UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In the Matter of ROSEMARY PYE, Regional Director of the First Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, v. THE LONGY SCHOOL OF MUSIC, Respondent.	CASE 1:10-cv-11974-PBS

RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT

INTRODUCTION[1]

In its hasty and ill-conceived pursuit of preliminary injunctive relief against The Longy School of Music ("Longy" or the "School"), the main premise of the National Labor Relation Board's ("Petitioner" or "Board") account is that Longy masterminded a ruse, in the span of five weeks (February 1, 2010 – March 5, 2010) in the form of a wide-scale realignment coupled with a wholesale curriculum shift, to punish union supporters and cut the American Federation of Teachers (the "AFT" or "Union") off at its knees.[2/] This global realignment represented a fundamental change in the scope and direction of the School that was underway well before the AFT's arrival at Longy.

1/ Each fact is supported by affidavits, as incorporated in the Factual Background section herein.

2/ The Board cannot seem to make up its mind. Based upon its specific request, the Board has already received an expedited hearing date (December 13) for the same Complaint which serves as the basis for the Petition for Injunction under Section 10(j) of the National Labor Relations Act (the "Petition") at issue here.

Indeed, the timeline and statistics behind the conduct at issue – rather than the Board's rhetoric and unsupported speculation – tell the real story here. On the heels of her hiring in 2007, Longy's President, Karen Zorn, initiated an effort to develop a strategic plan (the "Strategic Plan") for Longy, beginning in March 2008. After numerous meetings conducted by a specially appointed task force, in January 2009, Longy's Board of Trustees approved this Strategic Plan, which prompted President Zorn and the senior staff to begin analyzing criteria for faculty realignment. Focusing on the concept of a core faculty (i.e. faculty with higher teaching loads and success in recruiting students to Longy), the heads of both the Conservatory and Community Programs divisions focused upon specific criteria -- private teaching hours –– as a basis for realizing that type of faculty roster. At the same time, Longy began exploring potential merger partners on a parallel track. In September 2009, the Board of Trustees authorized President Zorn to implement the senior staff's vision, as part of the Strategic Plan, to create a "core faculty." At that same meeting in September 2009, President Zorn set a proposed date of March 15, 2010 to make the requisite faculty cuts and reassignments, and her team started meeting weekly to set the plan for effectuating these changes. By this time, Longy was in active merger discussions with Bard College ("Bard"), with the intention of having Longy become the graduate school of music at Bard.

On October 28, 2009, without any prior notice to Longy, the Union filed its representation petition. The election would have been held in December, but the Union insisted that Conservatory department chairs be included in the unit despite their numerous management responsibilities. The parties' hearing on this matter –– resulting in Longy's favor by concluding that the chairs should be excluded from the proposed

bargaining unit based upon their management functions at the School –– delayed the election until January 20, 2010. By this time, the merger with Bard was progressing quickly and the March 15th goal for the faculty realignment was fast approaching. To that end, Longy's senior staff – with no consideration of Union affiliation and consistent with their analysis adopted in writing in March 2009 – finalized the objective criteria for the faculty realignment and the new management structure of the Conservatory and Community Programs divisions. With the approval of the Board of Trustees and Bard College, Longy announced these changes and the soon-to-be merger with Bard to the entire faculty on March 5, 2010.

The result of this Strategic Plan process, which was well underway in early 2009, was a fundamental shift in Longy's operation, which also included other core program changes: (1) the phasing out of the undergraduate program; (2) the implementation of a new method for pedagogy courses; and (3) creation of the Masters of Art in Teaching. This Strategic Plan, and its attendant changes to Longy, was a core business decision that was not subject to the collective bargaining process.

As for the faculty realignment and divisional changes, the impact was a global one – with no intended or resulting disparate impact on the bargaining unit. The members of the 88-person bargaining unit actually fared better than the general faculty (including Union and non-Union members). Only 8% of the bargaining unit members did not have their contracts renewed, while 16% of the total faculty received non-renewal letters. In fact, as a result of these changes (along with the concurrent changes to the Conservatory's management structure, which added nine faculty to the bargaining unit), the total percentage of Longy faculty members considered for membership in the

bargaining unit rose from 47% to 60% of Longy's total faculty. The numbers speak for themselves.

The Board also fails to address the unexplained delay undercutting its Petition for Injunctive Relief under 10(j). The central alleged unfair labor practices occurred in March 2010. The Union did not file the underlying unfair labor practice charge until August 9, 2010. More than two months later, Petitioner issued a Complaint and Notice of Hearing on October 13, 2010. The Board requested an expedited hearing which will occur three weeks from now. On November 16, 2010 – more than eight months after the complained of conduct occurred – the Board filed the instant Petition. Thus, after all the delay on the Union's and Board's part, this hearing on the merits is now scheduled just eight weeks after the Complaint was issued and just six weeks after Longy's Answer was due. By all appearances, Petitioner has hastily brought this request for extraordinary relief to federal court in an attempt to circumvent its own administrative process, try the merits of this complex case on affidavits rather than live testimony, and place undue settlement pressure on Longy.

Under these circumstances, the Court should reject the Board's request and allow the parties to present witnesses and exhibits at the previously scheduled hearing before an Administrative Law Judge on December 13, 2010 or, in the alternative, a hearing before this Court for that same purpose.

FACTUAL BACKGROUND

I. The Longy School of Music.

The Longy School of Music, founded in 1915, is a private, non-profit school located near Harvard Square in Cambridge, Massachusetts. Longy maintains an adjunct

faculty which serves a variety of constituencies in the field of music, ranging from preschool children to graduate students. Historically, Longy has been comprised of two separate divisions: (1) the Conservatory, which offers degree and diploma programs for undergraduate and graduate students; and (2) Community Programs, a community-based school of preparatory and continuing studies, offering lessons, classes, and participation in ensembles for children and non-degree adult students. In the fall of 2009, the Conservatory enrolled 210 students, including 47 undergraduates and 163 graduate students. For the 2009-2010 school year, approximately 165 faculty members were actively teaching courses at Longy, 47 of which were considered full-time based on their teaching load.

Longy's senior executive team is comprised of the following individuals: Karen Zorn, who has been Longy's President since the spring of 2007; Wayman Chin, who has been the Dean of the Conservatory since June 2008; Miriam Eckelhoefer, Director of Community Programs at Longy; Howard Levy, Chief Financial Officer since May 2008; Steven Tremble, Vice President for Institutional Advancement; and Kalen Ratzlaff, Chief of Staff (formerly Director of Human Resources and Information Systems).

Longy's Board of Trustees consists of approximately twenty Trustees who serve three-year terms with no term limits. The Board of Trustees, chaired by Bonny Boatman, generally meets six times annually. (Zorn Aff., ¶ 9).[3/]

II. Longy's Strategic Plan and Proposed Merger with Bard College.

A. Longy's Strategic Plan.

In March 2008, President Zorn initiated the process for drafting a Strategic Plan for Longy's future (the "Strategic Plan"). A collaborative effort, President Zorn and her

[3/] The Affidavit of Karen Zorn is attached hereto at Exhibit 1.

then Chief-of-Staff, Jaime Bard, selected the following task force to lead the process: Elizabeth Anker (Faculty); Jaime Bard (President's Office); Rob Bradshaw (Student); Wayman Chin (Department Chair); Cathy Cotton (Staff); Denis Cycan (Staff); Mariko Gillan (Staff); Sarah Glenn (Staff): Franziska Huhn (Faculty); Louise Ambler Osborn (Trustee); Kalen Ratzlaff (Staff); Alexander See (Staff); Jeremy Van Buskirk (Faculty); and President Zorn. This task force met periodically from April 2008 to November 2008, in addition to hold strategic planning discussions with students, faculty, and staff, many of which were moderated by an outside consultant. (Zorn Aff., ¶¶ 11-14).

