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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
Portland Division

RONALD K. HOOKS, Regional Director of the
Nineteenth Region of the National Labor Relations
Board, for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner,

v.

NEXSTAR BROADCASTING, INC. D/B/A
KOIN-TV,

Respondent.

Civil No. 3:21-cv-00177-MO

RESPONDENT'S RESPONSE TO
10(J) PETITION

ORAL ARGUMENT
REQUESTED

TABLE OF CONTENTS

I. INTRODUCTION 1

II. SUMMARY OF REASONS INJUNCTIVE RELIEF SHOULD BE DENIED 2

III. MATERIAL FACTS 12

 A. General Background And Bargaining History..... 12

 B. Employees Become Dissatisfied With Union. Local 51 Seeks to Coerce Support. 14

 C. Company Withdraws Recognition, Grants Wage Increase, Removes Union Bulletin Boards. 15

 D. The Administrative Case Pending Before an ALJ 17

IV. ARGUMENT 19

 A. Injunctive Relief Is an Extraordinary Remedy. 19

 B. The Doctrine Of Unclean Hands Warrants Denial Of The Requested Injunctive Relief..... 21

 C. The Director’s Likelihood of Success is Less Than “Probable.” 22

 D. There Is No Likelihood Of Irreparable Harm If Injunctive Relief Is Denied. The Balance of Equities and Public Interest Weigh Against Granting The Requested Relief..... 29

V. CONCLUSION..... 32

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allentown Mack Sales & Service, Inc. v. NLRB</i> , 522 U.S. 359, 367 n. 2 (1999).....	<i>passim</i>
<i>Alliance for the Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir. 2011)	20
<i>Anderson Lumber Co.</i> , 360 NLRB 538 (2014), <i>enf'd</i> , 801 F.3d 321 (D.C. Cir. 2015)	24
<i>Avidair Helicopter Supply, Inc. v. Rolls-Royce Corp.</i> , 2009 WL 3180787, at *2 (W.D. Mo. 2009).....	6
<i>Camacho v. Camacho</i> , 1994 WL 424429 (E.D. Cal. 1994).....	4
<i>Chicago Tribune Co.</i> , 304 NLRB 259 (1991)	21
<i>Communications Workers of America v. Beck</i> , 487 U.S. 735 (1988).....	4
<i>Continental Nut Co.</i> , 195 NLRB 841 (1972)	21
<i>Fountain Lodge, Inc.</i> , 269 NLRB 674 (1984)	10
<i>Frankl v. HTH Corp.</i> , 650 F.3d 1334 (9th Cir. 2011)	20, 29, 30
<i>Green Oak Manor</i> , 215 NLRB 658 (1974)	24
<i>Highlands Regional Medical Ctr.</i> , 347 NLRB 1404 (2006), <i>enf'd</i> , 508 F.3d 28 (D.C. Cir. 2007)	24, 26
<i>Hooks v. Aim Aerospace Sumner</i> , 2018 WL 838043 (W.D. WA 2018)	12

<i>Institute of Cetacean Research v. Sea Shepherd Conservation Society</i> , 725 F.3d 940 (9th Cir. 2013). Application of the	2, 20
<i>Johnson Controls</i> , 368 NLRB No. 20 (2019)	12
<i>Levitz Furniture Company of the Pacific</i> , 333 NLRB 717 (2001)	6, 7, 23, 24
<i>McKinney v. Southern Bakeries, LLC</i> , 786 F.3d 1119 (8th Cir. 2015)	8, 9, 11
<i>Miller v. Cal. Pac. Med. Ctr.</i> , 19 F.3d 449, 460 (9th Cir. 1994)	20
<i>Moving Picture Projectionists Local 150 (Garfield Theater)</i> , 274 NLRB 30 (1985). In its Welcome Letter, the Union	28
<i>NLRB v. Savair Mfg. Co.</i> , 414 U.S. 270 (1973).....	28
<i>Republic Molding Corp. v. B.W. Photo Utilities</i> , 319 F.2d 347 (9th Cir. 1963)	3, 20
<i>Seller Agency Council, Inc. v. Kennedy Center for Real Estate Education, Inc.</i> , 621 F.3d 981 (9th Cir. 2010)	2
<i>Sharp v. Parents in Community Action, Inc.</i> , 172 F.3d 1034 (8th Cir. 1999)	6, 19
<i>SKC Electric, Inc.</i> , 350 NLRB 857 (2007)	28
<i>Small v. Avanti Health Systems, LLC</i> , 661 F.3d 1180 (9th Cir. 2011)	29, 30
<i>Southwestern Portland Cement Co.</i> , 289 NLRB 1264 (1988)	21
<i>Three Rivers Electrical, Inc.</i> , 356 NLRB 170 (2010)	23
<i>Times Publishing Co.</i> , 72 NLRB 676 (1947)	4, 21
<i>United States v. Torres</i> , 794 F.3d 1053 (9th Cir. 2015)	23

<i>Valley Health System</i> , 369 NLRB No. 16 (2020), <i>remanded on other grounds</i> , 832 Fed. Appx. 514 (9th Cir. 2020).....	25, 26
<i>Vaughan v. John C. Winston Co.</i> , 83 F.2d 370 (10th Cir. 1936)	4
<i>Wetzel v. Edwards</i> , 635 F.2d 283 (4th Cir. 1980)	4
<i>Winter v. Natural Resources Defense Council</i> , 555 U.S. 7 (2008).....	<i>passim</i>
<i>Wurtland Nursing & Rehabilitation Center</i> , 351 NLRB 817 (2007)	7, 23, 24
Statutes	
29 U.S.C. § 157.....	22
29 U.S.C. § 158(a)(2).....	31
29 U.S.C. § 158(a)(3).....	4
29 U.S.C. §§ 158(a)(5), (d).....	3
29 U.S.C. § 158(b)(1)(A).....	3
29 U.S.C. § 158(b)(3)	3
29 U.S.C. § 158(b)(5)	19
29 U.S.C. §§ 160(e), (f)	2
29 U.S.C. § 160(j).....	2

I. INTRODUCTION

This petition for injunctive relief by the Regional Director (“Director”) for the National Labor Relations Board (“Board”) arises out of an extended and ongoing labor dispute between Nexstar Broadcasting, Inc. d/b/a KOIN-TV, hereafter “KOIN” or “Company,” and National Association of Broadcast Employees & Technicians (NABET), Local 51, hereafter “Local 51” or “Union.” Over a period of thirty months from June 2017 through December 2019, the parties bargained in an effort to reach a new collective bargaining agreement covering two units of employees. In 2018 and 2019, they were assisted by a federal mediator. The negotiations were contentious, and although the parties reached tentative agreements on most issues, a few critical issues remained unresolved when 2019 came to a conclusion. The most contentious of these issues involved whether KOIN would agree to collect (through checkoff/payroll deduction) Local 51’s initiation fee (roughly \$3,000 for most employees), and health care benefits (whether specific types of coverage sought by the Union would be provided). On these two issues, the parties were at loggerheads.

Throughout the negotiations, each party filed multiple unfair labor practice charges against the other party. In the meantime, numerous employees had expressed dissatisfaction with Local 51 and the representation they were receiving. A few employees initiated an effort to oust Local 51 with the ultimate goal of perhaps replacing Local 51 with IATSE. During 2019, numerous employees approached KOIN management voluntarily and made objective statements indicating that they no longer wanted Local 51 to represent them. Based on these statements and other objective evidence that the Union no longer enjoyed majority support in either bargaining unit represented by Local 51, KOIN withdrew recognition of, and ceased bargaining with, the Union on January 8, 2020.

