STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

Eastern Michigan University,

Plaintiff,

Case No. 22-001203-CL

Hon. Carol Kuhnke

v.

EMU Chapter of the American Association of University Professors, *et al*

Defendants.

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DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER, ORDER TO SHOW CAUSE, AND PRELIMINARY INJUNCTION

I. Introduction

This is no ordinary labor dispute. Plaintiff Eastern Michigan University and its Negotiating Team (hereinafter "EMU Administration") have engaged in a coordinated months-long attack upon its faculty union, the Eastern Michigan University Chapter of the American Association of University Professors (hereinafter "EMU-AAUP" or the "Union"). After delaying negotiations for months by insisting on in-person bargaining during the pandemic, EMU Administration engaged in a pattern of dilatory hard-ball negotiation tactics, including surface bargaining, refusing to meet with union negotiators, presenting illegal bargaining proposals, and leaking in the press. Because of these tactics, the over 500 tenure and tenure track faculty at EMU voted to withhold their labor in order to finally—after months of fighting at the table—end EMU Administration's unfair labor practices and obtain a fair and equitable union contract.

Rather than negotiate in good faith to resolve the matter, EMU Administration comes running to this Court to issue an order returning the workers to their posts under penalty of contempt. Such an order would be directly contrary to the public policy of this State. The Michigan Supreme Court has held that injunctions in labor disputes are "contrary to public policy in this State . . . absent a showing of violence, irreparable injury, or breach of the peace." *Sch Dist v Holland Educ Asso,* 380 Mich 314, 326, 157 NW2d 206, 210 (1968). EMU Administration has made no such showing here.

Even if EMU Administration had made such a showing, however, the Michigan Supreme Court has held that prior to issuing injunctions or temporary restraining orders in labor disputes, courts ***must*** conduct an analysis of traditional equity considerations, including the doctrine of "unclean hands." *Mich State AFL-CIO v Mich Emp't Relations Comm'n*, 212 Mich App 472, 477, 538 NW2d 433, 437 (1995). As set forth in detail below, EMU Administration comes to this Court

seeking equitable relief with hands that are far from "clean." Rather, they are filthy. EMU Administration's coordinated pattern of delay, bad faith negotiating tactics, and unfair labor practices has deeply damaged the University—well before any work stoppage on the part of Defendants.

And yet, these tactics continue in this litigation. EMU Administration now seeks to continue its attack on its faculty union by seeking a patently overbroad injunction that would prohibit not only striking, but Union members' right to peacefully picket their employer in violation of *Thornhill v Alabama*, 310 US 88 (1940). The fundamental right to picket has long been protected by the First Amendment to the U.S Constitution, and this Court should reject this request for a prior restraint of speech in the strongest possible terms.

In sum, an injunction in this case is not justified by the traditional injunction factors, would reward a litigant with unclean hands in the underlying dispute, and would violate Michigan statutory law and the Michigan and U.S. Constitutions. This Court should therefore deny EMU Administration's Motion for a Temporary Restraining Order, Order to Show Cause, and Preliminary Injunction. It does not have to be this way. EMU Administration should end unfair labor practices and return to the bargaining table to negotiate a fair and equitable contract with the faculty it claims to value.

II. Statement of Facts[1]

Plaintiff Eastern Michigan University is a State University in Ypsilanti, Michigan. The EMU-AAUP is the exclusive bargaining representative of all tenured and tenured track Faculty at the University. The Parties last negotiated a full collective bargaining agreement in 2015, which

[1] The following Statement of Facts is Supported by the Attached Verification of the EMU-AAUP Counsel, Joseph X. Michaels.

expired in 2019. Prior to the expiration of that Agreement, the parties agreed to a two-year extension until 2021. And in 2021, the Parties extended that agreement for yet another year, until August 31, 2022. Defendants are the Union, its Organizer/Contract Representative, its Executive Committee, and its Chief Negotiator.

A. EMU Administration Stalls Bargaining for Months Based on an Illegal Insistence on In-Person Bargaining

In Spring 2022 and before, the Union began preparing for bargaining of a successor agreement. The Union's bargaining council formulated proposals and discussed changes the Union wanted to make to the contract. In April 2022, more than four months prior to the expiration of the CBA extension, Dr. Matt Oches ("Oches"), an Organizer/Contract Representative of EMU-AAUP, and Kathleen H. Stacey, PhD ("Stacey"), EMU's Interim Assistant VP Academic Human Resources, began discussions regarding the commencement of negotiations for a successor collective bargaining agreement. In these preliminary discussions, consistent with the practice of the parties throughout the pandemic—including grievance proceedings, effects bargaining, and even bargaining of the 2021 contract extension—Oches expressed the Union's position that negotiations be conducted via Zoom, while Stacey—for the first time—expressed EMU Administration's position that the parties meet in person.

On May 12, 2022, Stacey emailed Oches with an explanation of EMU Administration's position and advised that she put a block of rooms on hold for May 24, 2022, the date she and Oches had agreed to begin negotiations. On May 13, 2022, Oches responded by email rejecting an in-person meeting, offering instead to meet via Zoom. Oches asked for EMU Administration's response by May 17th, advising that "if we do not receive a response by then, the union will take appropriate action."

On May 19, 2022, Oches emailed Stacey advising that the EMU-AAUP negotiating team was ready to meet with EMU Administration's team on Zoom at 9:30 am on May 24th and requested that she distribute a Zoom link he had provided to EMU's team.

On May 20, 2022, James P. Greene of the law firm Dykema Gossett ("Greene"), EMU's Chief Negotiator, advised Oches that EMU Administration was not agreeable to conducting negotiations via zoom calls. Greene closed by advising Oches that if the Union reconsidered its position and was willing to meet for in-person negotiations, he would schedule the first meeting.

