

**AGREEMENT BETWEEN MILPITAS UNIFIED SCHOOL DISTRICT AND SANTA CLARA SWIM CLUB
FOR USE OF MILPITAS HIGH SCHOOL'S AQUATIC CENTER**

THIS AGREEMENT is made and entered into this 23rd day of August 2016, by and between the MILPITAS UNIFIED SCHOOL DISTRICT, a California public school district ("DISTRICT") and Santa Clara Swim Club, a 501(c)(3) non-profit California corporation ("CONTRACTOR").

RECITALS

- A. DISTRICT is the owner of the Milpitas High School Pool Complex ("POOL") and associated on-site pool facilities (referred to as "POOL COMPLEX") which is located at 1285 Escuela Parkway, Milpitas, CA 95035 and is further described in Section 2.A.; and
- B. DISTRICT desires to offer affordable child, adult, disabled and senior swim programs at POOL COMPLEX; and
- C. CONTRACTOR wishes to use POOL and POOL COMPLEX (collectively referred to as the "Facilities") for swim programming.

In view of the above, the parties agree as follows:

1. TERM OF AGREEMENT.

- a. The term of this Agreement for use of Milpitas High School Pool Complex shall commence on August 24, 2016 and expire on December 31, 2016, subject to the provisions of Section 11 of this Agreement. The pools and related facilities shall be available for the hours set forth in EXHIBIT A, entitled "PROGRAM FACILITY AND USE".

2. FACILITIES FOR CONTRACTOR'S USE

- a. CONTRACTOR shall have the use and responsibility for all bookings and staffing except as otherwise specifically provided herein, for DISTRICT's POOL COMPLEX.

3. FEES AND PAYMENT FOR USE

- a. For the purposes of this Agreement between the DISTRICT and the CONTRACTOR, "participant" is defined as a pool user during CONTRACTOR's hours of operation.
- b. CONTRACTOR will provide the DISTRICT with monthly lease payment payable on the first of each month at the rate of One Hundred Dollars (\$100.00) per hour with a maximum rate of five hundred dollars (\$500) per day at the POOL COMPLEX during the term of this Agreement, commencing on the first day of operations and ending on the last day of service. An "operational" day shall be defined as the days when CONTRACTOR provides swimming services. Payments shall be submitted to the DISTRICT no later than the tenth (10th) day of the month.
- c. CONTRACTOR shall pay DISTRICT 10% of all profits generated from programming at the POOL COMPLEX. CONTRACTOR is obligated by Federal law to conduct an annual audit of all operations. The 10% annual profit sharing payment will be made after the completion of the annual audit. Complete audited records will be presented to DISTRICT for profit share verification.

d. CONTRACTOR will provide lifeguard services for DISTRICT physical education swim class and during DISTRICT swim and water polo practices and meets. Refer to Section 4 for Lifeguard services.

e. If the DISTRICT were to incur charges for phone services, CONTRACTOR shall be billed at actual cost plus an administrative service charge of ten percent (10%).

f. In the event that the CONTRACTOR incurs damages to the Facilities during use, the DISTRICT will provide the CONTRACTOR with a detailed invoice specifically setting forth damages and itemized costs incurred to repair such damages. Upon receipt of such invoice, the CONTRACTOR will be responsible for issuing payment to DISTRICT for the damages within ten (10) business days.

g. In the event CONTRACTOR disputes the charges, there will be a single cure period of sixty (60) days to resolve the damages, disputes, and payments regarding the damages.

h. Any and all payments made shall be sent to:

Milpitas Unified School District
Accounts Payable
1331 E. Calaveras Blvd.
Milpitas, CA 95035

i. CONTRACTOR shall pay before delinquency any and all taxes, assessments, license fees, and public charges levied, assessed or imposed and which become payable during the Agreement Term upon CONTRACTOR's fixtures, improvements, alternatives or additions, furniture, appliances and personal property installed or located in the POOL COMPLEX.

CONTRACTOR shall, at CONTRACTOR's sole cost and expense, comply with all of the requirements of all city, county, municipal, state, federal and other applicable government authorities, now in force, or which may hereafter be in force, pertaining to CONTRACTOR's use of said premises.

