Chairman Lutgert convened the meeting of the University Board of
Trustees in the Student Union Ballroom at 8:30 a.m. on Wednesday, January 31, 2007
with the following members present:

Sharon Irish Bevins
Brian Cobb (via conference call)
Larry Hart
Lindsay Harrington
Kirt Gallatin
Bernie Lester
David Lucas
Scott Lutgert
James Malone (via conference call)
Ed Morton
Jerry Starkey – (via conference call)
Michael Villalobos (via conference call)
Jaynie Whitcomb

Members of Staff Present:
Dick Pegnetter
Bonnie Yegidis
Joe Shepard
Steve Magiera
Susan Evans
Wendy Morris
Barbara Krell
Kathy Bottoms

Guests: Joe Catti, Chair, Foundation Board of Directors, Attorney John Potanovic, Henderson, Franklin; Jeffrey Tuscan and Mark Winzenread, Stroemer Tuscan & Company

1. Call to Order – Chair Scott Lutgert

Chairman Lutgert greeted the Trustees and stated the meeting was
duly noticed and minutes will be kept. He stated that some Trustees will
be joining on conference call. Chairman Lutgert asked Ms. Evans to call
the roll and the results are as noted above. He stated that individuals who
wish to speak to an agenda item should register with Ms. Bottoms and
each individual will be allowed three minutes to speak to a particular agenda item.

2. Consent Agenda – Chair Scott Lutgert

Chairman Lutgert stated the consent agenda consists of minutes from two prior meetings as listed:
- Minutes of January 17, 2007 Emergency Meeting (Addendum A)
- Minutes of January 22, 2007 Conference Call Meeting (Addendum B)

Motion was made by Trustee Harrington to approve the consent agenda. Motion was seconded by Trustee Whitcomb. Motion carried unanimously.

3. Charge and Instructions for FGCU Presidential Search and Screening Committee – Chair Scott Lutgert

Chairman Lutgert stated that at the January 17th meeting the Board appointed the members of the committee that will search and screen candidates for a new president. He stated that attached to the documents today is a copy of those instructions. (Addendum C) Chairman Lutgert stated that the search and screen committee will report back to the Board in the fall of this year with not less than three candidates unranked and will work with the President to hire a search firm. Motion was made to approve the Charge and Instructions for the FGCU Presidential Search and Screening Committee by Trustee Malone. Motion was seconded by Trustee Hart. Motion carried unanimously.

4. Finance & Administration Committee Meeting – Committee Chair David Lucas

Committee Chair Lucas called on Mr. Tuscan to make a presentation to the Board regarding the independent audit. (Addendum D) Mr. Tuscan stated that the report before the Trustees has one change. He reported there was one cell phone for Dr. Merwin and the auditors reviewed the records for the period of January 1, 2006 through November 2006. December and January bills were not available. Mr. Tuscan stated there was a flat fee monthly plan and the calls were reviewed. Dr. Merwin did sign a statement that the calls were business related and reimbursed the University for personal calls. Mr. Tuscan stated that with that addition, the report would be final. He answered all questions asked by Trustees. Chairman Lutgert asked Mr. Tuscan to characterize the results of the Audit Report. Mr. Tuscan stated there appeared to be no significant or material non-compliance with rules and policies of the University. A
motion was made by Trustee Malone to approve the Audit Report as final with the caveat indicated by Mr. Tuscan. Motion was seconded by Trustee Morton. Motion carried unanimously.

Committee Chair Lucas stated there are two documents related to Dr. Merwin’s retirement resignation. Trustee Lucas asked Dr. Shepard to review the Accrued Benefits document (Addendum E) with Trustees. Dr. Shepard explained that when Dr. Merwin’s contract was determined at the June 2006 Board meeting, a $75,000 bonus was included for past performance paid upon the approval of the Board of Trustees. The Board did approve that amount. He stated that President Merwin was entitled to that amount immediately upon ratification of this Board. Dr. Shepard reported the University paid out the $75,000 as required, however, President Merwin elected to receive $25,000 from that calendar year and the remaining $50,000 in the current calendar year for tax purposes. He stated this was Dr. Merwin’s voluntary choice and not that of the University. Therefore, it is not compensation for retirement, settlement, or severance; it is simply what is due him based on the decision made by President Merwin.

