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September 17, 2021

Board of Directors  
Sonoma State University Foundation  
1801 East Cotati Avenue  
Rohnert Park, CA 94928

Re: Your Duties and Obligations as Board Members, and the Nonprofit Integrity Act

Dear Members of the Board:

You have been both kind and generous in agreeing to serve as a director of the Sonoma State University Foundation (the “**Foundation**” or the “**corporation**”). Your participation on the Board is a valuable service to the campus, to the broader Sonoma County community, and to the people of the State of California.

The purpose of this letter, which is presented annually at a Board meeting, is to provide information to both new and continuing Board members regarding your legal responsibilities as a director of the Foundation, and about the California Nonprofit Integrity Act. Please read it carefully, contact me if you have questions, and then promptly print the letter, check the appropriate box, date and sign the letter at the end, and return the signed copy to the Foundation. **You are encouraged to do this by emailing a completed PDF copy to the Foundation staff.**

The Foundation is a not-for-profit corporation organized under the Education Code of the State of California. This is different from most not for profits or other corporations with which you may have Board experience, as those organizations are formed solely under the California Corporations Code. The Education Code (amplified by provisions of the California Code of Regulations) sets up a higher standard of responsibility for the directors than is applicable toward other corporations. To the extent that the Education Code does not establish specific standards, they are set by the California Nonprofit Corporation Law.

The Foundation is an “auxiliary organization” of Sonoma State University. Its purpose is not to produce a profit for itself but to produce a service to the campus, and it can do this in any number of ways. The Foundation’s specific purposes are stated in the Articles of Incorporation and are generally

to promote the objectives of the University in such manner as the President may determine to be appropriate.

**Generally speaking, if you regularly and diligently prepare for and attend Board meetings, disclose any conflicts of interest you have regarding a Board matter and recuse yourself prior to the Board taking action on the matter, act in good faith and in a manner in which you reasonably believe to be in the best interests of the Foundation, make reasonable inquiries where a reasonable person would make such an inquiry, and vote "no" where you conclude that a proposed Board action is inappropriate, you will have fulfilled your duties and your conduct will be above reproach.**

Your function is to manage the affairs of the Foundation. The Board can do this by delegating some management functions and corporate powers to others, provided that the Board ultimately directs and controls the actions of those to whom management powers are delegated, and provided that you have determined that the people to whom you delegate authority are competent, experienced and trustworthy.

In managing the Foundation, each of you must exercise your own independent judgment and in doing so you may not always be right. **You are generally not responsible for errors in your judgment, so long as in reaching your decision you have exercised the degree of care that would be expected of a knowledgeable individual acting in good faith. This is also known as the "business judgment rule," which protects a director by a presumption that the director acted reasonably. This presumption does not apply where the director has a financial interest in the subject matter on which his or her business judgment is being exercised.** In that circumstance, the director must prove he or she satisfied their fiduciary duty to the Foundation.

## **A. MANAGEMENT**

The Board of Directors is ultimately responsible for the management of the Foundation. The Education Code, the Code of Regulations, and the Nonprofit Corporation Law set the following standards you must adhere to in properly managing the affairs of the Foundation:

**1. General Fiduciary Duty.** Your fiduciary duty to the corporation includes the duty of care, the duty of inquiry, the duty of loyalty, and the duty to comply with investment standards. To satisfy these duties, you are required to act in good faith, and in a way you reasonably believe to be in the best interests of the Foundation, with the same care as an ordinary prudent person in a like position would use under similar circumstances.

**2. Duty of Inquiry.** You cannot close your eyes to how others are conducting the Foundation's business. You are required to make reasonable inquiry into the matters to be dealt with

by the Board, particularly if circumstances would put a reasonable person in your position on notice of the need to inquire further. This means that you may not passively sit in meetings and let others decide what course to take on issues before the Board. Each director must make a reasonable effort to determine the nature of the matters to be considered and the consequences to the Foundation of any actions (or inaction) being considered.