Based on his investigation of the dueling charges, the Director issued complaints against both KOIN and Local 51. The complaints against KOIN were heard by an ALJ in November 2020. Briefs have been filed and the case is pending a decision by the ALJ. The complaints

against Local 51 were the subject of a unilateral settlement agreement reached between Local 51 and the Director shortly before the November 2020 hearing.¹ On February 2, 2020, the Director filed his request for injunctive relief pursuant to § 10(j) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(j). Normally, the federal district courts do not have jurisdiction over cases arising under the Act. The Board is authorized to adjudicate alleged violations (unfair labor practices) of the Act. Review of Board decisions lies in the federal courts of appeals. 29 U.S.C. §§ 160(e), (f). However, under § 10(j), following the issuance of a complaint, the Board (through its Regional Director) may seek injunctive relief pending a final Board decision, and the district court has jurisdiction to issue such relief as is “just and proper.” KOIN now files its response in opposition to the Director’s petition. For the reasons discussed herein, the petition for injunctive relief should be denied.

II. SUMMARY OF REASONS INJUNCTIVE RELIEF SHOULD BE DENIED

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 24 (2008). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.* at 20. Because an injunction is at its core an equitable remedy, “traditional equitable considerations such as laches, duress and unclean hands may militate against issuing an injunction that otherwise meets *Winter’s* requirements.” *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 725 F.3d 940, 944 (9th Cir. 2013). Application of the “unclean hands” doctrine is committed to the equitable discretion of the district court. *Seller Agency Council, Inc. v. Kennedy Center for Real Estate Education, Inc.*, 621 F.3d 981, 986 (9th Cir. 2010). “[T]he court must weigh the substance of the right asserted by

¹ Two prior charges filed by KOIN against Local 51 were also determined to have merit. One resulted in a “merit dismissal” based on the Union’s agreement to provide certain requested information to KOIN. The second resulted in an ALJ Decision, affirmed by the Board, finding an unfair labor practice on the part of the Union.

plaintiff against the transgression which, it is contended, serves to foreclose that right. The relative extent of each party's wrong upon the other and upon the public should be taken into account, and an equitable balance struck." *Republic Molding Corp. v. B.W. Photo Utilities*, 319 F.2d 347, 350 (9th Cir. 1963).

The Director comes before this Court with unclean hands. He couches his petition for injunctive relief as a narrow question of whether KOIN unlawfully withdrew recognition from Local 51, thereby violating its bargaining obligation under §§ 8(a)(5) and 8(d) of the Act, 29 U.S.C. §§ 158(a)(5), (d). In fact, however, the case is neither simple nor narrow, and the Director has not come clean. While he has submitted the entire administrative record, which exceeds 2,000 pages, to this Court, his request for injunctive relief and supporting memorandum wholly disregard the larger legal and factual issues raised in that administrative proceeding, and focus solely on a small piece of the litigation; i.e., KOIN's decision to withdraw recognition and cease bargaining with the Union on January 8, 2020. Thus, in his memorandum of points and authorities, he makes only a passing mention of the bargaining between the parties (Memo at pp. 3-4). There is no reference to the fact that after thirty months of bargaining, including two years with the assistance of a federal mediator, KOIN and Local 51 had largely reached a stalemate, primarily over two issues—the Union's request for specific health care coverage not provided by the Company's national plan and Local 51's insistence that KOIN collect the Union's initiation fee, which amounted to three weeks of pay, or roughly \$3,000, from each newly hired employee. The Director does not advise this Court that he issued (or was prepared to issue) no less than three unfair labor practice complaints against Local 51 alleging that the Union bargained in bad faith (thereby violating §8(b)(3) of the Act, 29 U.S.C. § 158(b)(3)) by refusing on multiple occasions to furnish relevant information requested by KOIN and unlawfully coerced employees (thereby violating § 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A)) by falsely informing

employees that they were required to join the Union in order to maintain their job, when in fact, there was no collective bargaining agreement, and no valid union security clause, in effect.²

There is no mention in the Director's memorandum of the Board decision finding the Union guilty of bad faith bargaining by refusing to furnish relevant information requested by KOIN or of the November 2020 unilateral settlement agreement between the Director and Local 51 in which the Union agreed to remedy additional 8(b)(1)(A) and 8(b)(3) violations. The Director does not inform this Court that under the Act, one party's "bad faith" bargaining constitutes a legal defense to allegations of "bad faith" bargaining by the other party, *Times Publishing Co.*, 72 NLRB 676 (1947), and that KOIN has raised, and the parties are litigating, in addition to the Union's bad faith that has already been found, whether the Union's initiation fee is "excessive" and thus unlawful under § 8(b)(5) of the Act and whether the Union, in an effort to curb ongoing efforts by employees to oust Local 51, unlawfully coerced employees by offering to waive its exorbitant initiation fee, but only if they joined the Union and began paying dues during a limited window period.

KOIN does not contend that the Director has deliberately sought to mislead this Court. If one takes the time, the facts cited above can be gleaned from the record that has been filed with the court. At the same time, however, he has not been fully forthcoming. The Director is not free to gerrymander his request for injunctive relief by carving out those parts of the case that he finds inconvenient to his request. Yet that is precisely what his petition seeks to do. He is asking this Court to piecemeal a case that simply cannot be divided into separate parts. *See Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980) ("a preliminary injunction may not be availed of to secure a piecemeal trial"); *Vaughan v. John C. Winston Co.*, 83 F.2d 370, 374 (10th Cir. 1936) ("equity does not do things piecemeal"); *Camacho v. Camacho*, 1994 WL 424429, at *7 (E.D.

² Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), prohibits discrimination based on an employee's union activities or membership, but does permit employers and unions to enter into agreements requiring employees to become Union "members," which is itself a "term of art" that is generally restricted to financially supporting the union. *See Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

Cal. 1994) (“In exercising equity, the court should avoid piecemeal litigation and try to dispose of the entire controversy”). The withdrawal of recognition issue does not stand alone. It was the culmination of thirty months of bargaining and can be determined only in the context of the much larger bargaining case, which includes the Union’s various unlawful acts (some already established, some settled, and some raised as a defense by KOIN):

<u>Allegation</u>	<u>Status</u>
Issued “Welcome Letter” unlawfully informing employees they were required to join union and pay dues and fees	Settled October 2020
Charged employees an initiation fee that is “excessive” and violative of §8(b)(5)	Being litigated as affirmative defense
Unlawfully offered limited waiver of initiation fees if employee joined in October 2019	Being litigated as affirmative defense
Refused to bargain over whether Company would collect Union’s initiation fee	Being litigated as affirmative defense
Refused to furnish relevant information requested on June 7, 2018	Merit dismissal based on Union’s agreement to furnish information
Refused to furnish relevant information requested on December 14, 2018	Board Decision
Refused to furnish relevant information requested on June 26, 2019	Settled October 2020
Refused to furnish relevant information requested on August 15, 2019	Settled October 2020

The Director, however, carefully refrains from asking this Court to intervene in the larger bargaining case. That is perhaps understandable given the length of the record and the complexity of the legal issues, all of which are currently pending before an ALJ. In due course,

the ALJ will issue a decision, which can then be reviewed by the Board, and if appropriate, a remedial order can be issued. The Board has “very potent remedial powers.” *Sharp v. Parents in Community Action, Inc.*, 172 F.3d 1034, 1040 (8th Cir. 1999).

While the limited scope of the Director’s petition is intuitively understandable, it is neither just nor proper. This Court is not in a position to decide the Director’s request for limited injunctive relief in a vacuum. Yet it also is not in a position to fairly assess all of the allegations, issues, and defenses raised in the larger bargaining case. The complexity of these issues in conjunction with the limited scope of this Court’s jurisdiction in Board proceedings and the Director’s limited request for relief counsel against undertaking any such assessment. That presumably is why the Director has chosen not to present the larger bargaining case to this Court. But it also is why this Court should deny the petition for injunctive relief. *See Avidair Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 2009 WL 3180787, at *2 (W.D. Mo. 2009) (court declined to order piecemeal injunctive relief as it “lacks the information necessary to untangle that web and is unwilling to risk an injunction that sweeps broader than necessary”). The Director is not free to have his cake and eat it too. KOIN requests that this Court deny the petition on general equitable grounds.