4. LIFEGUARD SERVICES

a. CONTRACTOR shall provide lifeguards for all DISTRICT physical education swim class and during DISTRICT swim and water polo practices and meets.

i. The following lifeguard scope will be provided by the CONTRACTOR

1. Hiring of all lifeguards
2. Scheduling all lifeguards to maintain a 25:1 swimmer to lifeguard ratio
3. Certification of all lifeguards
 - a. CONTRACTOR shall secure and maintain in full force such licenses and permits as are required by law in connection with furnishing of said service
4. Lifeguards report to the PE teacher or coach on deck
5. Complete payroll management

6. All payroll tax forms and filing obligations
7. All workers' compensation payment, audit and filing obligations

ii. Lifeguard qualifications:

1. Lifeguards must be 18 years or older
2. Must be fluent in both oral and written English
3. All lifeguards are subject to the requirements of Education Code Section 45125.2. Prior to working on a District campus, lifeguards must undergo a criminal history background check by the California Department of Justice and the FBI, and must possess a clean and current license.
 - a. CONTRACTOR shall provide for all lifeguards prior to performing work under this Agreement, a copy of the background clearance(s) received from the California Department of Justice, FBI or any agency performing a background check. The background investigation shall be for a minimum of seven (7) years.
 - b. CONTRACTOR employees providing services to the DISTRICT have not been convicted of serious or violent felonies or violent misdemeanors as defined in Penal Code Sections 1192.7(d) and 667.5(c), respectively.
4. Milpitas High School, through the direction of the designated administrator, shall meet with and evaluate the CONTRACTOR at the end of each semester and shall make suggestions for improvements or correction. CONTRACTOR will make every effort to implement the suggestions or corrections.
5. CONTRACTOR shall be solely responsible for providing training of all lifeguards in the appropriate response to unsafe condition and emergency situations.

iii. Availability of lifeguards

1. For ongoing services, ie: school-time lifeguard services at POOL COMPLEX, CONTRACTOR shall provide lifeguards that will be regularly assigned to this duty. The same person(s) shall be consistently assigned to this duty and should only be replaced by another lifeguard in cases of illness or other absence approved by the CONTRACTOR
2. DISTRICT has the right to reject, without cause, any lifeguard personnel assigned to perform the duties herein described. CONTRACTOR shall provide a replacement immediately after notification of rejection.

5. USE OF FACILITY

- a. CONTRACTOR shall have exclusive use of the Facilities during the dates and times as described in EXHIBIT A- PROGRAM FACILITY AND USE. DISTRICT may notify CONTRACTOR seventy-two (72) hours in advance when DISTRICT needs to use some or all of the Facility. Changes to the hours of exclusive use may be made as mutually agreed upon by DISTRICT and CONTRACTOR. If DISTRICT shall also conduct programs at the Pool, they will be identified on EXHIBIT A unless otherwise mutually agreed in writing.
- b. During the CONTRACTOR's use of Facility as stipulated in this Agreement, the DISTRICT

shall not provide staffing including lifeguard supervision of the Facility nor any other staffing for aquatics operations. Lifeguard supervision is part of the CONTRACTOR's responsibility. CONTRACTOR is required to maintain certification consistent with the California Health and Safety Code in regards to certified lifeguards throughout the term of this Agreement as identified in Section 1. Failure to maintain certifications throughout the term can result in immediate termination of the agreement.

- c. It is the CONTRACTOR's responsibility to properly train staff for its programs, including, without limitation, swim instructional purposes, at no cost or risk to the DISTRICT. In addition, CONTRACTOR will provide a minimum of one (1) lifeguard on the pool deck during swim lessons responsible for the supervision and safety of all participants in the pool during CONTRACTOR swim lessons.
- d. DISTRICT shall furnish janitorial services for the Facility. Janitorial service shall include routine maintenance such as: removal of trash, cleaning the restrooms, and vacuuming the pools. The CONTRACTOR shall keep the appearance of each Facility in a safe, clean and sanitary condition, and reasonably free from rubbish during operating hours, to the satisfaction of DISTRICT, which expressly retains and reserves the right to inspect the Pool and Facilities at any reasonable time. CONTRACTOR shall provide and maintain equipment and other interior furnishings or devices meeting industry standards as required to operate the Facilities.
 - i. When CONTRACTOR has meets at the Facility, DISTRICT shall provide janitorial services for the entire duration of event plus a minimum of two (2) hours for clean up at \$45/hour. CONTRACTOR must notify DISTRICT a minimum of 5 business days in advance and can cancel without charge with 48 hour notice.
 - ii. CONTRACTOR must provide facility use schedule to DISTRICT two weeks prior to start of new schedule. DISTRICT needs the schedule to adequately maintain the pool.

