



fisherphillips.com

May 21, 2020

VIA EMAIL TRANSMISSION

emcnair@smcnlaw.com & jmonroe@smcnlaw.com

Eben O. McNair, Esq.
Jessica Monroe, Esq.
Schwarzwald McNair & Fusco, LLP
1215 Superior Avenue, East
Cleveland, OH 44114

Re: University of Akron – AAUP/Akron
Article 15, Section 12 evidence notice and packet

Dear Sandy and Jessica,

As to your question regarding the Non-Disclosure Agreement (“NDA”) currently in place, the University of Akron (“University”) confirms the NDA and its provisions remain effective and are not waived. In providing this letter and referenced documents and information, the University does so to meet its contractual obligations under Article 15, Section 12 and within the provisions of the NDA. Should Akron-AAUP desire to disseminate any document provided by the University, the University requests it first be notified to confirm whether the particular document is covered by the NDA. For example, the Board of Trustees Executive Session document is not to be disseminated under the NDA as our client does not waive the confidentiality of that document. Similarly, student enrollment reports fall under the NDA as a trade secret. That said, there may be a document that we provide through this letter that is not within the NDA. To be sure, we suggest we discuss each document Akron-AAUP intends to use or disseminate to be clear on the NDA’s applicability. We appreciate your anticipated cooperation on this issue.

The University memorializes that it has invoked the provisions of Article 15 titled *Retrenchment* Section 12 as a catastrophic circumstance and *force majeure* exists, both of which are beyond the control of the University and would render impossible or unfeasible the implementation of the procedures set forth in Article 15. Since at least April 21, 2020, University representatives have been regularly meeting with Akron-AAUP representatives to discuss and show evidence of the catastrophic circumstance and *force majeure* in order to discuss a proposed course of action(s).

To the extent additional documents or information become available or develop that further support the Article 15, Section 12 invocation and evidence packet, they will be later provided.

Cleveland
200 Public Square
Suite 4000
Cleveland, OH 44114

(440) 838-8800 Tel
(440) 838-8805 Fax

Writer's Direct Dial:
440-740-2132

Writer's E-mail:
smoore@fisherphillips.com

Fisher & Phillips LLP

Atlanta • Baltimore • Bethesda • Boston • Charlotte • Chicago • Cleveland • Columbia • Columbus • Dallas • Denver • Detroit • Fort Lauderdale • Gulfport
Houston • Irvine • Kansas City • Las Vegas • Los Angeles • Louisville • Memphis • Nashville • New Jersey • New Orleans • New York • Orlando • Philadelphia
Phoenix • Pittsburgh • Portland • Sacramento • San Diego • San Francisco • Seattle • Tampa • Washington, DC

I. Summary of Circumstances

a. Student Enrollment Decline 2011-2019

The University has experienced significant decline in its student enrollment from 2011 to present and has provided information to Akron-AAUP representatives with this information, which is incorporated herein by reference:

- i. Graph titled *Total Enrollment and Total Number of Regular Full Time Employees Each Fall Semester*

b. Student Enrollment Decline 2020

The University has provided weekly enrollment updates to Akron-AAUP representatives since Article 15 discussions began. These weekly updates are incorporated herein by reference:

- i. Enrollment Update as of April 7, 2020
- ii. Enrollment Update as of April 14, 2020
- iii. Enrollment Update as of April 21, 2020
- iv. Enrollment Update as of April 22, 2020
- v. Enrollment Update as of April 29, 2020
- vi. Enrollment Update as of May 6, 2020
- vii. Enrollment Update as of May 20, 2020
- viii. All future enrollment updates provided from May 20, 2020 forward – to be provided as available

c. Financial Status and Decline – 2015 to present

The University has provided its financial reports to Akron-AAUP representatives since Article 15 discussions began. These reports are incorporated herein by reference:

- i. Financial Report for FY Ended 6-30-2011
- ii. Financial Report for FY Ended 6-30-2012
- iii. Financial Report for FY Ended 6-30-2013
- iv. Financial Report for FY Ended 6-30-2014
- v. Financial Report for FY Ended 6-30-2015
- vi. Financial Report for FY Ended 6-30-2016
- vii. Financial Report for FY Ended 6-30-2017
- viii. Financial Report for FY Ended 6-30-2018
- ix. Financial Report for FY Ended 6-30-2019
- x. Financial Report for Six Months Ended 12-31-2019
- xi. Financial Report for Eight Months Ended 2-29-20
- xii. All future financial reports provided from February 29, 2020 forward – to be provided as available

d. COVID-19 Worldwide Pandemic

Within Executive Order 2020-01D *Declaring a State of Emergency*, Governor Mike DeWine recognized that:

- ✓ COVID-19 is a respiratory disease that can result in serious illness or death
- ✓ As of March 10, 2020, the Centers for Disease Control and Prevention listed over 79 countries with confirmed cases of COVID-19, over 98,000 diagnosed cases worldwide with 3,380 deaths reported worldwide (NOTE: as of 5/12/20 the COVID-19 statistics worldwide are 4,178,156 confirmed cases with 286,353 deaths of which Ohio has 24,777 confirmed cases and 1,357 deaths)

Executive Order 2020-01D is incorporated herein by reference.

After enacting Executive Order 2020-01D, Ohio Department of Health Director Amy Acton, MD, MPH issued the following orders:

- ✓ *March 12, 2020 ODH Director Acton's Order titled Director's Order In Re: Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio*
- ✓ *March 17, 2020 ODH Director Acton's Order titled Director's Order In Re: Amended Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio*
- ✓ *March 22, 2020 ODH Director Acton's Order titled Director's Stay at Home Order Re: Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity*
- ✓ *March 31, 2020 ODH Director Acton's Order titled Director's Order Re: Director's Order for Non-Congregate Sheltering to be utilized throughout Ohio*
- ✓ *April 2, 2020 ODH Director Acton's Order titled Amended Director's Stay at Home Order Re: Amended Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity*
- ✓ *April 30, 2020 ODH Director Acton's Order titled Director's Stay Safe Ohio Order re: Director's Order that Reopens Business, with Exceptions and Continues a Stay Healthy and Safe at Home Order*

All of Director Acton's orders are incorporated herein by reference.

The University incorporates herein all future Executive Orders and Ohio Director of Health Orders related to or impacting the University's operation that are issued from April 30, 2020 forward.

e. Reduction in State Revenue FY 20 and FY 21

The University provided Akron-AAUP information regarding the reduction in State revenue for FY 20 at 3.8% reduction of initial allocation. On May 5, 2020, Governor DeWine announced the impact on the State budget due to COVID-19. Specifically, over

\$775 million in reductions to Ohio's General Revenue Fund for the remainder of FY 20. Over the next two months, higher education budgets will be reduced by \$110 million.

The University anticipates the State will reduce FY 21 budgets for higher education by approximately 20% due to the economic impact of COVID-19, based on current information.

- f. Reimbursement in FY 20 to students based on COVID-19 operational impact
The University provided Akron-AAUP information regarding the student reimbursements required based upon the change in University operations due to Governor DeWine's Executive Order 2020-01D and Ohio Director of Health Amy Acton's Orders. This information is incorporated herein by reference.
- g. Anticipated and Unquantifiable Additional Impact
The University expects additional negative impact on its financial projections for the remainder of FY 20 and for FY 21 based on future anticipated and unquantifiable COVID-19 impact to operations. For example, the extent to which State orders prevent the University from returning to its normal operations as existed prior to March 12, 2019, the University will lose revenue normally received in areas such as student housing, campus food service, student union operation, recreational center operation, EJT PAH operation, and parking. This revenue is essential to offset expenses in these areas. As shown on the spreadsheet titled *FY 20 Projected Expenditures in Select Categories Representing Commitments and/or Sunk Costs*, this impact could be significant. This information is incorporated by reference.

II. Article 15, Section 1(A) Evidence

a. Financial Exigency

Even before the impact of COVID-19, the University had been utilizing Article 15 to address its severe financial problems that threatened its ability to maintain operations at an acceptable level of quality. In that regard, the University and Akron-AAUP has used normal attrition Article 15, Section 2(A) to alleviate some of the financial exigency and to respond to enrollment decline from 2011 to present. The University has supplied normal attrition information to Akron-AAUP from 2011 to present, all of which is incorporated by reference.