Dr. Shepard requested Mr. Potanovic render a legal opinion regarding this matter. Mr. Potanovic echoed what Dr. Shepard indicated and characterized this document as a confirmation of entitlements. Mr. Potanovic stated the accrued benefit and bonus items reviewed by Dr. Shepard are the University’s contractual obligations to Dr. Merwin. A motion was made to approve the Accrued Benefits document by Trustee Starkey. Motion was seconded by Trustee Lester. Committee Chair Lucas introduced one member of the public who registered for public comment under this agenda item. Trustee Lucas introduced Mr. Anthony Thomas. Mr. Thomas’ complete comments are attached (Addendum F). Motion carried.

Committee Chair Lucas asked Dr. Shepard to present information regarding the proposed Retirement Agreement (Addendum G). Dr. Shepard stated this agreement is based upon Dr. Merwin’s retirement on January 17, 2007. He reported the agreement notes a number of requirements in terms of expectations from Dr. Merwin regarding severing the relationship with Florida Gulf Coast University. Dr. Shepard stated he used outside counsel as well as counsel from the Board of Governors Office and the University’s counsel. Dr. Shepard stated that in keeping with the Auditor General and State Statutes, the comments need to stay within the contents of the contract signed by the Board of Trustees last June. Dr. Shepard asked Mr. Potanovic, outside counsel, to review the legal issues with the Board of Trustees concerning interpretation of the contract and the settlement.
Mr. Potanovic gave his thoughts regarding the contract and the situation as it now exists. He stated that Dr. Merwin has resigned and there is no debate or question regarding his employment agreement entered into on July 1, 2006. He stated that on page 6, paragraph 3c, there is a provision that deals with resignation. This paragraph indicates that should Dr. Merwin resign, he shall receive compensation to which he is entitled under Section II of this agreement. He further stated that any performance awards shall be pro-rated until such time as the effective date of the resignation. Mr. Potanovic stated that as a legal reference, we have a resignation, we look to a contract to see if there is any provision on resignation and there is one. He stated that provision then sends us to paragraph 2 of the agreement which tells us about the type of compensation to be paid upon departure of Dr. Merwin. He stated that here is where the contract language isn’t a model of clarity, and there is some debate. Mr. Potanovic stated that debate could range from an entitlement that Dr. Merwin could argue for in his best case scenario and the University’s worst case scenario, the entitlement that he is paid through the end of his contract. His contract runs through the end of June 2009, and if he’s paid through June 2009 as a contractual obligation or negotiated severance, it’s a large amount. Dr. Shepard stated he could be entitled to his Foundation Annuity of $424,000, additional salary earnings of $765,000 plus benefits of $424,000, a one year sabbatical of $295,000, one year teaching of $266,000, and a housing allowance of $120,000 throughout the term. He also would be allowed teaching support for $5,000 per year and $25,000 for office support. Additionally, he could arguably be entitled to performance awards of $150,000, automobile expense of $12,000 for a total of $2.6 million. Mr. Potanovic stated this would be the “home-run” interpretation from Dr. Merwin’s standpoint. He stated that no where in the contract is there any qualification on the type of resignation. Mr. Potanovic stated that Vicki Shirley, General Counsel to the Board of Governors, gave legal opinion without discussion with Mr. Potanovic and the concern about the “home-run” interpretation is one that was expressed independently by Ms. Shirley. Mr. Potanovic stated that another available interpretation under the contract which could be reached by an arbitrator or a court if this is litigated is that the intent of the parties at the time of the agreement was signed was that if Dr. Merwin resigned, he would be compensated for a year. He stated that the question then is whether it is through a contract year which is June of any calendar year or for a full calendar year. Mr. Potanovic stated that in either case, it involves a situation where Dr. Merwin would be receiving some amount of compensation under the resignation provision and interpretation described. Dr. Shepard stated that Ms. Shirley’s interpretation for Dr. Merwin was one year sabbatical at 90% of his given salary equaling $268,200, one year teaching $241,308 which is 90% of one year sabbatical, plus benefits of $163,065, teaching support of $5,000 per year which would be part of that and general support would be $25,000 per
year, and performance awards pro-rated would be $29,166 up to January 17th of this year. Mr. Potanovic stated the total package would be $731,812 in terms of what the outside counsel has noted Dr. Merwin could argue. He stated he has had discussions with Dr. Merwin’s attorney who indicated in no uncertain terms that he understands these interpretations as well. He stated that neither Dr. Merwin nor his attorney have registered any opinion with Mr. Potanovic as to how you fill in the blank on the retirement agreement. Mr. Potanovic offered to answer any questions Trustees had regarding this matter.

