

35937

AGREEMENT

This Agreement (this "**Agreement**") is executed as of June 4, 2021 (the "**Effective Date**") by and among Evolution Hospitality, LLC, a California limited liability company ("**Operator**"), and the City of Long Beach, a California municipal corporation (the "**City**"). Operator and City are each referred to in this Agreement as a "**Party**" and collectively as the "**Parties**".

RECITALS

A. City is the owner of the hotel, museum and attraction known as the RMS Queen Mary, the water surrounding it within the enrockment, the land adjacent to the Queen Mary and improvements on that land, and certain additional water rights adjacent to the Queen Mary, collectively located at 1126 Queens Hwy, Long Beach, California 90802, which includes the submerged land and water used to develop and operate a cruise ship docking area and terminal for Carnival Corporation (collectively, the "**Property**").

B. Operator previously managed the Property pursuant to that certain Hotel and Property Management Agreement (as amended and assigned), dated as of September 23, 2011, by and between Operator and EHT QMLB, LLC, a Delaware limited liability company, as owner (the "**Management Agreement**"), which Management Agreement ceased to be of force and effect once the sub-leasehold interest of EHT QMLB, LLC in the Property was terminated.

C. The Property closed to the public on or about May 7, 2020 in response to the COVID-19 pandemic and its unprecedented impact on the Property, and the Property remains closed to the public as of the Effective Date.

D. Subsequent to the closure of the Property, Operator provided basic and limited safeguard services at the Property pursuant to that certain Agreement, dated May 12, 2020 (the "**Prior Caretaker Agreement**"), by and between Operator and Urban Commons Queensway, LLC, a California limited liability company "**UCQ**"), which Prior Caretaker Agreement is currently subject to a rejection motion before the bankruptcy court administering ongoing UCQ bankruptcy proceedings (the "**Bankruptcy Court**").

E. The Parties desire that Operator provide basic and limited safeguard services at the Property while the Property is closed to the public (the "**Caretaker Services**") designed to prevent further waste at and further material damage to the Property, but Operator is not required to provide any services at or to the Property to the extent sufficient funds are not made available by City under the terms of this Agreement.

F. In order to prevent further waste and further material damage to the Property, City is taking emergency measures to secure the Property and, accordingly, City desires to engage Operator to provide the Caretaker Services while the Property remains closed to the public, and Operator has agreed to provide such Caretaker Services, all on and subject to the terms and conditions contained in this Agreement.

THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties agree as follows:

1. Term. The term of this Agreement (the "**Term**") shall commence on the Effective Date and expire on December 4, 2021, unless this Agreement is sooner terminated or the Term is extended, in each case pursuant and subject to this Section 1 and the other terms of this Agreement. The Term shall automatically extend to June 4, 2022 unless sooner terminated pursuant to this Section 1 or the other terms of this Agreement. Either Party may terminate this Agreement at any time, with or without cause, upon the delivery to the other Party of a written notice of termination, in which case this Agreement shall terminate

sixty (60) days following the date of such notice (or on such other date as may be mutually agreed by the Parties), which termination shall be without payment of any termination fee or penalty by any Party, but each Party shall pay all amounts due under this Agreement through the date of termination, including, without limitation, the Caretaker Fee (as defined below), any Caretaker Costs (as defined below) and any Reimbursable Expenses (as defined below). The Parties acknowledge and agree that UCQ's proposed rejection and termination of the Prior Caretaker Agreement has not yet been approved by the Bankruptcy Court, that the Bankruptcy Court has discretion to determine the exact date of termination of the Prior Caretaker Agreement, and that the effective date of the termination of the Prior Caretaker Agreement has not been established as of date the Parties fully execute this Agreement. Notwithstanding anything to the contrary contained herein, this Agreement shall be deemed to become effective immediately subsequent to the effective termination of the Prior Caretaker Agreement, it being the intention of the Parties that (i) the Prior Caretaker Agreement and this Agreement shall not be effective at the same time, and (ii) there be no gap in the provision of Caretaker Services by Operator under the Prior Caretaker Agreement and this Agreement, respectively. The Effective Date shall be amended to be the date immediately after the effective termination date of the Prior Caretaker Agreement.

