

**AGREEMENT BETWEEN THE CITY OF CUPERTINO AND DAN GERTMENIAN
FOR MATH AND CHESS INSTRUCTION SERVICES**

THIS AGREEMENT, for reference dated July 1, 2016, is by and between CITY OF CUPERTINO, a municipal corporation (hereinafter referred to as "City"), and Dan Gertmenian, a sole proprietor, whose address is 167 Acalenes Drive #15, Sunnyvale, CA 94086(hereinafter referred to as "Consultant"), and is made with reference to the following:

RECITALS:

A. City is a municipal corporation duly organized and validly existing under the laws of the State of California with the power to carry on its business as it is now being conducted under the Constitution and the statutes of the State of California and the Cupertino Municipal Code.

B. Consultant is specially trained, experienced and competent to perform the special services which will be required by this Agreement; and

C. Consultant possesses the skill, experience, ability, background, certification and knowledge to provide the services described in this Agreement on the terms and conditions described herein.

D. City and Consultant desire to enter into an agreement for educational enrichment classes upon the terms and conditions herein.

NOW, THEREFORE, it is mutually agreed by and between the undersigned parties as follows:

1. **TERM:**

The term of this Agreement shall commence on July 1, 2016, and shall terminate on June 30, 2017, unless terminated earlier as set forth herein.

2. **SERVICES TO BE PERFORMED:**

Consultant shall perform each and every service set forth in Exhibit "A" which is attached hereto and incorporated herein by this reference.

3. **COMPENSATION TO CONSULTANT:**

Consultant shall be compensated for services performed pursuant to this Agreement in the amount set forth below and as described in Exhibit "A" which is attached hereto and incorporated herein by this reference.

Compensation: 70% of the resident fee based on final class rosters, minus a \$20 administrative fee per participant and copier use fees.

The City will issue no more than three payments throughout the course of the year.

In the event that less than the required minimum number of participants shall request and pay for services prior to the agreed upon time for the commencement of services to be performed by Contractor, City may cancel and withdraw from this Agreement. The total compensation to the Consultant shall not exceed \$260,000.

4. **ACKNOWLEDGEMENT OF MANDATED REPORTING REQUIREMENTS:**

Consultant shall comply with the requirements of California Penal Code 11164-11174.3 and as set forth in Exhibit "B" which is attached hereto and incorporated herein by this reference.

5. **FINGERPRINT AND TUBERCULOSIS (TB) CONSULTANT DECLARATION:**

Consultant agrees that all individuals covered under this Agreement shall provide fingerprints for criminal background test purposes and results of TB screening, pursuant to the requirements as set forth in Exhibit "C" which is attached hereto and incorporated herein by this reference.

6. **TIME IS OF THE ESSENCE:**

Consultant and City agree that time is of the essence regarding the performance of this Agreement.

7. **STANDARD OF CARE:**

Consultant agrees to perform all services hereunder in a manner commensurate with the prevailing standards of specially trained professionals in the San Francisco Bay Area and agrees that all services shall be performed by qualified and experienced personnel who are not employed by the City nor have any contractual relationship with City.

8. **INDEPENDENT PARTIES:**

City and Consultant intend that the relationship between them created by this Agreement is that of an independent contractor. The manner and means of conducting the work are under the control of Consultant, except to the extent they are limited by statute, rule or regulation and the express terms of this Agreement. No civil service status or other right of employment will be acquired by virtue of Consultant's services. None of the benefits provided by City to its employees, including but not limited to, unemployment insurance, workers' compensation plans, vacation and sick leave are available from City to Consultant, its employees or agents. Deductions shall not be made for any state or federal taxes, FICA payments, PERS payments, or other purposes normally associated with an employer-employee relationship from any fees due Consultant. Payments of the above items, if required, are the responsibility of Consultant.

9. **IMMIGRATION REFORM AND CONTROL ACT (IRCA):**

Consultant assumes any and all responsibility for verifying the identity and employment authorization of all of his/her employees performing work hereunder, pursuant to all applicable IRCA or other federal, or state rules and regulations. Consultant shall indemnify and hold City harmless from and against any loss, damage, liability, costs or expenses arising from any noncompliance of this provision by Consultant.

