



EXECUTIVE

May 4, 2023

**APPROVAL OF ADDENDUM TO
ATHLETIC EMPLOYMENT CONTRACT**

REQUEST:

Approval of a second addendum to the Athletic Employment Contract between Western Kentucky University and Tyson Helton.

FACTS:

The University and Coach Helton have negotiated a second addendum to the Athletic Employment Contract which outlines revised terms and conditions of his employment as head men's football coach and extends his employment until December 31, 2026.

BUDGETARY IMPLICATIONS:

Tyson Helton will receive an extension of one year to his current contract. His base salary and bonuses will remain the same.

RECOMMENDATION:

President Timothy C. Caboni requests approval of the second addendum to the Athletic Employment Contract between Western Kentucky University and Tyson Helton.

MOTION:

Approval of the Addendum to the Athletic Employment Agreement between Western Kentucky University and Tyson Helton.

**SECOND ADDENDUM
TO
WESTERN KENTUCKY UNIVERSITY
ATHLETIC EMPLOYMENT CONTRACT**

This Second Addendum to the Employment Contract between **WESTERN KENTUCKY UNIVERSITY** (the "University") and **TYSON HELTON** ("Coach") is entered into for the following purposes:

Revisions to existing contract:

ARTICLE III – TERM OF EMPLOYMENT is amended to add an additional season to the existing term of employment following each season the football program wins seven or more games. The revised normal expiration date is now December 31, 2026 (or December 31, 2027, or December 31, 2028, or December 31, 2029 in the event of extension).

ARTICLE V – 5.05 LIQUIDATED DAMAGES UPON TERMINATION WITHOUT CAUSE

If COACH terminates the contract without cause, he will pay the UNIVERSITY, in equal payments over a 12-month period, according to the following schedule:

Prior to December 31, 2023	\$1,100,000
Between January 1, 2024 and December 31, 2024	\$800,000
Between January 1, 2025 and December 31, 2026	\$500,000

If UNIVERSITY terminates the contract without cause, WKU will pay COACH, in equal payments over a 12-month period, according to the following schedule:

Prior to December 31, 2023	\$4,000,000
Between January 1, 2024 and December 31, 2024	\$3,150,000
Between January 1, 2025 and December 31, 2025	\$2,250,000
Between January 1, 2026 and December 31, 2026	\$1,350,000
Between January 1, 2027 and December 31, 2028	\$1,000,000

Unless otherwise specifically amended herein, the parties agree that all terms, conditions, agreements, and provisions of the Employment Contract dated February 11, 2019 and the subsequent Addendum dated February 18, 2022 shall continue in full force and effect for the term as established herein. The parties agree that this Addendum is contingent upon subsequent approval by the University's Governing Board of Regents which will be sought by the University on May 4, 2023.

This Addendum entered into this _____ day of _____, 2023 by:

Todd Stewart
Director of Athletics
Western Kentucky University

Tyson Helton
Head Coach
Western Kentucky University

APPROVAL OF ATHLETIC EMPLOYMENT CONTRACT

REQUEST:

Approval of Athletic Employment Contract between Western Kentucky University and Steve Lutz.

FACTS:

The University and Coach Lutz have negotiated an Athletic Employment Contract which outlines the terms and conditions of his employment as head men's basketball coach through June 30, 2027.

BUDGETARY IMPLICATIONS:

Steve Lutz will be paid \$650,000 annually along with performance incentives.

RECOMMENDATION:

President Timothy C. Caboni requests approval of the Athletic Employment Contract between Western Kentucky University and Steve Lutz.

MOTION:

Approval of the Athletic Employment Agreement between Western Kentucky University and Steve Lutz.

**WESTERN KENTUCKY UNIVERSITY
ATHLETIC EMPLOYMENT CONTRACT**

This Employment Contract is made this 22nd day of March, 2023, between
Western Kentucky University (the "University") and Steve Lutz ("Coach").

ARTICLE I
PURPOSE

The University and Coach have entered into this Employment Contract because the University desires to hire Coach for the time period referenced herein, with Coach's assurance that he will serve the entire term of this Employment Contract, a long-term commitment by Coach being critical to the University's desire to run a stable basketball program.

The University and Coach agree that head coaches of intercollegiate athletic teams at Western Kentucky University conduct their professional activities under circumstances unique in the family of University employees, including evaluation and scrutiny of team performances by the public and the media and control by external rules and regulations.

Coach shall be a staff employee at the University, with the terms of his employment restricted solely to this Employment Contract. It is understood and agreed that Coach's sole grievance rights shall be as set forth herein and that Coach hereby waives any and all grievance rights under the University's internal grievance procedures.

ARTICLE II
POSITION

2.01 DESCRIPTION OF DUTIES AND RESPONSIBILITIES

A. RECOGNITION OF DUTIES

Coach agrees to be a loyal coach of the University. Coach agrees to devote his best-efforts full time to the performance of his duties for the University, to give proper time and attention to furthering his responsibilities to the University, and to comply with all rules, regulations, policies, and decisions established or issued by the University. Coach also agrees that, notwithstanding any other provisions of this Employment Contract, during the term of this Employment Contract, he will not engage, directly or indirectly, in any business which would detract from his ability to apply his best efforts to the performance of duties hereunder.

B. GENERAL DUTIES AND RESPONSIBILITIES

During the period in which the University employs Coach as Head Men's Basketball Coach, Coach agrees to undertake and perform all duties and responsibilities attendant to the position of Head Men's Basketball Coach as set forth herein. Coach shall not be reassigned to any other position or role without Coach's prior written consent.

