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THE WINDFALL CLAUSE AGREEMENT  
  
Version 1.0

THIS WINDFALL CLAUSE AGREEMENT (this “**Agreement**”) is made as of [                      ], 20[       ] (the “**Effective Date**”), by and between the undersigned party designated as “Donor” (the “**Donor**”), and the undersigned party or parties designated as “Recipients” (the “**Recipients**”). Each party may be hereinafter referred to individually as a “**Party**” or collectively as the “**Parties**”.

1. **WHEREAS**, in keeping with the mission of The Windfall Clause, Donor has pledged to donate certain windfall profits of Donor upon the occurrence of the Triggering Event (the “**Pledge**”) to Recipient [as set forth in Exhibit A and Exhibit B];
2. **WHEREAS**, Recipient wishes to confirm Donor’s Pledge upon the terms and conditions hereinafter set forth; and
3. In consideration of the mutual covenants and agreements hereinafter set forth, the Parties agree as follows:

# Definitions.

“**Affiliate**” of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, or otherwise.

[“**Authorized Recipient Affiliates**” means the [Affiliates of Recipient as may be notified by Recipient to Donor from time to time/Persons identified as such in [the/a] Exhibit].]

“**Confidential Information**” means any information that is treated as confidential by a party, including but not limited to all non-public information about its business affairs, products or services, Intellectual Property Rights, trade secrets, third-party confidential information, and other sensitive or proprietary information[, whether disclosed orally or in written, electronic, or other form or media][, and] [whether or not marked, designated, or otherwise identified as “confidential”]. Confidential Information shall not include information that: (a) is already known to the Receiving Party without restriction on use or disclosure prior to receipt of such information from the Disclosing Party; (b) is or becomes generally known by the public other than by breach of this Agreement by, or other wrongful act of, the Receiving Party; (c) is developed by the Receiving Party independently of, and without reference to, any Confidential Information of the Disclosing Party; or (d) is received by the Receiving Party from a third party that is not under any obligation to the Disclosing Party to maintain the confidentiality of such information.

[“**Deliverables**” means all documents, work product, and other materials that are delivered to Recipient hereunder or prepared by or on behalf of Donor in the course of performing the Services[, including any items identified as such in [the/a] Statement of Work].

“**Disclosing Party**” means a party that discloses Confidential Information under this Agreement.

“**Donor Personnel**” means all employees and Permitted Subcontractors, if any, engaged by Donor to perform the Services.

“**Donor Proposal**” means Recipient’s Request for Proposal for the Services and Donor’s response[, attached as Exhibit [A],] describing how Donor proposes to carry out the Services.]

[“**Intellectual Property Rights**” means all (a) patents, patent disclosures, and inventions (whether patentable or not), (b) trademarks, service marks, trade dress, trade names, logos, corporate names, and domain names, together with all of the goodwill associated therewith, (c) copyrights and copyrightable works (including computer programs), [mask works,] and rights in data and databases, (d) trade secrets, know-how, and other confidential information, and (e) all other intellectual property rights, in each case whether registered or unregistered and including all applications for, and renewals or extensions of, such rights, and all similar or equivalent rights or forms of protection in any part of the world.]

“**Law**” means any statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree, other requirement, or rule of law of any federal, state, local, or foreign government or political subdivision thereof, or any arbitrator, court, or tribunal of competent jurisdiction.

“**Losses**” mean all losses, damages, liabilities, deficiencies, Actions, judgments, interest, awards, penalties, fines, costs, or expenses of whatever kind, including reasonable attorneys’ fees and the cost of enforcing any right to indemnification hereunder and the cost of pursuing any insurance providers.

“**Person**” means an individual, corporation, partnership, joint venture, limited liability company, governmental authority, unincorporated organization, trust, association, or other entity.

[“**Pre-Existing Materials**” means [the pre-existing materials specified in [the/a] Statement of Work/all documents, data, know-how, methodologies, software, and other materials[, including computer programs, reports, and specifications,] provided by or used by Donor in connection with performing the Services, in each case developed or acquired by Donor prior to the commencement [or independently] of this Agreement].]

“**Receiving Party**” means a party that receives or acquires Confidential Information directly or indirectly under this Agreement.

[“**Recipient Materials**” means any documents, data, know-how, methodologies, software, and other materials provided to Donor by Recipient[, including computer programs, reports, and specifications].

[“**Services**” means the professional [and other] services to be provided by Donor under this agreement, as described in more detail in [the/a] Exhibit, and Donor’s obligations under this Agreement.]

“**Statement of Work**” or “**SOW**” means [the/each] Statement of Work entered into by the parties and attached to this Agreement[, substantially in the form of Exhibit [B/[OTHER LETTER]]].

“**Triggering Event**” means [that event/the time] upon which Donor achieves that certain [profit/market capitalization/net asset value/OTHER METRIC] threshold that triggers Donor’s obligations to make a Pledge under this Agreement.

# Gift by Donor.

## Upon the occurrence of the Triggering Event, Donor shall contribute to Recipient the Pledge, as set forth in Exhibit A and Exhibit B, in the form of payment [acceptable to Recipient/set forth in Exhibit A and Exhibit B][and shall provide the [Deliverables/Services] listed in Exhibit A and Exhibit B in accordance with the terms and conditions of this Agreement.]