10. **NON-DISCRIMINATION:**

Consistent with City's policy that harassment and discrimination are unacceptable employer/employee conduct, Consultant agrees that harassment or discrimination directed toward a job applicant, a City employee, or a citizen by Consultant or Consultant's employee or subcontractor on the basis of race, religious creed, color, national origin, ancestry, handicap, disability, marital status, pregnancy, sex, age, or sexual orientation will not be tolerated. Consultant agrees that any and all violations of this provision shall constitute a material breach of this Agreement.

11. **HOLD HARMLESS:**

Consultant shall, to the fullest extent allowed by law, with respect to all services performed in connection with the Agreement, indemnify, defend, and hold harmless the City and its officers, officials, agents, employees and volunteers from and against any and all liability, claims, actions, causes of action or demands whatsoever against any of them, including any injury to or death of any person or damage to property or other liability of any nature, whether physical, emotional, consequential or otherwise, arising out, pertaining to, or related to the performance of this Agreement by Consultant or Consultant's employees, officers, officials, agents or independent contractors. Such costs and expenses shall include reasonable attorneys' fees of counsel of City's choice, expert fees and all other costs and fees of litigation.

In addition to the obligations set forth above, Consultant shall indemnify, defend, and hold the City, its elected and appointed officers, employees, and volunteers, harmless from and against any Claim in which a violation of intellectual property rights, including but not limited to copyright or patent rights, is alleged that arises out of, pertains to, or relates to Consultant's negligence, recklessness or willful misconduct under this Agreement. Such costs and expenses shall include reasonable attorneys' fees of counsel of City's choice, expert fees and all other costs and fees of litigation.

12. **INSURANCE:**

On or before the commencement of the term of this Agreement, Consultant shall furnish City with certificates showing the type, amount, class of operations covered, effective dates and dates of expiration of insurance coverage in compliance with the paragraphs below. Such certificates, which do not limit Consultant's indemnification, shall also contain substantially the following statement: "Should any of the above insurance covered by this certificate be canceled or coverage reduced before the

expiration date thereof, the insurer affording coverage shall provide thirty (30) days' advance written notice to the City of Cupertino by certified mail, Attention: City Manager." It is agreed that Consultant shall maintain in force at all times during the performance of this Agreement all appropriate coverage of insurance required by this Agreement with an insurance company that is acceptable to City and licensed to do insurance business in the State of California. Endorsements naming the City as additional insured shall be submitted with the insurance certificates.

A. **COVERAGE:**

Consultant shall maintain the following insurance coverage:

(1) **Workers' Compensation:**

Statutory coverage as required by the State of California.

(2) **Liability:**

Commercial general liability coverage, including, sexual abuse and molestation coverage, in the following minimum limits:

Bodily Injury: \$500,000
 each occurrence
 \$1,000,000
 aggregate - all other

Property Damage: \$100,000 each occurrence
 \$250,000 aggregate

If submitted, combined single limit policy with aggregate limits in the amounts of \$1,000,000 will be considered equivalent to the required minimum limits shown above.

(3) **Automotive:** Proof of automobile insurance required at the California statutory minimums.

B. **SUBROGATION WAIVER:**

Consultant agrees that in the event of loss due to any of the perils for which he/she has agreed to provide comprehensive general and automotive liability insurance, Consultant shall look solely to his/her insurance for recovery. Consultant hereby grants to City, on behalf of any insurer providing comprehensive general and automotive liability insurance to either Consultant or City with respect to the services of Consultant herein, a waiver of any right to subrogation which any such insurer of said Consultant may acquire against City by virtue of the payment of any loss under such insurance.

C. **FAILURE TO SECURE:**

If Consultant at any time during the term hereof should fail to secure or maintain the foregoing insurance, City shall be permitted to obtain such insurance in the Consultant's name or as an agent of the Consultant and shall be compensated by the Consultant for the costs of the insurance premiums at the maximum rate permitted by law and computed from the date written notice is received that the premiums have not been paid.