C. SPECIFIC DUTIES AND RESPONSIBILITIES WHILE EMPLOYED AS COACH

As of the beginning of this Employment Contract, the duties and responsibilities assigned to Coach in connection with the position as Men's Basketball Coach are as set forth below. This list of specific duties and responsibilities supplement, and is not exclusive of, the other general duties and responsibilities provided for elsewhere in this Employment Contract.

1. Provide the University with his most dedicated and conscientious service in carrying out the duties and responsibilities as set forth herein or as may be assigned by the Athletics Director and perform his duties and responsibilities

in a manner consistent with state and University rules, regulations, and policies.

2. Be primarily responsible for all aspects of the basketball program including budget, scheduling, and the recruiting, training, supervision, evaluation, and performance of student athletes, coaching staff, and basketball office clerical staff subject to the approval of the Athletics Director.
3. Abide by and comply with the constitution, bylaws, and interpretations of the National Collegiate Athletic Association (NCAA) and Conference USA, or any other basketball conference the University may choose to enter (the basketball conference that University is a member of shall be referred to as the "Conference"), as well as all University rules and regulations relating to the conduct and administration of the Men's Basketball program. In the event that Coach becomes aware, or has a reasonable cause to believe, that violations of such constitution, bylaws, interpretations, rules, or regulations may have taken place, he shall report the same promptly to the Athletics Director of the University.
4. Use his best efforts to ensure that all academic standards, requirements, and policies of the University are observed by him and by members of his coaching staff at all times, including those in connection with the recruiting and eligibility of prospective and current student athletes for the basketball program, and ensure that said standards, requirements, and policies are not compromised or violated at any time.
5. Use his best efforts, in conjunction with the University, to ensure that all student athletes recruited for his basketball program are provided proper

academic counseling and are encouraged to and given every opportunity to meet the degree requirements necessary to graduate from the University.

6. Recruit, coach, and train student athletes to compete successfully against major college competition in a quality basketball program.
7. Use his best efforts to ensure that his student athletes conduct themselves in a manner that will reflect a positive image for the University both on and off the basketball court.
8. Use his best efforts to keep public statements complementary to the athletics program and to the University.
9. Use his best efforts to establish and maintain a frequent and systematic program of personal communication with the University's student body, faculty, and staff.
10. Be available to attend a minimum of twenty (20) meetings each year throughout Kentucky and other states as scheduled and as mutually agreed upon by the Coach, Athletics Director, and/or President, provided the meetings shall be scheduled so as to not unreasonably interfere or prejudice Coach's other duties. Said meetings may include appearances at alumni functions, University corporate partnership appearances, etc.

2.02 DISCIPLINARY ACTIONS FOR VIOLATIONS OF NCAA OR CONFERENCE RULES AND REGULATIONS

If Coach is found to be in violation of NCAA or Conference rules and regulations, Coach shall be subject to disciplinary and/or corrective actions by the University which may include termination for cause as set forth in section 5.01.

2.03 REPORTING RELATIONSHIPS

The parties (without delineating the particular terms and conditions) acknowledge that each party will use its best efforts and will cooperate with the other to provide the following support for the University's basketball program.

- A. Coach's immediate supervisor for purposes of implementing the Employment Contract shall be the Athletics Director of the University; all matters pertaining to the operation of the University's basketball program shall be subject to the direction and control of the Athletics Director.
- B. The overall policy of the entire athletics program shall remain the exclusive prerogative of the University. The Coach shall administer the daily routine and organization of the program as he deems necessary to effectuate its success, provided such administration shall be in accordance with the policies established by the Athletics Director.
- C. Coach shall have primary responsibility for decisions relating to scheduling of basketball opponents, means of travel to be employed, hotel, food accommodations, size and content of the travel squad and party, and all other matters pertaining to the operation of similar phases of the basketball program, but final decisions in such matters shall be with the Athletics Director. It is specifically agreed and understood that travel arrangements shall be made in conformance with any contractual agreements between the University and any travel agency.
- D. Coach shall have the right to release, hire, and retain assistant basketball coaches subject to the approval of the Athletics Director, the President of the University, and (as it pertains to hiring) the University's Board of Regents.

- E. Coach shall have primary responsibility for developing the budget annually for the Men's Basketball program subject to the approval of the Athletics Director.

ARTICLE III
TERMS OF EMPLOYMENT

The initial term of this Employment Contract shall begin on the 22nd day of March, 2023, and continuing through June 30, 2027. The parties agree that if circumstances do not exist that would justify dismissal for cause as defined in 5.01 herein, the term of this Employment Contract shall be automatically extended (i.e., no action is required by either party) by one additional year on July 1, 2024, 2025 and 2026 (i.e., to provide for a continuing four-year term, through June 30, 2030). Provided, however, that this extension provision shall not be construed to create an employment term that exceeds four (4) years at any given time, in accordance with the provisions of KRS 164.360(2).

ARTICLE IV
COMPENSATION / BENEFITS

In consideration for the promises he has made in entering into this Employment Contract, Coach shall be entitled to the following forms of compensation; base salary payments, benefits, and bonuses.

4.01 SALARY AND BENEFITS

- A. The initial base salary paid by the University to Coach for services and satisfactory performance of the terms and conditions of this Employment Contract shall be \$650,000 annually and shall be payable in equal monthly installments during the period of this Employment Contract and

made in conformity with the payroll procedure of the University. Coach will be reviewed for his performance on an annual basis.

