

AMERICAN ASSOCIATION OF UNIVERSITY  
PROFESSORS – UNIVERSITY OF AKRON  
CHAPTER,

Grievant,

and

THE UNIVERSITY OF AKRON,

Public Employer

) ARBITRATOR JACK BUETTNER

)

) Grievance No. 2020-01

) (Article 15, Section 12)

)

)

) **ARBITRATION BRIEF SUBMITTED FOR THE**  
) **UNIVERSITY OF AKRON**

)

)

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I. Overview

A. Case Overview

The present grievance pursued by the American Association of University Professors-University of Akron Chapter (“Akron-AAUP”) is nothing more than a flagrant effort to obstruct the University of Akron’s (“UA” or the “University”) legitimate use of its contractual authority to bypass the Byzantine retrenchment procedures when catastrophic and unforeseeable circumstances arise that render the conventional procedures impossible or unfeasible. The Akron-AAUP’s efforts should be stopped immediately and comprehensively in its tracks.

Success by Akron-AAUP in this proceeding would devastate the University’s multi-part plan to address the overwhelming impact from the COVID-19 pandemic and the well-known financial fallout from that event. The University would be forced to expend millions of dollars in back pay to dozens of laid off faculty who will have no work to do for at least a semester (and possibly more), and then be forced to utilize the conventional retrenchment procedure that will not produce any cost savings for more than one year. Further compounding the matter, the required order of layoffs would necessitate even more faculty to be laid off to produce the same cost savings and leave the surviving faculty unable to maintain the standards of a viable academic program. All of this would be occurring while the University continues its struggle to reduce a \$56 million-deficit within one fiscal year. If that task sounds impossible, then that is because it is.

Akron-AAUP raises three objections to the University’s legitimate invocation of the contractual catastrophic circumstances provision (detailed in Article 15, Section 12). All of these objections lack any merit and should be rejected.

Akron-AAUP first argues that the financial crisis generated by the COVID-19 pandemic and the response to and fallout from the same does not constitute catastrophic circumstances that render conventional retrenchment procedures impossible and unfeasible. Akron-AAUP actually accuses the University of using the pandemic as an excuse to address pre-existing financial and operational problems. Akron-AAUP also claims that the University's proposed measures are too extreme and that a more gradual approach that does not involve immediate layoffs should be implemented.

Akron-AAUP's denial of the obvious boggles the mind! The University must eliminate a \$56 million-deficit in just one fiscal year, \$11 million of which come from the layoffs that Akron-AAUP challenges. The repercussions from the sudden, immediate and detrimental loss of funds due to reduced State funding and reduced projected student enrollment are well known to Akron-AAUP, both from public knowledge and confidential information provided only to Akron-AAUP (via a non-disclosure agreement), the University's Trustees and the upper-level Administration.

Equally untenable is Akron-AAUP's attempted obstruction of the University's painful strategy for addressing the immediate cost-reduction efforts. There exists no contractual basis for challenging those decisions. Once the University satisfies the elements for invoking the catastrophic circumstances provision, the University's discretion is limited only by the bounds of the law. Moreover, Akron-AAUP's alternative, "go slow/go light" approach simply will not work. In fact, it will result in more layoffs of faculty and non-faculty employees and lead to the same financially devastating result (i.e., a nearly complete exhaustion of the University's unrestricted net assets) only one year later than if the University did absolutely nothing in the face of this

huge deficit. In fact, Akron-AAUP's alternative appears to be little more than an effort to avoid the painful concessions that other bargaining units negotiated and administrators volunteered to take. The University already has provided Akron-AAUP with the evidence to support this conclusion, yet Akron-AAUP chooses to ignore it for reasons known only to them.

Akron-AAUP next argues that the University's contractual authority to bypass the contractual retrenchment procedures somehow extends only to a small part of the procedures, and excludes virtually the entire layoff process, including: the order of the layoffs, the length of the layoff notices, placement of laid-off faculty in alternative teaching positions, recall rights, part-time employment opportunities, continued health benefits and restoration rights. Akron-AAUP argues that all of these processes are not "procedures" that the University can bypass, but instead are "substantive rights" that cannot be touched.

Akron-AAUP's tortured interpretation renders the University's authority virtually useless, which is itself all the reason needed to reject it. The clear contract language that the University's bypass authority extends to all aspects of conventional retrenchment refutes the Akron-AAUP's interpretation. In addition, the "procedural vs. substantive rights" distinction cannot be found anywhere in the Article 15 retrenchment procedures. Indeed, the clear and unambiguous contract language and a common-sense understanding of the retrenchment process confirm that the entire Article 15 is procedural. Finally, the distinction Akron-AAUP seeks to impose makes no sense. The Sections of Article 15 that Akron-AAUP claims are "procedural" are no different than the Sections that it claims are "substantive."

Finally, Akron-AAUP unbelievably claims that the University failed to share the required information regarding the basis for invoking the catastrophic circumstances provision and the

proposed course of action. Akron-AAUP must have forgotten about the 18 bargaining sessions during which the parties discussed these topics thoroughly and repeatedly, and the dozens of follow-up information requests that documented this information. The University is at a loss to understand what else it could have provided.

Akron-AAUP's efforts should be seen for what they are: a desperate attempt to avoid painful, but critically essential, cost concessions that every other employment group on campus has accepted. The time has come for Akron-AAUP to cease its campaign of obstruction and step up like everyone else has done.

B. Brief Format Overview

This brief contains eight sections, intended to provide a full context to the issue presented in this arbitration and the University's position and supporting argument. The sections are summarized as follows:

Section II provides a general summary of the University as an institution.

Section III gives an overview of the University's General Fund, which is unrestricted and the source of revenue for payroll and benefit expenditures. This section presents the University's Financial Reports for Years Ended 2011 through 2019, identifies the reduction in State Share of Instruction revenue for Fiscal Years Ended 2016 to 2019, and details enrollment driven revenue reductions for Fiscal Years Ended 2015 to 2019. This section also identifies correlated campus-wide staffing adjustments based on student enrollment decline and the use of several programs to secure such reductions in the Akron-AAUP unit. Next, Section III provides an overview of the University's FY 2019-2020 approved budget and the Financial Report for FY20, 6-months ended

December 31, 2019 so that the University's General Fund position pre-COVID-19 can be best understood.

Section IV describes the arrival of the COVID-19 pandemic and its immediate, unpredictable, and unfolding aftermath. This section is provided in a timeline-like fashion, with material dates underlined to give a flavor that existed in real time as this situation emerged – complete and utter uncertainty and constantly changing variables. The landscape of what was happening at the University as the COVID-19 pandemic took hold in Ohio beginning March 10, 2020 is detailed. The changes to State Share of Instruction Revenue from January 2020 through the drastic announcement on May 5, 2020 by Governor DeWine as to FY20 reductions with less than 2 months remaining in the fiscal year is explained. The University's Board took prompt action to secure necessary budget reductions for FY20 and to provide the flexibility needed to implement additional employee-related reductions as circumstances continued to change. The context for the initially projected FY21 \$65-million budget deficit is provided, and the actions taken by the University's Board and administration to secure the necessary savings is detailed.

Section V provides an overview of the relationship between the University and Akron-AAUP leadership during this volatile time. The dramatic shift from bargaining over a successor contract at the start of 2020 to meeting to share information as it became known, to exploring how Akron-AAUP would fill its role in contributing to addressing the FY21 budget deficit as all others on campus were, to negotiating a tentative agreement with financial concessions for FY21, to collaborating to minimize the number of Akron-AAUP faculty positions to be abolished

occurred within a relatively compressed time frame: April 21, 2020 through July 13, 2020 – less than three months.

Section VI identifies the key articles in the Labor Contract.

Section VII summarizes the grievance filed by Akron-AAUP.

Section VIII identifies the issue in this case and provides the University's position and supporting argument and requests the Arbitrator deny the grievance in its entirety.

Section IX contains the University's conclusory remarks.

## II. The University of Akron – History

The University, now celebrating its sesquicentennial (150<sup>th</sup>) anniversary, was originally formed and financed by Akronites, in particular industrialist John R. Buchtel. The University has a rich history in the rubber industry, providing the world's first courses in rubber chemistry and forming its Rubber Technical Institute in 1942 to support contributions in the development of synthetic rubber to aid in the Allied war efforts.

In 1967, the University transitioned from a municipal university to a state university. UA established the world's first College of Polymer Science and Polymer Engineering in 1988, the largest academic program of its kind in the world. In 2000, the University implemented its campus enhancement program, *New Landscape for Learning*, resulting in 22 new buildings, 18 major additions, acquisitions, and renovations, and 34 acres of new green space being added to its 218-acre campus. Now, UA offers 200+ in-demand associate, bachelor's, master's, doctorate, and law degree programs. Holding accreditations from 35 professional agencies, the University presently delivers its programs to a diverse group of learners, including full-time, part-time, and on-line students. Although best known for its application of polymer and advanced materials expertise

in the fields of manufacturing, medical devices and technology, air filtration, advanced energy, emerging green technologies, and microelectronic and optical devices, the University also enjoys distinction for its research in all colleges, multi-disciplinary centers, and labs.

### III. Overview of the University's General Fund Pre-COVID-19

As a state public university, UA's general unrestricted funding is delivered through specific revenue streams which include: State Share of Instruction ("SSI"); Tuition, General Service, and Other Fees ("TGO"); Indirect Cost Recovery ("ICR"); and Investment Income ("II"). The Ohio Department of Higher Education ("ODHE") provides to each state university information on the SSI estimate for a fiscal year. SSI is based on projections of Ohio tax revenue collections and is paid monthly. ODHE maintains discretion to modify the SSI estimate throughout the fiscal year.

Student enrollment drives the TGO revenue stream. Higher student enrollment typically increases the credit hours delivered each fiscal year, as well as associated general service and other fees. ICR represents money received on some of its research grants to help cover indirect costs. II results from short, intermediate, and long-term operating fund portfolios and relevant market performance and is immediately reinvested such that II remains unavailable to the University's General Fund for expenditures.

Expenditures paid from the University's General Fund include: Payroll, Fringes, Operating Costs, and, Scholarships. The General Fund, through a series of transfers and advances, interweaves into and from other University accounts to support the overall financial health and sustainability of the University. These other areas include the University's reserves, capital projects, debt service, and other expenditure categories.

State law requires the University to balance its budget at the end of each fiscal year.

Specifically, Ohio Administrative Code Rule 3359-3-04 titled *Budget Deficit* states:

- (A) It is the responsibility of each vice president, dean, director or department chair to ensure, for all accounts for which they are responsible, that expenditures remain in line with authorized budgets during the fiscal year. **In addition, the carry-forward of a deficit budget balance in any general fund, auxiliary enterprise, grant, contract, or other restricted account, from one fiscal year to the next is prohibited.** [Emphasis added]

While the University may take a budget deficit and place it as a line item into the next fiscal year as a “structural deficit,” such inclusion draws from available operating revenue streams in that new fiscal year and can result in the University not being able to meet its payroll and debt obligations. Hence, any structural deficit must be minimal and promptly eliminated from the base budget; otherwise, the University will not have the funds it needs to adequately fund operations.

In regard to cash reserves, the University cannot completely exhaust these reserves. Doing so would eliminate the existence of reserves that must be available during a fiscal year should the operating fund not have enough revenue to meet payroll or pay basic bills. The cash reserves are a “Band-Aid” that allow the University a fallback to address expenditure obligations when General Fund revenue is unavailable or exhausted. Draining the cash reserve balance too low would also result in the University’s credit rating being downgraded from an investment-grade rating to a non-investment-grade rating and the UA’s regional accreditation body, the Higher Learning Commission, taking action to address the probability of the University’s continued viability.



A. Overview of University Financial Reports for Fiscal Year Ended 2011 through Fiscal Year Ended 2019

To understand the catastrophic circumstances at issue in this case, it is important to understand the University's financial status in the years prior to the COVID-19 pandemic. The University's *Financial Report for Fiscal Year Ended 6/30/19* (see, UA Exhibit 1-A) stated General Fund total actual revenue at \$318,070,876, a mere 1% below the budgeted total revenue allocation for that year. Total actual expenditures totaled \$288,253,099, a mere 2% below the budgeted total revenue allocation. The net before transfers and advances from the General Fund to support other areas of University operations, specifically the Auxiliary Units, totaled \$29,817,777 and balanced at \$0 as required by state law after said transfers and advances were reconciled. Prior to COVID-19 arriving, at the end of FY19, the University's finances were being managed effectively.

Dating back to Fiscal Year 2011, the University's Financial Reports at each ended fiscal year evidence this pattern of fiscal method and rigor. The below chart demonstrates the General Fund revenue and expenditure allocations, with reconciliations of the net through transfers (e.g. paying bills in the residence halls and other auxiliaries) and advances (i.e. drawing from reserves) achieving a balanced budget each year.

Fiscal Year Ended	Total Revenues	Total Expenditures	Net Revenues	Net Transfers-In & (Transfers-Out)	Surplus (Deficit)	Addition To & (Draw on) Reserves Included in Net Transfers	University Exhibit #
2019	318,070,876	288,253,099	29,817,777	(29,817,777)	-	(3,795,965)	UofA-1A
2018	339,540,568	298,307,167	41,233,401	(41,233,401)	-	(4,219,995)	UofA-1B
2017	366,702,452	314,895,486	51,806,966	(39,706,765)	12,100,201	-	UofA-1C
2016	373,393,155	322,142,687	51,250,468	(51,250,468)	-	(6,192,736)	UofA-1D
2015	374,250,900	333,400,000	40,850,900	(44,333,300)	(3,482,400)	-	UofA-1E
2014	382,534,100	329,460,400	53,073,700	(51,180,500)	1,893,200	-	UofA-1F
2013	386,381,400	344,335,200	42,046,200	(44,781,800)	(2,735,600)	-	UofA-1G
2012	388,852,600	341,353,700	47,498,900	(58,090,000)	(10,591,100)	-	UofA-1H
2011	395,661,400	323,389,000	72,272,400	(68,990,500)	3,281,900	-	UofA-1I

Comparing Financial Statements for Fiscal Year Ended 2010 and Fiscal Year Ended 2019 provides a clearer picture of the changed financial position of the University over the last decade. See, *UA Exhibit 1-J – FY10 and FY 19 Comparison Financial Statements*. In general terms, overall operating revenues have substantially declined by **-23.2%** and the overall operating expenditures have decreased **-19.2%**. So, while the budget has been balanced each year, the University experienced a large change in its financial position over that time, having to draw significantly (more than \$14M in total) from its reserves in three of the past four years. The University sustained this overall financial decline over time and was able to address its change in financial position in a more measured manner than the current circumstances allow.

i. University's Reduction in SSI from Fiscal Year Ended 2016 to Fiscal Year Ended 2019

The University has experienced an overall decline in SSI revenue Fiscal Year Ended from 2016 to Fiscal Year Ended 2019 of over -4% in lower revenue.

<u>Fiscal Year Ended</u>	<u>Total SSI Revenue</u>	<u>Percentage change from prior fiscal year</u>	<u>University Exhibit #</u>
2019	101,851,513	<b>-3.65%</b>	UA-1A
2018	105,711,686	<b>-2.69%</b>	UA-1B
2017	108,566,094 <sup>1</sup>	2.11%	UA-1C

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<sup>1</sup> Based on \$106,317,746 SSI in Fiscal Year Ended 2016 (See, UA Exhibit 1D).

ii. University's Adjustments to Enrollment Driven Revenue Reductions from Fiscal Year Ended 2015 to Fiscal Year Ended 2019

The University also experienced a significant decline in its TGO revenue stream from \$257,504,809 in Fiscal Year Ended 6/30/15 to \$207,983,916 in Fiscal Year Ended 6/30/19, representing an over -19% revenue reduction.

<u>Fiscal Year Ended</u>	<u>Total TGO Revenue<sup>2</sup></u>	<u>Percentage decline from prior fiscal year</u>	<u>University Exhibit #</u>
2019	207,983,916	-5.96%	UA-1A
2018	221,188,865	-7.09%	UA-1B
2017	238,093,290	-4.59%	UA-1C
2016	249,557,278 <sup>3</sup>	-3.08%	UA-1D

1. Enrollment Decline 2008 to 2019

From 2008 through 2019, the University experienced a drastic enrollment decline of 6,720 students, moving from 25,950 students to 19,230 students. *See, UA Exhibit 2 - Enrollment 2008 to 2019 Enrollment.* By student category, these reductions represent the following percentage decreases:

<u>Student Category</u>	<u>Change from Fall 2008 to Fall 2019 by Head Count</u>	<u>Change from Fall 2008 to Fall 2019 by Student Credit Hour</u>	<u>Change from Fall 2008 to Fall 2019 by Full-time Equivalent</u>
Undergraduate	-24%	-24%	-24%
Graduate	-38%	-36%	-36%
Law	-10%	-2%	-3%

This student enrollment decline is the primary factor in the historical decline in the University's TGO revenue.

<sup>2</sup> The University provides enrollment incentive programs (e.g. scholarships). These expenditures are not reflected in the TGO Revenue figures.

<sup>3</sup> Based on \$257,504,809 TGO Revenue in Fiscal Year Ended 2015 (*See, UA Exhibit 1E*).

## 2. Correlated Staffing Adjustments 2010 to 2019

From 2010 through 2019, the University experienced the following overall changes in its full-time staffing levels:

- Administrators: Overall decline of -23.3%
  - Akron-AAUP Faculty: Overall decline of -19.9%
  - Non-Faculty Staff: Overall decline -38.9%
  - Library Faculty: Overall decline of -48%
  - Contract Professionals: Overall increase 1.4%<sup>4</sup>
- See, UA Exhibit 3 - FT employees and total enrollment 2010-2019.*

Notably, other than the small complement of contract professionals, the Akron-AAUP Faculty unit at the University has decreased by the smallest percentage. The decline in Akron-AAUP Faculty numbers has not kept pace with the correlating drop in student enrollment (i.e. -34.3% student enrollment decline and only a -19.9% Akron-AAUP Faculty decline). When viewed from 2008 through 2019, the full-time employee count dropped for Akron-AAUP -18% while other work groups experienced higher position loss (administrators: -25%; non-bargaining & bargaining staff: -33%). *See, UA Exhibit 4 – Head Counts and Pay Increases.* Notably, over this same period, Akron-AAUP Faculty received a +35% nominal increase in percentage salary increases, while other union employees averaged a +25.5% nominal increase, and unrepresented staff averaged a +18.8% nominal increase. *Id.* In addition, reductions in Akron-AAUP headcounts came through normal attrition and a series of retirement incentive programs, whereas a large involuntary reduction in force of other employee groups occurred in 2015.

Prior to COVID-19, the University secured cost savings through regular attrition for FY20 for full-time Akron-AAUP bargaining unit faculty and resignations/deaths (20 positions). *See, UA*

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<sup>4</sup> The increase shown in this category is a result of many positions being reclassified from staff to contract professionals.

*Exhibit 5 – Response to Akron-AAUP 7/23/20 Information Request - 2020 and 2021 Terminations for Akron-AAUP.* In addition, retirements were secured utilizing various programs as described in the next item.

a. TARP, VRIP, VSRP, IRIP of Akron-AAUP Faculty: 2017 through May 2020

The University implemented several incentive programs to secure most of the reductions in Akron-AAUP Faculty levels from 2017 through early 2020. These included: a Transition After Retirement Program (“TARP”), a Voluntary Retirement Incentive Program (“VRIP”), a Voluntary Separation/Retirement Program (“VSRP”), and an Individual Retirement Incentive Program (“IRIP”).

Beginning in approximately Spring 2017 to present, the University implemented the TARP to incentivize employees to transition from active employment into retirement. The program, customized to each participant, allowed moving into retirement by retiring and later returning to employment with less job responsibilities/duties. *See, UA Exhibit 6A – Transition After Retirement Program Introductory Document; UA Exhibit 6B - TARP BOT 6.14.17 Meeting (TARP voluntary separations: 7); UA Exhibit 6-C – TARP BOT 10.11.17 Meeting (TARP voluntary separations: 2 additional).* From FY17 to FY 19, the TARP resulted in the following voluntary early retirements of Akron-AAUP faculty and resulting savings:

<u>Fiscal Year Ended</u>	<u>Number TARP Participants</u>	<u>Savings</u>
2017	9	\$475,859
2018	7	\$392,831
2019	7	\$370,856

*UA Exhibit 6-D – TARP Savings FY17-19.*

During Fiscal Year 2018, the University's Board passed Resolution No. 12-19-17 and Resolution No. 2-11-18 to implement the VRIP effective May 31, 2018. The VRIP provided eligible full-time Akron-AAUP Faculty members and eligible administrators with full-time faculty rank additional incentives upon separation from employment to provide the University "with greater flexibility to respond to current budgetary priorities." *See, UA Exhibit 7 – VRIP Resolution 12-19-17 and Resolution 2-11-18.* By its Resolution No. 3-1-19, the University implemented the VSRP to provide eligible full-time Akron-AAUP Faculty members with additional incentives upon separation from service and to provide the University "with greater flexibility to respond to current budgetary priorities." *See, UA Exhibit 8 – VSRP Resolution No. 3-1-19.*

Since at least 2017, the University has also utilized Article 16 Section 11 of the Labor Contract to secure cost savings through granting retirement incentive benefits to individual Akron-AAUP Faculty through written agreement between the Akron-AAUP, its members, and University representatives. *See, Stipulated Exhibit A, p. 76-77.*

Because of these efforts, the University eliminated a net total of 63 Akron-AAUP Faculty positions<sup>5</sup> and saved \$6,117,000 in payroll expenditures through VSRP, VRIP, and IRIP. *See, UA Exhibit 9 – VSRP VRIP IRIP Summary.*

B. Overview of University's Fiscal Year 2019-2020 Approved Budget and Financial Report Fiscal Year 2020, 6-Months Ended Report

The University approved its Fiscal Year 2019-2020 General Fund budget on June 15, 2019, which stated \$246,840,000 in total revenue and \$230,345,000 in total expenditures, and net transfers

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<sup>5</sup> Technically, 90 Akron-AAUP Faculty participated in the VRIP, VSRP, or IRIP programs. The University had to hire 27 employees to fill vacant positions deemed essential to programming, leaving 63 positions eliminated.

of \$16,495,000 that after transfers and advances resulted in a balanced budget at \$0. *See, UA Exhibit 10 – Resolution 6-15-19 Pertaining to the Approval of the FY 2019-2020 General Fund, Auxiliary and Sales Funds Budgets.* The budgeted draw on operating reserves<sup>6</sup> was \$11,584,000. *Id.*

In its Fiscal Year 2020, 6-months ended report, the University determined that as of December 31, 2019, its budgetary projections had been met 51% on the revenue side and 47% on the expenditure side and 6-months into Fiscal Year 2020 had a projected surplus of \$3,858,728 after reconciliation of projected transfers and advances. *See, UA Exhibit 11 – Financial Report for Six Months Ended 12/31/19.* Prior to the arrival of the COVID-19 pandemic, the University appeared well within its projected budgetary projections and it was managing any actual and potential stressors (e.g. enrollment, personnel cost increases).

C. Closing Remarks on University’s General Fund Position Pre-COVID-19

Before the COVID-19 pandemic and its impact arrived, the University was in a relatively positive financial position. While it had suffered significant reductions in its two primary General Fund revenue streams (i.e. reduction of -4% in SSI from FY16 through FY19 and reduction of over -19% in TGO revenue due to declining enrollment), the University implemented various expenditure reduction programs and took various staffing actions to meet its fiscal responsibilities. Such employment actions impacted the entirety of the University’s campus as demonstrated by the significant reductions to all but one work group. The University’s fiscal stewardship enabled UA to achieve balanced budgets without any structural deficit while maintaining its colleges and programs. As of December 31, 2019, the University had no

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<sup>6</sup> Operating reserves are the result of prior year operating surpluses/excess of revenues over expenditures.

knowledge that unforeseen financially catastrophic circumstances would materialize within a matter of months that would forever change the University.

IV. The Arrival of the COVID-19 Pandemic and the Immediate Unpredictable Unfolding Aftermath

The COVID-19 pandemic materialized within an extremely small window of time and brought unprecedented circumstances that have never been experienced. At all times, the COVID-19 pandemic and its impacts have changed and evolved in a manner that cannot be predicted with any level of certainty. The consequences have been swift, all-encompassing, and will continue unabated until a vaccine or course of treatment is found and distributed such that the virus loses its virulence, deadliness, severity, and foothold on our society and nation. The best anyone can do is to act and adapt to the changing circumstances in order to survive through the pandemic and come out the other side as intact as possible. This is the reality of every individual, business, and educational institution in our nation. This is reality for the University of Akron. Without action, the University will not survive the impacts of the COVID-19 pandemic. Survival is the University's only option, and act it must to survive.

A. January 2020 and February 2020 – Just Before COVID-19's Arrival

Beginning January 2020 and for the remainder of FY20, the University's SSI monthly revenue deposit decreased. *See, UA Exhibit 12 - SSI Transactions Posted to GL FY20.* For the first six months of FY20, the University received a monthly SSI deposit of \$8,349,694 for July 2019, \$8,343,087 each for August through October 2019, and \$8,343,088 each for November and December 2019. The six-month SSI revenue total of \$50,065,131 matches the actual SSI revenue identified for FY20 in the six-month ended report dated 12/31/19. *Id.*



On January 15, 2020, the University's SSI monthly revenue deposit decreased to \$8,148,595, a -2.3% reduction as compared to December 2019. *Id.*

On February 12, 2020, the University held a Board of Trustees meeting. At that meeting, there was no mention of the COVID-19 pandemic, as one might expect given the virus had not yet hit Ohio. *See, UA Exhibit 13 – 2/12/20 Board of Trustees meeting packet.*

On February 19, 2020, the University's SSI monthly revenue deposit was \$8,148,595, again a -2.3% as compared to December 2019. *See, UA Exhibit 12, p. 1.*

On February 27, 2020, Ohio Governor DeWine and Ohio's Health Director provided a COVID-19 Prevention and Preparedness Plan. *See, UA Exhibit 14 – 2/27/20 DeWine Update.* At the time of this update, there were no confirmed cases of COVID-19 in Ohio and Governor DeWine stated:

"I want to be clear that the threat of Coronavirus in Ohio and the United States remains low, but this could change, and we have to be prepared. I believe it is imperative that we are open with the public and are communicating information in real-time about the Coronavirus to both inform and educate our communities. We will communicate what we know, when we know it."

In that update, Governor DeWine also announced he had ordered college and university leaders to:

- Urge every student and faculty member on campus who had not received an influenza shot to get one immediately.
- Prohibit college travel to nations where the CDC recommended no travel.
- Take appropriate action to accommodate students studying abroad and needing to return to the United States.

B. COVID-19 Arrives in Ohio – March 10, 2020

i. Ohio Governor DeWine’s Declaration of a State of Emergency

On March 10, 2020, Governor DeWine signed Executive Order 2020-01D *Declaring State of Emergency* for Ohio to protect the well-being of its citizens as the Ohio Department of Health had confirmed on only the day before that three (3) patients tested positive with COVID-19 in Ohio. *See, UA Exhibit 15 – Governor DeWine Executive Order 2020-01D*. That order stated that the confirmation of individuals with COVID-19 in Ohio created “a potentially dangerous condition which may affect the health, safety, and welfare of citizens of Ohio.”

ii. University President Gary L. Miller Directive – First Campus Operational Impact

On March 10, 2020, University President Gary L. Miller (“President Miller”) issued a directive that suspended all classes until the conclusion of Spring break<sup>7</sup> on March 30, 2020 and ordered all courses be migrated to online delivery for when classes resumed March 30, 2020. The directive also cancelled all large-scale and non-essential events scheduled on campus until at least April 20, 2020. *See, UA Exhibit 16 – President Miller’s 3/10/20 Directive*. The costs and expenses associated with migrating all courses to online delivery was not in the FY20 budget and could not be wholly quantified at that moment.

C. March 11, 2020 to March 31, 2020 – Movement to Shuttering Ohio & Further Reduction in the University’s SSI Revenue Stream

On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. *See, UA Exhibit 17 – WHO Declaration 3/11/20*.