## [[The/Each Exhibit] that sets forth the terms of the Pledge]/[Exhibit A and Exhibit B]] shall include the following information, if applicable:

### The [profit/market capitalization/net asset value/OTHER METRIC] threshold that constitutes windfall profitability [./, and the calculations used to support such belief.][;/and]

### The manner, if any, in which Donor’s Affiliates’ [profits/market capitalization/net asset value/OTHER METRIC] shall be considered for the purposes of determining Donor’s obligations under the Pledge;

### The manner in which Donor will make the Pledge to Recipient [,/ and if such Pledge is to be made in installments, the details of such payment schedule, including the frequency of the installments, the number of installments, and the date such installments will commence and end.] [;/and]

### Procedures for receipt of the Pledge, including any obligations and continuing obligations each Party may have in connection with such Pledge. [;/and]

### [*If the Pledge is made in installments*: Any criteria for Donor’s [continued] receipt of the Pledge./; and]

### [Any other terms and conditions agreed upon by the parties in connection with the Pledge.]

# Use. [Recipient may use the Pledge for general corporate purposes.] OR [In accordance with Donor’s direction, Recipient will use the Pledge, and any income earned in connection with the Pledge to support [program/[Recipient]. [For clarity, if a portion of the Pledge remains unspent or unallocated upon completion of the applicable program or purpose, or in the case that Recipient otherwise determines in its discretion in good faith that it is no longer possible for the Pledge to serve its original purpose, then Recipient may use the remaining funds for unrestricted general corporate purposes.]

# Additional Gifts. Donor reserves the right to increase Donor’s contribution through additional gifts and contributions subject to Recipient’s written consent to such increase. [In the event the Parties wish to increase Donor’s contribution, the Parties shall amend this Agreement, including Exhibit A and Exhibit B, to update the Pledge and the terms and conditions of such Pledge.] [The Parties may permit others to contribute to any fund established by this Agreement, but all such gifts will be subject to the terms and conditions of this Agreement.]

# Donor’s Obligations

## [In addition to the Pledge, Donor shall provide the Services to Recipient [and the Authorized Recipient Affiliates] as described in more detail in each exhibit attached hereto in accordance with the terms and conditions of this Agreement.]

## Donor shall:

### [subject to the prior written approval of Recipient, [which approval shall not be unreasonably withheld or delayed]] appoint: (a) a Donor employee/appointee/representative to serve as a primary contact with respect to this Agreement and who will have the authority to act on behalf of Donor in connection with matters pertaining to this Agreement (the “**Donor Contract Manager**”);

### maintain the same Donor Contract Manager throughout the Term of this Agreement except for changes in such personnel due to: (a) Recipient’s request pursuant to Section 5.2.3; or (b) the resignation or termination of such personnel or other circumstances outside of Donor’s reasonable control;

### upon the [reasonable] written request of Recipient, promptly replace Donor Contract Manager and any other Donor Personnel;

### before the date on which the [Pledge/first installment of the Pledge] is to be made by Donor to Recipient, obtain, and at all times during the Term of this Agreement maintain, all necessary licenses and consents and comply with all relevant Laws applicable in connection with such Pledge;

### comply with, and ensure that Donor and Donor Personnel comply with, all rules, regulations, and policies of Recipient that are communicated to Donor in writing;

### [Upon Recipient’s written request, ]maintain and provide reasonably adequate accounting records, including complete and accurate records of any installments or other contributions, [S/s]ervices, [Deliverables,] goods or Actions made by Donor in connection with the Pledge[., upon Recipient’s written request, Donor shall allow Recipient or Recipient’s representative to inspect and make copies of such records and interview Donor Personnel in connection with the provision of the Services][; provided that any such inspection shall take place during regular business hours no more than once per year and Recipient provides Donor with at least [ten (10) business days’/reasonable] advance written notice];

### obtain Recipient’s written approval[, which shall not be unreasonably withheld or delayed/which may be given or withheld in Donor’s sole discretion,] prior to entering into agreements with or otherwise engaging any Person, including all Affiliates of Donor, to make the Pledge [or any installments of the Pledge] [and perform any [S/s]ervices for [and deliver any Deliverables to] Recipient. Recipient’s approval shall not relieve Donor of its obligations under the Agreement, and Donor shall remain fully responsible for the performance of each Person designated to [fulfill/assume] Donor’s obligations hereunder (“**Permitted Designee**”) and for their compliance with all of the terms and conditions of this Agreement as if they were Donor itself. Nothing contained in this Agreement shall create any contractual relationship between Recipient and any Permitted Designee;

### require each Permitted Designee to be bound in writing by the confidentiality [and intellectual property assignment or license provisions of this Agreement[, and, upon Recipient’s written request, to enter into a non-disclosure or intellectual property assignment or license agreement in a form that is reasonably satisfactory to Recipient]];

### for all Donor Personnel and for the payment of their compensation, including, if applicable, withholding of income taxes, and the payment and withholding of social security and other payroll taxes, unemployment insurance, workers’ compensation insurance payments, and disability benefits;

### keep adequate books and records of account with respect to its financial condition, in accordance with GAAP [(or such other method acceptable to Lender)] consistently applied. Donor shall cause its Affiliates to do the same;

### promptly (and in any case, no less than ten (10) business days after such a request) furnish all financial statements and information reasonably requested by Recipient to ascertain Donor’s obligations under the Pledge, each prepared in such detail as reasonably required by Recipient to ascertain Donor’s present and past obligations under the Pledge, and each certified by a responsible officer to be true, complete, and correct. Donor shall cause its Affiliates to do the same;

### cause its Affiliates to absolutely, unconditionally, and irrevocably guarantee, as primary obligors and not merely as surety, all monetary obligations of Donor hereunder;

### Donor acknowledges that time is of the essence with respect to Donor’s obligations hereunder and that prompt and timely performance of all such obligations[, including all timetables, milestones, and other requirements in this Agreement and [the/each] Exhibit,] is strictly required; [and]

### [The obligations of Donor under this Agreement shall be performed fully within the United States, unless approved in writing in advance by Recipient.]

