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August 4, 2020 Client No. 304.00

VIA EMAIL

Jourden Lamar
Chair of the Humboldt State University Center Board of Directors
1 Harpst St.
Arcata, CA 95521

Re: HSU Directives for the Operations of the University Center

Chairperson Lamar and Members of the Board:

Originally, my office was requested by Dave Nakamura to provide an opinion advising the Humboldt State University Center (UC) regarding the ability of the Humboldt State University (HSU) and its President or delegatees to unilaterally modify the operations of UC, including eliminating commercial services and activities of the UC. However, we were informed late last week that Mr. Nakamura has been placed on administrative leave and relieved of his current position with the UC. Accordingly, we are providing this opinion directly to the Board.

As discussed in more detail below, an auxiliary organizations is a distinct legal entity that is designed to provide essential campus services consistent with, but separately from, the educational mission of the university which it directly serves. As a separate non-profit public benefit corporation, the UC's business operations and activities are governed by its own Board of Directors, with HSU having oversight responsibilities of the UC to ensure that it is operating consistent with its Operating Agreement and the policies of the California State University system (CSU) and HSU campus, and that the corporation is fiscally viable. Additionally, HSU's President may assign programs and activities to campus auxiliaries. However, if HSU unilaterally assumes the management and operations of the campus' dining services and Student Recreation Center (SRC) activities and functions performed by UC, HSU will likely have exceeded its authority by violating the Operating Agreement between the UC and the CSU Trustees and its Chancellor.

BACKGROUND

The UC is an auxiliary organization authorized by, and in good standing with, the Board of Trustees of the California State University and its duly qualified Chancellor, serving to promote the welfare of Humboldt State University and its campus community. Established in 1970, the UC is a non-profit public benefit corporation governed by its Board of Directors composed of representatives from the University's student body, faculty, administration, staff, and alumni, as wells as the campus' surrounding community.

The UC's operating agreement with the CSU Trustees, effective through June 30, 2028, indicates that the UC will manage, operate and administer the campus commercial services relating to the activities of the bookstore, food services, campus services; and, the campus student union programs relating to recreational and wellness, student recreation and fitness, and professional performance and entertainment events. In 2011, the operation of the bookstore was outsourced to a third party. (Audit of

HSU Auxiliaries (2016), p. 17; UC 2019 Financial Statements, p. 10.) According to the UC financial statements, its primary activities are to develop, finance and operate the University Center building and the dining services on the HSU campus. The UC building houses the major operations of the UC, including the bookstore, dining operations, Center Arts, UC activities, and various clubs and activities. UC also leases space to Associated Students (AS) and offers a variety of conference spaces, meeting rooms, and lounge/study areas both within the UC facility and in Nelson Hall East. UC is primarily supported by dining sales and student fees, with additional revenue from the outsourced bookstore operations and student programming services for Center Activities, SRC, Humboldt Bay Aquatic Center and Center Arts. (Id. at 5.)

It is our understanding that on July 9, 2020, HSU directed Mr. Nakamura, the Executive Director of the UC, to execute a contract with Aladdin Food Management Services on the behalf of the UC for Aladdin to operate and manage the dining services that are currently managed and operated by UC. In reviewing Aladdin's draft contract, however, the contracting parties in revision 4 of the draft agreement were HSU and Aladdin; the UC was not a party to the agreement. Revision 5 did not specifically identify the other party to the contract with Aladdin. Aladdin's contract proposal indicated that the effective date for the contract was July 20, 2020. It is our understanding that HSU has not conducted a formal budget review in consultation with the UC. It is also our understanding, to the best of UC's knowledge, that HSU has not complied with statutorily mandated bidding process intended to stimulate fair and open competition, protect the public from misuse of public funds, eliminate favoritism, fraud, and corruption, and to obtain the best value, as required under CSU policies. (CSU Contracts and Procurement Policy (April 1, 2020), Sec. II ("Fair and Open Competition").)

On July 13, 2020, the HSU President issued a memorandum to the HSU Vice President for Administration and Finance, the HSU Vice President for Enrollment Management and the HSU Director of Athletics and Recreational Sports, pertaining to the programmatic oversight of UC, and announcing that, "effective immediately," UC's reporting structure was going to be "across multiple divisions" and this change "may impact the purpose and bylaws of the UC Board and [the] operating agreement." The HSU President further "recommended the purpose, bylaws, and other related items be updated and made current to reflect these changes at this time," and directed "all internal charges from [UC] to other campus departments" to be suspended until they are reviewed and "appropriate updates are finalized for the board." The HSU President's chief of staff was to inform the UC Board chairperson.