2. Caretaker Services. Operator shall provide the Caretaker Services at the Property during the Term to the extent that sufficient funds are made available to Operator to fund the cost of the Caretaker Services. City acknowledges that (i) the Caretaker Services include basic and limited services to safeguard the Property during the period that the Property continues to be closed to the public, (ii) the preparation of the Property for reopening to the public and the performance of any of the Necessary Renovations (as hereinafter defined) are beyond the scope of this Agreement, (iii) Operator will not be required to undertake such preparation for reopening except pursuant to a separate written hotel management agreement and a separate written pre-opening services agreement for the Property, and (iv) Operator will not be required to supervise or perform the Necessary Renovations except pursuant to a separate written project management agreement for the Property. Any employees of Operator or its affiliates that are utilized to provide the Caretaker Services shall not be part of any union representing former employees at the Property, and in no event shall Operator or its affiliate be required to sign or otherwise become subject to any collective bargaining agreement upon the Property as a result of this Agreement or the provision of the Caretaker Services.

3. Caretaker Fee; Caretaker Costs; Reimbursable Expenses; Caretaker Agreement.

(a) In consideration for Operator's provision of the Caretaker Services, City shall pay to Operator a monthly fee in the amount of \$20,000 (the "**Caretaker Fee**"), which Caretaker Fee shall be prorated for any partial calendar months during the Term. City shall also pay and be responsible for (i) the monthly costs for the Caretaker Services at the Property during the Term (including, without limitation, the costs for payroll and benefits for property level employees, utilities, waste management, security services, basic systems connectivity, essential emergency repairs, the fairly and equitably allocated premium for any workers compensation, crime, cyber and employment practices insurance carried by Operator with respect to property level employees and safeguard services and other similar costs necessary to safeguard the Property during the Term) (the "**Caretaker Costs**"), estimates of which are set forth on Schedule A for the month of June and Operator shall provide monthly updates consistent with Schedule A, and (ii) all travel, lodging, meals and other reasonable expenses incurred by Operator which are directly related to Operator's performance of the Caretaker Services (the "**Reimbursable Expenses**"). Operator shall submit a monthly statement of Reimbursable Expenses to City with reasonable supporting detail, and City shall pay the Reimbursable Expenses to Operator within thirty (30) days following receipt of such monthly statement. The estimated Caretaker Costs shall be paid to Operator by City and deposited in the Caretaker Account (as defined below) on a monthly basis during the Term, in advance of the month in which such Caretaker Costs are expected to be incurred, which Caretaker Costs shall be due and payable within three (3) business days following the Effective Date for the first month of the Term and on the first (1st) day of each month thereafter during the Term. Operator makes no representation, warranty or guaranty that the actual

Caretaker Costs will not exceed the estimated amounts set forth on Schedule A; provided, however, notwithstanding the foregoing, in the event that the Caretaker Costs are expected to exceed the estimated amounts set forth on Schedule A, Operator shall notify City of same and shall not, except in the case of an emergency, exceed the amounts set forth on Schedule A without the prior written approval of City, which approval shall not be unreasonably withheld, conditioned or delayed. Operator agrees to notify City in writing in the event of any emergency occurring at the Property as soon as reasonably practicable during (or, if not reasonably practicable, after) such emergency, which notice shall include the amount of any such emergency expenditure. In the event that City fails, refuses or is otherwise unwilling or unable to provide to Operator the funds sufficient to pay or reimburse Operator or its affiliate for the amount of any Caretaker Costs that Operator reasonably determines are necessary to provide the Caretaker Services at the Property but exceed the estimates set forth on Schedule A, Operator shall not cease providing the Caretaker Services until it provides City with written notice of such failure, which written notice shall specify the amount of Caretaker Costs that City has failed or refused to fund. For a period of five (5) business days from the date of such written notice (or such other period as may be mutually agreed between Operator and City), Operator shall continue to provide the Caretaker Services at the Property (the "**Cure Period**"). In the event that City funds such amounts in accordance with this Section 3 prior to the end of the Cure Period, Operator shall continue to provide the Caretaker Services for the period covered by such payment. In the event that City fails to fund such amounts by the expiration of the Cure Period, Operator may terminate this Agreement upon ten (10) days prior written notice to City.

(b) Operator shall establish and maintain a bank account (the "**Caretaker Account**") in a federally insured financial institution selected by Operator and reasonably approved by City. Operator's designees shall be the sole signatories on the Caretaker Account. The Caretaker Costs funded by City pursuant to this Agreement and any funds received by Operator from the operation of the Property shall be deposited in the Caretaker Account. City hereby authorizes Operator to use available funds in the Caretaker Account from time to time to pay the Caretaker Costs, Caretaker Fees and Reimbursable Expenses as contemplated by this Agreement. Operator shall provide a monthly statement to City setting forth the use of funds in the Caretaker Account for the immediately preceding month.