B. The Parties File Unfair Labor Practice Charges

That same day, on May 20, 2022, EMU-AAUP filed an unfair labor practice charge with the Michigan Employment Relations Commission ("MERC"), alleging failure to bargain in good faith in violation of the Public Employment Relations Act ("PERA"). The case was assigned MERC Case No. 22-E-1201-CE. Specifically, the Union alleged that prior to the beginning of negotiations over the parties' collective bargaining agreement, which was due to expire on August 31, 2022, EMU Administration was refusing to negotiate via remote means in bad faith. This refusal was evidence of bad faith as the community transmission rate in Washtenaw County at that time was "high", and all contract administration duties during the COVID-19 pandemic, including grievance hearings, 2020 COVID effect bargaining, and the 2021 CBA bargaining had been performed via remote means effectively. Nonetheless, Greene had sent an email to the Union stating, "the University is not agreeable to conduct the negotiations via zoom calls."

On May 27, 2022, EMU Administration filed its own unfair labor practice charge at MERC against EMU-AAUP, alleging that the Union violated PERA by refusing to bargain in good faith in rejecting in-person negotiations and instead seeking bargaining sessions via Zoom. This charge was assigned MERC Case No. 22-E-1229-CE. Concurrently with its ULP, EMU Administration

filed a Motion to Dismiss the Union's ULP, arguing that bargaining modality is a ground rule, and therefore a permissive subject of bargaining that it was not required to bargain over. The motion made not a single mention of the COVID-19 pandemic.

EMU-AAUP filed its response to the EMU Administration's Motion to Dismiss on June 6, 2022. The Union argued that PERA required EMU Administration to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment. Thus, the duty to meet was not permissive. And as PERA is silent as to whether the required meeting be in person or via Zoom, and given the history of the parties' conduct throughout the COVID pandemic, EMU Administration's refusal to bargain via Zoom was done in bad faith in violation of PERA. Concurrently, the Union filed a Motion to Dismiss the EMU Administration's charge, raising the same arguments.

On June 14, 2022, MERC Administrative Law Judge David M. Peltz issued an Interim Order on the EMU Administration's Motion to Dismiss, denying the Motion. In doing so, Judge Peltz held that there were questions of fact regarding whether EMU Administration breached its obligation to meet at reasonable times to confer in good faith based on the totality of the circumstances. The ALJ also stated in a footnote:

> Although the National Labor Relations Board (NLRB) has expressed a preference for direct face-to-face bargaining, the cases standing for that proposition have largely involved a party's demand to bargain through a mediator or by telephone. *See e.g. Alle Arecibo Corp*, 264 NLRB 1267 (1982); *Success Village Apartments*, 347 NLRB 1065, 1080 (2006). Bargaining by video conferencing is more like face-to-face bargaining than telephone negotiations. Moreover, given the recent widespread adoption of video conferencing services such as Zoom by courts and administrative agencies, including MOHAR, as well as the many technical improvements in the quality of such services, the continued viability of such a presumption, to the extent it exists under PERA, may be an issue to be decided in this matter.

On June 28, 2022, after missing the deadline by which it could respond to the Union's Motion to Dismiss (which was not resolved by the interim order), EMU Administration filed its own Motion for Summary Disposition in favor of its own charge. Despite the Interim Order taking an on-point and contrary position, EMU Administration claimed the Union refused to meet in-person and that doing so was bad faith as a matter of law. Because EMU Administration failed to timely respond to the Union's Motion to Dismiss, on June 29, 2022, EMU-AAUP filed a Motion for Show Cause Order and/or Dismissal for EMU's failure to respond. On July 21, 2022, ALJ Peltz sent notice to the parties for a Pre-Trial Conference to be held on July 26, 2022.

Beyond the ULPs regarding bargaining modality, on June 2, 2022, EMU Administration unilaterally determined that grievance meetings would be conducted in-person, including all Step III meetings. As a result, on June 15, 2022, EMU-AAUP filed an unfair labor practice charge with MERC alleging retaliation in violation of PERA. Specifically, the Union alleged that EMU Administration's policy shift to in-person meetings for Union activities—while other types of University meetings remained remote—was evidence that EMU Administration changed the modality of contract-based meetings due to the Union's position in the earlier ULPs. Moreover, as the change was unilaterally implemented without input or bargaining with the Union, the EMU Administration's action was in further violation of PERA. This charge remains pending.

C. <u>The Union Agrees to In-Person Bargaining, but EMU Refuses to Agree to Its Location</u>

On June 1, 2022, the Union's negotiating team authorized EMU-AAUP counsel Joseph X. Michaels ("Michaels") to send correspondence to Greene, informing him that he and Matthew Kirkpatrick would be co-chief negotiators for the Union and that both would be available for ***in-person*** bargaining at the offices of the Croson, Taub, and Michaels, PLLC in Ann Arbor on June 7, 2022 at noon. Counsel requested that visitors to his law office wear a mask at all times and show

proof of up-to-date vaccination cards as the EMU Administration had required of its faculty members throughout the COVID pandemic. EMU Administration now had an unambiguous offer to meet in person with Union bargainers, which should have satisfied their ostensible concerns regarding communication.

Later that day, Greene rejected the Union's offer to meet in-person. EMU Administration insisted on its own campus as the location with "appropriate safety protocols" for the afternoon of June 9th or 10th. The Union responded that it was requesting in-person bargaining at its counsel's office because it wanted control over audio-visual communications and could better ensure compliance with COVID-19 protocols. EMU-AAUP also offered June 14th as an alternate date for bargaining. The next day, the EMU Administration maintained its position that it would only bargain on its own campus.