6. MAINTENANCE AND UTILITIES.

- a. CONTRACTOR agrees to maintain, at CONTRACTOR'S own cost and expense, the Facilities in a good, safe and usable condition and in accordance with all applicable laws and regulations including, without limitation, the State of California Health and Safety Code, and except for structural and other obligations as noted in Section 6.G., including, but not limited to, furnishing lifesaving equipment such as Shepherd's Crook, life ring buoy. DISTRICT agrees to review safety equipment with CONTRACTOR prior to the start of programs.
- b. DISTRICT agrees to comply with all state and federal mandates related to pool circulation systems under the Virginia Graham Baker Act.
- c. DISTRICT will attempt to maintain the water temperature of pool at a minimum temperature of 78 degrees to 80 degrees Fahrenheit ("Required Temperature") on

mutually agreed hours of operation.

- d. DISTRICT agrees to provide general grounds keeping services at the Pool sites outside of the perimeter fence. DISTRICT shall maintain all landscaping at the Pool at no cost to the CONTRACTOR. This will include trimming of landscaping, landscaping irrigation systems, and lawn maintenance within the POOL COMPLEX.
- e. DISTRICT will furnish and administer all chemicals (chlorine, muriatic acid and CO2) necessary for the safe and healthful use of the Facilities. If CONTRACTOR notices the water is not within the safe and healthful standards according to Santa Clara County Department of Environmental Health requirements, CONTRACTOR is to notify the DISTRICT immediately.
- f. DISTRICT shall provide access to at least one telephone at the Facilities for CONTRACTOR staff's use during operating hours. The phone will be accessible in the Pool office. The office will be open and accessible to DISTRICT and CONTRACTOR staff during operating hours of the Facility. CONTRACTOR shall have access to keys and responsibility for locking, unlocking, arming, and disarming of the Facility during CONTRACTOR's scheduled swim activities.
- g. DISTRICT shall be responsible for on-going structural and other long term capital repairs of the Pool Facilities including, but not limited to, pool leaks, deck issues, pipes, plumbing, electrical, lighting fixtures, windows, existing perimeter fencing, door and window locks and cages, other security systems, except to the extent such repair may be caused by the misconduct or negligent actions or omissions of CONTRACTOR.

7. INSURANCE REQUIREMENTS

CONTRACTOR shall procure and maintain at his expense, for the duration of this Agreement, the insurance described below in the coverage amounts described below. The CONTRACTOR shall file with the DISTRICT the Certificates of Insurance specified below. Each insurance policy shall be issued by an A-rated admitted carrier licensed to transact business in the State of California.

CONTRACTOR agrees that in the event of loss due to any of the perils for which it has agreed to provide Comprehensive General Liability insurance, CONTRACTOR shall look solely to its insurance for recovery. CONTRACTOR hereby grants to the DISTRICT, on behalf of any insurer providing Comprehensive General Liability insurance to either CONTRACTOR or DISTRICT with respect to the services of CONTRACTOR herein, a waiver of any right to subrogation which any such insurer of said CONTRACTOR may acquire against the DISTRICT by virtue of the payment of any loss under such insurance.

Value of Insurance

The insurance shall preferably be written by an A-rated admitted insurer licensed to do business in the State of California, and shall be written for not less than the following, as

established by the District, or greater if required by law:

- 1) **Commercial General Liability** \$2,000,000 Each Occurrence
- 2) **Errors and Omissions** \$1,000,000
- 3) **Worker's Compensation Insurance** shall be preferably written by an A-rated admitted insurer licensed to do business in the State of California, and shall be written for not less than the following, as established by the District, or greater if required by law: **Statutory** \$1,000,000

Certificates of Insurance

The CONTRACTOR shall not commence work under this Agreement until he has obtained all required insurance and certificates which have been delivered to and approved by the DISTRICT.

