

**AMENDMENT NO. 1
TO THE MANAGEMENT AGREEMENT BETWEEN
THE CITY OF MIAMI BEACH, FLORIDA AND
LIVING ARTS TRUST, INC. D/B/A O CINEMA
FOR THE MANAGEMENT & OPERATION
OF A PORTION OF THE BYRON-CARLYLE THEATER**

This Amendment No. 1 (Amendment) to the Management Agreement, dated October 24, 2014 (the Agreement), by and between the CITY OF MIAMI BEACH, FLORIDA, a municipal corporation, organized and existing under the laws of the State of Florida, having its principal place of business at 1700 Convention Center Drive, Miami Beach, Florida 33139 (the City), and LIVING ARTS TRUST, INC. d/b/a O CINEMA, a Florida nonprofit corporation, having its principal place of business at 90 NW 29th Street, Miami, FL 33127 (O Cinema), is entered into this ____ day of _____ 2018 (Effective Date).

RECITALS

WHEREAS, on October 24, 2014, pursuant to City Commission Resolution No. 2014-28729, the City and O Cinema entered into a Management Agreement (Agreement), for the management and operation of a portion of the City-owned Byron Carlyle Theater (Facility), located at 500 71st Street, Miami Beach, Florida 33141; and

WHEREAS, the Initial Term of the Agreement ends October 31, 2019 and the City has the option to renew with single or multi-year terms, which Renewal Term(s) are not to exceed a total of five (5) years, by providing O Cinema with not less than 365 days written notice prior to the expiration date of the Initial Term; and

WHEREAS, pursuant to the Agreement, O Cinema is responsible for all maintenance, minor repairs, janitorial expenses, and 72% of the costs of utilities at the Theater (representing O Cinema's proportionate share of the Facility), while the City is responsible for all major repairs, capital improvements, and 28% of the charges for utilities at the Theater; and

WHEREAS, as compensation for use of the Facility, the Agreement requires O Cinema to pay minimum annual rent of \$5,000, or 10% of certain revenues, whichever is greater (Use Fee) and, in addition to rent, O Cinema contributes \$2,500 annually to defray the City's cost for major repairs and capital improvements to the Facility (Capital Contribution); and

WHEREAS, O Cinema has requested the City modify several terms in the Agreement, including: an extension of the term of the Agreement by two years; an annual City subsidy to O Cinema of \$100,000, less utility costs, and maintenance and repairs of HVAC, Septic, Sewer, safety systems, roof, and elevator systems at the Facility; waiver of the Use Fee and the Capital Contribution; and modification of certain performance benchmarks; and

WHEREAS, on July 13, 2018 and July 20, 2018, the Finance and Citywide Projects Committee (FCWPC) recommended that the City Commission fund the additional amounts necessary to accommodate O Cinema's requests related to its Agreement,

provided that O Cinema add a City appointee to its board of directors and expand its programming for seniors and children; and

WHEREAS, the City and O Cinema hereby agree to extend the Agreement through the first two (2) one-year Renewal Terms, commencing November 1, 2019 and ending October 31, 2021; and

WHEREAS, on November 14, 2018, the Mayor and City Commission adopted Resolution No. 2018-_____, accepting the recommendation of the FCWPC, at its July 13, 2018 meeting, and approving, in substantial form, Amendment No. 1 to the Management Agreement with Living Arts Trust, Inc. (d/b/a O Cinema); said amendment providing for: (1) the exercise of the first two (2) one-year renewal options, commencing November 1, 2019 and ending October 31, 2021; (2) the payment to O Cinema of an annual subsidy, in the gross amount of \$100,000, less a minimum utility payment (estimated to be \$22,000 per year), resulting in a net annual subsidy of \$78,000, payable quarterly, in the amount of \$19,500, subject to an annual true up payment to the City for utility usage exceeding O Cinema's proportionate share (72%) of the utility expenses for each contract year, and contingent upon funding approval during the City's budgetary process for each fiscal year; (3) the assumption, by the City, of the responsibility for maintenance and repairs of the Facility, at an estimated cost of approximately \$50,000 annually, contingent upon funding approval during the City's budgetary process for each fiscal year; (4) the waiver of the use fees, having a value of approximately \$12,000 per year; 5) the waiver of the annual capital contribution of \$2,500; and 6) the modification of the annual benchmark requirements, incorporating a requirement to provide programming for youth and seniors, and relaxing some of the benchmarks to conform to existing operational conditions; and authorize the City Manager and City Clerk to execute the final amendment.

NOW THEREFORE, in consideration of the mutual promises and conditions contained herein, and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the City and O Cinema hereby agree to amend the Agreement as follows:

1. ABOVE RECITALS.

The above recitals are true and correct and are incorporated as part of this Amendment.