### [*Any additional Donor Obligations*]

# Recipient’s Obligations.

## Recipient shall:

### cooperate with Donor in all matters relating to the terms of this Agreement [and the Services] and appoint[, in its reasonable discretion,] a Recipient employee, representative, or other designee who will serve as the primary contact with respect to this Agreement and who will have the authority to act on behalf of Recipient with respect to matters pertaining to this Agreement;

### respond promptly to any request by Donor to provide direction, information, approvals, authorizations, or decisions that are reasonably necessary for Donor to make the Pledge[/to perform Services] in accordance with the requirements of this Agreement;

### provide such [Recipient Materials/information] as Donor may [reasonably] request [and Recipient considers reasonably necessary], in order to make the Pledge [carry out the Services], in a timely manner, and ensure that it is complete and accurate in all material respects;

### [reports on performance of the [Recipient/Recipient’s fund] and use of the Pledge proceeds shall be provided annually to Donor for endowment gifts;]

### obtain and maintain all necessary licenses and consents and comply with all applicable Law in relation to the Pledge [and Services] [to the extent that such licenses, consents, and Law relate to Recipient’s business, premises, staff, and equipment], in all cases before the date on which the Pledge is to be made [and Services are to start[./; and]

### [*Any additional Recipient obligations*]

### If Donor’s performance of its obligations under this Agreement is prevented or delayed by any act or omission of Recipient[, any Authorized Recipient,] or [its/their] agents, subcontractors, consultants, or employees [outside of Donor’s reasonable control], Donor shall not be deemed in breach of its obligations under this Agreement or otherwise liable for any costs, charges, or losses sustained or incurred by Recipient, in each case, to the extent arising directly or indirectly from such prevention or delay.

# Change Orders.

## If [Recipient/Donor/either party] wishes to change the terms of the Pledge [and/or scope or performance of the Services/this Agreement], it shall submit details of the requested change to [Donor/Recipient/the other party] in writing [in accordance with the notice provisions in Section 21.4]. Donor shall, within a reasonable time (not to exceed [NUMBER] days) after receiving a Recipient-initiated request, or at the same time that Donor initiates such a request, provide a written estimate to Recipient of: (i) the likely time required to implement the change; (ii) any necessary variations to the [Services/and Deliverables] arising from the change; (iii) the likely effect of the change on the Services; (iv) any other impact the change might have on the performance of this Agreement; and (v) any other information [reasonably] requested by Recipient.

## Promptly after receipt of the written estimate, the parties shall negotiate and agree in writing on the terms of such change (a “**Change Order**”). Neither Party shall be bound by any Change Order unless mutually agreed upon in writing in accordance with Section 22.8.

# Term and Termination.

## This Agreement shall commence as of the Effective Date and shall continue thereafter [[as set forth in Exhibit A]/[until the completion of the Services [under all Statements of Work]/for a period of [TERM] [(the “**Term**”)]], unless sooner terminated pursuant to this Section 8.

## Termination.

### Either Party may terminate this Agreement [any SOW], effective upon written notice to the other party (the “**Defaulting Party**”), if the Defaulting Party: (i) becomes insolvent or admits its inability to pay its debts generally as they become due; (ii) becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency law, which is not fully stayed within [NUMBER] business days or is not dismissed or vacated within [NUMBER] days after filing; (iii) is dissolved or liquidated or takes any corporate Action for such purpose; (iv) makes a general assignment for the benefit of creditors; or (v) has a receiver, trustee, custodian, or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business.

### Recipient may terminate this Agreement, including all Exhibits hereto, if Donor fails to materially comply with any of its obligations hereunder, and does not rectify the breach within 10 calendar days of notice of such breach.

## Upon expiration or termination of this Agreement for any reason:

### Donor shall (i) [promptly deliver to Recipient all Deliverables (whether complete or incomplete), and all Recipient Materials in its possession], [(ii)] provide reasonable cooperation and assistance to Recipient [upon Recipient’s written request [and at Recipient’s expense]] in connection with the termination of this Agreement.

### Each Party shall (i) return to the other Party all documents and tangible materials (and any copies) containing, reflecting, incorporating, or based on the other Party’s Confidential Information, (ii) permanently delete all of the other Party’s Confidential Information from its computer systems, and (iii) certify in writing to the other Party that it has complied with the requirements of this clause[; provided, however, that Recipient may retain copies of any Confidential Information of Donor incorporated in the Deliverables or to the extent necessary to allow it to make full use of the Services and any Deliverables].

## In no event shall Recipient be liable for any Donor Personnel termination costs arising from the expiration or termination of this Agreement.

# Successors and Assigns.

### 9.1 The rights and obligations of this Agreement shall be binding upon the successors and assigns of each of the parties, without the need for an express assignment.

## Donor agrees to be prohibited from transferring, pledging, selling, lending, or assigning any of Donor’s lines of business, material revenue-generating assets, or material assets with the future potential to generate revenue or to any other party without the prior written consent of all Recipients. If Donor transfers, pledges, sells, lends, or assigns any of its lines of business, material revenue-generating assets, or material assets with the future potential to generate revenue without the prior written consent of all Recipients, Donor agrees that this action will cause irreparable harm to the Recipients and Donor agrees to promptly pay the full amount of all damages awarded in any judgment. Donor also agrees that the harmful transaction (the transferring, pledging, selling, lending, or assigning any of Donor’s lines of business, material revenue-generating assets, or material assets with the future potential to generate revenue) is subject to being stopped by an injunction obtained to stop the transaction on the basis of the anticipated harm.

# Survival. The rights and obligations of the parties set forth in this Section 10, and Section 1, Section 14, Section 15, Section 16, Section 17.6, Section 18, and Section 22, and any right or obligation of the Parties in this Agreement which, by its nature, should survive termination or expiration of this Agreement, will survive any such termination or expiration of this Agreement.

# [Donor Recognition. Recipient may publicly acknowledge the Pledge in accordance with Recipient’s customary donor recognition practices unless Donor otherwise instructs Recipient/To honor Donor, and to express the appreciation of Recipient, publicity in the form of news announcements, both internal and external, will be made in the annual report with the permission of Donor.]

