

PROPOSAL: Approval of Memorandum of Understanding between the Board of Trustees of Western Michigan University and The Western Michigan University Foundation

Background

The mission of the Western Michigan University Foundation is to promote and support Western Michigan University so that it can effectively carry out its mission of teaching, research and service. The Foundation accomplishes its mission by maintaining and enlarging an endowment fund, the income from which provides supplemental financial assistance for current demands. Although the Foundation has its own Articles of Incorporations and Bylaws, and the Foundation and University have worked cooperatively over many decades, it is considered best practice to have in place a memorandum of understanding further outlining how the Foundation can most effectively advance the mission of the University, develop a shared vision for the future partnership and clarify mutual expectation of both parties.

The effort to create the Memorandum of Understanding that is before this Board for consideration began over a year ago with involvement from members of this Board and members of the Foundation Board of Directors. The Memorandum of Understanding sets forth protocols on communication, shared leadership, services provided to the Foundation by the University, reporting requirements, distributions from the endowment, fundraising, the annual fee provided by the Foundation to the University, as well as standard contract provisions.

Recommended Action

It is recommended that the Board of Trustees approve the Memorandum of Understanding between the Western Michigan University and this Board and that the administration be authorized to execute the Memorandum of Understanding on its behalf.

MEMORANDUM OF UNDERSTANDING
BETWEEN
WESTERN MICHIGAN UNIVERSITY AND
WESTERN MICHIGAN UNIVERSITY FOUNDATION

THIS MEMORANDUM OF UNDERSTANDING (this “Agreement”) is entered into as of _____, 2026 (“Effective Date”), by and between The Board of Trustees of Western Michigan University, a Michigan constitutional body corporate (“University”), and Western Michigan University Foundation, a Michigan nonprofit corporation (“Foundation”).

Recitals

A. The University, an instrumentality of the State of Michigan created by an act of legislation in 1903, is also provided for in the Constitution of Michigan of 1963 and is often referred to as a constitutional corporation. The University is qualified to receive tax-deductible contributions under section 170 of the Internal Revenue Code of 1986, as amended (“IRC”).

B. The Foundation was incorporated in 1976, and operates exclusively for the benefit of the University by providing support for the University’s objectives, goals and mission and assisting in the accomplishment of the University’s educational purposes. The Foundation may also provide support to the Western Michigan University Homer Stryker M.D. School of Medicine and, with the concurrence of the University, other entities affiliated with the University, in each case in accordance with its exempt purposes. The Foundation is a tax-exempt public charity described under IRC 501(c)(3).

C. The University has designated the Foundation as the sole repository (except in special, limited circumstances where a donor may request to donate directly to the University) of charitable contributions made in support of the University.

D. In connection with its fundraising and asset management activities, the Foundation has a need for certain administrative and support services, and the University is willing and able to provide such services to Foundation, subject to the terms and conditions of this Agreement.

Agreement

The parties agree as follows:

1. Purpose. This Agreement is intended to set forth policies and procedures that will contribute to the coordination of the parties’ mutual activities. The University and Foundation will review this Agreement at least every five years, and within three months of a change in University President if sooner, to determine whether any amendments are appropriate.

2. Relationship of the Parties. This Agreement seeks to clarify the role that each party fulfills in supporting the other party's charitable and educational purposes, including research and related activities (while respecting that the parties are and shall remain separate legal entities), and nothing in this Agreement shall be construed to create the relationship of employer/employee, partners, or joint venturers between the parties hereto or to provide any party with the right to manage or control any other party. Neither this Agreement nor actions taken pursuant to this Agreement shall create a co-employer or joint employer relationship of one party with the employees of the other party.

3. Communications. To ensure effective achievement of the terms of this Agreement, the University and the Foundation (through their respective Presidents and, as determined by each in their discretion, other officers and/or Board representatives) shall hold regular meetings (no less frequently than twice per year) to foster and maintain productive relationships and to ensure open and continuing communications and alignment of priorities. All of the University trustees and all of the Foundation board members shall be invited to participate in at least one such meeting per year.

