

## AGREEMENT

This Agreement is entered into as of July 1, 2006, between the Ball State University Foundation, Inc., an Indiana nonprofit corporation (the "Foundation"), and the Ball State University Board of Trustees, a perpetual body corporate formed under the statutes of the State of Indiana to manage, control and operate Ball State University (the "University").

### Recitals:

- A. The University is a state university of the State of Indiana which receives a portion of its support from the State of Indiana.
- B. The Foundation is a nonprofit corporation exempt from taxation under §501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"); and the Foundation is not a private foundation within the meaning of §509(a) of the Code because it is an organization described in §§509(a)(1) and 170(b)(1)(A)(iv) of the Code, in that the Foundation is organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a university which is an agency or instrumentality of the State of Indiana.
- C. Since its incorporation in 1951, the Foundation has supported the University by soliciting and obtaining private gifts and other support from the alumni, parents and friends of the University, as well as gifts and grants from corporations, foundations and other private donors, all for the benefit of the University.
- D. The Foundation administers, manages and invests the funds accumulated through these gifts; and it distributes and expends such funds at the direction of the University, subject, however, to the restrictions, if any, placed thereon by the donors.
- E. In connection with the Foundation's fund-raising and asset management activities, the University has agreed to make certain services, staff and facilities available to the Foundation, at cost, because the services provided by the Foundation for the exclusive benefit of the University make a substantial contribution to the University's efforts to achieve its mission as an institution of higher learning.
- F. The University and the Foundation deem it desirable, by this Agreement, to recognize and reconfirm long-standing policies, procedures and working relationships between the University and the Foundation and to clarify the

In consideration of the foregoing, and of the mutual covenants and undertakings set forth herein, the University and the Foundation agree as follows:

1. **The Relationship Between the Foundation and the University.** Although organized and operated for the benefit of the University, the Foundation is an incorporated §501(c)(3) nonprofit corporation that is separate and independent from the University. The Foundation was created to raise, manage, steward and distribute private resources to support the University's missions. While the Board of Directors of the Foundation includes certain trustees and officers of the University, a substantial majority of the directors are independently elected. The Board of Directors is responsible for the control and management of all assets of the Foundation, including prudently managing all gifts and using such funds as requested by the University, subject to the donor's intent.

The Foundation's operations are governed by the provisions of its Articles of Incorporation and Bylaws. The directors and officers of the Foundation exercise their fiduciary responsibilities in accordance with these governance documents, Foundation policies, agreements with the University and others, applicable state and federal statutes and regulations, and the common law of Indiana.

2. **Foundation Responsibilities.**

a. **Fund-Raising.** The University shall have overall responsibility for fund-raising activities. The University's Vice President for University Advancement will direct the planning and implementation of fund-raising activities under the overall supervision of the President of the University. The Foundation's staff, Foundation directors, and University trustees may be asked to assist with fund-raising which would be accomplished within the guidelines and plans developed by the University; *e.g.*, the Foundation's staff administers the planned giving program as an integral part of the University's overall fund-raising program.

The President of the Foundation will report to the Foundation's Board of Directors for administrative and fiduciary responsibilities and will work with the Vice President for University Advancement on matters relating to fund-raising.

b. **Asset Management.** The Foundation is the primary repository of private gifts for the benefit of the University, and it shall administer, manage, invest and disburse these funds in compliance with all applicable agreements between the Foundation and the University, University and Foundation policies, gift agreements with donors, and state and federal laws and regulations.

3. **Financing of Fundraising and Administrative Services.** The Foundation shall maintain a current financial plan which provides for underwriting the costs of fundraising and administrative services. From time to time, the President of the Foundation and the President of the University may enter into agreements concerning fees to be charged by the Foundation to support Foundation and University fund-raising and administrative services.

4. **Space, Staffing, and Other Support.**

a. **Office Space.** The University and the Foundation entered into a Lease Agreement, effective as of October 1, 1997, under which the Foundation leases certain space in the University Alumni Center for its principal office, which Agreement shall remain in effect in accordance with its provisions.

b. **Staffing.** University employees assigned to the Foundation shall be covered by and subject to the University's employment policies and procedures, as set forth in applicable employee handbooks; including, *e.g.*, the University's employment classifications, compensation system, performance evaluation and discipline procedures, vacation, holiday and leave policies, and employee benefit programs. All such employees shall be classified in one of the following personnel categories: continuing contract professional, contract professional, exempt staff or nonexempt staff. Foundation supervisory personnel shall be responsible for hiring or dismissing employees, recommending compensation, establishing and enforcing work rules, evaluating the performance of, and disciplining the employees assigned to the Foundation, within policies governing other University employees.