D. ADDITIONAL INSURED:

City, its City Council, boards and commissions, officers, employees and volunteers shall be named as an additional insured under all insurance coverages, except any professional liability insurance, required by this Agreement. The naming of an additional insured shall not affect any recovery to which such additional insured would be entitled under this policy if not named as such additional insured. An additional insured named herein shall not be held liable for any premium, deductible portion of any loss, or expense of any nature on this policy or any extension thereof. Any other insurance held by an additional insured shall not be required to contribute anything toward any loss or expense covered by the insurance provided by this policy.

E. SUFFICIENCY OF INSURANCE:

The insurance limits required by City are not represented as being sufficient to protect Consultant. Consultant is advised to confer with Consultant's insurance broker to determine adequate coverage for Consultant.

13. CONFLICT OF INTEREST:

Consultant warrants that it is not a conflict of interest for Consultant to perform the services required by this Agreement. Consultant may be required to fill out a conflict of interest form if the services provided under this Agreement require Consultant to make certain governmental decisions or serve in a staff capacity as defined in Title 2, Division 6, Section 18700 of the California Code of Regulations.

14. PROHIBITION AGAINST TRANSFERS:

Consultant shall not assign, sublease, hypothecate, or transfer this Agreement, or any interest therein, directly or indirectly, by operation of law or otherwise, without prior written consent of City. Any attempt to do so without said consent shall be null and void, and any assignee, sublessee, hypothecate or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation or transfer. However, claims for money by Consultant from City under this Agreement may be assigned to a bank, trust company or other financial institution without prior written consent. Written notice of such assignment shall be promptly furnished to City by Consultant.

The sale, assignment, transfer or other disposition of any of the issued and outstanding capital stock of Consultant, or of the interest of any general partner or joint venturer or syndicate member or cotenant, if Consultant is a partnership or joint venture or syndicate or cotenancy, which shall result in changing the control of Consultant, shall be construed as an assignment of this Agreement. Control means fifty percent (50%) or more of the voting power of the corporation.

15. SUBCONTRACTOR APPROVAL:

Unless prior written consent from City is obtained, only those people and subcontractors whose names and resumes are attached to this Agreement shall be used in the performance of this Agreement.

In the event that Consultant employs subcontractors, such subcontractors shall be required to furnish proof of workers' compensation insurance and shall also be required to carry general, and professional liability insurance in reasonable conformity

to the insurance carried by Consultant. In addition, any work or services subcontracted hereunder shall be subject to each provision of this Agreement.

16. **PERMITS AND LICENSES:**

Consultant, at his/her sole expense, shall obtain and maintain during the term of this Agreement, all appropriate permits, certificates and licenses including, but not limited to, a City Business License, that may be required in connection with the performance of services hereunder.

17. **REPORTS:**

A. Each and every report, draft, work product, map, record and other document, hereinafter collectively referred to as "Report", reproduced, prepared or caused to be prepared by Consultant pursuant to or in connection with this Agreement, shall be the exclusive property of City. Consultant shall not copyright any Report required by this Agreement and shall execute appropriate documents to assign to City the copyright to Reports created pursuant to this Agreement. Any Report, information and data acquired or required by this Agreement shall become the property of City, and all publication rights are reserved to City. Consultant may retain a copy of any report furnished to the City pursuant to this Agreement.

B. All Reports prepared by Consultant may be used by City in execution or implementation of:

- (1) The original Project for which Consultant was hired;
- (2) Completion of the original Project by others;
- (3) Subsequent additions to the original project; and/or
- (4) Other City projects as appropriate.

C. Consultant shall, at such time and in such form as City may require, furnish reports concerning the status of services required under this Agreement.

D. All Reports required to be provided by this Agreement shall be printed on recycled paper. All Reports shall be copied on both sides of the paper except for one original, which shall be single sided.

