the MOU, neither should this Court. *See, e.g., Weymouth Farms, Inc.*, 325 NLRB 960, 962 (1997) (contracts “obtained via ... bad-faith” will not be enforced). As described *supra* 5-6, while representing Newmont, Hall told the Union that the MOU’s purpose was to maintain the status quo of Union representation for bargaining unit employees, while creating more jobs and work. Since then, third-party beneficiary NGM has rejected the status quo of Union representation, withdrawn recognition, and claimed accretion of the bargaining unit based on asserted facts from the lease period. NGM cannot now use the MOU as a shield, having breached the MOU itself.

1                   **B. The Court Must Defer to the Regional Director’s Bargaining Unit Analysis.**

2                   NGM’s arguments that the bargaining unit is no longer appropriate are misplaced. The  
3 Court must defer to the Regional Director’s position because “[t]he determination of appropriate  
4 bargaining units is uniquely the Board’s function.” *Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304,  
5 308 (9th Cir. 1996); *see also Small v. Marine Spill Response Corp.*, 2006 WL 1429445, \*9-10  
6 (C.D. Cal. May 17, 2006) (deferring to Regional Director’s bargaining unit determination and  
7 issuing interim bargaining order, despite the court’s uncertainty whether the unit remained  
8 appropriate).

9                   The only issue before this Court is whether it is likely that the bargaining unit is *an*  
10 appropriate one, not whether it is the *most* appropriate unit. *See Hoffman v. Hartford Hosp.*, 1995  
11 WL 420821, at \*3 (D. Conn. Mar. 31, 1995) (“The hospital argues that the union is not an  
12 appropriate bargaining unit. The issue here, however, is not whether the union is an appropriate  
13 bargaining unit. The only issue is whether the Board has reasonable cause to believe the union is.  
14 The hospital can make its arguments that the union is not an appropriate bargaining unit... before  
15 the Board.”). Nor is a final determination of the appropriate bargaining unit necessary to grant  
16 injunctive relief, including an interim bargaining order. *Kaynard v. Palby Lingerie*, 625 F.2d  
17 1047, 1054-55 (2d Cir. 1980). Even if the Court were to consider Respondent’s bargaining unit  
18 evidence, the Regional Director has met her burden to produce “some evidence ... together with  
19 an arguable legal theory.” *HTH*, 650 F.3d at 1356.

20                   Then, the NLRB applies a strong presumption in favor of historic bargaining units. NGM  
21 will bear a “heavy evidentiary burden” before the Board to prove that the historic unit is  
22 “repugnant to the Act’s policies.” *Stein, Inc.*, 369 NLRB No. 10, at 2 n.6 (2020). Under  
23 longstanding NLRB policy, a “mere change in ownership should not uproot bargaining units that  
24 have enjoyed a history of collective bargaining unless the units no longer conform reasonably  
25 well to other standards of appropriateness.” *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 9 (2007).

26                   NGM fails to show that the NLRB will likely find the historic unit to be “repugnant to the  
27 Act’s policies.” *Stein*, 369 NLRB No. 10, at 2 n.6. The community-of-interest test relied on by  
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1 NGM, NGM Memo 14-17, is applied to determine whether a *new* bargaining unit is appropriate.  
2 *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996). By contrast, “[i]n most  
3 cases, a historical unit will be found appropriate if the predecessor employer recognized it, even  
4 if the unit would not be appropriate under Board standards if it were being organized for the first  
5 time.” *Id.* Nor can NGM base its challenge to the bargaining unit on the unilateral changes it  
6 made to working conditions after it withdrew recognition from the Union in November 2019;  
7 “because these changes were unlawful, they [are] disregarded in the analysis.” *Dodge of*  
8 *Naperville, Inc. v. NLRB*, 796 F.3d 31, 37-38 (D.C. Cir. 2015).

9 In any event, NGM’s claims of integration are overblown and contradicted by the  
10 evidence, which shows that the amount of interchange is limited and caused by NGM’s unlawful  
11 unilateral changes.<sup>8</sup> NGM’s evidence of “integration” concerns only superficial changes to  
12 surface operations (NGM Memo. 14-17), and for good reason. Extensive site-specific training is  
13 required by the Mine Safety and Health Administration (“MSHA”) before any employee can  
14 begin work at any mine, and “[t]his need for site specific training limits the ability of NGM to  
15 freely move mining employees around to different mines.” Ex. 13, App. 2 p. 228. “The workers  
16 are so specifically trained to each mine ... that it is not practical or legal to move workers freely  
17 around from mine to mine. A person cannot be on a mine site without site-specific training  
18 which takes a full day minimum.” Ex. 17 App. 3 p. 66. NGM itself ran an annual MSHA training  
19 recently in Elko, where it separated the employees into former Newmont and former Barrick  
20 groups for site-specific trainings. Ex. 10, App. 2 p. 164-65.