The Foundation's Board of Directors shall be responsible for hiring, firing, establishing the compensation, and otherwise directing and supervising the performance of the President of the Foundation. The President of the Foundation shall have these responsibilities with respect to the other employees assigned to the Foundation, within the policies and procedures of the University. All prospective positions and employees assigned by the University to provide services to or on behalf of the Foundation must be approved by the Foundation and the University. Compensation for the President of the Foundation shall be established by the Foundation's Board of Directors, upon the recommendation of the Compensation Committee.

The Foundation shall maintain adequate liability insurance, errors and omissions insurance, and other insurance, as determined by its Board of Directors, covering the University's employees who are assigned to the Foundation. Such insurance shall name the University as an additional insured, shall be written with carriers that are satisfactory to the University, and shall be the primary coverage with respect to these employees (*i.e.*, claims shall not be made against the University or its carriers unless the policy limits of the Foundation's insurance have been exceeded). The Foundation shall indemnify and hold the University, its trustees, officers, employees and agents, harmless from and against any and all liability, loss, damage and expense (including reasonable attorney's fees) that any of them may incur or suffer as a result of a claim, demand, action, cause or

action, or judgment arising out of or alleged to have arisen from the acts or omissions of any of the University's employees assigned to the Foundation, if such acts or omissions occurred or are alleged to have occurred while the employee was so assigned to work for the Foundation. The Foundation's obligation to indemnify pursuant to this paragraph shall exist even though the liability, loss, damage or expense is also covered by insurance maintained by the University.

5. **Donor Records.** The Foundation maintains a database of contributors, prospects and friends of the Foundation and the University (the "Donor Database"), for its internal use in fulfilling its mission, and to assist in performing its services under this Agreement. Although, from time to time, some or all of the Foundation's Donor Database may be stored on hardware leased from the University or accessed using software leased from or licensed by the University, the Donor Database, as well as other data, materials and information of the Foundation pertaining to past, current or prospective donors, is proprietary to the Foundation and constitutes its confidential information and trade secrets, and is hereafter referred to, in whole or in part, as "Foundation Confidential Information."

Upon the request of the University's President or Vice President for University Advancement, and subject to the agreements and covenants set forth below, the Foundation will, from time to time, disclose Foundation Confidential Information in verbal or written form or on electronic, magnetic or other media about past, current or prospective donors, including identifying information, giving history, past involvement with the University, cultivation and solicitation strategies, and other information. In consideration for the disclosure of Foundation Confidential Information, the University agrees and covenants as follows:

- (i) The communication of Foundation Confidential Information to the University and its employees is not required by law, is totally subject to the discretion of the Foundation, and would not be made by the Foundation if such data and information, upon disclosure to the University, were to thereby be determined to become property of the University and/or otherwise available for public examination. The University agrees that all Foundation Confidential Information that has been, or may be, disclosed to the University is and shall remain the proprietary and confidential information of the Foundation and shall be used solely for purposes authorized by the Foundation consistent with its mission.
- (ii) Preserving the confidentiality of Foundation Confidential Information is paramount to the effectiveness of the Foundation in carrying out its purposes. Public or other indiscriminate disclosure of the Foundation Confidential Information could violate the need for discretion and confidentiality inherent in the fund-raising mission of the Foundation and could irreparably damage the Foundation's relationships with past and current contributors and negatively impact on its ability to develop new

donors. Therefore, the Foundation's consent to treat any Foundation Confidential Information that may be disclosed hereunder or otherwise to the University, as a public record, is specifically denied.

- (iii) If, at any time or for any reason, any Foundation Confidential Information disclosed to the University cannot be kept legally confidential, then such information shall be promptly returned to the Foundation.

In order to assure the confidence of the University community and others in the Foundation's operations, its Board of Directors shall foster an atmosphere of openness in its operations, consistent with the prudent conduct of its business. The parties understand that the Foundation is not a public agency or a governing body as defined in Indiana Code §§5-14-1.5 and 5-14-3 and is therefore not required to adhere to the Indiana Open Door and Access to Public Records statutes. Nothing in this Agreement shall be construed as a waiver of the Foundation's right to assert exemption from these statutes.