To our knowledge, no contract has been executed between HSU and Aladdin to date. Nevertheless, on or about July 20, 2020, Aladdin representatives arrived on HSU's campus and began developing plans for "transitioning" the campus' dining services from the UC to Aladdin. During the July 2020 meeting of the AS, VP Meriwether "shared details on changed [*sic*] to HSU Dining Services and the Bookstore," presenting the UC's Operating Agreement and HSU's intent to proceed with a request for proposals (FRP) for HSU dining services. (A.S. Announcement.) The RFP timeline was to begin on or about August 1, 2020 and extend through the Spring 2021 semester. (RFP Timeline.)

During a transition meeting on July 28, 2020, Aladdin stated that it is "not making any money this year," but that it sees it as an advantage for the RFP process. Additionally, Aladdin has requested potentially proprietary information from the UC relating to its vendors, ordering history, contract pricing, accounting and cash flow, and other information. It is further our understanding that if the UC's dining services are dissolved by HSU, it may result in approximately 90% of UC's employees being laid off. Aladdin has asked the UC to consider remaining the "employer" of dining service employees for the 2020-2021 academic year, although Aladdin would be the entity directing and managing all aspects of the employment relationship. Additionally, the VP Meriwether has requested a list of the UC's student employees in dining services for the stated purpose of communicating with each of them that they will have a job and that the "outsourcing" of dining services is "not a big deal."

It is our understanding that HSU Housing, a self-supporting entity of the State, may assume the UC's dining services and subsequently outsource to Aladdin. It is further our understanding that HSU administrators have indicated an intent to have the Athletics Department operate the SRC. If this occurs, there have been indications that a portion of student fees that is associated with the SRC will be re-directed to the Athletic Department. Moreover, while UC has purchased and inventoried the equipment, supplies and technology necessary for the activities and operation of the SRC, there are indications that HSU and its Athletic Department may seek to assume ownership of UC's property.

ISSUES PRESENTED

1. Whether HSU and its President has the authority to substantially change the Operating Agreement between the UC and the CSU Board of Trustees, including removing a primary function and activity of the UC such as dining services?

2. Whether the UC is obligated to provide the HSU Vice-President for Enrollment Management, Jason Meriwether, a list of its student employees for the stated purpose of communicating with each of them that they will have a job and that the "outsourcing" of dining services "is not a big deal"?

3. Whether the UC is required to disclose its proprietary information regarding dining services to Aladdin – which is essentially the competition when submitting proposals for HSU's dining services solicitation for bids – without any executed contract between Aladdin and HSU (or the UC)?

4. Whether it is appropriate for the UC to remain the "employer" of dining service employees for the 2020-2021 academic year, despite Aladdin being the operator and manager of dining services?

SHORT ANSWERS

1. No. HSU does not have the authority to unilaterally and substantially change the Operating Agreement between the UC and the CSU by removing the dining services portion of the UC's operations without properly proceeding through the mechanisms established by statute, regulations, policies of the CSU Board of Trustees, and the terms of the Operating Agreement. Further, HSU assuming dining services from the UC would run contrary to the Operating Agreement entered into between the Board of Trustees of the CSU and its Chancellor and the UC to operate the dining services. Also, by unilaterally acting to cause the UC to no longer be fiscally viable, HSU is effectively dissolving the corporation and the auxiliary's status as being "in good standing" with the Chancellor's Office without going through the proper procedures.

2. Yes. The UC must provide HSU with a list of employee names to the extent that this information is subject to public inspection under the McKee Transparency Act. However, the UC is not obligated to disclose the personal contact information of its employees. Additionally, if the HSU Vice President were to contact the UC's employees to "assure"

them that they have a job and that outsourcing "is not a big deal," this act would be on the behalf of HSU, not the UC.

3. No. Irrespective of whether Aladdin executes a contract with HSU, the UC is not required to disclose proprietary information to Aladdin. Moreover, the UC likely is not required to disclose proprietary information to HSU, as such a disclosure to a public entity could subject what is intended to be proprietary information to disclosure under the CPRA.

4. Likely not. By remaining the "employer" of dining service employees that are, in fact, under the control and direction of Aladdin, a private for-profit company, the UC would be operating outside the scope of its Articles of Incorporation and the activities and functions set forth in its Operating Agreement with the CSU Board of Trustees. While such an agreement may provide the UC with a new revenue source if it were to lose dining services, it would also come with a continuing risk of liability, including tax liability for the income that is not related to its exempt purpose under Internal Revenue Code 501(c)(3) and California Revenue and Taxation Code Section 23701d.