- B. Coach shall be eligible to participate in a group insurance, retirement, and voluntary payroll deduction program on the same basis and with the same University contributions that apply to the University's non-academic administrative staff.
- C. The University shall furnish to Coach, for his use on a loan basis during the term of his Employment Contract, one (1) automobile and shall pay for automobile liability and comprehensive insurance and taxes, if applicable, upon said vehicle, as well as scheduled maintenance. University shall also be responsible for expenses related to business-related fuel expenses for said vehicle which are incurred in the normal course of his employment. University warrants and represents that Coach's name shall not appear on a lease for the vehicle nor any other ownership agreements in connection with the vehicle. Notwithstanding the above, University shall make whatever arrangements necessary to ensure Coach's legal right to the vehicle during the Term. Additionally, upon termination or expiration of this Employment Contract, Coach's name shall be removed from any documentation in connection with the insurance of the vehicle.
- D. The University will provide Coach, without charge, four (4) VIP football season tickets, six (6) Red Towel season men's basketball tickets, and twelve (12) reserved seat men's basketball season tickets. Such tickets may not be resold or traded for personal benefit by Coach. Coach shall have the option to buy twelve (12) additional season tickets in football or

men's basketball if available. Coach shall be provided eight (8) tickets for NCAA men's basketball tournament games and, if available, may be offered additional tickets for purchase. It is agreed and understood that all tickets are provided to aid Coach in the performance of his job. It is intended that the value of the tickets be excluded from compensation under the Internal Revenue Code Section 132(a)(3) as a working fringe benefit.

4.02 COACH'S INCENTIVES

Coach shall be entitled to receive 50% of all gross ticket revenues that exceed \$900,000. Coach shall also be entitled to the following incentive/bonuses as of the date of this Employment Contract:

- | | |
|---|-----------|
| 1. Academic Progress Rate between 950-969
each academic year | \$50,000 |
| 2. Academic Progress Rate of 970+
each academic year | \$50,000 |
| 3. C-USA Regular Season Championship | \$100,000 |
| 4. NCAA Tournament Appearance | \$100,000 |
| 5. NIT Appearance | \$50,000 |
| 6. C-USA Coach of the Year | \$50,000 |

Each incentive and bonus described under this Section 4.02 shall be deemed earned by Coach upon the occurrence of the achievement and/or event that the incentive and/or bonus is conditioned on. Each incentive and/or bonus shall be paid to Coach within sixty (60) days of Coaching earning the incentive and/or bonus. The incentives and bonuses are cumulative and not exclusive of one another.

4.03 TELEVISION AND RADIO SHOWS

Coach shall be required, as part of his duties, to make reasonable efforts to appear on a series of television and radio programs relating to the Men's Basketball program at Western Kentucky University. The parties agree that Western Kentucky University shall own all rights to these particular programs and shall be entitled, at its option, to produce and to market the programs and to negotiate with third parties for the production and marketing of the programs. Coach shall not unreasonably refuse to personally contact sponsors to increase advertising revenue as part of his obligation to work toward the television and radio programs. The Coach shall allow his name, likeness, facsimile, and biographical sketch to be used by Western Kentucky University or the Producer of the television and radio shows for promotional purposes only. As it relates to these television and radio programs only, Western Kentucky University shall have this exclusive right to contract with program sponsors for commercial endorsements. The parties agree that the University shall be entitled to retain all revenues from program sponsorships and from program sponsors for commercial endorsements used during the television and radio programs produced under the provisions of this paragraph. The parties agree and understand that the Coach will be compensated for his services provided herein by the Big Red Radio Network.

4.04 OPPORTUNITIES TO EARN OUTSIDE INCOME

While Coach is representing the University as Head Men's Basketball Coach, he shall have the opportunity to earn outside income as a result thereof and retain all income derived therefrom. The following general terms and conditions shall apply to each case in which Coach seeks to or makes arrangements to earn outside income as a result of his being Head Basketball Coach:

- A. Such outside activities shall not interfere with the full and complete performance by Coach of his duties and obligations as a University coach.
- B. In no event shall Coach accept or receive directly or indirectly any monies, benefit, or any other gratuity whatsoever if such action would violate NCAA legislation.
- C. Coach shall obtain the advance written approval from the Athletics Director before entering into such agreements, such approval not to be unreasonably withheld or delayed.
- D. Such activities are independent of Coach's employment at University and the University shall have no responsibility nor bear any liability for any claims arising therefrom.
- E. SUMMER CAMPS. Coach shall be entitled to at least three (3) weeks of basketball camps using Western Kentucky University's athletic facilities and equipment. Coach shall have priority to conduct at least two weeks of camp (i.e., fourteen (14) days) in the month of June after the regular term of public school in Kentucky has concluded. The operation of camp(s) will be conducted under the auspices of Western Kentucky University Athletics Department and shall be conducted in accordance with general policies of the University. Coach will be obligated to pay the University the sum of one dollar (\$1) for the use of its intercollegiate athletic facilities and equipment for each of the basketball camps, and said equipment and facilities shall be available for use for a minimum of three (3) weeks per year. A separate rate will be determined for the use of the Raymond B. Preston Health and Activities Center, which rate will

not be unreasonable and which shall be determined by September 30 of the preceding year. Rates for room and meals to be charged by Western Kentucky University for such student camps shall be rates normally charged for student camps generally by the University, which may vary from year to year. Coach agrees and understands that the University will place a surcharge on each camper enrolled in the camps, and University agrees to give Coach notice of the amount of the surcharge on or before September 30 of the preceding year. Should there be a conflict between Western Kentucky University's Men's Basketball program and any other University athletic team or University sponsored or affiliated program or organization concerning the use of the above facilities and equipment, this conflict shall be resolved by and in the sole discretion of the Athletics Director, who shall have the final determination on all matters.

F. OTHER INCOME

1. Commercial, Apparel, and Equipment Endorsements - Coach may undertake commercial endorsements in exchange for his agreement to consult with the manufacturer or seller concerning the design and/or marketing of any products and services in which he identifies himself as Coach of the University's intercollegiate basketball team and retain any and all income derived therefrom; provided, however, that such endorsements are in writing, do not conflict with existing University contracts, do not discredit or embarrass the University, do not extend beyond the term of this Employment Contract, would be coterminous with Coach's termination of employment as Head Basketball Coach at the University, and are subject to the University's

trademark and licensing program, and the prior approval of the University's Athletics Director, such approval not to be unreasonably withheld or delayed.