**3. Duty to Comply with Investment Standards.** This requires you and the Foundation to do the following:

3.1. Avoid speculation and instead to look to permanent disposition of investment funds, considering the probable outcome and the probable safety of the Foundation's capital (Corporations Code § 5240(b)(1));

3.2. Comply with any additional standards imposed by the Foundation's Investment Policy and in the Foundation's Bylaws (Corp. Code § 5240(b)(2)). The Bylaws address Restricted Funds in Article V:

"The corporation may receive funds which have been earmarked for specific purposes and functions. The corporation, acting through its officers, will ensure that such funds are not commingled with other funds of the corporation, but they may be merged for investment purposes. All funds are to be used for the purpose for which they were gifted."

3.3 Comply with the express terms of all instruments or agreements under which the assets were contributed, such as trusts, donor agreements, and the like. (Corp. Code § 5240(b)(2)); and

3.4 Comply with the general fiduciary duties of care and inquiry previously mentioned. (Corp. Code § 5240(d)). Note that an investment does not violate these standards if it was required (as opposed to merely being authorized) by the instrument or agreement under which the assets were contributed (Corp. Code § 5240(c)). If the trust or other instrument or agreement merely authorizes the investment without requiring that it be made, the investment can still violate your general fiduciary duty of care and inquiry.

**4. Reliance.** In making your decisions, you are entitled to rely on certain information presented to the Board. This information would include opinions, reports, financial data, and statements, including financial statements, prepared or presented by any of the following:

4.1. An officer or employee of the Corporation whom the director believes to be reliable and competent in the matter presented.

4.2. Counsel, independent accountants, or other persons as to matters which the director believes to be within such person's professional or expert competence.

4.3. A committee of the Board on which the director does not serve as to matters within its designated authority if the director believes the committee merits confidence.

Reliance is not warranted, however, and a duty to inquire further into the matter arises, when the need for inquiry is indicated by the circumstances or when the director has knowledge that would cause reliance to be unwarranted.

Subject to the more specific duties enumerated below, if you act in accordance with the foregoing requirements, you will not be liable for any act or omission, including those which may exceed or defeat the corporation's purposes. However, liability may be incurred on a separate basis, e.g., misleading outsiders, furthering your own interests, or your own commission of a tort.

**5. Conflict of Interest (self-dealing).** You are prohibited from having any financial interest in any contract or transaction entered into by the Foundation. The consequences of a violation can be draconian: **The contract or transaction is void, except where all the following conditions are met:**

5.1. The fact of the financial interest by a Board member is either disclosed to the Board or known to the Board before the Board acts on the matter; and

5.2. The fact of the financial interest and disclosure of it prior to the Board is noted in the minutes; and

5.3. The Board thereafter authorizes, approves or ratifies the contract or transaction in good faith and the vote of the Board is sufficient to approve the matter, without counting the vote or votes of the financially-interested member or members;

5.4. The contract or transaction is just and reasonable as to the auxiliary organization at the time it is approved.

The preceding exceptions to the conflict-of-interest rule do not apply in the following instances, and **the Board is absolutely prohibited from entering into any contract or transaction between the Foundation and the following:**

- A. Any director(s);
- B. Any partnership or unincorporated association in which any director is a partner or in which the director is an owner or holder, directly or indirectly, of any proprietorship interest;
- C. Any corporation in which any director is an owner or holder, directly or indirectly, of 5% or more of the outstanding common stock.

It is also absolutely prohibited for you to attempt to influence another director to enter into any contract or transaction in which you have a financial interest without first disclosing that financial interest to the Board at a public meeting of the Board.

**6. Transactions With Other Entities For Which You Are Also A Director (Common Director Transactions).** If you do not have one of the conflicts of financial interest described above, the Corporation can enter into transactions with other entities, such as Sonoma State Enterprises, Inc., so long as the following requirements are strictly adhered to:

- 6.1 The Board (or any committees of the Board), must be fully informed of the common directorship and of the material facts as to the transaction, before the Board votes to approve the transaction; and
- 6.2 The transaction must be approved in good faith, without counting the vote of the common director(s).

**7. Use of Unpublished Information.** You may not use for personal pecuniary gain any information that is not a matter of public record which you received by reason of membership on the Board. The prohibition applies whether you are currently on the Board, or not, and there is no fixed time limitation on the prohibition.

**8. Elections.** The duties of directors in connection with election, selection or nomination of other directors are governed by the rules of good faith, prudence, inquiry, and reliance set forth above.