The task force wrote the rough draft of the Strategic Plan, and the final product was written by Ms. Bard, who solicited feedback on her drafts throughout the process. (Zorn Aff., ¶ 14). Overall, the Strategic Plan set the following four goals for Longy: (1) Longy is a vibrant player in the local community and global music scene; (2) Longy's programs are visionary and pragmatic, offering a nurturing yet challenging experience for students; (3) Longy has a balanced and sustainable budget; and (4) Longy has the space it needs for its programs to flourish. (Zorn Aff., ¶ 15). At a January 2009 Board of Trustees meeting, President Zorn presented a final draft of Longy's Strategic Plan – titled "Strategic Plan: a Compass for Longy's Future, 2009-2012" – which was discussed and approved by the Board of Trustees. (Zorn Aff., ¶ 16; Jesse Aff., ¶ 16).[4/] One of the enumerated goals to be achieved through implementation of this Strategic Plan was: "faculties are structured and compensated in ways that better serve our students." Another designated tactic was to "seek the optimal academic partner" to compensate for Longy's fledgling undergraduate program. Copies of the Strategic Plan were made available to the Longy community in February 2009. (Zorn Aff., ¶¶ 16-18, Tab A).

[4/] The Affidavit of Sandra L. Jesse is attached hereto at Exhibit 2.

B. The Turnaround Strategy and Proposed Merger with Bard College.

While President Zorn's Strategic Plan task force ran on a parallel track, the School also focused on other more immediate strategic options simultaneously. By late 2008, Longy's senior executive team had determined that the School's current business model was unsustainable. While the School was thriving academically, its financial difficulties and long-term goals needed to be addressed, most importantly, a one million dollar deficit. (Zorn Aff., ¶¶ 19-20). At the December 8, 2008 Board of Trustees meeting, President Zorn and Mr. Levy proposed two options to the Board of Trustees: (1) focus heavily on creating a turnaround; or (2) seek opportunities to be acquired by another music institution. (Zorn Aff., ¶ 21). In response, the Board of Trustees voted to reauthorize the Board of Trustees' Executive Committee to explore both of these options. At the Board of Trustees' January 26, 2009 meeting, Chairwoman Boatman provided a report from the Executive Committee, which first recommended Lesley University as a potential merger partner. (Zorn Aff., ¶ 22; Jesse Aff., ¶ 16).

At the April 14, 2009 Board of Trustees meeting, Chairwoman Boatman provided a status report on President Zorn's discussions with Lesley University. (Zorn Aff., ¶ 23). At this meeting, President Zorn presented an organizational map on the proposed turnaround strategy, which included major changes such as removing the undergraduate program and "decreasing the number and creating a core faculty for which Longy is their primary place of employment." The Executive Summary of the turnaround strategy emphasized two features: (1) growing the student body; and (2) making efficiency gains. The turnaround strategy proposal specifically stated that Longy aimed to reduce its faculty by approximately 43 teachers. (Zorn Aff., ¶¶ 23-24).

At the Board of Trustees' May 5, 2009 meeting, this conversation about the turnaround strategy continued, with President Zorn walking the Trustees through a detailed PowerPoint presentation. As part of this presentation, one of the "key strategic decisions" discussed was changing the composition of Longy's faculty.[5/] At the Board of Trustees' September 12, 2009 retreat, President Zorn provided an update on Longy's turnaround strategy, which she had presented at the May meeting. (Zorn Aff., ¶¶ 27-28). This discussion focused on growing the Conservatory's student population and reshaping the faculty to meet Longy's needs, including developing a smaller, core faculty. In discussing the faculty changes, the Board of Trustees indicated the need for specific criteria –– which had already been developed by the divisions –– on the process of faculty cuts and President Zorn mentioned March 15, 2010 as the proposed date for implementing these faculty changes. (Zorn Aff., ¶ ¶ 28-29; Eckelhoefer Aff., ¶ 12; Jesse Aff., ¶ 10).[6/] Also at this retreat, Dean Chin gave a presentation on the future of the Conservatory, including his vision for creating a core faculty, which would require significant faculty reductions. (Zorn Aff., ¶ 30; Chin Aff., ¶¶ 16-18).[7/]

With Lesley University no longer a feasible option, in July 2009, President Zorn began initial discussions with Bard, a liberal arts college in upstate New York, about a potential merger with Bard College. (Zorn Aff., ¶ 32; Jesse Aff., ¶ 12). Consistent with the Strategic Plan, Bard would provide the undergraduate program and Longy would become the graduate school of music at Bard. (Zorn Aff., ¶ 32; Jesse Aff. ¶ 12). At the October 19, 2009 Executive Session meeting, the members discussed the faculty changes.

5/ Longy's merger discussion with Lesley University effectively ended in the spring of 2009. (Zorn Aff. ¶ 25).

6/ The Affidavit of Miriam Eckelhoefer is attached hereto at Exhibit 3.

7/ The Affidavit of Wayman Chin is attached hereto at Exhibit 4.

By the spring of 2010, the discussions with Bard had progressed significantly. Throughout the winter, attorneys for Longy and Bard conducted due diligence and communicated with the Board of Trustees regarding the potential merger. (Zorn Aff., ¶¶ 33-34; Jesse Aff., ¶ 15). The Board of Trustees reviewed the first draft of the Letter of Intent between Longy and Bard at its February 22, 2010 meeting. (Zorn Aff., ¶ 35; Jesse Aff., ¶ 14). Bard's president, Dr. Leon Botstein, and another Bard faculty member attended the Board of Trustees' March 15, 2010 meeting as special guests. At this meeting, Longy's outside corporate counsel explained the merger process and Dr. Botstein discussed his vision for the affiliation. (Zorn Aff., ¶ 37; Jesse Aff., ¶ 17).

Since March 2010, Longy has been engaged in active merger negotiations with Bard, which are subject to a confidentiality agreement. (Zorn Aff., ¶ 39; Jesse Aff., ¶¶ 18-19). Longy and Bard College are bound by a confidentiality agreement and the process is a fluid one, and thus it is difficult to answer all of the Union's questions and provide a specific timeline on the merger. Longy is doing its best to share information about this anticipated transaction with the Union as permissible and practicable under the circumstances. (Zorn Aff., ¶ 40; Jesse Aff., ¶¶ 18-19).

III. Longy Implements Long-Planned Organizational Changes.

After Longy's Board of Trustees approved the School's Strategic Plan in January 2009, President Zorn and the senior staff started creating a plan for realigning and decreasing the overall number of faculty. (Ratzlaff Aff ¶ 6; Chin Aff., ¶ 11-13; Eckelhoefer ¶ 12-13).[8/] By February 2009, they had discussed cutting as many as 40-50 faculty positions. (Ratzlaff Aff., ¶ 7). As early as March 2009, they specifically began discussing specific criteria for faculty realignment, including non-renewals and divisional

[8/] The Affidavit of Kalen Ratzlaff is attached hereto at Exhibit 5.

reassignments - from the beginning, the criteria focused on program need and private teaching activity. (Ratzlaff Aff ¶ 8; Eckelhoefer Aff., ¶¶ 9-11). Their goal was to create a "core faculty" by streamlining the faculty and focusing on students, recruitment, and curriculum needs. (Zorn Aff., ¶ 42; Chin Aff., ¶ 11-13).

Capitalizing on the Strategic Plan, in a report drafted by Director Eckelhoefer and dated March 4, 2009, she referenced the purpose behind the proposed reorganization/restructuring as well as the relevant criteria that should be relied upon to meet those goals:

> [i]n order to build a stronger and more united community program, we need to invest in and encourage our faculty who are committed to teaching at Longy. Ideally, we want these faculty (as well as new faculty) to continue to increase their teaching hours for an average minimum 8-10 hours/week with an ideal goal of around 15-18 hours/week. This can only be achieved by reducing the number of faculty teaching under 5 hours/week and phasing out high paid faculty or allowing them to continue by self-filling their studios.

