

MIAMIBEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, FL 33139, www.miamibeachfl.gov

Jimmy L. Morales, City Manager
Tel: 305-673-7010, Fax: 305-673-7782

March 8, 2018

Living Arts Trust, Inc. d/b/a O Cinema
2401 Swanson Avenue
Miami, Florida 33133

Sent Via US Certified Mail Return Receipt:
70151730000182951437

Senen Garcia, Esq.
2665 S. Bayshore Drive, Ste. 220
Coconut Grove, FL 33133

Sent Via E-Mail (Senen@sgarcialaw.com)

Re: Notice of Failure to Cure Defaults Under Management Agreement between the City of Miami Beach ("City") and Living Arts Trust, Inc. d/b/a O Cinema ("O Cinema"), dated October 24th, 2014 ("Agreement"), for the management and operation of a portion of the Byron Carlyle Theater located at 500 71 Street, Miami Beach, Florida 33141

Dear Mr. Garcia:

We are in receipt of your correspondence dated January 26, 2018 in response to the City's Notice of Default dated December 26, 2017 ("Notice of Default"). Put simply, the City is disappointed by the response and O Cinema's failure to cure the defaults outlined in the Notice of Default.

The City disagrees with several assertions made in O Cinema's correspondence regarding its obligations at the Byron Carlyle Theater ("Facility"). In the Notice of Default, the City outlined four separate events of default, **all of which could have reasonably been cured within the thirty (30) day cure period, which expired on February 21, 2018.**¹

Based on O Cinema's failure to cure the numerous defaults within the cure period, the City hereby places **O Cinema on notice that the cure period has expired** and that O Cinema is now in default of its Agreement with the City, for the reasons as set forth below.

1. Failure to Remit Florida Sales Tax, in violation of Sections 5.3.13 and 19 of the Agreement.

¹ The City delivered the Notice of Default to O Cinema by email, in addition to delivering the Notice of Default by certified mail to the address O Cinema provided in Section 32 of the Agreement. On Jan. 22, 2018, the City received a "return to sender" delivery notification, because the addressee had moved and left no forwarding address. Pursuant to Section 32 of the Agreement, as the Notice of Default was "deemed duly served if mailed by registered or certified mail," the Notice of Default was deemed duly served on January 22, 2018, the date of the return of service (even though O Cinema and its counsel had actual notice well before then). Accordingly, the 30 day notice period therefore expired **February 21, 2018.**

As a threshold consideration, it is inconceivable that O Cinema has still failed to remit Florida sales tax to the state despite the City placing O Cinema on notice of its failure to do **since 2014**. Since the inception of this Agreement, O Cinema has failed to register with the Florida Department of Revenue to remit applicable sales taxes. In its response to the City's Notice of Default, O Cinema acknowledges that it is required to collect and remit sales tax on concession revenues, and has failed to do so. O Cinema has similarly acknowledged its obligation to collect and remit sales tax to the State since as early as August 31, 2017, during a meeting with staff from the City's Office of Internal Audit. **O Cinema's failure complete its registration with the Florida Department of Revenue and remit applicable sales taxes within the 30 day cure period is a default of O Cinema's obligations as set forth in Sections 5.3.13 and 19 of the Agreement.**

Specifically, Section 5.3.13 of the Agreement required, and O Cinema has failed, to properly and timely "act as a collection agent for the City on sales taxes from operation of the Facility and remit to the State of Florida such sales taxes." To this end, the remittance of applicable sales taxes to the Florida Department of Revenue is a default that was capable of being cured within a 30 day cure period. Indeed, this is a basic obligation of any business, and it is difficult to comprehend how O Cinema could have permitted this to even become an event of default, much less fail to cure after the City's audit and a formal Notice of Default from the City.

Accordingly, the failure to remit applicable taxes to the State of Florida is a default under the Agreement and O Cinema has failed to cure despite more than thirty (30) days written notice from the City.²

2. Failure to Remit City Resort Taxes, in violation of Sections 4.2.1(c)(vi) and 19 of the Agreement.

The City disagrees with O Cinema's assertion that it is somehow exempt from remitting resort taxes collected from the general public for food and beverage sales at the Facility. As you are aware, O Cinema must "collect and remit resort taxes to the City, as required pursuant to Section 102-306 of the City Code" (and Section 4.2.1(c)(vi) of the Agreement).

To begin with, the City disagrees with any assertion (nor did O Cinema provide any legal authority for the proposition), that the operation of a food and beverage concession, incidental to O Cinema's charitable purpose of promoting and exhibiting films, is itself a charitable non-profit activity that would somehow exempt O Cinema from complying with the requirement to collect resort taxes from the general public on sales of food and beverage items.

