

WHEN RECORDED, RETURN TO:
Clarence E. Matherson Jr., Esq.
City of Phoenix
200 West Washington Street
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Phoenix, Arizona 85003

**SIXTH AMENDMENT TO
FIRST RESTATED OPERATING AGREEMENT**

City Contract No. 53440- 6

This Sixth Amendment to First Restated Operating Agreement (this “Sixth Amendment”) is entered into as of and shall be effective as of this 29 day of February, 2016, between the **CITY OF PHOENIX, ARIZONA**, an Arizona municipal corporation acting by and through its City Manager (the “City”), and **PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP**, a Delaware limited partnership (the “Operator”), and amends that certain First Restated Operating Agreement dated July 19, 1989 between the City and the Operator, as amended by that certain First Amendment to First Restated Operating Agreement dated December 4, 1994, as amended by that certain Second Amendment to First Restated Operating Agreement dated July 31, 2002, as amended by that certain Third Amendment to First Restated Operating Agreement dated June 21, 2004, as amended by that certain Fourth Amendment to First Restated Operating Agreement dated July 28, 2005 (the “Fourth Amendment to Operating Agreement”), and as amended by that certain Fifth Amendment to First Restated Operating Agreement dated July 9, 2012 (collectively referred to herein as, the “Operating Agreement”). All capitalized terms used in this Sixth Amendment that are not defined herein shall have the meanings assigned to them in the Operating Agreement.

RECITALS

- A. The City is the owner of the land and improvements commonly known as Talking Stick Resort Arena (the “Arena”).
- B. The Operator operates the Arena pursuant to the Operating Agreement.
- C. The City and the Operator are also parties to that certain Renovation and Development Agreement dated August 29, 2001, as amended (City Contract No. 96732) (the “RDA”). The RDA contemplated that the Operator would make renovations to Arena. The renovations included renovations to portions of the interior of the Arena, including seating enhancements, concourse renovations and restroom improvements (the “Interior Work”), completion of improvements to the Entry Pavilion, and completion of improvements to north side of the Arena.

D. The RDA also contemplated that the Operator would construct a New Entertainment Facility and secure a tenant for the Entertainment Facility on that portion of land which included the property known as the Sun Mercantile Building located at 230 South Jefferson Street, Phoenix, Arizona (the "Sun Mercantile Building").

E. The City agreed to contribute up to \$9,900,000.00 towards the completion of the Interior Work renovations. The City later agreed to increase the amount it would contribute towards the Interior Work renovations to \$13,400,000.

F. Section 3.6(b) of the RDA provided that the Operator would be subject to payment penalties in the form of Operating Expenses in the amount of \$350,000 on January 1, 2003, January 1, 2004 and January 1, 2005 ("Annual Payment Determination Date") if the New Entertainment Facility was not Substantially Complete or Substantially Complete but not occupied by an approved tenant for an approved use by the City by any one of the three Annual Payment Determination Dates as set forth in the Original Agreement, as amended.

G. The parties, pursuant to the First Amendment to the RDA, extended the three dates for the "Annual Payment Determination Dates" to July 1, 2004; July 1, 2005; and July 1, 2006, respectively.

H. The City, pursuant to the Second Amendment to the RDA, agreed to further defer the accrued Operating Expenses to July 1, 2007, in consideration of Operator's agreement to locate the Rock and Roll Hall of Fame on the Arena site on or before June 1, 2005.

I. The Parties, pursuant to the Third Amendment to the RDA, agreed to delete the requirement that the Operator locate the Rock and Roll Hall of Fame on the Arena site and further deferred the accrued Operating Expenses in consideration of Operator's agreement to construct a Class A boutique hotel and associated uses on the Arena site.

J. To effect the agreement of the Parties reached in the Third Amendment to the RDA, the City and Operator entered into the Fourth Amendment to Operating Agreement for the purpose of removing a portion of the City-owned property that incorporated the Arena and a portion of the property located on the southwest corner of 3rd Street and Jefferson Street, referred to therein as the Hotel Pad so that the Operator could construct and operate a Class A boutique hotel on the Hotel Pad.

K. Pursuant to the Third Amendment to the RDA, the City and Operator entered into that certain Disposition and Redevelopment Agreement (City Contract No. 96732-DRA) dated July 28, 2005 ("DRA") that provided for the City to lease the Hotel Pad to the Operator and enter into other agreements as necessary to facilitate development of a Class A boutique hotel on the Hotel Pad.

L. The Third Amendment to RDA also provided that in the event that the Operator did not cause a Class A boutique hotel to be constructed on the Hotel Pad within 180 days of the date of execution of the DRA, commence construction of the Class A boutique hotel by June 30,

2007, or complete construction of the hotel by December 31, 2008, the Operator would immediately pay to the City the accrued Operating Expenses of \$1,050,000.

M. As of this date, the Operator has not caused to be constructed a Class A boutique hotel on the Hotel Pad, and the Parties do not believe that such a boutique hotel could be supported in the current market.

