SOUTH DAKOTA BOARD OF REGENTS

Budget and Finance

AGENDA ITEM: 6 – L
DATE: December 8-9, 2021

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SUBJECT
DSU Donation Agreement Amendment

CONTROLLING STATUTE, RULE, OR POLICY
BOR Policy 5:3 – Agreements and Contracts
BOR Policy 6:13 – Facilities Use by Private Parties

BACKGROUND / DISCUSSION
Dakota State University (“DSU”) requests authorization to proceed with finalizing and executing the First Amendment to the Sanford Medical Center Donation Agreement set forth in Attachment I. The Board initially approved the Donation Agreement at its August 2018 meeting, through which Sanford Health would contribute $5,000,000, payable in ten (10) annual installment payments to the DSU Foundation, as set forth in Attachment II (“Donation Agreement”). The Donation Agreement was subsequently assigned by Sanford Health to Sanford Medical Center, which now desires to amend the Donation Agreement to provide an additional $5,000,000, payable in ten (10) annual installments spanning from September 15, 2028 – September 15, 2037.

The additional contributions are intended to support the DSU Trojan Unite athletics facilities campaign. Aside from extending the term of the Donation Agreement until July 31, 2038 and adding an additional $5,000,000 contribution, bringing the total donation thereunder to $10,000,000, all other terms and conditions remain as originally stated.

IMPACT AND RECOMMENDATION
DSU requests the Board of Regents authorize President Griffiths to finalize and execute the amendment set forth in Attachment I, which will provide an additional $5,000,000 for the benefit of DSU, bringing the total under the agreement to $10,000,000.

ATTACHMENTS
Attachment I – Draft Amendment to Donation Agreement with Sanford Medical Center
Attachment II – Donation Agreement

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DRAFT MOTION 20211208_6-L:
I move to authorize Dakota State University to proceed with finalizing the draft amendment to the donation agreement set forth in Attachment I, subject to approval of the final draft by the Executive Director.
FIRST AMENDMENT TO DONATION AGREEMENT

THIS FIRST AMENDMENT TO DONATION AGREEMENT is entered into as of the ___ day of __________________, 2021, by and among SANFORD MEDICAL CENTER ("SMC"), DAKOTA STATE UNIVERSITY ("DSU") and DAKOTA STATE UNIVERSITY FOUNDATION (the “Foundation”).

WHEREAS, Sanford Health, DSU and the Foundation entered into that certain Donation Agreement dated September 24, 2018 (the “Agreement”), whereby Sanford Health agreed to contribute $5,000,000 to the Foundation for projects, scholarships, faculty and/or the athletic department (the “Contributions”); and

WHEREAS, Sanford Health assigned the Agreement to SMC; and

WHEREAS, SMC desires to contribute an additional $5,000,000 to the DSU Trojans Unite athletics facilities campaign; and

WHEREAS, in consideration therefor, the parties have agreed to extend the term of the Agreement as more fully set forth below.

NOW, THEREFORE, the parties agree as follows:

1. Capitalized terms not defined herein shall have the meanings ascribed to them in the Agreement.

2. Subject to the conditions precedent set forth in Section 1 of the Agreement, SMC agrees to contribute to the Foundation an additional $5,000,000, payable in ten (10) installments as set forth on Exhibit A attached hereto (collectively, the “Campaign Contributions”).

3. The parties acknowledge and agree that the Capital Contributions shall be used for the DSU Trojans Unite athletics facilities campaign to transform the DSU campus and the Madison, South Dakota community by providing new homes for DSU Trojan athletics as well as Madison High School football and track, with Phase I to include an event center housing an esports arena, football stadium, and outdoor track and soccer complex and later phases to include a new basketball arena, indoor athletics complex, baseball and softball complex, and an outdoor amphitheater.

4. All references in the Agreement to the DSU Athletic Facilities shall hereafter include any and all current or future athletic facilities on the DSU campus or at such other locations DSU utilizes in connection with its athletic programs, unless otherwise prohibited by such other locations.