Injunctive relief also is inappropriate under the four-factor *Winter* analysis. Initially, the Director’s contention that he has a high probability of success on the withdrawal of recognition issue misses the mark for two reasons. First, he is incorrect in his pejorative characterization of KOIN’s evidence offered to show that the Union had in fact lost majority support. The Board’s decision in *Levitz Furniture Company of the Pacific*, 333 NLRB 717 (2001) merely required that the employer present “objective” evidence that the union had lost majority support. The word objective “has nothing to do with the *force*, as opposed to the *source*, of the considerations supporting the employer’s doubt.” *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 367 n. 2 (1999). Requiring that the employer’s evidence be “objective” imposes “on the employer the burden of showing that it was supported by evidence external to the employer’s

own (subjective) impressions.” *Id.* “*Levitz* said nothing to restrict the type of evidence that could meet this standard” and the employer’s evidence need not be “unambiguous.” *Wurtland Nursing & Rehabilitation Center*, 351 NLRB 817, 818, n. 4 (2007). Loss of majority support need only be established by a “preponderance of the evidence.” *Id.* Here, KOIN relies upon multiple statements by employees, all objective in nature, indicating their desire to oust Local 51 as their bargaining representative, as well as other evidence tending to show that employees did not support Local 51. All of this evidence was external to KOIN’s subjective views.

Second, even if KOIN’s evidence is ultimately determined by the Board to fall short of establishing that the Union lost majority support, there remains the impact of the Union’s own unlawful conduct. If, as KOIN contends, and as the Director has already found in certain instances, Local 51 engaged in a pattern of bad faith bargaining and unlawful coercive conduct over the entire course of bargaining leading up to the withdrawal of recognition, such unlawful conduct constitutes a valid defense and precludes any finding of bad faith on KOIN’s part. It also constitutes “unclean hands” on the part of the Union, who stands to be the beneficiary of the requested injunctive relief. The Union’s unlawful conduct is not peripheral to the withdrawal of recognition issue. Indeed, much of it is directly related to the effort by employees to oust Local 51. In particular, in 2019, Local 51 sent out letters falsely and unlawfully telling employees who had not joined the Union that they were required to join the Union under penalty of termination if they failed to do so. Local 51 also sent out letters in September 2019 offering to waive the Union’s exorbitant initiation fee, but only if the employee joined the Union and began paying dues during the month of October 2019. In that fashion, the Union sought to unlawfully coerce employees and thwart their efforts to eliminate Local 51 as the exclusive bargaining representative.

It is not the role of this Court to determine the “merits” of the Director’s Complaint or KOIN’s defenses. That will ultimately be determined by the Board. What is important for purposes of this proceeding, however, is that the Union’s alleged bad faith and coercive conduct

does not disappear simply because the Director wishes to ignore it. It goes directly to the heart of the appropriateness of the requested injunctive relief. The Director's likelihood of success is an open question.

But regardless of how this Court views the Director's likelihood of success, his petition fails because there is no persuasive evidence that "irreparable harm" will occur in the absence of injunctive relief. "An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32. There must be a "likelihood," not merely a "possibility," of irreparable harm. *Id.* at 22. The Director relies upon "presumed" harm to the collective bargaining process if he must await a final Board decision to obtain relief. The court decisions that he relies upon are wholly distinguishable, and in this case, these asserted harms are speculative and remote. The Union's loss of support occurred long before KOIN withdrew recognition. This loss of support centered around the lack of progress in the ongoing negotiations, the size of the Union's initiation fee, and dissatisfaction with the representation provided by Local 51's President and Chief Negotiator, Carrie Biggs-Adams. Preexisting loss of employee support cannot be a basis for establishing irreparable harm. *See McKinney v. Southern Bakeries, LLC*, 786 F.3d 1119, 1124-1125 (8th Cir. 2015).

Moreover, the Director's assertion of irreparable harm begs the question: *How will an order from this Court protect the Board's remedial powers or the collective bargaining process?* The order requested by the Director would require KOIN to resume recognizing and bargaining "in good faith" with the Union. But to what end? In the scenario envisioned by the Director, there is no resolution, even in a preliminary fashion, of the larger bargaining case that is pending before the ALJ. How can the parties be expected to bargain in any meaningful fashion without knowing how the Board views each party's prior bargaining conduct? An order from this Court cannot require either party to abandon its position on any substantive issue. A prime example is the subject of the Union's initiation fee. The Union's position consistently has been that it is none of the Company's business. In response, the Company has said that you can charge

whatever you want (jack it up to \$10,000) but we are not going to collect it. So, how does an order to resume bargaining in “good faith” resolve that disagreement? What the Director requests that this Court order is bargaining for the sake of bargaining.

If the parties’ disagreements were merely substantive, perhaps further bargaining might conceivably resolve such disagreements. But here the substantive disagreements are inseparable from the legal bargaining issues raised in the administrative complaint and by the Company’s Answer, issues that will not be resolved by the requested injunction. Thus, the Director contends in the administrative proceeding that KOIN unlawfully refused to bargain in good faith over health care benefits. (Doc. 2-1, ¶ 10). He further alleges that the Company engaged in unlawful “surface bargaining,” in part because of its bargaining position regarding the Union’s initiation fee and whether the Company would collect that fee. (Doc. 2-1, ¶ 12). The Director’s requested injunction, however, leaves these legal issues (as well as the Company’s defenses based on the Union’s unlawful conduct) unresolved. Resuming bargaining in these circumstances would be pointless and ineffective.

“The relevant inquiry is whether this is the rare case when a preliminary injunction is necessary to preserve the effectiveness of the ordinary adjudicatory process.” *Southern Bakeries*, 786 F.3d at 1124. “The employees’ lack of union representation while awaiting the Board’s action is not enough to make this a ‘serious and extraordinary’ case that requires injunctive relief.” *Id.* at 1125. “There is no indication in this case that allowing the ordinary adjudicatory process to run its course would significantly undermine the Board’s ability to remedy the alleged unfair labor practices.” *Id.* Local 51 is a long-standing union, which represents employees of a number of large employers along the entire west coast. (Doc. 2-2, pp. 45-46). No employees have been terminated or replaced by non-union employees and there has been no reduction in benefits. And, as noted, the Union lost majority support *before* KOIN withdrew recognition. *See id.* at 1124-1125 (distinguishing cases where “an employer replaces pro-union employees with

nonunion employees, continues to blatantly violate the Act, or refuses to bargain and unilaterally withdraws recognition from a union that has demonstrated support”).

The point is that the harm to the collective bargaining process that the Director purportedly seeks to prevent, if it exists at all, cannot be remedied by the limited injunction that the Director requests this Court to enter. Such an injunction will not resolve (preliminarily or otherwise) the substantive bargaining issues that have precluded the parties from reaching an agreement. It will not resolve the larger legal issues that are being litigated in the administrative proceeding and that directly impact the bargaining process. It will not increase Local 51’s ability to communicate with KOIN employees. And it will not protect the Board’s ultimate remedial powers. In fact, an injunction, at least arguably, will further harm the bargaining process.³ Ordering two parties who have been at odds for thirty months and who each accuse the other of bargaining in bad faith to resume their bargaining relationship *before* the legal and factual issues that resulted in the severing of the relationship have been resolved is both pointless and likely to exacerbate each party’s frustrations and disagreements with the other party. It is akin to ordering a husband and wife who have separated and who are each accusing the other of misconduct to resume living together while the disputed issues are being litigated. It is simply unworkable and unproductive. Similarly, ordering KOIN to restore the Union bulletin boards might be symbolic, but it would hardly increase the Union’s ability to communicate with employees. The Union bulletin board is largely a relic of the twentieth century. All KOIN employees have email addresses and smart phones. The Union communicates by email and text message, not by posting notices.

³ It bears noting that the Board requires that parties meet in person for collective bargaining in or around the locale in which the represented employees work because it is more effective than remote bargaining and permits represented employees to fully participate in the process. *Fountain Lodge, Inc.*, 269 NLRB 674 (1984). As a result of the COVID-19 pandemic, in-person bargaining is not realistic. While nothing would preclude a court from ordering remote bargaining if necessary to preserve the Board’s remedial authority, it is not favored.