# Legal Effect. This Pledge is intended to be legally binding on Donor. Donor understands that Recipient is relying on and may continue to rely on Donor’s Pledge in a variety of ways. Such reliance may include, without limitation, Recipient’s decisions regarding programming, capital expenditure, fundraising, and financing matters. Should Donor die (if Donor is a natural person) or cease to be a going concern (if Donor is not a natural person) prior to the fulfillment of the Pledge, the Pledge and this Agreement will be binding on Donor’s executors, administrators, trustees, heirs, and assigns.

# Further Assurances. Donor and Recipient will sign those other documents and take those other Actions as the other may request in order to effect the transactions contemplated by this Agreement.

# [Intellectual Property Rights; Ownership.

## [Except as set forth in Section 14.3,] Recipient is, and shall be, the sole and exclusive owner of all right, title, and interest in and to the Deliverables, including all Intellectual Property Rights therein. Donor agrees, and will cause its Donor Personnel to agree, that with respect to any Deliverables that may qualify as “work made for hire” as defined in 17 U.S.C. § 101, such Deliverables are hereby deemed a “work made for hire” for Recipient. To the extent that any of the Deliverables do not constitute a “work made for hire,” Donor hereby irrevocably assigns, and shall cause the Donor Personnel to irrevocably assign, to Recipient, in each case without additional consideration, all right, title, and interest throughout the world in and to the Deliverables, including all Intellectual Property Rights therein. Donor shall cause Donor Personnel to irrevocably waive, to the extent permitted by applicable Law, any and all claims such Donor Personnel may now or hereafter have in any jurisdiction to so-called “moral rights” or rights of droit moral with respect to the Deliverables.

## Upon the [reasonable] request of Recipient, Donor shall, and shall cause the Donor Personnel to, promptly take such further Actions, including execution and delivery of all appropriate instruments of conveyance, as may be necessary to assist Recipient to prosecute, register, perfect, or record its rights in or to any Deliverables.

## [Donor and its licensors are, and shall remain, the sole and exclusive owners of all right, title, and interest in and to the Pre-Existing Materials, including all Intellectual Property Rights therein. Donor hereby grants Recipient [and the Authorized Service Recipients] a [limited, irrevocable, perpetual, fully paid-up, royalty-free, non-transferable (except in accordance with Section 22.6), non-sublicenseable, worldwide] license to [use, perform, display, execute, reproduce, distribute, transmit, modify (including to create derivative works), import, make, have made, sell, offer to sell, and otherwise exploit] any Pre-Existing Materials to the extent incorporated in, combined with or otherwise necessary for the use of the Deliverables [for any and all purposes/solely to the extent reasonably required in connection with Recipient’s receipt or use of the Services and Deliverables]. All other rights in and to the Pre-Existing Materials are expressly reserved by Donor.]

## Recipient and its licensors are, and shall remain, the sole and exclusive owner of all right, title, and interest in and to the Recipient Materials, including all Intellectual Property Rights therein. Donor shall have no right or license to use any Recipient Materials except solely during the Term of the Agreement to the extent necessary to provide the Services to Recipient. All other rights in and to the Recipient Materials are expressly reserved by Recipient.]

# Confidential Information.

## The Receiving Party agrees:

### not to disclose or otherwise make available Confidential Information of the Disclosing Party to any third party without the prior written consent of the Disclosing Party; provided, however, that the Receiving Party may disclose the Confidential Information of the Disclosing Party to its [and its Affiliates, and their] officers, employees, consultants, and legal advisors who have a “need to know,” who have been apprised of this restriction, and who are themselves bound by nondisclosure obligations at least as restrictive as those set forth in this Section 5;

### to use the Confidential Information of the Disclosing Party only for the purposes of performing its obligations under the Agreement or, in the case of Recipient, to make use of the Services and Deliverables; and

### to [immediately/promptly] notify the Disclosing Party in the event it becomes aware of any loss or disclosure of any of the Confidential Information of Disclosing Party.

## If the Receiving Party becomes legally compelled to disclose any Confidential Information, the Receiving Party shall provide:

### prompt written notice of such requirement so that the Disclosing Party may seek, at its sole cost and expense, a protective order or other remedy; and

### reasonable assistance, at the Disclosing Party’s sole cost and expense, in opposing such disclosure or seeking a protective order or other limitations on disclosure.

If, after providing such notice and assistance as required herein, the Receiving Party remains required by Law to disclose any Confidential Information, the Receiving Party shall disclose no more than that portion of the Confidential Information which, on the advice of the Receiving Party’s legal counsel, the Receiving Party is legally required to disclose [and, upon the Disclosing Party’s request, shall use commercially reasonable efforts to obtain assurances from the applicable court or agency that such Confidential Information will be afforded confidential treatment].

[Nothing in this Agreement shall prevent either party from using any general methodologies or know-how contained in the unaided memory of such party’s personnel [or those of its Affiliates] developed or disclosed under this Agreement; provided that in doing so it is not in breach of its obligations of confidentiality under this Section or using any Intellectual Property Rights of the other party [or any of its Affiliates].]

# Representations and Warranties.

## Each Party represents and warrants to the other Party that:

### it is duly organized, validly existing, and in good standing as a corporation or other entity as represented herein under the laws and regulations of its jurisdiction of incorporation, organization, or chartering;

### it has the full right, power, and authority to enter into this Agreement, to grant the rights and licenses granted hereunder, and to perform its obligations hereunder;

### the execution of this Agreement by its representative whose signature is set forth at the end hereof has been duly authorized by all necessary corporate Action of the Party; and

### when executed and delivered by such Party, this Agreement will constitute the legal, valid, and binding obligation of such Party, enforceable against such Party in accordance with its terms.

