

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING is entered into between Washburn University Foundation, 1729 SW MacVicar Avenue, Topeka, KS 66604, a not-for-profit 501(c)(3) corporation organized and existing under Kansas law, hereinafter “the Foundation”, and Washburn University, 1700 SW College, Topeka, KS 66621, a municipal university under Kansas law, hereinafter “University”, to memorialize the agreement of the parties concerning their ongoing relationship.

IN CONSIDERATION of the mutual covenants hereinafter set forth, the parties agree as follows:

1. PURPOSE

The parties agree the purpose of the Memorandum of Understanding is to delineate the respective rights and obligations of the parties and define the relationship between the parties.

2. PREVIOUS AGREEMENTS SUPERSEDED

The parties agree this Memorandum of Understanding supersedes any and all previous agreements and amendments thereto between the parties.

3. RELATIONSHIP BETWEEN THE PARTIES

The parties agree the relationship of the parties is between two separate and independent entities. There is not a joint venture, partnership, employer-employee relationship or, except as provided in Section 7 regarding the management of the University-owned endowed funds, any principal-agent relationship.

A. University is a municipal university supervised, operated and controlled as provided by the laws of the state of Kansas.

B. The Foundation is a not-for-profit corporation organized and existing under Kansas law having as its purpose: (a) identifying and soliciting support for the benefit of University, its programs, staff and students; and (b) management of corporate and endowment assets.

C. The parties agree each shall be solely responsible for all its operational aspects, including, but not limited to

1. Budgeting and financial decisions;

2. Setting priorities and long-term plans for the entity;
3. Employment, compensation and evaluation of employees;
4. Management and oversight of all operations

4. COMMUNICATIONS

A. Liaison Committee

1. The parties agree there shall be a liaison committee comprised of:
 - a. the President of the Foundation;
 - b. the President of University;
 - c. the Chairperson and Chairperson-Elect of the Foundation's Board of Directors; and
 - d. the Chairperson and Vice Chairperson of University's Board of Regents.
2. The duties of the Liaison Committee shall include, but not be limited to:
 - a. an annual review of this Memorandum of Understanding to discuss and/or propose improvements in the relationship or revisions to this Memorandum of Understanding;
 - b. monitoring the relationship of the parties;
 - c. resolving questions and concerns of the respective entities; and
 - d. discussing fundraising priorities and activities of University.

B. Ex-Officio Appointments

To better ensure close communication between the parties to facilitate activities of the Foundation for the benefit of University, the parties agree the following ex-officio appointments shall be made as provided for in the Foundation bylaws:

1. University's President shall be an ex-officio, non-voting member of the Foundation's Board of Directors and its Executive Committee;
2. University's Chairperson of the Board of Regents, or designee of the Chairperson, who shall be a member of the Board of Regents, shall be an ex-officio, non-voting member of the Foundation's Board of Directors and its Executive Committee;
3. University's Vice President for Administration and Treasurer shall be an ex-officio, non-voting member of the Foundation Finance and Investment Committees.

4. The Foundation's President shall be an ex-officio member of the University President's executive cabinet.

5. THE FOUNDATION RESPONSIBILITIES

The primary functions of the Foundation under this Memorandum of Understanding are identifying and soliciting financial support and effectively managing its endowment and other assets designated for the benefit of University, its programs, staff and students. The Foundation agrees it shall:

- A. create an environment conducive to increasing levels of private support for the mission and priorities of Washburn University;
- B. be responsible for advising, planning, coordinating and executing comprehensive development activities in support of the University's mission, its units and departments consistent with University priorities established by its Board of Regents;
- C. establish, adhere to, and periodically assess its gift-management and acceptance policies;
- D. acknowledge and issue receipts for all gifts for Washburn University, except for membership gifts for KTWU and gifts to the Law School Foundation funds and provide appropriate recognition and stewardship of such gifts;
- E. receive the written approval of a duly authorized University representative before accepting gifts with restrictive terms requiring
 - additional allocation of University resources to maintain the gift or satisfy the restriction,
 - placement on the Washburn University campus,
 - departure from established or required University policies and procedures;
- F. not accept grants from state or federal agencies requiring any act or performance by University or its governing board and/or employees without express written approval of University's governing board;
- G. not accept or deposit in a Foundation fund revenue received from a University activity other than through normal development activities;
- H. establish and enforce policies to protect donor confidentiality and rights;
- I. establish asset-allocation, disbursement, and spending policies that adhere to applicable federal and state laws including the Uniform Prudent Investor Act (UPIA) (K.S.A. 58-24a 01 et seq.) and the Uniform Management of Institutional Funds Act (UMIFA) (K.S.A. 58-3601 et seq.); and,

J. receive, hold, manage, invest and disburse contributions of cash, securities, and other forms of property investing gifts contributed in the form of planned and deferred gift instruments according to established policies.

6. THE FOUNDATION DISBURSEMENT OF FUNDS TO UNIVERSITY

The parties agree:

A. The Foundation is the primary depository of private gifts for the benefit of University, its programs, staff and students and will disburse funds to the designated entity within the University in compliance with applicable laws, university and the Foundation policies, and gift agreements;

B. The Foundation's disbursements from its assets to the University must be reasonable business expenses which:

- support the institution;
- are consistent with donor intent; and,
- comply with applicable law;

C. The Foundation will make available for distribution computed earnings, as determined according to the approved the Foundation Investment Policy, from the endowed funds at least annually on or before the first day of March or other date(s) mutually agreed upon by the two parties;

D. Distributions from restricted expendable or endowment funds must be expended by University in accordance with the terms of the gift agreement creating the endowment. Appropriate documentation and authorization supporting the restricted spending are required for disbursement and/or transfer of restricted funds;

E. The Foundation shall not pay any University employee or employ any University employee in any capacity without prior express written approval and appropriate authorization by University.

7. MANAGEMENT OF UNIVERSITY-OWNED ENDOWED FUNDS

A. The parties agree the Foundation shall act as an agent of the University only to invest and manage such University-owned endowed funds as are placed with it in conformance with applicable federal and state law, including but not limited to the UMIFA and the UPIA in accordance with the Foundation Investment Policy.

B. The parties agree that either party may terminate the management by the Foundation of all or part of the University-owned endowed funds by providing

written notice to the other. Upon receipt of notice under this section or section 19 of the Memorandum of Understanding, the parties shall create an ad hoc committee which shall, within fifteen (15) days of the notice, develop and prepare a plan for the transfer of the fund(s) identified in the notice. Such plan shall include, the transfer date, and the procedure for the transfer or payment of the principal balance of such fund(s) realizing capital appreciation/loss attributable to such funds, together with all interest, dividend or other income attributable to such fund(s).

C. The parties agree termination of the Foundation management of University-owned endowed funds shall not operate to terminate this Memorandum of Understanding.

D. The Foundation shall administer University-owned funds in accordance with policies and procedures for administering the Foundation funds as provided under this section, section 5 and section 6 of this agreement.

8. THE FOUNDATION OPERATIONAL FUNDING AND ADMINISTRATION

The parties agree:

A. The Foundation has the right to use a reasonable amount of income and realized and unrealized capital gains from restricted and unrestricted endowed funds and all other funds held by the Foundation, whether endowed or expendable, for the Foundation programs, operations, and services to benefit the University subject to the provisions of this agreement;

B. The Foundation shall maintain copies of the plans, budgets, and donor and alumni records developed in connection with the performance of its obligations;

C. The Foundation may designate a portion of its unrestricted funds, endowed and expendable, to a discretionary fund to be used to reimburse University's President for necessary travel and other expenses incurred for authorized purposes; provided, however, all such expenditures for which reimbursement may be made must comply with the Internal Revenue Code § 501(c)(3) and regulatory guidance promulgated pursuant to Code § 501 (c)(3), and be consistent with the Foundation's mission. A quarterly report of expenditures from such discretionary fund will be provided to the Executive Committee of the Foundation Board of Directors. The fund will be audited as part of the Foundation annual audit and reviewed at least annually by the Audit Committee.