5. Notwithstanding anything in the Agreement to the contrary, the term of the Agreement is hereby extended through and until July 31, 2038. The parties acknowledge and agree that the exclusive right to negotiate an extension of the Agreement and/or any of the exclusive advertising or signage rights granted to SMC therein and the right of first refusal set forth in Sections 3 and 4 of the Agreement shall remain in full force and effect.
6. Exhibit A to the Agreement is hereby deleted and Exhibit A attached hereto is incorporated herein by reference.

7. All references in the Agreement to Sanford Health shall hereafter refer to SMC.

8. Except as modified by this Amendment, the terms and conditions of the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, this Amendment is executed as of the date set forth above.

SANFORD MEDICAL CENTER

By _____________________________
Its _____________________________

DAKOTA STATE UNIVERSITY

By _____________________________
 Its _____________________________

DAKOTA STATE UNIVERSITY FOUNDATION

By _____________________________
 Its _____________________________
EXHIBIT A

Contributions and Campaign Contributions

Contributions

September 15, 2018 - $500,000 – Paid
September 15, 2019 - $500,000 - Paid
September 15, 2020 - $500,000 - Paid
September 15, 2021 - $500,000 - Paid
September 15, 2022 - $500,000
September 15, 2023 - $500,000
September 15, 2024 - $500,000
September 15, 2025 - $500,000
September 15, 2026 - $500,000
September 15, 2027 - $500,000

Campaign Contributions

September 15, 2028 - $500,000
September 15, 2029 - $500,000
September 15, 2030 - $500,000
September 15, 2031 - $500,000
September 15, 2032 - $500,000
September 15, 2033 - $500,000
September 15, 2034 - $500,000
September 15, 2035 - $500,000
September 15, 2036 - $500,000
September 15, 2037 - $500,000
DONATION AGREEMENT

THIS AGREEMENT is made this 24th day of September, 2018 (the “Effective Date”), by and among SANFORD HEALTH (“Sanford”), DAKOTA STATE UNIVERSITY (“DSU”) and DAKOTA STATE UNIVERSITY FOUNDATION (“Foundation”), and.

WHEREAS, DSU, founded in 1881, offers doctorate, master’s, bachelor’s and associate degree programs in numerous fields of study. The work of DSU is carried out on a residential campus in Madison, South Dakota, through online courses and through The University Center in Sioux Falls, South Dakota; and

WHEREAS, the Foundation is a charitable foundation under §501(c)(3) of the Internal Revenue Code, providing support for various educational activities and objectives of DSU; and

WHEREAS, Sanford is a part of an integrated health care system located in Sioux Falls, South Dakota, who, with its parent, subsidiaries and affiliates, delivers health care to patients primarily in South Dakota, North Dakota, Minnesota and Iowa; and

WHEREAS, Sanford, DSU and the Foundation desire to strengthen their relationship via the provision of funds for DSU projects, scholarships, faculty and the athletic department, and the desire to explore other projects of mutual interest that advance the respective missions of each organization and benefit the Madison, South Dakota community; and

WHEREAS, Sanford, DSU and the Foundation collectively desire to further develop the infrastructure for health care in the Madison community, which interests would be served via the terms and conditions of this Agreement; and

WHEREAS, Sanford desires to further its mission and the continued development of Sanford’s health care services via its involvement in all the foregoing; and

WHEREAS, Sanford agrees to contribute to the Foundation, for the benefit of DSU, the sum of $5,000,000; and

WHEREAS, DSU and the Foundation desire to recognize Sanford’s commitment to the foregoing by granting certain exclusive rights to Sanford and other recognitions as more particularly described herein.

NOW THEREFORE, Sanford, DSU and the Foundation, in consideration of the mutual promises and covenants set forth herein, do hereby acknowledge and agree as follows:

1. During the term of this Agreement, Sanford agrees to contribute to the Foundation $5,000,000, payable in ten (10) installments as set forth on Exhibit A attached hereto (collectively the “Contributions”). The first installment is subject to the following condition precedent:

Contract No. 2018854
(i) Approval of Board and/or Legislature. Authorization in writing of approval for any obligation of DSU under this Agreement if required by the South Dakota Board of Regents (the “BOR”) and/or the South Dakota Legislature or any other governmental entity required by law or policy to approve the terms and conditions of this Agreement.

Each of the remaining installments is subject to the following conditions precedent:

(i) Compliance with Agreement. Neither DSU nor the Foundation is in material breach of any term or condition of this Agreement.