2. MODIFICATIONS.

The Agreement is hereby modified (deleted items ~~struck through~~ and inserted items underlined) as follows:

(a) Subsection 4.2.4 of the Agreement is hereby modified as follows:

4.2.4 Annual Benchmarks. Every year, throughout the Term of the Agreement, O Cinema shall achieve the following benchmarks:

- operate a minimum of 5-days a week, 48 weeks a year schedule;
- present no less than 500 Events throughout the year;
- serve an anticipated ~~40,000~~ 20,000 visitors per year;
- ~~increase attendance by 5% annually over prior years;~~
- highlight and market O Cinema Miami Beach as part of O Cinema's annual marketing budget, ~~which budget shall not be less than \$50K~~ and provide by June

1 of each year: (1) a comprehensive annual report of completed marketing efforts over the past year and (2) a detailed plan for O Cinema's marketing strategy over the upcoming year;

- provide Miami Beach residents with discounted-quality cinematic offerings (~~20%~~40% discount) at least 12 times per year, for a minimum of one film screening per month;
- present an annual event, "Celebrate Miami Beach," highlighting Miami Beach's culture and history, including a film screening, post-film discussion, and reception, all provided with free admission for the community;
- provide no less than 200 free tickets for seniors for select screenings. In addition, O Cinema will work with local senior centers, senior housing facility, and the City's Parks & Recreation Department to offer free special screenings throughout the year for seniors (aged 62 and over) no less than once per quarter and/or four times per year;
- provide no less than 200 free tickets for youth throughout Miami Beach for select screenings. In addition, O Cinema will work with Parks & Recreation Department and area schools to offer free special screenings throughout the year for students (up to age 18) no less than once per quarter and/or four times per year;
- provide no less than 100 free and/or discounted tickets offered annually through the Miami-Dade County Golden Ticket program for seniors ages 62 and over, and the Miami-Dade County Culture Shock \$5 ticket program for youth ages 13-22 to select films and events.

(b) Subsection 5.3.3 of the Agreement is hereby modified as follows:

5.3.3 negotiate, execute in its name as agent for the City, deliver, and administer any and all contracts in connection with the management, ~~maintenance~~, promotion and operation of the Facility; provided that if any such contract has a term that extends beyond the remaining Term, such contract shall provide that it is automatically assigned to City as of the expiration or termination date of this Agreement and that the City Manager may terminate any such agreement at any time, without cause and/or liability to the City, upon not less than ten (10) days written notice.

(c) Subsection 5.3.5 of the Agreement is hereby deleted in its entirety and replaced with the following:

5.3.5 O Cinema warrants and represents to City that, prior to the Effective Date, O Cinema inspected the Facility, and O Cinema hereby accepts the Facility "as-is, where-is and with all faults."

(d) Subsection 6.1 of the Agreement is hereby deleted in its entirety.

(e) Subsection 6.2.4 of the Agreement is hereby deleted in its entirety.

(f) Section 9 is hereby deleted in its entirety and replaced with the following:

SECTION 9. LIMITED FUNDING BY CITY.

9.1 Upon execution of this Amendment, during the remainder of the Term for each Contract Year, the City shall provide funding to O Cinema, contingent upon funding approval during the City's budgetary process each fiscal year, in an amount not to exceed \$100,000.00 for a Contract Year, which shall be reduced by \$22,000, representing O

Cinema's minimum utility use fee ("Minimum Utility Payment") for the shared utilities (as are defined in Section 20), resulting in a net subsidy to O Cinema of \$78,000 ("City Contribution(s)"), payable in quarterly installments annually, with the first payment, in the amount of \$19,500.00, due October 1; \$19,500.00 due on January 1; \$19,500.00 due on April 1; and \$19,500.00 due on July 1. O Cinema shall submit an invoice for each payment of such City Contribution and also submit the corresponding reports due for that particular quarter. The City will pay the invoice within forty-five (45) days from receipt of the invoices. Notwithstanding the foregoing, the City, in its sole discretion, may condition payment of the City Contribution upon O Cinema providing the requisite reports under this Agreement including, without limitation, those reports set forth in Sections 5 and 12 of this Agreement.

If at such time the City occupies that area of the Facility not currently occupied by O Cinema, depicted as "City of Miami Beach" in Exhibit A, then the City agrees to revisit with O Cinema the structure of the Minimum Utility Payment.

9.2 Annual True Up. Notwithstanding the foregoing, in the event that the cost of O Cinema's share of the utility bills for the Contract Year, based upon O Cinema's Proportionate Use (72%) of the Theater, exceeds the Minimum Utility Payment, then O Cinema will reimburse the City for the overage amount received during the applicable Contract Year within forty-five (45) days from the end of the fourth quarter. Conversely, in the event that the cost of O Cinema's share of the utility bills for the Contract Year, based upon O Cinema's Proportionate Use (72%) of the Theater, falls short of the Minimum Utility Payment, then the City will reimburse O Cinema for the underage amount from the applicable Contract Year within forty-five (45) days from the end of the fourth quarter.