(Eckelhoefer Aff., ¶¶ 10-11, Tab B). Likewise, in March 2009, Dean Chin drafted a memorandum in which he explained his vision of removing what he called "inactive faculty" – those with fewer than five hours of teaching. (Chin Aff., ¶ 15, Tab B). As he explained, a faculty cut

> allow[s] program and academic leaders (Dean of the Conservatory/Director of Community Programs) to focus faculty forces towards those who are populating studios; permits a concentration on faculty who are creating a positive learning environment, in line with Longy's vision and mission and strategic goals; removal of inactive faculty (those with fewer than five hours of teaching) enables an opportunity for greater strategic planning and hiring in specific areas, particularly those with small or declining enrollment.

(Chin Aff., ¶ 15, Tab B).

Once the Board of Trustees approved the faculty re-alignment plan at the September retreat, Longy's senior staff began meeting weekly. (Zorn Aff., ¶ 43; Ratzlaff Aff ¶ 9; Chin Aff., ¶ 23; Eckelhoefer Aff., ¶ 12). They had a formidable challenge ahead of them. Music schools are unique, as students often want to study with one particular teacher and some instruments/specialized areas have very few students. As a result, there is no "one size fits all" criterion for paring down faculty. (Zorn Aff., ¶ 43; Ratzlaff Aff ¶ 9). Mr. Ratzlaff worked with Dean Chin and Director Eckelhoefer to determine the exact type of changes to the faculty, including granting of Emeritus status, non-renewal, and reassignment to and from the Conservatory and Community Programs. (Zorn Aff., ¶ 44; Ratzlaff Aff ¶ 10; Chin Aff., ¶¶ 24-26; Eckelhoefer Aff., ¶¶ 12-13). The divisional re-assignment categories were established in mid-October 2009, well before the Union's petition.

Against the backdrop of accelerated discussions with Bard, the need to effectuate Longy's Strategic Plan, including the program and faculty changes, was becoming more pressing by the close of 2009. (Zorn Aff., ¶ 46; Ratzlaff Aff., ¶ 12-13). In January 2010, President Zorn, Dean Chin, Director of Community Programs Eckelhoefer, Mr. Levy, and Mr. Ratzlaff began meeting to map out the changes to the faculty make-up and the structure of the Conservatory and the Community Programs, including management positions. (Zorn Aff., ¶ 47; Ratzlaff Aff., ¶ 13; Eckelhoefer Aff., ¶ 15; Chin Aff., ¶ 22-24). Relying upon criteria –– private teaching hours and programmatic needs –– first developed in March 2009 by Director Eckelhoefer and Dean Chin, the senior staff had preliminarily agreed to implement the following faculty changes on a School-wide basis

by February 2010: (1) three faculty were to be granted Emeritus status; (2) 34 faculty would not have their contracts renewed, (3) ten faculty would be assigned to Community Programs only, and (4) 37 faculty would be assigned to the Conservatory only. (Zorn Aff., ¶ 48; Ratzlaff Aff., ¶ 14).

As for leadership positions in these divisions, they decided to consolidate the fourteen (14) Conservatory departments and chairs into seven or eight departments/chair positions. (Ratzlaff Aff., ¶ 15; Chin Aff., ¶ 32). Additionally, they decided to eliminate the Community Program chair positions – nine in total – and create a part-time administrative staff position ("Associate Director of Community Programs") as well as a new position, Chair of Chamber Music and Small Ensembles. (Zorn Aff., ¶ 49; Eckelhoefer Aff., ¶¶ 17-24).

Focused on criteria first established in March 2009, as well as unique program needs, the final criteria consisted of the following:

> **Conservatory**[9/]
>
> -Voice, Piano, and String Departments: faculty members needed three or more private students in their primary studios.[10/]
>
> -Early Music: one faculty member per instrument.
>
> **Community Programs**
>
> -Private lesson instructors: faculty members needed an average of more than three hours a week of private teaching activity during the last three years. Also, a faculty member would be removed from Community Programs if he or she had an average of less than three hours of private teaching activity per week in the current school year (2009-2010)

9/ In Woodwinds and Brass, Longy did not renew contracts for two faculty members – both of whom had no activity or students in the Conservatory.

10/ Three examples of exceptions to this criterion were Malcom Lowe, the Boston Symphony Orchestra Concertmaster; Anton Belov, one of only two male voice teachers (and thus an essential program need); and the double bass teachers (another essential program need).

> and showed a steady decline in private teaching activity.
>
> -Classroom teachers: faculty members would be removed from Community Programs if they had little to no teaching activity in the last three years, unless they met a specific program need.
>
> -Also, continuing education students would be allowed to remain working with Conservatory teachers who had been removed from Community Programs.

(Eckelhoefer Aff., ¶ 16). (Zorn Aff., ¶¶ 50-53; Chin Aff., ¶ 26; Eckelhoefer Aff., ¶¶ 15-16).

Using the divisional assignment categories crafted in mid-October 2009, the faculty members (both within and outside the bargaining unit) would either: (1) be divisionally reassigned based on their actual teaching activity (Conservatory only, Community Programs only); (2) be granted Emeritus status; (3) be non-renewed; (4) or experience no change. While the threshold was lowered (five vs. three), the criteria remained the same and matched with the "core faculty" vision of Longy's Strategic Plan. (Zorn Aff., ¶¶ 50-53; Ratzlaff Aff., ¶¶ 6-14, Tab A; Chin Aff., ¶¶ 25-27; Eckelhoefer Aff., ¶¶ 12-13).

On March 5, 2010, President Zorn held a three-hour faculty meeting to confidentially announce the anticipated merger with Bard, and to explain the changes to Longy's faculty and programs attendant to the implementation of the Strategic Plan. (Zorn Aff., ¶¶ 56-57; Catt Aff., ¶ 4).[11/] Specifically, in addition to the news about Bard, President Zorn discussed the management reorganization of the Conservatory and Community Programs, phasing out of the undergraduate program, revamping of the Pedagogy program, and the faculty realignment changes. (Zorn Aff., ¶ 58). Consistent

[11/] The Affidavit of Cristina Catt is attached hereto at Exhibit 6.

with her expectations announced at the September 2009 Board Retreat, President Zorn informed the faculty members that they would be receiving letters the following week notifying them of their teaching assignments. (Zorn Aff., ¶ 59).

On March 12, 2010, Longy sent the faculty agreement letters to Longy's 188 faculty members, including the 88 members of the bargaining unit.[12/] (Ratzlaff Aff., ¶ 17). Faculty members were also invited to meet with Dean Chin or Director Eckelhoefer if they wished to discuss their assignments. In sum, these changes impacted the total faculty as follows: (a) 9 faculty members were assigned exclusively to Community Programs; (b) 2 faculty members were added to Community Programs due to program needs; (c) 46 faculty members were assigned exclusively to the Conservatory; (d) 31 faculty members' contracts were not renewed; (e) 6 faculty members were granted Emeritus status; (f) 87 faculty members experienced no change in their status; and (g) 5 visiting faculty members were notified that department needs would be reassessed before making a final decision on their "Visiting Faculty" status.[13/] (Ratzlaff Aff., ¶ 18).

Union affiliation played no part in these changes.[14/] The members of the 88-person bargaining unit actually fared better than the general faculty (including Union and non-Union members). For example, only one Union member was transferred to Emeritus status, while five non-Union members were. Likewise, only 8% of the bargaining unit members did not have their contracts renewed, while 16% of the total faculty received non-renewal letters. (Ratzlaff Aff ¶ 19). As a result of these changes, the total percentage

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12/ The faculty agreement letters became effective September 1, 2010.

13/ Two faculty members were already planning on leaving Longy after the 2009-2010 school year.