- 1) Certificates of Insurance shall include the following clause:
"This policy shall not be canceled or reduced in required limits of liability or amounts of insurance until notice has been mailed to the Owner stating the date of the cancellation or reduction. The date of cancellation or reduction may not be less than ten (10) days after the date of mailing the notice."
- 2) The Certificate of Insurance shall state, in particular, those insured, extent of insurance, location and operation to which the insurance applies, date of expiration, and the cancellation and reduction notice.
- 3) Certificates of Insurance shall have attached an Additional Insured Endorsement clearly stating that the District is named as an additional insured under the policy described and that such insurance policy shall be primary to any insurance or self-insurance maintained by the District.

8. INDEMNIFICATION

CONTRACTOR shall protect, defend, indemnify and hold harmless DISTRICT, its officers, employees and agents against any action, demand, claim, loss or liability arising out of or resulting in any way from this Agreement or any actions taken, work performed or service provided under this Agreement. CONTRACTOR's obligations to indemnify and hold harmless the DISTRICT and/or its employees. All of CONTRACTOR's obligations under this Section are intended to apply to the fullest extent permitted by law and shall survive the expiration, completion or sooner termination of this Agreement. In any action or claim against DISTRICT in which CONTRACTOR is defending DISTRICT, DISTRICT shall have the right to approve legal counsel providing DISTRICT's defense.

9. SUBCONTRACTS

- a. CONTRACTOR shall not assign performance of any part of this Agreement without the prior written consent of DISTRICT'S Director or the Director's authorized designee.
- b. CONTRACTOR shall be responsible for directing the services of any approved

subcontractors and for payment of any compensation due. DISTRICT assumes no responsibility whatsoever concerning subcontractor compensation.

- c. CONTRACTOR shall change or add subcontractors only with the prior written approval of DISTRICT's Director or the Director's authorized designee.
- d. No subcontract will alter in any way any legal responsibility of CONTRACTOR to provide services under this Agreement.
- e. CONTRACTOR will monitor each approved subcontractor to ensure compliance with the terms and conditions of this Agreement and provide records of their compliance as requested.
- f. CONTRACTOR will provide DISTRICT with records of payment to subcontractor(s) for obligations incurred under subcontract.

10. EMPLOYEES/VOLUNTEERS.

- a. Any and all personnel employed or retained by CONTRACTOR in conducting the operations of CONTRACTOR's program shall be qualified to perform the duties assigned to them.
- b. CONTRACTOR shall not hire employees or volunteers who will have supervisory or disciplinary authority over minors who have been convicted of any offense identified in California Public Resources Code Section 5164. CONTRACTOR shall fully indemnify, defend and hold harmless DISTRICT for any such hiring. CONTRACTOR shall notify DISTRICT in writing of any violation of this provision as soon as is reasonably practicable.
- c. CONTRACTOR shall also not employ any person, paid or unpaid, who is permitted to provide services requiring contact with children or providing food concessionaire services or other licensed concessionaire services in that area, unless CONTRACTOR has complied with the TB testing requirements set forth in Section 5163 of the California Public Resources Code.
- d. Regardless of whether services have been provided prior to full execution of this Agreement, CONTRACTOR certifies to DISTRICT that all services were provided in full compliance with the terms and provisions of this Agreement.
- e. To give effect to California Public Resources Code Sections 5163 and 5164, CONTRACTOR shall follow the procedures contained in EXHIBIT B – EMPLOYEE/VOLUNTEER CLEARANCE VERIFICATION AND COMPLIANCE WITH THE CHILD ABUSE AND NEGLECT REPORTING ACT which is attached hereto. In the event CONTRACTOR chooses a different national criminal database for complying with the FBI requirement for background checks, then such alternative database shall be approved in writing by CONTRACTOR's liability insurance provider. CONTRACTOR shall have all staff sign Exhibit B and keep on record for the

DISTRICT to inspect as needed.