In summary, although granting the injunctive relief requested by the Director would “accelerate” the ultimate remedy if he should ultimately prevail before the Board, it will not preserve or protect the Board’s remedial authority. *Southern Bakeries*, 786 F.3d at 1125. There is absolutely no basis for believing that an order to bargain by the Board in six or twelve months will be any less effective than such an order now. The matter is already pending before an ALJ and the Board has the ability to expedite its review process if it feels that time is of the essence. And at that time, there will be a complete resolution of all issues. The parties can thus bargain with full knowledge of their legal rights and obligations. There simply is no reason for this Court to intervene at this stage of the process.

The balance of equities and the public interest largely mirror the other factors discussed above. It is not so much that an injunction will cause “hardship” on either party. In that respect, the burdens on the Company and the Union are in equipoise. The equities, however, in this case favor denial of an injunction because the petition itself is an inappropriate attempt to break off a small piece of a much larger case. Further, what the Director asks this Court to do serves no meaningful purpose, leaves the larger issues wholly unresolved, and ignores the Union’s own unclean hands. The Director disputes KOIN’s evidence that the Union lost majority support, but ignores that during all of 2019, the Union was unlawfully telling employees that they had to join the Union and pay the Union’s dues and initiation fee when that was both untrue and unlawful. There is a certain level of hypocrisy in the Director’s position: “Local 51 still enjoys majority support. Please disregard the fact that the Union was falsely and unlawfully telling employees that if they did not join and financially support the Union, they would be fired.”

It also is significant that the Union could have resolved the representation issue in or around February 2020 by filing a representation petition with the Director. Indeed, it appears that Local 51 initially considered doing so. Thus, following the withdrawal of recognition, it began circulating a petition for employees to sign indicating that they did want Local 51 to represent them. But for reasons that are undisclosed, the Union chose not to file its petition with the

Director. Had it done so, a secret-ballot election could have been conducted in short order, and there would have been a quick and definitive resolution of the representation issue. This is the course that the Board has held, albeit in a slightly different factual context, is favored (over unfair labor practice litigation) for resolving disputes of this nature. *Johnson Controls*, 368 NLRB No. 20 (2019). Requesting injunctive relief to resolve a dispute that can easily and fairly be resolved simply by filing a petition seeking an election cannot be characterized as equitable or in the public interest. *See Hooks v. Aim Aerospace Sumner*, 2018 WL 838043, at *3 (W.D. WA 2018).

For these reasons, KOIN requests that this Court deny the Director's petition for injunctive relief under § 10(j) of the Act. The administrative process should be permitted to continue as Congress intended. In due course, the Board will issue an appropriate order, which may be reviewed in a federal court of appeals.

III. MATERIAL FACTS

A. General Background And Bargaining History

Nexstar is an owner and operator of local television stations affiliated with the major broadcast networks. Based in Irving, Texas, it operates stations in cities as large as Los Angeles to as small as Brownsville, Texas. At the time of the hearing, Nexstar operated 197 stations. This number had grown substantially as a result of two large acquisitions: Media General in 2016 and Tribune Broadcasting in 2019. The Media General deal resulted in the acquisition of KOIN. (Doc. 2-2, pp. 578-579). At the time of this acquisition, KOIN was party to a collective bargaining agreement with Local 51, which was effective from July 29, 2015, to July 28, 2017 (the "Expired CBA"). (Doc. 3-1, p. 5, 11-49).⁴

Negotiations for a successor agreement began on June 21, 2017. Thereafter, the parties would meet on 42 dates, typically 2 days at a time. An FMCS Mediator first joined the parties for bargaining starting at the March 22, 2018 session and participated in every session thereafter,

⁴ The CBA was extended by mutual agreement on two occasions, but was allowed to expire in September 2017. (Doc. 3-1, p. 5).

through the conclusion of bargaining in December 2019. (Doc. 3-1, pp. 5-6). Negotiations were often tense and chipper at times, particularly in 2017 and early 2018 prior to the arrival of the federal mediator. (Doc. 2-2, p. 319). Despite their difficulties, the parties eventually were able to come to tentative agreements on a large number of subjects. (Doc. 1-1, pp. 402-449). As the parties entered into calendar year 2019, the only issues that remained unresolved were Paid Leave, Insurance/Benefits, Daily Overtime, 6th & 7th Day Pay, Union Security, Union Business, Indemnification Letter, and Wages. (Doc. 3-1, pp. 207-208, 213-226).

2019 was a tumultuous year in which little positive was accomplished at the bargaining table. The two biggest issues by a long stretch concerned Union Security/Union Business and Health Care benefits. On these issues, the parties could never bridge their fundamental disagreements. Regarding Union Security/Union Business, the expired contract contained provisions requiring employees to become Union members and requiring the Company to collect (through dues deduction) the Union's membership dues and initiation fees. (Doc. 3-1, pp. 16-18). The Union's initiation fee, and whether KOIN would agree to collect it, became a major bone of contention. Local 51's initiation fee was, in the Company's view, exorbitant compared to other Local Unions with whom Nexstar had contracts. This initiation fee was equal to three weeks of pay, which was roughly \$3,000 per employee. The Union's position throughout the negotiations was that the initiation fee was none of the Company's business and that the Company should continue to collect it. KOIN acknowledged that the amount of the fee was for the Union to determine, but took the position that the Company would not agree to collect such an exorbitant fee. The Union would have to collect the fee itself and the Company would not terminate an employee who did not pay it. The parties could never resolve this disagreement. (Doc. 3-1, pp. 108-187, 240-342; Doc. 2-2, pp. 631-636).

Regarding health care benefits, the overriding issue was the scope of coverage that would be provided. The Company's national health care plan did not provide the coverage sought by the Union. KOIN offered to consider other plans that might provide such coverage, if they were

cost effective, and the parties did explore other plans, but few provided such coverage and those that did were cost prohibitive. No resolution was reached despite extensive bargaining. (Doc. 3-1, pp. 200-204, 240-302).

B. Employees Become Dissatisfied With Union. Local 51 Seeks to Coerce Support.

As of early 2019, there were a large number of employees who had been hired since the contract terminated in September 2017 and who had neither joined the Union nor paid its initiation fee. (Doc. 10-1, p. 460). From the perspective of many of these employees, their interests were not aligned with, and indeed were antagonistic to, the Union's interests. Not surprisingly, many employees began discussing how to oust Local 51. It was not that employees were anti-union per se. Rather, they were anti-Local 51, and their long-term goal was to replace Local 51 with a different union, perhaps IATSE. (Doc. 2-2, pp. 774-786).

Perhaps recognizing its dwindling support, in late February 2019, Local 51 sent out "Welcome to NABET-CWA" letters to newly hired employees who had not yet joined the Union. (Doc. 10-1, pp. 452-458). In the Welcome Letter,⁵ the Union stated:

Welcome to NABET-CWA. According to our records, KOIN-TV ("Company"), with whom we have a collective bargaining agreement, has recently employed you. Article 2 of the Agreement requires that an employee shall within thirty (30) calendar days after the date of hire; make application to pay their financial obligation.

The letter went on to define the employee's dues and initiation fee obligations. It stated that the initiation fee would be reduced by 25% if paid within thirty (30) days. Otherwise, the employee could pay the fee over time by signing a checkoff form authorizing a deduction of 8% pay per paycheck until fully paid.

Inasmuch as there was no contract in place and thus no obligation to join the Union or pay dues or initiation fees, KOIN filed an unfair labor practice charge (19-CB-257037) alleging

⁵ While we do not know how many employees actually received this letter, the record does reflect that 17 employees who remained employed as of January 8, 2020, had been hired after the contract expired in September 2017. (Doc. 10-1, p. 460).

that the Union was violating § 8(b)(1)(A) of the Act by unlawfully threatening and coercing employees in the exercise of their statutory rights. This charge was ultimately determined to have merit and shortly before the administrative hearing was scheduled to commence in November 2020, the Union and the Director entered into a unilateral settlement agreement. (Doc. 4-1, pp. 313-317). On January 13, 2021—a mere 20 days before the Director filed his petition for preliminary injunctive relief—Local 51 posted the required Notice to Employees. In material part, this Notice stated:

WE WILL NOT issue you a welcome letter/packet that indicates that you must begin paying Union dues and fees within your first 30 days of employment during a contract hiatus period when there is no current contractual obligation that you do so, and **WE HAVE** already rescinded this language from our welcome letter.