## Donor represents and warrants to Recipient that:

### it shall [perform the Services using personnel of required skill, experience, and qualifications and in a professional and workmanlike manner [in accordance with [best/generally recognized/commercially reasonable] industry standards for similar services] and shall] devote adequate resources to meet its obligations under this Agreement;

### it is in compliance with[, and shall perform the Services in compliance with,] all applicable Laws;

### [Recipient will receive good and valid title to all Deliverables, free and clear of all encumbrances and liens of any kind;]

### [(i) [to Donor’s knowledge] none of the Services, Deliverables, and Recipient’s use thereof infringe or will infringe any [Intellectual Property Right/registered or issued patent, copyright or trademark] of any third party [arising under the Law of the United States/[IDENTIFY SPECIFIC JURISDICTIONS]], and (ii) as of the date hereof, there are no pending or, to Donor’s knowledge, threatened claims, litigation, or other proceedings pending against Donor by any third party based on an alleged violation of such Intellectual Property Rights, in each case, excluding any infringement or claim, litigation, or other proceedings to the extent arising out of (x) any Recipient Materials or any instruction, information, designs, specifications, or other materials provided by Recipient to Donor, (y) use of the Deliverables in combination with any materials or equipment not supplied or specified by Donor, if the infringement would have been avoided by the use of the Deliverables not so combined, and (z) any modifications or changes made to the Deliverables by or on behalf of any Person other than Donor. [Donor’s sole liability and Recipient’s sole and exclusive remedy for Donor’s breach of this Section 6 are Donor’s obligations under Section 17.1.3]];

### [the Services and Deliverables will be in conformity in all [material] respects with all requirements or specifications stated in this Agreement and the [applicable] Statement of Work [for a period of [thirty (30)/[OTHER NUMBER]] days after [delivery to/acceptance by] Recipient]. [In the event of Donor’s breach of the foregoing warranty, Donor’s sole and exclusive obligation and liability and Recipient’s sole and exclusive remedy shall be as follows: Donor shall use reasonable efforts to cure such breach; provided, that if Donor cannot cure such breach within a reasonable time (but no more than [thirty (30)/[OTHER NUMBER]] days) after Recipient’s written notice of such breach, Recipient may, at its option, terminate the Agreement by serving written notice of termination in accordance with Section 22.4.

### The foregoing remedy shall not be available unless Recipient provides written notice of such breach within [thirty (30)/[OTHER NUMBER]] days after [delivery/acceptance] of such Service or Deliverable [to/by] Recipient or with respect to changes made by any Person other than Donor or at Donor’s direction.]

### [[*Additional representations and warranties*].]

## EXCEPT FOR THE EXPRESS WARRANTIES IN THIS AGREEMENT, (A) EACH PARTY HEREBY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE UNDER THIS AGREEMENT, AND (B) DONOR SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, [AND] FITNESS FOR A PARTICULAR PURPOSE, [TITLE, AND NON-INFRINGEMENT].

# Indemnification and Agreement to Comply with Awarded Damages.

## [Donor shall defend, indemnify, and hold harmless Recipient [and Recipient’s Affiliates/Authorized Service Recipients] and [its/their] officers, directors, employees, agents, successors, and permitted assigns (each, a “**Recipient Indemnitee**”) from and against all Losses [awarded against a Recipient Indemnitee in a final judgment] [arising out of or resulting from any third-party claim, suit, action, or proceeding (each, an “**Action**”)] arising out of or resulting from:]

### [bodily injury, death of any person, or damage to real or tangible, personal property resulting from the willful, fraudulent, or [grossly] negligent acts or omissions of Donor or Donor Personnel][; and]

### Donor’s [material] breach of any representation, warranty, or obligation of Donor set forth in this Agreement.

### [Donor shall defend, indemnify, and hold harmless the Recipient Indemnitees from and against all Losses [awarded against a Recipient Indemnitee in a final judgment] based on a claim that any of the Services or Deliverables or Recipient’s receipt or use thereof infringes any Intellectual Property Right of a third party [arising under the Laws of the United States][; provided, however, that Donor shall have no obligations under this Section 17.1.3 with respect to claims to the extent arising out of: (i) any Recipient Materials or any instruction, information, designs, specifications, or other materials provided by Recipient in writing to Donor; (ii) use of the Deliverables in combination with any materials or equipment not supplied to Recipient or specified by Donor in writing, if the infringement would have been avoided by the use of the Deliverables not so combined; or (iii) any modifications or changes made to the Deliverables by or on behalf of any Person other than Donor or Donor Personnel].

## [Recipient shall defend, indemnify, and hold harmless Donor [and Donor’s Affiliates] and [its/their] officers, directors, employees, agents, successors, and permitted assigns from and against all Losses [awarded against Donor in a final judgment] [arising out of or resulting from any third-party Action] arising out of or resulting from:]

### [bodily injury, death of any person, or damage to real or tangible, personal property resulting from the [grossly] negligent or willful acts or omissions of Recipient; and]

### [Recipient’s [material] breach of any [representation, warranty, or obligation of Recipient in this Agreement/representation or warranty set forth in Section 6 of this Agreement].

## [The party seeking indemnification hereunder shall promptly notify the indemnifying party in writing of any Action and cooperate with the indemnifying party at the indemnifying party’s sole cost and expense. The indemnifying party shall immediately take control of the defense and investigation of such Action and shall employ counsel of its choice to handle and defend the same, at the indemnifying party’s sole cost and expense. [The indemnifying party shall not settle any Action in a manner that adversely affects the rights of the indemnified party without the indemnified party’s prior written consent[, which shall not be unreasonably withheld or delayed].] The indemnified party’s failure to perform any obligations under this Section 17.3 shall not relieve the indemnifying party of its obligations under this Section 17.3 except to the extent that the indemnifying party can demonstrate that it has been materially prejudiced as a result of such failure. The indemnified party may participate in and observe the proceedings at its own cost and expense.]

## Notwithstanding anything to the contrary in this Agreement, the indemnifying party is not obligated to indemnify, hold harmless, or defend the indemnified party against any claim (whether direct or indirect) [if/to the extent] such claim or corresponding losses arise out of or result from, in whole or in part, the indemnified party’s: (a) negligence or more culpable act or omission (including recklessness or willful misconduct); or (b) bad faith failure to comply with any of its obligations set forth in this Agreement.