DISCUSSION

I. Authority and Control of the UC Generally

A. The Structure and Operations of the UC

California State University auxiliary organizations are organized and operated for the benefit of the California State University. Specifically, CSU auxiliary organizations "promote and assist" the CSU Board of Trustees ("Trustees") by "engaging in activities that are essential and integral to the mission and purpose of the California State University." (Educ. Code § 89913(b); see also 5 CCR § 42401.) Auxiliary organizations generally exist for the purpose of providing essential activities and performing functions closely related to, but not normally included as a part of, the regular instructional program of the university. (See *Associated Students v. Board of Trustees* (1976) 56 Cal.App.3d 667, 669; see also 5 CCR § 42401(b)-(d).) Whether due to limitations on State funding or restrictions under California law or regulations, the CSU Trustees and their Chancellor have found that, despite certain functions being important to the mission of the CSU and its campuses, those functions "are more effectively accomplished by the use of an auxiliary organization rather than by the Campus." (Operating Agreement, Sec. 1.)

Under the Education Code, California State University auxiliary organizations are "independently governed corporations that are legally separate from the California State University." (Educ. Code § 89913(c).) In this instance, UC is organized and operated as a tax-exempt, nonprofit public benefit corporation formed for charitable purposes. (Restated Articles of Incorporation; Corp. Code § 5111.) Under federal and State law, an exempt organization, such as UC, is exempt from taxation if it is organized and operated for exempt purposes, including charitable, religious, educational, scientific, or literary purposes. (Internal Revenue Code (IRC) § 501(c)(3); Revenue and Taxation Code (RTC) § 23701d(a).) Specifically, an exemption organization must not be organized or operated to benefit private interests. (IRC § 501(c)(3); RTC § 23701d(a).) Further, the assets of the organization must be irrevocably dedicated to exempt purposes, including upon dissolution or if it becomes impossible to perform the organization's specific purposes. (Id.)

As a California nonprofit public benefit corporation, the activities and affairs of the UC are "conducted and all corporate powers [are] exercised by or under the direction of the board [of directors]." (Corp. Code § 5210(a).) Corporate powers include the ability to enter into contracts, bring or defend a legal action, or transfer property. (Corp. Code § 5140.) The UC's Board of Directors ("Board") may further delegate the management of the corporation's activities and day-to-day operations, however its function to govern cannot be delegated. (*Kennerson v. Burbank Amusement Co.* (1953) 120 Cal.App.2d 157.) Unlike many other nonprofit public benefit corporations that determine the number, composition and, if appropriate, voting membership of their respective boards (Corp. Code §§ 5150-5153), a CSU auxiliary organization's board of directors is required to include in its voting membership university administrators, staff, faculty, non-campus personnel, and students. (Educ. Code § 89903(a)(1); 5 CCR § 42602(b)(2).) Moreover, where an auxiliary organization is primarily funded by student fees collected on a campus or system-wide basis, Education Code section 89903 requires that at least a majority of the board be students with full voting privileges, unless the Trustees determine that there are legal or contractual barriers. (Educ. Code § 89903(a)(2).) Nevertheless, as a nonprofit public benefit corporation, it is UC's Board that directs UC's business, affairs and activities.

Although independently governed and legally separate entities, CSU auxiliary organizations are prohibited from operating outside the regulation and oversight of the CSU system. Specifically, auxiliary organizations must comply with the regulations and policies established by the CSU Trustees, the executive orders ("EO") of the CSU Chancellor and, if serving a single campus, the policies and procedures governing the campus. (5 CCR § 42402; Executive Order ("EO") 698.) Further, the CSU Trustees have determined that it is appropriate for auxiliary organizations to perform certain "essential functions" that are "integral part[s] of the educational mission of a campus" and the CSU. These functions include managing, operating and administering bookstores, food services, campus services, instructionally-related programs and activities, and student union programs, such as recreational and wellness programs, professional performance and entertainment events, so long as they are conducted in accordance with applicable policies, rules, and regulations. (5 CCR § 42500(a); Operating Agreement Sec. 2.)

The structure and operation of CSU auxiliary organizations such as UC are subject to many statutory frameworks, including those governing (1) tax-exempt corporations, i.e. federal Internal Revenue Code and California's Revenue and Taxation Code; (2) nonprofit public benefit corporations, i.e. California Corporation Code; and (3) CSU auxiliary organizations, i.e. California Education Code and its implementing regulations in Title 5 of the California Code of Regulations. Nevertheless, UC's Board remains responsible for directing the business, activities and affairs of UC, including, but not limited to, planning the year's programs and activities, adopting corporate policies and long-term plans, and approving all expenditures and fund appropriations. (Educ. Code § 89904.)

B. <u>Oversight and Responsibilities of HSU in Relation to UC</u>

Although CSU auxiliaries are legally separate corporations from the CSU system and the campuses they serve, they are designed to provide essential campus services consistent with the educational mission of the university. Pursuant to the Education Code, Title 5 and subsequent delegations of authority or responsibility, numerous entities and positions have the ability to impact the operations of a campus auxiliary organization including the CSU Trustees, Chancellor, campus president, campus chief financial officer ("CFO"), and the auxiliary's governing board. Each has oversight responsibilities and, in some instances, the authority to significantly limit or impair the operations of an independently governed and legally separate corporate entity.