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<sup>7</sup> Spring break 2020 was scheduled from March 23, 2020 to March 29, 2020.

On March 12, 2020, the Ohio Director of Health issued an Order that prohibited mass gatherings in Ohio. *See, UA Exhibit 18 – 3/12/20 Ohio Director of Health Order.* “Mass gatherings” was defined at that time as “100 or more persons in a single room or single space at a time.”

On March 17, 2020, the Ohio Director of Health issued an Order that modified her prior order on mass gatherings, defining them as “50 or more persons in a single room or single space at the same time.” *See, UA Exhibit 19 – 3/17/20 Ohio Director of Health Order.* That order also stated:

- “While not mandatory, it is strongly recommended that Ohioans avoid unnecessary non-family social gatherings of more than ten (10) people in accordance with President Trump’s coronavirus guidelines issued March 16, 2020.”
- “Regardless of whether an event or gathering falls within the definition of mass gathering, all persons are urged to maintain social distancing (approximately six feet away from other people) whenever possible and to continue to wash hands, utilize hand sanitizer and practice proper respiratory etiquette (coughing into elbow, etc.)”

On March 17, 2020, the University’s Board of Trustees held a special meeting and passed Resolution 3-1-20 *Pertaining to the Presidential Authority to Respond to a Public Health Emergency.* That resolution gave President Miller broad authority to respond to the COVID-19 public health emergency and oversee and direct all steps necessary for the University to maintain essential functions and operations critical to carrying out its mission and to protect the health, safety, and welfare of the campus community. *See, UA Exhibit 20 – University Resolution 3-1-20.* The Board recognized the State of Ohio’s projection that the COVID-19 peak would occur in late April or early May and ratified President Miller’s March 10, 2020 decisions that when classes resumed March 30 from the extended spring break, the remainder of the semester would be delivered through online instruction; the campus would be operated for essential function

operation only; all residence halls would close, with limited exceptions; travel restrictions remained in place; and large-scale non-essential events continued to be cancelled.

On March 18, 2020, the University's SSI monthly revenue deposit was \$8,148,595, again a **-2.3%** as compared to December 2019. *See, UA Exhibit 12, p. 1.* This variation did not cause concern as it appeared in the range of normal.

On March 22, 2020, the Ohio Director of Health issued a Stay at Home Order effective March 23, 2020 through April 6, 2020. This order required:

- All Ohioans shelter at home
- All non-essential businesses cease operations
- All mass gatherings of 10 or more people prohibited
- All educational institutions (including colleges and universities) utilize distance learning and only have their campus opened for essential business, defined as for facilitating distance learning, performing critical research, performing essential functions, provided social distancing of 6-feet per person is maintained to the greatest extent possible.

*See, UA Exhibit 21 – 3/22/20 Ohio Director of Health Order.*

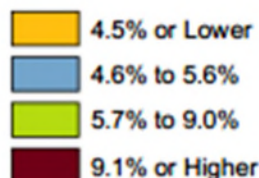
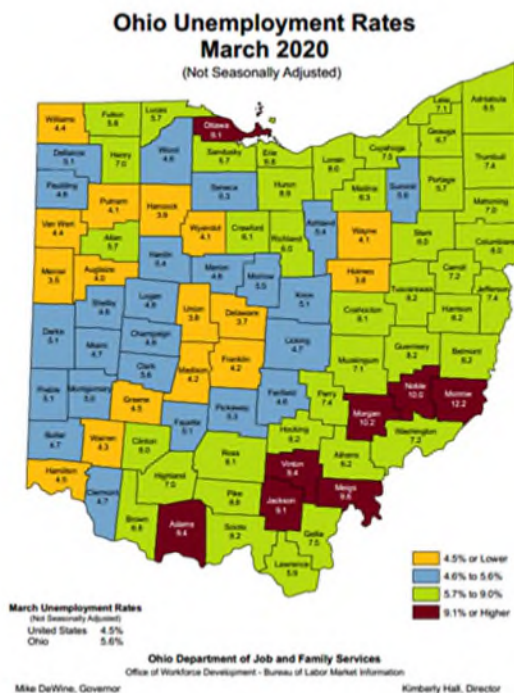
On March 31, 2020, the Ohio Director of Health issued a Non-Congregate Sheltering order directing all public colleges and universities to make available vacant grounds, buildings, and facilities of colleges/universities as determined to be necessary and suitable after reasonable consultation with its officials, the local board of health, Ohio EMA, and county emergency services for temporary use as non-congregate sheltering to prevent the spread of COVID-19. *See, UA Exhibit 22 – 3/31/20 Ohio Director of Health Order.*

D. April 1, 2020 through End of Spring Semester 2020

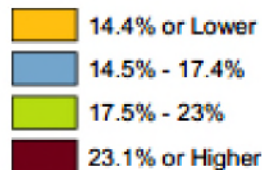
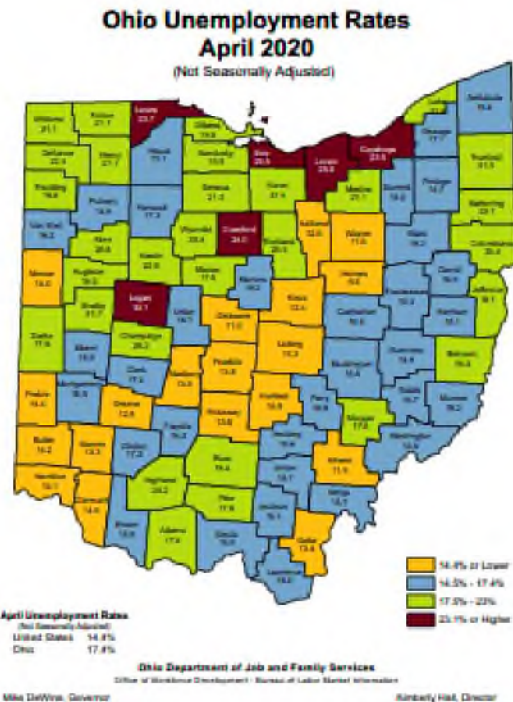
i. Ohio Department of Health Order – April 2, 2020

On April 2, 2020, the Ohio Director of Health issued a Stay at Home Order effective April 6, 2020 through May 1, 2020. See, *UA Exhibit 23 – 4/2/20 Ohio Director of Health Order*. This order effectively renewed the earlier March 31, 2020 Stay at Home Order, extending it through May 1, 2020.

ii. Ohio Unemployment Rates March 2020 and April 2020



March 2020 – Key



April 2020 – Key

Of note, the State of Ohio experienced an explosion in its unemployment rate from 5.6% to 17.4% in a one-month period.<sup>8</sup> The increase impacted redefining the key used for these maps, moving the yellow bracket from 4.5% in March 2020 to 14.4% in April 2020; the blue bracket from 4.6%/5.6% to 14.5%/17.4%; the green bracket from 5.7%/9.0% to 17.5%-23%; and the maroon bracket from 9.1%+ to 23.1%+. Such dramatic reductions negatively impacted Ohio's tax revenue stream and economy in unprecedented ways as well. The huge increase in unemployment dramatically reduced Ohio's income tax revenues, which is one of the state's largest revenue sources.

Ohio's COVID-19 unemployment predicament is expected to further impact the University as many families of current and new students are struggling to pay for tuition and costs in FY21. The University has experienced an increase in requests for additional aid from families due to job loss. The extent of this impact cannot be foreseen with certainty, particularly given the financial consequences of this pandemic are sure to continue until a vaccine or other effective course of treatment is discovered.

### iii. Loss of State Tax Revenues

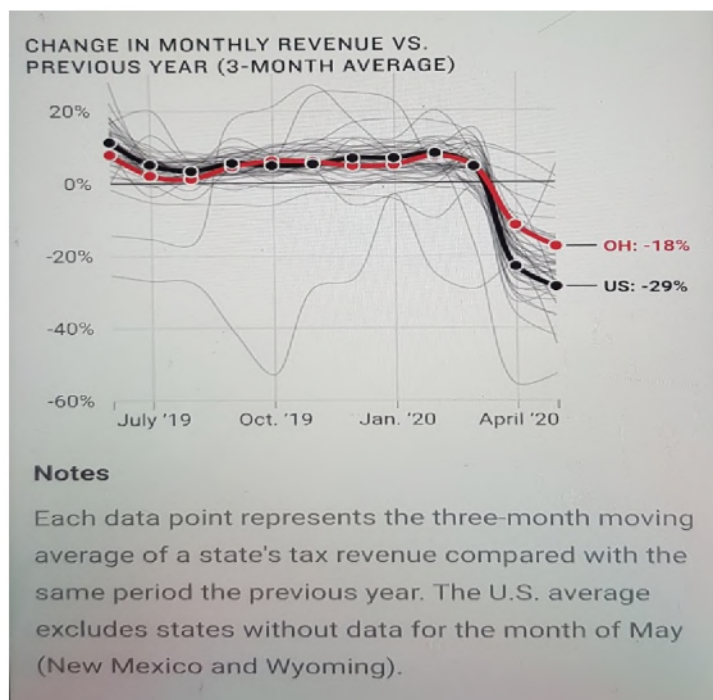
In addition to the direct impact of the unemployment explosion to Ohio's tax revenue collection, other revenue streams to the State have been significantly impacted by the COVID-19 pandemic. For instance, the shuttering of Ohio in March 2020 resulted in a precipitous drop in gasoline sales tax. See, *UA Exhibit 24-B* - <https://taxfoundation.org/qas-tax-revenue-decline-as-traffic->

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<sup>8</sup> Ohio's unemployment rate moved to 13.4% in May 2020 and to 11.1% in June 2020. See, *UA Exhibit 24-A – Ohio Unemployment sheets from Ohio Department of Job and Family Services*.

drops/. Consumer sales tax revenues also declined significantly in the Spring, including taxes normally collected from bars and restaurants. Alcohol sales tax collection also decreased overall. On August 18, 2020, Ohio State University News published an article regarding the COVID-19 pandemic's anticipated impact on Ohio municipalities based on sales tax loss. See, *UA Exhibit 24-C* - <https://news.osu.edu/covid-19-pandemic-likely-to-cause-sales-tax-loss-for-ohio-municipalities/>.

From the onset of COVID-19 through approximately May 2020, Ohio experienced an estimated **-18%** monthly revenue decline. See, *UA Exhibit 24-D* - <https://www.npr.org/2020/08/03/895384643/ohio-built-up-savings-over-the-past-few-years-covid-19-will-wipe-out-much-of-that>. NPR's analysis for Ohio is depicted in the below-chart:



All of the foregoing tax revenue indirectly impacts the University, as the State can only provide SSI revenue to the extent it has revenue to do so. Loss of State revenue already resulted in the SSI revenue cuts announced May 5, 2020, and all public colleges and universities in our State are braced for more SSI revenue cuts in FY21 beyond those already implemented.



iv. Projected Enrollment Data<sup>9</sup>

On April 7, 2020, the University began to more closely track its enrollment projections for Summer 2020 and upcoming Fall 2020. As shown below, in comparison to 2019 headcounts, the University had a projected **-19.2%** decline in Summer registrants, **-8.5%** in Fall registrants, and **-7.5%** in new freshmen admits.

**Enrollment Update as of April 7, 2020<sup>10</sup>**

Summer Course Registrations	2019 Headcounts	2020 Headcounts	Headcount Difference	% Difference
	3,958	3,197	-761	-19.2%
Fall Course Registrations	2019 Headcounts	2020 Headcounts	Headcount Difference	% Difference
	5,320	4,869	-451	-8.5%
New Freshmen Admits	2019 Headcounts	2020 Headcounts	Headcount Difference	% Difference
	10,492	9,700	-792	-7.5%

May 3, 2020 was the last day of the University's Spring Semester, with exams running from May 4, 2020 through May 10, 2020. By this time (as shown below), the summer course registrations had declined **-11.5%** as compared to 2019 numbers for that same week with 630 less students enrolled for Summer 2020 than attended in Summer 2019. The enrollment numbers for the Fall Course registrations varied as well as compared to 2019 with **-18.7%** less fall course registrations, **-6.5%** less new freshmen admits, and **-20.6%** less new freshmen confirmations.

<sup>9</sup> All enrollment projection data is subject to a Non-Disclosure Agreement, which is attached as UA Exhibit 25 – NDA #1. In providing this information through brief, the University does not in any way waive this information as confidential, privileged, and protected from public disclosure as a matter of law.

<sup>10</sup> All enrollment data tracking sheets are contained in UA Exhibit 26 – Enrollment tracking sheets 4/7/20 to 8/19/20.



### Enrollment Update as of May 6, 2020

Category	2019 Headcounts	2020 Headcounts	Headcount Difference	% Difference
Summer Course Registrations	5,501	4,871	-630	-11.5%
Fall Course Registrations	10,819	8,798	-2,021	-18.7%
New Freshmen Admits	10,715	10,019	-696	-6.5%
New Freshmen Confirmations	3,094	2,458	-636	-20.6%

v. Reduction in SSI Revenue – April 2020

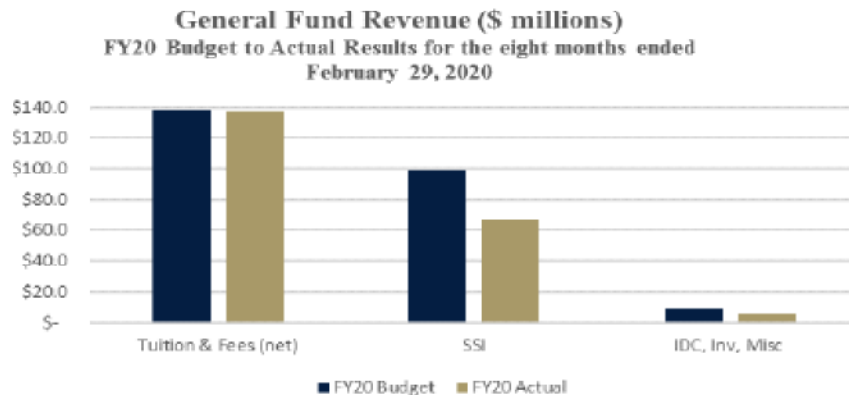
On April 15, 2020, the University's SSI monthly revenue deposit was \$8,148,595, again a -2.3% as compared to December 2019. *See, UA Exhibit 12, p. 1.* This variation did not cause concern as it appeared in the range of normal.

vi. University April 15, 2020 Board of Trustees Meeting

At its April 15, 2020 meeting, the University's Board of Trustees considered and approved the Financial Report for FY20 for the Eight Months Ended 2/29/20 as presented. *See, UA Exhibit 27 – 4/15/20 Board of Trustees meeting packet. See, UA Exhibit 28 – Financial Report FY20 Eight Months Ended 2/29/20.* The report contained the following remarks regarding the COVID-19 pandemic, which reveal an emerging serious problem, the full effects of which had not been experienced:

- "It is [too] early to predict the full impact of the COVID-19 pandemic. As more information is known, it will be reflected as deemed appropriate." *See, p. 2, 20, 49.*
- "Tuition & General Service Fees – The original assumption estimated a blended enrollment reduction exceeding four percent while indications as the fall 2019 semester approached were the decline might approach six percent. The revenue projection incorporates an overall six percent decline assuming a flat 2020 summer enrollment; however, enrollment will most likely be negatively impacted by the COVID-19 pandemic." *See, p. 2.*

- “Indications are that due to the COVID-19 pandemic, [p]arking will not achieve the \$6.5 million revenue budget; rather, revenue is projected to fall short of this amount by approximately \$223,000. *Id. at p. 40*
- In terms of actual and projected FY20 revenue, on p. 6, the report provided the following graph:



- Other fees – “Current expectations are that Other Fees will approximate \$20.9 million, or \$600,000 less than budget. The projection will be updated as the impact of COVID-19 on summer 2020 enrollment becomes clear.” *See, p. 6.*
- Scholarships – “projected \$8.6 million less than budget” *Id.*
- SSI – “total \$66.4 million or 67% of annual budget of \$99.1 million “If State of Ohio revenues are adversely impacted by COVID-19 shutdowns, the funding available for SSI will likely be negatively impacted.” *See, p. 7.*
- Indirect Cost Recovery – “The impact of COVID-19 will most likely be a reduction to IDC revenues as faculty will not be on campus spending grant funds to conduct funded research.” *See, p. 7.*
- Investment Income – “prior to recent events, the investment income was expected to fall short of budget by approximately \$400,000. The projection will be updated when the impact of COVID-19 on the financial markets becomes known. At this moment, financial markets remain stable.” *See, p. 7.*
- Expenditures – “Each expenditure category may be impacted as a result of COVID-19. Adjustments will be reflected as they become known.” *See, p. 20.*
- Income – “Revenues will be adversely impacted as a result of COVID-19. Prorated refunds of room, board, and fees and lost revenues from other closed facilities and cancelled events will be identified as they become known.” *See, p. 20.*

- Athletics – “Projections indicate, due to COVID-19, cancellation of spring sports, busses, hotels, and other travel arrangements, operating expenditures will total \$501,000 below budget and will be updated should spending activities merit a change.” *See, p. 28.*
- Residence Life & Housing – “Residence hall refunds, due to COVID-19 early closure, will result in an approximate loss of between \$2.5 to \$3.2 million of the actual revenue figures for the spring semester.” *See, p. 30.*
- EJ Thomas Performing Arts Hall – “Prior to the COVID-19 related event cancellations, the revenues were projected to approximate \$2.6 million.” “Certain show related costs may be eliminated as COVID-19 resulted in event cancellation.” *See, p. 32.*
- Dining – “Once the impact of COVID-19 related refunds is known, the projection will be updated.” *See, p. 34.*
- Recreation & Wellness Services – “Due to COVID-19, SRWS has cancelled the following revenue generating events: all swim team practices/events, rentals, certification courses, Intramurals, community leagues, and external events until April 20.” *See, p. 36.*

By the April 15, 2020 Board meeting, the University knew the COVID-19 pandemic was already dramatically impacting UA in unique, unforeseen, and unprecedented ways – the closure of campus had direct and indirect revenue and expenditure impacts. The University had a huge problem, but the dimensions of which it could not measure at that time. The University could not foresee the catastrophic financial issues and declines to revenue streams that would materialize in less than a month.

vii. Ohio Department of Health Order – April 30, 2020

On April 30, 2020, the Ohio Director of Health issued a Stay Safe Ohio Order, reopening the State within certain restrictions. *See, UA Exhibit 29 – 4/30/20 Ohio Director of Health Order.* Specifically, all businesses and operations in the State of Ohio, with certain narrow exceptions, were permitted to reopen so long as all workplace safety standards and applicable standards

were met. Mass gatherings of 10 people or more continued to be prohibited state-wide unless exempted by the order.

viii. University Leadership Financial Focus as of April 30, 2020

On April 30, 2020, the University's Director of its Office of Resource Analysis and Budget communicated with those tasked to identify areas for potential budget reductions that:

"the leadership team is working diligently to apply a strategic and differential approach to determine the levels of reductions. Until specific targets are identified and communicated, please start planning for a reduction of 25% of the FY20 Budget. This is a general target and your specific target will be communicated to you soon. As you can imagine, timing is critical. Following input from Faculty Senate and the University Council the budget will be presented to the Board of Trustees on June 10, 2020."

*See, UA Exhibit 30 – 4/30/20 Email from Director Gilliland.*

ix. May 5, 2020 - COVID-19 Update: State Budget Impact FY20

On May 5, 2020, Governor DeWine announced \$775 million in reductions to Ohio's General Revenue Fund for the remainder of Fiscal Year 2020. *See UA Exhibit 31 – 5/5/20 Governor DeWine Update.* Notably, Governor DeWine reported that state revenues at the end of February 2020 – prior to the onset of the COVID-19 pandemic - for FY20 were \$200 million ahead of estimates. By the end of April 2020, however, the Governor stated Ohio's revenues were below budgeted estimates by \$776.9 million. This represented an approximate downward swing of Ohio's revenues of nearly \$1,000,000,000 dollars (\$976,000,000 to be exact) in two months.

Based on State law, Governor DeWine also announced on May 5, 2020 that budget reductions for FY20 had to be implemented in order to balance the budget. Higher education received a \$110 million-budget reduction to be implemented by June 30, 2020. Governor DeWine also directed a freeze in state agencies hiring or any employment action that resulted in

compensation increases. The State did not draw from Ohio’s Budget Stabilization Fund (i.e. “rainy-day fund”) to cover the budget deficit. In this respect, Governor DeWine stated:

“I know that I have said that ‘it’s raining,’ but we do not want to tap into the rainy-day fund yet. The rain is not a passing spring shower – it could be a long, cold, lingering storm, and we should not use the fund until it is necessary.”

This is an extremely important point. Perhaps setting the example for others, the State of Ohio did not draw on its reserves in May 2020 and instead implemented a plan of action to cut its expenditures both internally (e.g. freezing employment actions) and externally (i.e. revenue streams to the state agencies it provides revenue).

x. The Projected FY21 \$65 Million-Budget Deficit and University Action

The University’s growing understanding of the scope of the problem continued on or about May 6, 2020, when, based on the unforeseen loss of SSI revenue and TGO revenue resulting from the COVID-19 pandemic, the University projected a FY21 \$65-million budget deficit – which is a 20% reduction of UA’s operating budget – and worked quickly to identify all actions necessary to secure the necessary expenditure reductions. In a communique with school stakeholders, the University’s Provost John Wiencek explained the impact of COVID-19 on the University’s financial health, stating:

“When I interviewed in early March, the draw on our reserves was moderate, allowing several years for planning and targeted growth which could bring expenses into alignment with revenue from enrollment and state subsidy. COVID-19 has dramatically changed the situation for all universities in the nation. Our draw on reserves for the next fiscal year is estimated to be 5-7 times of what it would have been if COVID-19 had not happened. This draw rate will place the financial health of the University in jeopardy by the end of next fiscal year if we do not take immediate action. It is our shared responsibility to take action now for the sake of our students and for the Akron community.” *See, UA Exhibit 32 - 5/6/20 Provost Wiencek Message Proposed Plan for Redesigning UA.* [Emphasis added]

The catastrophic circumstances appeared on May 6, 2020, and the University quickly began to evaluate its options to identify a course of action.

Provost Wiencek communicated that the University leadership's focus was on "rebuilding our budget" to address the \$65 million-budget shortfall that Interim Chief Financial Officer Dr. Steve Storck ("CFO Dr. Storck") projected. Not addressing this projected deficit through immediate action was not an option. Absent action, the financial health of the University stood in jeopardy as the cash reserve draw rate to try to cover the deficit would have been "5-7 times of what it would have been if COVID-19 had not happened." Provost Wiencek explained the reduction of \$65 million in expenditures would imply a minimum 20% reduction campus-wide, up to 25% dependent on financial impact from students not being on campus for an extended period. Provost Wiencek invited input from all University stakeholders and shared the plan to be developed would be guided by "benchmark[ing] expenditures to national and regional sister institutions" to "invest appropriately in instruction, student services, academic support, and institutional support." It was anticipated the discussion would result in a "realistic resource allocation (i.e. new budget) to all units throughout the University." *Id.*

The severity of the situation increased to the point that by the next week, May 14, 2020, the University announced discontinuation of "three intercollegiate athletic programs at the end of the 2019-2020 academic year as part of its plan to reduce the University's financial support to the Athletics Department by approximately **-23% (-\$4.4 million).**" *See, UA Exhibit 33 - 5/14/20 University News Release Redesigning The University of Akron – Athletics Update.* The University further explained additional reductions would be made to the Athletics budget "including salary

reductions for select coaches and administrators, staff position eliminations, and scholarship and operating reductions.” See, *UA Exhibit 34 - 5/14/20 University Frequently Asked Questions*.

Shortly thereafter, at its next negotiation session on May 19, 2020, the University’s bargaining team provided the Akron-AAUP’s bargaining team a general notice of its intent to invoke Article 15, Section 12. See, *UA Exhibit 78*.

The very next day, on May 20, 2020, Provost Wiencek reported to the University’s community feedback and status of an academic design plan to be presented to the Faculty Senate before the President and Provost presented it to the Board of Trustees at its May 29, 2020 meeting. The plan redesigned the college’s administrative structure to support a \$260M general fund budget for FY21 forward. See, *UA Exhibit 35 – 5/20/20 University Feedback and Next Steps for Academic Design Plan*.

The day after that (May 21, 2020), the University provided formal notification to Akron-AAUP that the University invoked Article 15, Section 12.<sup>11</sup> See, *UA Exhibit 79*.

The very next week, on May 27, 2020, President Miller provided an update on the University’s redesign plan. See, *UA Exhibit 36 – 5/27/20 Redesigning The University of Akron – Update #3*. In the update, President Miller shared that the Faculty Senate discussed “the updated proposal to create a different administrative structure for the University’s academic division, consolidating our current eleven colleges into five.” Once this dramatic consolidation of the colleges occurred, the University intended to “provide to the colleges and vice-presidential units the target budgets for the upcoming fiscal year.” Although the University originally had directed

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<sup>11</sup> See, Section V (p. 62) and Section VIII (p. 104) for more information regarding the University’s May 19, 2020; May 21, 2020; and May 22, 2020 Article 15, Section 12 notifications.

deans and vice presidents prepare a 25% budget reduction, the University intended on building the new budget after consolidation of the colleges occurred at the May 29, 2020 Board of Trustees meeting to present at the Board's June 10, 2020 meeting. *Id.*

The very next day (May 28, 2020), President Miller provided a final report on redesign of the University's academic structure. *See, UA Exhibit 37 – 5/28/20 Final Report: Redesign of the Academic Structure.*

xi. Significant Reduction in FY20 SSI Revenue May 2020 and June 2020

On May 20, 2020, the University's SSI monthly revenue deposit was \$6,266,926, a -25% reduction as compared to December 2019.<sup>12</sup> *See, UA Exhibit 12, p. 1.*

On June 17, 2020, the University's SSI monthly revenue deposit was \$6,266,926, another -25% reduction as compared to December 2019. *See, UA Exhibit 12, p. 1.* Overall, for FY20, the SSI actual revenue was only 96% of the projected revenue to be received under the FY20 adopted budget. This -4% annual reduction equaled a \$3,945,636 unanticipated reduction in SSI revenue in FY20. This bulk of this unforeseen reduction (which occurred in a one-month period between May 20, 2020 and June 17, 2020) forced the University in the position of needing to close the resulting deficit created by this single revenue line reduction within 39 days (or slightly more than 1/10 of a year), by the end of FY20.<sup>13</sup>

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<sup>12</sup> The University's SSI revenue allocation has been dropping in recent years due to the decline in enrollment. SSI is normally allocated based on a rolling-three-year average, one year in arrears. While the state announced it intended to reduce the final three months of FY20 by -20% (annualized at a -5% decline), it ultimately cut the last two months of FY20 by -25% (annualized at a -3.8% decline) as reflected in the May 2020 and June 2020 SSI monthly revenue deposits.