## Donor acknowledges that Recipient will suffer irreparable harm if Donor fails to comply with any of Donor’s material obligations set forth in this Agreement and Donor acknowledges its culpability should such a failure to comply occur. Donor agrees to comply with any judgment awarding damages if any such a judgment is issued on the basis of a failure by Donor to comply with Donor’s material obligations.

## If Donor breaches its obligations under Exhibit B (the "**Donor Breach**"), Donor shall pay to Recipient an amount equal to the amount that would otherwise be due from Donor to Recipient under Exhibit B (the "**Liquidated Damages**"). The Parties intend that the Liquidated Damages constitute compensation, and not a penalty. The Parties acknowledge and agree that Recipient’s harm caused by a Donor Breach would be impossible or very difficult to accurately estimate as of the Effective Date, and that the Liquidated Damages are a reasonable estimate of the anticipated or actual harm that might arise from a Donor Breach. Donor's payment of the Liquidated Damages is Donor’s sole liability and entire obligation and Recipient’s exclusive remedy for any Donor Breach.

# [Limitation of Liability.

## EXCEPT AS OTHERWISE PROVIDED IN SECTION 18.3, IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER OR TO ANY THIRD PARTY FOR ANY LOSS OF USE, REVENUE, OR PROFIT [OR LOSS OF DATA] OR FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, OR PUNITIVE DAMAGES WHETHER ARISING OUT OF BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGE WAS FORESEEABLE AND WHETHER OR NOT SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

## EXCEPT AS OTHERWISE PROVIDED IN SECTION 17.3, IN NO EVENT WILL EITHER PARTY’S LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, EXCEED [[NUMBER] TIMES] THE AGGREGATE AMOUNTS PAID OR PAYABLE TO DONOR [PURSUANT TO THIS AGREEMENT/PURSUANT TO THE APPLICABLE STATEMENT OF WORK/IN THE [NUMBER] [YEARS/MONTHS] PERIOD PRECEDING THE EVENT GIVING RISE TO THE CLAIM].

## The exclusions and limitations in Section 18.1 and Section 18.2 shall not apply to:

### damages or other liabilities arising out of or relating to any failure by Donor to comply with the Pledge or any of Donor’s material obligations;

### [damages or other liabilities arising out of or relating to a party’s failure to comply with its obligations under Section 4;

### damages or other liabilities arising out of or relating to a party’s failure to comply with its obligations under Section 5;

### a party’s indemnification obligations under Section 7;

### damages or other liabilities arising out of or relating to a party’s gross negligence, willful misconduct, or intentional acts;

### death or bodily injury or damage to real or tangible personal property resulting from a party’s negligent acts or omissions;

### damages or liabilities to the extent covered by a party’s insurance; and

### a party’s obligation to pay attorneys’ fees and court costs in accordance with Section 22.13.]]

# [Non-Solicitation.

## During the Term of [this Agreement/any Statement of Work] and for a period of [[NUMBER] months] thereafter, neither Party shall, directly or indirectly, in any manner solicit or induce for employment any person who performed any work under [this Agreement/such Statement of Work] who is then in the employ of the other Party. A general advertisement or notice of a job listing or opening or other similar general publication of a job search or availability to fill employment positions, including on the internet, shall not be construed as a solicitation or inducement for the purposes of this Section 9, and the hiring of any employee or independent contractor who freely responds thereto shall not be a breach of this Section 9.

## If either Party breaches Section 19.1, the breaching party shall, on demand, pay to the non-breaching party a sum equal to one year’s basic salary or the annual fee that was payable by the claiming party to that employee, worker, or independent contractor plus the recruitment costs incurred by the non-breaching party in replacing such person.]

# [Non-Exclusivity; Non-Compete. Donor retains the right to perform the same or similar type of services for third parties during the Term of this Agreement[, except that, during the Term, Donor shall not provide services to the following direct competitors of Recipient: [*List Direct Competitors*].]]

# Force Majeure.

## No Party shall be liable or responsible to the other Party, or be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement [(except for any obligations to make payments to the other Party hereunder)], when and to the extent such failure or delay is caused by or results from acts beyond the impacted party’s (“**Impacted Party**”) [reasonable] control, including without limitation the following force majeure events (“**Force Majeure Events**”): (a) acts of God; (b) flood, fire, earthquake, [OTHER POTENTIAL DISASTER(S) OR CATASTROPHE(S), SUCH AS EPIDEMICS], or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot, or other civil unrest; (d) government order, law, or Actions; (e) embargoes or blockades in effect on or after the date of this Agreement; [and] (f) national or regional emergency; [and] [(g) strikes, labor stoppages or slowdowns, or other industrial disturbances;] [and] [(h) telecommunication breakdowns, power outages or shortages, lack of warehouse or storage space, inadequate transportation services, or inability or delay in obtaining supplies of adequate or suitable materials;] [and] [(i) other [similar] events beyond the [reasonable] control of the Impacted Party]. The Impacted Party shall give notice within [NUMBER] days of the Force Majeure Event to the other Party, stating the period of time the occurrence is expected to continue.

## [During the Force Majeure Event, the non-affected Party may similarly suspend its performance obligations until such time as the affected Party resumes performance.]

## The affected Party shall use diligent efforts to end the failure or delay and ensure that the effects of such Force Majeure Event are minimized and shall resume performance of its obligations as soon as reasonably practicable after the removal of the cause. [If the affected Party’s failure or delay remains uncured for a period of [NUMBER] days following written notice given by it under this Section 21, [either Party/the other Party] may thereafter terminate [this Agreement/an applicable Statement of Work] upon [NUMBER] days’ written notice.]