(c) Operator shall perform the Caretaker Services in accordance in all material respects with all labor and employment laws applicable to the property level employees employed by Operator and its affiliates, including, without limitation, the provisions of the California Labor Code requiring the payment of prevailing wages to the property level employees employed by Operator and its affiliates. City shall be responsible for and pay Operator's cost to comply with such prevailing wage laws either as a Caretaker Cost or a Reimbursable Expense, as applicable, regardless of whether such compliance costs are set forth on Schedule A. Operator's obligation to comply with this Section 3(c) shall be subject to City's performance of its payment obligations under this Agreement. Notwithstanding the foregoing, City shall be the primary contractor for all work that is defined under the prevailing wage laws of California and the City of Long Beach as craft, maintenance and/or construction work, and that Operator shall not perform this work directly or serve as such primary contractor..

4. Outstanding Accounts Payable. As of the Effective Date, there exists outstanding accounts payable at the Property, the continuing non-payment of which may result in further waste at, and further material damage to or liens on the Property, including, without limitation, amounts due for sales, use and occupancy taxes and real and personal property taxes assessed against the Property (collectively, the "**Outstanding AP**"). During the Term, Operator shall use commercially reasonable efforts to identify to City the Outstanding AP that may result in further waste at, further material damage to or liens on the Property. In the event that City desires to fund payment of any Outstanding AP, Operator shall assist City in facilitating the payment, including applying any funds provided to Operator by City to payment of the Outstanding AP if and to the extent designated by City for payment. Nothing in this Section 4 shall obligate City to pay any Outstanding AP, such determination to be made by City in its sole and absolute discretion.

5. Necessary Renovations. City recognizes there is a substantial need for repairs and renovations at the Property, some or all of which must be completed in order to reopen the Property to the public (the "Necessary Renovations"). City acknowledges and agrees that in no event shall Operator be liable for the cost and expense of any Necessary Renovations or any further deterioration of the condition of the Property during the Term. Operator or its affiliate may be engaged by City to provide project management services for Necessary Renovations pursuant to a separate written project management agreement for the Property.

6. Property Tours/Cooperation. As part of the Caretaker Services, Operator shall assist and cooperate with City in connection with any efforts by City to provide tours of the Property to City employees and their consultants, and any prospective new lessee or lessees for the Property, including any lenders or investors or other consultants engaged by any such prospective new lessee(s).

7. No City Liability or Assumption under Management Agreement and Prior Caretaker Agreement. City shall not be or become liable for any obligations or liabilities under the Management Agreement or the Prior Caretaker Agreement by virtue of the execution and delivery or performance of this Agreement. The Parties acknowledge and agree that neither the execution of this Agreement nor the performance of any of the terms and/or conditions hereof (including, without limitation, the funding of Caretaker Costs or Outstanding AP by City) shall constitute an assumption by, or otherwise make, City obligated under or liable for any of any obligations or liabilities under the Management Agreement or the Prior Caretaker Agreement. This Section 7 shall survive the expiration or earlier termination of this Agreement. Under Government Code Section 830.6 and by prior approval in advance by its City Council, City hereby affirms that this Agreement is part of its design and activity related to remedying potential deteriorating and dangerous conditions at the Property.

8. Indemnification by City. City hereby indemnifies, defends and holds harmless Operator, its affiliates and each of their respective shareholders, members, managers, directors, officers, employees, representatives and agents (collectively, the "Operator Indemnitees"), from and against any and all losses, costs, damages, liabilities, claims, demands, actions and causes of action and expenses whatsoever (including, without limitation, reasonable attorneys' fees and court expenses) (collectively, "Losses"), incurred by the Operator Indemnitees from third-party claims to the extent arising out of, as a result of, or in connection with the operation and condition of the Property from and after the Effective Date, including, without limitation, (i) the performance by Operator or its affiliates of the Caretaker Services, including, without limitation, any and all obligations incurred relating to any agreements with third parties entered into by Operator or City in connection with the Caretaker Services, and (ii) any occurrence or event happening in or about the Property or occurring in connection therewith including, without limitation, any damage or destruction to or deteriorating condition of the Property. City shall apply the proceeds of any applicable available insurance or self-insurance to the payment of any claim under the indemnity set forth in this Section 8, but the availability or unavailability of any such insurance or self-insurance proceeds shall not in any way limit City's obligations under this Section 8. City's obligations under this Section 8 shall not apply to the extent Losses arise as a result of (i) Operator's breach of this Agreement or (ii) the gross negligence or willful misconduct of the Operator Indemnitees. The provisions of this Section 8 shall survive the expiration or earlier termination of this Agreement.