**9. Loans and Distributions.** You are prohibited from reaping any pecuniary gain from the Foundation. This prohibition applies to loans of money or property, guarantees of any obligation of any director or officer, and any distribution to any officer or director of any money or property. The income and assets of the Foundation are absolutely committed to its nonprofit purposes. The Foundation is permitted to make advances to directors or officers for certain expenses reasonably anticipated to be incurred in the performance of the duties of the officer or director, provided that the

officer or director would be entitled to be reimbursed for such expenses by the corporation if the advance had not been made.

**10. Breach of Duty; Remedies.** Civil or criminal lawsuits against or involving the directors of nonprofit corporations are very rare. However, if you attend a meeting where an action is taken in violation of certain laws, with knowledge that it is a violation, you may be guilty of a misdemeanor and may also be subject to civil liability and damages. This rule applies even if you abstain, so it is always prudent to vote “no” to create a clear record of your objection, whether it be to a potentially illegal Board action or just to an action that you disagree with.

Any contract, transaction or election entered into or conducted in violation of the above principles may be deemed void as to all parties, whether innocent or culpable. Each director who knowingly approves any of the above prohibited transactions, or who abstains from voting against an action that director knows is illegal, may also be personally liable to the Foundation for the entire amount of any financial damage sustained by the Foundation. Your protection is to be sure that the other directors act in accordance with these standards and, if they do not, then to vote “no”. Abstaining in this situation can be equivalent to having cast a “yes” vote.

Suit may be brought for the Foundation’s breach of these rules by the Foundation itself, or by any officer or director, the Attorney General of the State of California and, in appropriate cases, any creditor of the corporation or other person damaged. The statute of limitations within which suit can be brought on most of these breaches is extremely long: ten years.

The types of damages that may be recovered include: an accounting for and paying to the corporation any profits made on the transaction by the director; loss of any profits the Foundation may have made on the transaction, payment for the use of any Foundation property taken; return or replacement of any property lost, plus payment of any income that was or would have been derived from the property, plus the appreciation in value of the property or in the case it was sold; and return of the sale proceeds. In addition, interest is collectible and where the act was willful, punitive damages may be assessed. The court may give any other appropriate remedy.

**11. Mandated Duties.** The Education Code and Nonprofit Corporation Law require the following be done by any auxiliary organization:

11.1. Engage a certified public accountant to audit, in accordance with procedures proscribed by the Department of Finance, all funds annually. The Chancellor's office should furnish the accountant with the appropriate procedures. The audit must be submitted to the trustees and to the Director of Finance. An audited statement shall be published and disseminated as widely as feasible and must be available to any

person upon request. Publication in the campus student newspaper is deemed sufficient.

By statute, the President of the University is responsible for ascertaining that expenditures accord with trustee policy, are proper, and for the integrity of the financial reporting.

11.2. Conduct the corporation's operations in conformity with regulations established by the trustees including, but not limited to, providing salaries, working conditions and benefits for full-time employees which are comparable to those provided California State University and Colleges' employees performing similar services or, if the employee's duties are not comparable, then at least equal to salaries prevailing in other educational institutions in the area or commercial operations of like nature. Benefits may exclude retirement benefits, if so provided in the regulations.

11.3. Hold at least one business meeting per quarter.

11.4. Have the benefit of the advice and counsel of at least one attorney admitted to practice law in California and at least one licensed certified public accountant.

11.5. Accept no grant, contract, bequest, trust or gift unless it is so conditioned that it may be used only for purposes consistent with policies of the trustees.

11.6. Conduct your business in public meetings, except where closed sessions are permitted, all in accordance with the provisions of the California Education Code, commencing with Section 89920.

11.7. Approve all expenditures and fund appropriations. Appropriations of funds for use outside your normal business operations must be approved in accordance with trustee policy and regulations by an officer designated by the trustees.

11.8. Conduct your operations of commercial services, if any, so that they are self-supporting.

11.9. Maintain up-to-date Articles of Incorporation, Bylaws, records of members, records of account and minutes of proceedings.