# Miscellaneous.

## Each Party shall, upon the [reasonable] request[, and at the sole cost and expense,] of the other Party, promptly execute such documents and perform such acts as may be necessary to give full effect to the terms of this Agreement.

## The relationship between the Parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture, or other form of joint enterprise, employment, or fiduciary relationship between the Parties, and neither Party shall have authority to contract for or bind the other Party in any manner whatsoever.

## [Neither Party shall issue or release any announcement, statement, press release, or other publicity or marketing materials relating to this Agreement, or otherwise use the other Party’s trademarks, service marks, trade names, logos, symbols, or brand names, in each case, without the prior written consent of the other Party[, which shall not be unreasonably withheld or delayed].]

## All notices, requests, consents, claims, demands, waivers, and other communications hereunder shall be in writing and shall be deemed to have been given (a) when delivered by hand (with written confirmation of receipt); (b) when received by the addressee if sent by a nationally recognized overnight courier (receipt requested); (c) on the date sent by [facsimile (with confirmation of transmission)/email] if sent during normal business hours of the recipient, and on the next business day if sent after normal business hours of the recipient; or (d) on the [third/[OTHER NUMBER]] day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Such communications must be sent to the respective parties at the addresses indicated below (or at such other address for a party as shall be specified in a notice given in accordance with this Section 22.4).

If to Donor: [DONOR ADDRESS]

[Email: [EMAIL ADDRESS]]  
Attention: [TITLE OF OFFICER TO RECEIVE NOTICES]

If to Recipient: [RECIPIENT ADDRESS]

[Email: [EMAIL ADDRESS]]  
Attention: [TITLE OF OFFICER TO RECEIVE NOTICES]

## This Agreement, together with all Schedules, Exhibits, and Statements of Work and any other documents incorporated herein by reference, constitutes the sole and entire agreement of the Parties to this Agreement with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings and agreements, both written and oral, with respect to such subject matter. In the event of any conflict between the terms and provisions of this Agreement and those of any Schedule, Exhibit, or Statement of Work, the following order of precedence shall govern: (a) first, this Agreement, exclusive of its Exhibits and Schedules; (b) second, the [applicable] Statement of Work; [and] (c) third, any Exhibits and Schedules to this Agreement[; and (d) fourth, the Donor Proposal].

## Neither Party may assign, transfer, delegate, dispose of, or otherwise convey (“**Assign**”) to another Person, any or all of its rights or obligations under this Agreement, including by operation of law, change of control, or merger, without the prior written consent of the other Party[, which consent shall not be unreasonably withheld or delayed[.]] [; provided, that, upon prior written notice to the other Party, either Party may assign the Agreement to an Affiliate of such Party or to a successor of all or substantially all of the assets of such Party through merger, reorganization, consolidation, or acquisition.] Neither Party may Assign to another Person, including an Affiliate, this Agreement, and any or all of the rights and obligations hereunder, nor take any Actions (whether directly or indirectly, or that could be implied to), to circumvent the terms of this Agreement, including any or all of the obligations hereunder]. No assignment shall relieve the assigning Party of any of its obligations hereunder. Any attempted assignment, transfer, or other conveyance in violation of the foregoing shall be null and void. This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective successors and permitted assigns.

## This Agreement is for the sole benefit of the Parties hereto and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other Person any legal or equitable right, benefit, or remedy of any nature whatsoever, under or by reason of this Agreement.

## This Agreement may be amended, modified, or supplemented only by an agreement in writing signed by each Party hereto. No waiver by any Party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the Party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

## If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal, or unenforceable, the Parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby are consummated as originally contemplated to the greatest extent possible.

## This Agreement shall be governed by and construed in accordance with the internal laws of the State of [RELEVANT STATE] without giving effect to any choice or conflict of law provision or rule (whether of the State of [RELEVANT STATE] or any other jurisdiction) that would cause the application of Laws of any jurisdiction other than those of the State of [RELEVANT STATE]. [Any legal suit, Action, or proceeding arising out of [or related to] this Agreement or the Services provided hereunder [may/shall] be instituted [exclusively] in the federal courts of the United States or the courts of the State of [RELEVANT STATE] in each case located in the city of [RELEVANT CITY] and County of [RELEVANT COUNTY], and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, Action, or proceeding. Service of process, summons, notice, or other document by mail to such Party’s address set forth herein shall be effective service of process for any suit, Action, or other proceeding brought in any such court.][[1]](#footnote-1)

## [Each Party irrevocably and unconditionally waives any right it may have to a trial by jury in respect of any legal Action arising out of or relating to this Agreement or the transactions contemplated hereby.]

## Each Party acknowledges that a breach by a Party of Section 14 (Intellectual Property Rights; Ownership) [and/,] Section 15 (Confidential Information)[, Section 18 (Non-Solicitation), or the non-compete portions of Section 20 (Non-Exclusivity; Non-Compete)] may cause the non-breaching party irreparable damages, for which an award of damages would not be adequate compensation and agrees that, in the event of such breach or threatened breach, the non-breaching party will be entitled to seek equitable relief, including a restraining order, injunctive relief, specific performance, and any other relief that may be available from any court, in addition to any other remedy to which the non-breaching party may be entitled at law or in equity. Such remedies shall not be deemed to be exclusive but shall be in addition to all other remedies available at law or in equity, subject to any express exclusions or limitations in this Agreement to the contrary.

## [If any Action, suit, or other legal or administrative proceeding is instituted or commenced by either Party hereto against the other Party arising out of [or related to] this Agreement, the prevailing party shall be entitled to recover its [reasonable/actual] attorneys’ fees and court costs from the non-prevailing Party.]

## This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, email or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

# [Morality Clause. If at any time Donor or its name may compromise the public trust or the reputation of the institution, including acts of moral turpitude, Recipient may remove the name of Donor from the Pledge or any gifts or use of proceeds in connection therewith, or return the Pledge, or a portion thereof, to Donor upon prior written notice.]