21 NGM cannot be trusted even on the smallest details. To take just one example, NGM  
22 claims that it has “combined” the former Newmont and Barrick Mine Emergency Response  
23 Teams (“MERT”). NGM Memo. 16. But there has been no change. Service on the MERT is not  
24 a job classification. Rather, MERT personnel always had regular, full time jobs at their own mine  
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26 <sup>8</sup> See Ex. 2, App. 1 pp. 222-23; Ex. 5, App. 2 p. 78 (“We don’t have any interchange with  
27 Bar[r]ick employees”); *supra* note 3 (worker witnesses describing how their coworkers, working  
28 conditions, and supervisors have remained the same under NGM).

1 sites, but also volunteered to be on-call for emergencies throughout the region. The former  
2 Newmont and Barrick teams were always cross-trained for multiple mine sites and responded to  
3 emergencies at both companies' sites. Josh Jauer Declaration ¶¶8-17 (attached).

4 **C. NGM's Statute of Limitations Argument Lacks Merit.**

5 The 6-month limitations period under §10(b) of the National Labor Relations Act  
6 ("NLRA"), 29 U.S.C. §160(b), begins to run when the union has "clear and unequivocal notice"  
7 that a ULP has occurred. *Leach Corp.*, 312 NLRB 990, 991-92 (1993). Thus, the §10(b) period  
8 begins on the date of withdrawal of recognition, not when a withdrawal is merely threatened.  
9 *See, e.g., GT Einstein Elec.*, 321 NLRB 816, 819 (1996).

10 Hiliary Wilson's transmission of the proposed MOU to the Union on June 27, 2019 is not  
11 clear and unequivocal notice of NGM's withdrawal of recognition. At most, it could be viewed  
12 as a threat to withdraw recognition at some point in the future. The §10(b) period was not  
13 triggered then for several additional reasons: (1) Newmont was recognizing OE3, and Newmont  
14 and NGM continued to do so through the summer and fall of 2019. *See supra* 3-6. Thus, any  
15 intent attributable to NGM in the proposed MOU was not "clear and unequivocal." (2) A  
16 forward-looking offer to negotiate an agreement cannot possibly constitute notice of NGM's  
17 final position. (3) As discussed *supra* 11-12, the MOU does not mean what NGM claims it does.  
18 (4) Wilson was employed by Newmont at the time, and admits she had no authority to speak for  
19 NGM. NGM Ex. D, App. I pp. 036, 038 (Wilson Dec. ¶¶6, 13).

20 Nor was the filing of the amended implementation agreement with the SEC on July 5,  
21 2019 "clear and unequivocal notice" to the Union of a ULP. Again, at most it could be viewed as  
22 a threat to withdraw recognition (and not even a clear and unequivocal threat). And NGM  
23 presents no evidence that the Union knew, or even had reason to know, about that filing.

24 **II. The Regional Director's Record Establishes Irreparable Harm.**

25 Under binding Ninth Circuit precedent, reasonable inferences of irreparable harm  
26 necessarily follow once a likelihood of unfair labor practices has been established. The Regional  
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1 Director has shown that NGM withdrew recognition of the Union and imposed unilateral  
2 changes without bargaining (as NGM’s evidence amply confirms). Either of these actions,  
3 standing alone, is presumed to cause irreparable harm justifying injunctive relief. But in any  
4 event, the record is replete with evidence of irreparable harm.

