OPERATING AGREEMENT
BETWEEN TRUSTEES AND
CALIFORNIA STATE UNIVERSITY SAN MARCOS AND
CALIFORNIA STATE UNIVERSITY SAN MARCOS FOUNDATION

This agreement is made and entered into by and between the State of California through its Trustees of the California State University by their duly qualified and acting Chancellor (hereinafter called State) on behalf of the California State University San Marcos (hereinafter called University) and California State University San Marcos Foundation (hereinafter called FOUNDATION). The term of this agreement shall be March 1, 2009 through June 30, 2016 unless sooner terminated as herein provided.

1. PURPOSE

The purpose of this agreement is to set forth the terms and conditions under which FOUNDATION may operate as an auxiliary organization pursuant to Chapter 7, Part 55, Division 8, Title 3 (Sections 89900 et seq.) of the Education Code and Subchapter 6, Article 1, Part V (Sections 42400 et seq.) of Title 5 of the California Code of Regulations (CCR). In entering this agreement, Trustees find that certain functions important to the mission of the California State University are more effectively accomplished by the use of an auxiliary organization rather than the usual state procedures.

2. FUNCTION

In consideration of receiving recognition as an official auxiliary organization of the California State University, FOUNDATION hereby agrees, for the period covered by this agreement, to perform the following functions specified in Section 42500, Title 5, CCR:

   1. Recipient of Gifts, Bequests, Endowments, Trusts, and similar gift management.

   2. Acquisition and development of real property

FOUNDATION further agrees to receive and apply exclusively the funds and properties coming into its possession toward furthering these purposes. Prior to initiating any additional functions, FOUNDATION agrees to obtain written approval of Trustees.

Operations of FOUNDATION under this Agreement shall be integrated with campus operations and shall be supervised by campus officials so as to assure compliance with the objectives stated in Title 5, CCR, 42401.

It is mutually understood that the functions authorized under this Agreement are exclusively intended to support, assist and enhance the educational mission of the campus, and that the services are for the students, faculty and staff, and invited guests of the campus.
3. ADDITIONAL CONDITIONS

A. FOUNDATION agrees to maintain its organization and to operate in accordance with all applicable regulations and policies of State, Chancellor, and the University.

B. With respect to expenditures for public relations or other purposes which would serve to augment appropriations for CSU operations, FOUNDATION may expend funds in such amount and for such purposes as are approved by FOUNDATION's governing body. FOUNDATION shall file with State a statement of FOUNDATION's policy on accumulation and use of public relations funds. The statement shall include the policy and procedures for solicitation of funds, purposes for which the funds will be used, allowable expenditures, and procedures of control.

C. No officer or employee of the California State University shall be appointed or employed by FOUNDATION if such appointment or employment would be incompatible, inconsistent, or in conflict with his or her duties as a State officer or employee.

4. RECORDS

FOUNDATION shall maintain adequate records and shall submit periodic reports as required by State showing the operation and financial status of FOUNDATION. The records and reports shall cover all activities of FOUNDATION whether pursuant to this agreement or otherwise.

5. INTERNAL COMPLIANCE AND OPERATIONAL REVIEW

FOUNDATION agrees to assist the President and his or her designee in carrying out the compliance and operational reviews required by Executive Order 698 and related policies.

6. FISCAL AUDITS

FOUNDATION is subject to the provisions of Section 89900 of the Education Code and Section 42408 of Title 5, CCR. In accordance with these provisions, FOUNDATION agrees to:

A. Contract with a certified public accountant for an annual audit at FOUNDATION's expense. The report on such examinations shall be furnished to the State.

B. Permit examination of all FOUNDATION records by State or their designee.
7. REMEDIES ON TERMINATION OR BREACH

A. Failure of FOUNDATION to comply with any term of this agreement may result in the removal, suspension, or placing on probation of FOUNDATION as an auxiliary organization in good standing. Such action by State may involve the limitation or removal of FOUNDATION’s right to utilize the resources, facilities, and name of State and University (ref. Title 5, CCR, 42406).