**12. Indemnity.** The law provides that the Foundation may indemnify its directors, officers, employees, and agents against whom an action, whether civil, criminal or administrative, is threatened or brought for an alleged breach of the person's duties. The indemnity can cover any

amount actually and reasonably incurred in connection with such a proceeding, including attorneys' fees, judgments, fines, and other expenses. The Foundation's Bylaws include a provision providing that, to the fullest extent permitted by law, the Foundation will indemnify its directors and officers against expenses you incur by in connection with any legal proceeding you are involved in by reason of your serving on the Board. However, indemnity is only available to a director or officer if the person acted in good faith and in a manner such person reasonably believes was in the best interest of the Foundation. The fact that the proceeding may turn out adversely to the person is not in itself a presumption the person did not act in good faith and in a way he or she reasonably believed to be in the best interest of the Foundation, with the probable exception of cases of conflict of interest. These rules are rather lengthy and complicated and in the event any action is threatened or instituted you should consult with your own counsel, Board counsel, and the Board concerning appropriate Board action.

## **B. CONTRACT LIABILITY**

The directors ordinarily will have no personal liability for performance of the contracts of the Foundation or for its debts. One of the principal purposes of incorporating is to insulate the officers and directors from liability on the debts and contracts of the Foundation.

## **C. TORTS AND CRIMINAL CONDUCT**

A tort is the violation of another person's rights, other than rights established by contract, which results in the injury to the person or his or her property. Most commonly it is based on negligence or willful misconduct, but in specific instances it may result without fault. Willful misconduct is also generally a crime.

As with contract liability, the directors and officers are not liable for the torts of other officers, directors, employees, or agents of the Foundation unless the person participated in or authorized the conduct constituting the tort. As an example, if one of your employees negligently injures another person without your participation or authorization, you are not personally responsible although the Foundation may be. However, even the Foundation ordinarily would not be responsible for willful misconduct of a director, officer, employee, or agent. The Foundation should carry adequate liability insurance to protect itself against losses arising out of torts. Liability insurance to protect the individual directors and officers is also prudent. I have been told by Foundation officials that the Foundation carries both types of insurance.

## **D. THE CALIFORNIA NONPROFIT INTEGRITY ACT**

California's Nonprofit Integrity Act (the "Act") applies to any "charitable corporation or any legal entity holding property for charitable purposes." "Charitable purpose" under California law

includes the advancement of education, as well as other purposes that are beneficial to the community. The Foundation attempts to conduct its activities in full accordance with the Act.

The Act requires the Foundation, as well as commercial fundraisers and fundraising counsel employed by the Foundation, to register with the Attorney General and to file financial disclosure reports. I have been told by Foundation officials that the Foundation complies with these requirements.

Audited financial statements and the appointment of an audit committee are required for any fiscal year in which the gross revenue is \$2 million or more. The Foundation has an Audit Committee. The Act provides that the Committee may include people who are not members of the Board, but no one on the staff of the Foundation, including its president/CEO or treasurer/CFO may be members of the Audit Committee. The Foundation's Finance Committee must be kept separate from the Audit Committee. While members of the Finance Committee can serve on the Audit Committee, the chair of the Audit Committee cannot be a member of the Finance Committee, and members of the Finance Committee must constitute less than one-half of the membership of the Audit Committee. I am told by Foundation officials that the Foundation's Audit Committee complies with all these requirements.

The Audit Committee is responsible for making recommendations to the Board regarding the hiring and termination of the independent auditor, and it may negotiate the auditor's compensation, confer with the auditor to satisfy the members of the Board that the Foundation's financial affairs are in order, review and determine whether to accept the audit, and oversee all non-audit services by the auditing firm. The Audit Committee cannot take any actions independently. Its actions and recommendations are subject to supervision and approval of the Board of the Foundation.

The heart of the Nonprofit Integrity Act is its prohibitions on misrepresenting the purpose, nature or beneficiary of a solicitation. Misrepresentation can take many forms. It can be affirmative statements or conduct, or the failure to speak or act in a certain way which results in the failure to disclose or a misrepresentation of a material fact about the solicitation.

What follows is a list of prohibited practices under the Act, taken from a publication entitled "CSU Auxiliaries: Nonprofit Integrity Act & Charitable Solicitation Compliance Manual", which contains more details about the Act. If you would like a copy, just contact me or a Foundation staff person, and we'll be happy to provide you with one.