Trustee Malone asked if there is an arbitration clause. Mr. Potanovic stated there is an arbitration clause on page 7 that does mandate arbitration which can be changed by the parties to litigation. Trustee Lester asked if it is Mr. Potanovic’s best judgment that if we went to arbitration, we are talking about settling somewhere between the $700,000 and $2.6 million. Mr. Potanovic stated that it is nearly an absolute if the University went to arbitration the other side would seek those higher numbers in arbitration, but he could not tell whether an arbitrator would agree with their position or their interpretation of the contract. Mr. Potanovic stated that the record here today is that Dr. Merwin resigned. Trustee Morton stated he believes that the absolutes are zero and $2.6 million and also that the $731,000 and zero can be determined as absolutes. Trustee Morton stated that perhaps the number lies somewhere between zero and $731,000 understanding that the costs of the continued negotiation and the desire on the part of this community to close the chapter on this book and go on to build a better and brighter future for this University lies somewhere between those two numbers. Trustee Morton asked Mr. Potanovic if that was a fair way to characterize this situation. Mr. Potanovic stated it was fair and that in the large perspective when dealing with the intent or interpretation of the contract, there is more art than science involved. He stated the opinion that would matter most is the arbitrator and since the arbitrator is not sitting in the room, the point is well taken that this range would be possible. Mr. Potanovic stated that it would take hundreds of dollars of fees that FGCU could spend, and if the University lost, the University would also be required to pay the fees by Dr. Merwin’s group. Trustee Malone cautioned that there could be even greater financial risk to the University than what is being considered today. Trustee Irish Bevins stated these last two weeks have been extremely difficult. She stated she has been contacted by numerous faculty members, and while it is not easy to craft a faculty voice, she summarized that faculty, while applauding Dr. Merwin’s past accomplishments, overwhelming did not support the package compensation discussed at the last meeting. She stated that faculty also believed no additional salary is warranted after January 17th. Trustee Irish Bevins stated her compromise is to ask the Board to consider compensation through the end of the academic year which would be June
30th. Trustee Hart stated that on January 17th the Board accepted the retirement of Dr. Merwin. He stated he understands where the faculty is coming from and also understands what the students are feeling. Trustee Hart stated that as a Trustee he must insure that when we disburse funds we are not taking away future opportunities of faculty and students. He stated he would have been more comfortable if we had not accepted the retirement of January 17th because once we did that, all the other factors kick in. He stated that once those factors are on the table, we can’t go back and replace them. Trustee Hart also stated Dr. Merwin is going to leave here today with something from the Board of Trustees. He stated this is an embarrassment to the community and to the Trustees, and he would like to remove that as quickly as possible. He stated that if we do nothing today we could risk a lot of legal expenses down the road. Trustee Lucas stated that having negotiated the agreement with Dr. Merwin, the agreement before the Board is slightly under $400,000, and he believes we should focus on that amount. Trustee Lucas asked for clarification from Dr. Shepard. Dr. Shepard stated that one year’s salary with benefits, not including benefits of housing, teaching and performance awards, would be $298,000 with ensuing benefits of $95,360 for a total of $393,360. He stated the estimated value of maintaining the home office is from $3-to-$ 5,000.00 which brings the total value to $397,000. Chairman Lutgert stated that number is very close to the scenario Trustee Morton described earlier. Trustee Lucas stated the motion proposed would read “to approve the retirement agreement in the amount of $396,000 to $398,000 which would be one year’s salary, plus benefits, plus home office for one year”. Trustee Morton asked if it would be appropriate to add the funding source in the motion. Dr. Shepard stated the primary sources of funding are through the State funding mechanism, the second would be through the University Foundation which would include donor dollars, and the third source would be the FGCU Financing Corporation which is made up of several different types of money including auxiliary revenues. He stated all three sources have the sufficient amount and all three are on the table. Ms. Morris stated it would be up to the Board to determine the source of funds for any arbitration judgment. Trustee Starkey stated it is important to consider that we are coming up with a proposal that must be agreed to by Dr. Merwin, and while there may be a tendency about coming up with a lower number, we still need to recognize that we are looking at a process that requires agreement of the parties which would include the zero to $2.6 million. Trustee Malone stated that in dealing with executive level compensation, it is rare to have this type of disparity. He stated that if there is a chance that we can negotiate the $400,000, then it is in our best interest to take advantage of that opportunity. Trustee Whitcomb stated that after listening to the legal advice and reading the contract, our solution is to decide on reasonable compensation according to the contract. She stated this is not a going away gift. Chairman Lutgert stated he agreed with Trustee Whitcomb and
this is our obligation. He does not want this matter to go to arbitration because the amount could be much higher than the amount under consideration. He stated whatever is done today should be characterized as a lump sum settlement of the contract in the best interest of the University. Committee Chair Lucas stated Dr. Merwin has already agreed to the $398,000 amount and to him that is very compelling. He feels we have the ability to reach an agreement today. Trustee Cobb asked if we were to decide whether the money came from the Foundation, how that would occur. Dr. Shepard replied that either the Foundation or Financing Corporation boards would be required to approve that funding.