5 **A. The Respondents’ Unlawful Withdrawal of Recognition and Unilateral Changes**  
6 **Support an Inference of Irreparable Harm.**

7 Key to the irreparable harm inquiry is “the probability that declining to issue the  
8 injunction will permit the allegedly unfair labor practice to reach fruition and thereby render  
9 meaningless the Board’s remedial authority.” *Miller*, 19 F.3d at 460. “[I]rreparable injury is  
10 established if a likely unfair labor practice is shown along with a present or impending  
11 deleterious effect of the likely unfair labor practice that would likely not be cured by later relief.”  
12 *HTH*, 650 F.3d at 1362. To determine if there is a “present or impending deleterious effect,”  
13 courts may rely on “inferences from the nature of the particular unfair labor practice at issue.”  
14 *Id.*; *accord Bloedorn*, 276 F.3d at 297 (“the prospect of an irreparable injury may be inferred”  
15 from the nature of the violation). Moreover, “the mere continuance of unfair labor practices over  
16 time constitutes irreparable harm favoring injunctive relief.” *Gold v. Eng’g Contractors, Inc.*,  
17 831 F.Supp.2d 856, 861-62 (D. Md. 2011) (citing *HTH*, 650 F.3d at 1362).

18 **1. Withdrawal of Recognition**

19 Prior to transitioning control over the Carlin trend mines, Newmont and NGM repeatedly  
20 promised to recognize the Union, but then withdrew recognition at the eleventh hour. Pet. Mem.  
21 3-10; *supra* 3-8. Irreparable harm may be inferred when a single employer withdraws recognition  
22 of an incumbent union, because of the obvious difficulties of returning the union to its original  
23 relative bargaining position even if the Board later finds liability. *HTH*, 650 F.3d at 1362-63  
24 (holding that likelihood of success on §8(a)(5) charge, “along with permissible inferences  
25 regarding the likely effects of that violation, can demonstrate the likelihood of irreparable  
26 injury”). The same principle applies in cases involving the Regional Director’s successorship  
27 theory. *See Small*, 661 F.3d at 1194-95 (“[E]mployees’ general interest in being represented as  
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1 soon as possible is especially heightened in a situation where many of the successor's  
2 employees, who were formerly represented by a union, find themselves after the employer  
3 transition in essentially the same enterprise, but without their bargaining representative.”).<sup>9</sup>

## 4 **2. Unilateral Changes**

5 Likewise, an employer's refusal to bargain with its employees' collective bargaining  
6 representative “has long been understood as likely causing an irreparable injury to union  
7 representation.” *HTH*, 650 F.3d at 1362. As particularly applicable here, “the result of an  
8 unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the  
9 eyes of the employees, to drive them to a second choice, or to persuade them to abandon  
10 collective bargaining altogether.” *Id.* The employer's unilateral changes “disturb[] the status quo,  
11 and put the Union in the position of having to bargain back benefits and conditions of  
12 employment that its members would have already had in the absence of” those changes made by  
13 the employer.” *Harrell v. Am. Red. Cross*, 714 F.3d 553, 558 (7th Cir. 2013) (reversing district  
14 court's denial of §10(j) relief). A “long line of cases ... support rescission to restore the status  
15 quo, in order to remedy exactly this type of unlawful behavior.” *Id.*

16 An employer's refusal to bargain also causes irreparable harm to employees because it  
17 denies them “the opportunity to achieve the economic benefits that a CBA can secure for  
18 workers.” *Small*, 661 F.3d at 1191-92. This harm is irreparable because the Board typically does  
19 not provide a retroactive remedy. *Id.* Additionally, “unions provide a range of non-economic  
20 benefits to employees that are not realized when an employer refuses to bargain with the union,”  
21 such as seniority provisions and grievance procedures. *Id.* at 1192. Even the temporary loss of  
22 such benefits irreparably harms employees because the Board's “forward-looking order cannot  
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24 <sup>9</sup> See also *Bloedorn*, 276 F.3d at 298 (“Given the uncertainties that both the union and its  
25 members face during the transition, a successor's refusal to recognize the union ... inflicts a  
26 particularly potent wound on the union and its members.”); *NLRB v. Electro-Voice, Inc.*, 83 F.3d  
27 1559, 1573 (7th Cir. 1996) (“As time passes, the benefits of unionization are lost and the spark to  
28 organize is extinguished. The deprivation to employees from the delay in bargaining and the  
diminution of union support is immeasurable.”).

1 fully compensate the employees ... for the ... benefits that good-faith collective bargaining with  
2 the Union might otherwise have secured for them in the present.” *Bloedorn*, 276 F.3d at 299.