9. Insurance. City shall, throughout the Term, procure and maintain at City's sole cost and expense, self-insurance, commercial insurance, or a combination thereof, at a minimum as set forth on Schedule B. City shall deliver to Operator evidence of all required insurance coverages, including existing, additional and renewal policies and, in the case of insurance about to expire, shall deliver evidence of the renewal policies not less than ten (10) days after the respective dates of expiration.

Operator shall, throughout the Term, procure and maintain at Operator's sole cost and expense, workers' compensation as required by the Labor Code of the State of California and Employer's liability insurance with minimum limits of One Million Dollars (US \$1,000,000) per accident or occupational

illness. The policy shall be endorsed with a waiver of the insurer's right of subrogation against the City of Long Beach, and its officials, employees, and agents.

10. Assignment and Transfer. Neither Party may assign any of its rights and obligations under this Agreement without the consent of the other Party, which may be withheld in such Party's sole and absolute discretion.

11. Governing Law; Disputes. This Agreement shall be construed under and be governed by the laws of the State of California. The venue of any mediation, arbitration or judicial proceedings shall be in California, unless otherwise mutually agreed by the Parties. The Parties agree that any issue, controversy or claim arising out of or relating in whole or in part to this Agreement shall be settled by binding arbitration in accordance with the Streamlined Arbitration Rules of JAMS (or the equivalent of its successor) at its Los Angeles, California offices, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereover. In the event of any arbitration pursuant to the terms hereof, or any litigation to enforce this arbitration provision or the arbitration award, the prevailing Party shall be entitled to reimbursement for out-of-pocket costs and expenses related to such legal action, including, without limitation, reasonable attorneys' fees. All dispute resolution proceedings shall be confidential. The arbitrator(s) shall issue a reasoned written award, and neither Party shall be entitled to the award or recovery of punitive or exemplary damages of any kind. BOTH PARTIES HEREBY VOLUNTARILY WAIVE THEIR RIGHT TO A JURY TRIAL AND CERTAIN OTHER LEGAL REMEDIES BY AGREEING TO THIS ARBITRATION PROVISION.

12. Counterparts. This Agreement may be executed in one or more counterparts, each of which is deemed an original and all of which, taken together, constitute a single instrument.

13. Negation of Partnership, Joint Venture and Management Agreement. The Parties acknowledge and agree that nothing in this Agreement shall constitute or be construed to constitute or create a partnership, joint venture, agency, management agreement or lease between City and Operator with respect to the Property.

14. No Recordation. Neither this Agreement nor any memorandum hereof shall be recorded against the Property.

15. Entire Agreement. This Agreement embodies the entire agreement between the Parties with respect to the transactions contemplated by this Agreement, and supersedes all prior agreements relating to the subject matter hereof. No other extrinsic representations, warranties, or promises, made prior to the signing of this Agreement, other than those expressly stated and incorporated herein, shall bind the Parties or create any legal obligations whatsoever.

16. Third Parties. Except as otherwise expressly provided herein, nothing in this Agreement, express or implied, is intended to confer upon any person, other than the Parties and their respective heirs, executors, personal representatives, successors and assigns, any rights or remedies under or by reason of this Agreement.

17. Invalid Provisions. If any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future laws, such provisions shall be fully severable and this Agreement shall be reformed to include a provision as similar as possible to such illegal, invalid, or unenforceable provision in order to be legal, valid, or enforceable.

18. No Waiver. No failure of any Party to exercise any power given such Party hereunder or to insist upon strict compliance by the other Party with its obligations hereunder shall constitute a waiver of any Party's right to demand strict compliance with the terms of this Agreement.