A motion was made by Trustee Malone and seconded by Trustee Starkey to approve the settlement agreement in the amount of $398,000 and to authorize the Chair to execute the agreement providing there are no substantial changes. Trustee Gallatin stated that from the students’ point of view, he will vote no on this matter. Motion carried with two no votes from Trustee Irish Bevins and Trustee Gallatin.

A motion was made by Trustee Morton and seconded by Trustee Whitcomb to authorize the Chair to request that the FGCU Financing Corporation take the following actions in the best interests of the University: 1. Pay any and all reasonable expenses of the Henderson Franklin law firm and Stroemer Tuscan CPA firm incurred by the University in these matters and, 2. Pay any and all reasonable compensation in the amount of $398,000 approved by the University Board of Trustees as part of the retirement agreement for Dr. Merwin. Motion carried unanimously.

Chairman Lutgert thanked the Trustees for their assistance during this difficult time. He stated we are fortunate to be able to take care of this matter today and the University will be able to move forward now.

Chairman Lutgert stated that President Pegnetter will need a contract and he made a motion to authorize Trustee Lucas to negotiate a contract with President Pegnetter and bring that contract back to the Board’s next meeting. Motion was seconded by Trustee Hart. Motion carried unanimously.

5. President’s Report – Interim President Dick Pegnetter

President Pegnetter provided an update of activities since January 17, 2007. He stated that his focus, as he said when he accepted this position, is to keep everyone on campus and all of our off campus supporters looking forward. President Pegnetter stated that the first thing he did after his appointment was to send a President’s Message to all of the campus, faculty and staff, indicating some things that needed reflection.
in terms of the great strength, acceleration and trajectory that the University has and that we are going to continue that progress. He stated that our outside supporters were aware of our plans to move forward and upward and so we made over one hundred calls to external supporters to update them. President Pegnetter reported that he immediately scheduled meetings with the leadership teams of all the campus units. He stated he has already talked with a number of those groups and over the next ten days, will have met with all academic and administrative leadership teams. He stated the purpose of these meetings is to let the leadership teams know we will continue our upward trajectory within our Strategic Plan, and most importantly that we have a very strong leadership team in place across the University. President Pegnetter stated that the problem we have had to deal with over the last few days is a problem that is external to the structure and operation of the University. It was unfortunate, but it wasn’t an internal issue that we had to deal with that needed to be significantly correct, removed and redone. All of the internal parts and structure and strength of that leadership is in place, and he gets a very positive response as to how people reflect on that thought. He stated that he wishes to assure everyone that the commitments we have made with our external supporters are commitments made on behalf of the University, and he wants everyone to know that his leadership team has pointed out that these are University commitments and no one should feel that things promised to be worked on with them were going to be at risk because of new leadership in the University.