An auxiliary organization that primarily serves a single campus, as is the case with the UC, is required to *report* to the campus president and chief financial officer (CFO) in a variety of instances. Specifically, the campus Chief Financial Officer (CFO) is charged with overseeing the auxiliary organization to ensure compliance with the objectives stated in Section 42401 of Title 5, which include: (1) providing the fiscal means and the management procedures that allow the campus to carry on activities providing those instructional and service aids not normally furnished by the State budget, (2) providing effective operation and to eliminate the undue difficulty which would otherwise arise under the usual governmental budgetary, purchasing, and other fiscal controls, and (3) providing fiscal procedures and management systems that allow effective coordination of the auxiliary activities with the campus in accordance with sound business practices. (5 CCR § 42401; Operating Agreement, Sec. 3.) Every five years, the campus must review an auxiliary to ensure the operating agreement between the auxiliary and the CSU is current and the auxiliary's activities are in compliance with the agreement. (*Id*.; EO 1059.) The CFO's review is confirmed by either updating the operating agreement or submitting a letter to the campus president with a copy to the Chancellor's Office certifying that the review was conducted. (5 CCR § 42401; Operating Agreement, Sec. 3.) As part of the periodic review of an auxiliary's operating agreement, the campus president "should examine the need for each auxiliary." (EO 1059(II)(B).)

Further, the campus president "is responsible for the educational effectiveness, academic excellence, and general welfare of the campus, over which he [or she] presides." (5 CCR § 42402.) Accordingly, with regard to a campus auxiliary organization, the campus president is responsible for each of the following:

(a) Ensuring the propriety of the auxiliary's expenditures (Educ. Code § 89900(b));

(b) Ensuring the integrity of the auxiliary's financial reporting (*Id*.);

(c) Exercising prudent judgment in the utilization of auxiliaries (EO 1059 (I)(C);

(d) Ensuring fiscal viability the auxiliary (*Id*.);

(e) Requiring auxiliaries submit programs and budgets for review at a time and in a manner determined by the president (5 CCR § 42402);

(f) Reviewing the programs and appropriations of the auxiliary and ensuring compliance with CSU and campus policy (5 CCR § 42402);

(g) Requiring discontinuance of a program or appropriation if the campus president determines it to be inconsistent with CSU or campus policy (*Id*.);

(h) Compiling and submitting to the Chancellor the public relations policies of campus auxiliaries (5 CCR § 42502(i); and

(i) Ensuring costs incurred by CSU for services, products, and facilities provided to an auxiliary are properly and consistently recovered (EO 1000).

From the list above, HSU's responsibilities for oversight are to ensure UC conducts its business in compliance with the Education Code, the policies of the CSU and campus, and the operating agreement. To make these necessary determinations, HSU is required to *review* UC's expenditures, operations, and activities. For the HSU president to exercise responsibility over the entire campus program, all campus auxiliaries must submit annual budgets and programs to the HSU president for review and approval. (5 CCR § 42402.) Therefore, once UC's Board approves an annual budget, it is required to submit the budget to the HSU President for approval. If the HSU President determines UC's budget, expenditures or a program is not consistent with CSU or HSU policies, the President may instruct UC to refrain from a specific program or appropriation until further review and, if necessary an appropriate adjustment is made. (*Id.*)

As part of the oversight authority, a campus president also has the authority to utilize campus auxiliaries. Specifically, as delegated by and through the Chancellor's Executive Order 1059, a campus president is "responsible and accountable for prudent judgment in the utilization of campus auxiliaries …" (EO 1059(I)(C).) Included within that responsibility is the authority to determine whether the campus or an auxiliary should have ownership of a campus program or activity. (EO 1059(II)(C); Operating Agreement, Exhibit A, "CSU Auxiliary Organization Compliance Guide," ("Exhibit A") Sec. 10.6.2(a).) For a campus president to *assign* certain campus activities or programs to an auxiliary requires the approval of the CSU Chancellor or designee, as well as the execution of a written agreement. (Operating Agreement, Exhibit A, "CSU Auxiliary Organization Compliance Guide," Sec. 10.6.) When an auxiliary accepts ownership of a program or activity "it also assumes the associated legal obligations and liabilities, fiscal liabilities, and fiduciary responsibilities." (EO 1059(II)(C).) Indications of ownership include:

- Authority and discretion to contract for services or materials required by the activity
- Responsibility for business losses
- Legal liability as an owner or principal entity
- Fiduciary obligations associated with the activity
- Responsibility for establishment of operating and administrative policies
- Primary control or discretion over the expenditure of funds

(EO 1059(II)(C).)