B. Upon termination or breach of this agreement, State, at its sole discretion, may require FOUNDATION to transfer all assets in its possession by reason of its status as a CSU auxiliary organization to a successor nonprofit corporation qualifying as an auxiliary organization. This remedy shall be in addition to any other remedies available to State upon termination or breach of this agreement.

8. FAIR EMPLOYMENT PRACTICES

In the performance of this agreement, FOUNDATION shall not deny employment opportunities to any person on the basis of race, color, religion, ethnic group identification, sex, sexual orientation, marital status, pregnancy, age, physical or mental disability, medical condition, or veteran's status. FOUNDATION shall adopt employment procedures consistent with the policy statement on nondiscrimination and affirmative action in employment adopted by State.

9. DISPOSITION OF ASSETS

Attached hereto as Attachment 1 is a copy of FOUNDATION’s Articles of Incorporation which establishes that upon dissolution of FOUNDATION, the net assets other than trust funds shall be distributed in accord with Section 42600, Title 5, California Code of Regulations. For the period covered by this agreement, FOUNDATION agrees to maintain this provision as part of its Articles of Incorporation. In the event FOUNDATION should change this provision to make other disposition of the net assets, this agreement shall terminate as of the date immediately preceding the date such change becomes effective, and all net assets shall become the property of State.

10. USE OF CAMPUS FACILITIES

FOUNDATON may use those facilities identified for its use in a lease agreement executed between University and FOUNDATION. In addition to the facilities covered by the lease agreement, University may permit FOUNDATION to utilize other campus facilities. Permission shall be granted by the execution of a license agreement with University. Such a license must be set forth in the format provided by State.
The campus may be used for research projects and for institutes, workshops, and conferences only when such use does not interfere with the instructional program of the campus.

11. DISPOSITION OF NET EARNINGS

FOUNDATION agrees to comply with Trustee’s and University policy on expenditure of funds, including but not limited to State guidelines for the disposition of revenues in excess of expenses and State policies on maintaining appropriate reserves.

12. ACCEPTANCE, ADMINISTRATION, AND USE OF GIFTS

FOUNDATION agrees that it will accept and administer gifts, scholarships, loan funds, and fellowships in accordance with policies of the State, Chancellor, and University.

14. INDEMNIFICATION

FOUNDATION agrees to indemnify, defend, and save harmless the State, the Trustees of the California State University, Chancellor, and University, their officers, agents and employees of each of them (all of which are hereinafter referred to as “State”) from any and all loss, damage, or liability that may be suffered or incurred by State, caused by, arising out of, or in any way connected with the operation of FOUNDATION as an auxiliary organization.

15. CHARGES FOR FACILITIES & SERVICES PROVIDED BY THE STATE

FOUNDATION agrees to reimburse State for expenses incurred by State as the result of FOUNDATION’s activities under this agreement. Reimbursement shall be for items including, but not limited to rentals, campus services, and indirect costs. Reimbursement shall be on a simple but equitable basis and in accordance with the policies for reimbursement of costs as established by State. FOUNDATION agrees to make reimbursement within 30 days from receipt of notice of such determination.

16. INSURANCE

A. FOUNDATION shall maintain in force during the term of this Agreement and all extensions thereof liability insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by FOUNDATION, its agents, representatives, employees or subcontractors.

B. Minimum Scope of Insurance Coverage shall be at least as broad as:

1) Insurance Services Office Commercial General Liability coverage (occurrence
form CG 0001).
2) Insurance Services Office Business Auto Coverage form number CA 0001, code 1 (any auto).
3) Workers’ Compensation insurance as required by the State of California and Employer’s Liability Insurance.
4) "All Risk" Property Insurance with applicable limits for all property that the Campus has an insurable interest in.

C. Minimum Limits of Insurance

FOUNDATION shall maintain limits no less than:

1) General Liability: $1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.

2) Automobile Liability: $1,000,000 per accident for bodily injury and property damage.

3) Employer’s Liability: $1,000,000 per accident for bodily injury or disease.

4) Property Insurance: Full replacement of insured property.