11. TERMINATION

- a. If CONTRACTOR fails to perform any of its material obligations under this Agreement, DISTRICT may terminate this Agreement upon ten (10) days advance written notice to CONTRACTOR specifying the breach and providing CONTRACTOR with the opportunity to cure ("Notice Period"). If after the conclusion of the Notice Period, CONTRACTOR has failed to cure the breach or, in those instances where the breach is incapable of being cured within the Notice Period, CONTRACTOR has failed to commence to cure the breach, DISTRICT may terminate this Agreement.
- b. If DISTRICT fails to perform any of its material obligations under this Agreement, including, without limitation, making the DISTRICT's Facilities available to CONTRACTOR as specified in SECTIONS 2 and 4, CONTRACTOR may terminate this Agreement upon ten (10) days advance written notice to DISTRICT specifying the breach and providing DISTRICT with the opportunity to cure ("Notice Period"). If after the conclusion of the Notice Period, DISTRICT has failed to cure the breach or, in those instances where the breach is incapable of being cured within the Notice Period, DISTRICT has failed to commence to cure the breach, CONTRACTOR may terminate this Agreement.
- c. DISTRICT may terminate this Agreement immediately and/or close the Facilities if such action is deemed necessary by DISTRICT due to an emergency or otherwise is necessary to protect the public health and safety.
- d. DISTRICT may terminate this Agreement without cause by giving the CONTRACTOR written notice of the termination. The written notice must set forth the effective date of the termination, which must be at least 30 calendar days after the date of the written notice.
- e. The termination rights and remedies specified under this Agreement are cumulative.

12. NOTICES

Any notices required or permitted to be given under this Agreement shall be in writing and personally delivered or sent by U.S. mail, postage prepaid addressed as follows:

DISTRICT
Milpitas Unified School District
ATTN: Assistant Superintendent,
Business Services
1331 E. Calaveras Boulevard
Milpitas, CA 95035
(408) 635-2600 Ext 6024
kng@musd.org

CONTRACTOR
Santa Clara Swim Club
ATTN: Caleb Fenner
2625 Patricia Drive
Santa Clara, CA 95051
(408) 246-5050 Ext. 020
cfenner@santaclaraswimclub.org

The parties may change their respective addresses for purposes of delivering notices by sending notice of such change pursuant to this paragraph.

13. MISCELLANEOUS

- a. The parties agree that this Agreement shall be governed and construed in accordance with the laws of the State of California. In the event that suit shall be brought by either party to this Agreement, the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San Jose, California.
- b. The headings of the sections and subsections of this Agreement are inserted for convenience only. They do not constitute a part of this Agreement and shall not be used in its construction.
- c. Any and all Exhibits, which are referred to in this Agreement, are incorporated herein by reference and are deemed a part of this Agreement. This Agreement, including all Exhibits attached hereto, represents the entire understanding of the parties as to those matters contained herein. No prior oral or written understanding shall be enforced or taken effect with respect to those matters covered hereunder. This Agreement may only be amended by formal written agreement executed by both parties.
- d. If a court of competent jurisdiction adjudges any provision of this Agreement as void or unenforceable, the remaining provisions shall not be affected hereby and shall remain in full force and effect.
- e. DISTRICT'S waiver of any violation of this Agreement by the CONTRACTOR is not a waiver of any other violation by the CONTRACTOR.
- f. DISTRICT's acceptance of any service or deliverable is not a waiver or release of any professional duty of care applicable to such service or deliverable, or of any right of indemnification, any insurance requirements, or any other term or condition of this Master Agreement.
- g. CONTRACTOR shall perform all services consistent with all applicable federal, state and local laws, ordinances, codes and regulations. This obligation is not limited in any way by CONTRACTOR's obligation to comply with any specific law, ordinance, code or regulation set forth elsewhere in this Master Agreement.
- h. Where this Agreement refers to DISTRICT and no officer of the DISTRICT is named, DISTRICT's Director of Maintenance shall have the authority to act on DISTRICT's behalf.
- i. The following Exhibits are attached to this Agreement and are deemed a part of this Agreement:

EXHIBIT A – Program Facility and Use

EXHIBIT B – Employee/Volunteer Clearance Verification and Compliance with the Child Abuse and Neglect Reporting Act

IN WITNESS WHEREOF, the parties have executed their Agreement on the date(s) written below.