N. As of this date, the Parties have agreed to a methodology to address the Operating Expenses provided for in the RDA.

O. The Parties have mutually terminated the rights and obligations of the Operator to cause to be constructed the Class A boutique hotel on the Hotel Pad in the Mutual Termination of Redevelopment Agreement of even date herewith between the City and Operator.

P. The Parties now desire to amend the Operating Agreement to reincorporate therein the Hotel Pad and the associated Operating Expenses.

Q. The Parties acknowledge the community significance of the historic Sun Mercantile building, which is currently unoccupied and in need of renovations.

R. At this time, the City has not identified funding to properly preserve and revitalize this historic community asset.

S. The Operator is willing and able to cause this historic building to be preserved and occupied with a City-approved use at no additional expense to the City.

AGREEMENT

NOW, THEREFORE, the City and the Operator agree to amend the Operating Agreement as follows:

1. **Incorporation; Capitalized Terms.** The recitals set forth in this Sixth Amendment to Operating Agreement above are incorporated herein and made a part hereof. Capitalized terms used herein and not otherwise defined will have the meanings given to such terms in the Operating Agreement.

2. **Exhibit 1.1 "Definitions" Amended.** The definition of "Site" in Exhibit 1.1 as item number 144 is amended in its entirety to read as follows:

"144. Site means that portion of the Redevelopment Area described as Blocks 37 and 38 and portions of Blocks 33 and 34, Original Townsite of Phoenix and such other real property as described in the DDA. The Site is legally described in Exhibit D-82(b) attached to the DDA."

3. **Section 5.1.9 Added.** A new Section 5.1.9 is hereby by added to the Operating Agreement to state in its entirety as follows:

Operating Expenses; Payment in lieu of Operating Expenses. The Operator shall cause to be paid to the City Operating Expenses in the amount of \$1,050,000 on or before January 1, 2017. The Operating Expenses required in this Section shall be paid above and beyond any additional payments or expenses the Operator is required to pay pursuant to this Operating Agreement. The Operating Expenses as discussed herein shall be reduced in an amount equal to the City-approved expenses the Operator incurs or has caused others to incur in order to preserve, renovate and occupy with a City-approved use the historic Sun Mercantile building. The Operator shall provide written documentation to the City of any expenses the Operator believes were incurred as a direct result of the preservation, renovation and occupancy provided herein. Said expenses may include necessary infrastructure and site improvements pursuant to plans approved by both the City of Phoenix Planning and Development Department (including the Historic Preservation Officer) and the Phoenix Convention Center Department. The Operator shall provide the City a written schedule of design and construction activities, as well as planned uses, on or before October 15, 2015. The Operator agrees to begin the City-approved Sun Mercantile building improvements on or before January 1, 2016, and all improvements must be completed on or before January 1, 2017. If the preservation and renovation of the Sun Mercantile building is not completed to the satisfaction of the City on or before January 1, 2017, the Operating Expenses shall be immediately due and payable. If the City-approved Sun Mercantile building renovation costs are less than \$1,050,000, the Operator agrees to pay the City the difference by January 1, 2017. If the City-approved Sun Mercantile building renovation costs exceed \$1,050,000, no additional Operating Expenses are due the City. The City shall not be responsible for any such costs and no further offset will be available.

4. **Section 7.1 Amended.** Section 7.1 of the Operating Agreement is hereby amended by adding the following sentence as the last sentence in the section:

The parties agree and acknowledge that the term “Imposition” excludes the current assessment for the Enhanced Municipal Services District in the downtown area.

5. **Section 14.2 Amended.** Section 14.2 of the Operating Agreement is hereby amended by striking the fifth sentence of the paragraph and replacing with the following language:

The Operator shall be entitled to up to twenty (20) parking spaces in the Arena Garage for the exclusive short term, complimentary use of visitors to the Arena ticket booths and box offices and the Arena Store.

6. **Section 14.4 Deleted.** Section 14.4 of the Operating Agreement is hereby deleted in its entirety.

7. **Section 14.5 Deleted.** Section 14.5 of the Operating Agreement is hereby deleted in its entirety.

8. **Section 15.1.9.1 Amended.** Section 15.1.9.1 of the Operating Agreement is hereby amended to state in its entirety as follows:

15.1.9.1 **General.** Subject to Section 15.1.9.2, any proprietary event conducted by the City of at the direction of the City or any event for which the City issues a license or permit (a “City proprietary Activity”) shall be conducted in such a manner so that there shall be at least one point of access to and from the Arena to be used for commercial purposes and located on Jackson Street available for the Operator and the Operator’s employees, vendors, suppliers and licensees.