<sup>13</sup> This -4% reduction severely impacted the University's financial standing, since the University needed to make up for that reduction to finish FY20 with a balanced budget. Reducing the time period to eliminate a deficit increases the percentage of the budget that must be reduced to achieve the same result over a longer time period. For example, if the University needed to implement what would be a -4% annual expenditure reduction, but only had six months (one-half year) to accomplish that result, then it would need to reduce expenditures by -8% (or double



xii. University May 29, 2020 Board of Trustees Meeting

On May 29, 2020, only one week following the receipt of its second **-25%** monthly SSI reduction, the University's Board of Trustees held a special meeting. *See, UA Exhibit 38 – 5/29/20 Board meeting packet.* The Board took considerable action at this meeting to secure necessary cost savings to address the FY20 budget deficit and to prepare for the impact the COVID-19 pandemic on FY21. These actions included:

- The Board passed Resolution 5-1-20 *Approval for Consolidation of Academic Units*. The resolution outlined the academic division of University, which then included eleven colleges and schools, noting the large number increased administrative costs. Through this Resolution, effective July 1, 2020, the administrative structure of the Academic Programs of University was modified to be deployed through five colleges and schools, with the academic units to be maintained identified within each remaining college. *See, UA Exhibit 39 - Resolution 5-1-20.*
- The Board considered revisions to three University Rules: 3359-22-01, "Contract Professional Rule;" 3359-26-05.1, "Reductions in Workforce;" and 3359-11-02.1, "Furloughs for Non-Bargaining Unit Employees" (collectively the "Proposed Rules"). All three of the Proposed Rules were intended to provide flexibility to the University with respect to its workforce. On May 27, 2020, Sarah J. Kelly, Associate Vice President Human Resources/CHRO, drafted a memorandum to President Miller outlining the revisions to the Proposed Rules. The Memorandum outlined the transparent process by which Human Resources reviewed the Proposed Rules and solicited comments and questions from employee stakeholders.
- The Board passed three (3) resolutions regarding the Proposed Rules:
  1. Resolution 5-2-20, *Approval to Adopt University Rule 3359-26-05.1, Reductions in Workforce*, which provided the framework and guidelines for the implementation of a reduction in workforce for classified civil service employees. *See, UA Exhibit 40 - Resolution 5-2-20.*
  2. Resolution 5-3-20, *Approval to Adopt University Rule 3359-22-01, Contract Professional Rule*, which provided the framework and guidelines for the implementation of a reduction in workforce for contract professionals,

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the annual amount) for the remainder of the year. Here, the University had only 1/10<sup>th</sup> of a year to reduce an annual expenditure reduction of **-4%**. Consequently, the University needed to reduce existing expenditure by ten-times the annual amount, or **-40%**, to achieve the same cost savings over the course of an entire year.

including elimination of the ability to request, as a matter of right, a hearing in response to a reduction in workforce separation. *See, UA Exhibit 41 - Resolution 5-3-20.*

3. Resolution 5-4-20, *Approval to Adopt University Rule 3359-11-02.1 Furloughs for Non-Bargaining Unit Employees*, which framework and guidelines for the implementation of an employee furlough plan, which would allow the University to balance its budget if it experiences a reduction in state funding or other loss of revenue, for any reason, that causes a significant operating deficit. *See, UA Exhibit 42 - Resolution 5-4-20.*
- The Board passed Resolution 5-5-20, *Approval to Temporarily Reduce Non-Bargaining Staff and Contract Professional Employee, Annual Compensation and To Re-negotiate Employment Contracts*. *See, UA Exhibit 43 - Resolution 5-5-20.* The anticipated savings in FY21 from Resolution 5-5-20 is \$2,179,000 (salary, payroll tax and retirement contributions, based on May 2020 headcount and salaries). *See, UA Exhibit 44 – Response to Akron-AAUP 2020-6-1 Request, Tab 3 question 2 response.*

This Resolution recognized that as a result of the COVID-19 pandemic, the University projected a revenue shortfall of approximately \$65 million for fiscal year 2021. Thus, the Board authorized the University administration to temporarily reduce the annual base wages of all non-bargaining unit staff and contract professionals hired before April 1, 2020, earning \$50,000 or more per year, who are not subject to an individual employment agreement, effective July 1, 2020, through June 30, 2021, in accordance with the scale reflected in this table:

<b><u>SALARY TIER</u></b>	<b><u>% REDUCTION</u></b>
Under \$50,000	0%
\$50,000 - \$66,999	3%
\$67,000 - \$91,999	4%
\$92,000 - \$124,999	5%
\$125,000 – \$149,999	6%
\$150,000 - \$199,999	7%
\$200,000 -	10%

The Resolution further authorized the University non-bargaining staff and contract professionals, as well as the University senior administration, including the President, Executive Vice President and Provost, Cabinet members and those with the title Vice President or Dean, to take a voluntary reduction to their annual base wage in excess of the tiered schedule of reductions, effective July 1, 2020, through June 30, 2021. Finally, the Resolution authorized the University administration, retroactive to March 9, 2020, to negotiate modifications to the terms and conditions of employment contracts for those University employees having individual employment contracts.

- The Board passed Resolution 5-6-20, *Approval to Increase Employee Contributions to Health Plan Premiums*. See, *UA Exhibit 45 - Resolution 5-6-20*. The Resolution again recognized the serious financial shortfall the University had experienced as a result of COVID-19 and determined it was no longer financially possible for the University to subsidize the premium cost for the Health Plan at the current percentage rate that it is paying for non-bargaining unit employees not having faculty rank. Thus, effective January 1, 2021, the percentage of contribution to the Health Plan annual premium for non-bargaining unit employees not having faculty rank will increase, as reflected in the table below:

Salary Tier	Current Contribution	Future Contribution
Under \$32,000	15%	15%
\$32,000 - \$36,999	17%	17%
\$37,000 - \$47,999	18%	18%
\$48,000 - \$49,999	19%	19%
\$50,000 - \$66,999	19%	30%
\$67,000 - \$91,999	20%	31%
\$92,000 - \$124,999	21%	32%
\$125,000 -	23%	34%

The anticipated savings in FY21 from Resolution 5-6-20 is \$600,000 based on enrollment as of May 2020. See, *UA Exhibit 44 – Response to Akron-AAUP 2020-6-1 Request, Tab 4 question 3 response*.

- The Board passed Resolution 5-7-20, *Approval to Eliminate Retiree Dependent Health Insurance Benefits For Non-Bargaining Unit Employees*. See, *UA Exhibit 46 - Resolution 5-7-20*. The University had been providing health insurance coverage (the “Retiree Dependent Health Insurance”) for non-bargaining unit retiree eligible dependents. The cost to the University to fund this benefit was approximately \$1.46 million per year. Because of the serious financial shortfall the University has experienced as a result of COVID-19, the University concluded that it was no longer financially possible to maintain the Retiree Dependent Health Insurance program. Thus, the Resolution approved the termination of the Retiree Dependent Health Insurance program effective December 31, 2020.

The anticipated savings in FY21 from Resolution 5-7-20 is \$1.46 million based on May 2020 enrollment and rates. See, *UA Exhibit 44 – Response to Akron-AAUP 2020-6-1 Request, Tab 5 question 2 response*.

At its May 29, 2020 special meeting, the Board was in the midst of a financial crisis of catastrophic proportions. It took decisive action and was clearly in survival mode. No stone was left unturned. Indeed, as detailed in a later section, the University and Akron-AAUP negotiation teams were actively meeting for over a month at this point discussing the financial situation and exploring potential concessionary measures similar in kind to those that began to be implemented for other work groups on May 29, 2020.

xiii. The University's Reduction Planning

With passage of Resolution 5-1-20, *Approval for Consolidation of Academic Units (see UA Exhibit 39)*, the University's leadership focused effort on aligning college budgets within the projected FY21 \$260 million-General Fund budget. To make the most objective, strategic, and differentiated decisions, Provost Wiencek utilized an objective benchmarking tool – the Delaware Cost Study. *See, UA Exhibit 47, 2018 Delaware Cost Study Database.*<sup>14</sup>

As background, the Delaware Cost Study is a discipline-level comparative analysis tool that is nationally recognized. It gathers faculty teaching loads, instructional costs, and separately budgeted scholarly activity data using the Carnegie classifications (R1, R2, and R3) for sorting comparative data sets at request. The R1 “Research 1” institution is one at which the faculty's primary mission is research. These are very large universities. In Ohio, R1 universities include The Ohio State University, Case Western Reserve University, and The University of Cincinnati. R2 designates a doctoral university with high research activity, generally \$100M to \$150M in

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<sup>14</sup> The University notes this database is proprietary in nature and is only produced for the limited purpose of informing the Arbitrator as needed in regard to the information utilized by the University and its transparency in providing these documents to Akron-AAUP. This database was provided to Akron-AAUP in response to its June 17, 2020 informational request.

research activity. The University of Akron is in the R2 category. R3 denotes an institution that delivers professional degrees (e.g. nursing) but with small research expenditure.

When the University began its budget planning after reducing its colleges, it had the 2018 Delaware Cost Study data combined with data from R1, R2, and R3 institutions. Provost Wiencek, having used the 2018 Delaware Cost Study at his last university to analyze colleges for budgeting, had familiarity with how to use the information for general objective benchmarking. Provost Wiencek was very clear that he did not use the 2018 Delaware Cost Study as a “formula.” See, *UA Exhibit 48 – Provost Wiencek Narrative on Budget Resetting in OAA*. Rather, he used it to open conversations with deans as a tool to be used in a differential way to benchmark appropriate levels of budget reductions based on objective normalization of college financial performance. Put another way, each college would need to reduce budgets, but the level had to be differentiated to ensure funding was appropriately set for each department as normalized through a national Classification of Instructional Program (“CIP”) benchmarks.

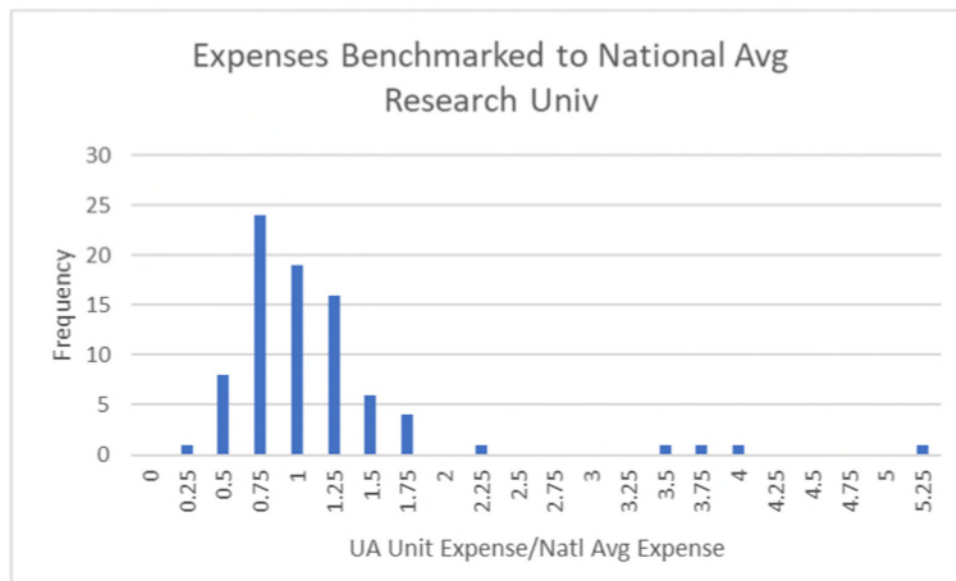
Provost Wiencek provided Akron-AAUP leadership with information regarding his systemic differentiated normalization analysis, including a detailed narrative that stated, in pertinent part,

Original budget reduction targets were set by the Budget Office utilizing the functional spending approach ... informed by the benchmarking work of UC Budget and Finance committee. No reductions were made to scholarships, student services, and public service. 20% reductions were given to institutional support and plant operations/maintenance. 25% reduction was given to instruction/departmental research. 30% reduction was given to separately budget research. 40% reduction was given to academic support given the consolidations of the colleges. The university budgets flowed from those functional spending reductions.

The reductions to the units reporting to the Provost were further differentiated based on a benchmarking analysis. The University of Delaware collects data from research universities that captures faculty workload with respect instruction and research

expenditures. The DCS benchmark data is attached as an Excel sheet called “Delaware Cost Study Database.” They also capture the cost of instructional delivery on an \$ per SCH mode, broken down by the CIP code (Classification of Instructional Programs – a number assigned to each program offered on campus). Thus, one can calculate how much it should cost to deliver an academic program on average at a research university. Our expenditure data is reported at the department level which will often capture multiple programs or CIP codes. See **Redacted** which contains the data provided to me by Institutional research. It includes current year SCH data and FY 19 expenditure data. I needed to move from the data in the tab called, “Main Tabulation” to a table that prorates the budget for a department among its various CIP codes (differing academic programs). This is an approximation, but it is done by weighting the budget by the SCH delivered in that CIP. In addition, CIPs can exist in multiple locations such as Wayne or the main campus. This analysis bundled all SCH irrespective of location.

Thus, we have a national average expenditure and a U of Akron expenditure. I divide the UAkron expenditure by the national average (which is unique for each CIP) expenditure to arrive at a % of DCS. The tab called Sheet 6 contain my calculations. A program that spends 100% of DCS is spending at the national average for a research university. A program that spends at 80% of DCS are below the national average. Here is the frequency plot of our various academic programs as a function of the national average:



Notice that we have a program that is operating on 25% of the national average funding. This very low number is likely due to the assumption that funding is tracking with SCH delivered. On the other end, we have some again nuanced and unique situations. One program has much of its funding tied up in research instrumentation cores and infrastructure so their costs are warped by the placement of a function normally operating with a research office into an academic unit.

Please remember that research universities include multiple classifications. R1 institutions are very large and substantially different than R2 institutions. R1 institutions in Ohio include Case Western Reserve University, Ohio State and Cincinnati. They pay their faculty higher salaries and are more generously resourced. R1 institutions are likely, by and large, to be above the national average in terms of this type of analysis. R2 institutions, conversely, are likely to be below. I have asked for a subset of this data including R2 institutions going forward so that I can reanalyze our data. My prior institution was a R2 institution as well and its programs as an aggregate operated with a budget at about 80% of DCS. Our data is comparable in this regard.

The reasons for some units being above or below national averages are impossible to explain. The state of affairs right now is simply a reflection of many incremental decisions made over the lifetime of the institution. Some of those decisions were likely due to some special project or influence a given program might have but many of the decisions were likely rewarding productive behavior or strategic interests.

The philosophy in this case is to preserve the quality of instruction and academic excellence. Those at the high end of the Redacted scale I developed above based on the DCS Data have more capacity to absorb the budget reduction and still maintain academic excellence. Fundamentally, the goal was to provide differential cuts that also help maintain academic excellence. Other approaches that artificially assign revenue and expense to each unit could be equally effective but ultimately suffer from a lack of agreement on revenue attribution as well as a tendency to ignore overhead costs. This approach was chosen since it is less rife with such controversy and fundamentally benchmarks nationally rather than internally.

Given the assumptions tied up in proration, the analysis was bundled up to the College level. That is shown in the second spreadsheet. Each college was then assigned a budget reduction target based on their % DCS. The budget reductions ranged from 15 to 35% as INITIAL targets. This builds a surplus that was used to work with Deans that could not meet the target and maintain the integrity of their academic departments. Since Wayne was not separately analyzed, I made an assumption that it was less than 100% of DCS but not a lot less. I have worked with the Dean (now Director) of Wayne to tap into the mitigation funds given this anomaly in the analysis. This process is still under development but much of the contingency fund is being redeployed as we unearth some flaws in the analysis (scholarships in College budgets) and also critical needs for the UA (the library in particular).

*See, UA Exhibit 48.*

Provost Wiencek regularly explained his use of the 2018 Delaware Cost Study was not formulaic because: (a) it included R1 institutions, such that the instructional expenditures for each CIP code would necessarily be inflated for normalizing an R2 institution; and (b) the CIP



coding could not be assumed uniform in application. With these known variables, Provost Wiencek employed the 2018 Delaware Cost Study as a tool to inform the budgeting process by deans at the colleges and their department heads. See, *UA Exhibits 49-A (Provost's Analysis); 49-B (Provost's Analysis r2); 49-C (Provost's analysis College Level); 49-D (Copy of Wiencek Data – Spring 2020); 49-E (FY21 GF Budget-Colleges JW Recommendation)* Specifically, Provost Wiencek successfully identified which colleges and departments had more capacity to absorb budgetary reductions without negatively impacting academic programs. It was used as a starting point and to support Provost Wiencek's budget reduction planning and decisions.

Provost Wiencek requested the Delaware Cost Study to produce a customized report of just R2 institutions and knew the report would likely not be available until after the budget planning and FY21 budget was created. The University received the 2020 Customized Delaware Cost Study on August 10, 2020. See, *UA Exhibit 50 – 2020 Delaware Cost Study*. The 2020 Customized Delaware Cost Study affirms all of the assumptions that Provost Wiencek made in how he used the 2018 Delaware Cost Study<sup>15</sup> and confirmed the resulting budgets were objectively normalized and appropriately differentiated. Provost Wiencek kept Akron-AAUP apprised at all relevant times and provided response to informational requests. See, e.g. *UA Exhibit 52 – Cover to DCS final 7/30/20*.

Each college identified and recommended whether a reduction in force was necessary to achieve its budget and the number of positions suggested to be abolished. Provost Wiencek reviewed these recommendations and worked with each college dean to try to minimize the total

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<sup>15</sup> See, *UA Exhibit 51 – Provost's college level July 6 update*.



number of affected Akron-AAUP Faculty and non-faculty staff. Ultimately, Provost Wiencek presented his recommendations to President Miller and Resolution 7-5-20 *Personnel Actions*; Resolution 7-6-20 *Approval to Abolish Positions*; and Resolution 7-7-20 *Approval to Abolish Bargaining Unit Faculty Positions* were recommended to the Board of Trustees at its July 15, 2020 Board meeting as below-detailed.

xiv. University June 10, 2020 Board of Trustees Meeting

Less than two weeks after holding its special meeting on May 29, 2020, on June 10, 2020, the University's Board of Trustees held another critical meeting. *See, UA Exhibit 53 – 6/10/20 Board meeting packet.* The Finance and Administration Committee submitted its Financial Report for FY20,<sup>16</sup> revised to reflect COVID-19 Implications, for the nine months ending March 31, 2020 (or one month later than the report reviewed during its April 15, 2020 Board meeting). The following was noted:

- Tuition & General Service Fees – “The revised revenue projection now contemplates an overall seven percent enrollment decline which assumes summer 2020 enrollment down 20 percent.” *See, p. 2.*
- Other Fees – “The revised revenue projection now contemplates an overall seven percent enrollment decline which assumes summer 2020 enrollment down 20 percent.” *Id. 2.*
- SSI – “The revised projection contemplates a \$5 million reduction, down to \$94 million, largely as a result of a likely State reduction as a result of COVID-19 impact on state finances.” *Id.*
- Investment Income – “The original assumption estimated \$1.4 million while the revised projection is closer to \$750,000.” *Id. and p. 7.*
- Tuition & General Service Fees – “Assuming a 20 percent decline in 2020 summer enrollment, the Tuition and General Service Fees are projected to be \$174.7 million, or \$4 million less than budget.” *See, p. 6.*

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<sup>16</sup> *See, UA Exhibit 54 - Financial Report FY 20, nine months ended 3/31/20.*

- Other Fees – “Current expectations are that Other Fees will approximate \$19.3 million, or \$2.2 million less than budget.” *Id.*
- SSI – “The Ohio Department of Higher Education announced a reduction of \$4.9 million, or 20 percent of the outstanding SSI distributions, to reflect the expected impact of COVID-19 shutdowns on state revenues.” *See, p. 7.*
- CARES Act 50% – “The federal government passed the CARES Act to support various government agencies in the wake of COVID-19. The University was appropriated \$14.2 million, 50% of which is to be direct aid to students, with a distribution plan to be determined which will be in compliance with Federal requirements. The remaining 50%, or \$7.1 million, will be managed as determined by the University leadership and the Board of Trustees, in accordance with Federal requirements.”
- Expenditures, Compensation – “Payroll expenditures total \$136.5 million or approximately 74 percent of the annual budget of \$139.7 million.” *See, p. 8.*
- Athletics – “Due to COVID-19, the assumptions indicate that the cancellation of the NCAA Men’s Basketball Tournament will reduce the annual NCAA receipts to \$387,000 or 37% for a total loss of \$658,000.” *See, p. 21* “The revised projections indicate the Athletic Facility rental events canceled as a result of COVID-19 represent a loss of \$39,000 in rental revenue.” *See, p. 22, 28.*
- Residence Life – “due to COVID-19 early closure, will result in \$3.5 million of lost revenue and the loss of \$40,000 in revenue due to the cancellation of the AA conference.” *See, p. 23, 30.*
- Dining – “The revised projections assume refunds to the students due to COVID-19 early closure, will result in \$1.8 million in reduced revenue for spring semester.” *See, p. 24.*
- Recreation & Wellness – “Assumes due to COVID-19, the closing of SRWS will generate \$56,000 in refunds for memberships and prepaid events.” *See, p. 25, 34.*
- Jean Hower Taber Student Union – “Assumes the impact of the COVID-19 pandemic will reduce the Barnes & Noble commission and space rental revenue by \$27,000.” *See, p. 26.* Wayne Student Union – Same impact, with \$4,000 loss B&N commission. *See, p. 27.*
- Parking & Transportation – “A transfers-In – Other of \$615,000 from the General Fund is needed to settle the remaining projected fiscal year-end shortfall.” *See, p. 27.*

The COVID-19 crisis continued unabated at the time of the June 10, 2020 meeting. Substantial impacts existed in every area of the financial report, revenue and expenditures. Little external relief existed and the University faced a path forward strewn with uncertainties and unknowns on what the remainder of Summer 2020 and the upcoming 2020-2021 academic year

would even look like by Fall and the upcoming Spring. All that was known was the University had to continue to maintain as much flexibility as possible to continue adapting to the catastrophic circumstances that continued to unfold.

Under New Business, the Board of Trustees approved the following budget reduction measures in reaction to the anticipated impact of loss of SSI revenue on FY20:

- The Board passed Resolution 6-13-20, *Temporary Spending Authority for July and August 2020. See, UA Exhibit 55 – Resolution 6-13-20*. This Resolution provided spending authority for July and August 2020 in order for the University to meet its anticipated basic payroll, operating, and utility expenses.
- The Board passed Resolution 6-14-20, *Temporarily Reduce Compensation for Non-Bargaining Unit Faculty and Academic Administrators having Faculty Rank. See, UA Exhibit 56 – Resolution 6-14-20*. During its May 29, 2020 meeting, the Board had temporarily reduced the wages of all non-bargaining unit staff and contract professionals hired before 4/1/20 and earning \$50,000 or more for FY21. Resolution 6-14-20 provides the same salary reduction for all non-bargaining unit faculty and academic administrators with faculty rank, as follows:

<b><u>SALARY TIER</u></b>	<b><u>% REDUCTION</u></b>
Under \$50,000	0%
\$50,000 - \$66,999	3%
\$67,000 - \$91,999	4%
\$92,000 - \$124,999	5%
\$125,000 – \$149,999	6%
\$150,000 - \$199,999	7%
\$200,000 -	10%

- The Board passed Resolution 6-15-19, *Pertaining to the Approval of the FY 2019-2020 General Fund, Auxiliary, and Sales. See, UA Exhibit 57 – Resolution 6-15-19*. The FY 2019-2020 budget was updated to reflect the impact of COVID-19 and balanced the budget without a structural deficit.

The Board also passed the following budget reduction measure for FY21:

- The Board passed Resolution 6-15-20, *Increase Employee Contributions to Health Plan Premiums for Non-Bargaining Unit Faculty and Academic Administrators having Faculty Rank. See, UA Exhibit 58 – Resolution 6-15-20*. During its May 29, 2020 meeting, the Board increased the employee health plan contributions for all non-

bargaining unit employees not having faculty rank earning \$50,000 or more, effective 1/1/21 to achieve needed savings in FY21. Resolution 6-14-20 provides the same employee health plan contribution increases for all non-bargaining unit faculty and academic administrators with faculty rank, as follows:

Salary Tier	Current Contribution	Future Contribution
Under \$32,000	15%	15%
\$32,000 - \$36,999	17%	17%
\$37,000 - \$47,999	18%	18%
\$48,000 - \$49,999	19%	19%
\$50,000 - \$66,999	19%	30%
\$67,000 - \$91,999	20%	31%
\$92,000 - \$124,999	21%	32%
\$125,000 -	23%	34%

So, as of June 10, 2020, the Board had taken action to achieve cost savings through wage concessions and health plan employee premium increases for FY21 for all non-bargaining unit employees, whether staff, professionals, or administrators.

xv. CFO Dr. Storck's July 10, 2020 FY21 Budget Video

On July 10, 2020, CFO Dr. Storck provided an overview of the University's FY21 budget in a video posted on its website. *See, UA Exhibit 59 – CFO Dr. Storck 7/10/20 Video*. He began by focusing on the assumptions used to initially project the FY21 General Fund budget in March 2020, using the information contained in the February 29, 2020 budget report.<sup>17</sup> These included:

- The assumptions in the FY21 budget include a 20% decline in enrollment and a proportionate decrease in institutionally funded scholarships. This resulted in a tuition and general service fees revenue decline from a FY20 projected amount of \$174,700,000 to \$140,889,000. This is a \$33.8 million decline.
- Other fee revenues declined from \$19,293,000 to \$16,751,000. That is a \$2,542,000 decrease.

<sup>17</sup> The University used the financial information through the end of February 2020 to support preparing the budget projection for the Board's April 15, 2020 meeting. The projected year-end (6/30) was based on the actual budget performance data through February 29, 2020. These amounts were also used to project FY21, other than SSI, which was driven by comments from the Ohio Department of Higher Education, and the 20% decline in enrollment estimate.

- Institutionally funded scholarships decreased from a projected amount of \$51,700,000 to \$46,000,000. That resulted in a decrease in net tuition and fee revenues of \$30,653,000.
- SSI Revenue: At the time the University prepared the FY21 budget, the Ohio Department of Higher Education officials advised the University that it should expect a \$5,000,000 reduction in funding. As a result, the University projected its FY20 SSI revenues to be \$94,068,000. For FY21 and FY22, the Ohio Department of Higher Education informed the University that it should assume what translated into a \$20,000,000 reduction in funding in both years. This resulted in the University building the FY21 budget with the assumption that SSI revenues would be \$79,165,000, or about \$15,000,000 less than projected
- Indirect Cost Recovery: Projected for ICR for FY21 was \$4,500,000, but, the University budgeted \$4,000,000 based on economic projections at the time
- Investment Income: for FY21, budgeted \$744,000, but due to the instability of the market, decline of value of common stock and drop in interest rates, the University budgeted \$500,000 for FY21, which is a \$244,000 decrease
- Miscellaneous Revenues: For FY20, the University budgeted \$2,680,000. But, based on its knowledge of what it expected to receive in FY21, the budget was lowered to \$1,821,000

Around the time the University was preparing the budget, it was notified it would receive a one-time allocation of \$7,076,000 from the Cares Act<sup>18</sup> to offset refunds of room, board and fees, and other COVID-19 related expenditures. The CARES Act funding lowered the operating budget deficit for FY20 from \$14,000,000 to about \$7,000,000.

CFO Dr. Storck explained that when you add: \$30,653,000 in net tuition revenue reduction, to the \$19,974,000 reduction in SSI, and \$14,000,000 in anticipated operating deficient for FY20, it results in a \$65,000,000 funding shortfall. The \$14,000,000 budget deficiency is referred to as “structural deficit.” It carries forward one year to a next unless steps are taken to increase revenue or decrease expenditures by that amount. This number would be

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<sup>18</sup> Any and all CARES Act monies received are restricted funds with specific limitations on their use. *See, UA Exhibit 60 – CARES funding restrictions.*

higher, but the University took temporary savings measures, such as restructuring a portion of the University long term debt and extending payments; using reserves built into auxiliary enterprise operations; deferring capital improvements; and limiting department operating funds. CFO Dr. Storck explained the University cannot continue to use this method to address the deficit as it will detract from its ability to meet basic operating obligations.

CFO Dr. Storck confirmed the University has \$65,000,000 available in cash reserves and explained that if the University incurred an operating deficit of \$65,000,000 and used all of its reserve funds, it would not be able to operate and would not be able to pay all of its bills. He also confirmed the University's investment grade credit rating is contingent on these funds and would be downgraded to a non-investment grade rating if tapped too aggressively. Indeed, utilizing certain levels of the University's reserves would expose the University to full payment of certain debts that were supposed to remain at investment grade. This, in turn, would impact the University's accreditation, by prompting the Higher Learning Commission to initiate steps to assess the viability of the institution's future. CFO Dr. Storck emphasized that he could not overstate the importance of maintaining an appropriate level of the University's operating reserves.

CFO Dr. Storck noted a recent projected uptick in enrollment for the Fall of 2020 from a decline of 20% to a decline of 15%. However, he cautioned these numbers are preliminary and could be negatively impacted in the next several weeks and into the Fall semester based on COVID-19. Specifically, if an outbreak occurred at the University, the University would need to revert back to remote learning and refund room, board, and other fees as it had in Spring 2020.