3 Lastly, “a failure to bargain in good faith threatens industrial peace,” which is “the  
4 overriding policy of the NLRA.” *Small*, 661 F.3d at 1192. Thus, “when the Director establishes a  
5 likelihood of success on a failure to bargain in good faith claim, that failure to bargain will likely  
6 cause a myriad of irreparable harms.” *Id.* at 1191. The employer’s duty to bargain in good faith  
7 with its employees’ chosen representative is “the core of the Act, and the primary means  
8 fashioned by Congress for securing industrial peace.” *Id.* at 1192. Injunctive relief is necessary to  
9 protect this policy because “[t]he Board cannot fashion a retroactive remedy for the harm to  
10 industrial peace that occurs during the period that the employer refuses to bargain.” *Id.*

11 **B. The Record is Replete With Evidence of Irreparable Harm.**

12 The evidentiary record amply supports these reasonable inferences. Respondent assured  
13 both OE3 representatives and employees that OE3 would continue to be recognized, and that  
14 bargaining unit employees’ working conditions would remain governed by the CBA, only to  
15 abruptly withdraw recognition and refuse to bargain. As a result, Union support is imperiled,  
16 bargaining unit employees are leaving the mines or intimidated into silence, and the Union’s  
17 bargaining strength may be at a low ebb by the time of a final Board decision. Courts recognize  
18 such “dissipation of employee support for the Union as well as employee fear of retaliation and  
19 discrimination by the employer” as irreparable harm from ongoing unfair labor practices.

20 *Coffman v. Queen of the Valley Med. Ctr.*, 895 F.3d 717, 728 (9th Cir. 2018).

21 While this case is pending before the Board, more employees may temper their Union  
22 support out of fear of being targeted. *See supra* at 8-9 & note 6. Anti-union intimidation is  
23 especially potent here due to the scarcity of other job opportunities in the area and NGM’s  
24 apparent policy of banning terminated employees from its property. *See Ex. 10*, App. 2 p. 165  
25 (“This is a small town and 95% of all jobs are related to NGM. If for some reason you lose  
26 employment, you have to move out of town to get another job.”); *Ex. 15*, App. 3 p. 23 (“Not  
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1 being able to set foot on these mine sites is a huge problem. I'm really limited in terms of where  
2 I can go to work at after this happened. NGM property is integral to this whole area.... NGM  
3 totally wiped out my selection of mining jobs by banning me from NGM property.”).

4 The injury inflicted upon workers from the loss of their bargaining representative is  
5 “immeasurable in dollar terms once it is delayed or lost.” *Small*, 661 F.3d at 1191-92. Since  
6 withdrawing recognition, NGM has rejected the just cause termination requirements of the CBA  
7 and deemed all workers to be “at-will” employees. Ex. 1, App. 1 p. 12; *see also* Ex. 15, App. 3 p.  
8 19-22 (employee was terminated during disciplinary meeting with no union representative  
9 present and after the period for disciplinary action specified in the CBA). Some bargaining unit  
10 employees now find themselves in the precarious position of being “at will” employees for the  
11 first time in decades.<sup>10</sup> As a result of the loss of collectively bargained just cause protections,  
12 some terminated workers will be compelled to seek employment elsewhere regardless of whether  
13 NGM’s termination decision was fair, as one employee already did in order to provide for his  
14 young family. *See* Ex. 12, App. 2 pp. 204-05. Other workers are choosing to leave NGM rather  
15 than work without union representation. *See supra* 9.

16 NGM’s unilateral changes to terms and conditions of employment further support a  
17 finding of irreparable harm to employees and the Union. After withdrawing recognition, NGM  
18 changed the company health plan, took away employees’ pension plan, cashed out employees’  
19 accumulated paid time off rather than allowing employees to use that time for vacation while  
20 also accruing benefits, and eliminated just cause termination. *See, e.g.*, Ex. 1, App. 2 p. 12; Ex. 7,  
21 App. 2 pp. 107-09; Ex. 10, App. 2 pp. 161-63. These changes were particularly egregious

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23 <sup>10</sup> *See* Ex. 7, App. 2 pp. 108-09 (“Becoming at will and losing the protection of the Union and  
24 the grievance procedure and a *Weingarten* representative means you have no job protection.  
25 There’s no one to assure that they do things fairly.... Basically, for no reason, if they decide they  
26 don’t want you, you’re without a job without an explanation.... If you’ve got 30 years like me  
27 and maybe you’re a higher wage item, maybe you just need to be gone.”); *id.* p. 109 (“The Union  
28 has been at Newmont since 1965, for 54 or 55 years. These guys know that they’ve always  
depended on the Union and their protection. They’ve always had the protection of the contract.  
Then they tell us we’re at will and that’s the way it goes after telling us we would be protected  
this whole time. That has really upset everybody a lot.”).