4. Shared Leadership.

- (a) Ex Officio Office Holders. The University and the Foundation are separate legal entities, but support one another in the accomplishment of their respective charitable and educational purposes, including research and related activities. To ensure the responsiveness to one another and take advantage of efficiencies to be gained from the sharing of knowledge and resources, the University and the Foundation agree that (a) the University's Chief Financial Officer/Treasurer shall serve, *ex officio*, as the Foundation's Chief Financial Officer/Treasurer; (b) the University's Assistant Treasurer shall serve, *ex officio*, as the Foundation's Assistant Treasurer, and (b) the University's Vice President for Advancement shall serve, *ex officio*, as the Foundation's Executive Director.
- (b) Retention of Authority by University. The University retains authority to assign, supervise, evaluate, compensate, transfer, terminate or discipline all of its employees, including those that may act on the University's behalf in providing services to the Foundation. The University shall compensate, pay payroll taxes and handle tax withholding for, provide benefits to, and otherwise determine the terms and conditions of employment for, all of its employees providing services to the Foundation. The University will also maintain worker's compensation coverage for such employees.
- (c) Executive Director Role. Notwithstanding subparagraph (b), the University shall consult with the Foundation prior to assigning, conducting an annual performance review or similar evaluation, transferring, terminating or disciplining the individual serving as the Foundation's Executive Director. Such consultation, while it must occur, shall not require the University to share any information that is protected by the attorney/client privilege (unless the University consents to the sharing of such information or such sharing

would not forfeit the privilege). Further, on at least an annual basis, the Foundation's Executive Director shall meet with the Foundation's Board to review the Executive Director's performance goals for the upcoming year.

5. Services. The parties acknowledge that they have had a long-standing relationship pursuant to which the University has provided services to the Foundation and the Foundation has conducted its activities for the benefit of the University. The University agrees to continue providing such administrative and support services ("Services") as Foundation may require from time to time to conduct the Foundation's activities so long as such Services are in the best interests of the University as determined solely by the University after consultation with the Foundation. The University shall perform the Services in a diligent, prompt and professional manner. In performing the Services, the University shall comply with all applicable federal, state, local and foreign laws, statutes, regulations and orders and with all reasonable policies and procedures of Foundation and the University. Subject to these limitations and in addition to any other obligations under this Agreement, Services that will be provided by the University are set forth in Exhibit A. The parties may modify these Services by mutual agreement without the necessity of formally amending this Agreement.

6. Retention of Authority by the Parties. Each party has ultimate authority and control over its management and operations, notwithstanding this Agreement.

7. Reporting. On an annual basis, the Foundation will provide the University with: (i) a copy of its annual budget following adoption by the Foundation's Board; (ii) copies of its audited financial statements and annual IRS Forms 990 and 990-T; and (iii) a financial report showing the balance, investment gain/loss, receipts and expenditures of the Foundation. The University will annually report to the Foundation on how it has spent distributions from the Foundation, including confirming that it has taken reasonable action to comply with all applicable donor restrictions to the extent such compliance is not in violation of the law, and the amount and purpose of any donations that it received directly from a donor. On at least an annual basis, the University's president will also communicate to the Foundation the priorities and long-term plans of the University. Each party further agrees to provide such additional information and/or reports as may be reasonably requested by the other party from time to time to enable the other party to carry out its obligations under this Agreement, except if such request involves information that is protected by the attorney/client privilege.

8. Distributions for Charitable and Educational Purposes. On a semiannual basis (or more frequently if mutually agreed to by the Foundation and University), the Foundation will transfer funds to the University, in compliance with applicable law and Foundation policies to be used by the University in furtherance of its charitable and educational purposes, including research and related activities, and subject to any applicable donor restrictions as to use or otherwise. The amount of each transfer (which is in addition to the Annual Fee and any other fees for Services that are payable pursuant to Section 11 below) will be determined based on the amount of then distributable gifts and endowment spendable dollars, taking into consideration any additional amounts requested by the University and approved by the Foundation for extraordinary or unexpected expenses and/or purposes. With each transfer, the Foundation will provide the University with the information needed, as applicable, to direct

the transfer to the appropriate department and/or comply with any restrictions as to use or administration.

