

SECOND AMENDED
Operating Agreement

North Carolina State University
and
XYZ Foundation, Inc.

This Operating Agreement (Agreement) is made between North Carolina State University (NC State) and XYZ Foundation, Inc. (Foundation).

RECITALS

- A. NC State is an institution of higher education and a constituent institution of the University of North Carolina (UNC) subject to the UNC Board of Governors' Code and the UNC Policy Manual, including UNC Regulation 600.2.5.2[R] (UNC Regulation) adopted 16 November 2005, recently amended _____, and as may be amended thereafter, governing University Associated Entity relationships; and
- B. Foundation, as a North Carolina nonprofit corporation qualified under Section 501(c)(3) of the Internal Revenue Code and existing for the purposes of aiding and promoting educational and charitable purposes and lawful activities of NC State, is a Major Associated Entity of NC State; and
- C. NC State in its capacity as an Approving Institution has officially recognized and Approved Foundation as satisfying the standards and eligibility requirements as a Major Associated Entity of NC State; and
- D. The parties desire to formalize the University Associated Entity relationship between NC State and Foundation in compliance with UNC Regulation 600.2.5.2[R] by setting forth the manner in which NC State is to provide support to Foundation and in which Foundation is to provide support for NC State; and
- E. The capitalized terms in this Agreement shall have the same meaning as defined in UNC Regulation 600.2.5.2[R] unless otherwise stated herein. The Chancellor may delegate authority for NC State obligations and approvals at his discretion.

TERMS

In consideration of the mutual covenants, promises and conditions herein contained, and for good and valuable consideration the adequacy of which is hereby acknowledged, NC State and Foundation agree as follows:

1.0 Foundation Support of NC State.

- 1.1 Foundation's sole purpose is to provide support to NC State in accordance with Foundation's governing documents, that support includes, but is not limited to:

- 1.1.1 Raising, receiving, investing, and administering funds for the benefit of NC State to use for its mission, educational, research, and outreach purposes;
- 1.1.2 Assisting the NC State Office of University Advancement as directed in its fundraising, marketing, public relations and alumni outreach activities and development programs with individuals, corporations, foundations, and other appropriate organizations;
- 1.1.3 Soliciting funds as directed for student scholarships, faculty support, facilities, programs, and supporting other educational, research, cultural, scientific, public service, charitable activities and lawful purposes of NC State;
- 1.1.4 Promoting the welfare and future development of NC State.
- 1.1.5 Performing other acts as may be deemed appropriate by NC State.

2.0 Use of NC State Name.

- 2.1 Foundation may use the name of NC State as well as NC State's logo, informal seal, and other symbols and marks of NC State, in connection with services rendered by it for the benefit of NC State in accordance with NC State's trademark regulation and rule. Any Foundation communication utilizing NC State's name and/or symbols must clearly indicate that the communication originates from the Foundation and not NC State. All uses of NC State's name and/or symbols shall be subject to oversight and approval by NC State, which may withhold permission for particular uses at its sole discretion.
- 2.2 Foundation shall not delegate the authority to use NC State's name or symbols to any person or entity without the prior written approval of the Chancellor or the Chancellor's designee.
- 2.3 Foundation agrees to cease using NC State's name and symbols in the event:
 - 2.3.1 Foundation dissolves or its Approved status is removed;
 - 2.3.2 This Agreement is terminated as provided below (unless the parties agree otherwise); or,
 - 2.3.3 Foundation ceases to be a nonprofit corporation under North Carolina law or ceases to be recognized by the Internal Revenue Service as described in Section 501(c)(3) of the Internal Revenue Code.
 - 2.3.4 The Chancellor revokes such authority for failure to conform with the requirements of section 2.1, above. Such revocation shall not occur until after Foundation is provided notice of its failure to conform and a reasonable opportunity to cure such non-conformance.
- 2.4 Notwithstanding the provisions of section 2.1, Foundation agrees that it will not offer any course or seminar using NC State University's name without first obtaining prior written permission from the Chancellor or Chancellor's designee.

3.0 Relationship between Foundation and NC State.

- 3.1 NC State agrees to encourage and maintain the independence of Foundation and, at the same time, foster the cooperative relationship between NC State and Foundation.
- 3.2 At least one Senior Academic Officer or Senior Administrative Officer of NC State or a designee of the Chancellor must sit as an ex-officio voting regular member of the Foundation's board, and on any standing committee or other committee that has delegated authority to act on behalf of the governing board.
- 3.3 Foundation agrees to cooperate with Chancellor and/or the Chancellor's designee to allow NC State to monitor the relationship between NC State and Foundation.
- 3.4 Foundation shall be responsible for control and management of all assets of Foundation, including prudent management of all gifts to Foundation consistent with donor intent.
- 3.5 NC State may remove the Approved status of Foundation upon 60-day advance written notice of material noncompliance with or breach of: (a) UNC Regulation; (b) the applicable policies of UNC or NC State; or (c) this operating agreement. During this time, the Approving Institution may consider and accept or reject a correction action plan submitted by the Associated Entity. If rejected, Foundation must dissolve as soon as practicable and cease doing business on behalf of NC State.