9. UNIVERSITY RESPONSIBILITIES.

University agrees it shall:

- A. Provide the Foundation the following in-kind services in consideration of the Foundation activities:
 - Designated office space of appropriate size and quality;
 - Building and grounds maintenance and janitorial services;
 - Support services of the kind and type provided University departments on a cost reimbursement basis including but not limited to, access to the University's telephone and campus mail system, printing and copying services, parking; and,
 - Access to University's libraries and other facilities and programs as are provided to University employees;
- B. Permit the Foundation the right to use the University's logo, seal and other symbols and marks in conjunction with University-sanctioned fund-raising and/or development projects; provided, however, the Foundation shall not have the right or authority to delegate or assign the use of any of such University marks or symbols without the express written approval of University's President. The Foundation will otherwise operate under its own seal, logos, symbols and marks and shall not use University's seal or other marks in the promotion of the Foundation business and activities;
- C. Require University's areas and departments, including but not limited to KTWU and the Law School, to coordinate their gift acknowledgment, deposits and donor recognition with the Foundation;
- D. Require University's areas and departments, including but not limited to KTWU and the Mulvane Art Museum, to coordinate fund-raising activities through the Foundation;
- E. Expend restricted expendable or endowment funds in accordance with the terms of the gift agreement creating the endowment and create appropriate documentation and authorization supporting the restricted expenditures.

10. AUDITS, RECORDS AND REPORTING

- A. Each party agrees it shall have a certified public accounting firm perform a full and complete annual audit of its finances and operations and shall provide the other party a copy of such annual audit not later than six (6) months following the close of the party's fiscal year.
- B. Each party agrees that representatives of the other may inspect its records and accounts at reasonable times during regular business hours; provided,

however, such inspection of the Foundation records, data and information shall not include the right to inspect records pertaining or relating to individual private donors.

C. The Foundation will provide University access to its data and records on a strictly need-to-know basis in accordance with applicable laws, the Foundation policies, and guidelines. The Foundation and University agree that University at no time shall possess, keep, or maintain any Foundation record except those records which the Foundation designates for public release.

D. The Foundation will provide University quarterly reports of the investment performance of all pooled funds through the Investment Committee.

E. Each party shall provide the President of the other party a current list of its respective governing board members, its officers and its administrative employees who report to the respective President.

11. CONFIDENTIALITY

A. The parties agree that, except as provided otherwise in section 10 of this Memorandum of Understanding, the Foundation records, particularly records pertaining or relating to donors, are private and confidential and shall be maintained by the Foundation.

B. Because the Kansas Open Records Act requires public entities to provide access to any records it makes, possesses, maintains or keeps, University shall not accept any record from the Foundation which pertains or relates to any donor unless such donor expressly has consented to disclosure of any part of such the Foundation records. University shall establish procedures to ensure its officers, agents and employees are aware of this provision.

C. The Foundation agrees it shall:

1. keep confidential any information, data or record it receives from University, including but not limited to University employees and students;
2. not re-disclose any such information pertaining to students it may be entitled to receive under the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. §1232g) to any person or entity except as is permitted under FERPA or which may be obtained as directory information under FERPA; and,
3. not disclose to any person or entity any information, data or record it may have pertaining or relating to University employees.

12. NONDISCRIMINATION

A. The Foundation agrees that, when acting as an agent for University it shall:

1. not discriminate upon the basis of race, color, sex, religion, creed, handicap/disability, national origin, sexual orientation or any basis as may be proscribed by federal, state or local law;
2. shall comply with all non discrimination laws to which University is or may become subject; and,
3. comply with University's Equal Educational and Employment Opportunity Policy statement now in force of which may hereafter be promulgated.