A determination of ownership of an activity or program is not necessarily tied to:

- Employment of individuals granted signatory authority related to the activity (e.g., person or persons who can sign a letter or other related documents on behalf of a principal entity)
- Ownership of the facility where the activity occurs
- Authority to request an expenditure
- Academic or similar programmatic control over the activity

(*Id*.; see also Exhibit A, Sec. 10.6.3.)

Notwithstanding the foregoing, there appears to be no provision that expressly authorizes a campus president to remove a campus activity or program from an auxiliary. Further, if assigning an activity to an auxiliary that is a willing-recipient requires the approval of the CSU Chancellor, it is reasonable to presume that removing a contracted function from an auxiliary in good standing with the Chancellor would, at minimum, also require the approval of the Chancellor or designee. (5 CCR § 42406.) Moreover, an auxiliary that fails to meet one or more of the basic criteria for remaining in good standing may only be placed on probation or suspension if the Chancellor follows specific procedures, including providing the auxiliary with notice of the violations and opportunity to respond.

Accordingly, similar to corporate parent companies, the CSU and the university campus are able to "exercise general executive responsibility for the operations of [a campus auxiliary] and review its major policy decisions" without demonstrating the existence of control or violating an auxiliary's separateness.

(*Sammons Enterprise v. Superior Court* (1988) 205 Cal.App.3d 1427, 1434.) Further, the management of any auxiliary's day-to-day operations may be delegated by its board of directors to any person(s), company or committee. (*Ibid*.; Corp. Code § 5210; see also *Oliphant v. Home Builders* (1917) 34 Cal.App.720.)

II. <u>HSU's Intended Conduct Potentially Results in the Unilateral Dissolution of the Dining Services of the UC Without the UC's Consent</u>

The types of actions being contemplated at HSU have occurred before in the CSU system. Specifically, as indicated above, CSU auxiliary organizations are "entities designed to provide essential campus services consistent with the educational mission of, but separately from, the university they directly serve." (1988 Cal AB 1643, 1988 Cal Stats. ch. 1615.) When the president of CSU Chico proposed dissolving the interest of the Associated Student, a campus auxiliary, in providing commercial services and to establish other auxiliaries to operate the commercial services, it raised "serious questions about the potential for liability to the state." (Id. at Sec. 1(a)(4).) In 1988, the State Legislature responded by enacting Education Code Section 89905.5 in order "to ensure that auxiliary organizations continue to be operated in a manner that is separate from, but related to, the state so as to protect the state from possible liability." (Id. at Sec. 1(a)(5).)

Education Code Section 89905.5 prohibited an auxiliary of CSU Chico from discontinuing its commercial services "without providing the campus with adequate notice of its intent to discontinue the service, and the opportunity to continue the service through other means." (Educ. Code § 89905.5(a).) Further, until specific conditions are met, "[n]o commercial service operated by an auxiliary organization on the California State University, Chico, campus or any aspect of the management of the commercial services shall be taken over by the Trustees of the California State University, the Chancellor of the California State University, the president of a campus of the California State University, or another auxiliary organization." (Educ. Code § 89905.5 (b).) Those conditions are:

(1) The entity seeking to assume all or part of the management of the commercial service has demonstrated that the commercial service has substantial programmatic or financial difficulties.

(2) The governing board of the auxiliary organization currently operating the commercial service has been provided adequate opportunity to respond to the concerns demonstrated pursuant to paragraph (1).

(3) The governing board of the entity seeking to assume all or part of the management of the commercial service has approved the assumption of the new programmatic or financial responsibility.

(4) The auxiliary organization currently operating the commercial service has been provided adequate compensation for any losses, including, but not limited to, property, inventory, services, or employees directly resulting from the assumption of all or part of the operation of the commercial service by the entity.

(Educ. Code § 89905.5(b).)

Where an entity is going to assume responsibility for commercial services, it must first "be established as an official [CSU] auxiliary organization operating separate from, but related to, the university of service so as to protect the state from all possible liability associated with the operation of commercial services." (Id. at (c).)

If Education Code Section 89905.5 applied to all CSU campuses, the attempts of HSU to subvert the functions and operations of the UC, as well as the terms and provisions of the Operating Agreement, would be a clear violation of the Education Code. Specifically, food services are commercial services generally grouped with bookstores and other campus services, separate from housing. (5 CCR § 42500.) It is our understanding that, while HSU, its housing department, and Aladdin appear to have an interest in assuming the dining services of the UC, neither have demonstrated that the dining services, as operated by the UC, have substantial programmatic or financial difficulties. Further, the UC has not received any notice of substantial programmatic or financial difficulties, nor been given opportunity to respond to any concerns. Nor has HSU or CSU approved the assumption of the dining services and resulting financial responsibility. Moreover, it is our understanding that Aladdin is a private company and has not been established as an approved auxiliary organization of the CSU. Further, if Section 89905.5 applied to HSU, either HSU or Aladdin would be required to adequately compensate the UC for its losses directly resulting from the assumption of its dining services.