E. No Report, information or other data given to or prepared or assembled by Consultant pursuant to this Agreement shall be made available to any individual or organization by Consultant without prior approval by City.

18. **RECORDS:**

Consultant shall maintain complete and accurate records with respect to sales, costs, expenses, receipts and other such information required by City that relate to the performance of services under this Agreement.

Consultant shall maintain adequate records of services provided in sufficient detail to permit an evaluation of services. All such records shall be maintained in accordance with generally accepted accounting principles and shall be clearly identified and readily accessible. Consultant shall provide free access to such books and records to the representatives of City or its designees at all proper times, and gives City the right to examine and audit same, and to make transcripts therefrom as necessary, and to allow inspection of all work, data, documents, proceedings and activities related to this

Agreement. Such records, together with supporting documents, shall be kept separate from other documents and records and shall be maintained for a period of three (3) years after receipt of final payment.

If supplemental examination or audit of the records is necessary due to concerns raised by City's preliminary examination or audit of records, and the City's supplemental examination or audit of the records discloses a failure to adhere to appropriate internal financial controls, or other breach of contract or failure to act in good faith, then Consultant shall reimburse City for all reasonable costs and expenses associated with the supplemental examination or audit.

19. **NOTICES:**

All notices, demands, requests or approvals to be given under this Agreement shall be given in writing and conclusively shall be deemed served when delivered personally or on the second business day after the deposit thereof in the United States Mail, postage prepaid, registered or certified, addressed as hereinafter provided.

All notices, demands, requests, or approvals from Consultant to City shall be addressed to City at:

City of Cupertino
10300 Torre Ave.
Cupertino CA 95014
Attention: Director of Recreation and Community Services

All notices, demands, requests, or approvals from City to Consultant shall be addressed to Consultant at:

Dan Gertmenian
167 Acalenes Drive, #15
Sunnyvale, CA 94086

20. **TERMINATION:**

In the event Consultant fails or refuses to perform any of the provisions hereof at the time and in the manner required hereunder, Consultant shall be deemed in default in the performance of this Agreement. If such default is not cured within the time specified after receipt by Consultant from City of written notice of default, specifying the nature of such default and the steps necessary to cure such default, City may terminate the Agreement forthwith by giving to the Consultant written notice thereof.

City shall have the option, at its sole discretion and without cause, of terminating this Agreement by giving thirty (30) days' prior written notice to Consultant as provided herein. Upon termination of this Agreement, each party shall pay to the other party that portion of compensation specified in this Agreement that is earned and unpaid prior to the effective date of termination.

City has no obligation to offer any of Consultant's services to participants, and, unless minimum enrollment for a particular class identified in the Scope of Services is met, City may cancel that class without further notice to Consultant or payment under this Agreement. The City in its sole discretion may determine the type of classes, the number of classes and the assigned instructor.

21. **COMPLIANCES:**

Consultant shall comply with all state or federal laws and all ordinances, rules and regulations enacted or issued by City.

22. **CONFLICT OF LAW:**

This Agreement shall be interpreted under, and enforced by the laws of the State of California excepting any choice of law rules which may direct the application of laws of another jurisdiction. The Agreement and obligations of the parties are subject to all valid laws, orders, rules, and regulations of the authorities having jurisdiction over this Agreement (or the successors of those authorities.)

Any suits brought pursuant to this Agreement shall be filed with the courts of the County of Santa Clara, State of California.

23. **ADVERTISEMENT:**

Consultant shall not post, exhibit, display or allow to be posted, exhibited, displayed any signs, advertising, show bills, lithographs, posters or cards of any kind pertaining to the services performed under this Agreement unless prior written approval has been secured from City to do otherwise.

24. **WAIVER:**

A waiver by City of any breach of any term, covenant, or condition contained herein shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant, or condition contained herein, whether of the same or a different character.

25. **INTEGRATED CONTRACT:**

This Agreement represents the full and complete understanding of every kind or nature whatsoever between the parties hereto, and all preliminary negotiations and agreements of whatsoever kind or nature are merged herein. No verbal agreement or implied covenant shall be held to vary the provisions hereof. Any modification of this Agreement will be effective only by written execution signed by both City and Consultant.