(ii) Formal Evaluation. The parties agree to formally evaluate the DSU/Sanford relationship at least annually, such evaluation to be attended by DSU’s President and Athletic Director and Sanford’s Senior Executive Director—Orthopedic and Sports Medicine and/or their designees or invitees. The meeting will include discussions regarding terms and conditions of this Agreement.

(iii) Board Approval. The Board of Trustees of Sanford authorizing said annual Contribution during such year.

(iv) Annual Statement. The Foundation will send an annual invoice statement to Sanford thirty (30) days prior to the payment dates set forth in Exhibit A. All statements shall be addressed as follows:

Sanford Health
PO Box 5039
2301 E. 60th Street North
Sioux Falls, SD 57117-5039
Attn: Treasurer

The parties acknowledge and agree that the Contributions made to the Foundation shall be for the benefit of DSU for projects, scholarships, faculty and/or the athletic department as determined by the University.

2. Exclusive Health Care Presence Recognition. During the term of this Agreement, in recognition for the Contributions made hereunder, DSU acknowledges that Sanford shall have an exclusive 3rd Party Health Care Presence at the DSU Memorial Fieldhouse and DSU Trojan Field (the “DSU Athletic Facilities”). For the purposes of this Agreement, “Health Care Presence” shall include, but not be limited to, businesses and/or entities that operate a hospital and/or clinic, which provides any health care services of any kind including, without limitation, a clinic such as a “walkup”, “rapid care”, or “urgent care” clinic, which provide health care services and/or for the provision of dialysis, physical therapy, chiropractic care, occupational therapy, occupational health, oral surgery, audiology, psychiatry, dietetics, optometry, ophthalmology, laser surgery, plastic surgery, maxillofacial surgery services, the sale of health care accessories, the sale or
operation of health care plans, weight loss management, pharmacy, and/or athletic training or strength conditioning services.

Traditional dentistry and orthodontics, however, shall not be deemed a Health Care Presence, so long as said dentistry and orthodontics is not associated or affiliated with any other hospital or health care entity. Notwithstanding the foregoing, DSU may seek an exception to this exclusive Health Care Presence provision upon written request to Sanford, which Sanford in its sole discretion may either grant or deny. DSU acknowledges that at the time of the execution of this Agreement, no agreements or informal arrangements exist that would conflict with Sanford's exclusive Health Care Presence as set forth in this Section, except for such naming rights as have been granted previously to Madison Community Hospital, d/b/a Madison Regional Health System and Sioux Falls Specialty Hospital, L.L.P. It is understood and agreed by the parties that in the event said rights expire or terminate during the term of this Agreement, including any options previously granted, DSU shall not extend the same.

3. Exclusive Advertising and Signage Recognition. DSU hereby covenants and agrees that Sanford shall have, and DSU irrevocably transfers, sets over and assigns to Sanford exclusive “Health Care Presence” signage recognition with respect to the exterior and interior of the DSU Athletic Facilities. In addition, DSU hereby agrees, covenants and promises during the term of this Agreement that it shall not, without the prior written consent of Sanford, which consent may be granted or withheld in the exercise of Sanford’s sole discretion, directly or indirectly sell or lease, or solicit or market to sell or lease, or permit any naming or other advertising in any medium in, on or from any DSU Athletic Facility(ies) in violation of Sanford’s exclusive Health Care Presence (as defined in Section 2 above), except for such rights granted previously to Madison Community Hospital, d/b/a Madison Regional Health System and Sioux Falls Specialty Hospital, L.L.P. DSU acknowledges that at the time of the execution of this Agreement, no other agreements or informal arrangements exist that would conflict with Sanford’s exclusive advertising and/or signage rights as set forth in this Section. It is understood and agreed by the parties that upon expiration or termination of Sioux Falls Specialty Hospital, L.L.P.’s rights during the term of this Agreement, including any options previously granted, DSU shall not extend the same. It is further understood and agreed by the parties that in the event Madison Community Hospital, d/b/a Madison Regional Health System desires to extend its agreement with DSU with respect to advertising and signage only, Sanford, without violating this Section 3, agrees that DSU may enter into an agreement with Madison Community Hospital, d/b/a Madison Regional Health System for the same.