As indicated above, HSU has the authority to review the UC's operating agreement and its activities to ensure the activities are compliant with the operating agreement and the agreement is current. (EO 1059; UC Operating Agreement Sec. 3.) As part of the periodic review, the HSU President "should examine the need for each auxiliary and look at efficiency of the auxiliary operations and administration." (Id.) However, as indicated above, as a nonprofit public benefit corporation, the activities and affairs of the UC are "conducted and all corporate powers [are] exercised by or under the direction of the board [of directors]." (Corp. Code § 5210(a).) Accordingly, HSU does not have the authority to unilaterally direct the day-to-day business operations of the auxiliary, nor the authority to dissolve an auxiliary organization. It is our understanding that the UC's activities, including the dining services are consistent with its Operating Agreement. It is further our understanding that, pursuant to UC policy 201, the UC's budget was sent to the HSU President in May of 2020. To date, the UC has not received the President's approval. However, according to the Board of Directors meeting minutes from April 9, 2020, the UC's 2020-21 draft budget indicated a deficit of approximately $1.3 million. (See Meeting Minutes, p. 4.)

In his memorandum on July 13, 2020, the HSU President indicated that he reviewed the "need" for each campus auxiliary, but did not indicated whether HSU no longer needs the UC. In fact, by contracting with another entity to assume the UC's dining services, HSU indicates that dining services are needed by the campus. However, the CSU Board of Trustees and the CSU Chancellor have already determined that it is not only necessary, but also in the best interests of the CSU and HSU to have the commercial dining services managed, operated or administered by the UC. (Operating Agreement, Sec. 2; Exhibit A, "Compliance Guide," Sec. 4.5.1(b).)

Irrespective of this determination, HSU appears to be attempting to contract directly with Aladdin for food service management, without complying with statutorily required bidding processes. Further, the unilateral outsourcing of a major program of the UC fails to respect the UC's separate role and relationship, existing functions, and the applicable decision-making standards.

By dissolving the interest of the UC in the campus dining services, HSU further increases the liability of the CSU system. Specifically, if there were a breach of the terms of HSU's contract with Aladdin, HSU will have placed itself and the CSU system at risk for non-compliance with all statutes, regulations and other requirements necessary for public contractual agreements. HSU would further essentially be acting in direct contradiction of the CSU Board of Trustees and Chancellor and in violation of the

Operating Agreement if it were to contract directly with a for-profit entity to manage the campus' dining services. Further, if HSU does decide to directly outsource campus food services and assume the function, the existing operating agreement and property lease between the CSU and the UC would need to be amended by all parties to delete the food services function. (Operating Agreement Sec. 2, 20 and 25.) Such an amendment would require approval by not only the HSU President, but the UC board and the CSU Chancellor's Office as well.

Unilateral termination of all or any portion of the 2018-2028 Operating Agreement and Lease between the CSU and the UC does not appear to be contemplated by the parties to the document. By its terms, only the CSU may terminate the operating agreement, and then only for breach or failure to comply with an agreement requirement and with 90-days written notice (including a "curing" provision). (*Id.*, Sec. 22.) In such a case, the leased premises could be taken back for "civil defense" purposes or in a national emergency, or, in the event that the premises are required for an unanticipated CSU need or exclusive use, with sufficient notice. (*Id.*, Sec. 25.)

Finally, UC's budget analysis indicates that if Dining Services are outsourced and the SRC student fee is directed to away from the UC, the financial loss likely will cause the UC to no longer be financially viable and will effectively result in its dissolution. Generally, the process for formally dissolving a nonprofit public benefit corporation requires the organization's Board of Directors to vote to approve the winding up and dissolution of the UC, a certificate evidencing that election, and a copy filed with the Attorney General and the Secretary of State. (Corp. Code § 6611(a).) The certificate must be signed and verified by at least a majority of the Directors then in office and it must set forth that the UC has elected to wind up and dissolve by election of its Board of Directors and evidence that the UC does not have members. (Id. at (b).) Prior to the directors of an auxiliary acting to dissolve the organization, they will take action to accomplish a dissolution plan that is consistent with applicable laws and statutes.