14/ Throughout the Petition, the Board refers to numerous allegations - - specifically Section 8(a)(3) allegations regarding discriminatory animus - - which are not before the Court. To be sure, the only 8(a)(3) allegations at issue are contained in still-pending unfair labor practice charges before the Board (1-CA-46337, 1-CA-46338 and 1-CA-46472). Yet, Petition makes numerous references to those specific allegations and, in fact, attached a number of supplemental affidavits (Clayton Hoener and Jonathan Cohler) which are plainly beyond the four corners of the Amended Complaint which supports this Petition.

of Longy faculty members considered for membership in the bargaining unit rose from 47% to 60% of Longy's faculty. The impact on the 88 members of the bargaining unit was as follows: (a) seven unit members were divisionally reassigned to Community Programs only; (b) 27 unit members were divisionally reassigned to the Conservatory only; (c) one unit member was granted Emeritus status; (d) seven unit members were non-renewed; and (e) 46 unit members experienced no change. (Ratzlaff Aff ¶ 21).

These faculty changes allowed Longy to realign faculty to support the future needs of the School's programs – as envisioned by the Strategic Plan. Overall, Longy's total faculty decreased from 188 to 150 faculty members.

IV. Longy's Switch in Health Insurance Carriers.

As a threshold matter, despite repeated discussion of the health insurance carrier change, the Board does not seek injunctive relief on that issue, therefore acknowledging that Longy had to right to make this switch. Indeed, it is undisputed that the faculty received virtually equivalent benefits from the new health insurance carrier. Historically, Longy reviews the scope, coverage, and expense of its health insurance plans for the entire School on an annual basis based upon its fiscal year (July 1 – June 30). During this past spring, like previous years, Longy evaluated the overall value of the then-current insurance carrier, Harvard Pilgrim. Through its insurance broker, Longy discovered that it could provide identical coverage to participants in its health insurance plans by switching to Blue Cross Blue Shield ("BCBS") while, at the same time, achieving a significant cost savings for the School and its workforce of faculty, staff, and administrators. (Ratzlaff Aff ¶¶ 24-25).

Longy gave its employees approximately one month's notice of the decision to

switch health insurance carriers and its positive impact on yearly premiums for all employees.[15/] (Ratzlaff Aff ¶ 26). In the roll-out at the beginning of June 2010, Mr. Ratzlaff highlighted these changes, all of which were cost-related for its employees, regardless of their coverage choices:

- The deductible for the family PPO will increase from $2,000 to $2,500. (Longy will continue to pay the first $1,000 of this deductible.)
- Copay for emergency room visits will increase from $100 to $150 (after deductible).
- Retail prescription prices will increase from $10/$20/$35 to $15/$30/$50.
- Mail order prescription prices will increase from $20/$40/$105 to $30/$60/$150.

(Ratzlaff Aff ¶ 27, Tab B).

While there were some cost-related changes, they were more than offset by substantial decreases in monthly premiums. By switching carriers, Longy's employees realized an average decrease of 7% in overall premium costs, as opposed to the 14% increase if Longy maintained the same benefits coverage with Harvard Pilgrim. In fact, the BCBS Plan provides better coverage than Harvard Pilgrim with respect to its physical and occupational therapy benefits, a critical benefit for musicians. (Ratzlaff Aff ¶ 28, Tab C).

Although Longy and the Union conducted five bargaining sessions during the month of June (the open enrollment period), the Union never raised any objections to the anticipated switch from Harvard Pilgrim to BCBS, effective July 1, 2010. (Ratzlaff Aff ¶ 29). Moreover, to date, the Union cannot demonstrate any lack of equivalency between

[15/] There is no question that members of the Union's negotiating team, including, but not limited to, the Longy Faculty Union's president, Clay Hoener, were given adequate notice of the switch to BCBS.

the two health insurance plans because there is none.[16/]

V. Longy Continues to Bargain in Good Faith

The Union election was held on January 20, 2010[17/], and the 88-member bargaining unit was certified by the NLRB on February 1, 2010.[18/] On February 12, 2010, AFT field representative Diane Frey formally requested negotiations. On February 23, 2010, Ms. Frey wrote to President Zorn requesting a meeting to discuss the pending announcements at the March 5, 2010 special faculty meeting. In a letter dated March 2, 2010, Longy responded to Ms. Frey's request and explained that, because the developments being announced would affect administrative staff, management, bargaining unit members, and non-union faculty at Longy, a meeting beforehand for a sub-section of the audience would be inappropriate.

Throughout the Petition, the Board takes pot shots at Longy's conduct during collective bargaining for a first-time contract. Once again, these allegations are not part of the Amended Complaint before this Court. With this said, at no point has Longy refused to bargain in good faith or engaged in surface bargaining. In fact, since March 12, 2010, Longy has met with the Union's negotiating team (eighteen) 18 times, for a total of approximately 34 hours. (Ratzlaff Aff ¶ 37). During these negotiating sessions, the parties have addressed, among other things, contract proposals, faculty compensation, health insurance coverage, benefit unit calculations, and the merger with Bard College.

16/ While the Board makes a number of references to the switch in health insurance carriers in support of its Petition, the Board avoids requesting injunctive relief on this alleged unilateral change.

17/ While the Board paints a picture of an employer hell bent on retaliating against a union that won in a landslide, the reality is far different. In fact, almost 40% of the eligible faculty members ruled against union representation (See Tally of Ballots).

18/ The unit membership is defined as: "All faculty currently teaching, and who have a weekly average of at least three benefit units in one of the last two fiscal years, excluding all other employees, visiting faculty, administrators, confidential employees, office clerical employees, managers, guards and supervisors as defined in the Act."

(Ratzlaff Aff ¶ 38).

Additionally, in response to the Union's more than forty (40) information requests, Longy has produced well over 1,600 pages of responsive information throughout the course of negotiations. These documents include faculty assignment letters, faculty compensation agreements, payroll information, course listings, employee handbooks, and health insurance information. (Ratzlaff Aff ¶ 39).

As for contract proposals, Longy has made every effort to move the process along in a productive fashion. It is important to note that the Union did not provide the School with a substantive economic proposal until August 3, 2010. Before that point, the vast majority of their so-called proposals concerned the relatively minor issues which are typically addressed near the end of contract negotiations. On August 17, 2010, for the first time, the Union confirmed that they had given Longy a "complete" proposal, albeit in piecemeal fashion over a couple of months. (Ratzlaff Aff ¶ 40).

On October 25, 2010, Diane Frey sent Longy a proposed contract compiled from the proposals the Union had submitted to Longy over the course of the previous 17 sessions. (Ratzlaff Aff ¶ 41). The School delivered a complete contract proposal to the Union on November 19, 2010. (Ratzlaff Aff ¶ 42).

While the Board paints the Union as an innocent bystander, the Union's conduct has made the collective bargaining process especially difficult. For example, the School has spent numerous bargaining sessions waiting for the Union's negotiating team to return from repeated caucuses. Indeed, the Union's bargaining notes will acknowledge the countless caucuses orchestrated by the Union's negotiating team. The Union has also wasted time asking the School to negotiate subjects which are well outside the mandatory

subjects of collective bargaining, such as the process for hiring new faculty and determining who is eligible for state unemployment insurance. (Ratzlaff Aff ¶ 43).

Particular challenges caused by the Union's actions –– as highlighted by Chief of Staff Ratzlaff –– include the following:

- The Union has made consistent efforts to stir up numerous distractions for Longy's administration, such as contacting the press, leafleting the Board of Visitors, disparaging the School to prospective and current students, and asking guest speaker Mark Morris to make a statement supporting the Union in his commencement address. (Ratzlaff Aff., ¶ 44; Catt Aff., ¶ Tab A).
- From their comments and actions, it seems that the Union thinks negotiating means giving them precisely what they are asking for – and, if not, Longy is "refusing to negotiate."
- The Union admittedly wants Longy to transform the School's former Employee Handbook (which applied to the entire workforce and was replaced in 2009) into a contractually binding agreement.
- The Union is attempting to circumvent the School's designated negotiating committee by attempting to draw the Board of Trustees into negotiations.

(Ratzlaff Aff ¶ 44).