Further, resort taxes are not "imposed upon" O Cinema in connection with its nonprofit charitable activities. Rather, resort taxes are only to be required and imposed upon *patrons*

² Separately, O Cinema claims it is exempt from sales tax on its film admission or ticket sales pursuant to Section 212.04(2)(a)(2) of the Florida Statutes, which provides for an exemption from sales tax for "dues, membership fees, and admission charges imposed by not-for-profit sponsoring organizations." Notwithstanding this assertion, whether or not true, O Cinema has yet to register with the State to pay applicable sales taxes (which at a minimum includes sales taxes on concession revenues), much less obtain an informal or formal opinion from the Department of Revenue with respect to any purported exemption for any portion of its operations.

who purchase food and beverage services at the Facility. O Cinema's obligation, pursuant to Section 102-309 of the City Code and its Management Agreement with the City, is to collect and remit resort taxes at the time of sale.

Moreover, the City's Office of Internal Audit has observed that O Cinema has already collected taxes collected from the general public. The City submits that there is no exemption available under the law that would permit O Cinema to falsely represent to its customers that it was charging them a tax, or which would permit O Cinema to actually collect monies from its customers under such fraudulent pretenses, when in fact O Cinema merely intended to keep those funds for itself on the basis of any purported exemption from the very same tax it collected from its patrons.

Again, O Cinema's complete disregard of the Agreement and City Ordinances to remit resort taxes it has already collected from its patrons, serves as a separate ground for termination of the Agreement.

3. Failure to Obtain the Requisite Licenses for the Sale of Alcohol, in violation of Sections 4.2.1(c)(v) and 19 of the Agreement.

In your January 26, 2018 response, you asserted that "O Cinema is in the process of obtaining a license for the sale of wine and beer" and that since the City's Notice of Default, "sales of wine and beer have ceased."

The sale or service of any alcoholic beverages, at any time, without a license, is an event of default under Sections 4.2.1(c)(v) and 19 of the Agreement. Moreover, since City's Notice of Default, O Cinema has not provided the City with any evidence of appropriate licensure to permit any beer or wine to be served at the Facility.

Notwithstanding City's notice to O Cinema to cease and desist from the sale or service of alcoholic beverages at the Facility, and notwithstanding O Cinema's assertion that sales of wine and beer have ceased, it appears that O Cinema continue to serve or sell alcoholic beverages at an advertised "mimosa" event on February 11, 2018, in violation of Sections 4.2.1(c)(v) and 19 of the Agreement.³

O Cinema's complete disregard of its obligations under Florida law and the City Code with respect to the sale or service of alcoholic beverages, is a separate default under the Agreement.

4. Failure to Satisfy the City's Insurance Requirements, in violation of Section 14 of the Agreement

The City disagrees with your assertion that O Cinema has maintained uninterrupted insurance coverage satisfying the established amounts required by the Agreement, including lapses that were noted on policy coverage dates for the past three years, including current Insurance Policy

³ Based on the foregoing event, O Cinema was cited by the City of Miami Beach's Code Enforcement Division, for violating Section 6-2(a) of the City Code. A copy of Miami Beach's Code Enforcement Violation: CC2018-04824 is attached as Exhibit "A".

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BAK-366651-1, which became effective on November 17, 2017 (following the expiration of Policy BAK-1009832 16 days prior on November 1, 2017).

Further, with respect to the current certificate, the Products–Completed Operations Aggregate coverage limit is listed as \$1,000,000, whereas Section 14.1 of the Agreement requires a minimum of \$2,000,000. The cure period has expired and O Cinema has yet to satisfy its contractual obligation to maintain the specific insurance coverages required by the Agreement.

Conclusion

Based on O Cinema's failure to cure the numerous defaults set forth above within the cure period, the City hereby places **O Cinema on notice that the cure period has expired and O Cinema is in material default of its Agreement with the City.** I intend to advise the City Commission of the status of this matter, and hereby reserve all rights and remedies available to the City under the Agreement and Florida law. By separate notice to O Cinema, I intend, in the next few weeks, to advise O Cinema of the remedies the City will exercise in connection with the foregoing defaults.

Should you have any questions, please do not hesitate to contact Mark Milisits, Asset Manager, at 305-673-7193.

PLEASE GOVERN YOURSELF ACCORDINGLY.

Sincerely,



Jimmy L. Morales
City Manager

cc: Eva Silverstein, Director of Tourism, Culture and Economic Development (via E-mail only)
Mark Milisits, Asset Manager (via E-mail only)