9. Fundraising. Each of the Foundation and the University is authorized to solicit gifts, contributions and grants for the other's benefit, but recognizing that all donations for the University's benefit should be paid to the Foundation for support of the University. Except to the extent explicitly allowed by a gift acceptance policy approved by both the Foundation and the University, the Foundation will obtain the University's written approval prior to accepting any gift that includes a naming right or establishment of a chair position. The Foundation and the University will coordinate major fundraising initiatives and campaigns and major gift solicitations. The leadership of the Foundation and University will work in conjunction to identify, cultivate and solicit prospects for major private gifts. Both parties must use and administer gifts and other charitable contributions in accordance with, and subject to, all applicable donor restrictions to the extent not in violation of the law.

10. Use of the University's Name, Logo and Marks. Consistent with its mission to support the University, the Foundation may use the University's name, seal, logos, acronyms and other symbols (collectively, "University Marks") in compliance with the WMU Brand Guide and Visual Identity System in the promotion of its business and activities, provided that the Foundation should clearly communicate that it is conducting the business and activities in its own name for the benefit of the University. The Foundation's right to use the University Marks is royalty-free and paid up, but may be revoked at any time if the Foundation's use is in violation of the terms of this Agreement provided that the University shall first give the Foundation written notice and an opportunity to cure such misuse within a period of not less than 30 days following the Foundation's receipt of written notice.

11. Fees.

(a) Foundation Fees. The Foundation has the right to fund its operations by reasonable means in accordance with policies approved by the Foundation's Board. Such methods may include the assessment of fees for services, imposing administrative fees, or utilizing a percentage of revenues and/or earnings from the overall investment pool, subject to all applicable donor restrictions and provided that any assessment of fees on the University itself (as opposed to utilizing a percentage of donations received and/or assets held by the Foundation) shall be subject to the University's approval.

(b) Administrative Fee (the "Annual Fee"). The Foundation has fiduciary responsibility and sole authority to set the Annual Fee and determine the Annual Fee amount available each year. When setting the Annual Fee, the Foundation will consider the needs of the University. The Annual Fee will be based upon a percentage of the annual amount of the market value of the Foundation's Endowment for the immediately preceding fiscal year ending June 30¹. It is the Foundation's responsibility to ensure the Annual Fee is reasonable considering industry best practices, the size of the Foundation

¹ As of the date of execution of this Agreement, the Annual Fee is set at 2% of the Foundation's Endowment market value.

investment portfolio and its investment policy. The Foundation will periodically review the use of the Annual Fee. Any change in the Annual Fee shall require an affirmative vote by the Foundation Board of Directors and be documented in the Foundation Board's meeting minutes.

(c) Payable to University. The Foundation shall pay to the University the Annual Fee, less any dollars used to pay Foundation expenses (the "Net Annual Fee"). The Net Annual Fee must be sufficient to pay for the activities provided under Section 5. Any excess Net Annual Fee will be used to support activities in carrying out the University's mission at the University's discretion. The University shall provide the Foundation with a complete accounting of the use of the Net Annual Fee for Services no more often than quarterly, but always providing an annual accounting once its fiscal year books are closed.

(d) Sharing of Information. The Foundation and the University shall provide each other with sufficiently detailed information to enable them to comply with their respective tax reporting and payment obligations. In addition, the University shall account for the use of the Net Annual Fee as set forth in subparagraph (c), above.

12. Cooperation. Each party acknowledges that the other party's performance of this Agreement requires the cooperation of both parties. As such, each party shall (a) promptly make available to the other party all information and assistance reasonably requested in connection with the performance of Services or other obligations under this Agreement; (b) promptly notify the other party of all matters that may affect the other party's performance of the Services or other obligations, including, without limitation, the existence of any and all claims, demands, or other facts which it believes may lead to a claim, charge or demand by or against it; and (c) abide by and perform all obligations of it as required by this Agreement.