CFO Dr. Storck also shared that on July 6, 2020, the University learned that the Ohio Department of Higher Education updated its SSI projections based on current Ohio Tax Revenue estimates. That notification stated the University would receive about \$9,000,000 less in SSI than the State last announced it had budgeted for FY21. While more favorable, the \$9,000,000 figure represented a historic SSI funding reduction for the University, so the University's preliminary projection of a \$20,000,000 decline remained appropriate for FY21. This was particularly important because the Ohio Department of Higher Education also strongly cautioned that its current projection is subject to change in the future and that the University was subject to further SSI reductions in FY21. Regardless, the \$9 million-decline alone is a concerning and significant decline in revenue.

xvi. University July 15, 2020 Board of Trustees Meeting

On July 15, 2020, only two days after negotiations with Akron-AAUP concluded, the University's Board of Trustees held a special meeting. *See, UA Exhibit 61 – 7/15/20 Board meeting packet.* During the meeting, numerous resolutions were passed. The Board passed resolutions for each bargaining unit, which embodied certain concessions to contribute to addressing the University's \$65 million-projected shortfall for FY20. These included:

1. Communications Workers of America, Local 4302 ("CWA"). Specifically, one resolution with the Physical Facilities Operations Center Unit of the CWA (Resolution 7-1-20), and the second with the Staff Bargaining Unit of the CWA (Resolution 7-2-20) (collectively "CWA Resolutions"). *See, UA Exhibit 62 – CWA Resolutions.* The CWA Resolutions recognized that the bargaining units entered into memoranda of understanding extending their respective collective bargaining agreements. The memorandums with both units outlined the impact of the COVID-19 pandemic on the University. In order to assist the University with the budget shortfall created by COVID-19, and as a way to share in the sacrifice of non-bargaining unit University employees, the CWA Units agreed to:
  - Wage reductions;
  - Furloughs;

- Benefit reductions; and
  - Elimination of retiree healthcare dependent benefits.
2. Fraternal Order of Police/Ohio Labor Council, Inc. (“FOP”). The Board passed Resolution 7-3-20, *Approval of the Collective Bargaining Agreement Between The University of Akron and the Fraternal Order of Police/Ohio Labor Council, Inc.* See, UA Exhibit 63 – Resolution 7-3-20. This resolution provided:
- Wage reductions;
  - Furloughs;
  - Benefit reductions; and
  - Elimination of retiree healthcare dependent benefits.
3. Akron-AAUP. The Board passed Resolution 7-4-20, *Approval of an Extension to The Collective Bargaining Agreement between the University of Akron and the Akron Chapter, American Association of University Professors.* See, UA Exhibit 64 – Resolution 7-4-20. At the time presented, Akron-AAUP had not yet held the ratification vote of its membership. Ultimately, the membership rejected the 7/13/20 Tentative Agreement. Consequently, Akron-AAUP is the only employee unit at the University who has not contributed to the FY20 or FY21 budgetary shortfall through wage and benefit concessions.

The Board also secured additional necessary cost reductions to address its budgetary crisis through resolutions that resulted in elimination of over 178 employment positions at the University, 97 of which were faculty positions with 96% of these impacting Akron-AAUP members.

- Resolution 7-5-20, *Pertaining to Personnel Actions* (see, UA Exhibit 65 – Resolution 7-5-20), which approved the retirement and resignation of numerous employees across the University – 153 (40 filled and 113 vacant) positions eliminated (See, UA Exhibit 66 – *Vacant Positions Eliminated 7.15.20 - 113 positions*);
- Resolution 7-6-20, *Approval to Abolish Positions* (see, UA Exhibit 67 – Resolution 7-6-20) – 82 non-AAUP positions eliminated;
- Resolution 7-7-20, *Approval to Abolish Bargaining Unit Faculty Positions* (see, UA Exhibit 68 – Resolution 7-7-20) – 96 Akron-AAUP positions eliminated. (Collectively “Abolishment Resolutions”). The Reduction in Force (“RIF”) List<sup>19</sup> is attached, with

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<sup>19</sup> There is a Non-Disclosure Agreement covering this RIF List and the University does not waive the confidential or privileged nature of the RIF List(s) covered by this NDA. See, UA Exhibit 69 – NDA #2 packet.



faculty who retired after the Board action highlighted. *See, UA Exhibit 70 – RIF List (retirements highlighted).*

The Abolishment Resolutions recognized the impact of the COVID-19 pandemic on not only the State of Ohio, but across the United States. The Abolishment Resolutions outlined Governor DeWine's May 5, 2020 announcement that there would be significant reductions to the Ohio Department of Higher Education's fiscal year 2020 budget for the state's public colleges and universities. As a result of the reduction in state funding for fiscal year 2020, as well as the projected reduction in state funding for fiscal year 2021 and other financial losses resulting from the COVID-19 pandemic, the University projected a revenue shortfall of approximately \$65 million for fiscal year 2021. The Resolutions recognized the other changes the University was making to combat the projected budgetary shortfalls:

- Consolidating the current eleven (11) colleges;
- Voluntary reduction in wages for certain employees and athletic coaches;
- Temporary reduction of annual base wages of certain non-bargaining unit staff and contract professionals, including those in athletics;
- Increase in health care contributions for certain non-bargaining unit employees; and
- Temporary reduction of wages and increase in health care premiums for certain non-bargaining unit faculty and academic administrators with faculty rank.

By July 15, 2020, the University had taken substantial and measured action to squarely address the projected \$65 million-budget deficit in FY21.

xvii. Summer Semester 2020

As the University worked through addressing its FY20 deficit and the action items needed to address FY21's projected \$65 million-budget deficit, it kept a close eye on how the COVID-19

pandemic was impacting student registration so it could anticipate associated declines in TGO revenue.

The University's Summer 2020 semester ran from May 18, 2020 through August 16, 2020. For the first week of Summer 2020, there were **-9.3%** less Summer registrants, **-17.3%** less fall course registrants, **-6.4%** less new freshmen admits, and **-18%** less new freshmen confirmations as compared to the same week in Summer 2019.

#### Enrollment Update as of May 20, 2020

Category	2019 Headcounts	2020 Headcounts	Headcount Difference	% Difference
Summer Course Registrations	6,130	5,559	-571	-9.3%
Fall Course Registrations	11,920	9,853	-2,067	-17.3%
New Freshmen Admits	10,838	10,144	-694	-6.4%
New Freshmen Confirmations	3,192	2,618	-574	-18.0%

By the last week of Summer 2020, the enrollment update reflected **-7.5%** less Summer registrants, **-8.1%** less Fall course enrollments, **-5.6%** less new freshmen admits, **-7.8%** less new freshmen confirmations, and **-15.2%** less new freshmen enrollments as compared to the same week for Summer 2019. This was only slightly better than the May 6, 2020 projections.

### Enrollment Update as of August 12, 2020

Category	2019 Headcounts	2020 Headcounts	Headcount Difference	% Difference
Summer Course Enrollments	6,300	5,826	-474	-7.5%
Fall Course Enrollments	18,221	16,747	-1,474	-8.1%
New Freshmen Admits	11,138	10,519	-619	-5.6%
New Freshmen Confirmations	3,483	3,212	-271	-7.8%
New Freshmen Enrollments	2,996	2,542	-454	-15.2% <sup>20</sup>

Since the weekly enrollment tracking from April 7, 2020 through August 12, 2020<sup>21</sup> continued to evidence a projected decline in enrollment for Summer 2020 and for Fall 2020 registrants, the University maintained its projected decline in TGO revenue for FY21.

#### xviii. Summary of University's Action Through July 15, 2020

From March 10, 2020 forward, the University took meaningful and prompt action to meet its operational and fiscal obligations occasioned upon it by the COVID-19 pandemic. These included:

- the permanent elimination of three athletic programs,
- the redesign of its college structure, and
- exercising its rule-making authority to modify and add rules necessary to give it flexibility to implement furloughs during FY21 with minimal notification.

The University also met regularly with its four bargaining units (Communication Workers of America – 2 units; Fraternal Order of Police; and Akron-AAUP) seeking concessionary contracts that reflected similar concessions as those put into place for non-bargaining unit employees.

<sup>20</sup> While slightly better than the May 2020 enrollment projections, the decline was still very bad for the University.

<sup>21</sup> See, *UA Exhibit 26 – Enrollment Sheets*.

Ultimately, the following additional actions were taken, as outlined more fully within earlier sections of the brief:

<u>Date</u>	<u>Action</u>	<u>Employee work groups impacted</u>	<u>Estimated savings</u>	<u>Fiscal Year</u>
5/29/20	Resolution 5-5-20 – Salary decreases FY21	Non-bargaining staff and contract professionals	\$ 2,179,000	FY21
5/29/20	Resolution 5-6-20 – Increase Health Plan Employee Contributions 1/1/21 forward	Non-bargaining staff and contract professionals	\$ 350,000	FY21
5/29/20	Resolution 5-7-20 – Elimination retiree & dependent benefits	Non-bargaining unit retirees/dependents	\$ 730,000	FY21
6/10/20	Resolution 6-14-20 – Salary decreases FY21	Non-Bargaining unit faculty and academic administrators with faculty rank	\$ 920,000	FY21
6/10/20	Resolution 6-15-20 – Increase Health Plan Employee Contributions 1/1/21 forward	Non-Bargaining unit faculty and academic administrators with faculty rank	\$ 75,000	FY21
7/15/20	Resolution 7-1-20 & 7-2-20 – concessionary labor contracts CWA	Bargaining unit staff	\$ 125,000	FY21
7/15/20	Resolution 7-3-20 – concessionary contract FOP	Bargaining unit staff	\$ 130,000	FY21
7/15/20	Resolution 7-4-20 – concessionary TA Akron-AAUP	Akron-AAUP	No savings – union membership rejected 7/13/20 TA	None
7/15/20	Resolution 7-5-20 – Personnel Actions eliminating vacant positions	All employee work groups campus wide	Vacant positions unfilled	FY21

<u>Date</u>	<u>Action</u>	<u>Employee work groups impacted</u>	<u>Estimated savings</u>	<u>Fiscal Year</u>
7/15/20	Resolution 7-6-20 – Reduction in force	82 positions campus wide excludes Akron-AAUP unit	\$ 5,200,000	FY21
7/15/20	Resolution 7-7-20 – Reduction in force	96 positions Akron-AAUP	\$11,200,000	FY21

The University relied upon securing the foregoing concessionary reductions in salary and increased health care premiums in order to minimize the reduction in force for FY21 that was necessary to appropriately respond to the looming \$65 million-projected deficit. From late May 2020 to mid-July 2020, the foregoing action items resulted in an estimated \$44 million-savings.<sup>22</sup>

xix. President Miller's Remarks before the Board of Trustees on August 12, 2020

A mere nine days before submission of this brief, President Miller addressed the Board of Trustees at its August 12, 2020 meeting. *See, UA Exhibit 71 - President Gary L. Miller's remarks before the Board of Trustees on Aug 12.* President Miller shared, in pertinent part:

Prior to COVID, we had implemented a number of important initiatives designed to move the University forward. With great participation by faculty and staff we began an accelerated strategic planning process. We believed we were on track to meet our goals within a three to four-year period.

The fallout from the COVID pandemic changed all that.

It compressed our financial challenges into the current fiscal year. We cleared campus and moved to online instruction last spring at great cost. Unprecedented COVID-related decreases in enrollment and SSI, coupled with the great uncertainty of the immediate future made it clear that if we failed to act decisively and immediately, the University would be placed in financial peril in the current fiscal year.

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Two examples of this uncertainty relate to our most important revenue streams: tuition and state support of instruction (SSI).

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<sup>22</sup> *See, UA Exhibit 71 - President Miller's Remarks before the Board of Trustees on 8/12/20.*

- The COVID-induced enrollment decline we are experiencing this fall cannot be overcome in a single year. Any decline in enrollment in a fall semester stays with us for four years.
- We have been cautioned to plan for the potential of additional declines in SSI in this fiscal year. But, even if the current depressed level stays the same this year, it is highly unlikely it will be increased in subsequent years. We will live with dramatically reduced state funding for many years to come. It would be irresponsible, indeed, reckless, for us to anticipate anything else.

There should be no doubt in anyone's mind in the University community that we not only face a crisis of the instant, we also are facing a fundamental reorientation of nearly every aspect of higher education. This is not just about balancing an annual budget. This is about how we will prosper in the new environment we face.

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However, there are those in the University who have very loudly vocalized their skepticism about the seriousness of our challenges. These people believe our problems are temporary and should be fixed with short-term, temporary solutions based on one-time savings and cost reductions. They believe we should just wait.

Such a view not only ignores the data (which we will review here this morning), it also reveals a fundamental and disquieting lack of trust and commitment to an institution that for 150 years has found a way to weather great change and to which these individuals profess their love. To turn, in this critical moment in our history, so single-mindedly to traditional practice is, indeed, a deep disappointment.

What we need now is courage and creativity and a willingness to embrace a change we all know is coming. I am indeed thankful we have these characteristics in this Board, among the vast majority of our faculty, staff and students and in this community.

President Miller provided a FY21 Budget Planning sheet to demonstrate the point that inaction and relying purely on reserves was not an option. *See, UA Exhibit 72 – FY21 Budget Planning Worksheet.* Had the University taken no action, maintained status quo, and simply relied upon its cash reserves, it would have had to deplete those operating reserves by \$49,321,000,<sup>23</sup>

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<sup>23</sup> The University's reserve balance as of August 12, 2020 was approximately \$65 million. *UA, Exhibit 59.*

nearly exhausting them. President Miller explained that the University's reserves are not a rainy-day fund. He stated:

The University reserve pool is not a rainy-day fund. It is not a pot of money we can draw from to weather a significant crisis. Retaining sufficient reserves is an obligation you have. The presence of these funds is absolutely required to back up our debt and our operational responsibilities and to maintain our accreditation. *See, UA Exhibit 71.*

In terms of revenue, President Miller confirms that within weeks of Fall semester 2020, the University is planning a **-15%** decline in enrollment, representing loss of a little over \$20 million in TGO revenue. Based on current information, President Miller shared that the University expected a decline of **-8.8%** in SSI revenue, compared to the FY20 approved budget, representing a loss of \$8,694,000. These decreases, combined with the projected loss of \$605,000 in ICR revenue, created a \$29,620,000 "minimum total reduction in revenue compared to FY20." *Id.* Notably, President Miller emphasized the significance of this number and this circumstance as follows:

The minimum total reduction in revenue compared to FY20 is \$29,620,000. This is an historic number representing nearly a 22% reduction from FY20. **In my time in higher education I have never seen a single year reduction of this magnitude.** *Id.*

Mr. Chairman, we are budgeting in the most volatile and uncertain time in my thirty years in higher education. But thanks to the courageous work of the leadership team, the chairs, the deans and many faculty and staff, we are presenting a positive way forward for the University.

President Miller also identified planning contingencies exist for major or temporary COVID-related disruption in the Fall 2020. On the revenue side, a TGO revenue contingency could materialize. Specifically, since the academic delivery model being deployed for Fall 2020 is newer, a disruption to academics could result in lost revenue as high as \$8,000,000 based on experience from Spring 2020 when COVID-19 first hit. Also, the SSI revenue could fluctuate with a potential

reduction of an additional \$4.7 million. Based on these two contingencies, the University determined, **“this year’s revenue decrease, now projected to be \$29M could be as large as \$41M.”** [Emphasis not added]. *Id.* On the expenditure side, this arbitration alone represents an \$11 million-dollar expenditure contingency as that would be the financial impact if the Akron-AAUP Faculty laid off in Resolution 7-7-20 *Approval to Abolish Bargaining Unit Faculty Positions (UA Exhibit 68)* were reinstated. President Miller remarked:

**Given the variability in revenue and expenses possible in the coming months, we caution the Board that the draw on reserves could range from \$7.8M to as much as \$32M.** As we have discussed, this outcome would be difficult to overcome. [Emphasis not added]

It is clear the cascade of catastrophic circumstances that began March 10, 2020 when the University suspended classes due to the COVID-19 pandemic’s arrival in Ohio continues unabated through the submission date of this brief. Forcing into the FY21 budget with \$11 million in estimated expenditures that had been saved through Resolution 7-7-20 *Approval to Abolish Bargaining Unit Faculty Positions (UA Exhibit 68)* would reinstate the catastrophic circumstances the University addressed through its implemented course of action through July 15, 2020. These catastrophic circumstances would force the University to initiate yet another round of Article 15, Section 12 layoffs, thus creating an avalanche of increased costs and responsive layoffs. These catastrophic circumstances would also place the University’s operation and accreditation in jeopardy – its very existence would hang in the balance.

xx. University August 12, 2020 Board of Trustees Meeting

On August 12, 2020, the University’s Board of Trustees held a meeting. *See, UA Exhibit 73 – 8/12/20 Board meeting packet.* The Board considered and approved the Financial Report for the eleven months ended May 31, 2020 (two months later than the report reviewed during its



May 29, 2020 special meeting) as presented. The report contained the following remarks regarding the COVID-19 pandemic:

- State Share of Instruction: “The revised projection contemplates a \$3.9 million reduction, down to \$95.2 million, largely due to the impact of COVID-19 state finances.” *See p. 2*
- Tuition and General Service Fees “have been tracking less than budget for much of the fiscal year. Based on preliminary 2020 summer enrollment, the Tuition and General Service Fees are projected to be \$175.6 million, or \$3.1 million less than budget.” *see p. 6*
- State Share of Instruction: “State Share of Instruction (SSI) revenues total \$88.9 million or 90 percent of the annual budget of \$99.1 million. The Ohio Department of Higher Education announced a reduction of \$3.9 million, or 20% of the outstanding SSI distribution for the fourth quarter of the fiscal year, to reflect the expected impact of the COVID-19 shutdown on state revenues.” *See p. 7*
- Indirect Cost Recovery: “Prior to the COVID-19 pandemic, revenues were expected to fall short of budget by roughly \$300,000. The impact of COVID-19 will most likely be a further reduction in IDC revenues; however, the revised projection is \$0.6 million.” *See p. 7*
- Investment Income: “Prior to COVID-19, the investment income was expected to fall short of budget by approximately \$400,000. With the impact of COVID-19 on the federal funds rate, the investment income is estimated to be \$744,000 or \$656,000 less.” *See p. 7*
- Transfers Out: Other: “Prior to the COVID-19 concerns, the Transfers-Out Other were projected to increase by \$1 million to \$31.8 million. Projections indicate the expected impact of COVID-19 will require supplemental General Fund support of \$1.4 million to address a projected shortfall in Athletics.” *See p. 9*
- Auxiliary Funds: Revenues: “will be adversely impacted as a result of COVID-19. Prorated refunds and lost revenues from closed facilities and cancelled events are reflected as appropriate.” *See p. 20*
- Auxiliary Funds: Other: Transfers In: “The original assumption contemplated General Fund operating and debt service support and Facilities Fees reserve usage for debt service for certain auxiliaries totaling \$32.8 million while based upon the enrollment variance and the fiscal performance within certain auxiliaries, the transfers were projected to be \$33.8 million. However, considering the expected impact of COVID-19 on operations, additional resources are required from the General Fund to offset anticipated shortfalls. Overall support from General Fund is expected to be \$34.2 million and \$1.9 million from Facilities Fee reserve.” *See p. 20*

- Athletics:
  - “Due to COVID-19, the assumptions indicate that the cancellation of the NCAA Men’s Basketball Tournament will reduce the annual NCAA revenues to \$387,000 or 37 percent for a total loss of \$658,000.” *See p. 21.*
  - “The revised projections indicate the Athletic Facility rental events canceled as a result of COVID-19 represent a loss of \$39,000 in rental revenue.” *See p. 21.*
  - “Due to COVID-19, the projection indicates that the cancellation of the NCAA Men’s Basketball Tournament will reduce the annual NCAA revenues to \$387,000, or 37 percent for a total loss of \$658,000. Cancellations of Athletic Facility rental events represent a loss of \$39,000 in rental income. Current expectations indicate that revenues will total \$7.3 million, or \$2.2 million below the \$9.4 million budget.” *p. 28*
- Parking and Transportation Services Revenues: “Due to COVID-19, \$1.1 million or 45 percent of spring semester revenue went towards refunds.” *See 9. 27*
- EJ Thomas Performing Arts Hall: “The cancellations of events related to the COVID-19 pandemic will produce a loss in revenue of \$40,000.” *p. 32*
- Residential Life and Housing: Revenue, Income: “Credits for residence halls, due to COVID-19 early closure, resulted in \$3.5 million of lost revenue and a loss of \$40,000 in revenue due to the cancellation of the AA conference.” *See p. 23*

By August 12, 2020, the University was as well positioned as possible to survive FY21 and to be as flexible as needed to adapt to the significant contingencies to revenue and expenditures that might result from the COVID-19 pandemic. This position is dependent upon maintaining all cost-saving measures implemented from May 29, 2020 through July 15, 2020, including the positions abolished by Resolution No. 7-7-20, *See UA Exhibit 68.*

The Board also passed Resolution No. 8-11-20 *Pertaining to the Approval of the FY 2020-2021 Akron and Wayne General Fund Combined Budget. See, UA Exhibit 74 – Resolution 8-11-20.* This resolution adopted the FY21 Budget Planning Worksheet recommended by President Miller in his remarks. *See, UA Exhibit 72.*

xxi. Fall 2020 – August 2, 2020 to August 19, 2020

As of August 2, 2020, using Fall 2019 enrollment numbers for comparison, the University was positioned for an enrollment reduction in Fall 2020 of **-9.37%** based on actual head count and a **-9.91%** reduction based on actual credit hour registrations. *See, UA Exhibit 75 – Response to Akron-AAUP 7/31/20 Information Request, question 5 response.* This confirms the University's enrollment projection information from April 7, 2020 to present was valid and appropriately relied upon in expecting a continued decline in TGO revenue in FY21.

On August 8, 2020, the Mid-Atlantic Conference announced postponement of all scheduled fall sport contests (men's and women's cross country, field hockey, football, men's and women's soccer, and women's volleyball) due to the COVID-19 pandemic. *See, UA Exhibit 76 – 8/8/20 MAC Conference Announcement.* The fate of winter sports is unknown as of the submission of this brief. Since the announced postponements contemplate some shortened seasons in the spring, the financial impact cannot be specifically determined as key variables remain unknown (e.g. length of season, identity of opponents, and broadcast commitments). The University's best projection is that cancellation of the fall sports will result in a net loss of \$700,000 to \$750,000), assuming no operating costs.

With 5 days before Fall Semester 2020 begins, the enrollment projection is as follows:

**Enrollment Update as of August 19, 2020\***

Category	2019 Headcounts	2020 Headcounts	Headcount Difference	% Difference
Summer Course Enrollments	6,300	5,826	-474	-7.5%
Fall Course Enrollments	18,618	17,240	-1,378	-7.4%
New Freshmen Admits	11,149	10,546	-603	-5.4%
New Freshmen Confirmations	3,499	3,236	-263	-7.5%
New Freshmen Enrollments	2,957	2,545	-412	-13.9%

\*Tuesday before classes begin: 8-18-20 vs. 8-20-19

V. Overview of the Relationship between the University and Akron-AAUP Leadership

Prior to the arrival of the COVID-19 pandemic in Ohio, the University and Akron-AAUP negotiation teams had met for several negotiation sessions in hope of securing a successor agreement before the end of the Spring 2020 semester. Everything changed when the COVID-19 pandemic arrived in Ohio on or about March 10, 2020. That day, after Governor DeWine's Executive Order 2020-01D was announced, University President Miller directed immediate suspension of classes until Spring break ended on March 29, 2020. *See, UA Exhibits 15 and 16 respectively.* From approximately March 10, 2020 through March 30, 2020, the University's primary focus was supporting operations being modified to support online delivery of all coursework on March 30, 2020.

By April 21, 2020, the University and Akron-AAUP leadership had established ongoing and regular communication regarding the COVID-19 pandemic and its catastrophic circumstances. The University and Akron-AAUP negotiation teams entered into a Non-Disclosure Agreement so the University could share confidential, privileged, and proprietary information that only its

Board of Trustees had thus far received. This information included both a Board packet from the April 15, 2020 Board meeting executive session and weekly enrollment projection updates beginning April 7, 2020. *See, UA Exhibit 77 – 4/15/20 Executive Session Board Packet.*<sup>24</sup>

From April 21, 2020 through July 13, 2020, the University and Akron-AAUP negotiation teams met on approximately 18 occasions, including:

April 21, 2020;<sup>25</sup>  
April 24, 2020;  
April 30, 2020;  
May 8, 2020;  
May 13, 2020;  
May 19, 2020;<sup>26</sup>  
May 22, 2020;  
May 26, 2020;  
June 2, 2020;  
June 8, 2020;  
June 11, 2020;  
June 18, 2020;  
June 30, 2020;  
July 2, 2020;  
July 8, 2020;  
July 9, 2020;  
July 10, 2020; and  
July 13, 2020.

At all times, the University sought concessions from the Akron-AAUP unit that ensured contribution from this work employee group was on par with sacrifices being made campus-wide.

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<sup>24</sup> In producing this document in this brief, the University does not in any way waive its right to maintain the confidential and proprietary nature of this document. *See, UA Exhibit 25 – NDA packet.* The document is produced for the limited purpose of the Arbitrator having a full record of information provided by the University to Akron-AAUP. The University confirms the NDA remains in full force and effect.

<sup>25</sup> Days prior to this April 21, 2020 meeting, the University's attorney notified the Akron-AAUP attorney of the potential for invocation of Article 15, Section 12 based on the unfolding financial impacts of the COVID-19 pandemic. These discussions were within the context of negotiating the language for the NDA#1 (*UA Exhibit 25*) language in order to provide Akron-AAUP leadership with the April 15, 2020 Board executive session packet (*UA Exhibit 77*).

<sup>26</sup> At this May 19, 2020 meeting, the University provided a summary notification of its intent to formally invoke Article 15, Section 12. *See, UA Exhibit 78 - summary notice 5/19/20.*

From the beginning of the COVID-19 pandemic crisis to present, the University has been as transparent as possible with Akron-AAUP as best evidenced by its continued response and provision of documents and information to requests Akron-AAUP made:

April 23, 2020 (16 questions);  
April 27, 2020 (9 questions);  
April 29, 2020 (4 questions);  
May 9, 2020 (16 questions);  
May 11, 2020 (3 questions);  
May 14, 2020 (2 requests);  
June 1, 2020 (31 questions);  
June 16, 2020 (10 questions);  
June 17, 2020 (1 question);  
June 25, 2020 (1 question);  
June 26, 2020 (1 question);  
July 1, 2020 (15 questions);  
July 5, 2020 (follow up on earlier questions);  
July 23, 2020 (6 new requests; 27 follow up requests);  
July 31, 2020 (5 requests); and  
August 10, 2020 (10 questions).

The University has provided all requested information and documents in as timely a manner as possible and in many cases created documents it was not otherwise required to create. All of these formal requests do not include informal requests made through counsel to one another, which are too voluminous to recount.

On May 21, 2020, the University provided Akron-AAUP its formal notification that the University invoked Article 15 Section 12 due to the catastrophic circumstances it faced. *See, UA Exhibit 79 – 5/21/20 Article 15 Section 12 Notification*. Akron-AAUP, through its legal counsel, objected to a position the University expressed in the May 21, 2020 notification. To avoid contention at the negotiation table, the University agreed to modify its Article 15 Section 12 notification and re-presented the document to Akron-AAUP on May 22, 2020. *See, UA Exhibit 80 – 5/22/20 Article 15 Section 12 revised Notification #1*. Akron-AAUP again, through its legal

counsel, objected to a position that was not removed from both letters. Again, to avoid contention at the negotiation table, the University agreed to modify its Article 15 Section 12 notification and re-presented the document to Akron-AAUP later on May 22, 2020. *See, UA Exhibit 81 – 5/22/20 Article 15 Section 12 Final Notification.* At no point did the University waive its position on the two items removed from its original Article 15 Section 12 letter dated May 21, 2020. In addition, the University provided Akron-AAUP access to all documents in support of the notification, all of which are incorporated herein as restated.