1 because bargaining unit employees were repeatedly reassured that the CBA would continue to  
2 apply to them. Ex. 10, App. 2 p. 158 (“They said under NGM they were going to take away our  
3 pension, buy out our PTO, change the way disciplinary actions were taken, but then they said if  
4 you’re under the Union contract none of it applies.”).

5 NGM’s unilateral changes to the health plan are causing ongoing irreparable harm to  
6 employees and their family members that cannot be remedied by a final Board order, as Steward  
7 Norm Wilson testified: “I’ve heard tons and tons and tons of complaints over the health plan.  
8 Comments like, I guess there’s no more taking the kids to the doctor. It’s a hell of a financial  
9 burden on people with families.” Ex. 7, App. 2 pp. 107-08. An employee whose child’s illness  
10 progresses because the family can no longer afford the child’s care cannot be fully compensated  
11 by a post-Board-decision economic remedy. Similarly, when NGM suddenly terminated the  
12 pension plan, this caused serious harm to many employees’ retirement savings. *See* Ex. 10, App.  
13 2 p. 163 (“I’m approaching retirement age and I’m losing a huge portion of my retirement.”).

14 NGM’s abrupt announcement that it would “cash out” employees’ accumulated PTO and  
15 replace it with a new leave plan, without giving those employees time to use their vacation days,  
16 has also caused substantial irremediable injury to employees. That benefit is more valuable to  
17 employees as vacation time than as its cash equivalent, because when used as vacation time, that  
18 time accrues further benefits (e.g., insurance and retirement contributions). *See* Ex. 10, App. 2 p.  
19 161-62 (“[I]f I take a month off of vacation, during that month, my insurance is paid for, my  
20 retirement is paid for, I earn more PTO, ... but I wasn’t compensated for my benefits that I  
21 receive while I’m on vacation.”); Ex. 7, App. 2 p. 107 (“When guys figured out their PTO was  
22 getting cashed out that really messed up some people’s plans.”).

23 Lastly, NGM has unilaterally removed the seniority provisions under the CBA, which has  
24 irreparably harmed employees by causing them to lose out on job opportunities they would have  
25 received under the CBA’s seniority provisions. Ex. 10, App. 2 p. 164.  
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1                   **C. Without Injunctive Relief, A Final Post-Board-Decision Bargaining**  
2                   **Order be Futile.**

3                   This is emphatically *not* a case where a bargaining order issued only after full NLRB  
4 adjudication (and likely appeals) will be adequate to remedy NGM’s ULPs. NGM has shown  
5 through its conduct that it would never, on its own, bargain in good faith. It has engaged in  
6 coercive, bad-faith tactics to evade its bargaining obligations since at least November 2019.  
7 Absent an injunction, NGM will reap the benefits of its unlawful conduct by so weakening the  
8 Union that a future bargaining order would be a futile gesture.

9                   First, NGM concealed its true intent to de-unionize the Newmont legacy mines by  
10 stringing along the Union and employees for months with repeated promises of continued  
11 recognition and adherence to the CBA—only to later pull the rug out from under them. *See* Pet.  
12 Mem., 4-9, *supra* 3-8. Now, NGM is steadily undermining the Union by stripping employees of  
13 the rights and benefits afforded them under the CBA, unilaterally changing the terms and  
14 conditions of employment, stamping out any visible Union support, and generally creating a  
15 culture of fear among workers. *Supra* 7-9. It is well-established that, if the employees are denied  
16 the benefits of union representation for the entire duration of the Board proceeding, the passage  
17 of time foreseeably will sever employee ties and loyalty to the Union.<sup>11</sup>

18                   Second, as it was withdrawing recognition, NGM offered the Union an election in a  
19 bargaining unit consisting of both the legacy-Newmont *and* the legacy-Barrick employees,  
20 whom the Union had never before represented – and then, when the Union declined this offer,  
21 filed an election petition with the NLRB. *Supra* 7-8. At every step, NGM’s actions were legally  
22 groundless. An employer may demand an election only if a union has demanded recognition as  
23 the majority representative of employees in the relevant bargaining unit at issue, *see, e.g.*, 29  
24 U.S.C. §159(c)(1)(B); *New Otani Hotel*, 331 NLRB 1078, 1078 (2000), or if the employer has