2. Other Products - Products obtained in trade or other negotiations by Coach on behalf of the University will not require compensation by the University to Coach and shall remain the property of the University.
3. Income from Speeches, Appearances, and Written Materials - Any income derived by Coach from speeches, appearances, and/or written materials shall be his separate income and shall fully vest to the Coach. Any speech given pursuant to this paragraph must be given by Coach in his individual capacity, not his official capacity as a University Coach.

ARTICLE V TERMINATION

5.01 TERMINATION BY UNIVERSITY FOR JUST CAUSE

The University shall have the right to terminate this Employment Contract for just cause prior to its normal expiration date. The term "just cause" shall be defined as follows:

- A. Conviction of a felony or declared by a court of competent jurisdiction to be guilty of a crime involving moral turpitude;
- B. Intentional serious violation of any law, rule, regulation, or constitutional provision of the NCAA by Coach;
- C. Intentional serious violation of any law, rule, regulation, or constitutional provision of the NCAA by a member of the men's basketball coaching

staff or any other person under the Coach's supervision and direction, including student athletes in the basketball program for which Coach had prior actual knowledge and failed to promptly and fully disclose / report to the Athletics Director;

- D. Deliberate violations of any material duties or material responsibilities outlined in this Employment Contract or refusal or unwillingness to perform such duties or responsibilities in good faith and failure to cure such violations upon thirty (30) days written notice from the Athletics Director. Notwithstanding anything to the contrary herein, for purposes of clarity and avoidance of doubt, it is not the intention of the parties that this Employment Contract be terminable for just cause for violation of minor, technical or otherwise insignificant University, NCAA, or Conference regulations which do not entail the risk of major institutional penalties. Furthermore, the parties agree that it is not the intention of the parties that this Employment Contract be terminable for just cause on the basis of Coach's win/loss record.

5.02 UNIVERSITY'S OBLIGATIONS UPON TERMINATION FOR CAUSE

In the event this Employment Contract is terminated for just cause in accordance with the provisions of Section 5.01 hereof, and at the time of such termination if there is more than one (1) month of unexpired term of this Employment Contract, the "severance fee" shall be computed and paid as if the unexpired term of this Contract was only one (1) month. The "severance fee" will be calculated solely on the base salary (not including supplement payments) as of date of termination. Additionally, University shall

remain responsible for paying Employee any amounts that have been earned as of the effective date of termination by Employee, but not yet paid by the University.

5.03 TERMINATION WITHOUT CAUSE

Termination "without cause" shall mean termination of this Employment Contract on any basis other than those set forth in Section 5.01.

- A. Notwithstanding anything to the contrary contained hereunder, either party shall have the right to terminate this Employment Contract without cause prior to its normal expiration date by delivering to the other party written notice of intent to terminate.
- B. In the event this Employment Contract is terminated without cause by either Coach or the University, the terminating party would be responsible for the following payment (paid over 12 months):

Termination prior to April 30, 2024	\$2.0 million
Termination between May 1, 2024 and April 30, 2025	\$750,000
Termination on any date on or after May 1, 2025	\$500,000

If Coach is terminated without cause and obtains employment within 12 months of termination (said twelve-month period is referred to as the "Severance Period"), each subsequent monthly payment from the University will be reduced by the amount of monthly compensation that Coach earns from Coach's new employer during the Severance Period.

Failure to timely pay such liquidated damages shall constitute a breach of this Employment Contract and such sum shall be recoverable together with reasonable outside attorney fees, in any court of competent jurisdiction. In no case shall either party be liable to the other for the loss

of any collateral business opportunities or any other benefits, perquisites, or income resulting from activities such as, but not limited to, camps, clinics, media appearance, apparel or shoe contracts, consulting relationships, or from any other sources that may ensue as a result of the termination of this Employment Contract without cause, unless such termination is found to be in violation of any terms or provisions of this Employment Contract.

- C. Should Coach's termination without cause be based upon his decision to resign or retire from collegiate men's basketball and Coach does not thereafter accept employment as a Head Men's Basketball Coach for at least one full year following the date of his resignation or retirement, then the terms in Sections 5.03(B) shall not apply.

ARTICLE VI MISCELLANEOUS

6.01 UNIVERSITY APPROVAL REQUIRED PRIOR TO NEGOTIATION WITH OTHER SCHOOLS OR EMPLOYERS

The parties agree that should another coaching or sports-related employment opportunity be presented to Coach or should Coach be interested in another coaching position during the term of his Employment Contract, Coach must notify the University's Athletics Director of such opportunity or interest, and obtain permission from the Athletics Director before any discussions can be held by Coach with anticipated coaching position principals, which permission shall not be unreasonably withheld. In consideration of this permission, Coach agrees that he shall inform the entity offering the

employment opportunity of the home-and-home series described in Section 5.03(D) of this Employment Contract.

6.02 AMENDMENTS TO AGREEMENT

This Employment Contract can only be altered or amended by written agreement between Coach and Athletics Director and as approved by the Board of Regents.

6.03 UNIVERSITY RETAINS ALL MATERIALS AND RECORDS

All materials or articles of information, including, without limitations, personnel records, team information, films, tapes, statistics, or any other material or data furnished to Coach by the University or developed by Coach on behalf of the University or at the University's direction of the University's use or otherwise in connection with Coach's employment hereunder are and shall remain the sole and confidential property of the University. Within thirty (30) days of the expiration of the term of this Employment Contract or its earlier termination as provided herein, Coach shall immediately cause any such materials in his possession or control to be delivered to the University.