President Pegnetter also reported that in all his interactions with people in the University and external to the University, including the Board of Governors meeting which he attended with Trustee Hart, there has been tremendous support during this transition period. He stated that several individuals indicated that the way that Florida Gulf Coast University’s Board of Trustees and University leadership has handled the problem was a text book example of how to go through a challenge and keep everything in tact and they especially complimented Chair Lutgert. President Pegnetter stated that the ship is on course and all engines are running.

6. Old Business – Chair Scott Lutgert

There was no old business to come before the Board.

7. New Business – Chair Scott Lutgert

There was no new business to come before the Board.

8. Chair’s Closing Remarks & Adjourn Meeting – Chair Scott Lutgert
Chair Lutgert thanked the staff members who assisted him during this transition period. He stated the next Board meeting is Tuesday, April 17th. Meeting adjourned at 9:40 a.m.
ADDENDUM:

A. Minutes of January 17, 2007
B. Minutes of January 22, 2007
C. Charge & Instructions for FGCU Presidential Search and Screening Committee
D. Independent Audit
E. Accrued Benefits Agreement
F. Public Comment –Anthony Thomas
G. Retirement Agreement
PUBLIC INPUT TO AGENDA ITEMS
FGCU Board of Trustees Meeting
January 31, 2007

Name: Anthony Thomas ar
Address: 2532 maple Ave Apt 302
St. Myers, FL

Agenda Item: [X] Merwin Resignation

[Signature & Date] 1-31-07

Tab #5
7" Accrued Benefits Agreement
In terms of additional questions that I would ask if I were conducting the audit to find out about any special relationship:

1. FINDINGS- It's highly unusual for the President to call an assistant professor for any reason. I think I would want to know more about that $10.56 call he made to her that he signed off on. Like when and why.

Why did they not check the "faculty member" in question's cell phone records to see how many times she phoned Merwin and for how long the calls were for and over what range of time? To just state that this was paid for by some grant (taxpayers money) and there was a flat fee is pretty superficial.

The report mentions that they interviewed various administration members as well as college staff regarding this issue. For some reason they neglected to interview her former dean, Dr.McGaha, who was most affected.

Promotion - They did not seem interested in the fact that this member's faculty performance was highly questioned by her supervisor, former dean, and community members to the extent that she was "removed" as the director of the Center for Public and Social Services, given a unsatisfactory teaching Rating...and that the provost coerced the former supervisor and dean into changing that evaluation to make her eligible for promotion. If that unsatisfactory evaluation would have remained in her file she would not have been eligible for promotion. I think I would have wanted to know why this person was given such preferential treatment.

Institute in question - The statement that the application for this Institute had all the appropriate signatures is very insufficient. All the President had to do was to say he wanted it approved and all the appropriate staff would have approved it.

It is noteworthy that it stayed in the Sponsored Research office until the President requested it be sent forward to him and the Executive Committee for approval. I think I would ask if the faculty and chair of her Division actually endorsed/approved it. And why they didn't check with the previous dean (Dr. McGaha) at all as to why it was not sent forward until he was removed as dean? It was only approved when Dr. Merwin inappropriately intervened...No one really felt it should have been approved as her special "stand alone Center". It did not merit that status at all especially in light of the numerous performance issues this faculty was having. In fact she had been removed as a Center director previously by her previous supervisor and dean Dr.McGaha due to non-performance in several areas. Why then should she be granted the elite status of being a "Director" of her own private Institute?

PROCEDURES: They did not check with her previous dean, Dr.McGaha, who knew her well as to ensure pressure or influence...that would seem to be obvious if they were really looking.