On July 13, 2020, the University and Akron-AAUP reached a concessionary tentative agreement (“7/13/20 TA”) that secured cost savings for FY21 in the areas of salary reductions and increase of health care premiums, sharing in the sacrifice made by all other employee groups. *See, UA Exhibit 82 – 7/13/20 TA.* The University relied upon these savings in approving the 7/13/20 TA and in adopting other cost reduction measures at its July 15, 2020 Board meeting.

Ultimately, Akron-AAUP’s membership rejected the 7/13/20 TA. The University must now address the budgetary impact of this decision.

But for the savings achieved through abolishment of positions through Resolution 7-7-20 *Approval to Abolish Bargaining Unit Faculty Positions (see, UA Exhibit 68)*, Akron-AAUP has not contributed to the FY21 budget deficit striking against basic notions of fairness and equity. This is particularly significant given that Akron-AAUP historically experiences less position decline (-18.8%) as compared to others, and Akron-AAUP has also historically enjoyed higher salary increases as compared to others.

It should be noted that on June 24, 2020 Akron-AAUP’s leadership was provided the University’s RIF list prior to it being presented to the Board of Trustees, which identified 113

positions to be abolished. Akron-AAUP worked in collaboration with the University to secure as many retirements as possible at that time, with the purpose to lower the number of positions to be impacted by the RIF. That effort proved successful – seventeen (17) positions were removed from the RIF list before it was presented to the Board of Trustees on July 15, 2020.

On or around July 28, 2020, Akron-AAUP retained Dr. Rudy Fichtenbaum (“Dr. Fichtenbaum”) who presented his analysis of the University’s financial statements for the years ending June 30, 2002 through 2019 (the “AAUP Report”), erroneously concluding the University’s financial position was not as serious as the University claimed.

On August 20, 2020, CFO Dr. Storck produced a thorough and detailed response to the Akron-AAUP report. *See UA Exhibit 83 – CFO Dr. Storck’s Memorandum & Exhibits; 83-A: UA Financial Report 6/30/19; 83-B: p. 362 of UA Exhibit 73; 83-C: FY21 Budget Planning Excerpt; 83-D: ODE: FY Budget Update 7/6/20 (see also, UA Exhibit 87); 83-E: Financial Report Document; 83-F: KPMG Metric Calculation Chart; 83-G: Financial Report Document; 82-H: KPMG Calculation Chart.* CFO Dr. Storck points to countless critical errors, inaccuracies, and misstatements in the Akron-AAUP Report, all of which are addressed in point-by-point fashion.

CFO Dr. Storck first notes FY19 is the most relevant to the assessment of the University’s finances as it is the most recent fiscal year to FY20. As the starting point for the FY20 budget, FY19 represents the starting point for the FY20 budget and is proper in that context. This is especially true given the impact the COVID-19 pandemic had on the University’s finances, as that is what ultimately required the University to institute a 20%-25% reduction in budget expenditures for the University remain viable beyond FY21.



CFO Dr. Storck also provides a detailed explanation of material errors and incorrect calculations contained in the Akron-AAUP Report, including:

- The Akron-AAUP Report erroneously concluded the University had \$394.5 million of revenues for budgetary use in FY19. In actuality, the FY19 General Fund budget only provided \$265.3 million in revenue.
- Based on its erroneous \$394.5 million assumption, the Akron-AAUP Report incorrectly characterized \$129.2 million of funding (the difference between \$394.5 million and \$265.3 million) as “missing.”
- The Akron-AAUP Report incorrectly included certain restricted revenues and funds in its calculations that are not available for use in the manner assumed.
- CFO Dr. Storck confirmed there is no “missing \$129.2 million.” Rather, the incorrect and inaccurate assumptions made in the Akron-AAUP Report created this “missing \$129 million.”

CFO Dr. Storck pointed to other inaccurate calculations and misstatements in the Akron-AAUP Report that related to the University’s debt and use of restricted funds. He stated when and for what the funds can actually be used, the consequences of using the restricted funds, and the basics regarding the University’s investment income.

In regard to the Akron-AAUP Report’s arm-chair quarterbacking University enrollment projections as overly pessimistic, CFO Dr. Storck explains the context within which decisions were made – early into the COVID-19 pandemic when states were shutting, instructional delivery moved to remote learning, and the University, along with the entire United States, was just beginning to feel the financial burden of the pandemic and the gravity of the circumstance.

Although the anticipated drop in enrollment has since somewhat improved, CFO Dr. Storck concluded that the University still has a sizable structural deficit, despite the Akron-AAUP Report’s contention otherwise. This structural deficit, according to CFO Dr. Stork, “requires immediate elimination of continued operating expenses and reductions that cannot be accomplished with one-time dollars.” *Id.*

Further, CFO Dr. Storck also reiterated the University's position on SSI, as explained more fully in his July 10, 2020 video. CFO Dr. Storck recognized that while there was some positive news in July of 2020 when ODHE officials revised the reduction in the University's FY21 SSI funding to \$8.7 million rather than the previous estimate of a \$20 million decrease, CFO Dr. Storck reinforced that the University must still remain fiscally conservative in its projections given the existence and unpredictability of the COVID-19 pandemic. In fact, the Akron-AAUP Report omits what Chancellor Randy Gardner made clear to the University on July 6, 2020:

**"Please note that, as with all line items in this challenging budget environment, I must place a "warning label" on this positive news. This new FY21 SSI amount is subject to change if the overall budget and supporting state revenue sources were to significantly worsen during the fiscal year compared to current projections."**

The upbeat AAUP Report also fails to consider the impact of what is known as the Composite Financial Index (CFI).<sup>27</sup> *UA Exhibit 83 – Storck Memorandum*. The CFI is a good barometer of an institution's overall financial health. The authors of the CFI explain that a score of 1.1 suggests that University officials should "reengineer the institution." Generally speaking, a CFI score of 1 represents very little financial health, whereas a score of 3 represents a relatively stronger financial position and is considered the threshold value for an institution. Therefore, a CFI score of 1.1 is an indicator that signals a need to make systemic changes to the University's business model – changes that the University made on July 15, 2020. *UA Exhibit 83H – KPMG Metric Calculation Chart*.

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<sup>27</sup> These ratios were developed by the public accounting firm KPMG and the investment banking firm Prager, Sealy & Co. The CFI relies on information from audited financial statements and utilizes four core ratios measuring various aspects of an organization's financial well-being – the primary reserve ratio, the viability ratio, the return on net assets ratio, and the net operating revenues ratio. These four ratios are weighted and combined to determine the CFI.

The University's CFI score for FY19 was 1.1. As this indicates, a CFI score of less than 1.1 is a serious matter as it demonstrates the tenuous financial position of an institution. There are other negative impacts of a CFI score of less than 1.1. The University's regional accrediting body, the Higher Learning Commission (HLC) closely monitors CFI scores of the institutions that it accredits. When a CFI score drops below 1.1, it triggers a financial indicator warning leading the Higher Learning Commission to issue a letter of concern. Moreover, the credit rating agencies would necessarily downgrade the University's credit rating, increasing the future cost of borrowing, as the University would be viewed as a riskier borrower. The University would also expose itself to having two of its existing debt issues being accelerated/called by the bondholders. The effects of reinstating faculty could further erode the University's CFI score.

The University calculated the impact of reducing the number of faculty and staff on the CFI for FY21. *UA Exhibit 83H – KPMG Metric Calculation Chart*. In scenario 1, assumed reductions among the AAUP faculty were \$11,740,000 and \$12,515,000 for non-AAUP faculty and new hires reduced the savings by \$788,000 for a total net savings of \$23,467,000. In scenario 2, the assumptions were that only non-AAUP faculty would be reduced and the new faculty hires were \$788,000 for a total net savings of \$11,727,000. In scenario 1, the CFI score was 1.3 while in scenario 2 the CFI score dropped to 1.0, a reduction of .3 or 23%. A CFI score of 1.0 is simply unacceptable, demonstrating the critical nature of the personnel reductions.

The catastrophic and material impact of the COVID-19 pandemic on the University's FY21 revenue stream is unmistakable. With only days remaining before Fall 2020 begins, the University must continue to position itself to withstand significant contingencies that may materialize in a relatively short time.

VI. Collective Bargaining Agreement: Relevant Provisions

The University and the Akron Chapter of the American Association of University Professors ("Akron-AAUP") are parties to a collective bargaining agreement effective July 1, 2018 through December 31, 2020 ("Labor Contract"). *See, Stipulated Exhibit A, Labor Contract.*

For purposes of this case, the relevant provisions of the Labor Contract are as follows:

A. Article 12 Grievance and Arbitration Procedures

ARTICLE 12  
GRIEVANCE AND ARBITRATION PROCEDURES

Section 1. Definitions

- A. *"Grievance": means any dispute between the University and the Akron-AAUP or between the University and a bargaining unit employee with respect to the interpretation, application, or violation of any of the provisions of this Agreement, subject to those exclusions appearing in other Articles in this Agreement.*
- B. *"Grievant": means either a member of this bargaining unit or the Akron-AAUP, who or which, as the case may be, pursues a Grievance under this Article.*
- C. *"Day": means Monday through Friday, when University classes are scheduled and in session.*
- D. *"GCAO": means the Grievance and Contract Administration Officer of the Akron-AAUP, or his/her designee.*
- E. *"AVPELR": means the person designated by the Provost, which shall be of a rank of Assistant Vice President or higher (or equivalent).*

Section 2. Informal Resolution

- A. *Nothing contained in this Article will be construed to prevent the informal adjustment of any grievance. The parties agree that, whenever possible, disputes shall be resolved informally, and the parties encourage open communications so that resort to the formal grievance procedure will not be necessary. Prior to initiating a formal grievance, the Grievant and the appropriate University administrator (Provost, dean, and/or department chair/faculty coordinator with supervisory responsibility) shall make a reasonable effort to meet and adjust the grievance in an informal manner. Such required informal adjustment must occur within twenty (20) days after the occurrence of the events upon which it is based*

*or within twenty (20) days after the Grievant knew, or through the exercise of reasonable diligence, should have known of the events on which it is based. Such informal adjustment shall continue for no less than fifteen (15) days after the initiation of the informal resolution process, after which either the Grievant or the University may terminate the process by giving notice to the other party.*

- B. While an individual Grievant has the right to be advised or assisted by the Akron-AAUP in attempting to secure informal resolution, such advice or assistance is not required. However, any resolution achieved without the Akron-AAUP's assistance shall not be binding upon the Akron-AAUP or another bargaining unit member.*

Section 3.      Initiation of Formal Grievance

- A. The formal grievance process shall be initiated by reducing the grievance to writing, signed and dated by the Grievant and/or the GCAO and two (2) copies will be presented to the AVPELR within twenty (20) days after the conclusion of the informal process set forth in Section 2, supra. The formal grievance document shall state the events upon which the grievance is based, the basis for the grievance, including the specific Articles and Sections of this Agreement or University rules or practices that are alleged to have been violated, and specify the relief and remedy sought and shall be submitted on forms, which shall be agreed to by the parties. However, the failure to comply with any of these specific requirements regarding the grievance document shall not be a basis for claiming that the grievance is untimely, or for denying the grievance so long as the missing information is provided at the initial meeting.*
- B. A grievance may be initiated at Step Two if all parties concur to initiate it at that level.*

Section 4.      Step One

*Within ten (10) days of receiving the formal grievance document the AVPELR will schedule a Step One meeting involving the dean and/or the dean's representative, the Grievant and the GCAO. The Step One meeting will occur at a time and place convenient to all parties and shall transpire no later than ten (10) days of the AVPELR receipt of the formal grievance document. Within ten (10) days after the Step One meeting, the AVPELR shall provide the GCAO and the Grievant with a written response.*

Section 5.      Step Two

*If the GCAO and the Grievant are not satisfied with the AVPELR's Step One response to the formal grievance, the formal grievance may be advanced to Step Two by the Akron-AAUP filing a written Notice of Appeal with the AVPELR within ten (10) days after the receipt by the Akron-AAUP of the Step One response. This Notice of Appeal shall state the reasons why the Step One disposition is*

*not satisfactory. Within ten (10) days of receipt of such Notice of Appeal, a Step Two hearing, with the Provost and/or designees, the Grievant, and the GCAO, will be scheduled by the AVPELR. The Provost and the President of the Akron-AAUP may reasonably include other representatives in the meeting. The AVPELR shall send a written disposition of the formal grievance to both the Grievant and the GCAO within ten (10) days following the conclusion of the Step Two hearing.*

#### Section 6. Arbitration

*If the Akron-AAUP is not satisfied with the University's Step Two written disposition, it may, at its sole discretion, within twenty (20) days of the receipt of the Step Two answer, appeal the grievance to arbitration. Any appeal to arbitration made hereunder shall be initiated by giving written notice of such appeal to the Federal Mediation and Conciliation Service ("FMCS") and simultaneous written notice to the AVPELR.*

- A. Within five (5) days following receipt of a list of arbitrators, all of whom must be members of the National Academy of Arbitrators, from FMCS, if the arbitrator is not selected by mutual agreement, the parties will alternate in striking names until only one (1) name remains. Which party strikes first (1<sup>st</sup>) shall be determined by a flip of the coin, or as the parties otherwise may agree. If the arbitrator thus chosen cannot serve, the parties shall request a new list and begin the selection process anew. However, in the event either party finds the initial panel to be unacceptable, it may reject the same and request a new panel at its expense. The party which did not reject the first panel shall have the option of having the parties alternatively strike from the second panel only or from both panels.*
- B. The procedural format for arbitration shall be either: (a) the FMCS rules for voluntary labor arbitration or (b) the FMCS rules for expedited labor arbitration. If the parties cannot agree in advance of the date the notice of appeal to arbitration is to be filed, as to the procedural format to be followed, the arbitration shall be conducted under the FMCS rules for voluntary labor arbitration.*
- C. Two (2) days prior to the hearing, the parties will exchange the names of all witnesses to be called and exhibits to be introduced during their case in chief.*

#### Section 7. Arbitrator's Authority and Decision

- A. The arbitrator shall have no authority to vary the procedures (including any time limit) prescribed herein or otherwise to add to, subtract from, or modify the terms of the Agreement. The arbitrator's task shall be to interpret the specific provisions which the Grievant or GCAO allege that the University has violated.*
- B. The arbitrator's decision will be rendered in writing within thirty (30) days of the close of the hearing or twenty (20) days from his/her receipt of the briefs, whichever is later, unless the parties mutually agree to a later award.*

- C. *Arbitration awards shall be in writing and shall explain the reasons for the arbitrator's decision. The arbitrator's decision will be final and binding on the University and Akron-AAUP and may be enforced in any court of competent jurisdiction. If either party seeks clarification of the arbitrator's decision or seeks to request the arbitrator's assistance regarding implementation of the remedy, any such communication to the arbitrator shall be done jointly by the parties.*

Section 8. Arbitration Procedures

- A. *If the procedural arbitrability of the grievance is challenged, the issue of procedural arbitrability shall be heard and decided by written opinion before the grievance is heard on its merits.*
- B. *The arbitrator shall not hear multiple grievances in the same hearing unless the issues are identical or the parties mutually agree otherwise.*
- C. *The grievant shall be restricted to the specific Agreement violation alleged in the grievance and the documents relating to Steps 1 and 2.*
- D. *Either party shall have the right to have the hearing transcribed at its cost and to submit a post-hearing brief.*
- E. *In disciplinary cases, evidence of all relevant prior offenses or misconduct shall be admissible.*
- F. *The arbitrator shall not consider any statement made by a federal or state mediator unless made at the table to both parties.*
- G. *The University and the Akron-AAUP will bear their own grievance process and arbitration expenses individually and share the arbitrator's fee and expenses equally.*

Section 9. Time Limits

- A. *Time limits in the steps may be shortened or extended by mutual written agreement of both parties. Any such extension or contraction does not constitute a waiver of the right to insist on the time limits on any other grievance or arbitration.*
- B. *Failure of either party to abide by the time limits shall result, at the other party's option, in the advancement of the grievance to the next level, or, upon five (5) days written notice, acceptance of the party's position which last responded, unless the other party further responds within the five (5) day period.*

## Section 10. Mediation

*Notwithstanding the other provisions of this Article, the GCAO and the AVPELR may mutually agree, in writing, to mediation at any time during the grievance/arbitration process.*

### B. Article 15 Retrenchment

#### ARTICLE 15 RETRENCHMENT

### Section 1. Determining the Necessity for Retrenchment

- A. *Retrenchment may be necessary when a judgment, made by action of the Board, based upon evidence made available to the Akron-AAUP according to the schedules set forth in this Article, indicates one (1) of the four (4) circumstances listed in Section 1(A)(1) through 1(A)(4) exists at the University.*
1. *Financial exigency, defined as financial problems so severe that they threaten the University's ability to maintain its operations at an acceptable level of quality;*
  2. *Significant reduction in enrollment of a college, department, or program continuing over five (5) or more academic semesters (not including summer) and which is expected to persist;*
  3. *Discontinuation of a college, department or program;*
  4. *Action by the Ohio Board of Regents or Ohio General Assembly which requires the University to implement a retrenchment.*

### Section 2. Bargaining Unit Reductions through Attrition First

- A. *Normal attrition is the preferred approach to alleviating financial exigency or responding to enrollment patterns.*
- B. *If the Board determines, according to the criteria listed in Section 1 of this Article, that retrenchment is necessary and, further, that in implementing this retrenchment a reduction in bargaining unit faculty is necessary, the Board shall attempt to achieve the desired result through attrition, including voluntary early retirement.*
- C. *If, after completing this procedure, the Board makes the judgment that retrenchment requires reductions in bargaining unit faculty beyond those conducted through attrition, the following procedures establish the process for implementing any retrenchment.*



### Section 3. Information

*In this Article, “day” means Monday through Friday during fall and spring semesters.*

- A. *The University shall provide to the Akron-AAUP evidence of the need for retrenchment, based on the criteria listed in Section 1 of this Article, of efforts to implement this retrenchment as outlined in Sections 2(A) and 2(B) of this Article, evidence that these efforts remain insufficient, and evidence that clearly documents the necessity for a recommendation to release bargaining unit faculty.*
- B. *At the same time, the Provost shall notify the dean/director of the affected unit(s) or program(s) that retrenchment may be required. Accompanying such notification shall be a written description and rationale for the proposed reductions, a copy of which is to be simultaneously forwarded to the Akron-AAUP.*
- C. *Upon receipt of the above-described notice of possible retrenchment, the dean/director of the affected unit(s) shall obtain the recommendations of the affected unit(s)’s members on how best to carry out the proposed retrenchment. The unit members’ recommendations, including any alternative proposals, shall be submitted by the dean/director to the Provost and to the Joint Committee on Retrenchment (see Section 4 of this Article, below) within ten (10) days after receipt of the notification of possible retrenchment, unless otherwise mutually agreed in writing.*
- D. *The Akron-AAUP shall be provided access and the opportunity to inspect and/or copy any additional information relevant to the anticipated retrenchment within five (5) days after the delivery of a written request to the Provost.*

### Section 4. Consultation

- A. *Within five (5) days after receipt of the data and information in Section 3(A) a Joint Committee on Retrenchment, with three members appointed by the President and three (3) members appointed by the Akron-AAUP, shall be formed, members shall be provided the information regarding retrenchment identified in Section 3 of this Article, and this group shall hold its first meeting. The Provost, or designee, shall chair the committee in an ex-officio, non-voting capacity.*
- B. *In the case of an anticipated retrenchment affecting a college, department, or program, the Joint Committee on Retrenchment’s recommendations shall include, with respect to such college, department or program, consideration of:*
  - 1. *Its historical role and contributions in the University’s educational, scholarly and service mission, and those long-range circumstances which may have changed to alter that role and those contributions;*

2. *The dependence of other programs in the University on the college, department, or program;*
  3. *Duplication elsewhere in the University of courses, research or services offered through the department, college or program, and possible organizational arrangements which might serve as alternatives to discontinuation;*
  4. *Arrangements which can be made to allow students enrolled to satisfy degree or certificate requirements;*
  5. *Stature of its faculty and alumni, and the possible consequences to the academic stature of the University through discontinuation;*
  6. *The profile of ages, periods of service and tenure status of its bargaining unit faculty and an estimate of their possible usefulness elsewhere within the University;*
  7. *Possible arrangements for planned phasing out of the college, department, or program as an alternative to abrupt discontinuation; and*
  8. *Any other factors the Joint Committee on Retrenchment deems relevant.*
- C. *Unless otherwise mutually agreed to in writing, within thirty (30) days after the receipt of the data and information in Section 3(A) and 3(C) this Joint Committee on Retrenchment will submit its advisory recommendations to the President. Such recommendations may include ways to relieve the need for retrenchment by raising additional funds, by reallocating funds, or by cutting or eliminating specified activities.*
- D. *The President shall forward these recommendations along with his or her own recommendations to the Board as soon thereafter as practicable. Other than as provided in Section 12 of this Article, the University agrees to take no action regarding retrenchment until the President and the Board have reviewed the recommendations from the Joint Committee on Retrenchment.*

Section 5. *After receiving and considering the recommendation(s) in Section 4, the Board will make the final determination to implement retrenchment.*

Section 6. *The Retrenchment Process*

*Once the final determination has been made that retrenchment is necessary, the following factors shall determine which bargaining unit faculty within the affected unit(s) will be released:*

- A. *The affected bargaining unit faculty member shall first be placed in the appropriate one of the following major categories:*

1. *Probationary faculty status*
  2. *Tenured faculty status*
- B. *Bargaining unit faculty, when within each of the categories listed in above Section 6(A), will then be placed in the appropriate subcategory listed below within each such major category:*
1. *Instructor*
  2. *Assistant Professor*
  3. *Associate Professor*
  4. *Professor*
  5. *Distinguished Professor*
- C. *Bargaining unit faculty will be recommended for release starting with the lowest numbered subcategory within the lowest numbered major category. In making the final determination within each subcategory of a major category as to whether or not an individual bargaining unit faculty member will be released, the following additional factors will be given full consideration:*
1. *The University's commitment to affirmative action and its policies adopted thereunder*
  2. *The quality of the bargaining unit member's service in the areas of teaching, research and publication and University and public service*
  3. *The impact on the academic program resulting from the release of the bargaining unit member*
  4. *Length of service with the University as a fulltime faculty member*

*The dean/director of the affected unit(s) after receiving the recommendation of the affected unit's members concerning the factors listed in this Section 6(C) will make final recommendations in accordance with Section 6(A), (B), and (C) to the Provost concerning the individual bargaining unit faculty to be released. Whenever bargaining unit faculty within a subcategory are considered approximately equivalent in the ratings on the factors set forth in this Subsection (C), then length of service with the University as a full-time faculty member will be the deciding factor.*

- D. *The Provost will then make the final decision for the University in accordance with 6(A), (B), and (C) concerning the bargaining unit faculty member to be released and will notify each such bargaining unit faculty member in accordance with the time limitations set forth in the following Section 7. A copy of each such notification shall be sent to the Akron-AAUP.*

Section 7. Notice of Release

- A. *The University will provide notice of release to affected members of the bargaining unit in accordance with the following:*
1. *For a bargaining unit faculty member holding a first (1<sup>st</sup>) or second (2<sup>nd</sup>) one (1) year contract expiring at the end of that academic year, not later than March 15; or if the one (1) year appointment terminates during an academic year, at least three (3) months in advance of its termination.*
  2. *For a bargaining unit faculty member holding more than a second (2<sup>nd</sup>) one (1) year contract expiring at the end of that academic year, not later than December 15; or if the one (1) year appointment terminates during an academic year, at least six (6) months in advance of its termination.*
  3. *For an untenured bargaining unit faculty member who is under tenure consideration, at least twelve (12) months, spanning at least two (2) academic semesters, not including summers.*
  4. *For a tenured bargaining unit member, at least eighteen (18) months, spanning at least three (3) academic semesters, not including summers.*

Section 8.

- A. *The University will endeavor to place released bargaining unit faculty, if qualified, in other available teaching positions within the University. No tenured bargaining unit faculty member will be dismissed solely on the basis of discontinuance of a program or department without the University making documented good-faith efforts to relocate the bargaining unit faculty member within the University. In addition to the foregoing, the University will endeavor to find other areas of employment within the University community for tenured bargaining unit faculty that are scheduled for release under this retrenchment Article.*
- B. *Notwithstanding the foregoing, if there is a consolidation of programs or departments or colleges among any of the public institutions of higher education within Northeast Ohio, such that the University would lose an existing program or department or college, the University may, in lieu of its above obligations to bargaining unit faculty members in such program or department or college: (1) first (1<sup>st</sup>) place all such tenured bargaining unit faculty members in corresponding*

*positions within that public institution of higher education for which they are qualified within the locus of tenure, at the same salary and in the same rank, as they had at the University at the time of release (and with the same benefits of other tenured faculty of such salary and rank at that other institution); and (2) also place all, or if unable to do so, less than all non-tenured bargaining unit faculty in corresponding positions within that public institution of higher education for which they are qualified within the locus of tenure, at the same salary and in the same rank, as they had at the University at the time of release (and with the same benefits of other non-tenured faculty of such salary and rank at that other institution). In the event any such released bargaining unit faculty member had obtained tenure at the time of release from the University, such placement with that other public higher education institution shall include placement with tenure.*

Section 9. *During a period of three (3) academic years following release of a bargaining unit faculty member under this Article, such bargaining unit faculty member shall be offered reinstatement to the same or similar position if reauthorized. Released bargaining unit faculty who have been offered reinstatement will have a period of sixty (60) days in which to accept or decline the offer of reinstatement. The released bargaining unit faculty member shall be able to complete the term of his or her current employment (up to one (1) year) before beginning the recalled position at the University. The University's offer to reinstate, if accepted, shall be at the same tenure level, rank and salary, adjusted to incorporate any general, non-performance based salary increases that were granted since the time the bargaining unit faculty member was released. If the bargaining unit faculty member declines the offer of reinstatement, all reemployment rights at the University shall be terminated and the position may be filled in accordance with regular employment policies and practices of the University. If the same or similar position is not reopened within the three (3) academic years referenced above, the bargaining unit member's employment rights at the University shall be terminated.*

Section 10. *In the event that a part-time teaching position becomes available in the program of a released bargaining unit faculty member and if the bargaining unit faculty member has the appropriate qualifications for the position, the bargaining unit faculty member will receive first (1<sup>st</sup>) consideration for the position. Acceptance or declination of such a part-time teaching position does not affect in any way the rights of a released bargaining unit faculty member to reemployment under Sections 8 or 9 of this Article.*

Section 11. *A bargaining unit faculty member who accepts reappointment shall be credited with rank and shall be reappointed with tenure if tenured at the time of release. A bargaining unit faculty member released due to financial exigency will receive from the University, to commence at the time of release, a one (1) year continuance of the University health insurance policy without charge. A terminated bargaining unit faculty member shall be eligible to continue coverage under the University's group rate benefit programs for health insurance benefits at his/her own expense as provided for under COBRA.*

Section 12. *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, this 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 the 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.*

VII. Summary of Akron-AAUP Grievance

On June 8, 2020, Akron-AAUP filed Grievance No. 2020-01 regarding the University's Invocation of Article 15, Section 12 ("Grievance").<sup>28</sup> *See, Stipulated Exhibit B-1 – Grievance.* The Grievance stated the three areas of dispute as follows:

1. The University has not demonstrated that the present circumstances are sufficient to justify the use of the force majeure clause.
2. The force majeure clause does not excuse the University from complying with Sections 6 through 11 of Article 15.
3. The University has not discussed its "proposed course of action" with the Akron-AAUP as required by Article 15, Section 12.

For remedy, the grievance effectively requested to stay implementation of Article 15, Section 12 unless and until:

- (a) circumstances outside of the University's control exist which justify invocation of Article 15 Section 12;
- (b) the University complies with Article 15, Sections 6 through 11; and
- (c) the University meets with Akron-AAUP to discuss its proposed course of action.

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<sup>28</sup> There are no issues of timeliness in this grievance.