EMU Administration's rejection of the Union's olive branch was clear evidence that the Administration had no intention of bargaining, even in-person. EMU-AAUP again offered an in-person session where all subjects of bargaining, including the modality, location, and date of time of future negotiations could be discussed. Cementing its intent to delay negotiations further, the EMU Administration moved the goal posts again and declined this offer and suggested bargaining at a hotel with the costs split between the parties.

On June 8, 2022, the Union accepted the use of a neutral site if it had videoconferencing technology and if the parties could agree on COVID protocols. EMU-AAUP also requested that EMU Administration pay for use the facilities (as the Union had offered a remote modality with no associated costs that the EMU Administration had rejected). Finally, the Union expressed a willingness to bargain at alternating sites. In response, the EMU Administration cynically demanded that the Union explain what it meant by videoconferencing technology and COVID

protocols "in as much detail as possible" and stated it would only agree to bargaining at a neutral site if the cost was split between the parties. EMU-AAUP, as it had said before, replied that the COVID protocols it was requesting was use of a mask at all times and presentation of an up-to-date vaccination card. The Union also reiterated that it would request the EMU Administration to pay for the use of neutral site ***or*** would agree to bargaining at alternate sites (on campus and at the office of EMU-AAUP's attorney). Neither offer was accepted.

Instead of being productive, EMU Administration restated its demand for an explanation of what the Union meant by videoconferencing technology, despite the Union previously providing an explanation that it would have remote bargaining participants that would want to be able to participate via Zoom. Additionally, EMU Administration stated that it would only agree to bargaining under COVID protocols in place at the University.

Through the help of a MERC mediator, counsel for the parties (Greene and Michaels) arranged to meet with the mediator at Michaels' law offices to discuss the matter on July 1, 2022. During that meeting, Greene again reiterated his position that ***any and all*** bargaining team members must be in person for ***each and every*** session, regardless of whether they had a health condition or travel obligation. The session was unsuccessful at reaching a resolution.

D. <u>The Parties Agree to a Bargaining Modality, and EMU Administration Continues to Stall</u>

On July 5, 2022, with no resolution of the MERC proceedings in sight and desiring to begin negotiations as soon as possible, the Union negotiating team authorized Michaels to send a letter to Greene agreeing to negotiate in a hybrid model, where chief negotiators would appear in person, but other individuals who wanted to appear remotely could do so in a "HyFlex" classroom at EMU. HyFlex has videoconferencing technology that allows for individuals to participate in discussions both in-person and via Zoom.

Almost certainly recognizing that a refusal to meet in this fashion would constitute (yet another) unfair labor practice, Greene quickly changed course from his position stated on July 1, 2022. On July 7, 2022, Greene, in a letter to Michaels, agreed to meet in the proposed arrangement that he had rejected out of hand just days before. Greene initially agreed to only two bargaining sessions, but "reserve[d] the right to assess its effectiveness and to suggest changes at a later date as the situation may warrant."

Following this agreement between the Parties, they began bargaining at EMU's Strong Hall on July 15. Bilateral Hybrid bargaining sessions were held on July 15, July 21, July 25, July 28, August 2, August 4, August 11, August 14, and August 17. During this bargaining, the EMU Administration repeatedly stonewalled information requests and refused to consider changes to the contract.

On August 4th, EMU-AAUP presented its first economic package proposal. In response, one week later, on August 11th, EMU provided its first economic package. This packaged included 2% raises for five years (in a time of rampant inflation) and also included drastic premium increases as well as coverage changes in the health plans offered to EMU-AAUP members. These changes were in-line with other health care plans at the University but would entirely eat up any proposed raise and result in a drastic decrease in compensation to EMU-AAUP Members. Hoping to spur movement, EMU-AAUP countered with its own economic package at the next session on August 14, 2022, dropping its proposed first-year wage increase in the first year and eliminating a request for a 4.5% raise in the final year, replacing it with a wage reopener.

E. MERC Schedules a Weeklong Hearing on the Parties' Unfair Labor Practice Charges, but then Holds the Parties' Unfair Labor Practice Charge in Abeyance

On July 26, 2022, while bargaining was ongoing, the Parties attended a prehearing conference before ALJ Peltz on the dueling ULPs regarding modality. The Parties, through

counsel, discussed various evidentiary and other issues, as well as EMU Administration's position. The ALJ asked whether EMU Administration's position was to require in-person bargaining for everyone regardless of health conditions of bargaining team members. The following exchange occurred on the record:

> JUDGE: … Is the University, if this case proceeds to a hearing, and the University has filed its own charge, is the University looking for an order from the Commission requiring the parties to revert to fully in-person bargaining as a remedy?
>
> COUNSEL FOR EMU ADMINISTRATION: ***I guess the answer to that would be yes, that was the basis of the charge***. . . .

(Emphasis added). The Judge responded as follows:

> I don't see, you know, I'll be quite honest with you, and I'm saying this on the record right now, I don't see any circumstance where if this case goes to hearing, the Commission is going to, unless there's some sudden change in the situation on the ground in terms of public safety, that the Commission is simply going to issue a blanket order requiring the parties to return to full in-person bargaining if there was some evidence that there are individuals on either team that have health issues.

Hearing Tr Page 30 (emphasis added).

The Judge set a full week of hearings on the matter to begin on August 29, 2022. However, after the parties began bargaining via a HyFlex means, on August 10, 2022, the ALJ—over the Union's objection—adjourned the hearing without date.

F. EMU Administration Requests MERC Mediation, and Continues to Stall

Following the order adjourning the hearing, the Parties continued "bargaining." On August 17, 2022, during a negotiation session, the Union requested an update on the status of a counter to its reduced economic demands. Greene responded that EMU Administration was working on a compensation offer and would have it soon. However, when the Parties returned to a bilateral session, Greene stated that Administration had seen no evidence presented justifying the requested pay raises proposed by the Union. The Union immediately responded with a presentation showing

that the compensation provided to its members lagged peer institutions. After presenting this evidence, Kirkpatrick pressed Greene for a counteroffer on compensation. Greene replied that no counter was coming (contrary to his prior representation), threw up his hands, and said "let's go to mediation then."