4.0 Foundation's Obligation to NC State.

- 4.1 Foundation agrees, before accepting real estate, or gifts with any restrictive terms and/or conditions that impose an obligation on NC State or the State of North Carolina or that impose an obligation to expend resources in addition to the gift, to obtain prior written approval from the Vice Chancellor for Finance and Administration and the Vice Chancellor for University Advancement unless such gift otherwise complies with NC State's Standard Operating Procedures for Acceptance of Gifts which may then be in force and effect. In addition, Foundation agrees that it will not accept a gift that has any restriction that is unlawful. An assessment on certain gifts may be applied as directed by the Chancellor.
- 4.2 Foundation agrees to consult with the Vice Chancellor of Research, Innovation and Economic Development (ORIED) or designee before accepting any contract or specific grant, as those terms are defined in the Standard Operating Procedures for Acceptance of Gifts. Foundation shall neither solicit, apply for nor accept any contract or specific grant in the name of the Foundation unless it receives prior written approval from the Vice Chancellor of OREID or designee.

- 4.3 Foundation agrees to advise prospective donors of restricted gifts that acceptance of such gifts is conditioned upon NC State's approval if the gift requires NC State approval under section 4.1 or 4.2. Foundation also agrees to follow NC State's criteria and procedures for naming facilities and programs before promising a donor any such opportunity.
- 4.4 Foundation agrees to coordinate with and receive prior approval from the Office of University Advancement or other appropriate NC State Office regarding funding goals, programs, and campaigns and agrees to comply with NC State POL03.00.01-.02 and the Standard Operating Procedures for Acceptance of Gifts, as amended from time to time. To enable coordination and compliance, members of the University Advancement staff shall have reasonable direct access to all documents and records of the Foundation in accordance with its generally applicable confidentiality and non-disclosure policies.
- 4.5 Foundation shall obtain, operate, and maintain its accounting, development activities, alumni and donor records, and other information on NC State-compatible data processing equipment, peripheral hardware and software. The Chair of the Foundation shall be the custodian of these records, and assigned employees of NC State will have access to them only for the purposes of providing services to the Foundation, of donor recognition and as requested by the Chancellor. Notwithstanding the foregoing, Foundation shall maintain ownership of and control access to any prospect and donor information it collects that constitutes a trade secret under N.C. Gen. Stat. § 66.152 and shall comply with N.C.G.S. § 132-1.2. The assigned NC State employees shall keep any Foundation's confidential and proprietary information secret and not disclose the records to any third party, except with consent or as authorized by law. Foundation agrees that it will comply with applicable regulations or schedules that NC State may establish from time to time that govern the retention and destruction of documents similar to the series types of records maintained by the Foundation, including electronic files and that prohibit destruction of documents if an investigation, audit or litigation is anticipated or underway.
- 4.6 Foundation shall administer its funds and make distributions to NC State and its associated entities in accordance with policies, regulations and procedures established by NC State and the Foundation as may be established and revised from time to time, in collaboration with NC State. Foundation agrees not to provide funds from unrestricted sources to NC State programs except through a granting process approved by the Chancellor or as requested by the Chancellor through the General Fund Budget Process. Foundation agrees that all transfers of funds from Foundation to NC State must be documented in writing or electronically in a form that has a retrievable transaction trail.

5.0 Limitations on Foundation.

- 5.1 Foundation agrees not to make any payments or to provide any non-salary or deferred compensation, to any NC State employee, except for approved expense reimbursements, without prior written approval by an authorized NC State representative and Foundation agrees to abide by NC State's policy on Non-Salary and Deferred Compensation (POL05.15.03) and UNC Policy 300.1.1 concerning the prohibition of payments to specified officers or employees.
- 5.2 Foundation officers and employees who have check signing authority or who handle cash or negotiable instruments must be bonded in an amount determined to be reasonable by the Foundation board and NC State.
- 5.3 In consultation with NC State's Insurance and Risk Management personnel, Foundation must purchase general liability and directors/officers insurance in an amount determined to be commercially reasonable.
- 5.4 Foundation must not engage in any activities not permitted to be carried on (a) by an organization exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986 and its Regulations as they now exist or as they may hereafter be amended, or (b) by an organization contributions to which are deductible under Section 170(c)(2) of the Code and Regulations as they now exist or as they may hereafter be amended, or (c) by a corporation created under the North Carolina Nonprofit Corporation Act, Chapter 55A of the North Carolina General Statutes, as amended from time to time.
- 5.5 Foundation may not acquire debt in excess of five hundred thousand dollars (\$500,000.00) that is not to be publicly traded without prior approval from the Chancellor or designee and after notifying the Vice President of Finance of the University of North Carolina.