6.04 TAX LIABILITIES

Coach shall be responsible for any and all income tax liabilities, interest, and/or penalties related to any benefits received pursuant to this Employment Contract.

6.05 LAWS OF THE COMMONWEALTH OF KENTUCKY

This Employment Contract shall be interpreted under the Laws of the Commonwealth of Kentucky, and if any provision of the Employment Contract may be prohibited, this shall not invalidate the remaining provisions of the Employment Contract.

6.06 ACKNOWLEDGMENT

Coach acknowledges that he has read and understands the foregoing provisions of this Employment Contract, that he has been afforded and has exercised the opportunity to consult with personal legal counsel that the provisions are reasonable and

**MEMORANDUM OF UNDERSTANDING BETWEEN
COLLEGE HEIGHTS FOUNDATION, INC. AND
WESTERN KENTUCKY UNIVERSITY**

REQUEST:

Approval of an amended and restated Memorandum of Understanding (MOU) between the College Heights Foundation, Inc. (CHF) and Western Kentucky University (WKU).

FACTS:

The current version of the MOU between CHF and WKU was last approved in 2017. It is customary to review this agreement every few years to determine if any revisions are necessary to further clarify and document mutual expectations between the two independent entities. In addition to the customary review, this revised MOU has also been updated to reflect the results of the strategic planning efforts that were undertaken by CHF and the Western Kentucky University Foundation (WKUF) to incorporate into one document.

College Heights Foundation, Inc. was founded in 1923 and will celebrate its Centennial anniversary on July 17, 2023. It has served WKU in a variety of ways throughout the past century, but its primary focus in the past few decades has been on providing scholarship support to deserving students. Western Kentucky University Foundation was founded in 1993 with its primary emphasis on providing private support for professorships, programmatic support, and capital projects. Both of the respective foundations carried out duties and responsibilities related to endowment management, investment allocations, and spending appropriations.

During the creation of the WKU strategic plan, *Climbing to Greater Heights*, the respective foundations were tasked with exploring ways to make the most of available scarce resources and create the optimum organizational structure in an effort to maximize the overall benefit to WKU. The respective foundations subsequently implemented measures to create greater efficiencies, streamline operations, and align policies and procedures. This strategic planning dialogue also generated discussions about how to eliminate donor confusion, simplify the giving process, and develop even more synergy by combining strengths and maximizing the collective potential.

The respective foundation boards continued collaborative efforts throughout the past couple of years which has ultimately led to an agreement between the entities to consolidate assets under the management and direction of the College Heights Foundation, Inc. Therefore, this amended and restated MOU largely resembles the existing MOU but also reflects the necessary edits to

designate CHF as the primary repository of gifts made in support of WKU and further clarifies the mutual expectations and responsibilities for both entities.

RECOMMENDATION:

President Timothy C. Caboni requests approval of the amended and restated Memorandum of Understanding (MOU) between College Heights Foundation, Inc. and Western Kentucky University. A copy of the MOU is included with the agenda material.

MOTION:

To approve the amended and restated Memorandum of Understanding (MOU) between College Heights Foundation, Inc. and Western Kentucky University.



**Amended and Restated Memorandum of Understanding
between
College Heights Foundation, Inc. and Western Kentucky University**

This Amended and Restated Memorandum of Understanding (“MOU”) is made and entered into effective as of July 1, 2023 by and between College Heights Foundation, Inc., a Kentucky nonprofit corporation (the “Foundation”), and Western Kentucky University (the “Institution”). This MOU supersedes and replaces in its entirety the previous Memorandum of Understanding between the Foundation and the Institution dated June 27, 2017. Further, the 2017 Memorandum of Understanding by and between the Institution and Western Kentucky University Foundation, Inc. (“WKUF”) dated July 3, 2017 has been terminated effective as of January 1, 2023.

In an effort to eliminate donor confusion, streamline efforts, and create economic efficiencies, after considerable study and deliberation and with the support of their respective governing boards and the Institution, the Foundation entered into a transaction with WKUF pursuant to which the Foundation received substantially all of the investments under management and other assets of WKUF pursuant to that certain Asset Transfer Agreement dated January 1, 2023 by and between the Foundation and WKUF. Additionally, pursuant to that certain Management Agreement dated January 1, 2023, the Foundation now manages WKUF and is responsible, on behalf of WKUF, for performing the obligations and responsibilities of WKUF. This MOU is the sole agreement governing the relationship between the Foundation and the Institution.

In consideration of the independent and mutual commitments herein contained, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Foundation and Institution agree as follows:

I. PURPOSES

The purposes of this MOU include the following:

a. To provide a framework and shared point of reference for leaders of both the Institution and the Foundation to work together for the benefit of the larger Western Kentucky University community, including students, faculty, alumni, donors, and support organizations.

b. To clarify and document mutual expectations, enumerate the primary ways in which the Foundation and Institution work together to support their shared mission, and to clearly delineate and allocate responsibilities between the Foundation and the Institution.

c. To affirm the independent corporate status of the Foundation, articulate the ways in which it fulfills its charitable purpose of support of the Institution, and to confirm the status of the Foundation as an independent advocate of the Institution in its interactions with donors and the public.

d. To provide a vital source of continuity through leadership transitions and serve as an important tool to educate new administrators and board members, as well as external constituents, about the role of the Foundation and its relationship with the Institution.