Shortly after this session, even though neither side had published details regarding proposals and counter proposals to date, EMU Administration's Vice President of Communications Walter Kraft published extensive details of the parties' proposals on the "EMU Today" website, and presumably spread this information in the press. *See Eastern Michigan University files for mediation in contract negotiations with faculty union,* EMU TODAY, Aug. 17, 2022 (available at https://today.emich.edu/story/news/12129).

The parties began attending MERC Mediation the following Monday, August 22, 2022. Due to delays and intransigence by EMU Administration, over a four-day period, the parties were only able to resolve minor non-economic terms as a result of a negotiated package proposal. For the full week of August 22nd, EMU Administration did not provide any economic offer.

On the third day of mediation, the EMU Board of Regents met to, *inter alia,* approve a series of collective bargaining agreements with other unions on campus. Each of those agreements had healthcare proposals that mirrored the EMU Administration's August 11th table proposal. Several EMU-AAUP members attended the Board of Regents meeting, and thereafter peacefully gathered in Strong Hall where negotiations were taking place. Strong Hall was open to the public during this time. Law enforcement appeared on the scene (presumably at the behest of the EMU Administration), but no arrests were made (nor could they have been) and the union members dispersed.

With no meaningful progress despite days of mediation, on August 25, 2022, the EMU-AAUP Negotiating Team recommended that the EMU-AAUP Executive Committee hold a membership meeting on August 27, 2022, to authorize the threat of a work stoppage at the table in accordance with the EMU-AAUP Policies and Procedures.

On August 26, the Union organized an informational picket in front of EMU residence halls on student move-in day. Union members, their families, and supporters peacefully picketed and passed out literature to students and parents. The event was entirely peaceful and in accordance with all relevant time, place, and manner restrictions on EMU's campus. There was also a lemonade stand.

On Saturday August 27, 2022, the parties bargained while the Union prepared for its general membership meeting to vote to authorize the threat of strike. Shortly before the meeting, EMU Administration finally presented ***only its second*** economic offer of the negotiations, ***four days*** before the expiration of the contract and only after a work stoppage was about to be threatened. In this offer, while EMU Administration raised its year one compensation offer to include a $3,600 base salary increase, it came with a drastic change in healthcare benefit costs. EMU Administration insisted on enforcing the "hard caps" contained in Michigan's Public Act 152 of 2011, codified at MCL 15.561, *et seq.* These hard caps are not placed on any other unit at EMU and were not part of the EMU Administration's August 11 table proposal. No explanation was given for the sudden change.[2] This change would result in benefit costs increasing ***thousands***

[2]Ironically, this proposal violated Public Act 152 itself, which provides that an Employer must choose—for all its units—whether to comply with the Act by virtue of the hard caps or the 80/20 rule. See MCL 15.564 ("By a majority vote of its governing body each year, prior to the beginning of the medical benefit plan coverage year, a public employer, excluding this state, may elect to comply with this section [80/20] for a medical benefit plan coverage year instead of the requirements in section 3 [hard caps].") No such vote had taken place, and all other unit on campus

of dollars for the over 80% of EMU-AAUP Members who elect the PPO option through Blue Cross Blue Shield. Under this proposal, a family plan would cost $8,343 dollars, ***an increase of $5,325 over current plan rates***.

The offer was unquestionably regressive from the Administration's prior offer but included a higher "headline" first-year economics number, which EMU Administration predictably placed on its EMU Today website, and presumably pushed to the press. *See e.g. Eastern Michigan University Makes a New Offer to Break Stalemate in Faculty Union Negotiations,* EMU TODAY, Aug. 27, 2022 (available at https://today.emich.edu/story/news/12141*)*; *EMU Makes Offer to End Contract Negotiations as Faculty Was Wet to Vote on Strike Plans,* The Detroit News, Aug. 27, 2022 (available at https://www.detroitnews.com/story/news/local/detroit-city/2022/08/27/emu-makes-offer-end-faculty-contract-negotiations/7919094001/). These actions were clearly designed to influence the votes of Union members prior to the meeting.

Notwithstanding EMU Administration's attempted interference, the motion to authorize a strike threat passed 97% to 3%.

Within approximately 24 hours after EMU's second offer, on August 28, 2022, the EMU-AAUP negotiating team prepared a comprehensive package proposal that accepted the proposed plan design changes and requested premiums in line with what Administrators at EMU pay for the same plans. The EMU-AAUP team also prepared proposals on all outstanding non-economic issues, including shared governance, salary equity, union release time, and retirement investment options. In the presentation of this proposal, Michaels—in accordance with the authority granted

complied with the Act using Section 4 (as had the previous table proposal). The Administration's attempt to propose hard caps was thus nothing more than an illegal bargaining tactic.

him by the full EMU-AAUP membership—conveyed to EMU Administration that a work stoppage was possible if no agreement was reached.

G. EMU-AAUP Agrees to Work Without a Contract, and EMU Continues to Stall

Mediation continued over the weekend and into the following week through the start of Fall classes on August 29th. With a contract deadline looming, EMU Administration went silent. It took over 48 hours, until the day before expiration, for the EMU Administration to counter the Union's offer, which it finally did on August 30, 2022. This offer included almost no movement from Administration's prior offer, only changing the first year raise to a flat rate, and increasing the wage offer in the final two years of its five-year proposal by 0.5%. This was EMU Administration's third economics offer in the entire negotiations. It still contained the illegal proposal to force faculty—and only faculty— on the hard cap model.