With respect to the exclusive advertising and signage recognition rights set forth in this Section 3, DSU and Sanford agree to be bound by the measurement, weight, location and luminosity limits established by DSU for each DSU Athletic Facility and Sanford shall cooperate on the design, fabrication and installation of the signage contemplated hereunder, the cost of which shall be borne by Sanford; however in no event shall Sanford be responsible in any manner for any of DSU’s costs to remove any other signage from the DSU Athletic Facilities and areas in which Sanford is granted the exclusive Health Care Presence signage recognition in accordance with this Agreement.
In addition, DSU covenants and agrees to include said exclusive Health Care Presence requirement in each of its own facility use agreements or leases and in any agreement or lease it may enter into with owners or operators of adjacent facilities to the extent such facilities may reasonably be considered part of, or affiliated (meaning DSU owned or controlled) with the DSU Athletic Facilities. Sanford may, upon the written request of DSU and in the exercise of Sanford’s sole discretion, waive the foregoing advertising rights with respect to lessees/users of the DSU Athletic Facilities on an event-specific basis. This section does not apply to the Madison Community Center.

4. **Term: Right of First Refusal.** The term of this Agreement shall commence as of the Effective Date and continue until the tenth (10th) anniversary thereof. During the term hereof, Sanford shall have the exclusive right to negotiate with DSU for an extension of this Agreement and/or any of the exclusive advertising or signage rights granted to Sanford hereunder. At least 12 months prior to the end of the term of this Agreement, the parties shall in good faith commence discussion as to terms and conditions of a proposed extension. In the event the parties are unable to agree to an extension of a term with respect to this Agreement and/or any of the exclusive sponsorship, advertising and/or signage rights granted to Sanford hereunder, (a) the exclusive sponsorship, advertising and/or signage rights granted to Sanford hereunder shall cease and terminate at the end of the term hereof and (b) Sanford shall, for an additional three-year period, have a right of first refusal with respect to any of the exclusive sponsorship, advertising or signage rights granted to Sanford hereunder. If at any time during said three-year period DSU receives a bona fide offer from a third party for the grant, sale, transfer or other disposition of any such exclusive sponsorship, advertising and/or signage rights, DSU shall give Sanford a first right of refusal with respect to such offer. Upon receipt of written notice and a copy of said offer from DSU that DSU has received an offer it is willing to accept, Sanford shall, within thirty (30) days after receipt of said notice, give written notice to DSU as to whether Sanford has elected to exercise its right to accept the same terms and conditions as contained in said offer. In the event Sanford does not exercise the right within said thirty day period, its rights hereunder shall be exhausted solely with respect to the rights conveyed to the third party offeror under the offer for the period stated in such offer and any such decision not to exercise shall not be deemed or construed as a waiver of its rights of first refusal with respect to any subsequent third party offers. The foregoing rights of first refusal shall survive termination of this Agreement for the period described above.

5. **Material Breach, Ceasing of Use, Impairment of Rights.**

A. **Default by DSU or the Foundation.** Upon (a) a material impairment by DSU or the Foundation of any exclusive rights or recognitions granted by DSU hereunder, which is not cured by DSU or the Foundation within thirty (30) days’ written notice thereof, or (b) a material breach by DSU or the Foundation of any other of DSU’s or the Foundation’s obligations hereunder, which breach is not cured by DSU or the Foundation within thirty (30) days’ written notice thereof, Sanford shall have the right to terminate any future installments set forth in this Agreement which become due and payable. If all payments have been made by Sanford and a default by DSU or the Foundation, as defined in this paragraph, has occurred and has not been remedied by DSU or the Foundation within the requisite time,
Sanford shall have the right to elect any and all remedies available under the law, equitable or legal, including, but not limited to, specific performance of this Agreement.

B. Default by Sanford. Upon Sanford’s default in making any installment due hereunder within thirty (30) days of its receipt of written notice that such installment is delinquent (except to the extent such payment by Sanford is disputed in good faith hereunder or payments are delayed as a result of the action or omission to act of DSU or the Foundation), DSU and the Foundation may declare this Agreement cancelled, forfeited and terminated by giving to Sanford thirty (30) days’ notice in writing of its intention to cancel and terminate this Agreement and/or DSU and the Foundation may pursue any other appropriate legal or equitable remedy.