9.3. Notwithstanding the foregoing, the costs associated with the City Contribution shall be subject to funding, appropriation, and approval by the City Commission during the City's annual budget approval process. Any references to City Contributions, payments, or reimbursements are based on a full Contract Year and subject to budgetary funding approvals for the Fiscal Year covering said Contract Year. As such, any event which creates a shortened Contract Year, such as a default or termination for convenience, shall be prorated accordingly.

9.4. Except as set forth in this Section 9, and other costs which the City has expressly agreed to pay under the terms of this Agreement, the City will have no other funding or other payment obligations with respect to the Facility or its Operating Expenses or its operations. Additionally, O Cinema and City have entered into this Agreement with the expectation and belief that, as of the Effective Date, no governmental body will impose any ad valorem taxes upon the Facility nor any sales, income, excise or other taxes. Notwithstanding the preceding sentence, the City makes no representation to O Cinema, either expressed or implied that any or all of such taxes may or may not be imposed at any time during the Term of the Agreement.

(g) Subsection 11.3 of the Agreement is hereby deleted in its entirety and replaced as follows:

11.3 Maintenance. The City hereby assumes, on behalf of O Cinema, the responsibility for the maintenance (the City maintenance responsibility), and the repair and replacement (at the City's sole discretion), of all improvements, fixtures, and equipment at the Facility (collectively, the City repair responsibility). Notwithstanding the foregoing, the costs associated with the maintenance and repair responsibilities shall be subject to funding, appropriation and approval by the City Commission during the City's annual budget approval process. Additionally, the City shall comply with the repair

responsibility through the City's existing agreements and in accordance with the same standards, as the City provides for other City facilities. The City maintenance and repair responsibilities shall not include those services or costs relating to or arising out of any private event or activity at the Facility including, without limitation, services and costs associated with the rental of the Facility, which additional services or costs shall remain the responsibility of O Cinema. O Cinema agrees to keep and maintain the Facility, and every part thereof, in good condition and order during the Term of the Agreement and will not suffer or permit any strip or waste of the Facility. O Cinema shall comply with any and all State, Miami-Dade County, and City laws, codes, rules, and regulations, etc. with regard to its respective obligations.

O Cinema shall provide the City with prompt notice of needed maintenance and repair requests that are deemed to be within the City's responsibilities, and the City shall have a reasonable time thereafter to commence said maintenance and/or repairs. Except as expressly provided in this Agreement, it is understood by the parties hereto that O Cinema shall not be responsible nor required to pay for any costs related to capital improvements or infrastructure (i.e. including, but not limited to, roof, structural elements and infrastructure, HVAC, plumbing and sewer lines, major electrical, etc.) for the Facility (collectively, capital improvements or repairs). O Cinema shall provide the City with prompt notice of needed capital improvements or repairs, so that the City, in its sole discretion, may prioritize and appropriate the funds necessary for any needed capital improvements or repairs.

(h) Subsection 12.1.1 of the Agreement is hereby modified as follows:

12.1.1 O Cinema shall keep full and accurate accounting books and records relating to all Operating Revenues and Operating Expenses, all in accordance with generally accepted accounting principles. O Cinema shall give the City's authorized representatives access to such books and records during reasonable business hours and upon reasonable advance notice. All books and records shall be made available on-site at the Facility or electronically. O Cinema shall keep and preserve for at least three (3) years following each Fiscal Year, or for as long as such records are required to be retained pursuant to Florida Public Records Law (whichever is longer), all sales slips, rental agreements, purchase order, sales books, credit card invoices, bank books or duplicate deposit slips, and other evidence of Operating Revenues and Operating Expenses for such period. In addition, on or before June 1st of each year ~~420 days following each Fiscal Year~~, O Cinema shall furnish to the City a line item (i.e., by categories) statement of Operating Costs and Operating Revenues (and profit or loss) for the Facility for the preceding Fiscal Year, and including the number of tickets sold and Events and other uses held, prepared in accordance with generally accepted accounting principles certified as accurate by O Cinema's Chief Accounting Officer or Chief Financial Officer.

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IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their appropriate officials, as of the date first entered above.

FOR CITY:

CITY OF MIAMI BEACH, FLORIDA

ATTEST:

By: _____
Rafael E. Granado, City Clerk

Dan Gelber, Mayor

Date

FOR O CINEMA:

**LIVING ARTS TRUST, INC. d/b/a O
CINEMA**, a Florida nonprofit
corporation.

ATTEST:

By: _____
Title

Print Name

Date

Title

Print Name