Sponsored SERVICE agreement

 This Sponsored Service Agreement (the “Agreement”) is entered into this date, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_, between South Dakota State University, a public land grant university with its principal place of business at Box 2201, SAD 200, Brookings, SD 57007-0001, (“SDSU”) and **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**, a \_\_\_\_\_\_\_\_\_\_\_ corporation with principal offices at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Sponsor”) (collectively the “Parties” or individually the “Party”).

RECITALS:

SDSU is South Dakota’s designated Land-Grant University established under South Dakota Codified Laws Ch. 13-58 with the mission of SDSU defined by South Dakota Board of Regents Policy 1:10:2 is to serve students and clients through teaching, research and extension activities. Sponsor desires to provide opportunity for SDSU to conduct a service to complement SDSU’s mission and SDSU and the Sponsor desire to enter into an Agreement pertaining to a service with the investigation to be funded by Sponsor and carried out by SDSU under the terms and conditions specified herein. NOW THEREFORE, in consideration of the promises hereof and the mutual covenants and agreements contained herein, the Parties hereto agree as follows:

1. **STATEMENT OF SERVICE**
	1. SDSU shall, with funds made available by the Sponsor, furnish the personnel, materials, services, facilities, and equipment for the conduct of the service described in Exhibit A, attached hereto and incorporated herein (the “Service”).

1.2 For avoidance of doubt, the Parties agree and acknowledge that the Service conducted under this Agreement is not investigative research in nature and is strictly limited to following the protocol supplied by the Sponsor as described in Exhibit A, which does not require or contemplate development of intellectual property by SDSU. Any data generated from the Service will be provided to the Sponsor in raw format without any analysis, interpretation or any other form of manipulation or intellectual input pursuant to Section 8.

1. **PRINCIPAL INVESTIGATOR**
	1. Identity. The Principal Investigator(s) will be assigned by SDSU for directing the performance of the Service described in Exhibit A.

2.2 Change in Principal Investigator. If for any reason the Principal Investigator(s) becomes unavailable, SDSU shall notify the Sponsor with an appointment of a successor Principal Investigator chosen by SDSU. Unless the Sponsor notifies objections in writing within fifteen (15) calendar days of notice by SDSU for the appointment of the successor Principal Investigator, the successor Principal Investigator will replace the Principal Investigator of this Agreement and will conduct the Service described in Exhibit A. If a mutually acceptable successor Principal Investigator is not identified within thirty (30) calendar days from the written objection of the Sponsor for the successor Principal Investigator, this Agreement may be terminated immediately by either Party, provided however that all funds paid to SDSU by the Sponsor prior to such termination will be retained by SDSU.

2.3 Relationship of Parties. SDSU shall have sole control over the Service performed under this Agreement. SDSU’s relationship to the Sponsor under this Agreement shall be that of independent party and not as an agent, joint venturer, or partner of Sponsor. Neither Party has the authority or right to bind the other Party or incur any liability on behalf of the other Party.

1. **CONDUCT OF RESEARCH PROGRAM**
	1. Period of Performance. The Service shall be performed during the period \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_, through \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_. This period of performance may be extended under the same terms or such other terms as may be mutually agreed upon in writing by the Parties.

3.2 Final Report. Within ninety (90) calendar days following termination of this Agreement, SDSU will furnish a final report to the Sponsor summarizing the Service performed and the results thereof.

1. **COSTS AND BUDGET; PAYMENT**
	1. Cost of Research. The Sponsor agrees to pay SDSU the fixed sum of **$**\_\_\_\_\_\_\_\_\_\_\_\_ USD for the performance of this Service. Payments are to be made in accordance with the following schedule:

Full amount prior to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,.

 4.2 Payments. Payments shall be by check payable to “South Dakota State University” and mailed to:

Grants & Contracts Administration

South Dakota State University

SAD 323, Box 2201

Brookings, SD 57007

* 1. Fiscal Management. SDSU shall maintain complete and accurate accounting records in accordance with accepted accounting practices for institutions of higher education. These records shall be available for inspection, review, and audit at reasonable times by the Sponsor, or its duly authorized representative, at Sponsor's expense, for three (3) years following the end of SDSU’s fiscal year (–ending June 30 of any given year) in which such costs are incurred.