II. FOUNDATION/INSTITUTION RELATIONSHIP

a. The Foundation/Institution relationship is derived from a shared interest in the success and further development of the Institution. It is recognized that to be effective in achieving its purpose, the Foundation shall operate independently from the Institution. However, the accountability of both the Foundation and the Institution are concerns common to both parties. The Institution controls fundraising activities conducted in furtherance of the Institution. In turn, the Foundation serves as the repository of all gifts and private support from alumni, parents, friends, corporations, foundations, and others for the benefit of the Institution. The Foundation assists the Institution in fostering a culture of philanthropy by growing the endowment and providing financial and other support to create and maintain intergenerational equity for the Institution.

b. While the Institution benefits from the Foundation's success, the Foundation is fully capable of supporting itself. The parties agree that one purpose of this MOU is to establish that the Foundation is not subsidized by the Institution. It is the shared intent of the Institution and Foundation that the business arrangement between them be "arm's length." The Foundation compensates the Institution for the cost of the services and other benefits which the Foundation obtains from the Institution by (i) paying the agreed upon direct service fees (the "Service Fees") and (ii) by providing valuable services to the Institution for which the Foundation is not otherwise compensated. It is the intent of the parties that, in any given fiscal year, the total of the Service Fees paid by the Foundation to the Institution plus the monetary value of the services provided by the Foundation to the Institution, shall always exceed the monetary value of any support the Institution provides to the Foundation.

c. Institution

(i) The Board of Regents of the Institution is responsible for overseeing the mission, leadership, strategic priorities, and operations of the Institution.

(ii) The Board of Regents of the Institution is responsible for the employment, compensation, and evaluation of the President of the Institution. The Foundation shall not provide compensation to the President or any other employee of the Institution without the necessary prior approvals in accordance with the policies of the Institution.

(iii) The Institution hereby designates the Foundation as the repository of gifts made in support of the Institution.

d. Foundation

(i) The Foundation was incorporated in 1923 for the purpose of, among other things, creating funds derived from voluntary gifts to assist all worthy and deserving students of the Institution in their efforts to obtain an education and to otherwise engage in such acts as are calculated to foster charitable and educational activities in connection with the operation of the Institution. The Foundation exists to manage the assets which have been contributed to support the mission and priorities of the Institution, provide opportunities for students, and contribute to institutional excellence.

(ii) As more particularly stated in its Articles of Incorporation, the Foundation is a Kentucky nonprofit corporation organized and operated exclusively for charitable purposes as may qualify it for exemption from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. The Foundation is able to take and hold (whether by gift, bequest, devise, or purchase), either absolutely or in trust, any property, real or personal, and to sell, exchange, transfer, or convey such property and to invest and reinvest the same, and to apply the income and principal of such property or any accretion thereto, for the benefit of the Institution and in furtherance of its purposes.

(iii) While the Institution is an agency and instrument of the Commonwealth of Kentucky, the Foundation is not. Further, the Foundation is not an operational function, division, or agent of the Institution. The Foundation exists as an independent legal entity which is completely separate from the Institution. The Foundation was not established or created by the Institution and the Foundation is not controlled by the Institution. As such, the Foundation is able to invest its assets and conduct its business as an independent nonprofit corporation.

(iv) The Foundation is governed by a board of directors that is independent from the Institution (the "Board"), each member of which has been duly elected pursuant to the provisions set forth in the Foundation's articles of incorporation and bylaws.

[a] The Board has the sole authority to set policy for the Foundation, retain investment advisers or professional counsel, hire/fire the Foundation's President, and otherwise direct the business and operations of the Foundation.

[b] The Board is responsible for ensuring the effective control and management of all assets of the Foundation, including the prudent management of all gifts, consistent with donor intent.

[c] The Board is responsible for the performance and oversight of all aspects of the Foundation's operations and shall maintain a comprehensive set of bylaws that clearly addresses the Board's fiduciary duties, including requirements that individual members of the Board act in

good faith, on an informed basis, and in a manner consistent with the Foundation's fiduciary duties and the Foundation's best interests.

[d] The Board shall establish and enforce policies to identify and manage potential conflicts of interest and ensure that Foundation assets do not directly or indirectly unduly benefit an individual person or entity.

III. INSTITUTION RESPONSIBILITIES

In consideration of the elements outlined in Article II Foundation/Institution Relationship and of all of the services provided to the Institution by the Foundation together with the Service Fees paid by the Foundation to the Institution, the Institution hereby agrees to provide the following support for the Foundation:

a. For so long as the Cliff Todd Center is owned by the Institution, the Foundation's possession and use of the Cliff Todd Center shall be governed by a separate lease agreement between Foundation as tenant and the Institution as landlord.

b. Information technology support to include, but not be limited to, email accounts, document imaging, server capacity, backup storage, website platform, cybersecurity, and enterprise systems, provided that the Foundation agrees it will comply with the Institution's policies and procedures related to access and use of the Institution's information technology support/services. The Institution agrees to name the Foundation as a co-insured party on any cyber security insurance policy maintained by the Institution. Unless covered by such insurance, the Institution shall not incur, and specifically disclaims, any liability related to any loss of Foundation data or information, regardless of fault on the part of the Institution. The Institution shall charge Service Fees covering these information technology support services, which shall be as agreed by the parties from time to time.

c. Access to the Institution's telephone system (with the understanding that the costs of such services utilized by the Foundation will be monitored on a monthly basis and included in the Service Fees pursuant to an agreed upon methodology as the costs may vary on a month to month basis based on actual utilization).

d. Access to Institution postal services (with the understanding that the costs of such services utilized by the Foundation will be monitored on a monthly basis and included in the Service Fees pursuant to an agreed upon methodology as the costs may vary on a month to month basis based on actual utilization).

e. Access, or opportunity to access, other benefits or services available to employees of the Institution, such as membership in the health and activities center, campus parking passes, group travel discounts, WKU store discounts, meal plan options, and athletic ticket discounts.