# No Legal Advice by OpenAI. The Parties acknowledge and agree that this Agreement and any materials and information provided by OpenAI are intended to serve as a starting point only, and should be tailored to meet the Parties’ specific requirements. The Parties shall not construe any information or materials provided on OpenAI’s website or in the Windfall Clause Report[[2]](#footnote-2) (the “**Report**”) as legal advice for any particular facts or circumstances. The materials provided by OpenAI, L.L.C. (“**OpenAI**”) on its website or websites (collectively, the “**Website**”), including this Agreement and the Report, are for illustrative purposes only. Neither the Website, this Agreement or the Report, nor any portions thereof are intended to serve as legal advice regarding any particular situation. Each Party acknowledges and agrees that competent professional counsel should be consulted for any legal planning and advice and that each state’s laws may include separate requirements for charitable giving, corporate and securities laws, contractual enforceability, tax liabilities and obligations, and similar Actions. The materials and information made available on the Website, including this Agreement and the Report, are provided with the understanding and agreement that none of the authors of same are engaged in rendering legal services. If legal or other expert assistance is required, the services of a competent professional should be sought. The user assumes all responsibilities and obligations with respect to any decisions or advice made or given as a result of the use or reliance of any materials or information found on the Website, including this Agreement and the Report.

# No False Information. Neither Party shall provide any false information in connection with the use of the OpenAI website, this Agreement, and the Report.

# Information Not Guaranteed to Be Reliable. The materials and information on the Website, including this Agreement and the Report, come from a variety of sources and include information that is subject to change without notice. The Parties acknowledge and agree that although OpenAI intends this information to be up to date and accurate, it cannot guarantee and does not warrant that the information is accurate, complete, or current; or that material accessible from the Website is free of viruses or other harmful computer code. The Parties acknowledge and agree that each Party must independently verify the accuracy of any information presented on the Website and in this Agreement.

# No Liability. In no event shall OpenAI have any responsibility in connection with the transaction(s) contemplated hereunder, including each Party’s rights and obligations concerning the subject matter hereof, nor shall OpenAI have any duty or responsibility to review, validate, authenticate, or take any Action with respect to the transaction(s) contemplated hereunder, including each Party’s rights and obligations concerning the subject matter hereof. OpenAI shall not have any liability for any loss of either Party in connection with the Pledge or the subject matter hereof, including any Parties’ rights or obligations hereunder. All debts, obligations, and liabilities of each Party shall be solely the debts, obligations, and liabilities of such Party, and OpenAI shall not be obligated or held responsible in any manner whatsoever for any such debt, obligation, or liability of either Party solely by reason of making this Agreement available for use in the public domain.

# OpenAI Disclaimer of Warranties. THE PARTIES’ USE OF THE WEBSITE, INCLUDING THIS AGREEMENT, THE REPORT, AND THE INFORMATION AND MATERIALS PROVIDED THEREIN (THE “**OPENAI MATERIALS**”), IS AT EACH PARTY’S SOLE RISK. THE OPENAI MATERIALS ARE PROVIDED ON AN “AS IS” AND “AS AVAILABLE” BASIS. OPENAI EXPRESSLY DISCLAIMS ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT. OPENAI MAKES NO WARRANTY THAT (I) THE OPENAI MATERIALS WILL MEET YOUR REQUIREMENTS, (II) THE OPENAI MATERIALS WILL BE UNINTERRUPTED, TIMELY, SECURE, OR ERROR FREE, OR (III) THE RESULTS THAT MAY BE OBTAINED FROM THE USE OF THE OPENAI MATERIALS WILL BE ACCURATE OR RELIABLE.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first above written.

|  |  |
| --- | --- |
|  | DONOR:  [DONOR NAME, a [Delaware] [corporation]] |
|  | By  Name: Title: |
|  | RECIPIENTS:  RECIPIENT 1:  [RECIPIENT NAME], a [501(c)(3) public charity] |
|  | By  Name: Title: |

|  |  |
| --- | --- |
|  | RECIPIENT 2:  [RECIPIENT NAME], a [501(c)(4) social welfare organization] |
|  | By  Name: Title: |

[EXHIBIT A]  
  
[STATEMENT OF WORK]

THIS STATEMENT OF WORK (“**SOW**”) is made as of [\_\_\_\_\_\_\_\_\_\_\_], 20[\_\_] (the “**Effective Date**”), by and between the undersigned party designated as “Donor,” a [Delaware] corporation (the “**Donor**”), and the undersigned party designated as “Recipient,” a [[State] corporation]/an individual [residing in [State]] (the “**Recipient**”). Each party may be hereinafter referred to individually as a “**Party**” or collectively, the “**Parties**”.

1. Description of Windfall/Triggering Event

[*Parties to define the windfall that would trigger the Donor’s obligations to make the Pledge, including what profit margins the Donor believes constitute a windfall*].

1. Payment Terms

[*Parties to establish how the Pledge is to be made, including whether the Donor shall make the Pledge in a lump sum payment, in installments, subject to a specific payment schedule, and other payment terms.*]

1. Services and Deliverables [; Other Terms]

[*Parties to list any specific services to be provided by the Parties under this Agreement, including any obligations and deliverables.*]

AGREED AS OF [Month] [Day], 202[\_]

|  |  |
| --- | --- |
| **DONOR:** | **RECIPIENT:** |
| By:  Name:  Title: | By:  Name:  Title: |

1. Note to Drafting Parties: Please review applicable state law to ensure enforceability of the provisions herein. [↑](#footnote-ref-1)
2. Cullen O’Keefe, Peter Cihon, Ben Garfinkel, Carrick Flynn, Jade Leung, Allan Dafoe, The Windfall Clause: Distributing the Benefits of AI for the Common Good (2020), https://www.fhi.ox.ac.uk/wp-content/uploads/Windfall-Clause-Report.pdf [https://perma.cc/8KES-GTBN]. [↑](#footnote-ref-2)