4.4 SDSU is not obligated to expend any other funds on this Service, and the Sponsor is not obligated to pay SDSU in excess of the stated amount. SDSU will retain title to equipment and all other items purchased with funds provided by the Sponsor.

 4.5 If the U.S. government is the source of any of the funds paid by Sponsor under this Agreement, then Sponsor represents the following:

 (a) Percent of federal funds: 0% CFDA #:

(b) Federal agency providing funds:

**5. RIGHTS IN SERVICE PRODUCT**

Background Intellectual Property shall mean Intellectual Property, proprietary information or confidential know-how relevant to the Service which is in the possession of a Party prior to the commencement of the Service or generated after commencement of the Service but independent of the Service. Background Intellectual Property will remain the property of the Party that developed the Background Intellectual Property. All research results, including but not limited to: data, information, records and service products directly generated from performance of Service except for any intellectual properties developed by SDSU, (collectively, “Service Products”), will be provided to Sponsor. Other than any Background Intellectual Property, Sponsor shall have the right to use the Service Products for any research or commercial purpose whatsoever provided that the Sponsor shall hold SDSU harmless from any and all claims and liabilities that may occur from the Sponsor’s use of Service Products and subject to the terms of Section 7.2 of this Agreement. SDSU, in accordance with South Dakota Board of Regents policy, shall own the tangible original copy of the Service Products. For avoidance of doubt, the Sponsor will have no rights in and to such Service Products other than the rights to use the Service Products specified herein.

**6. INVENTIONS AND DISCOVERIES**

6.1 Neither Party will gain a right to use Background Intellectual Property in any new invention without explicit written permission of the owning Party.

6.2 Although inventions are not anticipated under this Agreement, if under the performance of this Agreement new inventions are generated which are inherently intrinsic to and comprised of the Sponsor’s Confidential Information under this Agreement (“New Sponsor Proprietary Property”), sole ownership of such New Sponsor Proprietary Property shall vest in the Sponsor.

6.3 The rights to all inventions, discoveries, methods, know-how (both patentable and unpatentable) and other developments generated, developed, conceived and/or reduced to practice under this Agreement other than New Sponsor Proprietary Property (“Inventions”) shall be determined in accordance with U.S. Patent Law. All rights to Inventions made solely by employees, students or researchers of SDSU shall belong solely to SDSU. All rights to Inventions made solely by employees of the Sponsor shall belong solely to the Sponsor. All rights to Inventions made jointly by employees, students or researchers of SDSU and employees of the Sponsor (“Joint Inventions”) shall belong jointly to SDSU and the Sponsor. Each Party will notify the other, in writing (“Invention Notice”), within thirty (30) calendar days of reduction to practice, knowledge of conception or discovery of an Invention solely made by employees, students and/or researchers of a Party, or of a Joint Invention, and each Invention Notice will describe the Invention with sufficient specificity to allow assessment by the other Party. Parties will treat an Invention Notice in confidence and will not further disclose or use the same in ways not previously approved in writing by disclosing Party.

6.4 Sponsor will have an exclusive 100-day option period to review all Inventions (“Option Period”) beginning from the time SDSU sends a report or Invention Notice detailing the Invention to negotiate an appropriate licensing agreement, but will not have any rights to Background Intellectual Property unless it is included in a future license.

1. **PUBLICATION AND PUBLICITY**

7.1 Publication. SDSU shall have the right to publish or otherwise disclose the Service Products. SDSU agrees to submit all publications and presentations to the Sponsor thirty (30) calendar days prior to the first submission of such proposed publication or presentation to a journal, editor or third party. The Sponsor will have thirty (30) calendar days after the receipt of the publication or presentation to review it (“Review Period”). Upon notice by the Sponsor that the Sponsor reasonably believes a patent application relating to an Invention should be filed prior to the publication or presentation, the Sponsor may request in writing that SDSU delay publication or presentation of the Service Products during the Review Period. SDSU may delay submission of the publication or presentation for up to sixty (60) calendar days from the date of the Sponsor’s request, until a patent application or applications are filed, or until SDSU determines that it will not file a patent application, whichever comes first.