The University responded to the Grievance at Step Two on June 8, 2020. *See, Stipulated Exhibit B-2 – Step Two Response.*

VIII. Issues Presented and the University's Position and Supporting Argument

A. Issues Presented

The three issues in this case are:

1. Whether grounds necessary to satisfy invocation of Article 15, Section 12 existed?
2. Do any procedures within Sections 6 to 11 of Article 15 apply once Section 12 is invoked?
3. Whether the University discussed its proposed course of action with Akron-AAUP as required by Article 15, Section 12?

B. Burden of Proof

"It is axiomatic that the Union has the burden of proof in a contract interpretation case." Labor Arbitration Decision, *Franklin Electric Co.*, 06/075256, 122 BNA LA 1421 at \*1426 (Neas, 2006); *c.f.* Labor Arbitration Decision, *Florida Gulf Coast University Board of Trustees*, 2019 BL 514958, 2019 BNA LA 46 (Whelan, 2019) (holding in a challenge to University non-renewal decisions that "[i]n contract interpretation cases, the moving party - typically a grievant or a union - bears the burden of production and persuasion" and the University has the burden of proving only its affirmative defenses, e.g. arbitrability) (*citing* R. Abrams, *Inside Arbitration* 301-302 (2013); F. Elkouri & E. Elkouri, *How Arbitration Works* 422-424 (6th ed. 2003)).

Arbitrators have rejected attempts to shift the burden of proof to the employer in contract interpretation cases that do not involve a disciplinary discharge. *See e.g.*, Labor Arbitration Decision, *University of Washington --*, 11975-A-95-1216, 106 BNA LA 390 (Stuteville, 1996) (rejecting union's contention that university's layoff decision was disciplinary; "the

employer has acted in a manner consistent with the technological changes and budgetary considerations described above, so that the record does not support wholesale rejection of its 'layoff' characterization of the disputed transaction. The burden of proof remains on the union in this case.") As Arbitrator Bothwell noted in *Vickers, Inc.*, 43 LA 1256 (Bothwell, 1964):

The substantive burden of proof, whether in a court of law or in an arbitration proceeding, usually rests with the complaining party. The substantive burden of proof can never shift from one party to the other ... In arbitration proceedings [not involving discharge] the substantive burden of proof is usually on the Union as the complaining party.

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[I]f the Arbitrator decides that both sides have presented equally credible evidence, then he will rule against the party having the substantive burden of proving its contentions, which will usually be the Union.

In the instant case, the Union has the burden to prove any alleged violation of the retrenchment provisions in the CBA. See *Franklin Electric Co.*, 06/075256, 122 BNA LA 1421 at \*1426 (Neas, 2006) ("In this case the Union has the burden of proving that the Company violated Article 8 [Layoff and Recall Procedure] of the Contract.") See also Labor Arbitration Decision, [Redacted], 199064-AAA, 2015 BNA LA Supp. 199064 (Weisblatt, 2015) (union did not meet its burden of proving the employer violated CBA's layoff clause); Labor Arbitration Decision, [Redacted] 151640-AAA, 2014 BNA LA Supp. 151640 (Gordon, 2014) (same); Labor Arbitration Decision, Metropolitan Pier And Exposition Authority, 10-951657, 2011 BNA LA Supp. 147483 (Bierig, 2010) (same). Even where a CBA sets forth a procedure or order for layoffs, the Union must establish that "the Employer exercised its management rights to conduct layoffs in a manner that was arbitrary, capricious or motivated by bad faith or was illegal." Labor Arbitration Decision, *City of Mattoon*, 10/58686-8, 128 BNA LA 1753, \*1757 (Szuter, 2011) (denying layoff



grievance involving two police officers): “To be arbitrary or capricious an action must be based on an explanation that is so implausible that it runs contrary to its expertise.” *Id.*

Regarding the quantum of proof, the Union must establish any violation of the CBA by a preponderance of the evidence. *See Franklin Electric Co.*, 06/075256, 122 BNA LA 1421 at \*1426 (Neas, 2006) (finding that employer’s evidence in layoff dispute “outweighed” the Union’s, and therefore the Union did not satisfy its burden); Labor Arbitration Decision, [Redacted], 200727-AAA, 2017 BNA LA Supp. 200727 (Ahearn, 2017) (following the majority of arbitrators in following the “preponderance” standard in layoff case, and requiring the Union to “present more than equally weighted competent evidence”).

C. The University’s Position and Supporting Argument: Issue No. 1

i. Catastrophic Circumstances Exist: The University Properly Invoked Article 15, Section 12

Article 15, Section 12 unambiguously states “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.” Section 12 further describes this basis for its application, stating in pertinent part “[i]f such unforeseen, uncontrolled and catastrophic circumstances should occur, then...” To the extent the grievance mischaracterizes the unambiguous basis for Article 15, Section 12’s application, the University denies that interpretation.

The grounds necessary for the University to invoke Article 15, Section 12 existed: a catastrophic circumstance, unforeseen and beyond the University’s control, that rendered it impossible or unfeasible to implement Article 15 procedures.

ii. The Catastrophic Circumstances: Emergence of a \$65 Million Projected FY21 Deficit

The basic definition of the word “catastrophic” is:

- Causing sudden and very great harm or destruction – <https://dictionary.cambridge.org/dictionary/english/catastrophic> (Cambridge Dictionary)
- Involving or causing sudden great damage or suffering – [www.lexico.com/definition/catastrophic](http://www.lexico.com/definition/catastrophic) (Oxford Dictionary)

Within Article 15, Section 12, “catastrophic circumstances” is stated as one that is unforeseeable and beyond the University’s control.

The COVID-19 virus and ensuing global pandemic indisputably were both unforeseen and beyond the University’s control. As such, both qualify as “catastrophic circumstances” under the plain, clear, and unambiguous language of Article 15, Section 12. There is no contractual basis to find otherwise.

It appears Akron-AAUP’s grievance effectively asks the Arbitrator to somehow draw a technical distinction between the “catastrophic circumstance” of the COVID-19 virus/pandemic, its resulting direct and indirect economic impact, and the University’s responsive actions. In so doing, the grievance attempts to create a material question (where none exists) on whether COVID-19 qualifies as a catastrophic circumstance. Such argument is unsupportable contractually, practically, and logically. If something is catastrophic (unforeseen and beyond the University’s control), certainly any resulting impacts upon the University bear the same basic characteristics. To hold otherwise would render the language of Article 15, Section 12 inoperative and meaningless.

The very nature and essence of the COVID-19 virus and global pandemic and the government response embodies devastation, unpredictability, and abruptness:

- The day after the Ohio Department of Health confirmed positive COVID-19 test results for Ohio's first three cases, Governor DeWine declared a state of emergency in Ohio. *See, UA Exhibit 14.*
- Two days later, Ohio's Director of Health issued an order prohibiting mass gatherings, defined as 100 or more persons. *See, UA Exhibit 18.*
- Five days later, Ohio's Director of Health modified the mass gathering definition prohibiting congregations of 50 or more persons. *See, UA Exhibit 19.*
- This same day, March 17, 2020, the University's Board of Trustees held a special meeting and passed Resolution 3-1-20. *See, UA Exhibit 20.* This Resolution ratified President Miller's March 10, 2020 directive that cancelled classes/campus events and moved to an online platform for instructional delivery. It also gave President Miller broad authority to respond to the COVID-19 public health emergency and to maintain essential functions and operations.

This confluence of events was just the beginning, and as we are all acutely aware, there is currently no end in sight.

All actions taken by President Miller and the University from March 10, 2020 forward have been within the new world being created by COVID-19. Each day presented (and continues to present) new information on direct and indirect impacts to the University's operations and its revenue and expenditure streams. While one might claim the University could "foresee" the COVID-19 pandemic would have financial consequences and the University could "control" its reaction to the situation as it unfolded, this did not transform a catastrophic circumstance into an abrupt change in circumstance for purposes of Article 15, Section 12.<sup>29</sup> This is particularly true given the consequences that will be undoubtedly persist due to COVID-19 for the remainder of FY21 and FY22. These consequences remain unforeseeable and beyond the University's control.

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<sup>29</sup> Article 15, Section 12 distinguishes between abrupt changes in circumstance that can be addressed via Article 15 retrenchment procedures and catastrophic circumstances, which render retrenchment impossible and unfeasible.

iii. Unforeseen Reduction in SSI Revenue Due to COVID-19 Pandemic

With 56 days remaining in FY20, the University learned Governor DeWine cut \$775 million from the state budget, inclusive of a \$110 million reduction in Higher Education SSI funding. *See, UA Exhibit 31.* Governor DeWine's decision was beyond the University's control and was unforeseeable.<sup>30</sup> That decision resulted in the University losing approximately **-25%** from what it had anticipated receiving in each of its two remaining FY20 monthly (May-June) SSI deposits, and it required the University to eliminate **-40%** of its remaining expenditures for FY20 to balance its end-of-year budget. *See, UA Exhibit 12.*

Historically, the University received the following SSI revenues:

<u>Fiscal Year Ended</u>	<u>Actual SSI Revenue Received</u>	<u>Percentage Year-to-Year Change</u>
2017	108,566,094	+2.11%
2018	105,711,686	<b>-2.62%</b>
2019	101,851,513	<b>-3.65%</b>

*See, UA Exhibits 1-A; 1-B; 1-C; and 1-D.*

The largest percentage change from FY17 to FY19 was a **-3.65%** decline. While arguably catastrophic in nature for purposes of Article 15, Section 12, the University's budget projection tempered the actual percentage decline. Hence, the degree of the sudden change was more abrupt than catastrophic. Regardless, the events occasioned by COVID-19 squarely moved the University's financial circumstance into the catastrophic category.

The deviation between the budgeted and actual SSI revenue for FY17 to FY19 had less of a degree in suddenness reflecting an abrupt versus a catastrophic nature. These fluctuations varied from a +1.9% increase to a **-1.6%** decrease:

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<sup>30</sup> State and federal government actions and omissions in handling the COVID-19 pandemic and their decisions on revenue streams feeding the University's General Fund are beyond the University's control and are unforeseeable. There is no factual support otherwise.

<u>Fiscal Year Ended</u>	<u>Budgeted* SSI Revenue</u>	<u>Actual SSI Revenue</u>	<u>Percentage Change Budget to Actual</u>
2016	105,985,092	106,317,746	+0.00313
2017	106,510,000	108,566,094	+1.9%
2018	107,316,000	105,711,686	-1.5%
2019	103,507,000	101,851,513	-1.6%

\*Original Budget

See, UA Exhibits 1-A; 1-B; 1-C; and 1-D.

The FY 2020-2021 original General Fund budget relied on the financial report for the latest fiscal year available (FY19) to project the SSI revenue budget for FY20 at \$99,139,000. See, UA Exhibit 11. Things appeared to be going as well as could be at first. By December 31, 2019, the University received \$50,065,131 and was on target to receive the approved budgeted amount for the remainder of FY20. *Id.*

While the SSI revenue funding declined by -2.3% in each month from January 2020 through mid-March 2020, the University was still overall within its historic budget-to-actual SSI revenue fluctuation. Such fluctuation appeared within range to historical fluctuation, whether from a year-to-year or fiscal year budget-to-actual analysis, reflective of a degree of change more abrupt than catastrophic. Everything changed, however, with COVID-19's arrival.

May 5, 2020 materially changed everything for FY20 and FY21. By the close of FY20, within a two-month window, the University experienced a catastrophic (sudden and causing great damage) overall loss of SSI revenue, as shown:

<u>Fiscal Year Ended</u>	<u>Budgeted* SSI Revenue</u>	<u>Actual SSI Revenue</u>	<u>Percentage Change Budget to Actual</u>
2019	103,507,000	101,851,513	-1.6%
2020	99,139,000	95,193,364	-4.0%

\*Original Budget

See, UA Exhibits 1-A; 12; 74.

The reduction in budget-to-actual SSI revenue for FY20 was two and one-half times worse than that experienced in FY19, and experiencing this reduction with only 1/10<sup>th</sup> of FY20 remaining only magnified the problem ten-fold.

For more perspective, the year-to-year fluctuation of actual SSI revenue from FY17 to FY20 ranged from +2.11% to -3.65%. In FY20, again, within a two-month period, that historic fluctuation of year-to-year actual SSI revenue more than doubled in FY20, reflecting a -8.35% reduction.

<u>Fiscal Year Ended</u>	<u>Actual SSI Revenue Received</u>	<u>Percentage Change Actual Year to Year</u>
2017	108,566,094	+2.11%
2018	105,711,686	-2.63%
2019	101,851,513	-3.65%
2020	95,193,364	-8.35%

*See, UA Exhibits 1-A; 1-B; 1-C; 12.*

The impact was more acutely felt as the University's monthly SSI revenue precipitously fell -25% in the May 2020 deposit and by -25% in the June 2020 deposit, achieving the overall -8.35% FY20 variance. *See, UA Exhibit 12.*

The University's SSI monthly revenue deposits for July 2020, the first month of FY21, was \$7,537,000. *See, UA Exhibit 84 - FY 21 source documents, p.2.* This amount reflects one-third the amount allocated to the University by the State of Ohio for the first quarter of FY21 (\$22,611,133), as published on its *FY State Share of Instructional Distribution Schedule* dated 7/1/20. *Id. at p. 1.* As of submission of this document, the University's General Ledger reflected only the July 2020 SSI monthly payment as having been received. *Id. at p. 2.*

The actual SSI revenue currently known to be allocated to the University for FY21 reflects a projected total SSI revenue of \$90,444,528. *Id.* On August 11, 2020, the University's Board of

Trustees adopted the Fiscal Year 2020-2021 Akron and Wayne General Fund Combined Budget. *See, UA Exhibit 74.* This budget reflected a total projected SSI revenue of \$90,444,528 for FY21, matching the currently known state allocation on an annualized basis.

<u>Fiscal Year Ended</u>	<u>Actual SSI Revenue</u>	<u>Budgeted* SSI Revenue</u>	<u>Percentage Change</u>
2019	101,851,513		
2020		99,139,000	-2.6%
2021		90,445,000	-8.7%

\*Original budget

Assuming the FY21 actual is near the budgeted SSI revenue, the percentage would be two and one-half times worse than what the University experienced in FY20.

When considered in the context of the University's structural deficit in FY20, as carried into FY21, the University's fiscal health is extremely precarious. The month after being hit with the SSI revenue catastrophic circumstance in FY20, the University was walloped with another unforeseen, material, and substantial decrease, an estimated -8.7% annualized decline in SSI revenue from the State for FY21. The FY20 SSI actual revenue reduction, alone and in combination with the University's FY21 SSI projected revenue, constitutes catastrophic circumstances under Article 15, Section 12, particularly in the context of the University's structural deficit. To suggest the SSI revenue circumstance is not catastrophic begs the question, what exactly would be?

iv. Unforeseen Reduction in TGO Revenue Due to COVID-19 Pandemic

The second primary revenue source to the University's General Fund is TGO revenue, a direct consequence of enrollment and associated potential credit hours. The University experienced a 25% decline in enrollment from 2008 through 2019. *See, UA Exhibit 2.*

<u>Student Category</u>	<u>Change from Fall 2008 to Fall 2019 by Head Count</u>	<u>Change from Fall 2008 to Fall 2019 by Student Credit Hour</u>	<u>Change from Fall 2008 to Fall 2019 by Full-time Equivalent</u>
Undergraduate	-24%	-24%	-24%
Graduate	-38%	-36%	-36%
Law	-10%	-2%	-3%

*Id.*

The impact of the enrollment decline on the TGO revenue stream over the past eight fiscal cycles evidences a drop of actual TGO revenue decline of -20% comparing FY12 to FY19.

<u>Fiscal Year Ended</u>	<u>Actual TGO Revenue Received</u>	<u>Percentage TGO Revenue Change based on FY12</u>
2012	260,285,600	
2013	260,310,000	+0.027%
2014	252,374,900	-3%
2015	249,508,800	-4%
2016	257,504,809	-1.3%
2017	238,093,290	-8.5%
2018	221,188,865	-15.0%
2019	207,983,916	-20.0%

*See, UA Exhibits 1-A; 1-B; 1-C; and 1-D.*

Less students equals less potential for credit hours equals less tuition and fees received from students as TGO revenue.

Pre-COVID-19, the University regularly budgeted for continued year-to-year decline in TGO revenue. From FY16 to FY19, the TGO revenue budget was reduced from \$253,612,364 to \$209,400,000. For this time period, the variation from budgeted TGO revenue to actual TGO revenue ranged from +2.12% to -1.59%.



<u>Fiscal Year Ended</u>	<u>Budgeted* TGO Revenue</u>	<u>Actual TGO Revenue</u>	<u>Percentage Change Budget to Actual</u>
2016	253,612,364	249,557,278	-1.59%
2017	233,150,000	238,093,290	+2.12%
2018	224,193,000	221,188,865	-1.34%
2019	209,400,000	207,983,916	-0.057%

\*Original Budget

See, UA Exhibits 1-A; 1-B; 1-C; and 1-D.

Although the audited statement for FY20 will not be available until October 2020, the University's financial report for FY20, nine months ended March 31, 2020 had actual year-to-date TGO revenue at \$189,131,884. See, UA Exhibit 54. The TGO revenue received as of March 31, 2020, included only 21 days into the when the COVID-19 pandemic first impacted Ohio.

As compared to the FY20 budget, the University was already -5.54% lower in actual TGO revenue than budgeted with three months remaining in the fiscal year (see below chart). This represented a reduction nearly two times that experienced in the University's last four fiscal cycles. This was with three months remaining in FY20, a shuttered campus, and migration to online learning underway for all courses. See, UA Exhibit 16.

<u>Fiscal Year Ended</u>	<u>Budgeted* TGO Revenue</u>	<u>Actual TGO Revenue</u>	<u>Percentage Change Budget to Actual</u>
2020	200,237,000	189,131,884	-5.54%

\*Original Budget

See, UA Exhibits 1-D; 54.

In its Financial Report for FY20, nine months ended March 31, 2020, the University projected its TGO revenue would be \$193,993,000 as of June 30, 2020. Assuming this to be "actual TGO revenue" for purposes of comparison on a year-to-year basis, in percentage

variance, this approximates the University's loss of TGO revenue at **-3.1%**. The percentage reduction is nearly double the highest variance percentage in budgeted-to-actual TGO revenue experienced between FY16 and FY19 (i.e. **-1.59%**). It is nearly **six times** the percentage decline variance of **-.057%** between FY19 budget and actual TGO revenue.

<u>Fiscal Year Ended</u>	<u>Budgeted* TGO Revenue</u>	<u>Projected TGO Revenue<sup>31</sup></u>	<u>Percentage Change Budget to Projected to 6/30/20</u>
2020	200,237,000	193,993,000*	<b>-3.1%</b>

\*Projected to 6/30/20 - See, UA Exhibit 54.

By May 31, 2020, the predicament with the University's TGO revenue worsened, showing signs of decline. The University's financial report for FY20, eleven months ended May 31, 2020 reflected actual year-to-date TGO revenue at \$189,015,194. See, UA Exhibit 91. Though down \$116,690 from the financial report for FY20, nine months ended March 31, 2020, overall the University moved to **-5.6%** lower in actual TGO revenue than budgeted for FY20, with less than one month remaining in the fiscal year (see below chart) and in the midst of losing **-25%** in monthly SSI revenue deposits in May 2020 and June 2020.

<u>Fiscal Year Ended</u>	<u>Budgeted* TGO Revenue</u>	<u>Actual TGO Revenue</u>	<u>Percentage Change Budget to Actual</u>
2020	200,237,000	189,015,194	<b>-5.6%</b>

\*Original Budget

See, UA Exhibits 1-D; 73.

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<sup>31</sup> On August 11, 2020, the University's Board of Trustees adopted the Fiscal Year 2020-2021 Akron and Wayne General Fund Combined Budget. See, UA Exhibit 74.

With less than one-tenth of the fiscal year remaining, this reduction of the approximate **-5.57%** in TGO revenue was more than ten-fold (i.e. exceeding 50%).<sup>32</sup> The combination of the effective **-40%** SSI revenue and **-50%** TGO revenue decline in May 2020 and June 2020 was catastrophic to the University. To find otherwise would effectively deny current reality – the economic impact of a global pandemic<sup>33</sup> that shuttered local, state, federal, and international societies, wreaks ongoing havoc to financial markets, unpredictably jostles revenue streams, and keeps all of us on our toes waiting to see how our society will change to function tomorrow. The COVID-19 impact on FY20 TGO revenue is not wholly quantifiable, was sudden, unforeseen, and beyond the University’s control. Whether considered alone or in combination with SSI revenue impacts for FY20 and FY21 occasioned by the pandemic, the TGO revenue decline is catastrophic for purposes of Article 15, Section 12.

v. Additional COVID-19 Pandemic Financial Impacts

The University also experienced other direct and indirect financial impacts from closing its campus to classes and events from March 10, 2020 to present. The enormity of the record and briefing in this case is unique and justified as the institutional viability of the University is at stake in this case. To recount the entirety of the drastic changes occurring at the University since March 10, 2020 would take considerable additional time, resources, and pages in this brief. The University stands ready to take on this task if it must, but trusts the information provided within

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<sup>32</sup> See, footnote 13.

<sup>33</sup> As of August 20, 2020, there are 22,256,220 cases of COVID-19 worldwide, with 5,431,046 in the United States and 104,999 in Ohio and 782,456 COVID-19 deaths worldwide, with 170,640 in the United States and 3,627 in Ohio. See, *UA Exhibit 89, August 20, 2020 WHO COVID Data and Ohio Department of Health Data*; <https://covid19.who.int/>; <https://covid19.who.int/region/amro/country/us>; <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home>

this brief provides more than is necessary to establish the grounds necessary to invoke Article 15, Section 12. However, should the Arbitrator require even further explanation and a detailed itemized accounting of the totality of revenue and expenditure changes occasioned by the COVID-19 pandemic, the University reserves its right to provide that additionally requested information through supplemental briefing as the Arbitrator may request.

vi. COVID-19 Pandemic: The Continuation of Catastrophic Circumstances

The University's catastrophic circumstances are real as is the likelihood they will continue to change as the virulence and deadliness of COVID-19 waxes and wanes until a vaccine or other effective treatment is found and distributed. For example, the University does not control the choices of its students, and potential students, to return to campus during Fiscal Year 2021. We are in a global pandemic. The Fall term begins August 24, 2020. Many students remain concerned about the possible health hazards of a campus-based education, but many still could opt-out of an online experience. Indeed, the American Council on Education published a national survey that found nearly one in five U.S. college students were uncertain about plans for re-enrolling in the fall. See, *UA Exhibit 85*- <https://www.acenet.edu/News-Room/Pages/AACRAO-ACE-Survey-Finds-Uncertainty-About-Current-College-Student-Fall-Enrollment-Plans-Optimism.aspx>; *see also*, [https://www.axios.com/college-poll-students-campus-coronavirus-7b6c2687-e2df-4f72-9305-7b9f1a611f04.html?utm\\_campaign=organic&utm\\_medium=socialshare&utm\\_source=email](https://www.axios.com/college-poll-students-campus-coronavirus-7b6c2687-e2df-4f72-9305-7b9f1a611f04.html?utm_campaign=organic&utm_medium=socialshare&utm_source=email). This week, media outlets are reporting on college freshmen opting for a "gap year" rather than start college in Fall 2020. See, *UA Exhibit 86*.<sup>34</sup>

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<sup>34</sup> See also in *UA Exhibit 85* - <https://www.msn.com/en-us/money/careers/covid-19-has-some-college-students-taking-a-gap-year/ar-BB187uCK>; <http://www.mcall.com/news/local/mc-nws-gap-year-college-covid-19-20200816-ta5vgaxhqrfq3qtrnfjvqx5kka-story.html>; <https://www.foxbusiness.com/lifestyle/startups-eye-college-aged-students-gap-year-coronavirus>.

As of August 19, 2020,<sup>35</sup> the University's enrollment projection is:<sup>36</sup>

- New freshmen enrollments are down -13.9%
- New freshmen confirmations are down -7.5%
- New freshmen admits are down -5.4%
- Fall course enrollments are down -7.4%

How exactly enrollment will continue to be impacted by COVID-19 over the next month and during the 2020-2021 academic year cannot be foreseen in this moment. What we do know is the enrollment is down already,<sup>37</sup> the pandemic is getting worse in Ohio, and societal restrictions have been in place and are expected to become more restrictive in the future. For the first time in the history of the University, the choice of new and current students vis-à-vis enrollment cannot be treated as automatic. The same is true with every college and university in our nation.

vii. Arguing Choice in Exercise of Discretion is Irrelevant

Akron-AAUP improperly focuses upon how the University is choosing to address the Fiscal Year 2021 deficit. Disagreement with how the University exercises its discretion in addressing the projected deficit has absolutely no relevance to whether a catastrophic circumstance exists. Indeed, *the mere act of wrangling with managerial discretion inherently assumes a severe emergency situation exists that needs immediate attention*. In this case, the situation that exists is the catastrophic circumstance occasioned upon our University by the COVID-19 pandemic. So, Akron-AAUP has conceded in its grievance rationale that a catastrophic circumstance exists by

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<sup>35</sup> See, UA Exhibit 26, 8/19/20 Enrollment Update.

<sup>36</sup> The enrollment figures were different when the University invoked Article 15, Section 12.

<sup>37</sup> The University's two-week enrollment data will not be available until after the parties have filed briefs, reinforcing the current uncertainty.

taking issue with how the University is exercising its discretion in addressing the consequential Fiscal Year 2021 deficit.

Akron-AAUP's statement in its grievance that the University "wants to use the pandemic to further cut spending on its core academic mission" is pure hyperbolic posturing that has no place during these troubling times. The University and its leadership did not ask for a global pandemic and did not ask for the negative financial consequences of COVID-19 that continue to unfold. The University's exercise of its managerial discretion in addressing the catastrophic circumstances is not a material to this case.

viii. The Catastrophic Circumstances Render Impossible or Unfeasible the Implementation of Processes Under Article 15

Accepting the existence of the catastrophic circumstances created by the global COVID-19 pandemic, the University evaluated whether implementation of Article 15 procedures was impossible or unfeasible given the short timeline within which the University has to secure drastic budget savings needed to address its \$65 million<sup>38</sup>-projected deficit in FY21.

In its grievance rationale, Akron-AAUP states "[t]he University was aware of the likely effect of the coronavirus on the University's budget at least by April 15, 2020" and "if the procedures of Article 15 had begun on that date, retrenchment could have been completed by May 25." Here, the Akron-AAUP concedes that unforeseen circumstances existed, allowing the University to invoke Article 15, Section 12; they just allege that the University didn't invoke it fast enough.<sup>39</sup> Section 12 contains no timeliness requirement or deadline for the University to invoke

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<sup>38</sup> As of July 6, 2020, this \$65 million-projected deficit was reduced to a \$56 million projected deficit in response to a FY21 State Budget Update received that day by the University. *See, UA Exhibits 87.*

<sup>39</sup> Akron-AAUP is foreclosed from arguing that subsequent circumstances nullify the University's invocation of Article 15, Section 12.

this provision. Akron-AAUP's statements also falsely assume that at one moment in time (i.e. by April 15, 2020) the full financial impact of COVID-19 was known (or could have been reasonably known) with complete certainty.

By April 15, 2020, what was known was the COVID-19 pandemic had shuttered the State of Ohio and created a wave of financial impact upon every entity in our State and nation. The full extent of that wave is a function of numerous variables, including but not limited to:

- length of the State shuttering (in whole or in part);
- extent of individuals within the University's community impacted by the virus;
- impacts on financial resources (e.g. state and federal funding; tuition revenue);
- expense associated with PPE and costs related to complying with guidelines in opening the campus in whole or in part;
- expense and costs related to transitioning from traditional to remote learning modes;
- the closure of the residence and dining halls, etc...