6.0 NC State Support of and Services to Foundation.

- 6.1 NC State shall provide Foundation with office space under such terms and at such locations as are mutually acceptable, including utilities and janitorial services.
- 6.2 NC State shall provide an Employee Dishonesty bond in an amount determined from time to time by the parties for any NC State employee providing substantial services to Foundation.
- 6.3 NC State shall provide operational services to Foundation of the type provided to NC State departments on a cost reimbursement basis including, but not limited to, access to NC State telephone system, maintenance from the facilities services, printing services, computing services, University mail system, and other service providers. Foundation shall provide reimbursement for such services in accordance

with normally established rates for NC State departments. The parties shall develop a budget annually based on projected services required by Foundation.

- 6.4 NC State shall provide reasonable support to Foundation including assigning personnel consistent with the support outlined above and based upon an annual budget plan agreed to by the parties. Employees of NC State shall remain for all purposes employees of the university, even when assigned to assist with operations of the Foundation. The Foundation shall not pay or compensate in any way an NC State employee unless prior approval has been granted by the Chancellor or Chancellor's designee in accordance with NC State's policies. Approved reimbursement expenses may be paid as appropriate.
- 6.5 When NC State receives funds from Foundation for a specified purpose, NC State agrees to use such funds received for the specific purpose consistent with donor intent.
- 6.6 Foundation agrees that when NC State personnel provide services for the Foundation and there arises a conflict between NC State University and the Foundation, the NC State employee must comply with the policies, regulations, and directives of the University; provided that said employee shall notify the Foundation in ample time to remedy the conflict or approve the intended action when feasible. If prior notification is not feasible, the Foundation shall be promptly notified in writing of the conflict and action taken.

7.0 Foundation Budgets, Audits and Reporting.

- 7.1 Foundation agrees to create and adopt an annual operations budget, and an annual capital budget if any, through its regular participation in the annual general fund process or as such annual budgets may be otherwise duly created and adopted. If requested, the Foundation shall meet with the Chancellor or designee to review and agree on the proposed annual operations and capital budgets, as well as any subsequent proposed material changes to the budget(s).
- 7.2 Foundation bylaws must provide for an audit committee that has no NC State or Foundation employee as a member. The audit committee must receive the report of the independent CPA firm that conducts the Foundation's annual audit and prepares the relevant tax forms for submission by the Foundation. If practical, the audit committee should have a member who has financial expertise.
- 7.3 Foundation agrees, in consultation with NC State's Treasurer, to select a certified public accounting firm that is in good standing with the North Carolina Board of CPA Examiners and with substantial experience in performing audits for organizations of similar scope and complexity to the Foundation, to serve as the Foundation's independent auditor and to complete a full and complete annual audit of its finances and operations.

- 7.4 Foundation agrees to provide to the Chancellor, annually on or before December 31, or if not available on or before December 31, as soon as practicable when available:
- 7.4.1 The annual audit report, management letters and responses to management letters, and the publicly disclosed portions of Foundation's IRS Form 990;
 - 7.4.2 The list of Foundation governing board, officers, and employees;
 - 7.4.3 The names of the officers and governing board members of all Foundation associated or affiliated entities, if any;
 - 7.4.4 Within 90 days of the issuance of the audit report with audit findings or a management letter, Foundation must demonstrate to the Chancellor and to the Vice Chancellor for Finance and Administration that satisfactory progress has been made to implement a corrective action plan. Failure to receive an unqualified audit opinion, to comply with the reporting requirements of this regulation, or to satisfactorily implement a corrective action plan in response to an audit finding or management letter may result in Foundation losing its approved status.
- 7.5 Foundation agrees to allow the Chancellor or Chancellor's designee access to all Foundation documents and records at reasonable times, and to provide timely such other reports and any other information as requested by the Chancellor.

8.0 Conflicts of Interest.

Foundation will establish and maintain conflicts of interest and ethics policies, which must be approved by NC State, pertaining to its relationship with NC State, members of the governing board of the Foundation and persons doing business with Foundation and establishing required ethical standards for the members of the governing Board of the Foundation. Such policies shall provide that (a) all transactions (other than expense reimbursements set forth in 5.1), between Foundation and an officer, director, or employee of Foundation, must be approved by the Foundation Board; (b) no Foundation officer, director, or employee having a private business interest in a Foundation business transaction may be involved in the decision with respect to whether the Foundation should enter into such transaction; (c) no Foundation scholarship or fellowship award may be made to an officer, director, or employee of the Foundation or to a family member of such person unless the recipient of the award is determined by an independent awards committee.