7.2 Use of Name**.** The Sponsor shall not use the name of SDSU (except in an acknowledgement of sponsorship of this Agreement) in advertising or for any other commercial purpose without the prior written approval of SDSU. The Sponsor shall not state or imply in any publication, advertisement, or other medium that any product or service bearing any of the Sponsor's names or trademarks, and manufactured, sold, or distributed by Sponsor, has been tested, approved, or endorsed by SDSU.

1. **CONFIDENTIALITY**

8.1 The Parties agree that the terms of this Agreement and any Service performed hereunder and Service Products or Inventions developed hereunder will be held as confidential and any information relating to any of the foregoing must not be disclosed, published, or disseminated except upon written mutual agreement of the Parties, unless otherwise allowed pursuant to this Agreement. SDSU may disclose the existence of this Agreement should a proper request be made under the South Dakota open records procedures.

* 1. “Confidential Information” means any information embodied in written, graphical, digital, oral, biological or other tangible form, which is identified and designated as confidential at the time of disclosure, and disclosed by or on behalf of one Party to the other Party. Confidential Information of the Parties includes, but is not limited to, inventions, invention disclosures, evaluations and assessments of inventions, patent applications and other filings, legal instruments, biological materials, processes, methods, formulae, prototypes, devices, computer software, copyrighted works, experimental data, the potential intellectual property rights therein, and all business and legal arrangements discussions by or on behalf of the Parties.

8.3. Each Party agrees to treat all Confidential Information received from the other Party with at least the same degree of care it employs to protect its own confidential information. To the extent it is reasonably necessary to fulfill its obligations or exercise its rights under this Agreement, a Party may disclose the other Party's Confidential Information on the conditions that such Party remains liable for each person or entity to whom it discloses the Confidential Information agreement to: (a) maintain the Confidential Information for at least as long as and to the same extent as such Party is required hereunder; and (b) not use the Confidential Information except to the extent such Party is entitled to use the Confidential Information hereunder. If a Party is required by law, regulation, or court order to disclose any of the other Party's Confidential Information, then it will have the right to do so without violating the terms of this Agreement provided that it: (i) promptly notified the disclosing Party; (ii) reasonably assists the disclosing Party to obtain a protective order or other remedy of disclosing Party's election; (iii) provided disclosing Party prior review of any disclosure where possible; and (iv) only provides that portion of the Confidential Information that is legally required.

8.4 The obligations of Paragraph 8.1 and 8.3 shall not apply to Confidential Information that as evidenced by a receiving Party’s written records, was lawfully known to the receiving Party prior to its communication by the disclosing Party and was not communicated to the receiving Party subject to any restrictions on disclosure or use; or

(a) As evidenced by a receiving Party’s written records, is independently developed by the receiving Party without use or knowledge of the Confidential Information; or

(b) Is or becomes a part of the public domain other than by a breach of this Agreement by the receiving Party; or

(c) Is or becomes known to the receiving Party by the action of a third party not in breach of a duty of confidence; or

(d) Is required to be disclosed by the receiving Party to a third party pursuant to any applicable law, governmental regulation, or decision of any court or tribunal of competent jurisdiction, so long as the receiving Party takes reasonable steps to give the disclosing Party prior notice in order to contest such law, governmental regulation, or decision.

8.5 If Sponsor desires to observe the Service to be performed by SDSU, Sponsor agrees to execute a Confidentiality and Non-Disclosure Agreement for access to SDSU operations and facilities.