This summary of prohibited practices applies to every person or entity involved in planning, conducting, or executing any charitable solicitation or sales promotion, regardless of whether a commercial fundraiser or fundraising counsel is involved and regardless of any exemptions under the Act (including the exemption for educational institutions):

- operating in violation of, or failing to comply with, any of the requirements of the Act or other regulations or orders of the Attorney General, or soliciting contributions after registration with the Registry of Charitable Trusts has expired or has been suspended or revoked;
- using unfair or deceptive acts or practices or engaging in any fraudulent conduct that creates a likelihood of confusion or misunderstanding;
- using any name, symbol, emblem, statement, or other material stating, suggesting, or implying to a reasonable person that the contribution is to or for the benefit of a particular charity when that is not the fact;
- misrepresenting or misleading anyone in any manner to believe that the person on whose behalf a charitable solicitation or charitable sales promotion is being conducted is a charitable organization or that the proceeds of the charitable solicitation or charitable sales promotion will be used for charitable purposes when that is not the fact;
- misrepresenting or misleading anyone in any manner to believe that any other person sponsors, endorses, or approves a charitable solicitation or charitable sales promotion when that person has not given consent in writing to the use of the person's name for these purposes;
- misrepresenting or misleading anyone in any manner to believe that goods or services have endorsement, sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has endorsement, sponsorship, approval, status, or affiliation that the person does not have;
- using or exploiting the fact of registration with the Registry of Charitable Trusts so as to lead any person to believe that the registration in any manner constitutes an endorsement or approval by the Attorney General. The following statement is not prohibited:

“The official registration and financial information regarding (insert the legal name of the charity as registered with the Registry of Charitable Trusts) can be obtained from the Attorney General's Web site at <https://oag.ca.gov/charities> . Registration does not imply endorsement.”.

- representing directly or by implication that a charity will receive an amount greater than the actual net proceeds reasonably estimated to be retained by the charity for its use;

- soliciting for advertising to appear in a for-profit publication that relates to, purports to relate to, or that could reasonably be construed to relate to, any charitable purpose without making the following disclosures at the time of solicitation:
  - The publication is a for profit, commercial enterprise;
  - The true name of the solicitor and the fact that the solicitor is a professional solicitor; and
  - The publication is not affiliated with or sponsored by any charity;
- where a sale of advertising has been made, the solicitor, prior to accepting any money for the sale, shall make to the purchaser the disclosures required above in written form and in conspicuous type;
- misrepresenting that another charity will receive a portion of the solicited funds without that charity's consent; and
- representing that tickets will be donated without following the requirements contained in Section 12599.6(f)(12) of the Act.

Finally, under the Act, the Foundation must establish and exercise control over fundraising activities that are being conducted for its benefit, including (i) approving all written contracts and agreements with commercial fundraisers or fundraising counsel, (ii) being sure that these contractors are registered with the Attorney General's office, (iii) ensuring that the written contracts with these contractors comply with the requirements of the Act, (iv) and that all of the fundraising activities being conducted by the Foundation or on its behalf are being done without coercion, without using unfair or deceptive acts or practices, without confusing, causing misunderstanding, or misleading the person being solicited about where the proceeds of the contribution will go, what they will be used for, endorsements or sponsors, or any other matter relating to the solicitation.

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Should you have any questions in connection with this letter, or other matters arising out of your service to the Foundation, I will be happy to answer them. **Once you have read this letter, please promptly print it, check the appropriate box, date, and sign the letter at the end, and return the signed copy to the Foundation, preferably by emailing a completed PDF.**

Very truly yours,

OLSAN LAW, Inc.



By: \_\_\_\_\_  
Jeremy L. Olsan

JLO:abm

**NOTE: PLEASE READ, CHECK THE APPROPRIATE BOX, DATE/SIGN BELOW ON A COPY OF THIS LETTER AND RETURN THE SIGNED COPY TO SONOMA STATE UNIVERSITY FOUNDATION.**

The undersigned, being a member of the Board of Directors of Sonoma State University Foundation, hereby affirm that I have received and read this letter regarding my duties as a member of the Foundation's Board of Directors, prohibitions on conflicts of interest, and the Nonprofit Integrity Act, and that I **[check the applicable box below]**:

attended the annual Board of Director's meeting at which the Foundation's legal counsel presented these issues.

was unable to attend the annual Board of Director's meeting at which the Foundation's legal counsel presented these issues to the Board, but I am familiar with my duties as a Board member, the rules prohibiting conflicts of interest, and the Nonprofit Integrity Act. If I have questions about these subjects, I will contact the Foundation's legal counsel.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name