To the extent we issued any welcome letters with this language after August 26, 2019, **WE WILL** inform any employees who received such a welcome letter after that date that this language has been rescinded and that they have the right to resign from any membership they signed up for in response to this letter and receive a refund of any dues paid.

WE WILL NOT fail or refuse to provide information requested by Nexstar Broadcasting, Inc., d/b/a KOIN-TV (“KOIN-TV”), which is relevant to our negotiations for a successor collective bargaining agreement.

Meanwhile, in September 2019, Local 51 made yet another effort to coerce employees who had not joined the Union by sending out a letter offering to waive the Union’s exorbitant initiation fee, but if and only if the employee joined Local 51 during the month of October 2019. Employees who chose not to join the Union in October 2019 faced the prospect of having to pay the full \$3,000 fee. (Doc. 4-1, p. 17). This letter was the subject of another unfair labor practice charge filed by KOIN and is discussed further below.

C. Company Withdraws Recognition, Grants Wage Increase, Removes Union Bulletin Boards.

On January 8, 2020, KOIN advised the Union in writing that it was withdrawing recognition from the Union in both bargaining units previously represented by the Union. The

withdrawal of recognition was based primarily on oral disaffection statements made by employees to management, as well as other indicia of lack of support for the Union. What the record reflects is that employees were dissatisfied with the representation provided by Local 51 and Biggs-Adams and were looking to replace Local 51 with IATSE. Many of these statements are reflected in a December 18, 2019 email from KOIN manager Rick Brown to KOIN General Manager Pat Nevin:

I was speaking with Douglas Key and he brought up to me that him and a group of other people were not happy with Carrie Biggs-Adams about how the negotiations were going. Douglas told me, they spoke to Carrie that they were looking at getting rid of NABET and then after a year they would look at bringing in IATSE. Douglas did mention to me that they probably would lose some things during that time, but it was better than keeping NABET. Douglas said, right now they have 12 yes votes and he stated that they only need 19 to make it pass. He also mentioned that by getting the union out for the year, that people who were being protected by the union for poor job performance should not be protected and should leave.

On a follow up conversation with Douglas, he told me that he and Brian Watkins were working on getting a vote setup in January to decertify. Douglas said that all the photogs except Ellen and Robert were against the union, especially the new photographers.

Vivian Coday and Levan Funes asked me how to get the union out of the station and who to ask about getting the cards to pass around to decertify. I gave them the number for the Right to work attorney.

Chris Thibodaux told me that he does not like the union here and will not pay their initiation fees and dues. He does not want them here and does not support the union.

Jahaad Harvey came to me asking why Carrie was sending out a letter stating that he needed to pay dues after the company stopped taking the money out of the checks. Jahaad had never paid before the letter either. He asked me if he must pay the dues because he did not support the union and wanted it out.

Tom Westarp spoke to me and wants the union out. He said that he has been talking with Douglas on the situation above.

(Doc. 10-1, p. 466).

Rick Brown and Douglas Key both testified at the hearing. Key testified that he had multiple conversations with Brown in which Key told Brown about his conversations with other employees who were dissatisfied with the Union. Based on his recall at the time of the hearing, he specifically identified Chris Thibodeaux, Brian Watkins, William (Bill) Cortez, John (Karl) Peterson, Cambrie Juarez, Robert Sherman, Andrew Bissett, and Richard Roberson as having made statements that they wanted the Union out. (Doc. 2-2, pp. 775-786). Brown verified the statements made to him that are set forth in his email. He testified that he personally had conversations with Douglas Key, Tom Westarp, James Boehme, Vivian Coday, Levan Funes, Chris Thibodeaux, Karl Peterson, and Jahaad Harvey in which they stated dissatisfaction with the Union and their desire to get the Union out. (Doc. 2-2, pp. 818-829). In addition, Pat Nevin testified that he had a conversation with Christian Montes in which he stated his dissatisfaction with the Union and asked how he could get it out. (Doc. 2-2, p. 812).

Since January 8, 2020, the Company has refused to recognize the Union as the exclusive bargaining representative of employees in the two units. Thereafter, it removed the Union bulletin boards at its facility and gave employees a 1.5% wage increase. (Doc. 3-1, p. 8).

D. The Administrative Case Pending Before an ALJ

Throughout the bargaining and continuing into 2020, each party filed multiple unfair labor practice charges against the other party. These resulted in field investigations by the Director and in some cases, appeals to the Board's General Counsel. When the dust had finally settled, formal complaints were either pending (or about to be filed) against each party. These complaints were set to be consolidated for hearing before an ALJ in November 2020. Prior to that hearing, however, Local 51 and the Director entered into a unilateral settlement agreement, in which the Union agreed to undertake the remedial action being sought by the Director. Specifically, the Union agreed to remedy the allegations that it had unlawfully refused to furnish relevant information requested by KOIN on two separate occasions.⁶ One request was related to

⁶ These were not the first times that the Union refused to furnish relevant information. On two prior occasions, the Director found that the Union unlawfully refused to furnish relevant

PAGE 17 – RESPONDENT'S RESPONSE TO 10(J) PETITION

the Union's own benefit plans, and the other request was related to the Union's initiation fees. Regarding these allegations, Local 51 agreed to furnish the requested information if and when the parties resumed bargaining. The other allegation that was the subject of this unilateral settlement related to the Union's "Welcome to NABET" letter, which had been determined to be unlawfully coercive under § 8(b)(1)(A). In order to remedy this allegation, Local 51 agreed to rescind the pertinent provisions of the letter and issue refunds to employees, upon request. (Doc. 4-1, p. 316).

As for the allegations against the Company, the administrative complaint alleged various acts of bad faith bargaining. Shortly before the ALJ hearing, however, the Director, at the direction of the Board's General Counsel, amended the complaint by withdrawing allegations that KOIN had "opposed the Union's proposal regarding union security without a legitimate business justification;" had refused to bargain over Union Security and wages; had "insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to change its dues and initiation fee structure;" and had "linked non-mandatory subjects with mandatory subjects, including Union Security, and demanded that the Union bargain over the non-mandatory subjects if Respondent were to reach agreement on the mandatory subjects." (Doc. 2-2, p. 19). What was left after this amendment were allegations that the Company had refused to discuss health insurance, had failed to meet at reasonable times and places, had denigrated the Union, had engaged in surface bargaining, and had unlawfully withdrawn recognition from the Union and made certain unilateral changes in terms of employment.

information requested by KOIN. On the first occasion, the Director determined that Local 51 failed to furnish relevant information requested on June 7, 2018. However, because at the time, the violation was considered isolated, the Director issued a "merit dismissal" based on the Union's agreement to furnish the information. (Doc. 4-1, p. 391). On the second occasion, the Director issued a complaint alleging that Local 51 unlawfully refused to furnish relevant information requested on December 14, 2018. This case was litigated, and the ALJ, affirmed by the Board, subsequently found that the Union had violated its good faith bargaining obligation. (Doc. 4-1, pp. 368-385).

Although the Director had settled certain allegations against the Union and had dismissed certain other charges filed by KOIN, this did not eliminate these allegations from the administrative proceeding. It is well established that “bad faith” by the union constitutes an affirmative defense to allegations of “bad faith” on the part of the employer. It is further established that an employer may raise the Union’s unlawful conduct as an affirmative defense even if such allegations have been settled or dismissed by the Director. And in fact, KOIN raised as an affirmative defense numerous acts of unlawful conduct by Local 51. These acts included the allegations that were the subject of the unilateral settlement agreement between Local 51 and the Director, as well as the following: (1) Local 51 unlawfully coerced and restrained employees through its September 2019 limited offer to waive initiation fees; (2) Local 51 violated § 8(b)(5) of the Act, 29 U.S.C. § 158(b)(5), by charging an initiation fee that was “excessive;” (3) Local 51 bargained in bad faith by insisting that the Company collect its excessive initiation fee; and (4) Local 51 engaged in unlawful surface bargaining. (Doc. 2-1, pp. 57-61).