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<sup>11</sup> *See, e.g.*, *HTH*, 650 F.3d at 1362; *Bloedorn*, 276 F.3d at 298; *Pye v. Excel Case Ready*, 238  
F.3d 69, 75 (1st Cir. 2001); *see also Hoffman v. Inn Credible Caterers*, 247 F.3d 360 (2d Cir.  
2001); *Frye v. Specialty Envelope, Inc.*, 10 F.3d 1221 (6th Cir. 1993); *Asseo v. Centro Medico  
del Turabo*, 900 F.2d 445 (1st Cir. 1990).

1 reasonable good-faith uncertainty about the union’s ongoing majority support *in the bargaining*  
2 *unit that the Union represents, see, e.g., Valley Health Sys. LLC*, 369 NLRB No. 16, at 1  
3 (2020).<sup>12</sup> Even then, an employer cannot petition for an election in the *middle* of the CBA’s term,  
4 as NGM did here. *See, e.g., Shaw’s Supermarkets*, 350 NLRB 585, 588 (2007) (“an employer  
5 cannot file a petition while a contract to which it is a party is in effect”).

6 With this track record, NGM cannot be relied on to bargain in good faith when a final  
7 bargaining order issues from the Board. An interim bargaining order is essential so that a final  
8 bargaining order will be more than a pyrrhic victory. Moreover, even under normal  
9 circumstances, the slow pace of NLRB adjudication strongly supports injunctive relief, because  
10 the passage of time makes it more likely that the damage done will be incurable. *Lineback v.*  
11 *Irving Ready-Mix*, 653 F.3d 566, 570 (7th Cir. 2011); *see also HTH*, 650 F.3d at 1362-63; *Pye*,  
12 238 F.3d at 75; *Gold*, 831 F.Supp.2d at 862. This consideration is acute here, because this ULP  
13 proceeding has already been delayed due to the complications of litigating virtually during the  
14 global Coronavirus pandemic. NGM Extension Request, Ex. L (Dkt. 9-12). Once the hearing  
15 begins, it is sure to take longer than usual because of the inherent difficulties of trial-by-video.

### 16 **III. The “Balance of Hardships” Favors Injunctive Relief.**

17 The balance of hardships favors §10(j) relief, where, as here, the Regional Director has  
18 already established likelihood of success on the merits and irreparable harm. *See HTH*, 650 F.3d  
19 at 1365. Here, the balance is clear: it is the displacement of the union that has represented these  
20 miners for over 50 years, versus the mere administrative costs of complying with the law.

21 The Court should disregard NGM’s naked threat that employees will have to repay NGM  
22 back for wages and benefits received if injunctive relief is granted. NGM Memo. 34-35. NGM  
23 cites zero authority for its offensive proposition that companies charged with committing ULPs  
24 can turn around and extract the costs of compliance from the very employees whom the Act is

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25  
26 <sup>12</sup> NGM’s claims regarding the percentage of Newmont employees who paid union dues, NGM  
27 Ex. C, App. I p. 020, are irrelevant. The NLRB does not consider such evidence in determining  
28 whether an employer has unlawfully withdrawn recognition. *Crete Cold Storage*, 354 NLRB  
1000, 1000 n.2 (2009).

1 intended to protect. *But see* NRS 608.100 (prohibiting employers from recouping wages from  
2 employees). Further, under the Board’s requested order, rescission of NGM’s unlawful unilateral  
3 changes would occur only at the Union’s request. NLRB Pet. 11. NGM’s threat only serves to  
4 show how low NGM will stoop to evade its legal obligations.