26. **INSERTED PROVISIONS:**

Each provision and clause required by law to be inserted into the Agreement shall be deemed to be enacted herein, and the Agreement shall be read and enforced as though each were included herein. If through mistake or otherwise, any such provision is not inserted or is not correctly inserted, the Agreement shall be amended to make

such insertion on application by either party.

27. **CAPTIONS:**

The captions in this Agreement are for convenience only, are not a part of the Agreement and in no way affect, limit or amplify the terms or provisions of this Agreement.

IN WITNESS WHEREOF, the parties have caused the Agreement to be executed.

CONSULTANT

CITY OF CUPERTINO
A Municipal Corporation

By: _____

By: Danny Mestizo

Title: _____

Title: Recreation Coordinator

Date: _____

Date: 7/1/16

RECOMMENDED FOR APPROVAL:

By: Christine Hanel
Title: Acting Director of Recreation &
Community Services

APPROVED AS TO FORM:

Randolph Stevenson Hom,
City Attorney

ATTEST:

Grace Schmidt
City Clerk

EXPENDITURE DISTRIBUTION:

Account No: 580-62-613 700-702

Amount: \$260,000

EXHIBIT A

CONSULTANT SERVICES TO BE PERFORMED

The CONSULTANT will provide instruction of math and chess programs in, but not limited to, the following programs:

Chess

Math Olympiads: Division E

Math Olympiads: Division M

Math Olympiads: Honors

Location and Time of CONSULTANT Services:

Refer to the fall, winter, summer, and/or spring Recreation Schedules and/or the Afterschool Enrichment Brochure for all agreed upon dates, times, and class locations. By Mutual agreement of both parties, class schedule may change.

Eligible Participant Minimum and Maximums for CONSULTANT Services:

Minimum: 16

Maximum: 28

If less than the required minimum number of participants enroll in and pay for a particular class as identified in the schedule before the class is scheduled to start, the City may cancel the particular class and/or terminate this Agreement without additional notice or payment to Consultant.

Performance of CONSULTANT Services:

City shall have no right of control as to the manner Consultant performs the services to be performed. Nevertheless, City may, at any time, observe the manner in which such services are being performed by the consultant.

The Consultant shall follow all guidelines pertaining to registration procedures as listed in the quarterly recreation schedule. Participants may not take part in the program unless they are listed on the class roster or can show proof of enrollment. All participants and volunteers need to complete the City's Waiver of Liability form prior to taking part in the program. Contractors are responsible for supervising minors after class until a parent or legal guardian has arrived.

In the event of an injury occurring to a participant, the Consultant will notify the City within 1 hour and complete an Incident Report in the form approved by the City. The Incident Report must be submitted to the City within 24 hours of the injury occurring.

EXHIBIT B

ACKNOWLEDGEMENT OF MANDATED REPORTING REQUIREMENTS, RECEIPT OF TRAINING, AND RECEIPT OF PENAL CODES STATUTES

A mandated reporter is an individual who is obligated by law to report suspected cases of child abuse and neglect. In general, any individual who, in the ordinary course of their employment, has contact with children is a mandated reporter. Mandated reporters include child care workers, teachers and coaches. (California Penal Code 11165.7).

If your job duties as an employee or an independent contractor of Dan Gertmenian include contact with children, you are a Mandated Reporter. Prior to commencing employment and as a prerequisite of that employment, California law requires that you sign a statement to the effect that you have knowledge of the provisions of the Mandated Reporter Law, and will comply with those provisions. (California Penal Code 11166.5).

The following are the Mandated Reporter responsibilities under California law. You are also being provided with a separate informational document which includes the text of the California Mandated Reporter Law and contact information for Child Abuse and Neglect Reporting for the County of Santa Clara. Please review this information carefully and acknowledge your receipt and understanding where indicated. If you have questions or concerns about this form or your Mandated Reporter responsibilities, please contact the Recreation Supervisor at 408-777-3120.