Thus, the administrative proceeding that is pending before the ALJ is not a simple “withdrawal of recognition” case. Rather, it involves a panoply of allegations of bad faith bargaining and unlawful coercion on the part of both the Company and the Union. The withdrawal of recognition issue does not stand independent of these much larger bargaining issues.

IV. ARGUMENT

A. Injunctive Relief Is an Extraordinary Remedy.

Injunctions under Section 10(j) of the Act are appropriate only in the “rare” and “extraordinary” case where “the delay inherent in completing the adjudicatory process will frustrate the Board’s ability to remedy the alleged unfair labor practices.” *Parents in Community Action*, 172 F.3d at 1037, 1039. “Thus, the irreparable harm to be addressed under § 10(j) is the harm to the collective bargaining process or to other protected employee activities if a remedy must await the Board’s full adjudicatory process.” *Id.* at 1038.

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that the injunction is in the public interest.” *Winter*, 555 U.S. at 21. All four factors must be established by the plaintiff. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). In *Winter*, the Supreme Court rejected the Ninth Circuit’s position that if the plaintiff’s likelihood of success is “strong,” an injunction may issue even if there is only a “possibility” of irreparable harm. 555 U.S. at 21-22. The Ninth Circuit continues to apply a sliding scale analysis under which the degree of likelihood of success influences how strongly the balance of hardships would need to tilt in the plaintiff’s favor. *Alliance for the Wild Rockies*, 632 F.3d at 1134. The likelihood of success continuum appears to range from negligible to probable. Thus, at a minimum, the Director’s likelihood of success must be better than “negligible.” This minimum threshold can be satisfied “by producing some evidence to support the unfair labor practice charge, together with an arguable legal theory;” i.e., that “there are serious questions going to the merits.” *Frankl v. HTH Corp.*, 650 F.3d 1334, 1356 (9th Cir. 2011) (quoting *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994) (en banc)). However, if the Director’s likelihood of success is less than probable, but better than negligible, “then he must show that the balance of hardships tilts sharply in his favor, as well as showing that there is irreparable harm and that the injunction is in the public interest.” *Id.*

Because an injunction is an equitable remedy, traditional equitable considerations, including “unclean hands,” may warrant denial of “injunction that otherwise meets *Winter*’s requirements.” *Institute of Cetacean Research*, 725 F.3d at 944. Of course, the conduct alleged to constitute unclean hands must be related to the transaction or conduct that is the source of the plaintiff’s claims. “[T]he court must weigh the substance of the right asserted by plaintiff against the transgression which, it is contended, serves to foreclose that right. The relative extent of each party’s wrong upon the other and upon the public should be taken into account, and an equitable balance struck.” *Republic Molding Corp.*, 319 F.2d at 350.

B. The Doctrine Of Unclean Hands Warrants Denial Of The Requested Injunctive Relief.

The Director presents his request for injunctive relief as if it were a narrow issue unto itself. In truth, however, KOIN's decision to withdraw recognition and cease bargaining with Local 51 occurred at the culmination of a thirty-month period of negotiations between KOIN and Local 51. During this extended period of negotiations, Local 51 engaged in an ongoing pattern of bad faith bargaining, as well as other unlawfully coercive conduct designed to undermine the employees' freedom to remove a bargaining representative with whom they were dissatisfied. The Director acts as if the Union's own unlawful conduct is irrelevant. The opposite is true. Thus, it is well settled that a union's bad faith bargaining constitutes a valid defense to allegations of bad faith on the part of the employer. The seminal case in this area is *Times Publishing Co.*, 72 NLRB 676 (1947), where the Board stated:

The test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table. It follows that . . . a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.

72 NLRB at 683.

This is true even when the Director dismisses or settles charges making the identical allegations. *E.g.*, *Chicago Tribune Co.*, 304 NLRB 259, 260 (1991). The Board, in a number of cases, has found that a union's bad faith bargaining precluded any testing of the employer's good faith. *E.g.*, *Southwestern Portland Cement Co.*, 289 NLRB 1264 (1988), *Continental Nut Co.*, 195 NLRB 841, 868 (1972).

Here, the Union entered into an agreement with the Director in November 2020 in which it agreed to settle allegations that it had bargained in bad faith by refusing on multiple occasions to furnish relevant information requested by KOIN. The Union also agreed to settle allegations that it unlawfully coerced employees throughout 2019 by informing them that they were required

to join the Union and support it financially in order to maintain their employment. In addition to the Union's conduct that the Director concedes was unlawful, KOIN has alleged as a defense, and the parties are litigating, whether Local 51 engaged in other unlawful conduct. This conduct is directly related to and inextricably intertwined with the Director's allegation that KOIN unlawfully withdrew recognition from the Union, and is discussed below in relation to the discussion regarding the Director's likelihood of success.

All four *Winter* factors must be analyzed through the prism of the Union's own unclean hands and unlawful conduct. KOIN contends that when this analysis is undertaken, it becomes clear that the request for injunctive relief should be denied. This is a complex case which has already been presented to an Administrative Law Judge. Her decision can then be reviewed by the Board itself, and the Board's decision can be reviewed by a federal court of appeals. The administrative process should be allowed to run its due course.

C. The Director's Likelihood of Success is Less Than "Probable."

The first *Winter* factor focuses on the Director's likelihood of success. The court, of course, is not charged with actually deciding the merits of the case. Rather, it is required to assess the plaintiff's likelihood of success on a sliding scale ranging from "negligible" to "probable." Although the Director argues that his likelihood of success is high and almost certain, that argument is based on an incorrect characterization of the governing legal standard, as well as a complete discounting of the Union's own unlawful conduct.

A certified or recognized union has no right to lifetime tenure. Section 7 of the Act, 29 U.S.C. § 157, guarantees employees the right to choose whether or not to be represented. Subject to certain timeliness constraints, employees are free to remove or replace a union as their exclusive bargaining representative. There are multiple avenues through which employees can remove or replace an incumbent union. For example, a rival union might file its own representation petition with the Board, or employees may file a decertification petition with the Board. In certain circumstances, an employer may lawfully withdraw recognition from an

incumbent union. Over the years, the legal predicate for doing so has changed. For many years, employers could do so based on a reasonable “good-faith doubt” that the incumbent union continued to enjoy majority support. *See Allentown Mack, supra*. In *Levitz, supra*, the Board overruled its prior “good-faith doubt” standard for withdrawing recognition. Instead, “an employer may rebut the continuing presumption of an incumbent union’s majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.” 333 NLRB at 725.

While a petition signed by a majority of unit employees stating that they no longer wish to be represented by the union is the most common means of establishing actual loss of majority status, it is not the exclusive means of doing so. Indeed, in *Levitz*, the Board opined: “We emphasize that an employer with objective evidence that the union has lost majority support—*for example, a petition signed by a majority of the employees in the bargaining unit*—withdraws recognition at its peril.” (Emphasis added). *Id.* Importantly, “*Levitz* does not require that the evidence proving loss of majority be ‘unambiguous.’ An employer must prove loss of majority by a preponderance of the evidence.” *Wurtland, Nursing*, 351 NLRB at 818.