During this time, EMU Administration stonewalled on numerous information requests, and even failed to appear at a prescheduled meeting to discuss economics with Michaels and a member of the EMU-AAUP negotiating team. The member, who had begun teaching, had recently picked up a new class to help her students and had significant prep work to do for the new course. Instead of serving her students, she sat waiting for an unknown member of the Administration's negotiating team, who never appeared. No apology was given, and Greene refused to identify the team member(s) who were supposed to appear.

On August 31st, the day of the expiration of the contract, the Union presented a comprehensive package proposal to EMU Administration, which included dropping its proposed dental coverage increase and a proposal in which faculty would agree to pay for parking (which had previously been a benefit of employment), so long as the funds were placed in a fund to pay for parking and transportation costs for low-income EMU students. After presenting this proposal,

the Union negotiating team announced that it was willing to continue negotiating and work without a contract, as it was unlikely to receive sufficient information to evaluate the Administration's position prior to expiration. That night, EMU Administration filed a *pro forma* request for MERC fact finding, which did not contain a statement of relevant facts and only attached copies of the Parties' proposals. Accordingly, at midnight that night, the previous CBA expired, and along with it, the Parties' no-strike clause.

On September 2, the Union organized an informational picket at Rynearson Stadium in Ypsilanti during the EMU Football home opener against Eastern Kentucky University. Union members, their families, and supporters peacefully picketed and passed out literature to students and fans. The event was entirely peaceful and in accordance with all relevant time, place, and manner restrictions on EMU's campus. Again, there was a lemonade stand.

The Union offered to continue negotiations at any time proposed by EMU Administration, but no new sessions were scheduled until Saturday, September 3, 2022. That day, the Union Negotiating Team prepared a comprehensive economic package proposal and presentation (even though there had been no intervening offer from EMU Administration) which accepted all University-wide healthcare changes and proposed an offsetting wage increase. Despite the Parties agreeing to negotiate over a holiday weekend (ironically celebrating labor), the following day, EMU Administration failed to provide any counterproposal, and the Union Negotiating team called for a vote on the work stoppage which is the subject of Plaintiff's motion.

On September 4, 2022, on an EMU Today post, EMU Administration stated that "Classes on Tuesday and Wednesday, and for the remainder of the week, will take place as scheduled." *See Sept. 4: Eastern Michigan University Statement Regarding the Faculty Union's Threat to Walk*

out on Eastern Michigan University Students, EMU TODAY (Sept. 4, 2022) (available at https://today.emich.edu/story/statement/12154).

During the session on September 4, the Union Negotiating Team indicated it was willing to meet at any time over the next two days, but EMU Administration did not agree to meet, and instead indicated it would wait until the next mediation session scheduled for September 7.

The vote for a work stoppage was approved by the full EMU-AAUP Membership in a meeting the night of September 6, 2022, in order to remedy the multiple Unfair Labor Practices committed by the EMU Administration and to compel EMU Administration to negotiate in good faith. The motion passed 91% to 9%. The work stoppage began at midnight on September 7, 2022, and EMU Administration filed the instant action that afternoon.

III. Standard of Review

The decision to grant an injunction or Temporary Restraining Order is within the sound discretion of the trial court. *Senior Accountants, Analysts & Appraisers Ass'n v City of Detroit*, 218 Mich App 263, 269, 553 NW.2d 679, 683 (1996) ("We review the grant of an injunction for an abuse of discretion."). An injunction is extraordinary relief that should only be sparingly granted. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8, 753 NW 2d 595, 599 (2008). A party seeking a temporary restraining order must establish three elements: "(1) justice requires that the court grant the injunction; (2) a real and imminent danger of irreparable injury arises if an injunction is not issued; and (3) there exists no adequate remedy at law*." Senior Accountants, Analysts & Appraisers Ass'n. City of Detroit*, 218 Mich App 263, 269-70, 553 NW 2d 679, 683 (1996); *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8, 753 NW2d 595, 599 (2008) (same)

"Whether a preliminary injunction should issue is determined by a four-factor analysis: harm to the public interest if an injunction issues; whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted; the strength of the applicant's demonstration that the applicant is likely to prevail on the merits; and demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted." *State Emps Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-58, 365 NW2d 93, 96 (1984).

"***The moving party bears the burden of proving an entitlement to injunctive relief***." *Detroit Fire Fighters Ass'n v Detroi*t, 482 Mich 18, 34; 753 NW2d 579 (2008) (emphasis added). The moving party carries this burden by proving that the four traditional elements favor the issuance of a preliminary injunction by a preponderance of the evidence. *Id.; Dutch Cookie Machine Co v Vande Vrede*, 289 Mich 272, 280; 286 NW 612 (1939)." *Taxpayers for Mich Constitutional Gov't v State*, 330 Mich App 295, 304, 948 NW 2d 91, 98 (2019) *overruled in part on other grounds by Taxpayers for Mich Constitutional Gov't v State,* 508 Mich 48, 972 NW 2d 738 (2021).

IV. Legal Analysis

A. EMU Administration Has Not Established the Showing Required to Overcome the Presumption Against Labor Injunctions

i. *EMU Administration Has Not Shown Irreparable Harm*

Michigan courts have long held that a public employee strike is not in and of itself evidence of irreparable harm. *Sch Dist v Holland Educ Assoc*, 380 Mich 314, 157 NW2d 206, 210 (1968). "[A] particularized showing of irreparable harm was, and still is, as our law is understood, an indispensable requirement to obtain a preliminary injunction." *Mich Coal of State Employee Unions v Mich Civil Serv Comm'n*, 465 Mich 212, 225-26, 634 NW2d 692, 699 (2001). "The mere

apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9, 753 NW2d 595, 600 (2008).