9.0 Compliance with UNC and NC State policies and regulations and Foundation Bylaws and policies.

Both NC State and Foundation agree to comply with the policies, regulations and procedures of the UNC System and NC State pertaining to the Associated Entities, including amendments thereto. NC State shall provide Foundation with changes or amendments to policies and regulations as soon as practicable to allow the Foundation the opportunity to make required changes to ensure continued adherence to said policies and regulations, but in no event less than fifteen days prior to their effective date. Foundation

agrees to provide NC State with a copy of its Articles of Incorporation and Bylaws and shall provide any proposed amendments as soon as possible but in no event less than fifteen days prior to the meeting of the Foundation at which they are considered for adoption.

10. Effect of Agreement; Modification.

This Agreement (and its attachments, if any) contains all the terms between the parties and may be amended only in writing signed by an authorized representative of both parties.

11. Confidentiality.

Neither Foundation nor NC State shall disclose or use any private, confidential, proprietary, or trade secret information provided from one to the other except as required in and by the terms of this Agreement or as required by law. Foundation shall maintain ownership of and control access to any records, including donor and prospect information, it collects that constitute a trade secret under N.C.G.S. § 66-152.

12. Indemnification.

Foundation shall indemnify and hold harmless NC State, its Board of Trustees, officers, employees, agents, and students in their official and personal capacities, from and against any and all claim, damage, liability, injury, expense, demands, and judgments, including court costs and attorney's fees, arising out of Foundation's performance of this Agreement to the extent any such claim, damage, liability, injury, expense, demand or judgment is caused by the Foundation or any NC State employee acting at the direction of the Foundation Board or the Chair of the Foundation Board. This provision shall continue beyond termination or expiration of this Agreement.

13. Term and Termination.

The initial term of this Agreement shall be five (5) years from the day written below and shall be automatically renewed for successive terms, unless and until either party gives ninety (90) days written notice to the other party of its intent not to renew for a new term. Either party shall have the continuing right to terminate this Agreement at any time without cause upon 90 days written notice to the other party. If NC State removes the Approved status of Foundation, the Foundation must dissolve as soon as practicable and this Agreement shall then terminate.

14. Dissolution.

It is the intent of the Foundation that it has perpetual existence. In the event of dissolution of the Foundation, all assets and property which remain after the discharge of the Foundation's liabilities and unless otherwise designated by the donor of an asset shall be paid over or distributed by the Board of Directors to NC State or to another Approved Associated Entity of NC State organized to support the University or any of its Colleges, Schools, or Departments and shall be used or distributed for no other object or purpose

whatsoever. This dissolution provision must be contained in the Foundation's Bylaws or Articles of Incorporation.

15. Compliance with Applicable Law and Non-Discrimination.

Foundation agrees to comply with all applicable federal, state and local rules, regulations, and laws, as currently in effect and as may be amended from time to time. Foundation further agrees not to discriminate in any manner on the basis of sex, race, creed, age, color, national origin, religious belief, disability, status as a disabled veteran, or veteran of the Vietnam era, sexual orientation, gender identity or genetic information, and to comply with all non-discriminatory laws and policies that NC State promulgates and to which NC State is subject.

16. Whistle Blower Protection.

Foundation must have a confidential and anonymous mechanism to encourage individuals to report any inappropriateness within the entity's financial management and must prohibit punishment of or retaliation against any employee for reporting problems.

17. Notice.

Any notice to either party hereunder must be in writing signed by the party giving it, and shall be deemed given when sent via electronic means such as e-mail, sent by facsimile, or mailed postage prepaid by U.S. Postal Services first class, certified, or express mail, or other overnight mail service, or hand delivered, when addressed as follows:

To NC State:

North Carolina State University
Campus Box 7004
Raleigh, NC 27695-7004

Attn: Vice Chancellor for University
Advancement

North Carolina State University
Campus Box 7201
Raleigh, NC 27695-7201

Attn: Vice Chancellor for Finance
and Administration

To Foundation:

XYZ Foundation, Inc.
Campus Box 0000
Raleigh, NC 27695-0000

Attn: Chair of Board of Directors

Or to such other addressee as may be hereafter designated by written notice. All such notices shall be effective only when received by the addressee.

IN WITNESS WHEREOF, NC State and the authorized representative(s) of Foundation have executed this Agreement on this _____ day of _____, 2015.

North Carolina State University

XYZ Foundation, Inc.

By: _____
W. Randolph Woodson, Chancellor

By: _____
Chair

By: _____
Charles D. Leffler, Vice Chancellor
for Finance and Administration

By: _____
President

ATTEST:

ATTEST:

By: _____
Patricia J. Teal, Secretary

By: _____
Secretary