5 NGM’s claims regarding the costs of injunctive relief to the company should be taken  
6 with a grain of salt.<sup>13</sup> All that will be required of NGM is to comply with the law. *See Frankl v.*  
7 *HTH Corp.*, 693 F.3d 1051, 1066 (9th Cir. 2012) (“HTH will face little hardship by being  
8 required to do simply what the law demands.”); *Rubin v. Vista Del Sol Health Servs.*, 80  
9 F.Supp.3d 1058, 1107 (C.D. Cal. 2015). The Ninth Circuit has weighed the very harms cited by  
10 NGM here against the irreparable harm to the employees and to the collective bargaining process  
11 – and routinely has found such concerns insufficient to risk allowing “the alleged[] unfair labor  
12 practice[s] to reach fruition and thereby render meaningless the Board’s remedial authority.”  
13 *Miller*, 19 F.3d at 460; *see also Coffman*, 895 F.3d at 728 (“preservation of the [pre-ULP] status  
14 quo” outweighed the employer’s “hardship” in being “forced to recognize and bargain with the  
15 Union” and “in rescinding all unilateral changes”); *Small*, 661 F.3d at 1196. This rationale  
16 applies with particular force here, where NGM assumed the operations of a long-unionized  
17 company and then withdrew recognition from the established Union in the middle of a contract  
18 term at its own peril. NGM was on notice that, if found to have committed ULPs, it would have  
19 to unwind its unilateral changes.

20 Here, because a final order cannot undo much of the harm already exacted, “any harm to  
21 the Company from the bargaining order is offset by the value of lending relief to the Union and  
22

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23 <sup>13</sup> NGM told this Court two weeks ago that the costs of the injunction would be “one hundred  
24 million dollars” (NGM Extension Request (Dkt. 9), at 5 (emphasis in original)), but now claims  
25 that those costs are only \$35 million, NGM Memo. at 35, n.26. Additionally, NGM’s self-  
26 portrayal as the employees’ benefactor is contradicted by the record, *see, e.g.*, Ex. 11, App. 2 p.  
27 184-85 (“They don’t give us the same money Newmont gave out to us. Newmont had both plans,  
28 but they don’t give the same amount of money for health savings plan. We’ve also been paid  
late. Everybody was complaining about how payment didn’t go in on time and no one had gotten  
paid yet.”), and also worthy of skepticism, *HTH*, 650 F.3d at 1365.

1 the employees now, rather than limiting the extent of the possible future relief to the inadequate  
2 make-whole compensation[.]” *Scott v. Stephen Dunn & Assocs.*, 241 F.3d 652, 670 (9th Cir.  
3 2001), *abrogated on other grounds in Winter v. NRDC*, 555 U.S. 7, 20-22 (2008).<sup>14</sup>

#### 4 **IV. An Injunction Serves the Public Interest.**

5 In §10(j) cases, the public interest at stake is “to ensure that an unfair labor practice will  
6 not succeed because the Board takes too long to investigate and adjudicate the charge.” *Miller*,  
7 19 F.3d at 460. Because the Regional Director has made a strong showing of likelihood of  
8 success and irreparable harm, injunctive relief is in the public interest. *HTH*, 650 F.3d at 1365.  
9 Given the pervasive irreparable harm, *supra* at 15-20, such relief is essential “to preserve the  
10 Board’s remedial power.” *Miller*, 19 F.3d at 459-60; *see also HTH*, 650 F.3d at 1366. NGM’s  
11 arguments rest on the unsupported and outrageous claim that rescission of its unilateral changes  
12 would enable it to recoup moneys from its workers. Even taking NGM’s arguments at face value,  
13 the public interest is far better served by ongoing recognition of the Union that has served the  
14 Elko community for decades, uplifting wages and benefits for all workers in the industry and  
15 their families.<sup>15</sup>

#### 16 **CONCLUSION**

17 OE3 respectfully requests the Court to grant the petition and requested relief in full.

18 Dated: July 6, 2020

Respectfully submitted,

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23 <sup>14</sup> Notably, NGM focuses exclusively on rescission of its unilateral changes and fails to address  
24 the other aspects of the Regional Director’s requested relief – recognition of the Union and an  
interim bargaining order – thus waiving any arguments of injury arising from those remedies.

25 <sup>15</sup> Unions have a well-documented positive effect on the working conditions of even nonunion  
26 workers, by causing those employers to raise wages. *See, e.g., Western & Rosenfeld, Unions,*  
27 *Norms, and the Rise in U.S. Wage Inequality*, 76(4) *Am. Soc. Rev.* 513, 514, 517 (2011),  
28 *available at* [https://scholar.harvard.edu/files/brucewestern/files/american\\_sociological\\_review-2011-western-513-37.pdf](https://scholar.harvard.edu/files/brucewestern/files/american_sociological_review-2011-western-513-37.pdf).