In *Sch Dist v Holland Educ Assoc*, 380 Mich 314, 157 NW2d 206, 210 (1968), the Michigan Supreme Court specifically rejected that a showing that a school will not immediately be staffed is sufficient to establish irreparable harm, stating:

> Simply put, the only showing made to the chancellor was that if an injunction did not issue, the district's schools would not open, staffed by teachers on the date scheduled for such opening. We hold such showing insufficient to have justified the exercise of the plenary power of equity by the force of injunction.

Id. at 326. The Court found this lack of proof of any additional harm was fatal to the request for an injunction.

Here as well, each of the purported harms articulated by EMU Administration are simply the result of the University not being staffed by one employee group for a short time. All other employees on campus, including Administration, Full and Part-Time Lecturers, clerical, and professional/technical remain on campus. Thus, nearly all other campus activities except classroom teaching and office hours remain operational. And importantly, the strike has only gone on for a very short time. The disruption to learning is thus no more than that of cancelled classes due to a snowstorm. EMU simply does not suffer irreparable harm each time it cancels classes for inclement weather for a few days. Indeed, in similar recent strikes in this County, Universities have ***not even sought*** injunctions until after the Strike went on over a week with no end in sight. *See Board of Regents of The University of Michigan v Graduate Employees Organization, American Federation of Teachers Local 3550,* Case No. 20-924-CL (Connors, J.) (Strike authorized September 8, 2020, Motion for TRO filed September 15, 2020).

Most tellingly, despite the representations in its brief and application, EMU Administration has stated publicly that classes are continuing normally without interruption. *See Sept. 4: Eastern*

Michigan University Statement Regarding the Faculty Union's Threat to Walk out on Eastern Michigan University Students, EMU TODAY (Sept. 4, 2022) (available at https://today.emich.edu/story/statement/12154) ("Classes on Tuesday and Wednesday, and for the remainder of the week, will take place as scheduled.") Their statements before and after the strike belie any assertion that a strike, which has just begun, has caused harm that cannot be repaired. Once again, schools, including public universities have contingencies for snow days and other events that may cause cancellation of classes which do not constitute irreparable harm. And most importantly, EMU Administration can easily avoid any harm to it or its students by negotiating the fair and equitable contract it claims it wants with its Faculty. There is simply no showing of irreparable harm, and the injunction should be denied on this basis.

Courts in other jurisdictions have denied injunctive relief in similar circumstances. In *Timberlane Regional Sch Dist v Timberlane Regional Educ Ass'n*, 114 NH 245, 317 A2d 555 (1974), the New Hampshire Supreme Court affirmed the denial of an injunction to stop an illegal strike by public employees. In that case, there was a lengthy delay in the start of negotiations due to the conduct of the public employer. *Id.* at 246-47. Then the parties had difficulty reaching resolution on items including salary schedules and academic freedom. *Id.* at 247. Despite efforts to achieve compromise on remaining positions and with mediation pending, the teachers called for a strike. *Id.* at 247-48. The Court held, "that in deciding to withhold an injunction the trial court may properly consider among other factors whether recognized methods of settlement have failed, whether negotiations have been conducted in good faith, and whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue." *Id.* at 251. Because the trial court had taken those factors into account when denying the injunction, the denial was affirmed. *Id.* at 251-52.

In *Sch Committee of Westerly v Westerly Teachers Ass'n*, 111 RI 96, 299 A2d 441 (1973), the Rhode Island Supreme Court quashed an injunction against an illegal teacher strike where the lower court granted the injunction *ex parte* on the verified complaint of the chairman of the school committee. There, the teachers authorized a strike before the first day of school when the teachers and school board failed to come to an agreement with the teachers on wages. *Id.* at 97-98. The Court held that the trial court should conduct a hearing and review what has gone on between the parties and determine whether an injunction should issue and if so, on what terms and for what period of time, prior to granting such relief. *Id.* at 104-105. It was not sufficient for the school district to simply claim that the strike was illegal in order to receive injunctive relief.

Finally, in *Sch Dist No 351 v Oneida Education Ass'n*, 98 Idaho 486, 491, 567 P2d 830 (1977), the Idaho Supreme Court held that testimony from the union and school board was required prior to the issuance of an injunction, despite a statutory prohibition on strikes by public teachers in Idaho. The Court reasoned that testimony would permit the parties to introduce evidence of unclean hands and bad faith bargaining that would potentially exclude the issuance of an injunction against a strike, even if statutorily illegal.

As in these cases, EMU Administration has not shown the "indispensable requirement" of irreparable harm. The injunction should therefore be denied.

ii. *EMU Has an Adequate Remedy at Law*

"Equally important is that a preliminary injunction should not issue where an adequate legal remedy is available." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9, 753 NW2d 595, 600 (2008). The Michigan Employment Relations Commission ("MERC") "has both exclusive jurisdiction over claims involving ULPs and the power, through resort to injunctive relief, to prevent or correct ULPs." *Id.* (citing PERA, § 16); *Lamphere Schools v Lamphere*

*Federation of Teacher*s, 400 Mich 104, 117; 252 NW2d 818 (1977). Accordingly, "the PERA itself provides plaintiffs with an adequate remedy at law to prevent or repair any of the alleged harms to plaintiffs." *Id.* Thus, there is no irreparable harm nor a lack of an adequate remedy at law. *Id.* "PERA provides plaintiffs with the statutory protection from any ULP committed by the city", and therefore, the EMU Administration cannot prevail on the third factor. *Accountants, Analysts & Appraisers Ass'n v City of Detroit*, 218 Mich App 263, 279, 553 NW2d 679, 687 (1996). Additionally, as described below, EMU Administration may avail itself of the remedies in MCL 423.206 but has not done so. As EMU Administration has potential remedies at MERC and under PERA, the extraordinary remedy of an injunction is not appropriate.

