



Real Estate Assets Department
SDC003

SYMPHONY ASSETS POOL, XVI LLC
P201R9-003-C00

Document Type

LEGAL DOCUMENTS



Sub - Category

AMENDMENTS



5

**FIRST AMENDMENT TO THE AMENDED AND RESTATED CITY OF
SAN DIEGO PERCENTAGE LEASE**

THIS FIRST AMENDMENT TO THE AMENDED AND RESTATED CITY OF SAN DIEGO PERCENTAGE LEASE ("First Amendment") is made by and between THE CITY OF SAN DIEGO, a California municipal corporation ("CITY"), as lessor, and SYMPHONY ASSET POOL XVI LLC, a Delaware limited liability company as lessee ("LESSEE"), to be effective as of the date of execution by CITY (the "First Amendment Effective Date"), when signed by the parties and approved by the San Diego City Attorney.

FOR VALUABLE CONSIDERATION, the sufficiency of which is acknowledged, the parties agree as follows:

RECITALS

- A. CITY and LESSEE entered into the Amended and Restated City of San Diego Percentage Lease dated April 22, 2015 ("Lease"), in respect to the Premises. The Lease is on file as Document No. RR-309579 in the Office of the City Clerk;
- B. Pursuant to Section 1.15 of the Lease, LESSEE is required to complete the Plunge Refurbishment within eighteen (18) months of the Effective Date of the Lease, unless delay is caused by factors beyond LESSEE'S control;
- C. On or about October 16, 2015, LESSEE duly notified CITY that it would not be able to complete the Plunge Refurbishment within eighteen (18) months of the Effective Date due to unavoidable delays caused by factors beyond LESSEE'S control, specifically that significant delays were caused with LESSEE securing approval from the CITY's Historical Resources Board for the Plunge Refurbishment which in turn lead to the earliest date to be heard by the California Coastal Commission for the required coastal development permit for the Plunge Refurbishment to be in January 2016;
- D. LESSEE requests to extend the completion date for the Plunge Refurbishment to eighteen months (18) following September 5, 2016 (Labor Day) due to the possible delay in commencement of the Plunge Refurbishment in light of the anticipated annual beach construction moratorium ("Construction Moratorium") for the period from Memorial Day to Labor Day, should the Construction Moratorium be issued by CITY in 2016.
- E. CITY has determined that due to delays caused by factors beyond LESSEE's control after the Effective Date, the completion date for the Plunge Refurbishment and the corresponding Plunge Occupancy Date will be extended to eighteen (18) months following September 6, 2016.
- F. Pursuant to Section 10.17 of the Lease and the Mayor's authority to administer the Lease pursuant to San Diego Charter section 28 and San Diego Municipal Code section 22.0220, this First Amendment is approved by the Mayor or his designee.

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- G. All defined terms used in this First Amendment shall have the same meaning as set forth in the Lease unless specifically stated otherwise.

AGREEMENT

NOW, THEREFORE, the parties agree as follows:

1. Section 1.15 Plunge Swimming Pool and Plunge Swimming Pool Building Refurbishment and Upgrades by LESSEE, is deleted in its entirety and replaced with the following:

1.15 Plunge Swimming Pool and Plunge Swimming Pool Building Refurbishment and Upgrades by LESSEE. Plunge Swimming Pool is currently closed for repairs and upgrades. LESSEE shall, at its sole cost and expense perform, unless delay is caused by legal action filed against LESSEE arising from the California Coastal Commission approval of the Plunge Swimming Pool Refurbishment and Upgrades, Coastal Development Permit No. 6-15-1251: (a) the Allowed Plunge Refurbishment, as described in the attached **Exhibit C**, and (b) all repairs referenced as "Long Term Approach" in the "Mission Bay Plunge Building Structural and Mechanical (Heating and Ventilation) System Evaluation Report" dated August 8, 2011, prepared by Harris and Associates, attached hereto as **Exhibit D** (the "Plunge Report") (the items described in clauses (a) and (b) shall be collectively referred to as the "Plunge Refurbishment"), estimated to cost Five Million Nine Hundred Thousand Dollars (\$5,900,000). The cost of the Plunge Refurbishment shall be in addition to the "\$18M Improvement Obligation" (defined below). The Plunge Refurbishment shall be deemed to be completed upon the date in which the certificate of occupancy is issued permitting use of the Plunge Swimming Pool by the general public (the "Plunge Refurbishment Completion"). The Plunge Swimming Pool shall reopen to the general public upon the Plunge Refurbishment Completion, but in no event later than March 5, 2018 ("Plunge Occupancy Date"), unless delay is caused by factors beyond LESSEE'S control after the First Amendment Effective Date (including, without limitation, if a Construction Moratorium is issued by the CITY for 2017 and/or thereafter, in which case the Plunge Occupancy Date shall be extended by the number of days any such Construction Moratorium is in effect). Concurrently with the Plunge Refurbishment Completion, LESSEE shall establish and implement a regular Plunge Swimming Pool building maintenance program as referenced in the Plunge Report, or as otherwise approved by CITY in writing. A copy of the most current City-approved Plunge Swimming Pool building maintenance program shall be filed with the City Real Estate Assets Department.

2. Section 9.2 Construction Bond, is deleted in its entirety and replaced with the following:

9.2 Construction Bond. CITY may at any time require LESSEE to deposit with CITY a faithful performance bond in the amount of one hundred percent (100%) of the estimated cost of the work to be performed at the Premises. The bond may be in cash or may be a corporate surety bond or other security satisfactory to CITY. The bond shall insure that the work commenced by LESSEE will be completed in accordance with the plans approved by CITY or, at the option of CITY that the uncompleted work will be removed and the Premises restored to a condition satisfactory to CITY. The bond or cash

shall be held in trust by CITY for the purpose specified above, or at CITY's option may be placed in an escrow approved by CITY

9.2.1 No later than thirty (30) days prior to commencement of the Plunge Refurbishment as set forth in Section 1.15 above, LESSEE shall deposit with CITY a faithful performance bond in the amount of one hundred percent (100%) of the work to be performed for the Plunge Refurbishment. LESSEE acknowledges and agrees that failure to comply with the requirements of this Section 9.2.1 and/or submitting false information in response to these requirements shall be a default of this Lease.

3. No Other Changes. All other terms and conditions of the Lease shall remain in full force and effect. Any conflict between the terms and conditions of this First Amendment and those of the Lease shall be resolved in favor of the terms and conditions of this First Amendment.

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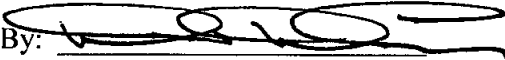
4. Authority. Each individual executing this First Amendment on behalf of another person or legal entity represents and warrants that they are authorized to execute and deliver this First Amendment on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws, or other written rules of conduct or governing agreement, and that this First Amendment is binding upon such person or entity in accordance with its terms. Each person executing this First Amendment on behalf of another person or legal entity represents and warrants such entity is a valid, qualified corporation, limited liability company, partnership, or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.

IN WITNESS WHEREOF, this First Amendment is executed to be effective as of the First Amendment Effective Date.

Date: May 20, 2016

Symphony Asset Pool XVI LLC, a
Delaware limited liability company

By: Pacifica Enterprises, Inc.,
A California Corporation (Manager)

By: 

Name: Dario De Luca

Title: President

By: 

Name: Roberto Colucci

Title: Chief Executive Officer

Date: May 27, 2016
First Amendment Effective Date

THE CITY OF SAN DIEGO, a California
municipal corporation

By: 

Name: CABELA THOMPSON

Title: DIRECTOR, REAL ESTATE

Approved as to form:

JAN I. GOLDSMITH, CITY ATTORNEY

By: 
Name: Hilda R. Hernandez
Title: Deputy City Attorney