1. **WARRANTIES AND INDEMNIFICATION**

9.1 **SDSU EXPRESSLY DISCLAIMS ALL EXPRESS OR IMPLIED REPRESENTATIONS AND WARRANTIES INCLUDING, WITHOUT LIMITATION, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ANY IMPLIED WARRANTIES ARISING FROM ANY COURSE OF DEALING, USAGE, OR TRADE PRACTICE, WITH RESPECT TO THE ITS PERFORMANCE UNDER THIS AGREEMENT AND THE SERVICE PRODUCT DEVELOPED UNDER THIS AGREEMENT; OR THAT SUCH RESULTS WILL NOT INFRINGE ANY PATENT, COPYRIGHT, TRADEMARK, OR OTHER RIGHTS OF THIRD PARTIES. IN NO EVENT WILL SDSU BE LIABLE FOR LOSS OF PROFITS, LOSS OF USE, OR ANY OTHER CONSEQUENTIAL, INCIDENTAL, SPECIAL OR PUNITIVE DAMAGES.**

9.2 The Sponsor will defend, indemnify and hold harmless SDSU and its employees, administrators, faculty, students, independent contractors and agents from and against any and all costs, liabilities, damages, and expenses, including, without limitation, attorneys’ fees, arising from any claims, damages, and liabilities asserted by third parties arising from this Agreement or the Service performed under this Agreement, and/or Service Products, New Sponsor Proprietary Property, and/or Inventions, if any. Sponsor shall also indemnify and hold harmless SDSU, and its officers, directors, consultants, employees, agents and assigns from and against any claim, liability, loss or damage, including reasonable attorney’s fees, arising out of Sponsor’s violation and/or SDSU’s enforcement of any of the terms and conditions of this Agreement.

1. **TERMINATION**

This Agreement may be terminated by either Party upon sixty (60) calendar days prior written notice to the other Party. In the event of termination of this Agreement by a Party or pursuant to Paragraph 11, the Sponsor shall pay SDSU, within thirty (30) calendar days of invoice from SDSU, for all direct costs and applicable indirect costs, up to and including the effective date of termination, and for all non-cancelable outstanding purchase orders made before receipt of notice of termination, even though such outstanding purchase orders may be invoiced beyond the termination date.

1. **FUNDING OUT**

The Parties acknowledge that legislative action may require that curtailment or termination of some or all of SDSU’s research and educational programs. The Parties acknowledge further that SDSU is obligated to respond to such legislative action and may determine that it is necessary to curtail or terminate those programs. SDSU has no obligation to the other Party to perform any research or educational program and nothing in the foregoing or otherwise in this Agreement will be interpreted to create any obligation on SDSU to perform research or educational programs. The Parties also agree that termination or failure to perform terms and conditions of this Agreement in response to legislative action will not be deemed a breach of this Agreement.

1. **ORDER OF PRECEDENCE**

In the event of any conflict, inconsistency or discrepancy amount, the Agreement and any other documents listed below shall be resolved by giving precedence in the following order: 1) this Agreement including the Exhibits hereto; 2) Purchase Order issued by the Sponsor. For avoidance of doubt, in the event a purchase order is issued under this Agreement and such purchase order contains standardized terms and conditions, the terms and conditions of this Agreement shall supersede and replace all such purchase order terms and conditions.

1. **COMPLIANCE WITH LAWS**

In performance of the Service, SDSU and Sponsor shall comply with all applicable federal, state and local laws, codes, regulations, rules and orders.

1. **GENERAL PROVISIONS**

14.1 Notices. All notices shall be in writing and effective upon receipt with a proof. Communications sent via electronic mail (commonly referred to as e-mail) will constitute a “writing” for purposes of this Agreement only upon the recipient acknowledging and sending an acceptance of the electronic mail to the other Party Notices shall be sent to the following addresses:

|  |  |
| --- | --- |
| If to SDSU: South Dakota State University Attn: Assistant VP- OTTCBox 2201, SAD 200 Brookings, South Dakota 57007 Telephone: 605-688-4756  | If to xxx: Name Attn: xxx xxx xxx Telephone: xxx Facsimile: xxx |

14.2 Governing Law. This Agreement is to be governed by and construed in accordance with laws of the State of South Dakota without regard to any principles of conflicts of law. Exclusive venue for any dispute not barred by sovereign immunity arising under, out of, or in connection with this Agreement will be the state and federal courts in or in close proximity to Brookings, South Dakota, unless the action cannot be brought in such court due to statutory proclamation in which case only the venue will be as so proscribed. Sponsor consents to the personal jurisdiction of all such courts and hereby waives any claims of lack of personal jurisdiction or inconvenience of such court. Nothing herein will be interpreted as a waiver of sovereign immunity.