B. Traditional Equity Factors Weigh Against an Injunction

One who seeks equitable relief must come with clean hands. *Rose v Nat'l Auction Group,* 466 Mich 453, 463; 646 NW2d 455 (2002). The unclean hands doctrine "is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975) (*quoting Precision Instrument Manufacturing Co v Automotive Maintenance Machinery Co*, 324 US 806, 814 (1944)). "Any willful act that transgresses equitable standards of conduct is sufficient to allow a court to deny a party equitable relief." *New Prod Corp v Harbor Shores BHBT Land Dev, LLC,* 331 Mich App 614, 627; 953 NW2d 476 (2019). In *Mich State v Mich Employment Relations Comm*, 212 Mich App 472, 478; 538 NW2d 433 (1995), the Michigan Court of Appeals affirmed a Circuit Court opinion that struck a PERA provision mandating the issuance of injunctions against strikes without regard to traditional equity factors. Thus, an injunction prohibiting public employees from striking seeks equitable relief to which the unclean hands doctrine would apply. *See Mich*

AFSCME Council 25 v Woodhaven-Brownstown Sch Dist, 293 Mich App 143, 145; 809 NW2d 444 (2011) ("A court's issuance of a preliminary injunction is generally considered equitable relief.").

Here, as described above, EMU Administration' hands are far from clean The Administration has impeded every step of the bargaining process. First, it refused to bargain over Zoom when all prior collective bargaining business—including contract negotiations, just a year prior, and grievance meetings in the days leading up to negotiations—was done remotely, when transmission rates in the area were "high", and when the University had nonetheless begun relaxing its COVID protocols. Then, EMU Administration took retaliatory actions, including unilaterally requiring that all grievance meetings be in-person going forward, leading to significant litigation at MERC. Once the Union relented regarding in-person bargaining, EMU Administration still continuously insisted on its own location and COVID protocols for bargaining. And after bargaining finally began, it engaged in surface bargaining, constantly delaying in providing the Union with information and proposals in an effort to "wind down the clock" so that EMU-AAUP would have no choice but to let the current contract expire or accept an ungenerous last-second proposal that never even came. And even after expiration, EMU Administration refused to engage in any meaningful discussions with Union negotiators, delaying negotiations for days and surface bargaining when they finally did agree to meet.

EMU-AAUP would like nothing more than to agree to a successor agreement and get back to work, but the Administration's egregious conduct has led the Union to have no choice but to strike. Under traditional principles of equity and fairness, EMU Administration is not entitled to equitable relief in the form of an injunction. Instead, the EMU Administration should bargain in good faith with its faculty.

C. Following Amendments to PERA, MCL 423.206(6) Provides the Exclusive Remedy for Public Employee Strikes

The Michigan Public Employees Relations Act delineates between two types of Public Employees. First, MCL 423.201(e) broadly defines a public employee as "an individual holding a position by appointment or employment in the government of this state, in the government of one or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service . . . ." MCL 423.201(h) then sets forth a different, narrower definition for a "Public School Employer", defined as "a public employer that is the board of a school district, intermediate school district, or public school academy; is the chief executive officer of a school district in which a school reform board is in place . . . ." Here, EMU employees, as they are in an institution of higher learning and not a school district, are only "public employees" under the Act, not "public school employees." *See e.g. Bd of Control of E Mich Univ v Labor Mediation Bd*, 18 Mich App 435, 439; 171 NW2d 471 (1969).

Relevant to this Motion, there are differing provisions as to how strikes are treated between the two groups. MCL 423.206—which was included in the original version of PERA known as the "Hutchinson Act"—provides that a public employer may discharge a public employee who is engaged in a work stoppage after a hearing. In Public Act 112 of 1994, however, the Michigan Legislature added MCL 423.202a, which provides that "public school employers" could, in addition to termination, petition the Michigan Employment Relations Commission for a fine equal to one days pay for each day the employee was on strike. And importantly, MCL 423.202a(14) provides an explicit basis for an injunction, stating:

> (14) A public school employer, the superintendent of public instruction, or the attorney general may bring an action to enjoin a strike by public school employees in violation of section 2, and a bargaining representative may bring an action to

> enjoin a lockout by a public school employer in violation of section 2, in the circuit court for the county in which the affected public school is located . . .

The Legislature added no such language to the public employee strike language contained in MCL 423.206, which applies to the employees involved in the instant action. And importantly, in Public Act 194 of 2016, the Michigan Legislature amended ***both*** MCL 423.206 (to provide for consolidated hearings) and MCL 423.202a (a near complete re-write).

In *Sch Dist v Holland Educ Assoc*, 380 Mich 314, 325, 157 NW2d 206, 210 (1968), the Court held (well before the 1994 and 2016 amendments to PERA) that MCL 423.206 did not provide an exclusive remedy to public employers, and that public employers could seek a (disfavored) injunction in Circuit Court. However, this conclusion can no longer hold in the wake of the 1994 and 2016 amendments to the Act. The Michigan legislature has edited both sections and chosen to include an express statutory provision authorizing an injunction in MCL 423.202a for "public school employees", but not done so for other public employees whose strikes are governed by MCL 423.206. The only logical conclusion of the legislature's inclusion of an injunctive remedy for public school employers, but not other public employers, is that it intended only the former to be able to resort to state court injunctions. Under the statutory canon of *expressio unius est exclusio alterius*, the expression of a remedy in one necessarily implies an exclusion in the other. And as MCL 423.202a and MCL 423.206 clearly and unambiguously do not contain a statutory basis for injunctive relief, Plaintiff's application should be denied.