D. Deductibles and Self-Insured Retentions
Any deductibles or self-insured retentions must be declared to and approved by the Campus. At the option of the Campus, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the Campus, its trustees, officers, employees and volunteers; or FOUNDATION shall provide a financial guarantee satisfactory to the Campus guaranteeing payment of losses and related investigations, claim administration and defense expenses.

E. Other Insurance Provisions
The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:

1) The University, its trustees, officers, employees, and volunteers are to be covered as additional insureds with respect to liability arising out of automobiles owned, leased, hired or borrowed by or on behalf of FOUNDATION; and with respect to liability arising out of work or operations performed by or on behalf of FOUNDATION including materials, parts or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to FOUNDATION’s insurance, or as a separate owner’s policy.
2) For any claims related to a project, FOUNDATION’s insurance coverage shall be primary insurance as respects the University, its trustees, officers, employees, and volunteers. Any insurance or self-insurance maintained by the Campus, its trustees, officers, employees, or volunteers shall be excess of FOUNDATION’s insurance and shall not contribute with it.

3) All insurance required under this agreement shall contain an endorsement naming the State of California, the Trustees of the California State University, California State University San Marcos, and the officers, agents and employees of each of them as additional insureds. It shall also contain requiring thirty (30) days written notice from the insurance company to both parties before cancellation or change in Coverage, scope or amount of any policy. Each policy, or a certificate of the policy, shall be deposited with the Campus within thirty (30) days after execution of this agreement and, on renewal of the policy, not less than thirty (30) days before the expiration of the term of the policy.”

F. Acceptability of Insurers
Insurance is to be placed with insurers with a current AM. Best’s rating of no less than A::VII.

G. Verification of Coverage
FOUNDATION shall furnish the Campus with original certificates and amendatory endorsements effecting coverage required by this clause. The endorsements should be on forms provided by the Campus or on other than the Campus’ forms, provided those endorsements or policies conform to the requirements. All certificates and endorsements are to be received and approved by the Campus before work commences. The Campus reserves the right to require complete, certified copies of all required insurance policies, including endorsements affecting the coverage required by these specifications at any time.

H. Subcontractors
FOUNDATION shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

I. Possessory Interest
The San Diego County Assessor may value the possessory interest created by this Agreement, or any subleases thereunder. Under California Revenue and Taxation Code section 107, a property interest tax may be levied on such possessory interests. FOUNDATION may be obligated to pay such property interest tax, and failure to do so may be considered a material breach of this Agreement. The burden of applying for and obtaining appropriate exemptions rests with FOUNDATION and subleases.
17. MAINTENANCE AND OPERATING EXPENSE

FOUNDATION shall be responsible for the payment of its organizational maintenance and operating expense during the term of this agreement.

18. AMERICANS WITH DISABILITIES ACT (ADA) Rev. 9/03

FOUNDATION assures the State that it complies with the Americans with Disabilities Act (ADA) of 1990, if that act is otherwise applicable. The ADA prohibits discrimination on the basis of disability. (42 U.S.C. 12101 et seq.)

19. NOTICES

All notices herein required to be given, or which may be given by either party to the other, shall be deemed to have been fully given when made in writing and deposited in the United States mail, certified and postage prepaid and addressed as herein provided.

Notice to FOUNDATION shall be addressed as follows:

California State University San Marcos
California State University San Marcos Foundation
c/o Vice President, University Advancement
333 South Twin Oaks Valley Road San Marcos, CA 92096

Notice to the State shall be addressed to:

Trustees of the California State University
401 Golden Shore
Long Beach, California 90802
Attention: Contract Services & Procurement

Notice to the University shall be addressed as follows:

Procurement & Support Services
California State University San Marcos
333 South Twin Oaks Valley Road
San Marcos, CA 92096-0001
IN WITNESS WHEREOF, this agreement has been executed by the parties hereto.

Executed on 4/8/2009 California State University San Marcos Foundation
By
Neal Hoss
Executive Director

Executed on 4-8-09 California State University San Marcos
By
Linda Hawk
CFO/Vice President
Finance and Administrative Services

Approved: California State University 6-4-09
Office of the Chancellor