6. **Names and Marks.** The Foundation shall operate under its own name, and the University hereby recognizes the Foundation's right to use its corporate name. The Foundation is hereby granted a general, non-exclusive, royalty-free license to use the name "Ball State University" in all Foundation activities conducted for the benefit of the University. Excluding its corporate name, the Foundation shall not use the University seal or other identifying marks, trade marks, logotypes and other proprietary marks in the promotion of the Foundation's business and activities, or in fulfilling its obligations under this Agreement, without the University's consent. The Foundation may not delegate or assign the authority to use the University's name or other marks to any person or entity without the University's prior written approval. The Foundation shall be barred from using the University's marks licensed to the Foundation if the University's relationship with the Foundation, as set forth in this Agreement or a future Agreement replacing and superseding this Agreement, is terminated.

The Foundation may develop and utilize its own trademark, trade name or other proprietary mark or name so long as any such trademark, trade name or other proprietary mark is consistent with the provisions of this Agreement. Nothing in this Agreement shall be construed to prevent the Foundation from using its corporate name regardless of the status of this Agreement. However, if the University's relationship with the Foundation, as set forth in this Agreement or a future Agreement replacing and superseding this Agreement, is terminated, the Foundation shall in all communications prominently communicate the fact that it is not affiliated with the University and shall refrain from any communications stating or implying that gifts to the Foundation are for the benefit of the University.

7. **Reimbursement for the Cost of Services Provided.** The Foundation shall reimburse the University on a quarterly basis for all costs associated with the provision of services, materials, or equipment to the Foundation. Such costs are to include salary and employee benefits, services for payroll, human resources, purchasing, computer support, computer

access, use of software, rent for space, telephone and data services, mail service, computer hardware, and any other service provided by the University

8. **Term and Termination.** A joint review shall be conducted at least every five (5) years. Notwithstanding the foregoing, either party may terminate this Agreement in the event the other party defaults in the performance of its obligations and fails to cure such default within ninety (90) days after receipt of written notice thereof.

If any of the following should occur hereafter: (1) this Agreement is terminated by either party, with cause, and the parties are unable to reach agreement with respect to their future relationship; (2) the Foundation ceases to exist; (3) the Foundation ceases to be a Code §501(c)(3) organization; or (4) the Foundation changes its purpose, which is to raise, manage, steward and distribute private resources to support the University's missions; then the Foundation shall, within ninety (90) days following receipt of a written request to do so from the University, transfer its assets and property to the University or to a successor Code §501(c)(3) organization.

9. **Non-discrimination.** The Foundation shall comply with the University's equal opportunity, affirmative action, and non-discrimination rules and regulations in carrying out its responsibilities under this Agreement, as well as all applicable federal and state laws and regulations covering equal opportunity, affirmative action and non-discrimination.

10. **Notices.** Any notices required or permitted to be given under this Agreement shall be in writing and shall either be delivered by hand or messenger service, or be mailed by certified mail, postage prepaid, to the following addresses or to such other address as may be provided by prior written notice to the other party:

If to the University: President  
Ball State University  
2000 West University Avenue  
Muncie, IN 47306

If to the Foundation: President  
Ball State University Foundation, Inc.  
2800 West Bethel Avenue  
Muncie, IN 47306

11. **Governing Law.** This Agreement is governed by and shall be interpreted according to the laws of the State of Indiana.

12. **Assignment.** Neither party shall assign this Agreement without the prior written consent of the other, and any attempt to do so shall be void.

13. **Severability.** If any clause, sentence, provision, paragraph or article of this Agreement is held to be invalid, illegal or unenforceable by a court of competent


jurisdiction, such holding shall not impair, invalidate or nullify the remainder of this Agreement. The effect of any such holding shall be confined to the portion so held invalid, illegal or unenforceable.

14. **Amendments.** This Agreement may not be amended or modified except by an instrument in writing executed on behalf of each of the parties hereto.

15. **Existing Agreements.** The following Agreements between the University and the Foundation are replaced and superseded by this Agreement: the July 1, 1980 Agreement concerning the University's provision of services to the Foundation and reimbursement of the University's costs for these services by the Foundation; the October 24, 1986 Agreement concerning assignment of fund-raising responsibilities; and the September 25, 2003 Agreement concerning fees to be charged by the Foundation for its fund-raising and administrative services.


Executed this 26<sup>th</sup> day of June, 2006.

BALL STATE UNIVERSITY  
BOARD OF TRUSTEES

By: 

Thomas L. DeWeese, President

BALL STATE UNIVERSITY  
FOUNDATION, INC.

By: 

William L. Skinner, Chairman