Contrary to the Director’s contention, the evidence relied upon by KOIN is neither inadmissible nor non-probative simply because it consists of oral statements made by employees to managers. As to the admissibility of the evidence, the Board does not strictly follow the Federal Rules of Evidence, and hearsay often is allowed into the record. *Three Rivers Electrical, Inc.*, 356 NLRB 170, n. 4 (2010). Indeed, a petition signed by employees is itself quintessential hearsay. It is an out-of-court statement offered to prove the truth of the matter asserted. The fact that it is a written, rather than oral, statement does not alter its hearsay nature. *United States v. Torres*, 794 F.3d 1053, 1059 (9th Cir. 2015). Yet written petitions are routinely accepted as probative evidence of employees’ desires. The question in all withdrawal of recognition cases is not whether the employer’s evidence is written or oral in nature. It is the objective nature of the evidence and the most reasonable interpretation of that evidence. Subjective evidence consisting

of the employer's general impressions regarding support for the union is not probative. Similarly, the Board does not permit a party to call employees as witnesses to testify regarding whether or not they want the union to represent them. Such evidence is not "hearsay," but it is neither admissible nor probative because it is subjective in nature and not capable of verification. Further, it suffers from the fact that the testimony inevitably comes months or even years after the actual withdrawal of recognition. *Highlands Regional Medical Ctr.*, 347 NLRB 1404, 1407, n. 17 (2006), *enfd*, 508 F.3d 28 (D.C. Cir. 2007). Statements, whether oral or written, by employees that the employer actually relied upon, however, are both relevant and probative. *See Allentown Mack*.

The Board's decision in *Anderson Lumber Co.*, 360 NLRB 538 (2014), *enfd*, 801 F.3d 321 (D.C. Cir. 2015) is instructive. In that case, applying the Board's decisions in *Levitz* and *Wurtland*, Judge Cracraft, affirmed by the Board, considered the impact of out-of-court statements by 8 of the 15 unit employees. She found that 4 of the statements, which were to the effect that the employees wished to resign from the Union or no longer be a union member, were unambiguous, but insufficient to establish that the employees no longer desired representation. She found the statements of the other 4 employees to the effect that the employee no longer wished to be a part of the Union to be ambiguous. Nevertheless, she concluded that "the more reasonable interpretation of these statements is that these four employees no longer desired to be represented by the Union."

Judge Cracraft specifically relied upon the Board's pre-*Levitz* decision in *Green Oak Manor*, 215 NLRB 658 (1974). Thus, she observed that in that case the employer relied on oral statements from a majority of unit employees that they did not want the union or did not want any part of the union. The Board adopted the administrative law judge's conclusion, *id.* at 663-664, that these statements meant that employees were dissatisfied with union representation and no longer desired the union to represent them. 360 NLRB at 543.

Clearly, contemporaneous oral statements by employees are as relevant, admissible, and probative as contemporaneous written statements. Indeed, one might convincingly argue that volunteered oral statements by individual employees are far more persuasive than a petition to which employees merely affix their signature. Thus, the Director is incorrect insofar as he contends that the evidence of actual loss of majority support must be unequivocal and in writing. This is the same error that the Board committed in *Allentown Mack*. The Board may not require proof beyond what its legal standard fairly demands. Actual loss of majority support is a legal standard, but it says nothing about the type or quality of the evidence that will suffice to establish such a loss.

The Director asserts that the statements relied upon by the Company are “unsubstantiated.” It is not completely clear what this means. If the Director is asserting that each employee must appear in court and verify that he/she informed the employer that he/she did not support the union, that assertion lacks any legal support. It appears that insofar as the employer’s evidence must be “substantiated” or “verified,” this simply means that there must be credible evidence linking the specific statement or conduct relied upon by the employer to a specific employee. In *Valley Health System*, 369 NLRB No. 16 (2020), *remanded on other grounds*, 832 Fed. Appx. 514 (9th Cir. 2020), a case cited by the Director, the employer relied upon an on-line form that one employee had created that could be filled out indicating support for or against the union. There was no evidence, however, as to who actually filled these forms out. Anyone could complete a form by filling in an employee’s name and address, with or without that employee’s consent. The form would then automatically be submitted to the employee who created the form. There was no direct interaction or communication between the person who completed a form and the employee who created the form. Thus, the employee who collected the forms testified that she did not know, and could not verify, that any of the forms were actually filled out by the employee whose name appeared on the form. In these circumstances, there was “no real evidence to establish that the emails that were counted were in

fact submitted by the employees listed on the emails.” Thus, the Board deemed the emails to be “unauthenticated.” Similarly, in *Highlands Regional, supra*, the employer relied on a petition that merely indicated that employees sought a vote on the union. The petition did not state that the employees did not want the union to represent them and, in any event, the petition was not signed by a majority of unit employees. Further, “the hearing testimony regarding employees’ bare recollections of their sentiments for or against union representation as of April 12,” was irrelevant “because this evidence was not before the Respondent when it withdrew recognition.” 347 NLRB at 1407 n. 17. There is nothing in the Board’s decision that suggests that statements made during the relevant time period and that are linked by testimony (based on direct personal knowledge) to specific employees require some further type of authentication or substantiation.

Here, KOIN’s evidence is objective, is directly linked to specific employees, and is reasonably interpreted as demonstrating that the Union lacked majority support in either bargaining unit at the time the Company withdrew recognition on January 8, 2020. The Company’s witnesses (Rick Brown, Pat Nevin, and Douglas Key) each testified to direct conversations that they had with specific named employees. Thus, unlike the employee in *Valley Health*, they had direct interaction with each identified employee and could report precisely what each employee stated regarding the Union. This is the essence of authentication and substantiation. In the larger unit (unit 1) there were 27 employees. (Doc. 10-1, p. 460). Based on the testimony of Brown, Nevin, and Key, 14 of these employees, a majority, had made statements clearly indicating that they wanted the Union out and did not want to be represented by the Union: Thomas Westarp (Doc. 2-2, p. 803), James Boehme (Doc. 2-2, pp. 822-823), Vivian Coday (Doc. 2-2, p. 824), Levan Funes (Doc. 2-2, p. 824), Chris Thibodeaux (Doc. 2-2, p. 825), Andrew Bissett (Doc. 2-2, p. 781), Jahaad Harvey (Doc. 2-2, p. 826), Douglas Key (Doc. 2-2, p. 820) Karl Peterson (Doc. 2-2, p. 826), Richard Roberson (Doc. 2-2, p. 781), Robert Sherman (Doc. 2-2, p. 781), Brian Watkins (Doc. 2-2, p. 820), William Cortez (Doc. 2-2, p. 777), Christian Montes (Doc. 2-2, p. 812). Thus, the Union clearly lacked majority support in

Unit 1, and KOIN lawfully withdrew recognition. The Union could have challenged the Company's decision by filing a petition for an election, but it never did so.

In the smaller unit, there were eleven employees as of January 8, 2020. (Doc. 10-1, p. 460). Three of the employees in this unit (Cambrie Juarez, Kelly Doyle, and Derric Crooks) specifically advised management that they no longer wanted to be represented by the Union. (Doc. 2-2, pp. 759-766). In addition, there were four other employees (Travis Box, Erin Carey, Colin Cashin, and Sheridan Kowta) who had been hired post-September 2017 and who—despite the Union's unlawful statements that they were required by contract to join and financially support the Union and its unlawful limited offer to waive the \$3,000 initiation fee if they joined in October 2019—had refused to join or financially support Local 51. (Doc. 10-1, p. 460). KOIN contends that the most reasonable interpretation of this evidence is that these four employees did not support Local 51. Indeed, they had a substantial financial incentive for Local 51 to be ousted. Thus, at least seven of the eleven employees in unit 2 had objectively demonstrated their opposition to the Union, and KOIN lawfully withdrew recognition. The Union could have challenged the Company's decision by filing a petition for an election, but it never did so.

But even if the Company's evidence is determined to fall short of what is required, there remains the issue of the Union's own bad faith and unlawful conduct. As discussed above, the Director has determined and thus concedes that Local 51 bargained in bad faith during the relevant time period by refusing on multiple occasions to furnish relevant information requested by KOIN. He further has determined and thus concedes that during 2019, at a time when some employees were seeking to oust Local 51, the Union unlawfully coerced employees to support Local 51 by falsely informing them that they were required to join and financially support the Union. In the absence of a secret-ballot election, the question of whether a union has, in fact, lost majority support is often neither black nor white, and neither party may manipulate the results by coercing or restraining employees in the exercise of their Section 7 right to choose. Thus, an employer who assists employees in circulating a petition to oust the Union or otherwise coerces

employees by threats or promises may not lawfully rely upon the petition to withdraw recognition. In such circumstances, the Union's ostensible loss of majority support is tainted and unreliable. *SKC Electric, Inc.*, 350 NLRB 857, 862 (2007). It surely follows that an incumbent union cannot continue to maintain its representation rights in perpetuity through unlawful coercion aimed at thwarting employee free choice. As discussed above, the Board has held on multiple occasions, in a variety of contexts, that a union's bad faith conduct precludes any testing of the employer's good faith. And it certainly can create an "unclean hands" situation rendering preliminary injunctive relief inappropriate.