DISTRICT
Milpitas Unified School District

CONTRACTOR
Santa Clara Swim Club

Cheryl Jordan, Interm Superintendent

John Bitter, CEO

Date

Date

EXHIBIT A
Program and Facility Use

Santa Clara Swim Club will have access to the POOL COMPLEX:

- Monday, August 8, 2016 through Saturday, December 31, 2016
 - Milpitas High School has priority use of the pools for their physical education classes and swim/water polo practices and meets.
 - Both pools after water polo & swim practice is completed, Monday through Friday, starting approx. 6pm in the evening to 1 hour prior to sunset
 - Both pools on Saturday 7:30 a.m. through 1 hour prior to sunset

EXHIBIT B
Employee/Volunteer Clearance Verification and Compliance
with the Child Abuse and Neglect Reporting Act

REPORTING CHILD ABUSE

Definition: Child Abuse refers to four different types of abuse: Physical abuse, sexual abuse, emotional abuse and neglect.

Child abuse is the leading cause of death for children under the age of 15 and national estimates indicate that over one million American children suffer from abuse at any one given time. Conservative estimates show that one of every ten children in a classroom is a victim of serious abuse. These children often have low self-esteem, feelings of distrust and powerlessness. They run a much higher risk of becoming prostitutes, delinquents, runaways, substance abusers, abusive parents, and at risk children in school. Yet, you can help by becoming more informed, reporting all suspected cases of child abuse, and encouraging peers to join in preventive activities.

California law declares that the treatment of children-both inside and outside the home-is a valid public concern. Furthermore, child abuse law [P.C. 11166(a)] requires designated persons to report any suspected child abuse. School district employees are among those persons required to report. Failure to report is punishable by six months in jail and/or a fine of up to \$1,000. In addition, professionals failing to report may be found civilly liable for subsequent injuries that occur due to the failure to report.

In addition, due to the nature of past injuries to foster children, no foster parent or group home staff is allowed to use physical punishment of any kind. If such punishment is currently occurring you must report it.

You are required to immediately report the suspected child abuse by phone to the Children's Protective Services or local law enforcement child abuse division. A written report on the appropriate form must be filed within 36 hours following the telephone call. You must provide the following information when you call:

- Your name and occupation (this will be held strictly confidential)
- The name and age of the child
- The present location of the child
- The nature and extent of injury and/or abuse
- Any other information, including what led you to suspect abuse
- DO NOT CALL THE PARENT/GUARDIAN

You are expected to notify your director/supervisor/administrator regarding the report. This person can also assist you in the process of filing the written report properly.

CHILD ABUSE

You will be expected to sign the following statement which is a notification that you have been informed of your responsibilities in regard to Child Abuse Reporting. Reporting forms can be found at the school sites and also the district office. We have a copy of the Reporting Form.

CHILD ABUSE EMPLOYEE STATEMENT

Section 11166 of the Penal Code requires any child care custodian, medical practitioner, nonmedical practitioner, or employee of the child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of a child abuse to report the known or suspected instance of child abuse to a child protective agency immediately or as soon as report here of within 36 hours of receiving the information concerning the incident.

Child care custodian includes teachers, administrative officers, supervisors of child welfare and attendance, or certificated pupil personnel employees of any public or private school, administrators of a public or private day camp; licenced day care workers; administrators of community care facilities licensed to care for children; headstart teachers; licensing workers or licensing evaluators; public assistance workers; employees of a child care institution including, but not limited to, foster parents, group home personnel, and personnel of residential care facilities; social workers or probation officers; instructional aides, teacher’s aides, teacher’s assistants, or other classified employees of any public or private school who have been trained in child abuse reporting if the school district has so warranted to the State Department of Education; and any person who is an administrator or presenter of, or a counselor in a child abuse presentation program in any public or private school.

Employee’s Signature

Date

Print Employee’s Name