While the University could project there would be a serious and significant financial impact, it could not (and still cannot) identify the entirety of the financial consequence of COVID-19 on Fiscal Year 2021. By April 15, 2020, the University knew that the impact was, and would be, disastrous. So, the University had to act promptly with full knowledge that the COVID-19 world would continue to wreak havoc on the University's finances and budgeting. The University accepted it had to remain flexible in moving through Fiscal Year 2021. Akron-AAUP's Monday morning arm-chair quarterbacking is unreasonable, inappropriate, and stands to devastate the University as an institution.

Review of Article 15 retrenchment procedures easily demonstrates the impossibility and unfeasibility as a viable option to address the University's catastrophic circumstances. First and foremost, "day" is defined in Article 15, Section 3 as follows:

"In this Article, "day" means Monday through Friday during fall and spring semesters."

Akron-AAUP, in its grievance, cited April 15, 2020 as the date it believes the University *could* have initiated retrenchment procedures. The University disputes this allegation. Although the University recognized by April 15, 2020 that a reduction in force was likely required, it did not have enough knowledge at that time to fully evaluate the timing within which said reduction had to occur in order to achieve required savings. At its April 15, 2020 meeting, the Board received a Financial Report for FY20 for the Eight Months Ended 2/29/20 that stated, "[i]t is too early to predict the full impact of the COVID-19 pandemic." *See, UA Exhibit 27, p. 2, 20, 49.* As to SSI revenue, the report stated, "[i]f the State of Ohio revenues are adversely impacted by COVID-19 shutdowns, the funding available for SSI will likely be negatively impacted." *Id. at p. 7.*

While the Board also met in executive session at its April 15, 2020 meeting to discuss potentials for what might unfold,<sup>40</sup> it did not have adequate information to more specifically deliberate and act.<sup>41</sup> Indeed, as of this date, the University had not been informed of the SSI revenue reduction for FY20 or FY21 and had just received its monthly April 2020 SSI revenue

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<sup>40</sup> This statement is made for purposes of informing the Arbitrator on the state of knowledge at the time and is not intended, nor should it be construed, as waiving the executive session privilege held by the Board under state law.

<sup>41</sup> The University, in an effort to be as transparent as possible with Akron-AAUP given the uncertainty of the looming catastrophic circumstances, entered into a Non-Disclosure Agreement ("NDA#1") (*see, UA Exhibit 25*) in order to provide Akron-AAUP leadership with the same executive session packet provided by President Miller to the University's Board. That packet was provided to Akron-AAUP leadership pursuant to the NDA#1 on or about April 21, 2020. So as of that date, Akron-AAUP had the same level of knowledge that the University had – the University stood at the brink of the catastrophic circumstances developing from impacts of the COVID-19 pandemic.



deposit at the same level as received in January 2020, February 2020, and March 2020. *See, UA Exhibit 12.*

Contrary to the April 15, 2020 date Akron-AAUP seeks to impose, the appropriate window to consider in determining whether Article 15 procedures were impossible or unfeasible opened on May 5, 2020 (when Governor DeWine announced the \$775 million-state budget reduction and its impact on the SSI revenue stream to Higher Education) and closed on July 15, 2020 (when the University's Board passed Resolution 7-7-20 *Abolishing Bargaining Unit Faculty Positions*). Inserting this window period into the temporal requirements of Article 15 retrenchment procedures exposes the flaw in Akron-AAUP's argument and underscores the impossibility of meeting either Akron-AAUP's suggested timeline or any other expedited timeline.

The last day of Spring Semester at the University was May 3, 2020, with exams running from May 4, 2020 to May 10, 2020. With this in mind, based on the definition of "day" contained in Article 15, Section 3, the Article 15 procedures either:

- could not have been initiated (using May 1)<sup>42</sup> because the Spring Semester ended May 3 (a Sunday) and the date of Governor DeWine's announced budget reduction on May 5; or
- would have had to be completed between May 5 and May 8 (the Friday of Spring Semester exam week).

Given the very first action of the retrenchment procedure (notification under Section 3) triggers a five-day period for Akron-AAUP to have access to and inspect information regarding the anticipated retrenchment (*see, Article 15, Section 3(D)*) and a ten-day period begins for the

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<sup>42</sup> May 1 would need to be used pursuant to Article 15, Section 3 definition of days, which can only include Monday to Friday.

dean/director of the affected unit to obtain recommendations of the affected unit members, it was clearly impossible and unfeasible to implement Article 15 procedures. Based on the definition of “days” alone, Article 15 procedures could not contractually occur in these catastrophic circumstances because the primary triggering event – May 5, 2020 – had not occurred or happened three “days” after the last “day” that could be used for Article 15 procedures until Fall semester begins on August 24, 2020 – three days after submission of this brief.<sup>43</sup>

The entirety of Article 15 procedures can be best estimated as follows:

- Section 3 – University provides evidence of need for retrenchment [Section 3(A)<sup>44</sup>]
  - Provost notifies deans/chairs [Section 3(B)], who have 10 days to consult with affected unit members and provide Joint Committee on Retrenchment with recommendations, alternative proposals [Section 3(C)]
  - Akron-AAUP has 5 days to inspect/copy information [Section 3(D)]

Section 3(A), (B), (C) contains a 10-day window.

- Section 4 – Consultation
  - Joint Committee on Retrenchment formed within five days of receipt of Section 3(A) information
  - Joint Committee on Retrenchment must within thirty days after receipt of Section 3(A) and 3(C) information submit its advisory recommendation to the President [Section 4(C)]

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<sup>43</sup> Akron-AAUP did not propose an Article 33, Section 3 mid-term modification to Article 15 procedures that would have either redefined “days” under Section 3, shortened consultation timelines in Section 4, or modified the effective dates for the notices of release in Section 7.

<sup>44</sup> Article 15, Section 12 requires the University meets the requirements of Section 3(A). The University met the Section 3(A) obligation as more fully detailed in Section VIII(c)(ix) herein. Arguably, Akron-AAUP could have requested the University convene a Joint Committee on Retrenchment under Article 15, Section 4(A). Akron-AAUP did not do so. Such omission should operate as a waiver of the retrenchment procedures and estop Akron-AAUP from pursuing this grievance in whole, or in the alternative, restrict it from challenging whether the University had grounds to invoke Section 12.

- President forwards Section 4(C) recommendation and his recommendations to the Board as soon as practicable

Section 4 contains a 30-day window, plus reasonable time for the President to review Joint Committee on Retrenchment recommendations and reasonable time for the President and Board to review all recommendations. In total, it is reasonable for Section 4 to take 45 to 60 days.

- Section 5 – The Board makes a final determination on implementing retrenchment

While no time window exists in Section 5, it is reasonable that it would occur by day 60 in Section 4 or within a 30-day window from Section 4.

- Section 6 – Retrenchment procedure

While no time window is identified, it is reasonable the time period to accomplish the tasks in this section could take anywhere from 10 to 30 days as it requires using certain variables to identify affected employees.

- Section 7 – Notice of release – *the effective date for contract terminations made Article 15 procedures impossible and unfeasible*
  - Contracts for faculty with 1<sup>st</sup> or 2<sup>nd</sup> one-year contract expiring at the end of that academic year *could not have been terminated until end of 2020-2021 academic year – the end of FY21, provided notification was received no later than March 15, 2021.* [Section 7(A)(1)]
  - Contracts for faculty with 1<sup>st</sup> or 2<sup>nd</sup> one-year contract terminating during an academic year *could not have been terminated until 3 months' advance notice was given.* [Section 7(A)(1)]
  - Contracts for faculty with more than a 2<sup>nd</sup> one-year contract expiring at the end of that academic year *could not have been terminated until the end of 2020-2021 academic year – the end of FY21, provided notification was received no later than December 15, 2020.* [Section 7(A)(2)]
  - Contracts for faculty with more than a 2<sup>nd</sup> one-year contract terminating during an academic year *could not have been terminated until 6 months' advance notice was given.* [Section 7(A)(2)]
  - Untenured faculty under tenure consideration *could not have been released until after at least twelve (12) months (spanning at least two (2) academic semesters not including summers) was provided – the earliest would have been Fall Semester 2021, into FY22.* [Section 7(A)(3)]

- Tenured faculty *could not have been released until after at least eighteen (18) months (spanning at least three (3) academic semesters not including summers) was provided – the earliest would have been Spring Semester 2022, into FY22.* [Section 7(A)(3)]

Based on the foregoing, the University obviously could not have secured the cost savings needed to address the COVID-19 catastrophic circumstances during FY21 by using regular Article 15 procedures. Indeed, it was clearly impossible and unfeasible to achieve **any** cost savings using Article 15 procedures in FY21 from a “day” definition perspective under Article 15 Section 3: (a) based on the time periods required for consultations/recommendations under Sections 3 and 4; (b) based on the reasonable consideration periods for the President and Board under Sections 4 and 5; (c) based on the time needed to complete identification of those to be affected under Section 6; and (d) because of the notification periods required before retrenchment could be implemented under Section 7. The University’s decision to invoke formally Article 15, Section 12 on May 19, 2020 was sound, appropriate, and justified.

Akron-AAUP’s claim the Article 15 procedure timetable was possible and feasible is woefully inaccurate. As demonstrated, it would take many months or longer to complete Article 15 retrenchment. Had the University been in a position where it had definiteness on the entirety of the nature and scope of the catastrophic circumstance it faced by April 21, 2020 as Akron-AAUP contends, the University still would have needed time to analyze how it was going to address the projected Fiscal Year 2021 deficit before engaging in a retrenchment procedure. By April 15, 2020, the University was still analyzing and assessing the situation. Akron-AAUP’s position is not tenable given the nature of this catastrophic circumstance, one borne with continued uncertainty and one not faced in modern history. By the time the University could

identify the budgetary reduction to be realized through layoffs, there was no time to initiate and complete the retrenchment procedure to capture actual savings in Fiscal Year 2021.

Notably, had Article 15 allowed the University to fully implement retrenchment in Fiscal Year 2021,<sup>45</sup> the number of faculty projected to be laid off to achieve similar savings would have been approximately 193 faculty positions. *See, UA Exhibit 88.* Implementing Section 12 initially resulted in an estimated 113 reductions. *See, UA Exhibit 66.* It is incomprehensible why Akron-AAUP is pursuing a case that, if successful for the Union, would result in elimination of positions of many more of its members at a later point in time.<sup>46</sup> Note that these numbers were estimated and shared at the bargaining table using the Akron-AAUP's interpretation that non-tenure-track faculty would be the first category of employees retrenched. The University disagrees with this interpretation, as the collective bargaining agreement clearly indicates that retrenchment is only applicable to only probationary faculty and tenured faculty – non-tenure-track faculty are clearly in neither category. Applying retrenchment (as Akron-AAUP proposes as a remedy) has even more potential adverse consequences than loss of additional faculty members. Requiring retrenchment would result in abolishment of faculty positions in a manner that does not allow

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<sup>45</sup> Article 15, Section 7 requires specific notification dates be met in implementing retrenchment. These are: (a) not later than March 15 in the case of a faculty member holding a first or second one-year contract or three months in advance of the end of a one-year appointment; or (b) not later than December 15 for faculty members holding more than a second one-year contract expiring at the end of that academic year or at least six months in advance of the end of the appointment; (c) at least 12 months for untenured faculty under tenure consideration; and (d) at least 18 months for tenured faculty. Akron-AAUP's contention that retrenchment could have been implemented to achieve the cost savings needed in Fiscal Year 2021 is pure unadulterated fiction.

<sup>46</sup> Indeed, the University already is preparing for that contingency, however unlikely, impossible, and unfeasible that might be. On this very day, President Miller has directed Provost Wiencek to issue the required notices to commence Article 15 retrenchment proceedings to address contingency that the University does not prevail in this arbitration. *See UA Exhibit 90.* This should not be misconstrued as an admission that Article 15 retrenchment is either possible or feasible; rather, it simply manifests the University's need to exercise that remaining option after all reasonable, possible, and feasible options have been foreclosed.

for program considerations and would be devastating for the University's academic programs. On the contrary, the use of Article 15, Section 12 was driven by programmatic considerations as recounted in Section IV of the brief, which is incorporated herein.

ix. The University Met its Notification Obligations Under Article 15, Section 12

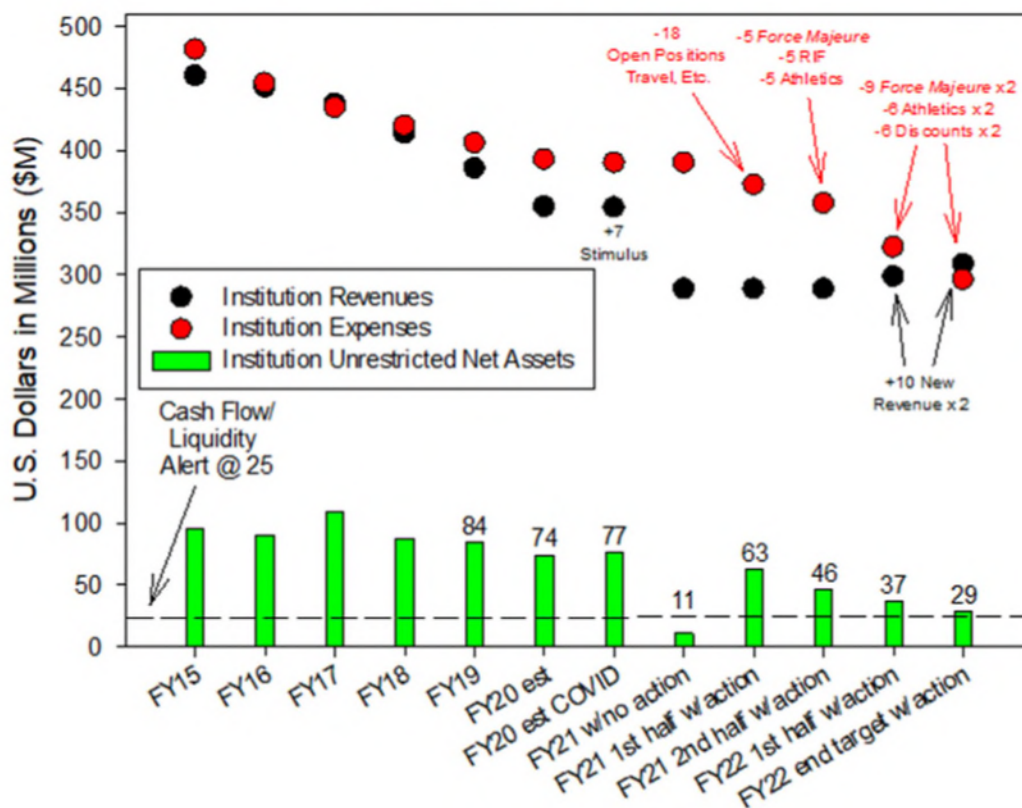
Once grounds for Article 15, Section 12 exist, Section 12 requires the University to "discuss and show evidence of the circumstances .... and ... this evidence will at least satisfy the requirements outlined in Section 3(A) of this Article." The University met both of these obligations. Since the third issue in this arbitration is focused on the discussion requirement in Article 15, Section 12, that requirement will be discussed later in Section E(i) of this brief.

While the University provided a formal Article 15, Section 12 invocation letter and evidence packet to Akron-AAUP on May 21, 2020, it actually began providing Akron-AAUP documents evidencing the catastrophic circumstances being created by the COVID-19 pandemic a month earlier. Specifically, on or about April 21, 2020, the University provided Akron-AAUP leadership a copy of a Board packet circulated during its April 15, 2020 executive session.<sup>47</sup> This packet contained the following graph and was explained to Akron-AAUP leadership during the April 2020 negotiation sessions:

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<sup>47</sup> As mentioned before, the Board packet (*UA Exhibit 77*) is confidential and a privileged document under state law. It is also covered by NDA#1. The University does not waive any privilege as to the Board packet and executive discussions thereon.

### Hypothetical Solution Trajectory for post-COVID UA



The graph identified one hypothetical financial solution for a post-COVID University based on what was known as of mid-April, 2020, with an added assumed \$20 million revenue increase in FY22 from a non-existent revenue source. The graph also assumed institutional revenue would increase in FY20 due to the potential for an influx of stimulus funds. FY20, notably, had no reduction in institutional revenue (which includes SSI and TGO revenue streams) and assumed no change. These material assumptions have proven wrong.

From FY15 through FY20 (estimated), the total institutional expenses (red dots) were greater than the total institutional revenues (black dots) in all but one year (FY17). Thus, institutional unrestricted net assets (i.e. cash reserves - green bars) have been historically declining. *See also, UA Exhibits, 1-A; 1-B; 1-C; 1-D; and 1-E.*

For FY20, before the onset of COVID-19, the University anticipated a deficit spending of \$10 million, drawing reserves down to \$74 million. With the arrival of COVID-19 and receipt of potential stimulus funds, the University initially discussed the possibility that the situation might improve slightly, only drawing reserves down to \$77 million. Nevertheless, the University at this time projected a potential \$65 million-deficit for FY21<sup>48</sup> based on the COVID-19 pandemic.

If the University took no action to limit operating expenses and reduce its workforce, it would have to draw from its reserves down to about \$11 million – an impractical, impossible, and unfeasible option as the reserves cash flow/liquidity level requires maintaining a \$25 million-floor for the reserves fund.

The hypothetical solution presented at the April 15, 2020 Board executive session, as shown in the above chart, also made two other basic assumptions for FY21 and FY22: (1) avoid workforce reductions as long as possible, and (2) emerge out of deficit spending mode by the end of FY22. Unfortunately, this “slow motion” action plan was unfeasible.

Implementing severe limits on all non-personnel expenditures (e.g. a strict hiring freeze) to immediately save \$18 million in the first half of FY21 still resulted in a \$14 million-draw on reserves down to \$63 million. In the second half of FY21, the “soft” implementation of *force majeure*/catastrophic circumstances to achieve \$5 million in savings from bargaining unit faculty, \$5 million in savings from other employee groups, and taking \$5 million from the Athletics budget (mostly in personnel), resulted in drawing the University’s reserves down to \$46 million by the end of FY21. FY22 would see even more “draconian” actions, reducing the bargaining unit by

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<sup>48</sup> With Governor DeWine’s May 5, 2020 state budget reduction announcement, this projected \$65 million deficit became reality for FY21 as of May 6, 2020.



another \$18 million, Athletics by another \$12 million, and changing undergraduate discounting (i.e. scholarships) strategy by \$12 million thereby making UA non-competitive for medium-to-high achieving students. Under all three scenarios, if revenues did not improve, the University would be in a significant deficit spending mode.

The hypothetical assumed and inserted a \$20 million-increase in revenues in FY22 to demonstrate that this would be the only way the University could tolerate using a “slow motion” action plan to respond to a \$65 million-projected deficit in FY21. The new revenue had (and continues to have) no basis-in-fact – there is no known way the University will secure this assumed revenue under the present situation.

Absent the addition of this nonsensical source of \$20 million in new revenue, cash reserves would not end up at a balance of \$29 million as shown, but at \$9 million. Thus, the hypothetical confirmed the University would be in essentially the same place at the end of FY22 as if it had taken no action in FY21 at all. Both options, which were non-options, put cash reserves well below the liquidity line, and would place the University in the position of being unable to make payroll or pay its bills. It would also have resulted in downgrading from investment-grade to non-investment-grade rating that would in turn trigger full payment of certain University debts that had to remain at investment-grade level. The University’s credit rating and accreditation would have also been adversely impacted.

In addition to providing the April 15, 2020 Board executive session packet, the University regularly met with the Akron-AAUP negotiation team from April 21, 2020 through July 13, 2020, a total of eighteen times to share information, negotiate concessions, and collaborate on ways to minimize the number of bargaining unit faculty positions to be abolished in the impending RIF.

On May 21, 2020, the University provided a formal Article 15, Section 12 invocation notification. *See, UA Exhibit 79.* Article 15, Section 12 states, in pertinent part, “this evidence will at least satisfy the requirements outlined in Section 3(A) of this Article.”

Article 15, Section 3(A) states:

E. The University shall provide to the Akron-AAUP evidence of the need for retrenchment, based on the criteria listed in Section 1 of this Article, of efforts to implement this retrenchment as outlined in Sections 2(A) and 2(B) of this Article, evidence that these efforts remain insufficient, and evidence that clearly documents the necessity for a recommendation to release bargaining unit faculty.

Article 15, Section 1 states:

A. Retrenchment may be necessary when a judgment, made by action of the Board, based upon evidence made available to the Akron-AAUP according to the schedules set forth in this Article, indicates one (1) of the four (4) circumstances listed in Section 1(A)(1) through 1(A)(4) exists at the University.

5. Financial exigency, defined as financial problems so severe that they threaten the University’s ability to maintain its operations at an acceptable level of quality;

6. Significant reduction in enrollment of a college, department, or program continuing over five (5) or more academic semesters (not including summer) and which is expected to persist;

7. Discontinuation of a college, department or program;

8. Action by the Ohio Board of Regents or Ohio General Assembly which requires the University to implement a retrenchment.

Article 15, Section 2 states:

Bargaining Unit Reductions through Attrition First

D. Normal attrition is the preferred approach to alleviating financial exigency or responding to enrollment patterns.

E. If the Board determines, according to the criteria listed in Section 1 of this Article, that retrenchment is necessary and, further, that in implementing this retrenchment a reduction in bargaining unit faculty is necessary, the Board shall attempt to achieve the desired result through attrition, including voluntary early retirement.

F. If, after completing this procedure, the Board makes the judgment that retrenchment requires reductions in bargaining unit faculty beyond those conducted through attrition, the following procedures establish the process for implementing any retrenchment.

The University's May 21, 2020 notification stated:

"The University memorializes that it has invoked the provisions of Article 15 titled *Retrenchment* Section 12 as a catastrophic circumstance and *force majeure* exhibits, 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."

"To the extent additional documents or information become available or develop that further support Article 15, Section 12 invocation and evidence packet, they will be later provided." *See, UA, Exhibit 79.*

The letter then summarized the catastrophic circumstances and provided corresponding historical data and documents regarding student enrollment decline, financial status and decline, the COVID-19 worldwide pandemic, reduction in SSI for FY20 and FY21, reimbursement in FY20 to students based on COVID-19 operational impact, and anticipated and unquantifiable additional impact. Thereafter, the letter categorically identified each area within Section 1 and Section 2, providing evidence regarding them. *Id. at pp. 2&3.*

First, the University explained the circumstances identified in Article 15, Section 1(A)(1), (2), (3), and (4) all existed. While Section 1(A) only requires at least one of the four circumstances "exists at the University," all four actually existed at the time of the May 21, 2020 letter. As such, all were cited with each serving as an independent basis for satisfying Article 15, Section 1. *Id. at pp. 4&5.* Next, the University outlined that it was impossible or unfeasible to implement Article 15 procedures. *Id. at p. 6.* The University also identified all Article 15, Section 12 discussions that had taken place through the date of the letter as well as Akron-AAUP information

requests/University responses. *Id. at pp. 6&7.* The University noted that it “incorporated any information and documents provided to the Union in response to requests made by the Union on or after [its then last request dated] May 14, 2020.” *Id. at p. 7.* The communique also identified campus-wide messages published by President Miller as of May 21, 2020 and any future campus messages. After identifying specific areas of proposed action, including “Reductions-in-Force” (*Id. at p. 8*), the letter explained the University’s position on Article 15, Section 12. *Id. at pp. 8-10.*

When the COVID-19 pandemic hit Ohio, the state initially communicated an intended reduction of 20% in State Share of Instruction (“SSI”) funding. The University had to modify its Fiscal Year 2021 budget accordingly. On July 6, 2020, Chancellor Randy Gardner sent a FY21 State Budget Update to the University, providing the intended SSI funding for FY21 with the caveat:

Please note that, as with all line items in this challenging budget environment, I must place a “*warning label*” on this positive news. This new FY21 SSI amount is subject to change if the overall budget and supporting state revenue sources were to significantly worsen during the fiscal year compared to current projections.

*See, UA Exhibit 87, July 6, 2020 Chancellor Randy Gardner Update.* Once received, the University adjusted its budget deficit for Fiscal Year 2021 to \$56 million. While certainly welcome, this easing of the revenue reductions fails to impact materially the University’s need to invoke Article 15, Section 12. The current \$56-million budget deficit still satisfies the elements for invoking Article 15, Section 12 and satisfies the financial exigency circumstance in Article 15, Section 1(A).

Notably, Article 15, Section 1(A) is stated as “financial exigency.” The University’s financial condition included a built-in structural deficit, carried year-to-year since at least FY12.<sup>49</sup> The

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<sup>49</sup> The University’s structural deficit began when its two-year temporary funding stopped in FY12.

existence of the structural deficit in and of itself was a financial exigency for purposes of Article 15, Section 1(A) once the totality of the University's finances became "so severe that they threaten the University's ability to maintain its operations at an acceptable level of quality." Finding a catastrophic circumstance based on the COVID-19 pandemic's impact on the University's revenue streams would satisfy the basic requirement of Article 15, Section 1(A). As explained earlier, the University's reserves cannot be utilized to cover the \$65 million (now \$56 million)-deficit in FY21 while allowing the University to meet payroll and debt obligations. Indeed, reserves must be carefully managed to prevent downgrading of the University's credit rating, triggering debt repayment, or compromising the University's accreditation. This is particularly true when there is no way to predict whether the revenue reductions could change for the worse, resulting in a future deficit approaching the initial \$65 million-deficit, or even worse, as Chancellor Gardner's "warning label" explains. *See, UA Exhibit 87.*

In terms of enrollment, Article 15, Section 1(B) requires a "[s]ignificant reduction in enrollment of a college, department, or program continuing over five (5) or more academic semesters (not including summer) and which is expected to persist." This circumstance exists at the University. Enrollment has historically declined since 2012. From 2012 to 2019, the University moved from 28,770 to 19,230 students. The declines by year were as follows:

<u>Fiscal Year Ended</u>	<u>Number of Students</u>	<u>Percentage Decline Year to Year</u>
2012	28,770	-3%
2013	27,080	-6%
2014	25,870	-4%
2015	25,180	-3%
2016	23,160	-8%

<u>Fiscal Year Ended</u>	<u>Number of Students</u>	<u>Percentage Decline Year to Year</u>
2017	22,110	-5%
2018	20,560	-7%
2019	19,230	-6%

*See, UA Exhibit 2.*

For 2020, as of August 19, 2020, the University projects a continued decline in student enrollment, with new freshmen enrollments down **-13.9%**; new freshmen confirmations are down **-7.5%**; new freshmen admits are down **-5.4%**; and Fall course enrollments are down **-7.4%**. *See, UA Exhibit 26.* Article 15, Section 1(B) is met.

Article 15 identifies the “[d]iscontinuation of a college, department or program” as a circumstance meeting the requirements of Section 1(C). The University restructured from eleven colleges to five at its May 29, 2020 Board meeting through Resolution 5-1-20 (*UA Exhibit 39*). In so doing, Article 15, Section 1(C) is satisfied.

Article 15 identifies “[a]ction by the Ohio Board of Regents or Ohio General Assembly which requires the University to implement a retrenchment” as a circumstance satisfying the requirements of Section 1(D). The 133<sup>rd</sup> Ohio General Assembly enacted House Bill 197 on or about March 25, 2020. This legislation was passed in response to the COVID-19 epidemic and 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 the Ohio Director of Health were taken based on authority in legislation enacted by the Ohio General Assembly. As such, the circumstance in Article 15, Section 1(D) exists.

The University also met its obligations under Article 15, Section 3(A) as they relate to Article 15, Section 2(A) and 2(B). While normal attrition is the preferred approach to alleviating a financial exigency (Section 2(A)), a single-year \$65 million (now \$56 million)-budget deficit simply cannot be met through normal attrition. Since at least 2017, the University implemented various voluntary early retirement programs to incentivize bargaining unit faculty to retire. Those have included the TARP, VRIP, VSRP, and IRIS as more fully described in Section III(A)(ii)(2)(a). Despite those efforts, the University still faces the FY21 budget deficit occasioned by COVID-19. The University collaborated with Akron-AAUP from at least June 24, 2020 to July 15, 2020 to secure voluntary retirements in an effort to reduce the number of positions to be abolished through the reduction-in-force. Those efforts resulted in 17 positions being eliminated through voluntary retirement prior or contemporaneous to the July 15, 2020 Board's adoption of Resolution No. 7-7-20.