B. This non discrimination provision is inapplicable to any action the Foundation takes at its own initiative rather than at the request of University.

C. The parties understand and agree that, as a public higher education institution, University shall not participate in any way, directly or indirectly, any activity which is in violation of federal, state, or local law, including, but not limited to:

1. the Age Discrimination in Employment Act of 1967, 29 USC § 621 et seq., as amended by the Older Workers Benefit Protection Act, 29 USC § 623(f)(1) et seq.;
2. Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq., as amended by the Civil rights Act of 1991, 42 USC §1981 et seq.;
3. Title IX of the Education Amendments of 1972, 20 USC §1681 et seq and amendments thereto; and,
4. the Kansas Acts Against Discrimination, K.S.A. 44-1001 et seq., and amendments thereto.

13. INDEMNIFICATION

The parties agree to indemnify and hold harmless the other party, its governing board, officers, agents, employees and students in their official capacities from and against any and all claims, damage, liability, injury, expense, demands, causes of actions, judgments, including court costs and attorney's fees (hereafter "loss") arising out of or resulting from the gross negligence of its officers, agents or employees. In the event such loss is proximately caused by the acts of both parties or their officers agents or employees, each shall be responsible for its proportionate share of claimant's damages under the laws of the state of Kansas. The parties agree this provision shall survive the termination of this Memorandum of Understanding.

14. NOTICE

The parties agree that notice to either party of this agreement must be in writing signed by the party giving it and shall be deemed given when mailed postage prepaid by U.S. Postal Service, first class, certified or express mail, or other overnight mail service or hand delivered when addressed as follows:

To University
President
Washburn University of Topeka
1700 College
Topeka, KS 66221

To Foundation
President
Washburn University Foundation
1729 SW MacVicar Avenue
Topeka, KS 66604

or to such other addressee as may be hereafter designated in writing or made by amendment to this Memorandum of Understanding. All such notices shall be effective only when received by the addressee.

15. GOVERNING LAW

The parties agree the laws of the state of Kansas shall govern this Memorandum of Understanding and that any suit or cause of action by either party against the other shall be filed in the Third Judicial District of the state of Kansas.

16. AGREEMENT COMPLETE

The parties agree that this Memorandum of Understanding constitutes the entire agreement of the parties and that no prior agreement or representation, written or oral, shall be binding or of any force or effect. Further, this Memorandum or Understanding may not be amended, modified, altered or enlarged except by a writing signed by the duly authorized representatives of the parties hereto.

17. AGREEMENT BINDING

The parties agree that this agreement shall be binding upon the successors and legal representatives of the parties hereto. Neither party shall assign this Agreement nor any of their respective rights, obligations or interest in it.

18. TERM

The parties agree the term of this Memorandum of Understanding shall be indefinite.

19. TERMINATION

The parties agree this Memorandum of Understanding may be terminated with or without cause upon sixty (60) day written notice to the other. Sixty (60) days following notice of termination, this Memorandum of Understanding shall terminate as though such date were originally fixed as the date of termination and the Foundation shall be required to vacate any University premises it occupies and cease using any University resource or asset to which it is entitled as provided in this Memorandum of Understanding. Upon receipt of notice of termination, the parties shall form an ad hoc committee in the manner and with the duties provided in section 7.b. of this Agreement. Notwithstanding termination of this Memorandum of Understanding, the Foundation will continue to be required to abide by the restrictions of any gifts or endowments it possesses and to make distribution of such funds as required by the respective gift instruments and the University is required to identify recipients of the Foundation scholarship funds consistent with restrictions in the gift instrument consistent with federal and state law.

IN WITNESS HEREOF, the duly authorized representatives of the parties have hereunto set their hand on the date and year written.

University

Foundation

By: _____
President, University

By: _____
President, Foundation

Date: _____

Date: _____

By: _____
Chairperson, Board of Regents

By: _____
Chairperson, Board of Trustees

Date: _____

Date: _____