Further, the University collaborated with Akron-AAUP to implement Article 15, Section 2(B) voluntary early retirement measures to achieve reduction of faculty and achieve some financial relief (e.g. December 2015 VRIP; 2019/2020 VSRP; and IRIP since VSRP). The University provided summary information as to the savings achieved through these programs – *VSRP VRIP IRIP Summary*, which is incorporated by reference.

As of March 12, 2020, the actions taken under Article 15, Sections 2(A) and 2(B) have not removed the financial exigencies of the University. The economic impact of COVID-19 has created catastrophic circumstances necessitating the University to identify action items needed to achieve a \$65M savings for FY 21 in order to maintain operations.

With respect to maintaining an “acceptable level of quality,” it should be noted that the University cannot maintain all of its colleges as of the Fall of the 2020-2021 year and is in the process of redesigning the make-up of the institution. This action alone demonstrates that the University can no longer maintain operations at an acceptable level of quality based on financial exigencies. By eliminating some of its colleges, departments, and programs, the University will reinvent itself and create a new platform which will redefine what constitutes an acceptable level of quality for purposes of Article 15 Section 1. In other words, the acceptable level of quality no longer exists under the current make-up of the University, as that structure is no longer fiscally sustainable.

b. Enrollment Reduction

Based on historical data, the University has had a significant reduction in enrollment over five or more academic semesters. Indeed, there is no doubt this trending will continue to persist as student enrollment has been in decline for up to the last 20 semesters.

Over the past month, the University experienced even more impactful enrollment reduction as demonstrated in the weekly enrollment updates. With 2020 Fall course registrations down 18.7 percent and new freshman confirmations down 20.6% as compared to 2019 Fall headcounts, the associated revenue impacts are in addition to the current \$65M projected deficit.

c. Discontinuation of College, Department, or Program

On May 7, 2020, the University released its proposed reorganization that would eliminate 6 of its 11 colleges to help offset the \$65M projected deficit. Even with this reorganization, the University anticipates needing to make at least 25% budget cuts for FY 21 in each of the remaining 5 colleges. Further, this necessary action will have an anticipated tangential loss of revenue that is unquantifiable at this time.

d. Action by Ohio General Assembly

The 133rd Ohio General Assembly enacted House Bill 197 (“House Bill 197”) on or about March 25, 2020. This legislation was passed in response to the COVID-19 epidemic impacted operations of the State. As a result of the operation of the State in reaction to COVID-19, the ability of the University’s students, prospective students, and employees to participate in their educational programming or operations of the University have been impacted. Further, all orders implemented by Ohio Director of Health Amy Acton were taken based on authority in legislation enacted by the Ohio General Assembly.

III. Implementation of Article 15 Procedures Impossible or Unfeasible

It is impossible or unfeasible for the University to implement the procedures of Article 15. The University must achieve action reductions of at least a \$65M ongoing savings by July 1, 2020 in order to maintain its operations for FY 21. Put simply, these savings cannot be achieved under Article 15.

- a. The Joint Committee on Retrenchment procedure in Article 15, Section 3(B), 3(C), and 3(D) and Section 4(A), 4(B), and 4(C) cannot be completed in a manner that would allow the University to secure necessary savings action items by July 1, 2020.
- b. The retrenchment process in Section 6 cannot be completed in a manner that would allow the University to secure necessary savings action items by July 1, 2020.
- c. The notice of release procedure in Section 7 cannot be completed in a manner that would allow the University to secure necessary savings action items by July 1, 2020.
- d. Any requirements of Sections 8, 9, 10 and 11 arise from Section 6 and Section 7. Consequently, Sections 8, 9, 10, and 11 carry no obligation and have no legal force or effect where Section 6 and Section 7 are impossible or unfeasible for the University under Section 12.

The University incorporates all of the information in this document into this section as if restated, for the basis of why implementation of Article 15 procedures are impossible or unfeasible for the University. Together, these serve as the basis for invocation of Article 15, Section 12.