6. No Joint Venture. Nothing herein contained shall be construed to place the parties in a relationship of partners or joint venturers and neither party shall have the power to obligate or bind the other in any manner whatsoever.

7. Indemnity. To the extent permitted by the Laws and Constitution of the State of South Dakota and subject to available appropriation, DSU shall save and hold harmless Sanford from any liability for damages and litigation costs including attorney’s fees which arise from DSU’s activity, except for damages due to the fault or negligence of Sanford, its sub-contractors, officers, employees or agents. Nothing herein shall preclude DSU from asserting against any party any defenses to liability it may have under South Dakota law, nor is anything herein intended to extend DSU’s liability beyond that provided by SDCL ch. 21-32.

8. Representations and Warranties of DSU and the Foundation. DSU and the Foundation hereby represent and warrant to Sanford the following:

A. The execution, delivery and performance by DSU and the Foundation of this Agreement and the assignment of rights effectuated hereby have been or will be duly authorized by all known necessary entities, including the BOR, if necessary. Notwithstanding the foregoing, this Agreement will not knowingly (i) require any authorization, consent or approval by, or registration, declaration or filing with, or notice to, any governmental department, commission, board, bureau, agency or instrumentality, or any third party, except such authorization, consent, approval, registration, declaration, filing or notice as has been obtained prior to the date hereof; (ii) violate any provision of any law, rule or regulation of or of any order, writ, injunction or decree presently in effect having applicability to DSU or the Foundation; and (iii) result in a breach of or constitute a default under any material agreement, lease or instrument to which DSU or the Foundation is a party or by which they or their respective properties may be bound or affected.
B. No material agreement, lease or instrument to which DSU or the Foundation is a party or by which its properties are bound or affected imposes upon the rights granted to Sanford hereunder any express or implied limitations on the exercise of such rights, except as disclosed by DSU and the Foundation in writing contemporaneously herewith or except as disclosed herein.

C. There is no litigation, proceeding or other investigation pending or, to the knowledge of DSU or the Foundation, threatened against DSU or the Foundation, which would prevent consummation of the transaction contemplated by this Agreement.

9. **Representations and Warranties of Sanford.** Sanford hereby represents and warrants to DSU and the Foundation the following:

   A. Sanford is a non-profit corporation duly organized, existing and in good standing under the laws of the State of South Dakota.

   B. The execution, delivery and performance by Sanford of this Agreement has been duly authorized by all necessary corporate action and does not and will not (i) require any consent or approval of Sanford’s Board of Trustees, except as otherwise provided in this Agreement; (ii) require any authorization, consent or approval by, or registration, declaration or filing with, or notice to, any governmental department, commission, board, bureau, agency or instrumentality, or any third party, except such authorization, consent, approval, registration, declaration, filing or notice as has been obtained prior to the date hereof; (iii) violate any provision of any law, rule or regulation or of any order, writ, injunction or decree presently in effect having applicability to Sanford or its articles or by-laws; and (iv) result in a breach of or constitute a default under any material agreement, lease or instrument to which Sanford is a party or by which it or its properties may be bound or affected.

10. **Injunctive Relief.** The parties acknowledge that breach or nonperformance with respect to certain of the covenants of this Agreement could cause irreparable harm and significant injury which may be difficult to estimate or ascertain. Accordingly, both parties agree that each party shall have, in addition to any other rights or remedies afforded by law, the right to seek immediate injunctive relief or specific performance due to any existing or threatened breach of this Agreement.

11. **Risk of Loss.** The parties acknowledge and agree that the BOR will have title to the DSU Athletic Facilities (subject to the rights granted to Sanford hereunder) and bears the risk of damage, loss, theft, or condemnation of any and all portions of, or personal property located at, said facilities, and no repairs and replacements thereof shall be at the expense of Sanford. The foregoing notwithstanding, Sanford acknowledges that it shall bear the risk of damage, loss, theft or condemnation of any Sanford signage or other Sanford property located at or upon the DSU Athletic Facilities, unless such damage, loss, theft or condemnation is a result of or attributable to
DSU's, the Foundation's, or their agents' negligence or intentional act. The State of South Dakota, the BOR, or DSU shall, at all times during the term of this Agreement, maintain physical damage insurance, insuring against loss or damage to the DSU Athletic Facilities in an amount specified by the State of South Dakota or the BOR, but in no event less than the full replacement value thereof. In the event of material casualty to the DSU Athletic Facilities, the State of South Dakota, the BOR, or DSU shall, subject to BOR approval, promptly repair or replace the DSU Athletic Facility.