13. Legal Services. In addition to Services consisting of legal services ("Legal Services") provided to the Foundation, the University, through its employees and independent contractors (collectively, "Providers"), may provide Legal Services to other University-affiliated organizations and to itself (collectively with the Foundation, "Recipients"). The interests of the Recipients are generally compatible, and the sharing of Legal Services provided by the Providers is intended to benefit the Recipients, collectively, through the reduction of overall fees and other economies of scale. The Foundation understands that if it has any individual concerns, such as its rights as against any other Recipient, it will retain its own counsel to protect its individual interests or concerns. The Foundation also acknowledges and agrees that a Provider is free to share with the University or use for the benefit of other Recipients any information learned by such Provider in connection with its provision of Legal Services to the Foundation, including after termination of such Legal Services. In no event shall the University and Providers be obligated to provide legal services to the Foundation or any other Recipient that would constitute a conflict of interest or appearance of impropriety.

14. Term and Termination. The term of this Agreement begins on the Effective Date and continues until terminated. This Agreement may be terminated (i) by the mutual agreement of the University and the Foundation at any time; (ii) by either the University or the Foundation upon ninety (90) days written notice to the other party (provided, however, that the

party initiating termination must act in good faith to provide an opportunity for a meeting to include executives and Board chairs (or another Board representative) within 30 days of initial written notice of intention to terminate); (iii) by either party immediately upon written notice to the other party if necessary to comply with any governmental law, rule or regulation applicable to such party; or (iv) by either party if the other party defaults in the performance of its obligations and fails to cure such default within 30 days of receipt of written notice of the default. Upon dissolution of the Foundation, after the Foundation has paid or made provision for the payment of the Foundation's liabilities and debts, all of the Foundation's assets, real and personal, shall be distributed to the University, or to any tax-exempt successor entity of the University, in accordance with the requirements of the Foundation's articles of incorporation.

15. Confidential Information. To facilitate each party's respective obligations under this Agreement, each party may share with the other party information that it considers nonpublic and confidential. Such information may relate to finances, funding, donor lists, personnel, problems, opportunities, or any other matters. Information may be in writing, communicated orally, or learned through observation. Neither party shall disclose to third parties any nonpublic information of the other party, shall use such information only for the purposes of this Agreement, and shall return to the other party any documents or other property upon request. Each party's confidentiality obligations shall continue until the information becomes public through no fault of such party.

16. Counterparts. This Agreement may be executed in counterparts, including facsimile or other electronic counterparts, each of which will be deemed an original and all of which shall be considered one and the same agreement, and shall become effective when one or more counterparts have been signed by each of the parties and delivered to the other party.

17. Force Majeure. Notwithstanding any other provision of this Agreement, neither party shall be liable for any delay or failure to perform under this Agreement when such interruption, delay or failure results, in whole or in part, from any consequence, direct or indirect, of a breakdown, damage or destruction of plant or equipment, delay in, shortage of, or inability to secure fuel, utilities, services, materials, transportation or labor, enemy or hostile action, sabotage, war, blockade, insurrection, riot, epidemic or pandemic, flood, earthquake, washout, nuclear or radiation activity or fall-out, civil disturbance, explosion, lightning, fire or other casualty, or any other cause, whether similar to or dissimilar from the foregoing, or any other circumstance beyond the control of such party, whether or not avoidable by the exercise of reasonable foresight, as applicable (each a "Force Majeure Event"). In the event of a Force Majeure Event, such party's affected obligations hereunder shall be postponed for such time as its performance is suspended or delayed on account thereof. The impacted party shall promptly notify the other party, either orally or in writing, upon learning of the occurrence of a Force Majeure Event. Upon the cessation of such Force Majeure Event, such party will use commercially reasonable efforts to resume the performance of its postponed obligations within a reasonable time thereafter.

18. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Michigan without regard to conflicts of law principles that would require the application of any other law.

19. Entire Agreement; No Third-Party Beneficiaries. This Agreement contains the entire agreement between the parties with respect to the subject matter hereof and supersedes any prior oral or written agreements, understandings, representations or warranties between the parties with respect to the subject matter hereof including, without limitation, that certain Agreement between the University and Foundation dated April 29, 1999 and that certain Support Services Agreement between the Foundation and University dated effective October 26, 2001. This Agreement is not intended to confer upon any person not a party hereto (and their successors and permitted assigns) any rights or remedies hereunder, nor does it alter any employment agreement with the University or create any employment rights of an individual with the Foundation.

20. Notices. All notices hereunder shall be sufficiently given for all purposes hereunder if in writing and delivered personally, sent by documented overnight delivery service or, to the extent receipt is confirmed, by electronic mail to the address provided by the receiving party.

21. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns; provided, however, that neither party shall assign its rights or delegate its obligations under this Agreement without the express prior written consent of the other party.

22. Amendments and Waivers. This Agreement may not be modified or amended except in a writing signed by both parties. Either party shall have the right, in its sole discretion, to waive the other party's obligation to perform or observe any term, condition, covenant or obligation required to be performed by the other party. Any such waiver of any such obligation shall not be construed as a waiver of any other obligation of the other party without the waiving party's express agreement thereto.

23. Waiver of Jury Trial; Dispute Resolution. Each of the University and the Foundation waives its right to a trial by jury and to bring any dispute between the parties in the courts of the State of Michigan and/or the United States of America.

- (a) Negotiation. In the event of any dispute or disagreement between any of the parties hereto as to the interpretation of any provision of this Agreement, the performance of obligations hereunder, or any other disputed matter relating hereto ("Dispute"), such Dispute, upon the written request of either party, shall be referred to the presidents of the University and Foundation or their respective designees. The presidents or their respective designees shall promptly meet in good faith to resolve the Dispute amicably. If the presidents or their designees are unable to resolve the dispute within thirty (30) calendar days after the reference of the matter to them, either party hereto shall be free to exercise the remedies available to it under subparagraph (b) below.
- (b) Arbitration. If a Dispute arises that is not resolved by good faith negotiation as provided in subparagraph (a) above, then such Dispute, upon ten (10) days' prior written notice from one party to the other of its intent to arbitrate

(an “Arbitration Notice”), shall be submitted to and settled exclusively by final and binding arbitration in lieu of any judicial proceeding. Such arbitration shall be conducted by the American Arbitration Association in Kalamazoo, Michigan before three (3) arbitrators in accordance with the Commercial Arbitration Rules of the American Arbitration Association existing at the date of submission of the Dispute to arbitration; provided, however, the parties shall be entitled to discovery as provided in the Michigan Court Rules of 1985, as amended. Each party shall pay its own expenses and each party shall pay one-half of the costs and expenses of the arbitrators and the American Arbitration Association. Any arbitration award shall be binding and enforceable against the parties hereto and judgment may be entered thereon in any court of competent jurisdiction.

- (c) Remedies. In any trial or arbitration, transfer of Foundation assets to any person or entity other than the University shall not be a remedy for breach of this Agreement or resolution of a Dispute if such transfer would not benefit the University in accordance with the Foundation’s purposes as set forth in its articles of incorporation.

24. Severability. If any provision, or any portion thereof, of this Agreement is held invalid or unenforceable, such decision shall not affect the validity or enforceability of any of the other provisions, or portions thereof, of this Agreement, which other provisions, and portions, shall remain in full force and effect, and the application of such invalid or unenforceable provision, or portion thereof, to persons or circumstances other than those as to which it is held invalid or unenforceable shall be valid and be enforced to the fullest extent permitted by law.

[signature page follows]

IN WITNESS WHEREOF, this Memorandum of Understanding has been signed by or on behalf of each of the parties as of the day first above written.

“University”

The Board of Trustees of Western Michigan University, a Michigan constitutional body corporate

By: _____
Name:
Its:

“Foundation”

Western Michigan University Foundation,
a Michigan nonprofit corporation

By: _____
Name:
Its:

By: _____
Name:
Its:

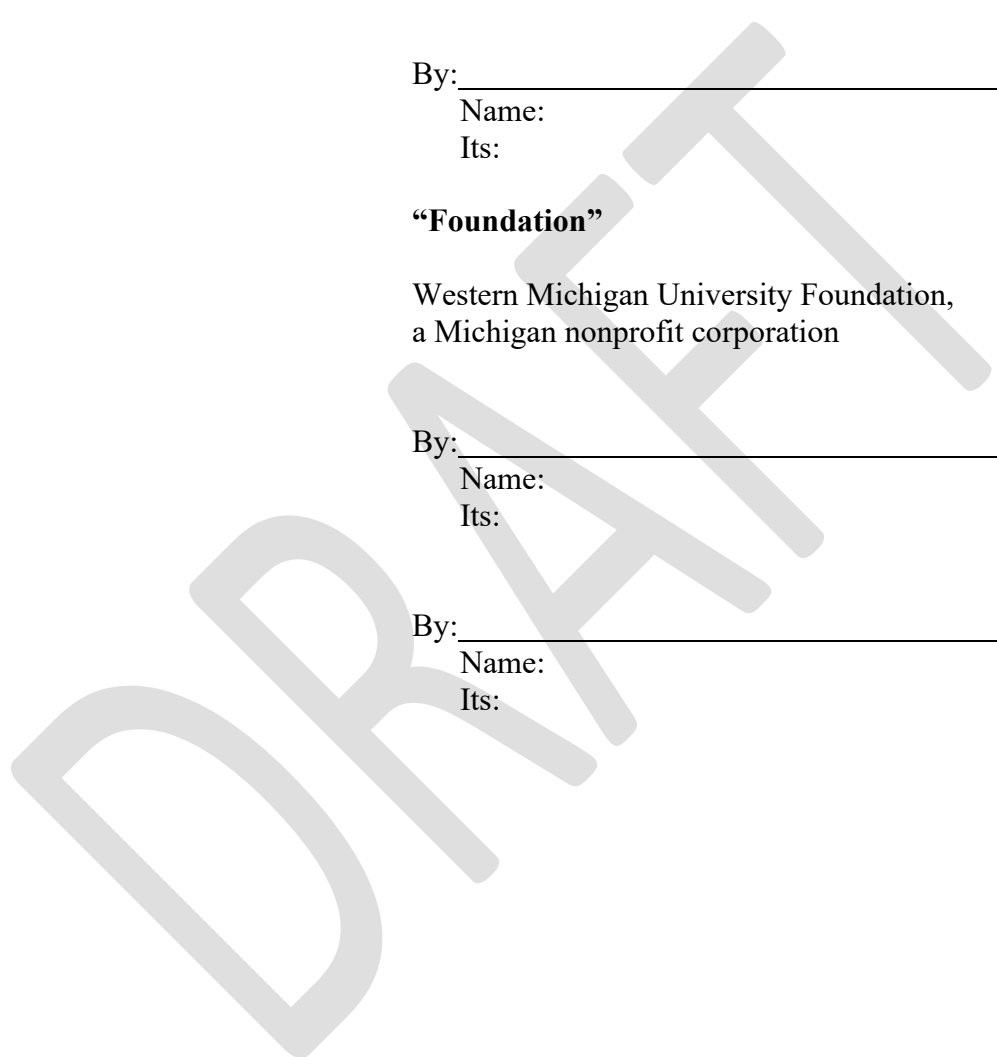


EXHIBIT A**UNIVERSITY SERVICES**

Pursuant to Section 5 of this Agreement, the University will provide such administrative and support Services as Foundation may reasonably require from time to time in order to conduct activities that are in the best interests of the University as determined solely by the University, and after consultation with the Foundation. Subject to the limitation and any others in this Agreement, such Services include, but are limited to the following:

- (a) Maintenance of corporate records, legal documents and any other documentation or records required by reason of the Foundation's tax-exempt status or otherwise;
- (b) Fundraising services, including providing substantiation receipts to donors as required by IRC 170(f);
- (c) Legal services by the University's in-house counsel(including, without limitation, review of Foundation contracts), subject to any conflict of interest;
- (d) Intellectual property services;
- (e) Management support systems (including, without limitation, business operating systems, and program management systems and support for such systems);
- (f) Website hosting and support;
- (g) External auditing services;
- (h) Materials management and contract administration support services;
- (i) Human resources management, compliance and support services;
- (j) Advice and facilitation of insurance and risk management;
- (k) Support services relating to employee payroll and benefit plans;
- (l) Advice and consultation regarding financing, capital projects, annual appeals, and fundraising goals;
- (m) Tax services (including, without limitation, preparation of federal, state and local tax and information returns);
- (n) Treasury and financial services;
- (o) Internal and external communications;
- (p) Support services relating to occupational, health and safety and environmental matters (including, without limitation, compliance, planning and reporting systems);
- (q) Support services relating to information technology and information and communication systems; and
- (r) Provision of office space and related overhead expenses.