f. The Institution hereby grants the Foundation a royalty-free, non-exclusive, non-transferable license to use the name "Western Kentucky University" and its shortened version "WKU", as well as any marks or logos associated therewith (the "Marks"), in connection with the ordinary course of operations of the Foundation; however, the Foundation shall operate under its own seal and logotype and shall not use the Marks in any manner that would reasonably be

expected to create confusion among third parties that the Foundation is acting on behalf of, or is, the Institution. The Foundation agrees that the Marks are the sole property of the Institution and that the Foundation shall not acquire any rights or interest in the Marks.

g. At the request of the Foundation, the Institution shall continue to provide the services of certain of the Institution's employees to the Foundation on a lease basis (the "Leased Employees"). The Foundation agrees that individuals hired after the date of this MOU to provide services to the Foundation shall be hired as direct employees of the Foundation. Such previously Leased Employees shall work for the exclusive benefit of the Foundation but shall be employed by, paid by, and receive fringe benefits through, the Institution (and the Institution agrees to process such payments in the ordinary course consistent with the Institution's policies), with the direct costs associated with the Leased Employees along with the associated central costs of services provided by the Office of Human Resources to be included in the Service Fees. The Foundation shall be responsible for the management and oversight of the Leased Employees. The Foundation shall notify the Institution immediately in the event the Foundation is not pleased with the performance of any Leased Employee and/or desires to discontinue the services of any Leased Employee, and the Institution shall use its best efforts to promptly implement any such requested change. The Foundation may also request that the salary of Leased Employees be adjusted, and the Institution will make a good-faith consideration of the request, considering, among other things, the timing and size of the requested salary adjustment. The Foundation shall indemnify and hold the Institution harmless from and against any claim, cause of action or demand asserted by any Leased Employee that is related to, or arises out of, the services performed by any Leased Employee for the Foundation, the compensation, benefits, or terms of employment of any Leased Employee at levels requested by the Foundation, any adverse employment action requested by the Foundation, or the actions, or inactions, of other Leased Employees or CHF employees.

h. The Institution may, upon reasonable request and if the necessary resources are available, permit the Foundation to make use of resources within the Office of Philanthropy and Alumni Engagement (the "Office of PAE"). The Foundation may, upon reasonable request and if the necessary resources are available, permit the Office of PAE to make use of resources within the Foundation. The Foundation and Institution agree that on average during the course of any given year the value of the resources provided by the Office of PAE to the Foundation are generally equivalent to the value of the resources provided by the Foundation to the Office of PAE and, accordingly, neither party will invoice the other for the use of any such resources.

i. Such other support as may be mutually agreed between the Foundation and the Institution from time to time.

j. In addition to the foregoing, the Institution agrees as follows:

(i) The President of the Institution is responsible for communicating to the Foundation the philanthropic priorities and long-term plans of the Institution, as approved by the Board of Regents.

(ii) The President of the Institution shall serve as an ex-officio non-voting member of the Foundation Board (and there shall be no further overlap between members of the governing bodies of the Foundation and the Institution).

(iii) The Institution shall include the Foundation as a participant, as necessary, in the Institution's strategic planning.

(iv) The Institution shall ensure that gift funds and other resources managed by the Foundation are utilized by the Institution in compliance with donor intent.

(v) The President of the Institution shall maintain control over fundraising activities conducted in furtherance of the Institution, and, together with other senior administrators and the Office of Philanthropy and Alumni Engagement, will maintain responsibility for identifying, cultivating, and soliciting prospects for private gifts. The President may, from time to time, specifically seek the assistance of the Foundation and its employees to fulfill those responsibilities and recognizes that donors may engage the Foundation directly to discuss further gifts. When the Foundation engages in fundraising activity in support of the Institution, those efforts must advance the mission of the Institution as articulated by the President of the Institution and/or as set forth in the Institution's Strategic Plan.

IV. FOUNDATION RESPONSIBILITIES

In support of its charitable purpose and in consideration of the support provided to the Foundation by the Institution, the Foundation agrees to provide the following support to the Institution:

a. The Foundation shall maintain its status as a tax-exempt (501(c)(3)) Kentucky nonprofit corporation.

b. The Foundation shall manage, distribute, and steward gifts and resources in accordance with donor intent. In connection with its asset-management and stewardship activities, the Foundation shall engage personnel and outside advisors with expertise in accounting, gift processing services, gift planning, investment management, and other capacities necessary for the fulfillment of its mission and work closely with the Institution to assist and counsel in such activities.

c. The Foundation shall be responsible for the management and oversight (as well as reimbursement for all compensation) of the Leased Employees as set forth in Section III.g above. In addition to the Leased Employees, the Foundation shall also be responsible for directly employing other qualified individuals as necessary to fulfill the Foundation's obligations under this MOU and as otherwise determined necessary by the Foundation's Board in furtherance of the Foundation's purpose and mission. The Foundation's Board is solely responsible for the employment, compensation, supervision, hiring/firing and review of the Foundation's President, who shall not be a Leased Employee.

d. The Foundation shall create an environment conducive to increasing levels of private support for the mission and priorities of the Institution, provided the Institution shall maintain the primary responsibility of soliciting and generating donor gifts.

e. The Foundation shall establish, adhere to, and periodically assess its gift-management and acceptance policies, which shall include the obligation that Foundation must first

give the Institution notice of any new proposed gift agreement, including all terms and conditions attached thereto, and receive approval from the Institution, through its President or his/her designee, before the Foundation may accept any non-monetary or restricted gift or pledge (or other gift or pledge) that obligates the Institution. The Foundation will promptly acknowledge and issue receipts for all gifts and provide appropriate recognition and stewardship of such gifts.

f. The Foundation, while protecting personal and private information related to donors who condition their contributions upon confidentiality (pursuant to policies to be established and enforced by the Foundation), shall in the spirit of transparency and accountability necessary to build trust with donors and the general public, use reasonable efforts to respond to public inquiries related to revenue, expenditure policies, investment performance, and/or other information regarding the Foundation's operations which the larger Western Kentucky University community has an interest in understanding.