12. Insurance. During the term of this Agreement, the State of South Dakota, the BOR, or DSU shall maintain, at its sole cost and expense, adequate coverage, whether self-insured or otherwise, against any liability arising out of injuries to or death of any person or damage to tangible property in any way connected with the ownership or operation of the DSU Athletic Facilities. DSU shall provide to Sanford a certificate evidencing such coverage.

13. Assignment. No party shall assign or transfer their respective rights or obligations under this Agreement without the prior written consent of all other parties, which consent may be granted or withheld in the exercise of the party's sole discretion; provided, however, that Sanford may, without the necessity of consent, assign or transfer its rights or obligations under this Agreement to any parent, subsidiary or affiliate corporation or entity, any corporation resulting in the consolidation or merger of Sanford into or with any other entity, any person, firm, entity or corporation acquiring all or substantially all of Sanford's assets. In the event Sanford is acquired by, or converts to, a for-profit corporation, any assignment or transfer of Sanford's rights hereunder shall be subject to the prior written consent of DSU and the Foundation, which consent shall not be unreasonably withheld or delayed. Any assignment or transfer prohibited by this provision will be void.

14. Exclusive Sports Medicine Agreement. DSU, the Foundation and Sanford hereby acknowledge and agree that DSU and Sanford have concurrently herewith entered into an Exclusive Sports Medicine Agreement to provide exclusive sports medicine services to DSU and its student athletes. DSU, the Foundation and Sanford agree that in the event the Exclusive Sports Medicine Agreement terminates at any time during the term hereof, this Agreement shall also terminate with no further rights or obligations on the part of any party. In the event of a direct conflict between the terms of this Agreement and the Exclusive Sports Medicine Agreement, the terms of Exclusive Sports Medicine Agreement shall prevail.

15. Miscellaneous.

A. This Agreement shall be interpreted under and governed by the laws of the State of South Dakota. Any action arising out of or related to this Agreement, whether at law or in equity, shall be instituted in and litigated solely and exclusively in the state or federal courts in the State of South Dakota.

B. This Agreement along with any other agreement referenced herein constitutes the entire agreement between the parties and supersedes all prior proposals and agreements, both written and oral, and all other written and
oral communications between the parties regarding the subject matter herein.

C. This Agreement may not be amended or altered in any manner except in a writing signed by both parties.

D. No forbearance to exercise any rights or privileges under this Agreement or waiver of any breach of any of its terms shall be construed as a waiver of any such terms, rights, or privileges, but the same shall continue and remain in full force and effect the same as if no such forbearance or waiver had occurred.

E. The parties agree that if any part, term, paragraph, or provision of this Agreement is in any manner held to be invalid, illegal, void, or in any manner unenforceable, or to be in conflict with any law, then the validity of the remaining portions or provisions of this Agreement shall not be affected, and such part, term, paragraph or provision shall be construed and enforced in a manner designed to effectuate the intent expressed in this Agreement to the maximum extent permitted by law.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed the day and year first above written.

SANFORD HEALTH

By

Name: Mike Begeman
Its: VP Public Affairs & Corp Admin
Sanford Health

DAKOTA STATE UNIVERSITY

By

Jose Marie Griffiths, Ph.D., President

DAKOTA STATE UNIVERSITY FOUNDATION

By

Floyd Rummel, Board Chair
EXHIBIT A

Contributions

September 15, 2018 - $500,000
September 15, 2019 - $500,000
September 15, 2020 - $500,000
September 15, 2021 - $500,000
September 15, 2022 - $500,000
September 15, 2023 - $500,000
September 15, 2024 - $500,000
September 15, 2025 - $500,000
September 15, 2026 - $500,000
September 15, 2027 - $500,000