Despite the Union's tactics, Longy has made every effort to bargain collectively and in good faith with the Union. Indeed, Longy will continue to abide by its obligations under the Act and looks forward to reaching an agreement with the Union. (Zorn Aff., ¶ 64; Ratzlaff Aff., ¶ 45).

LEGAL ARGUMENT

Against this factual and procedural backdrop, injunctive relief is not "just and proper." Pye v. Sullivan Brothers Printers, Inc., 38 F.3d 58, 63 (1st Cir. 1994) (internal citations and quotations omitted). The Board bears a heavy burden to justify the extraordinary relief of an injunction. Here, the Court should deny the Board's Petition because the it cannot demonstrate: (1) that it has a reasonable likelihood of success on the

merits of its claims or (2) that the Union will suffer irreparable harm if the injunction is not granted. Winter v. Natural Res. Def. Council, 129 S.Ct. 365, 375 (2008). Moreover, the balance of harms tips decidedly in Longy's favor.

I. Standards for Issuance of Injunction under Section 10(j) of the Act.

Section 10(j) relief is only appropriate when (1) there is reasonable cause to believe that the Respondent has committed the unlawful practice alleged, and (2) injunctive relief is "just and proper." Sullivan Brothers Printers, Inc., 38 F.3d at 63 (in assessing reasonable cause, the Board's position must be "fairly supported by the evidence.").[19/] In assessing the "just and proper" prong, the Court considers "the whole panoply of discretionary issues with respect to granting preliminary relief…otherwise the court is but a rubber stamp for the Director." Maram v. Universidad Interameicana De Puerto Rico, Inc., 722 F.2d 953, 958 (1st Cir. 1983). Thus the Board must demonstrate: (1) a likelihood of success on the merits; (2) the potential of irreparable injury in the absence of relief; (3) that such injury outweighs any harm preliminary relief would inflict on the respondent; and (4) that preliminary relief is in the public interest. Sullivan Brothers Printers, Inc., 38 F.3d at 63.

Indeed, the Board faces a steep hurdle to secure the extraordinary relief it seeks from this Court, as "interim relief is not normally appropriate unless it is clear that ultimate success for the Board 'will not prove difficult.'" Id. at 67. As here, when the interim relief sought by the Board "is essentially the full relief sought," the "likelihood of success **should be strong**" to warrant the issuance of an injunction. Asseo v. Pan

19/ While there is no question that many of the Board's attachments as well as its multiple references to purported 8(a)(3) allegations serve as "background noise" to the Court's overall inquiry, the First Circuit has opined that the reasonable cause inquiry "may be superfluous given that the just and proper prong of the standard requires that the claim have a substantial likelihood of success on the merits." Pye v. Exel Case Ready, 166 LRRM 2333 (1st Cir. 2001) (internal citations and quotations omitted).

American Grain Co., 805 F.2d 23, 35-26 (1st Cir. 1986) (emphasis added). Neither prong of this test is met here, and therefore Section 10(j) relief should not be granted.

II. The Board Fails to Demonstrate a Strong Likelihood of Success on the Merits.

The procedural background is clear: (1) after waiting over five (5) months, the Union filed an unfair labor practice charge regarding the alleged unilateral changes implemented in March 2010; (2) following the issuance of a Complaint, the Board sought and received an expedited hearing date (December 13, 2010); and (3) just weeks before the hearing before an Administrative Law Judge which will last at least five (5) days, the Board rushed to this Court seeking preliminary injunctive relief, claiming in part that the hearing date may be pushed back because the Board expects to amend the Complaint. This pattern of conduct certainly does not promote judicial efficiency or represent any sense of judicial economy. The Court should not countenance the Board's irrational behavior.

The Board fails to make out a sufficient showing of reasonable cause or a strong likelihood of success on the merits. Petitioner's case is based on allegations that Longy has violated Sections 8(a)(1) and 8(a)(5) of the Act by making certain unilateral changes in working conditions without providing the Union with prior notice and/or the opportunity to bargain about the decision, the implementation, and the effects of these changes. Specifically, the Board claims that Longy (1) announced changes to terms and conditions of employment directly to employees without prior notice and meaningful opportunity to bargain about changes or the effects of those changes; (2) unilaterally changed the bargaining unit members' terms and conditions of employment and removed work from the bargaining unit; (3) announced the change in Longy's health insurance

carrier to employees without prior notice and meaningful opportunity to bargain; (5) and impliedly threatened employees and implied to employees that it is futile to have the AFT represent them; and (6) on account of these aforementioned alleged acts, did not bargain in good faith. Because these claims lack merit, Petitioner cannot demonstrate the requisite strong likelihood of success on the merits.

A. Longy Was Not Required to Bargain Over its Core Business Decisions.

While the Board seeks to gloss over its own precedent in its Petition, Longy's core business decisions regarding the School's reorganization and faculty re-alignment were directly related to the implementation of its Strategic Plan and in preparation for the merger with Bard. (Zorn Aff., ¶¶ 19-21; Chin Aff., ¶¶ 11-13; Eckelhoefer Aff., ¶ 12; Jesse Aff., ¶¶ 5-6, 16). This was not "a mere change of administrative structure" as the Board asserts in its Petition. Longy does not need to bargain over the decisions "involving a change in the scope and direction of the enterprise." First National Maintenance Corp. v. NLRB, 452 U.S. 666, 667 (1981). Accordingly, Longy is not in violation of the Act.

Contrary to the Board's sweeping assertion, fundamental strategic decisions by Longy – including the March 2010 re-alignment – do not fall within the purview of collective bargaining. In First National Maintenance Corp., the Supreme Court analyzed whether management decisions were mandatory subjects of bargaining, dividing them into three categories. The first category consists of management decisions, such as choice of advertising, product type and design, and financing arrangements, which "have only an indirect and attenuated impact on the employment relationship." Id. For those types of decisions, there is no obligation to bargain. In the second category are management

decisions, such as the "order of succession of layoffs and recalls, production quotas, and work rules," which are almost exclusively "'an aspect of the relationship' between employer and employees." Id. (quoting Chemical Workers v. Pittsburgh Glass, 404 U.S. 157, 178 (1971)). As to these decisions, there is an obligation to bargain. The third category –– which the Board sidesteps in its Petition through nothing more than a footnote reference –– consists of management decisions which have a direct impact on employment, such as the elimination of jobs, but which have as their focus the economic profitability of the business. The Supreme Court stated that these decisions involve a change in "the scope and direction of the enterprise" and are akin to the decision whether to be in business at all. Id. For those decisions, the Supreme Court applied a balancing test and held that bargaining would be required "only if the benefit, for labor management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." Id. at 679. "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice." Id. at 678-679.

Longy's reorganization and realignment decisions, which initially took form well before the Union's Petition on October 28, 2009, were solely motivated by the School's Strategic Plan for the institution and the impending merger with Bard, rather than particular, discrete issues that could be resolved through bargaining. (Zorn Aff., ¶¶ 19-21; Chin Aff., ¶¶ 11-13; Eckelhoefer Aff., ¶ 12; Jesse Aff., ¶¶ 5-6, 16). Therefore, Longy had no duty to bargain over these core business decisions.

In AG Communications Systems Corp., the Board held that an employer did not have an obligation to bargain regarding its decision to integrate two bargaining units, represented by separate unions, where its motivation was a desire to merge duplicate corporate departments and to allow it to sell different equipment to new customers, and not motivated by a desire to reduce labor costs of bargaining-unit employees. The Board found that the employer's decision was not suitable to bargaining because it was at the core of the employer's entrepreneurial control and decision making. 350 NLRB 168, 172 (2007). In addition, the Board found that requiring bargaining would place a significant burden on the employer achieving its comprehensive business reorganization because "the integration process involved large-scale organizational restructuring conducted by joint teams" of the separate management. Id. As a result, the Board concluded that the benefits of bargaining were outweighed by the burdens on the employer's business decision, and was thus exempt from bargaining. Id.