14.3 Assignments. This Agreement is not assignable or otherwise transferable by either Party without the prior written consent of the other Party. The failure of a Party to comply with the terms of this Paragraph will render the assignment or transfer null and void. The prohibition set forth in this Paragraph 14.3 includes, without limitation (and the following shall be deemed to be “assignments”): (i) a consolidation or merger of a Party; (ii) a change in ownership or voting rights of more than fifty percent (50%) of the issued and outstanding stock of any corporate Party; (iii) any assignment or transfer which would otherwise occur by operation of law, merger, consolidation, reorganization, liquidation, appointment of a custodian, trustee, receiver or similar person, transfer or other significant change in corporate or proprietary structure; (iv) the sale, assignment or transfer of all or substantially all of the assets of a Party; and (v) where a Party is a partnership, a change in control of such partnership.

14.4 Severability. If any provision of this Agreement is rendered invalid or unenforceable by any law or regulation, or declared null and void by any court of competent jurisdiction, that part will be reformed, if possible to conform to law and if reformation is not possible, that part will be deleted and the remainder of the provisions of this Agreement will, subject to this paragraph, remain in full force and effect, unless enforcement of this Agreement without the invalid or unenforceable clause would be grossly inequitable under the circumstances or would frustrate the primary purpose of this Agreement.

14.5 Amendments. This Agreement embodies the entire understanding of the Parties and shall supersede all previous communication, either verbal or written, between the Parties relating to this Agreement. This Agreement may be amended only by the mutual written agreement of the Parties.

14.6 Waiver. A Party’s failure to enforce any of its rights herein may not be construed as a waiver of such rights; nor may one or more instances of non-enforcement be construed as a continuing waiver or as a waiver in other instances.

14.7 Force Majeure. A Party will not be liable to the other Party for inability to perform any of its obligations under this Agreement when its inability is the result of an act of God, earthquake, epidemic, order of civil or military authorities, flood, fire, war, civil disturbance, strike, act of terror, or other natural cause over which the Party has no control. A Party failing to perform an obligation under this Agreement because of force majeure must give the other Party written notice of the force majeure as soon as possible after its occurrence. A Party whose performance is excused because of force majeure must resume performance as soon as reasonably possible upon cessation of the force majeure.

14.8 Headings. Headings are included for convenience only and will not be used to construe this Agreement. The use of the term “including” means “including, without limitation.” The Parties acknowledge and agree that both Parties substantially participated in negotiating the provisions of this Agreement; therefore, both Parties agree that this Agreement shall not be construed more favorably toward one party than the other party, regardless of which party primarily drafted the Agreement. Each Party acknowledges that is was provided an opportunity to seek advice of counsel prior to entering into this Agreement.

**IN WITNESS WHEREOF**, SDSU and Sponsor have caused this Agreement to be duly executed by duly represented individuals as of the date first above written and as indicated below.

|  |  |  |
| --- | --- | --- |
| **South Dakota State University “SDSU”** |  | XXX**, Inc. “Sponsor”** |
|  |  |  |  |  |
| By: |  |  | By: |  |
| Name: | Daniel Scholl  |  | Name: | XXX, Ph.D. |
| Title: | Vice President, Research and Economic Development |  | Title: | XXX |
| Date: |  |  | Date: |  |
|  |  |  |  |  |
|  |  |  |  |  |
| **SDSU scientist for acknowledgment purposes only** |  | **Sponsor scientist for acknowledgment purposes only** |
|  |  |  |  |  |
| By: |  |  | By: |  |
| Name: | xxx, Ph.D. |  | Name: | Ph.D. |
| Title: | Professor |  | Title: |  |
| Date: |  |  | Date: |  |
|  |  |  |  |  |

EXHIBIT A

Sponsor will grant **$\_\_\_\_\_\_\_\_\_\_\_\_\_\_** to South Dakota State University Principal Investigator to perform the Service listed below. The term of this contract is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_ through \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_.

Principal Investigator: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Ph.D.