IV. Review of Article 15, Section 12 Discussions

University and Akron-AAUP representatives have had ongoing communications since at least April 21, 2020 regarding the University's catastrophic circumstances and the issue of *force majeure*. These discussions took several forms. The University incorporates all the information from these discussions herein, which include:

- a. Virtual Meetings
 - i. April 21, 2020
 - ii. April 24, 2020
 - iii. April 30, 2020
 - iv. May 8, 2020
- b. Ongoing Communications University and Akron-AAUP
 - i. University and Akron-AAUP leaders have been in regular communication regarding the catastrophic circumstance and *force majeure* matters.
 - ii. The legal representatives of the University and Akron-AAUP have had ongoing communication regarding the catastrophic circumstance and *force majeure* matters and have facilitated the exchange of information between their respective clients.

c. AAUP Informational Requests and University Responses

- i. April 23, 2020
The University responded to this request. All documents and information provided by the University is incorporated herein by reference.
- ii. April 27, 2020
The University responded to this request. All documents and information provided by the University is incorporated herein by reference.
- iii. April 29, 2020
The University responded to this request. All documents and information provided by the University is incorporated herein by reference.
- iv. May 5, 2020
The University responded to this request. All documents and information provided by the University is incorporated herein by reference.
- v. May 10, 2020
The University responded to this request. All documentations and information provided by the University is incorporated herein by reference.
- vi. May 11, 2020
The University responded to this request. All information provided by the University is incorporated herein by reference.
- vii. May 12, 2020
The University responded to this request. All documents and information provided by the University is incorporated herein by reference.
- viii. May 14, 2020
The University responded to this request. All documents and information provided by the University is incorporated herein by reference.
- ix. The University incorporates herein any information and documents provided to the Union in response to requests made by the Union on or after May 14, 2020.
Note: If the Union requests documents previously provided be produced again, please advise.

d. Physical Meetings

- i. May 13, 2020
- ii. May 19, 2020 – Note: 5/19/20 Force Majeure written notice document incorporated herein
- iii. May 22, 2020 (scheduled)

e. University President Dr. Gary L. Miller Messages

The University President communicated the following messages to the campus, which are incorporated herein by reference:

- i. We're in this together – March 29, 2020
- ii. Affirming Our Promises in the Post-COVID World – April 23, 2020
- iii. Affirming Our Promises in the Post-COVID World Update #1 – May 4, 2020

- iv. Future Campus Messages from University President Dr. Gary L. Miller – to be provided as available

V. Areas of Proposed Course of Action

The University has proposed the following areas of proposed action to Akron-AAUP:

- i. Utilizing Article 33 titled *Duration and Negotiation Procedure*, Section 3
- ii. Exploring actions items, on or before July 1, 2020, that can yield immediate savings including:
 - ✓ Additional voluntary retirements
 - ✓ Reductions-in-force
 - ✓ Furloughs
 - ✓ Unpaid leaves of absence
 - ✓ Increases in health care contributions
 - ✓ Salary reductions
 - ✓ Postponement of professional development
 - ✓ Retiree spouse and dependent healthcare
 - ✓ Sick leave credits
 - ✓ Tuition and fee remission reductions
- iii. Any other potential cost-savings measure, not listed above, that is achievable within the required timeframe(s)

VI. University's Position on Article 15, Section 12

On May 15, 2020, Akron-AAUP announced its position regarding certain sections of the Labor Contract. Specifically, the Union addressed Article 29, Article 15, and Article 33.

Of relevance, in that communication, Akron-AAUP acknowledged that “the hardships presented by COVID-19 likely trigger this provision,” referring to the “exigent circumstances” provision in Article 33, Section 3, which provides:

The University may seek to modify any provision of this Agreement prior to its expiration only if immediate action is required due to (1) exigent circumstances that were unknown at the time of negotiations; or (2) legislative or regulatory action taken by a higher-level legislative or regulatory body after this Agreement became effective that requires a change to conform to the statute or rule. In such event the University shall immediately so notify the Akron-AAUP and the parties shall meet and negotiate in good faith, including providing relevant information and documents, and attempt to reach agreement. If agreement cannot be timely reached, as either side may determine, then either side may submit the dispute to arbitration pursuant to Article 12, *infra*. *Emphasis added.*

The University maintains that Akron-AAUP's recognition that the COVID-19 pandemic has triggered the "exigent circumstances" of Article 33, Section 3 evidences a concession that the "catastrophic circumstances" in Article 15, Section 12 exists. This is particularly so as Akron-AAUP stated in regard to Article 15, Section 12, "Article 15, Section 12 provides an exception to the procedures in Article 15 where "catastrophic circumstances, such as *force majeure*" render the procedures "impossible or unfeasible. It is arguable that this clause applies to the current situation." The University, relying on all evidence cited in this document, contends both Article 15, Section 12 and Article 33, Section 3 are triggered. The University requires relief from current financial obligations under the Labor Contract to ensure continued operations of the University during FY 21 and beyond. Absent the required significant economic relief, the University will be unable to remain viable.