D. <u>An Injunction Requiring Faculty to Work Against Their Will Constitutes Involuntary Servitude Under the Plain Meaning of the U.S. and Michigan Constitutions.</u>

The Court in *Sch Dist v Holland Educ Assoc*, 380 Mich 314, 325, 157 NW 2d 206, 210 (1968), also made vague references to a constitutional challenge including one for involuntary servitude, without citing or discussing the relevant legal authority. Not being a basis of the opinion,

it appears to remain an open question whether the requested injunction would violate the prohibitions on involuntary servitude contained in both the U.S. and Michigan Constitutions. Specifically, U.S. CONST. AMEND XIII provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction

Art. I § 9 of the Michigan Constitution of 1963 provides parallel language. Specifically stating:

> Neither slavery, nor involuntary servitude unless for the punishment of crime, shall ever be tolerated in this state.

The order requested by the Plaintiff in this matter would certainly entail—by any common sense or legal definition—involuntary servitude. The workers striking at Eastern Michigan wish to withhold their labor in order to force their employer to bargain a contract. This is a voluntary choice. In so doing, they are subject to the risk of termination under the law. The proposed injunction would force them to abandon this voluntary decision under pain of contempt and criminal sanctions. Under the clear text of the Michigan and U.S Constitutions, such involuntary servitude, and hence the requested injunction, shall not exist. The striking employees simply cannot constitutionally be compelled by this Court to provide their employer labor involuntarily.

And again, while *Sch Dist v Holland Educ Assoc*, 380 Mich 314, 325, 157 NW 2d 206, 210 (1968), appeared to reject this argument, subsequent developments in the law render this judgment obsolete. For better or worse, a clear and growing body of law holds that judges should follow the text of the constitution and not include any policy or propose its own notions of what the law ought to be. *See NY State Rifle & Pistol Ass'n v Bruen,* 142 S Ct 2111, 2127 (2022) (focusing on a "textual analysis" of the "normal and ordinary" meaning of the words in the Second amendment and rejecting a balancing test for Second Amendment rights). *See also Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes,*

YOUTUBE (Nov. 25, 2015) https://www.youtube.com/watch?v=dpEtszFT0Tg. ("We're all textualists now").

The text of the 13th Amendment could not possibly be clearer: involuntary servitude ***shall not exist*** in the United States, except upon conviction of a crime. There is no "public employee" exception; there is no "irreparable harm" exception; there is not even a state-actor requirement. Under any textual reading, no person has the right to compel another person to work involuntarily. That includes this Court. As the requested order would constitute an order requiring involuntary servitude, this Court should reject it.

E. EMU Administration's Proposed Injunction Is Not Narrowly Tailored and Prohibits Constitutionally Protected Activity

Finally, EMU Administration's proposed request for relief includes prohibition against picketing and a permanent injunction against future strikes and picketing, which is both overbroad and in direct violation of the First Amendment. In *Thornhill v Alabama*, 310 US 88, 103 (1940), the US Supreme Court recognized that picketing regarding labor disputes was protected by the First Amendment and struck down a statute that outlawed picketing. Here, the EMU Administration seeks to enjoin the Union and its representatives from picketing EMU classes, extracurricular activities, and sporting events. (Pl's Br, Conclusion § C(3); Proposed Order ¶ 2(C) (enjoining Defendants from "from disrupting or otherwise interfering with EMU classes, extracurricular activities and sporting events, by picketing or other means").

This sentence implies that any picketing would be a "disruption" and thus prohibited, a clearly untenable position. And in any event, EMU Administration has offered no evidence that the Union has caused such disruption or interference to necessitate the extraordinary relief of an injunction that it asks for this Court to make permanent. The opposite is true; each and every picket or event sponsored by the Union has been a peaceful event without a hint of disruption.

At best, the Proposed Order is ambiguous and in violation of MCR 3.310(C), which requires injunctions to be in specific terms and "describe in reasonable detail, and not by reference to the complaint or other document, the acts restrained." At worst, it is a patently unconstitutional request for a prior restraint of Union member's right to free expression. *See Bantam Books, Inc v Sullivan,* 372 US 58, 70, 83 S Ct. 631, 639 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.")

Finally, EMU Administration's request to make this injunction permanent, (Pl's Br, Conclusion § D), is overbroad. As discussed above, the Michigan Supreme Court has rejected the approach that an injunction should issue in the event of any work stoppage. *Sch Dist v Holland Educ Assoc*, 380 Mich 314, 157 NW2d 206, 210 (1968). There must be an individualized inquiry regarding irreparable harm and the equities of the situation. Granting a permanent injunction is in no way tailored to the facts of an event that has potentially not even occurred yet. As such, Plaintiff's request for relief cannot be granted.

V. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that this Honorable Court DENY Plaintiff's Motion for Temporary Restraining Order, Order to Show Cause, and Preliminary Injunction, in its entirety and dismiss Plaintiff's Verified Complaint.

Respectfully submitted,
CROSON, TAUB, & MICHAELS, PLLC

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Dated: September 7, 2022

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was electronically filed with the Clerk of Court using the electronic system and served upon the attorney(s) of record for all parties to the above cause this 7th Day of September 7, 2022.

/s/ Adam M. Taub

VERIFICATION OF COUNSEL

STATE OF MICHIGAN)
)SS
COUNTY OF WASHTENAW)

Joseph X. Michaels, being first duly sworn, deposes and states that he serves as outside General Counsel to the Eastern Michigan University Chapter of the American Association of University Professors, that he has read the Statement of Facts in the attached filing, and that, he verifies on behalf of the Eastern Michigan University Chapter of the American Association of University Professors that the foregoing is true to the best of his knowledge, information, and belief.

Eastern Michigan University Chapter of the
American Association of University Professors
By: Joseph X. Michaels
Its: Outside General Counsel

Dated September 6, 2022

Subscribed and sworn to before me
This 6th day of September, 2022

Notary Public
Washtenaw County, Michigan
My commission Expires: 6.12.2029

Mary Conlin-Moore
Notary Public State of Michigan
Washtenaw County
My Commission Expires 6/12/2029
Acting in the County of Washtenaw