9. **Section 19.1 Amended.** Section 19.1 of the Operating Agreement is amended to state in its entirety as follows:

19.1 **Notice.** All notices and other communications pursuant to this Agreement shall be in writing and shall be deemed properly given if sent by personal delivery or by certified United States mail, postage prepaid, return receipt requested addressed as follows:

Operator:

Phoenix Arena Development Limited Partnership
201 E. Jefferson

Phoenix, Arizona 85005
Attention: Arena Manager

City:

For General Notices and Other Communication:

Director
Phoenix Convention Center
100 North Third Street
Phoenix, Arizona 85004

with a copy to:
City Attorney
City of Phoenix Law Department
200 West Washington Street, 13th Floor
Phoenix, AZ 85003

For All Financial Statements and Audits Performed under this Agreement:

Chief Financial Officer
City of Phoenix
251 West Washington Street
Phoenix, Arizona 85003

with a copy to:
City Attorney
City of Phoenix Law Department
200 West Washington Street, 13th Floor
Phoenix, AZ 85003

Each party may by notice to the other specify a different address for subsequent notice purposes. Notice shall be deemed effective on the date of actual receipt or three days after the date of mailing, whichever is earlier.

10. **Section 19.14 Amended.** Section 19.14 of the Operating Agreement is hereby amended in its entirety as follows:

19.14 Nondiscrimination Clause. The Operator, for itself and its successors and assigns, shall cause the following clause to appear in all contracts, licenses or sublicenses concerning the Site or the Facility: "Any supplier, contractor or lessee in performing under this contract shall not discriminate against any worker, employee

or applicant, or any member of the public, because of race, color, religion, sex, national origin, age, or disability, nor otherwise commit an unfair employment practice. The supplier, contractor or lessee shall ensure that applicants are employed, and employees are dealt with during employment without regard to their race, color, religion, sex, national origin, age, or disability. Such action shall include but not be limited to the following: employment, promotion, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rate of pay or other forms of compensation; and selection for training; including apprenticeship. The supplier, contractor or lessee further agrees that this clause will be incorporated in all subcontracts with all labor organizations furnishing skilled, unskilled and union labor, or who may perform any such labor or services in connection with this contract.” For suppliers, contractors or lessees with more than 35 employees, the Operator, for itself and its successors and assigns, shall cause the following additional language to be inserted into the contract as the last sentence of the above clause: “The supplier, contractor or lessee further agrees not to discriminate against any worker, employee or applicant, or any member of the public, because of sexual orientation or gender identity or expression and shall ensure that applicants are employed, and employees are dealt with during employment without regard to their sexual orientation or gender identity or expression.” The clause required herein may be modified or deleted to conform to changes in applicable laws, ordinances and regulations and deleted when no longer required by applicable law.

11. **Section 18.4 Deleted.** Section 18.4 of the Operating Agreement is hereby deleted in its entirety.

12. **Authorized Signatory for the City:** For purposes of the Operating Agreement as amended, the Phoenix Convention Center Director (the “PCC Director”) shall be the City’s authorized signatory, the person authorized to provide all consents or approvals, with the exception of the approval of financial statements and audits as may be required by the Operating Agreement. The PCC Director shall also be the person authorized to receive notices, demands, requests or other communications along with the City Attorney, with the exception of notices, demands, requests or other communications regarding financial statements or audits as may be required by the Operating Agreement. The City of Phoenix Chief Financial Officer shall be the City’s authorized signatory and the person designated to receive notices, demands, requests and other communications, along with the City Attorney, regarding financial statements and audits required by the Operating Agreement. Any notices provided hereunder shall be provided as stated in Section 19.1.

13. **Governing Law.** This Sixth Amendment shall be governed by and construed in accordance with the laws of the State of Arizona.

14. **Counterparts.** This Sixth Amendment may be executed in one or more counterparts, each of which shall be deemed an original and all of which combined shall constitute on and the same instrument.

15. **Successors and Assigns.** This Sixth Amendment shall inure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns.

16. **Cancellation.** The parties hereto acknowledge that this Sixth Amendment to Operating Agreement is subject to cancellation pursuant to the provisions of Arizona Revised Statutes § 38-511.

17. **Amendments Limited.** Except as expressly amended by the provisions of this Sixth Amendment, the Operating Agreement shall remain in effect without amendment or modification.

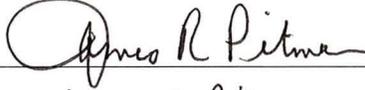
[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have executed this Sixth Amendment as of the date first above written.

OPERATOR:

Phoenix Arena Development Limited Partnership,
a Delaware limited partnership

By: Legacy GP, L.L.C., a Delaware limited liability
company, General Partner

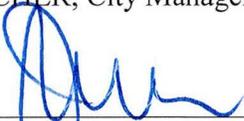
By: 

Name: James R Pitman

Title: Executive VP/CFO

CITY:

CITY OF PHOENIX, a municipal corporation
ED ZUERCHER, City Manager

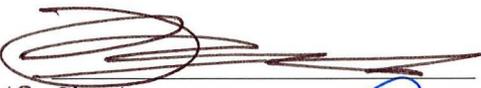
By: 

John M. Chan, Director
Phoenix Convention Center Department

ATTEST:


City Clerk

APPROVED AS TO FORM


ACTING City Attorney 



2016 MAR -1 PM 2:18
CITY CLERK DEPT.