I understand that:

- By virtue of my employment or independent contractor status with Dan Gertmenian, and because my employment requires me to have contact with children, I am a Mandated Reporter as defined by California Penal Code 11165.7.
- The following situations trigger mandatory reports: a) Physical Abuse (willful harming of a child); b) Sexual abuse including sexual assault, child exploitation, pornography, and trafficking; c) Severe or General Neglect; and d) Extreme Corporal Punishment (resulting in injury). (Cal. Pen. Code 11165 et. seq.) I further understand that I may, but am not required to, report suspected Emotional Abuse.
- If I reasonably suspect that a child is being abused, I must immediately make a telephone report. I must follow up with a written report within 36 hours. This report may be made to local law enforcement, or County Sheriff's Department, Probation Department or Child Welfare Agency. (Cal Pen. Code 11166(a)).

- I am not required to, but I may, share information about suspected abuse with my supervisor or management or the parents of the alleged victim.
- When I make a mandated report, I will be required to give my name. However, my identity will be kept confidential unless I either consent to disclosure or if the disclosure is made pursuant to a court order. Further, agencies investigating the mandated report may disclose my identity to one another. (Cal Pen. Code 11167(d)).
- The following agencies and individuals receiving or investigating mandated reports may disclose my identity to one another:
 - Prosecutors in a criminal prosecuting or in an action initiated under section 602 of the Welfare and Institutions Code arising from alleged child abuse;
 - Counsel appointed pursuant to subdivision (c) of Section 317 of the Welfare and Institutions Code;
 - A licensing agency when abuse or neglect in out-of-home care is reasonably suspected. (Cal Pen. Code 11167.5)
- I may not be disciplined, dismissed, retaliated against, discriminated against or harassed for making a mandated report of reasonably suspected child abuse.
- As a Mandated Reporter, I have civil and criminal immunity when making a report (Cal Pen. Code 11172).
- **As a Mandated Reporter, it is a misdemeanor to fail to comply with Mandated Reporting laws and I can be held criminally liable for failing to report suspected abuse.** The penalty for this is up to six months in County jail, a fine of not more than \$1000, or both. I further understand I could be civilly liable for failure to report. (Cal. Pen. Code 11166(c)).

I have been provided with a copy of California Penal Code sections 11164-11174.3 (Mandated Reporter Law).

I understand that I am a legally Mandated Reporter. I am aware of and understand my responsibilities under the Mandated Reporter laws of this state and am willing and able to comply. I understand that a copy of this Acknowledgement will be kept in my personnel file.

Name (Signature)

Date

Name (Print)

EXHIBIT C
City of Cupertino Consultant Declaration

The undersigned does hereby certify that:

1. I am a representative of Dan Gertmenian; that I am familiar with the facts herein and am authorized and qualified to execute this declaration.
2. I declare that Dan Gertmenian has complied with fingerprinting and criminal background investigation requirements with respect to all Consultant's employees who may have contact with minors in the course of providing services pursuant to the Agreement, and the California Department of Justice has determined that none of those employees has been convicted of a felony, as that term is defined in California Penal Code Section 11105.3.
3. That a complete and accurate list of Consultant's employees, who may come in contact with minors during the course and scope of the Agreement, are included below.
4. All of the below mentioned employees have tested negative for TB, or X-ray results for TB, and have current documentation on file with Consultant.
5. All of the below mentioned employees have received training and understand their responsibilities under the Mandated Reporter laws of this state and are willing and able to comply.

A List of all Consultant Employees Working for the City of Cupertino:

| | | |
|-------|-------|-------|
| _____ | _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

6. The City of Cupertino will be notified by Consultant in writing of any new employees and will be added to the above list prior to beginning work at the City of Cupertino.

I declare under penalty of perjury that the foregoing is true and correct:

| | | | |
|-------|-------|----------------------|-------|
| _____ | _____ | _____ | _____ |
| Date | Place | Consultant Signature | Title |