During the winding up process, the UC must request a letter from the Office of the Attorney General that either waives objections to the distribution of the nonprofit corporation's assets or confirms that it has no assets. The property and assets of the UC are irrevocably dedicated to charitable, scientific, literary or educational purposes. (Restated Articles of Corporation, Arts. 2.2, 2.3, and 2.5(b)-(c).) The UC is not organized for the private gain of any person and "[n]o part of its net earnings will inure to the benefit of its directors, trustees, officers, private shareholders or to individuals." (Arts. 2.2 and 2.5(b).) If UC were to wind up and dissolve, it's Articles of Incorporation provide that, "after paying or adequately providing for the debts, obligations, and liabilities of the Corporation, all net assets, other than trust funds," are to be distributed to a successor organization that is organized and operated for charitable, scientific, literary or educational purposes, and is approved by the HSU President and the CSU Chancellor. (Restated Articles of Corporation, Art. 2.5(c).) Additionally, the UC should file its final returns and any outstanding returns.

Once the UC is wound up, a majority of the Directors then in office must sign and verify the certificate of dissolution. (Corp. Code § 6615(a).) The signed and verified certificate of dissolution must be filed with Secretary of State and accompanied by either a written confirmation from the Attorney General that the UC has no assets or a written waiver of objections to the distribution of the UC's assets by the Attorney General. (Id. at (b) and (c).) The Secretary of State's acceptance of the certificate of dissolution will cease the UC's existence. (Corp. Code § 6615(c).) After the Secretary of State accepts the certificate of dissolution, it will then notify the Franchise Tax Board and the Attorney General's Registry of Charitable Trusts of the UC's dissolution. However, the Attorney General requests that a dissolving entity also provide notice to its office to ensure that the entity is withdrawn from its registry.

III. HSU is Able to Demand Limited Information Regarding the Employees of the UC

Under the California Constitution, all people have an inalienable right to pursue and obtain privacy. (Cal. Const. Art. I § 1.) However, an individual's right to privacy is not limitless or absolute. Rather, the expectation of privacy must be reasonable in light of the customs, practices, and physical settings surrounding particular activities. (Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1.) Additionally, reasonable limitations that are not unduly burdensome are permissible. (In re Alcala (1990) 214 Cal.App.3d 345.) Violations of another's right to privacy are actionable as invasions of privacy. Actionable invasions fall into four distinct kinds of activities: (1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness. (Hill, supra, 7 Cal.4th at 24.) Each "kind of activity," however, requires the existence of a legally protected privacy interest, a reasonable expectation of privacy in the circumstances, and a showing that the invasive conduct was unwarranted and highly offensive. (Hernandez v. Hillsides, Inc. (2009) 47 Cal.4th 272.)

The names and salaries of California public employees are information generally in the public domain under California Public Records Act, applicable to government agencies. (International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319, 327 (Local 21).) While the UC is not a government agency, thus not subject to the CPRA, as a CSU auxiliary organization it is subject to the McKee Transparency Act, which requires the UC to make available to the public for inspection the disclosable records that it maintains. (Educ. Code § 89913 et seq.) Information that is exempt from disclosure under the CPRA is also exempt under the McKee Transparency Act. (Educ. Code § 89915.5.) Accordingly, while the identity of auxiliary employees is not considered "exempt" from disclosure, the personal contact information of such employees would be exempt to the extent that disclosure would constitute an unwarranted invasion of personal privacy. (Educ. Code §§ 89913, 89916(a)(5); Govt. code § 6254.3; see also, Local 21, supra, at p. 329-330.)

In contrast, the "directory information" of students is generally disclosable under both the federal Family Educational Rights and Privacy Act (FERPA) and the California Education Code. However, before disclosing this information, the educational institution must notify students of the information that may disclosed, and the scope of access allowable for "legitimate educational interest" to "officials and employees." (20 USCS § 1232g; 34 C.F.R. 99.31; Educ. Code §§ 76210(b); 76240; 76221(a)-(j).) Directory information includes name, address, phone number, and email address. (34 C.F.R. 99.3; see also HSU Catalog 2020-2021, p. 305.)

Accordingly, while the UC may provide names of its employees to VP Meriwether, it is not required to provide their contact information. Mr. Meriwether may obtain that information from the directory information that HSU retains for its students, subject to is campus policies. (E.g. HSU Email Policy (Policy No. P16-01).) Additionally, the UC should consider adopting a "records access" policy that would clearly set forth the information it considers disclosable or non-disclosable because the information would be against the UC's fiduciary interests. It is our understanding that the AOA may have a template records access policy for use by its members.

IV. The UC is not Required to Disclose Proprietary Information to Aladdin Food Service Management

Records that are exempt from disclosure generally include corporate proprietary information. (Educ. Code § 89913(d); Govt. Code § 6254.15.) Under the McKee Transparency Act, "[a]ccess to records used, owned, or maintained by auxiliary organizations must be balanced by the need to protect … an auxiliary organization's fiduciary interests." (Educ. Code § 89913(d).) Trade secrets are not subject to disclosure. (Educ. Code § 89916.5(a).) For the purposes of the McKee Transparency Act, "trade secrets" means:

> [I]nformation including a formula, pattern, compilation, program, device, method, technique, or process, that does both of the following:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use.
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Educ. Code § 89916.5.)