There also remains the other allegations of unlawful conduct on the part of the Union, all of which are being litigated in the administrative proceeding. As this Court has no jurisdiction to determine the merits of these issues, KOIN will not discuss these issues in detail. It is sufficient to say that there are significant legal questions regarding whether Local 51 also unlawfully coerced employees in September 2019, when it offered to waive its exorbitant initiation fee, but only if they joined the Union and began paying dues during the month of October.⁷ This offer was clearly coercive within the meaning of § 8(b)(1)(A). Thus, the Union coerced employee support and thwarted employee opposition by offering a limited waiver of a fee that amounted to three weeks of pay. The coercive nature of this offer is apparent: Either join the Union now and start paying monthly dues, or as soon as we get a contract, we are going to force you to cough up roughly \$3,000. This is the very type of offer that the Supreme Court condemned in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). In combination, as well as alone, the Welcome letter and the Waiver letter unlawfully coerced employees to become Union members. These letters, in conjunction with the Union's extensive bad faith bargaining, created a hostile environment for employees who were seeking to oust the Union. The Union's bad faith and illegal conduct

⁷ There also is a substantial legal question as to whether Local 51's initiation fee was "excessive" and thus unlawful under § 8(b)(5) of the Act. *See Moving Picture Projectionists Local 150 (Garfield Theater)*, 274 NLRB 30, 32 (1985). In its Welcome Letter, the Union explicitly acknowledged that "[m]any people just starting out in the industry encounter difficulties in paying the full initiation fee in one lump sum payment." (Doc. 10-1, pp. 451-458).

tainted the Union's right to represent employees and justified the Company's withdrawal of recognition, particularly in light of substantial evidence that the Union had in fact lost majority support. The Union remains free to file petitions in each unit seeking to establish that they do have majority support.

Against this background, the most that can be said is that the Director's likelihood of success is arguably better than negligible but most definitely less than probable. We now turn to the other factors in assessing whether preliminary injunctive relief is appropriate.

D. There Is No Likelihood Of Irreparable Harm If Injunctive Relief Is Denied. The Balance of Equities and Public Interest Weigh Against Granting The Requested Relief.

Likelihood of irreparable harm in the absence of injunctive relief is an essential prerequisite for such relief. Here, the Director's contentions regarding irreparable harm are not founded upon any actual evidence. The Director has offered no affidavits suggesting that the Union is weak or that the Union will not be able to regroup if the Board ultimately rules in its favor. Local 51 is a large labor organization based in San Francisco. The decline in Union support clearly began well before KOIN withdrew recognition. Thus, it cannot be attributed to the withdrawal of recognition. The Director's arguments regarding irreparable harm, balance of hardships, and public interest are all premised upon cases such as *HTH, supra, and Small v. Avanti Health Systems, LLC*, 661 F.3d 1180 (9th Cir. 2011), where the Ninth Circuit discussed the types of harm that may be inferred to ensue when an employer unlawfully refuses to bargain with a union. These decisions, however, are of little assistance here. *HTH* was an egregious first contract bargaining case in which the employer hotel engaged in an extensive course of bad faith bargaining over a 13-month period, by seeking to "exclude the labor organization from any effective means of participation in important terms and conditions of employment of its members." 650 F.3d at 1359. After thirteen months, the hotel entered into a contract with a third party to manage the hotel, which required the third party to obtain the hotel's consent to any agreement that would increase the hotel's costs by more than \$350,000. Eventually, the third

party and the union were able to negotiate close to an agreement, but the hotel refused to consent. At that point, the relationship between the hotel and the third party broke down, and the hotel terminated the management contract. The hotel then required all employees to reapply, but refused to rehire five union bargaining committee members, and it withdrew recognition from the union without any objective evidence that the union had lost majority support. In this context, the Ninth Circuit agreed that an inference of irreparable harm could be drawn from the egregious nature of the unfair labor practices. *Id.* at 1362.

Avanti Health was a successorship case. It is well established that a successor employer must continue to recognize the predecessor's union if the predecessor's employees constitute a majority of the successor's work force and if there is "substantial continuity" between the predecessor and the successor. The determination of majority status is made at the time that a substantial and representative complement of employees has been hired. In this case, the evidence was clear that at the appropriate time, a majority of the successor's employees were former employees of the predecessor. As there was no dispute regarding "substantial continuity," it was clear that the Director had established a high probability of success. In this context, the Ninth Circuit discussed the litany of harms that follow from an unlawful refusal to bargain.

HTH and *Avanti* cannot reasonably be read as requiring a district court to presume irreparable harm in every case where the alleged unfair labor practice involves a refusal to recognize and bargain with a union. Such a reading would effectively warrant injunctive relief in every case where the Director alleged an unlawful refusal to recognize and established a better than negligible chance of success. The case presented here is quite different. KOIN has presented objective evidence that Local 51 lacked majority support as of January 8, 2020. The entire course of bargaining between the parties is pending before an ALJ. If the Board ultimately determines that KOIN unlawfully withdrew recognition and that Local 51 properly continues to represent KOIN's employees, it has the power to enter a remedial order requiring KOIN to resume recognizing Local 51.

It also bears noting that an order by this Court requiring KOIN to resume recognizing Local 51 will have little, if any, meaningful effect. This is so for two essential reasons. First, despite bargaining for thirty months and having the assistance of a federal mediator for the better part of two years, KOIN and Local 51 were utterly unable to resolve the critical issues that separated them, most notably health care coverage and whether KOIN would agree to collect the Union's exorbitant initiation fee. By the time the parties broke in December 2019, the mediator was openly questioning why the parties were continuing to meet when nothing positive was being achieved. An order by this Court to resume recognizing and bargaining with Local 51 is likely to achieve nothing more than restarting a relationship that is wholly dysfunctional. This is particularly true because of the second reason. The withdrawal of recognition is but a small piece of a much larger case that involves substantial legal issues regarding the overall bargaining process. Without resolution of these larger legal questions, any resumption of bargaining will not merely be unproductive; it will be counterproductive. The basic problem is that this Court is not being asked to resolve, and has no jurisdiction over, these larger legal questions. What the Director is asking this Court to do is piecemeal a case that simply cannot be divided into separate portions. It does no good at all to resolve (preliminarily) the withdrawal of recognition issue while the larger bargaining issues remain unresolved. Indeed, the Director's request that this Court enter the fray in this very limited fashion is the basis of KOIN's contention that the Director has "unclean hands."

As for the benefits of collective bargaining touted by the Director, those benefits simply cannot be achieved by the limited injunctive relief that has been requested. Further, foisting a union on unwilling employees, who would prefer to deal with their employer directly, or who desire to change their bargaining representative, is unlawful and expressly against the public interest. 29 U.S.C. § 158(a)(2). Unlike any of the cases cited by the Director, it is undisputed that there is a substantial group of employees who clearly do not want the Union to continue to represent them. The interests of these employees are entitled to substantial weight in the

balancing process. Their rights are no less important than the rights of those employees who continue to support the Union.

V. CONCLUSION

KOIN respectfully requests that the petition for preliminary injunctive relief be denied for the reasons discussed herein.⁸

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⁸ The Director's allegations concerning certain alleged unilateral changes and unlawful threats are clearly peripheral to the larger withdrawal of recognition issue. Most of these allegations post-date the withdrawal of recognition. But for the withdrawal of recognition, it seems highly unlikely that the Director would have requested injunctive relief on these other allegations. KOIN contends that this Court should also deny injunctive relief on these claims.