To require Longy's administration to negotiate over decisions that impacted the entire population and direction of School, including its affiliation with Bard, would have placed a significant burden on implementing its Strategic Plan. Indeed, Board law states that, "considerations of corporate strategy fundamental to preservation of the enterprise" that need to be exercised expeditiously, and in which bargaining with the Union would have been futile, are not required to bargain. See Oklahoma Fixture Co., 314 NLRB 958 (1994) *enforcement denied on other grounds*, 79 F.3d 1030 (10th Cir. 1996) (holding that the Board does not require mandatory bargaining for a subcontracting decision that was based solely on the company's concerns with legal liability that could drive the company out of business). Longy's affidavits prove that these core business decisions related to the

scope and direction of the School. (Zorn Aff., ¶¶ 19-20; Ratzlaff Aff., ¶ 18; Chin Aff., ¶¶ 11-13; Eckelhoefer Aff., ¶ 12; Jesse Aff., ¶¶ 5-6, 16). Bargaining over them would have been a futile exercise because there was no room for negotiation. As a result, the parties would have bargained to impasse and Longy would have implemented the changes as planned. In the meantime, however, such a delay would have seriously impeded the merger with Bard. (Ratzlaff Aff., ¶¶ 43-44).

The Board assumes that Longy's re-alignment was concocted within a brief five-week window between February 1 (certification date) and March 5 when President Zorn conducted the faculty meeting. While the Board has its conspiracy theories –– Longy purposely put this complete overhaul in place to "break" the Union –– the affidavits and supporting documents prove otherwise. The Strategic Plan was approved in January 2009 and the Bard merger discussions began in the summer of 2009. (Zorn Aff., ¶ 16, 32; Ratzlaff Aff., ¶ 6; Chin Aff., ¶ 11; Eckelhoefer Aff., ¶ 9; Jesse Aff., ¶ 16). Both Wayman Chin (Dean of the Conservatory) and Miriam Eckelhoefer (Director of Community Programs) developed the specific criteria – private teaching hours – as the foundational element for the re-alignment which would result in a core faculty. (Ratzlaff Aff., ¶¶ 8-10; Chin Aff., ¶¶ 12-16, Eckelhoefer Aff., ¶¶ 6). While the threshold was ultimately lowered (from five to three hours on average per week), the criteria remained constant. (Chin Aff., ¶ ¶ 23-31, Eckelhoefer Aff., ¶¶ 8-16; Ratzlaff Aff., ¶¶ 6-10, Tab A).

Longy's reorganization and realignment decisions could not have been motivated by anti-union animus. Contrast Pan American Grain Co., Inc. v. NLRB, 558 F.3d 22, 28 (1st Cir. 2009) (company president told two non-striking truck drivers that he "would rather close the company" than reach an agreement with the striking employees, whom he

called "jerks" among other things); Maram v. Universidad Interamericana De Puerto Rico, Inc., 722 F.2d at 959-60 (finding that employer, whose "decision to subcontract was made in haste, and coincided with the appearance of union cards" had failed to prove that discharge would have occurred absent antiunion motivation). Indeed, as a result of these changes, the bargaining unit actually grew in size. (Ratzlaff Aff., ¶¶ 19, 21-22). Also, labor costs were not the motivation behind the changes. Pan American Grain, 558 F.3d at 28 (1st Cir. 2009) (holding that in situations where there are multiple motives for a layoff, the employer has a duty to bargain with the union over the layoff decision as long as it is based at least partially on labor costs, itself a mandatory subject of bargaining).

At the same time, Longy does not dispute that it is required to negotiate over the effects of its core business decisions. Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198 (1991) ("[t]here is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by § 8(a)(5)"). While Longy broached the subject of "effects" bargaining during an early negotiating session, the Union did not want to pursue it. (Ratzlaff Aff., ¶ 43). Indeed, the Union has not even specifically requested "effects" bargaining. See NLRB v. Oklahoma Fixture Co., 79 F.3d 1030, 1037 (10th Cir. 1996) (Union admitted that it never requested effects bargaining, thereby "waiving its right to effects bargaining). Nonetheless, at the Union's specific request, Longy spent several negotiating sessions discussing the criteria for and impact of the faculty and program changes, and is prepared to continue to do so. (Zorn Aff., ¶ 64; Ratzlaff Aff., ¶¶ 37-38, 45). See id. at 1036 ("…[T]he window [for meaningful effects bargaining] does not automatically close upon the implementation of a

termination decision" where the court found that "at a minimum, the Union had four days' within which to request bargaining. It did nothing but file a complaint the very next day"). To be sure, to the extent necessary, Longy was and remains prepared to have a meaningful dialogue over the "effects" of the reorganization on the bargaining unit. (Zorn Aff., ¶ 64; Ratzlaff Aff., ¶ 45).

Moreover, contrary to the Board's contention that there was no possibility of effects bargaining, the realignment changes announced in March 2010 afforded the parties ample time to negotiate about the effects of the realignment. (Zorn Aff., ¶¶ 57-58; Catt Aff., ¶¶ 4-5). For example, Longy and the Union could have bargained about severance payments for the non-renewed bargaining unit members.

B. Longy Was Not Required to Bargain Over the Change in Health Insurance Carriers.

1. The Change to Blue Cross Blue Shield Provided Equivalent Benefits

Longy's decision to switch from Harvard Pilgrim to BCBS as the School's health insurance provider for the 2010-2011 year had no effect on the level of or access to benefits for the bargaining unit members and, therefore, Longy was not required to provide the Union with prior notice of or an opportunity to bargain about the change in healthcare provider. The designation of a particular health insurance carrier is not a mandatory bargaining subject, as long as the parties have negotiated over the "benefits, coverage, and administration of the plan." Connecticut Light & Power Co. v. NLRB, 476 F.2d 1079, 1083 (2d Cir. 1973); see Long Island Head Start Child Dev. Serv. v. NLRB, 460 F.3d 254, 258, n. 2 (2d Cir. 2006). Here, the record provides on disputed evidence that the health insurance plans are equivalent, and thus the benefit levels and

administration of the plan were not substantively changed by the switch to BCBS. Accordingly, the change to BCBS was not a mandatory subject of bargaining. See id. Indeed, the level of health insurance benefits not only stayed the same with BCBS, but the overall employee contribution costs actually decreased (Ratzlaff Aff., ¶¶ 25, 28, Tab C). Contrast Bastian-Blessing, Div. of Golcanda Corp. v. NLRB, 474 F.2d 49, 51-52 (6th Cir. 1973) (holding that naming of insurance carrier was a mandatory subject of bargaining because the switch had a material adverse impact on the employees' previously negotiated benefits").

Here, there was no unilateral *change* to the *terms* of the insurance plan. See id. at 53-54. The Union has failed to show any substantive differences between the Harvard Pilgrim and BCBS plans or any material impact on the bargaining unit. (Ratzlaff Aff., ¶ 29). Contrast Keystone Steel & Wire, Div. of Keystone Consolidated Ind., Inc. v. NLRB, 606 F.2d 171, 179 (7th Cir. 1979) (explaining that change in carrier became a mandatory subject of bargaining because it brought about material and significant effects upon the terms and conditions of employment).

2. Clay Hoener's Premium Change was within the School's Management Rights.

As for the isolated change to Clay Hoener's health insurance premium, this decision did not require prior notice or bargaining (though Mr. Hoener was afforded both opportunities (Ratzlaff Aff., ¶ 32, Tab D, ¶ 35)). See Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1093 (3d Cir. 1984) (explaining that the predominant focus under section 10(j) is the harm to the bargaining process, not to individual employees). First, this change was made purely for management reasons – namely, to prevent unequal treatment of its employees. (Ratzlaff Aff., ¶ 34). In July 2010, it was discovered, in relation to the

changeover in Longy's business office to its new accountant, that there was an anomaly regarding Mr. Hoener's health insurance benefits. (Ratzlaff Aff., ¶ 30). Anna Kuwabara, Longy's then Executive Vice President, had provided Mr. Hoener 160% of the individual monthly premium to be applied towards the purchase of a family plan during past benefit years. (Ratzlaff Aff., ¶ 30). This is not a standard benefit. (Ratzlaff Aff., ¶¶ 32-34). While Mr. Hoener and his partner – both faculty members – were able to apply 160% of the individual monthly premiums to their family plan, the two other faculty couples (who are also in the bargaining unit) at Longy were only able to apply 80% of the premium to the purchase of health insurance thereby resulting in a discriminatory practice. (Ratzlaff Aff., ¶ 31).