Further, the information must be redacted before turning over the auxiliary organization's records pursuant to a public request. (Id.) This redaction must not be overlooked in order for the UC to demonstrate that it has affirmatively taken reasonable steps to protect its information. (Civ. Code § 3426.1.)

Moreover, the UC should not produce any proprietary information to HSU. Specifically, the UC must "maintain adequate records and …prepare such periodic reports showing its operations and financial status as may be required," for audit by the CSU Board of Trustees and its Department of Finance. (5 CCR § 42404) Additionally, the UC must submit its programs and budgets to the campus president for his or her review. (5 CCR § 42402.) However, there would be no reason for the UC's budget to include product quantity per order, nor would it include vendor information or contract prices. Further, financial data, proprietary information, and trade secrets that are produced by the UC to HSU and then maintained by HSU are subject to disclosure under the CPRA if the public interest served by disclosure of the record outweighs the public interest served by not making the record public. (San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762; California State University, Fresno Assn., Inc. v. Superior Court (2001) 90 Cal.App.4th 810, 836.) Accordingly, with some exceptions, it is recommended that the UC not include in its records and reports to the CSU and HSU information that is a trade secret if those records and reports will be maintained by the CSU or HSU.

Further, even if HSU executed a contract with Aladdin, it would not entitle Aladdin as a third-party private contractor to the UC's proprietary information. Absent the consent of the UC, disclosure of its trade secrets to a competitor is not required if the information is not public.

V. Student Employees Likely Should Not Remain Employees of the UC if Aladdin Were to Receive a Contract to Operate HSU's Dining Services.

As discussed above, California State University auxiliary organizations are organized and operated for the benefit of the California State University. Specifically, CSU auxiliary organizations "promote and assist" the CSU Board of Trustees by "engaging in activities that are essential and integral to the mission and purpose of the California State University." (Educ. Code § 89913(b); see also 5 CCR § 42401.) Auxiliary organizations generally exist for the purpose of providing essential activities and performing functions closely related to, but not normally included as a part of, the regular instructional program of the university. (See *Associated Students v. Board of Trustees* (1976) 56 Cal.App.3d 667, 669; see also 5 CCR § 42401(b)-(d).)

The UC is organized and operated as a tax-exempt, nonprofit public benefit corporation formed for charitable purposes. (Restated Articles of Incorporation; Corp. Code § 5111.) Under federal and State law, an exempt organization, such as the UC, is exempt from taxation if it is organized and operated for exempt purposes, including charitable, religious, educational, scientific, or literary purposes. (Internal Revenue Code (IRC) § 501(c)(3); Revenue and Taxation Code (RTC) § 23701d(a).) Additionally, an exemption organization must not be organized or operated to benefit private interests. (IRC § 501(c)(3); RTC § 23701d(a).) The assets of the organization must be irrevocably dedicated to exempt purposes, including upon dissolution or if it becomes impossible to perform the organization's specific purposes. (Id.)

By remaining the "employer" of dining service employees that are, in fact, under the control and direction of Aladdin, a private for-profit entity, the UC would be operating outside the scope of its Articles of Incorporation as well as the activities set forth in its Operating Agreement with the CSU Board of Trustees. While such an agreement may provide the UC with a new revenue source if it were to lose dining services, it would also come with a continuing risk of liability. The income from this "co-employer" agreement with Aladdin may be taxable business income because it is not related to an exempt purpose under Internal Revenue Code 501(c)(3) and California Revenue and Taxation Code Section 23701d. Further, neither the UC's Articles of Incorporations nor its Bylaws contemplate contracting for the corporation to provide business services to for-profit entities. Finally, co-employers generally have to have contractual relationships with terms and provisions that are exhaustive. By entering any contractual relationship with Aladdin, the UC may be "co-signing" on to HSU's non-compliant service contract with Aladdin.

<u>Conclusion</u>

Auxiliary organizations, like the UC, are designed to provide essential campus services consistent with the educational mission of, but separately from, the university they directly serve. As a legally separate non-profit public benefit corporation, the UC's business operations and activities are governed by its Board of Directors, with HSU having oversight responsibilities of the UC to ensure that it is operating consistent with its Operating Agreement, policies of the CSU and campus, and that the corporation is fiscally viable. Additionally, HSU may assign programs and activities to campus auxiliaries. However, if HSU intends to assume the management and operations of the campus' dining services and SRC activities and functions performed by UC, without the consent of the CSU Chancellor or the UC's Board of Directors, it is our opinion that HSU likely will be exceed its authority by violating the Operating Agreement between the UC and the CSU Trustees and its Chancellor.

If you have any questions or concerns, please feel free to contact me.

Very truly yours,

Rex Randall Erickson