The University notes the modifications it made to its initial May 21, 2020 Article 15, Section 2 letter did not alter the evidence packet it provided to Akron-AAUP. Those revisions were made at the request of Akron-AAUP's legal counsel to quell conflict that counsel expected would otherwise emerge at future negotiation session and meetings. On that basis, and without waiving its articulated positions, the University revised the May 21, 2020 letter. *See, UA Exhibit 80.* This letter removed the following paragraph on page 9 of the May 21, 2020 letter:

"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.”

Shortly after sending this May 22, 2020 letter (*UA Exhibit 80*), Akron-AAUP’s legal counsel again contacted the University’s attorney and requested another potentially offending paragraph be removed to foster more positive relations at future meetings between the parties. The University agreed to do so in good faith, without waiving its position on the matter and the following paragraph was removed and a final May 22, 2020 letter was issued (*UA Exhibit 81*):

“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.”

The University does not believe either of the removed paragraphs are material to the grievance and issues presented in this case.

The University, at all times, has been as open and transparent as possible to Akron-AAUP. The number and depth of Akron-AAUP informational requests has been voluminous from April 23, 2020 to present as has the University’s responses. There have been 17 formal informational requests with over 130 individual requests, and at least 30 follow up requests. This



does not include informational requests made at meetings between the parties or in communications from Akron-AAUP's attorneys, all of which have continued to be responded to as quickly as circumstances allow. Outside of the University's Board, President and leadership, Akron-AAUP's leadership is the most informed stakeholder regarding the University's catastrophic circumstances.

D. University's Position and Supporting Argument: Issue No. 2

i. Article 15, Section 12 Excuses the University from all of the Requirements of Article 15, Sections 1-11 of the Retrenchment Process.

Perhaps anticipating that the University has established the substantive grounds for invoking Article 15, Section 12, Akron-AAUP improperly attempts to narrow the scope and breadth of the University's authority under that provision to bypass the retrenchment requirements of Article 15. Akron-AAUP erroneously contends that Article 15, Section 12 excuses the University only from the requirements of Article 15, Sections 2-4.<sup>50</sup> Specifically Akron-AAUP further contends erroneously that the "procedures set forth in this Article" referenced in Article 15, Section 12 that are "impossible or unfeasible" to implement relate only to Sections 2-4. Akron-AAUP compounds its errors by contending that "Sections 2-4 are the 'procedures' of the

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<sup>50</sup> These sections address: (1) attempting to find alternatives to involuntary retrenchment (Section 2); (2) notifying the Akron-AAUP of the need for retrenchment (Section 3(A)); (3) notifying the Deans/Directors (with a copy to Akron-AAUP) to develop a retrenchment plan, with input from the faculty in the areas affected by the retrenchment (Section 3(B)-(C)); (4) providing Akron-AAUP with access to inspect/copy information relevant to the retrenchment (Section 3(D)); and (5) convening and conducting a Joint Commission on Retrenchment to develop recommendations regarding the retrenchment and submit those recommendations to the University's President (Section 4).

Article” and that “Sections 6-11<sup>51</sup> do not set out ‘procedures’ to follow – they set out substantive (rather than procedural) rights when [faculty] positions are eliminated.”

Akron-AAUP’s argument constitutes a gross and selective misreading of the contract language. The clear and unambiguous language in Article 15, Section 12 – indeed the language in the entirety of Article 15 – empowers the University to bypass the entirety of Article 15, Sections 1-11. Moreover, nowhere in Article 15 does there exist the procedural vs. substantive distinction that Akron-AAUP seeks to foist upon the contract language. Furthermore, the entire Article 15 is “procedural” in nature. Finally, the distinction Akron-AAUP attempts to draw between Sections 2-4 and 6-11 makes no sense, as the requirements in both groups of sections are indistinguishable.

Article 15, Section 12 unambiguously states:

- (1) “[t]he 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.”
- (2) “[t]he 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.”
- (3) “[t]herefore, this Section 12 shall not be used to accomplish retrenchment as set forth in this Article.”
- (4) “[i]f 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
  - a. representatives of the University will meet with representatives of the Akron-AAUP to discuss and show evidence of the circumstances described above; and

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<sup>51</sup> Akron-AAUP inexplicably fails to categorize Article 15, Section 5 – which authorizes the Trustees to make a final determination to implement retrenchment after receiving and considering the Joint Committee on Retrenchment’s recommendations – as either procedural or substantive.

- b. 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)

The entirety of Section 12 either clearly identifies all of Article 15's sections as "procedures," or it refutes the "substantive rights vs. procedures" distinction entirety by declaring that all of Article 15 can be bypassed under Article 15, Section 12. The first sentence indicates that the entire Article (and not just Sections 2-4) is a "procedure for retrenchment." The second sentence states the grounds for bypassing the Article 15 retrenchment procedures: Section 12 applies when there are: (1) catastrophic circumstances; (2) beyond the control of the University; and (3) rendering impossible or unfeasible<sup>52</sup> the implementation of "procedures set forth in Article 15." The third sentence is dispositive all on its own, as it takes out the entire Article (regardless of any substantive/procedural distinction), and not just Sections 2-4 as Akron-AAUP posits, when it states that "Section 12 shall not be used to accomplish retrenchment **as set forth in this Article,**" without any language limiting that authority to just Sections 2-4 or excluding Sections 6-11. (Emphasis added.) The fourth sentence details the conditions for discussing the reasons for Article 15, Section 12's invocation and the University's proposed course of action, but it also references "bypassing the retrenchment procedures" without any restriction to Sections 2-4 or exclusion of Sections 6-11. Thus, every sentence of Article 15, Section 12 asserts that either there is no substantive vs. procedural distinction in Article 15, or the entire Article 15 is procedural in nature.

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<sup>52</sup> As discussed above, impossibility/unfeasibility encompasses both the timing/duration of the retrenchment process and the number of faculty who would need to be laid off under Article 15 to achieve the same cost savings, which faculty would be impacted by Article 15 retrenchment, and the inability of remaining faculty to teach all of the courses needed to maintain an academic program.

Further support for this reading of the University's broad authority under Article 15, Section 12 can be found in Section 2(C). Akron-AAUP's Grievance quotes, but seemingly glosses over, Section 2's language that once the Trustees decide that involuntary retrenchment must occur, "the following **procedures** establish the process for implementing any retrenchment." Once again, this language does not limit procedures to Sections 2-4, or exclude Sections 6-11 as procedures, and it declares that all of Sections 3-11 in Article 15 are "the following procedures." Moreover, virtually every Section in Article 15 – and every Section pertinent to these layoffs – that Akron-AAUP contends is "substantive" actually describe processes.

- Article 15, Section 6, entitled *Retrenchment Process*," states that, "Once the final determination has been made that retrenchment is necessary, the following factors shall determine which bargaining unit faculty within the affected unit(s) will be released . . . ." Thus, the very title denotes that Section 6 is procedural.
- Article 15, Section 7, entitled *Notice of Release*," states that "The University will provide notice of release to affected members on the bargaining unit in accordance with the following . . . ." This Section details the process and timing for issuing such a notice.
- Article 15, Section 8 is untitled and contains two subsections, only one of which is pertinent. Subsection A addresses the process for placing of released faculty into other available teaching positions.<sup>53</sup>
- Article 15, Section 9 details the process for offering reinstatement to released bargaining unit faculty;
- Article 15, Section 10 details the process for offering part-time teaching positions in the program of a released faculty member.<sup>54</sup>

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<sup>53</sup> Section B, which is inapplicable in this instance, pertains to the narrow circumstance of "consolidation of programs or departments or colleges among any of the public institutions of higher education within Northeast Ohio."

<sup>54</sup> Article 15, Section 11, which addresses faculty who accept reinstatement and health benefits (paid or COBRA) for released faculty, is irrelevant to this Grievance. The reinstatement portion arises only when faculty have been reinstated, which has not occurred. Akron-AAUP's Grievance does not allege that affected faculty have been denied health benefits provided for in Section 11.

Akron-AAUP continues its parade of errors by contending that Article 15, Sections 6-11 are not “procedures” because they are not required to occur within a specific time period.<sup>55</sup> Akron-AAUP asserts erroneously that Article 15, Section 12 “is intended to be used when there is not enough time to follow the procedures of Article 15.” This contention fails for multiple reasons.

Procedures regard process (i.e., how things are done) and not just timing. The entire process of retrenchment under Article 15 is rendered impossible or unfeasible by the current catastrophic circumstances that are beyond the University’s control. As discussed above, impossibility/unfeasibility encompasses more than just the timing/duration of the retrenchment process. It also involves the number of faculty who would need to be laid off under Article 15 to achieve the same cost savings, which faculty would be impacted by Article 15 retrenchment, the inability of remaining faculty to teach all of the courses needed to maintain an academic program and how much time faculty have before their layoffs become effective (because a long notice period drives up the cost of Article 15 retrenchment precisely when the University seeks to reduce costs). All of these concerns are related to the requirements in Article 15, Sections 6-7, regarding the order in which faculty are laid off and the length of any layoff notice.

Even under the “procedure is timing” analysis maintained by Akron-AAUP, Section 7 is a procedural provision. It addresses the timing of when a layoff should go into effect. Akron-AAUP implicitly concedes that point. While it states that Section 6 is not procedural because “[i]t is not

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<sup>55</sup> Akron-AAUP provides no specific argument regarding Sections 8, 9, 10 or 11 or any specific claim that the University has violated those Sections with its Article 15, Section 12 layoffs; consequently, the procedural vs. substantive distinction that Akron-AAUP asserts is irrelevant to the outcome of this dispute. As discussed above, however, the impossibility/unfeasibility of complying with the requirements of these sections is apparent.

a time-consuming process to rank and seniority [sic] as required by Section 6,” it makes no such argument for Section 7. Instead, it argues that the University should seek to amend the timing of the Section 7 layoff notices via “exigent circumstances” bargaining under Article 33, Section 3. The University does not need to engage in such bargaining because – according to the Akron-AAUP’s own argument – it has the right to adjust the timing of Section 7 layoff notices because there is not enough time to adhere to the length of those notices. Akron-AAUP’s argument that the University should pursue Article 33, Section 3 bargaining also confirms the need to bypass the Section 7 notice timing requirements, because it concedes that some modification – whether it is a one-time bypass under Article 15, Section 12 or a permanent modification under Article 33, Section 3 – was needed for the layoffs at issue be practicable.<sup>56</sup>

Finally, the distinction that Akron-AAUP seeks to draw between Sections 2-4 and 6-11 makes no practical sense and simply does not exist. Both groups of sections impose obligations upon the University in facilitating the Article 15 retrenchment. Some of the Sections have deadlines and timelines (Sections 3, 4, 7 and 9), while others do not (Sections 2, 6, 8, 10 and 11). All of them detail how things should be done (i.e., processes). This “difference without a distinction” simply underscores the lack of merit to Akron-AAUP’s entire construction of Article 15 in general and Article 15, Section 12 in particular.

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<sup>56</sup> Indeed, modifying permanently Article 15, Section 7 via Article 33, Section 3 would have a more harmful effect upon Akron-AAUP than the one-time bypass via Article 15, Section 12 that the University seeks.

E. University's Position and Supporting Argument: Issue No. 3

- i. Both a Reasonable Interpretation of the Contract Language and the Actual Facts Refute Akron-AAUP's Claim that the University Improperly Took Action to Bypass the Article 15 Retrenchment Procedures before Discussing with Akron-AAUP Its Proposed Course of Action under Article 15, Section 12.

Rounding out its meritless claims, Akron-AAUP tacks at the end of a four-page grievance a one-paragraph (eight-line) allegation that the University failed to discuss timely with the Akron-AAUP its "proposed course of action." This claim takes on the appearance of a last, desperate "throw-in" argument to be asserted when all else has failed. And fail it shall. Akron-AAUP's claim suffers the triple problem of being premature, outdated and inaccurate.

Akron-AAUP's claim is premature because Article 15, Section 12 requires only that the University's proposed course of action be discussed anytime "before taking any action that could be interpreted as bypassing the retrenchment procedures." The operative word in that entire phrase is "action." If the University has not taken any action to bypass the retrenchment procedures, then it need not discuss its proposed course of action with Akron-AAUP.

The term "action" implies, within the context of personnel and employment, affirmative conduct that has immediate and certain tangible results, such as the loss of a job, a demotion, a suspension or a transfer, to name but a few. An undertaking that is contingent, uncertain, undeveloped, or prospective and not imminent would not constitute "action" until some tangible result occurred or was imminent and definite.

When Akron-AAUP filed its grievance on June 8, 2020, the University had not taken any "action" of any sort regarding retrenchment, either consistent with or bypassing the Article 15 retrenchment procedures. The Trustees' approval of the layoffs that bypassed the Article 15

retrenchment procedures by laying off more senior, tenured faculty – the only “action that could be interpreted as bypassing the retrenchment procedures” that plausibly satisfies the contractual threshold – did not occur until July 15 (more than five weeks after Akron-AAUP filed its grievance), with an effective date of August 21 (more than five weeks into the future). The Administration’s recommendation to do so – which is one step removed from the Trustees’ action – did not occur until a few days before that. Anything before that is too remote to constitute “action.” Indeed, the Administration had not even developed the list of potential laid off faculty under an Article 15, Section 12 layoff procedure when Akron-AAUP filed its grievance. That did not occur for another two more weeks (still weeks before the Trustees took action), when the Administration shared that list (which was confidential and subject to the NDA) with the Akron-AAUP’s Negotiating Team.

Indeed, the entire basis for Akron-AAUP’s claim is a cryptic allegation that, “Upon information and belief, the University directed chairs to identify positions to be eliminated as early as April 24<sup>th</sup>.” Even if this allegation were true – which it is not, as discussed below – such direction does not violate Article 15, Section 12.

To start, this alleged direction occurred nearly **twelve weeks** before the Trustees approved the Article 15, Section 12 layoffs. No persons lost their jobs at that time, nor had any job losses been approved by either the Trustees or recommended by the Administration. In fact, Akron-AAUP’s grievance does not even allege that the University had identified any single faculty member at that time (either publicly or privately) as a layoff candidate, much less developed a list of such faculty. To argue that such an alleged directive constituted an “action” under



Article 15, Section 12 when no person was identified or even remotely affected at that time defies simple common sense.

Moreover, Akron-AAUP's claimed interpretation of "action" stretches beyond all bounds of reasonableness and practicality. At most, what allegedly occurred was the initial exploratory step into what an Article 15, Section 12 layoff would appear. Stated differently, the University allegedly told the department chairs, "Look into what an Article 15, Section 12 would look like, and then we can decide if it is feasible enough to warrant further effort." How is the University supposed to decide whether even to develop a course of action if it does not know what the impact will be? If Akron-AAUP's interpretation prevails, then it would be impossible for the University to even begin to contemplate pursuing an Article 15, Section 12 layoff procedure if the expected first step would violate Article 15, Section 12. The University would be unable to determine the impossibility or unfeasibility of utilizing Article 15 retrenchment or the feasibility of Article 15, Section 12 layoffs without undertaking this critical initial analysis. Akron-AAUP undoubtedly would love that circular logic to prevail, because it would preclude an Article 15, Section 12 layoff procedure from ever occurring. Unfortunately for Akron-AAUP, such circular logic renders the interpretation patently illogical and unreasonable, thus mandating its rejection.

Furthermore, Akron-AAUP's challenge to what the University allegedly did misses the entire point of why the University would undertake such an effort and the role that such an effort would play. Directing department chairs to identify positions to be eliminated under an Article 15, Section 12 layoff procedure is the first part of developing the very "proposed course of action" that Akron-AAUP demands that it receive before the University can "tak[e] any action that could be interpreted as bypassing the retrenchment procedures." Thus, the University cannot present,

and Akron-AAUP cannot receive, the proposed course of action until positions to be eliminated have been identified. The only reasonable interpretation of Article 15, Section 12, therefore, dictates that the University may (and probably should) internally identify positions to be eliminated before discussing its proposed course of action with the Akron-AAUP, which is precisely what Akron-AAUP alleges that the University did, and that doing so complies with Article 15, Section 12.

Akron-AAUP's claim is outdated because the University shared a tremendous amount of information with Akron-AAUP after Akron-AAUP filed its grievance on June 8 and before the Trustees on July 15 took action to implement the Article 15, Section 12 layoffs. Indeed, the University hoped (in vain, obviously) that Akron-AAUP would have withdrawn this claim given the events following the filing of Akron-AAUP's grievance.

The University and Akron-AAUP participated in 9 bargaining sessions between June 8 and when it reached a tentative agreement on July 13 that, if it had not been rejected by the bargaining unit after Akron-AAUP's leadership recommended rejection, would have settled this Grievance, and the University responded to over 49 individual requests and at least 30 follow up requests during that same time period. Dozens of hours of discussions occurred, and hundreds of pages of information were produced, most with the goal of explaining to Akron-AAUP why the University needed to invoke Article 15, Section 12 and how it planned to do so.

Finally, ignoring momentarily the prematurity and obsolescence of Akron-AAUP's claim, the allegation that the University never discussed its proposed course of action under Article 15, Section 12 is completely inaccurate and borders upon flagrantly false. Akron-AAUP maintains two baseless claims.

Although it concedes obliquely that the University met with the Akron-AAUP since at least April 21, 2020, Akron-AAUP alleges that during these bargaining sessions before June 8 “no aspects of [the University’s] proposed course of action have been disclosed” and that the University only disclosed “the bare fact that [it] is invoking the force majeure clause and that [it] does not intend to comply with any other provision of Article 15.” Akron-AAUP’s negotiating team must not have been attending the same bargaining sessions as the University’s bargaining team.

The University shared a wealth of information with Akron-AAUP’s negotiating team between April 21 and June 8. The parties conducted 10 bargaining sessions, and the University responded to 7 formal informational requests with over 81 individual requests. Some of the information the University provided was confidential information that had only been shown to the Trustees in Executive Session and were disclosed under an NDA.

To be sure, the University had less information to share during the initial bargaining sessions and more information to share as further bargaining sessions occurred. The reason was both simple and understandable: the University had less information to give because that information did not exist. During March-April 2020, the University still was attempting to assess the impact of the COVID-19 financial and operational fallout. The data still had to be collected and synthesized.

Rather than wait until the University had marshalled significant detail regarding its proposed course of action, the University met with Akron-AAUP starting in late April 2020 to solicit ideas from Akron-AAUP and input on how to deal with the catastrophic circumstances created by the COVID-19 pandemic. Akron-AAUP wasted that opportunity.

Rather than providing meaningful cost-cutting measures that the Akron-AAUP bargaining unit would accept, Akron-AAUP suggested not seeking cost savings from their bargaining unit and focused instead on arguing that every portion of the University **other than faculty** be cut, reduced, or financially impacted before seeking any reduction or costs savings measures that would have affected the Akron-AAUP bargaining unit. The Akron-AAUP also focused on submitting detailed and burdensome information requests when it should have been spending time working with the University to reach solutions on cost savings.

As the negotiations proceeded, the University provided increasingly more information to demonstrate both the basis for invoking Article 15, Section 12 and how it intended to proceed under those procedures. Perhaps the most damning evidence that renders Akron-AAUP's allegation completely baseless (indeed, laughable) is the May 22, 2020, letter that details the basis for the University's invocation of Article 15, Section 12. This nine-page, single-spaced letter detailed all of the information that the University had provided to that point (more than two weeks **before** Akron-AAUP filed the Grievance) and committed to continue to provide future, similar and related information whenever it became available, including:

- Data summarizing the University's significant decline in enrollment between 2011-19;
- Weekly student enrollment updates starting with the April 7, 2020 update (excepting a gap between May 6 and 20);
- Financial status reports for fiscal years ending June 30, 2011 through June 30, 2019, plus six and eight-month reports ending December 31, 2019 and February 29, 2020, respectively;
- Documentation of the extent of the COVID-19 pandemic and Ohio's response to same, including Orders from the Governor and the Ohio Director of Public Health;
- Data regarding the reduction in State revenue for FY20;

- Information regarding reimbursements to students because of the COVID-19 operational impact;
- An explanation of anticipated and unquantifiable additional impact on the University's financial projections for the remainder of FY20 and into FY21;
- Evidence to support the existence of "financial exigency" under Article 15, Section 1(A);
- Evidence of the University's enrollment reduction under Article 15, Section 1(B);
- Evidence of the University's proposed reorganization that would consolidate its 11 colleges into five colleges under Article 15, Section 1(C) and the need for a 25 percent budget reduction for the consolidated five colleges;
- Evidence of action by the Ohio General Assembly via H.B. 197, which impacted the ability of students, prospective students, and employees to participate in educational programming or operations;
- Evidence and an explanation that implementing Article 15 retrenchment procedures was impossible or unfeasible;
- Review of Article 15, Section 12 discussions, including virtual and face-to-face meetings, ongoing communications between the University and Akron-AAUP, Akron-AAUP information requests and University responses, and messages from President Miller to the University community; and
- Details of the University's proposed course of action, including utilizing midterm negotiations under Article 33, Section 3 and identifying several action items on or before July 1, 2020 that could yield immediate savings, such as additional voluntary retirements, reductions-in-force, furloughs, unpaid leaves of absence, increases in health care contributions, salary reductions, postponement of professional development, elimination of retiree spouse and dependent healthcare, sick leave credits, and tuition and fee remission reductions.

It belabors the obvious to state that this huge amount of information that the University submitted during a one-month period far exceeded "the bare fact that the University is invoking the force majeure clause and that the University does not intend to comply with any other provisions of Article 15."

The University continued to comply with its disclosure and discussion obligations under Article 15, Section 12 well after it issued its May 21 letter and even after Akron-AAUP filed its Grievance. Most significantly, when the University had clarity on its proposed course of action, it provided the Akron-AAUP with the proposed draft reduction list on June 24, 2020, **three weeks** before the Trustees took action to approve the Article 15, Section 12 layoffs. Again, this information was confidential and was subject to an NDA. At that point, the University and Akron-AAUP discussed the proposed course of action, and seemingly agreed upon ways to try to further reduce the number of faculty to be impacted by trying to secure additional voluntary retirements and negotiating incentive retirements under Article 16, Section 11.

The record evidence demonstrates conclusively that during these bargaining sessions from April 21 to July 13, the University discussed and showed evidence of: (1) catastrophic circumstances, (2) the need to bypass Article 15's retrenchment procedures, (3) potential proposed course of action, (4) the actual proposed course of action, and (5) modifying the actual proposed course of action until the actual course of action was identified and implemented. To be sure, the University more than satisfied its obligations under Article 15, Section 12.

Akron-AAUP's second inaccurate allegation involves the conclusory and woefully unsubstantiated allegation that the University had directed department chairs as early as April 24, 2020 to identify positions to be eliminated. This allegation is deficient for multiple reasons and at multiple levels.

Akron-AAUP's "factual" support for this allegation is "information and belief." Persons making questionable/unsupportable accusations use that phrase when they have no actual evidence but claim to have received "information" (second- or-third-hand rumors or grapevine

talk would be more accurate) and simply “believe” that it must be true. When proving a claim – instead of just alleging it – one’s “belief” is irrelevant; otherwise, the Earth would not be round simply because a member of the Flat Earth Society firmly believes that it is flat. As for “information,” it must be specific and accurate: who gave the directive, to whom was the directive issued, when was it issued (a definite date, and not something amorphous as “as early as April 24”), how was the directive communicated (e.g., memo, e-mail, text message, orally), where the communication occurred, what specifically was said, and why was the directive issued. Akron-AAUP’s “information” fails on both points.

Akron-AAUP’s grievance utterly fails to offer any specifics for this allegation that department chairs received directions as early as April 24, 2020 to identify positions to be eliminated under an Article 15, Section 12 layoff procedure. To this day, Akron-AAUP has not backed up this claim within anything even remotely constituting factual details. The reason is simple: none exist. The University did not, either on April 24, 2020 or any time immediately before or after that date, direct department chairs (or any other members of the Administration, for that matter) to identify positions to be eliminated as part of an Article 15, Section 12 layoff procedure.

The University, therefore, is at a loss to understand the basis for this claim, and it should not be forced to speculate as it defends itself against baseless allegations with so much on the line. The University welcomes the opportunity to review Akron-AAUP’s initial brief – where presumably Akron-AAUP will (and must) finally provide some detail to this accusation – in the hope that it can respond directly to these falsehoods in its reply brief.

Still, the University will delve into the dark world of speculation to ensure that it has taken every step to set the record straight. The only significant events that occurred on or around April 24, 2020, were two bargaining sessions: on April 21 and 24, so the University assumes that some information was shared with Akron-AAUP that resulted in Akron-AAUP making a leap of faith that department chairs had been directed to identify positions for an Article 15, Section 12 layoff.

During those bargaining sessions, the University's bargaining team shared with the Akron-AAUP's negotiating team a confidential presentation (which the University provided under an NDA) that President Miller had submitted to the Trustees during an Executive Session on April 15, 2020. The last page of that presentation consists of a chart that details the impact upon the University's unrestricted net assets balance of certain hypothetical scenarios in response to the financial fallout from the COVID-19 pandemic. These hypotheticals consisted of either doing nothing or implementing a gradual cost-reduction program during FY21 and FY22. Under the latter hypothetical, \$5 million dollars in Article 15, Section 12 layoffs would occur at the start of the Spring 2021 semester, followed by \$18-million in additional such layoffs during FY22.

If Akron-AAUP somehow (mis)construed this hypothetical as a directive to department chairs to identify positions for an Article 15, Section 12 layoff, then that is about as far off the mark as one can be. There are multiple reasons to refute this misconception.

To start, neither hypothetical ever was implemented. The University certainly never failed to take any action at all. It also did not wait until Spring Semester 2021 to implement layoffs under Article 15, Section 12. Instead, it took action immediately to implement layoffs among all of its bargaining units and elsewhere within the University.



In addition, the gradual approach hypothetical called for Article 15, Section 12 layoffs to occur when the Spring 2021 semester started, not the Fall 2020 semester that the Trustees eventually approved. Consequently, any exploration of Article 15, Section 12 layoffs would not have occurred as early as April 24, 2020, since any such layoffs would not have occurred for several more months.

Furthermore, both hypotheticals would have been financially devastating to the University if they had been implemented. Doing nothing would have reduced the unrestricted fund balance to only \$11 million by the end of FY21, far below the \$25 million threshold that would have sent warning signals to the University's creditors and accrediting bodies. The gradual approach actually would have achieved an even worse outcome, but it would have delayed that outcome by only one fiscal year. The gradual approach would have reduced the unrestricted fund balance to \$9 million by the end of FY22.<sup>57</sup>

How someone could have misinterpreted these unused hypotheticals as a direction to department chairs to identify positions for Article 15, Section 12 layoffs is beyond comprehension. This chart makes no mention of department chairs or identifying positions for any type of layoff. In fact, the chart contains very few notations from which one could understand its meaning. Perhaps that might explain Akron-AAUP's misunderstanding. But, a misunderstanding is not evidence, and Akron-AAUP's demonstrably false allegation should be rejected.

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<sup>57</sup> The gradual approach hypothetical's projected \$29-million unrestricted fund balance at the end of FY22 assumed that the University would receive a \$20-million in currently non-existent revenues during that fiscal year, even though there exists no basis for anticipating that such a huge revenue infusion would materialize.

IX. Conclusory Remarks

The time has come to bring to a halt Akron-AAUP's potentially destructive efforts to avoid experiencing the same painful but necessary concessions that every other employee has accepted. Akron-AAUP's obstructions to the University's proper invocation of its clear contractual authority to implement layoffs that are the only possible and feasible way to obtain immediate and effective cost savings needs to end. Akron-AAUP is not an island in the sky, and it should not be treated as such.

Akron-AAUP's objections to the Article 15, Section 12 layoffs due to catastrophic circumstances beyond the University's control lack any merit. Akron-AAUP's grievance challenging those layoffs, therefore, should be denied.

**CERTIFICATE OF SERVICE**

A true copy of the foregoing was hand delivered to the following at the offices of Zashin

& Rich this 21<sup>st</sup> day of August, 2020:

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