By way of background, Longy's health insurance policy is to contribute 80% of the individual monthly premium towards an employee's health insurance policy. (Ratzlaff Aff., ¶ 32, Tab D). That 80% of an individual plan from a particular provider then becomes a fixed benefit amount to be used for the purchase of the plan that best meets the need of the particular employee: individual, employee +1 or family. (Ratzlaff Aff., ¶ 32, Tab D). Which plan an employee chooses is the prerogative of the employee and not an isolated cash benefit – it is for the purchase of a plan. The "individual monthly premium" is a fixed amount when applied to a particular insurance choice. For example, if the individual monthly premium is $529, then Longy's contribution is consistently $423.20 (80%) towards either the individual, employee +1, or family policy. (Ratzlaff Aff., ¶¶ 32-34). The fact that the insurance provider offers different policies or that employees have different needs is not Longy's business. Longy provides a standard benefit. It is up to the individual employee to decide which plan to purchase, if at all.

Across the board, Longy only makes the 80% contribution per each policy.

Against this backdrop, the exception for Mr. Hoener allowed him to apply 160% of the individual premium (not the standard 80%) towards one policy (a family plan). (Ratzlaff Aff., ¶ 34). While it should not have happened in the first place and is not Mr. Hoener's fault, Longy needed to ensure that this type of special perk did not continue. In order to be fully consistent with Longy's health care benefit policies and applicable state and federal law, Longy could not allow for an isolated exception in this case without opening itself up to potential liability. Specifically, Massachusetts health insurance law, An Act Providing Access to Affordable, Quality, Accountable Health Care, 2006 Mass. Acts 111, requires employers to provide healthcare benefits to their employees in an equal and non-discriminatory manner. Likewise, in January 2011, federal non-discrimination laws will take effect that prohibit employers from favoring "highly compensated" employees -- Mr. Hoener is one of the most highly compensated employees at Longy -- in the provision of healthcare benefits. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). Lastly, the Employee Retirement Income Security Act ("ERISA") requires employers to administer benefit plans consistently in connection with an employer's plan documents. Employee Retirement Income Security Act of 1974, Pub.L. No. 93-406, 88 Stat. 829.

Second, Mr. Hoener and the Union were given ample prior notice of this discrepancy, including by emails from Kalen Ratlzlaff dated July 21, 2010 and July 22, 2010, and through an additional explanation dated August 6, 2010. (Ratzlaff Aff, ¶ 35, Tab E). The issue was also specifically discussed at the August 3, 2010 and August 17, 2010 negotiating sessions. (Ratzlaff Aff, ¶ 35). In August, Mr. Hoener requested that part

of his policy's contribution be deducted from his partner's (Lisa Lederer) paycheck. Mr. Ratzlaff confirmed through Longy's outside benefits consultant, however, that Ms. Lederer cannot have such a pre-tax deduction if she is not the subscriber on the plan. (Ratzlaff Aff, ¶ 36, Tab F).

In sum, it is improper and unwarranted for Petitioner to seek injunctive relief on an issue that falls well within Longy's management rights, only impacts an individual and requires certain actions by the School in order to comply with health insurance reform law.

C. Longy Has Never Threatened Reprisals or Implied that the AFT's Representation is Futile.

Petitioner's claim that Longy has violated Section 8(a)(1) of the Act is unsupported by fact or law. Specifically, the Board claims that President Zorn "impliedly told employees it was futile to have the Union represent them, and impliedly threatened employees with termination or unspecified reprisals if they were not loyal to Longy, supported the Union, or asserted their Section 7 rights." (Pet. Memo, pp. 2, 8, 19). Longy has engaged in no such conduct and, tellingly, the Board's allegations are only supported by innuendo, conjecture, and hearsay. Id.

In fact, the comments made by President Zorn at the March 5, 2010 faculty meeting – which made no reference to the Union – were taken out of context and misconstrued to serve the Board's interests. In reality, this meeting was a challenging and momentous one for Longy as an institution, and President Zorn knew that her message had to be enthusiastic, strong, and clear. (Zorn Aff., ¶¶ 62-63; Catt Aff., ¶ 4). At no point in time during the meeting did President Zorn try to deter faculty members from supporting the Union or convey a message that it was pointless for them to join, nor did

she threaten any employees who supported the union with reprisals. (Catt Aff., ¶¶ 4-7).

Even if Petitioner's account of this meeting was remotely accurate, President Zorn's purported comments do not rise to the level of a Section 8(a)(1) violation. Contrast Asseo v. Pan American Grain Co., 805 F.2d at 28 (record supported injunction where "numerous employees testified to various violations by the employer such as offering money for a vote against the Union, threats to discharge employees who supported the Union, and threats to close the plant should the Union prevail."); Angle v. Sacks, 382 F.2d 655, 660-61 (10th Cir. 1967) (employer's acts, including discharging employees that were the "nucleus of the organizational campaign," operated "to destroy or severely inhibit employee interests in union representation, and activity toward that end."). Here, the Union was already in place and President Zorn was speaking to the entire faculty about a Strategic Plan that had been approved well before the Union arrived at Longy. (Zorn Aff., ¶ 16, 32; Ratzlaff Aff., ¶ 6; Chin Aff., ¶ 11; Eckelhoefer Aff., ¶ 9; Jesse Aff., ¶ 16). This meeting had nothing to do whatsoever with the Union (Zorn Aff., ¶ 62; Catt Aff., ¶¶ 6-7). Petitioner can point to nothing more than particular individuals' skewed and self-serving opinions about how they perceived the meeting.

Longy also notes that the Petitioner's Complaint does not allege that Longy has violated Section 8(a)(3) of the Act. Accordingly, the Petitioner's focus on Longy's alleged retaliation and discrimination is misplaced and outside the issues before the Court.[20/] In fact, it appears that the Board is trying to put these allegations before the Court to make its case more compelling and paint Longy in a negative light. This transparent ploy should not be tolerated.

[20/] The Board's harsh description of Longy's conduct is at odds with a letter signed by twenty-three (23) faculty members in April 2010 in support of Longy's administration, specifically President Zorn. (Catt Aff. ___, Tab___).

II. The Board Cannot Establish the Threat of Irreparable Harm.

A. The Delays Attendant to this Case Belie the Need for Injunctive Relief.

The conduct in question – Longy's implementation of a school-wide reorganization and faculty realignment – occurred almost six months prior to the filing of the underlying Charge in this case. (Zorn Aff., ¶¶ 56-57; Catt Aff., ¶ 4). See Sharp v. La Siesta Foods, 859 F.Supp. 1370, 1375 (D. Kansas 1994) (denying 10(j) injunction and explaining that "[d]elay is an appropriate consideration in determining whether section 10(j) relief is just and proper, especially if the harm has already occurred" and "whatever 'lingering effect' exists as the result of respondent's unfair labor practices will no more be cured now than it would be at the conclusion of the Board proceedings."); Siegel v. Marina City Co., 428 F.Supp. 1090, 1093 (C.D. Cal. 1977) (denying petition for 10(j) injunction and holding that a "preliminary injunction could not preserve the status quo because the Board has waited three months since the alleged unfair labor practices occurred before filing its petition herein…"). Indeed, many of the affidavits relied upon by the Board are from August 2010, and the more recent affidavits largely address issues not currently before the Court. In light of the fact that the Union was aware of Longy's faculty realignment since March, and waited until right before the start of the new school year to file the Charge, the threat of irreparable harm is nonexistent. Overstreet v. El Paso Elec. Co., 176 Fed. Appx. 607, 610-11 (5th Cir. 2006) (affirming District Court's denial of 10(j) relief and its finding that elapsed time allowed the detrimental effect of the unfair labor practice to be fully realized with no lingering threat of additional harm warranting injunctive relief).