g. The Foundation shall receive, hold, manage, invest, and disburse contributions of cash, securities, patents, copyrights, and other forms of property, including immediately vesting gifts and deferred gifts that are contributed in the form of planned and deferred-gift instruments.

h. The Foundation shall establish prudent asset-allocation, disbursement, and spending policies that adhere to applicable federal and state laws including the standards of conduct set forth in KRS 286.3-277 and the Kentucky Uniform Prudent Management of Institutional Funds Act (KRS 273.600 to 273.645).

i. The Foundation shall engage an independent accounting firm annually to conduct an audit of the Foundation's financial and operational records and shall provide the Institution with a copy of the annual audited financial statements, including management letters and responses to management letters, within 30 days of receipt, as well as copies of any corrective action plan initiated by the Foundation in response to audit findings (if any).

j. Upon request, the Foundation shall provide the Institution with detailed quarterly financial reports, including, without limitation, information on all assets held and investments managed by the Foundation, the status of gift accounts, budget-to-actual comparisons, and the amount of the Endowment Pool.

k. The Foundation shall establish internal controls and other enterprise risk management practices commensurate with the fiduciary responsibilities of the Foundation and its Board.

l. The Foundation's Board of Directors shall evaluate the potential risks arising from the Foundation's operations and obtain commercially reasonable amounts of general liability and directors/officers' insurance.

m. The Foundation shall establish necessary accounts and/or transfer funds to the designated entity within the Institution in compliance with applicable laws, Institution and Foundation policies, and donor gift agreements.

n. The Foundation's disbursements on behalf of the Institution must be reasonable business expenses that support the Institution, are consistent with donor intent, and do not conflict with applicable law.

o. The Foundation is responsible for establishing a financial plan to underwrite the cost of Foundation programs, operations, and services. For the purpose of fulfilling its mission on behalf of the Institution, the Foundation has the right to use a reasonable percentage of the annual unrestricted funds; assess fees for services; and assess fees on gifts, endowed funds, and other investments.

p. The Foundation shall, for a reasonable time, maintain copies of the plans, budgets, and donor and alumni records developed in connection with the performance of its obligations.

q. The Foundation shall provide access to data and records to the Institution upon reasonable request and in accordance with Foundation policies and guidelines.

r. The Foundation shall provide an annual allocation for unrestricted discretionary support to both the Office of Philanthropy and Alumni Engagement and the Institution's President to be utilized for emerging needs and priorities of the Institution.

s. Upon request from the Institution, the Foundation shall assist with committee participation, student recruitment, fundraising initiatives, and/or plan implementation and in support of the overall mission of the Institution.

t. The Foundation shall provide administrative oversight for the Columbarium located at the Chandler Memorial Chapel on the WKU campus.

u. The Foundation shall help facilitate the implementation of the campus master plan in conjunction with the WKU Real Estate Corporation for property acceptance, rental, or acquisition.

V. MISCELLANEOUS TERMS

a. This MOU has been approved by the Board of Regents of the Institution and by the Board of Directors of the Foundation.

b. To ensure effective achievement of the items of the MOU, the Institution and Foundation officers and board representatives shall hold periodic meetings to foster and maintain productive relationships and to ensure open and continuing communications and alignment of priorities.

c. The Institution and Foundation may periodically review and amend this MOU as they jointly determine and agree to be necessary. Provided, however, that no amendment shall be binding or effective unless in writing and signed by duly authorized representatives of each of the Foundation and the Institution.

d. Either party may, upon 90 days prior written notice to the President and Board Chair of the other party, terminate this MOU. The party initiating termination of the MOU must act in

good faith to provide an opportunity for a meeting to include Institution and Foundation executives and Board Chairs (or the Board Chairs' designees) within 30 days of initial written notice of intention to terminate the MOU.

e. If the Institution terminates this MOU, the Foundation may require the Institution to pay, within 90 days of written notice, all debts incurred by the Foundation on the Institution's behalf, including, but not limited to, lease payments, advanced funds, and funds borrowed for specific initiatives. If the Foundation terminates this MOU, the Institution may require the Foundation to pay all debt it holds on behalf of the Institution in like manner.

f. IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, PUNITIVE, OR ENHANCED DAMAGES, LOST PROFITS OR REVENUES OR DIMINUTION IN VALUE, ARISING OUT OF, OR RELATING TO, AND/OR IN CONNECTION WITH ANY BREACH OF THIS MOU, REGARDLESS OF (i) WHETHER SUCH DAMAGES WERE FORESEEABLE, (ii) WHETHER OR NOT SUCH PARTY WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, (iii) THE LEGAL OR EQUITABLE THEORY (CONTRACT, TORT, OR OTHERWISE) UPON WHICH THE CLAIM IS BASED, AND (iv) THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.

g. Notwithstanding the foregoing, both parties recognize that, whether this MOU has been terminated or remains in full force and effect, the Foundation has a fiduciary duty to fulfill its responsibilities to donors under the terms of the gifts it has received to distribute and expend funds for the Institution's benefit. That obligation continues after the termination of this MOU.

h. This MOU supersedes and replaces in its entirety (i) the previous Memorandum of Understanding between the Foundation and the Institution dated June 27, 2017 and (ii) the Memorandum of Understanding by and between the Institution and Western Kentucky University Foundation, Inc. dated July 3, 2017, both of which documents are now void and of no further force and effect.

IN WITNESS WHEREOF, this MOU has been duly executed by the Foundation and the Institution as of the date first written above.

WESTERN KENTUCKY UNIVERSITY

By: _____

Its: _____

COLLEGE HEIGHTS FOUNDATION, INC.

By: _____

Its: _____