Akron-AAUP appears to be positioning itself in its May 15, 2020 communication to delay the inevitable economic action required to bridge the gap created by the current and expanding budgetary deficits. Specifically, Akron-AAUP wrongfully contends the University cannot immediately layoff any bargaining unit members under Article 29 (NTTs) or Article 15 (NTTs, probationary, and tenured faculty) and instead must secure any needed economic relief through Article 33, Section 3 and arbitration/court. This is simply wrong and appears intended to threaten the University that any of its efforts to sustain its financial viability will be legally challenged later if not to the satisfaction of Akron-AAUP. The reality is the threat of such action signals bad faith to the University and an intent to place the interest of the union over those of the students whom this University serves.

Article 15, Section 12 specifically states:

The procedure for retrenchment set forth in this Article is designed to accommodate both the orderly change in the University and reductions that must accompany more abrupt changes in circumstances. The parties recognize that catastrophic circumstances, such as *force majeure*, could develop which are beyond the control of the University and would render impossible or unfeasible the implementation of procedures set forth in this Article. Therefore, Section 12 shall not be used to accomplish retrenchment as set forth in this Article. If such unforeseen, uncontrolled and catastrophic circumstances should occur, then the University agrees that, before taking any action that could be interpreted as bypassing the retrenchment procedures, representatives of the University will meet with representatives of Akron-AAUP to discuss and show evidence of the circumstances described above and that this evidence will at least satisfy the requirements outlined in Section 3(A) of this Article and to discuss the proposed course of action. *Emphasis added.*

This section specifically recognizes the University may need to take action, bypassing the retrenchment procedures in Article 15. This is further reinforced by the language recognizing that "catastrophic circumstances" that "render impossible or unfeasible the

implementation of procedures set forth in this Article” requires that Section 12 not be used to accomplish retrenchment as set forth in this Article. All language within Section 12 confirms the University is exempt from complying with the retrenchment procedures in Article 15 where catastrophic circumstances like force majeure exists.

Also, Article 15 only applies to probationary faculty (Section 6.A.) and tenured faculty (Section 6.B.). Probationary faculty is defined in Article 13, Section C(2), which specifically defines probationary faculty as “all non-tenured tenure track bargaining unit members” and ends once indefinite tenure becomes effective. When Article 29 and the creation of “NTT” faculty was bargained, the parties did not address modifying Article 15 to include NTT faculty. Consequently, the University maintains that Article 15 does not require NTT faculty to be released prior to probationary faculty or tenured faculty as Akron-AAUP contends in its May 15, 2020 communication. The University has the right under Article 29, Section 1 to modify or eliminate NTT positions “[i]f the University’s needs change.” As demonstrated herein, the University’s needs have forever changed. It is in the process of eliminating 6 of its 11 colleges and taking other drastic measures to ensure the continued existence of the University. To suggest that the University cannot eliminate NTTs when it has the express power to do so (see also Article 3 titled *Management Rights*) is an untenable position in the current circumstance, particularly when Article 15, Section 12 empowers the University to layoff probationary and tenured faculty outside of retrenchment procedures. The fact that Akron-AAUP contends Article 15 applies to NTTs demonstrates the union intent is that NTT positions can, in fact, be eliminated during a catastrophic circumstance such as force majeure.

Sincerely,

/s/ Sarah

Sarah J. Moore
For FISHER & PHILLIPS LLP

SJM:vng

Attachments – available through shared folder provided through link to counsel

cc: Steve Nobil, Esq.
Dr. Rex Ramsier
Sid Foster, Esq.
Mark Stasitis, Esq.