19. Notices. All notices provided for in this Agreement shall be in writing and delivered in person, or sent by reputable and traceable overnight delivery service or by postage prepaid registered or certified mail, to the respective addresses for Operator and City set forth below, until such time as written notice, as provided hereby, of a change of address with a new address to be used thereafter is delivered to the other Party. Notices will be deemed delivered upon confirmation of delivery at the current notice address referenced above. Copies of any such notices shall also be sent via electronic mail to the e-mail addresses below. Upon request, a Party shall send copies of any notice or communication by ordinary mail as instructed by the other Party. All notices and other communications required or permitted to be given hereunder shall be given to the applicable Party at the address set forth below:

If to Operator, to:

Evolution Hospitality, LLC
5301 Headquarters Drive
Plano, TX 75024
Attention: Greg Moundas
Email: greg.moundas@aimhosp.com

With copies to:

Brownstein Hyatt Farber Schreck LLP
410 17th Street
Denver, CO 80202
Attention: Philip A Gosch
Email: PGosch@BHFS.com

If to City, to:

City of Long Beach
411 W. Ocean Blvd., 10th Floor
Long Beach, CA 90802
Attention: City Manager
Email: thomas.modica@longbeach.gov

With copies to:

City of Long Beach
411 W. Ocean Blvd., 10th Floor
Long Beach, CA 90802
Attention: Director of Economic and Property Development
Email: john.keisler@longbeach.gov

[Signatures follow on next page]

CITY:

City of Long Beach, a California municipal corporation

By: Thomas B. Modica
Name: Thomas B. Modica
Title: City Manager

EXECUTED PURSUANT
TO SECTION 504 OF
THE CITY CHARTER.

APPROVED AS TO FORM

6-9-2021
CHARLES PARKIN, City Attorney

By [Signature]
RICHARD ANTHONY
DEPUTY CITY ATTORNEY

IN WITNESS WHEREOF, the Parties have executed this Agreement to be effective as of the Effective Date.

OPERATOR:

Evolution Hospitality, LLC,
a California limited liability company

By: 

Name: Greg Moundas

Title: Vice President

[Signatures Continue on Following Page]

SCHEDULE A
ESTIMATED MONTHLY CARETAKER COSTS

Caretaker Expenses
The Queen Mary
June 2021

	June '21
	Plan
Labor	52,800
Benefits	15,840
<u>Contracts</u>	
Iron Mountain	412
Systems (internet, Oracle, Ricoh etc.)	5,454
Cox Business	6,007
Phone (Verizon Wireless/ Frontier/Cox, etc.)	3,200
Waste Management/Athens	2,138
Exterminator	600
	17,811
Security	46,746
<u>Utilities</u>	
City of LB (Water, Sewer, Gas)	13,348
Enwave Energy - Fixed Loan & Energy fee	46,203
SCE	16,670
<u>Misc. Exp</u>	
Web Hosting (Zambezi)	1,500
M7 IT Service	1,517
Other Misc	2,000
AQMD	25
Payroll Processing	1,850
Monthly Elevator	5,544
Historic Resources Consulting	7,500
Landscape	11,630
Caretaker Fee	20,000
Emergency Repairs	30,000
Total	260,984

One Time Payment for Elevator Expenses in Arrears (to be issued with first payment only):

22,174.52

SCHEDULE B

City's Required Insurance of Self-Insurance

A. Property insurance covering the Property, on a special perils basis that insures against such risks as are customarily covered by such insurance and includes, without limitation, coverage for boiler and machinery insurance, but excluding damage resulting from war, nuclear energy, and DIC perils, and all perils covered by the insurance shall have limits in aggregate amounts equal to replacement cost of the Property (exclusive of foundations, footings and land).

B. Commercial general liability insurance with a limits of \$1,000,000 for each occurrence and \$2,000,000 in the aggregate including the following coverages: (i) bodily injury including sickness and disease, (ii) death, (iii) property damage, (iv) assault and battery, (v) mental anguish as a result of bodily injury, (vi) contractual liability, (vii) independent contractors, (viii) premises and operation, and (ix) products and completed operations naming the Operator an additional insured ;

C. Excess liability insurance with limits of \$9,000,000 per occurrence and in aggregate applying on an a following form basis over the commercial general liability insurance policy obtained under Section B and

D. Commercial automobile liability insurance under Symbol 1 – any auto, with minimum limits of \$1,000,000 combined single limit insuring against damage due to bodily injury, death of any person or property damage arising out of the ownership, maintenance or use of any motor vehicles, whether owned, non-owned, hired or leased, in connection with Property operations .