Given this unexplained delay, there is no question that the Union can afford to wait

until the Board's disposition for the relief it seeks. See Moore-Duncan v. Traction Wholesale Ctr., No. Civ. A. 97-6544, 1997 WL 792909 (E.D. Pa. 1997) (finding that Board did not provide any concrete evidence that "it was more likely than not that remedial measures by the Board would fail.").[21/] Indeed, although the Board highlights the potential long delay if the Board's decision needs to be enforced or is appealed to the federal court, it "is seeking interim relief only until the Board [not the Court of Appeals or Supreme Court] issues its final Decision and Order." (Petitioner Memo, p. 6). Other than speculation and hearsay, the Board has presented no evidence of an appreciable decline in Union support or chilling effects at Longy. If the Union has waited this long for redress, it surely can wait until the Board's decision after the opportunity for witness testimony and the presentation of evidence in the context of a full-blown hearing.

Furthermore, as discussed above, the Union and Longy are actively engaged in collective bargaining negotiations, during which the issues of concern to the Union can still be addressed. (Ratzlaff Aff., ¶ 45). As such, there is no need to prevent the "negative impact" cited by the Board. (Petitioner Memo, p. 26). Lastly, the Board has presented no credible evidence that Longy's alleged conduct has had a "chilling impact" on employee support for the Union.

Finally, it appears that the Board is attempting to short-circuit the administrative process and prevent Longy from presenting live testimony to refute the Board's allegations. Indeed, the Board requested and was granted an expedited hearing – set for hearing before an Administrative Law Judge on December 13, 2010. In the interim, less than a month before the hearing and more than three months after the underlying Charge was filed, it rushes to federal court seeking emergency relief. The Court should

[21/] Copies of all unreported cases are attached hereto at Exhibit 7.

not allow the Board to maneuver between forums at its own whim.

B. Petitioner Has an Adequate Remedy at Law.

The central conduct at issue here – the realignment and attendant faculty cuts – can be compensated by money damages. See Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 217 F.3d 8, 13 (1st Cir. 2000) (explaining that irreparable harm is "a substantial injury that is not accurately measurable or adequately compensated by money damages."). Here, much of the requested injunctive relief is unnecessary, as (1) there is no evidence that Longy has or will threaten employees or imply that the AFT's representation is futile; (2) Longy is currently bargaining in good faith and is willing to engage in effects bargaining; and (3) and Longy represented, verbally and in writing, that it will not make any unilateral changes without bargaining with the Union. (Zorn Aff., ¶¶ 62, 64; Ratzlaff Aff., ¶ 45). Moreover, the Board does not even seek injunctive relief on one of its central allegations – that Longy impermissibly switched health insurance carriers.

Also, Longy cannot reverse the change to Mr. Hoener's health insurance premiums without running afoul of applicable federal and state laws. This leaves the Board seeking reinstatement of the eight Union employees whose contracts were not renewed and redress for the employees who were divisionally reassigned or lost CP chair positions. These injuries are not irreparable, as money damages will fully alleviate the harm. See K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 914 (1st Cir. 1989); Asseo v. Pan American Grain Co., 805 F.2d at 27 (noting that "…arguably the possibility of subsequent relief by the Board in the form of reinstatement with back pay precludes a finding of irreparable harm."). In fact, the faculty members who received non-renewal

letters were part-time, adjunct faculty with nominal compensation.[22/] So it is not the case where they have a suffered a loss of full employment.

III. The Balance of Harms Tips Decidedly in Longy's Favor.

Even if the Board had the requisite showing of irreparable harm, the real potential for harm to Longy cuts against the issuance of an injunction. Contrary to the Board's contention, Longy faces a great deal more than "economic inconvenience" if an injunction issues. (Petitioner Memo, p. 28). In fact, injunctive relief would place significant business, administrative, and pedagogical burdens on the School. First, the pending merger with Bard is at a crucial stage, and the upheaval an injunction would cause to the operations and environment at Longy could place this deal in jeopardy. (Zorn Aff., ¶¶ 39-40; Jesse Aff., ¶¶ 15, 18-19). Second, the administrative challenge of reinstituting the discharged employees and reversing the divisional reassignments would be a logistical and practical nightmare. (Ratzlaff ¶¶ 18, 20; Chin Aff., ¶ 35; Eckelhoefer Aff., ¶¶ 6, 20). See Asseo v. Pan American Grain Co., 805 F.2d at 27 (acknowledging that the "…granting of an interim bargaining order and the reinstatement of employees, are burdensome to the employer, and should not be imposed as a matter of course in all cases…"). Indeed, the Conservatory's first semester of the 2010-2011 year ends in less than a month. (Ratzlaff Aff., ¶ 22).

Lastly, as an institute of higher education, Longy's ultimate priority is to its students. (Zorn Aff., ¶¶ 10, 17, 42-43). The domino effect of the business and administrative harm caused by an injunction will ultimately harm the student body. Forcing the School to, on an interim basis, undo the changes of the March realignment

[22/] This fact –– nominal compensation for the faculty members who received non-renewal letters –– further demonstrates that Longy's actions were not motivated by labor costs.

will undoubtedly disrupt the educational environment of Longy. The Longy community has had many months to adjust to the newly aligned divisions and the change in scope and direction of the School. This progress should not be halted.

In stark comparison, the Union has been living with the alleged "irreparable harm" for months. To the contrary, Longy is bargaining in good faith with the AFT and there is no real concern of any "nullifying effect" on the process. Indeed, Longy has every intention of reaching a collective bargaining agreement with the Union. (Zorn Aff., ¶ 64; Ratzlaff Aff., ¶ 45). Moreover, given the reality that the bargaining unit makes up only a fraction of the general faculty, the disruption of an interim injunction may cause a backlash from the unit members' colleagues, and may lead to defections from the Union. Similarly, the nature of interim relief means that the affected Union employees may have their careers further interrupted if there is a Board finding for Longy and the realignment changes are reinstituted. Such instability benefits no one.

IV. Public Policy Supports Denial of the Petition.

While the Board seeks to short-circuit a process initiated by it, namely the expedited hearing scheduled for the week of December 13, 2010, the public interest here will be best served by conducting a full hearing on the merits of the Board's case. See Kaynard v. Mego Corp., 633 F.2d 1026, 1035 (2d Cir. 1980) (noting that "the issuance of a section 10(j) injunction diminishes whatever incentives for speed the General Counsel and the charging union might have otherwise had, since a considerable portion of the desired relief has already been obtained. Moreover, in the interval between the grant of an injunction and final adjudication by the Board, the rights of the parties will have been determined by a court rather than by the expert agency established by Congress.").

Indeed, the Board's expeditious decision on the underlying Charge will provide the most resolution for all parties involved. Given the Union's delay in bringing the underlying Charge, and the Board's litigation tactics vis-à-vis the upcoming hearing on the merits, a denial of Petitioner's motion will not adversely impact the remedial powers of the Board, the rights of the bargaining unit, or the statutory intent of the Act.

CONCLUSION

Imposing injunctive relief against Longy does not meet the "just and proper" standard. For the above-stated reasons, Longy respectfully request that this Court deny Petitioner's Petition for Injunction Under Section 10(j) of the National Labor Relations Act.

Respectfully submitted,

THE LONGY SCHOOL OF MUSIC

By its attorneys,

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Dated: November 24, 2010

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2010, I electronically filed the foregoing document with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to counsel of record for the parties.

___/s/_Donald W. Schroeder___
Donald W. Schroeder, Esq.