Lee A. Henderson
(612) 746-5750
lhenderson@hessianmckasy.com

Via E-Mail

January 9, 2014

Jeremy Hanson Willis
Director
Community Planning and Economic Development
105 Fifth Avenue South, Suite 200
Minneapolis, MN 55401

Re: Minnesota Orchestral Association Lease with City of Minneapolis

Dear Mr. Willis:

I write to respond to the letters dated December 2, 2013 and December 20, 2013[1] submitted by Michael Henson as CEO of the Minnesota Orchestral Association ("MOA") in an effort to meet the reporting requirements required of the Minnesota Orchestral Association ("MOA") in its lease ("Lease") with the City of Minneapolis ("City"). Mr. Henson's letters fall considerably short of meeting the obligations required in the Lease.

A. General Background

In May of 2013 the StarTribune published a commentary piece I wrote offering a potential solution to the then seven month old lockout.[2] The public response was significant and in two days, people responded to the op-ed piece with over a half a million dollars in pledges to help solve the financial challenges facing the orchestra. Given that response I attempted to speak with both the musicians and MOA management to see if there was interest in letting the public assist in a resolution. The musicians were receptive; MOA management refused to meet with me.

In September of 2013 I joined with retired musician Mina Fischer as part of SOS Save Osmo, as a second effort at fundraising. The two efforts together resulted in almost $1 million in pledges. MOA Management suddenly became interested in us in late September as the deadline for Osmo Vanska's resignation approached and MOA used the

[1] The letters will be referred to herein by their dates.
[2] http://www.startribune.com/opinion/commentaries/206519871.html

SOS Save Osmo name as part of a public offer (done outside the mediation process with Senator Mitchell) at the end of September.[3]

In November of 2013, the StarTribune published a second commentary piece from me that suggested among other things that the goals of the MOA management and the musicians were so at odds that reconciliation was no longer possible. As part of a plan to rebuild a world class orchestra, I suggested that the City ought to declare a breach of the lease.[4] Again the public response was overwhelming. Almost 400 people took the time to write me personal emails in support of the plan and the article was shared on over 1,300 Facebook pages.

The purpose of highlighting this information is twofold: (a) it provides you with some perspective on my involvement in this dispute so you can judge whether this submission can provide value in the City's evaluation of the Lease issues; and (b) these facts are important when dealing with some of the legal defenses asserted by the MOA in response to its obligations under the Lease.

On behalf of the more than 1,000 season ticket holders, donors, concert-goers or generally interested members of the public who continue to urge my involvement in this tragic mess, this letter is submitted to address the claims made by Mr. Henson in his submissions to the City to justify MOA's compliance with the Lease.

B. The Lease

1. The Reporting Requirements:

Under the Lease (Section 9) the MOA has an obligation to provide a report to the City on December 1 of each year that includes the following:

- A report of major activities at Orchestra Hall and a description of how the major activities meet the performing arts element of the Governmental Program (defined below)
- The MOA annual budget for the next fiscal year which shall demonstrate that forecast revenues (from all sources) will be equal to or exceed forecast program expenses
- MOA projected budgets for the next three fiscal years that show income will exceed expenses.[5]

Within 45 days after submittal of this information, the Community Planning and Economic Development (CPED) Director of the City is obligated to determine:

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[3] http://www.startribune.com/entertainment/music/225398062.html
[4] http://www.startribune.com/opinion/commentaries/231655011.html
[5] There is a third requirement related to maintenance funds available to preserve the physical condition of Orchestra Hall. The ability to meet this obligation does not appear to be an issue.

- That MOA is carrying out the Governmental Program
- That revenues equal or exceed program expenses

If the CPED Director finds that MOA has met its obligations, then the Director shall "approve the budget of Tenant" and forward its approval to the state. If the Director does not approve the budget of MOA then the Director must send a report to the City Council and the state.

2. The Use of Orchestra Hall

Under Section 13 of the Lease MOA may use Orchestra Hall only for purposes which "achieve the Governmental Program as set forth in Section 1.b. of the Lease; No use of Orchestra Hall is allowed which might "jeopardize the tax-exempt status of the general obligation bonds that funded the State Grant Proceeds."

3. The Public Purpose & Governmental Program

In Section 1 of the Lease the City explicitly identifies the public purpose of the City in agreeing to arrange for $14 million of bonding money and identifies the Governmental Program which must be met to achieve the public purpose.

The public purpose includes the following:

- It serves the public interest of the City to promote and provide for performing arts in the City.
- Orchestra Hall furthers that public purpose and "is and will continue to be a preeminent concert hall and cultural asset in the State of Minnesota and throughout the upper Midwest."

The Governmental Program includes the following:

- "a program for performing arts to be conducted in Orchestra Hall"
- "which shall achieve Landlord's goal of supporting and improving the cultural fabric of the State and region and promoting economic development and tourism."
- "to maintain a regionally renowned concert hall"
- The City recognizes "that Orchestra Hall will be utilized by multiple performing arts organizations, **in addition to** the Minnesota Orchestra."
- Compliance with the Governmental Program shall be evidenced by the fact that at least half of the earned revenue is being generated by the production or presentation of music and other performance programs.

4. Events of Default

There are a number of events that can result in a default under the Lease. Among them include the following:

- MOA fails to annually certify that Orchestra Hall is being used "as a performing arts and education center and related and ancillary activities to achieve the Governmental Program as required …"
- MOA fails to comply with the Grant Agreement

There are a number of detailed procedures that must be followed in the event of a declaration of a default and there are multiple opportunities for MOA to cure a breach. Therefore, this letter will not address those future actions. At the current time there is only one question before CPED - whether MOA has met its reporting requirements under the Lease.[6]

5. The Grant Agreement

The Grant Agreement with the state also requires that Orchestra Hall be used "for the operation of the Governmental Program or for such other use as the Minnesota legislature may from time to time designate, and for no other purposes or uses."

The City must annually determine that the property is being used for the purpose required by the Agreement "and shall annually supply a statement sworn to before a notary public," to such effect to the State.

Thus the Grant Agreement requires a City representative to sign a statement under oath that the MOA is in compliance with the Grant Agreement and the Governmental Program.

C. MOA Efforts to Meet The Reporting Requirements.

Mr. Henson's letters attempt to demonstrate MOA's compliance with its lease obligations. Mr. Henson spends a significant number of words in both letters discussing the current state of the labor negotiations (but without ever acknowledging that it is a management driven lockout). The state of MOA's labor relationship is irrelevant to the question of whether MOA has met its obligations under the lease.[7]

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[6] Another organization SOS Minnesota has recently submitted evidence to the City regarding other breaches of the Lease outside the reporting and functional use requirements for Orchestra Hall.

[7] The only issue on which the labor negotiations might have relevance is the question of *force majeure* raised by MOA's lawyers in their December 2, 2014 letter. That issue will be addressed below.

The arguments made by Mr. Henson in an effort to demonstrate MOA compliance with the Lease fall into two basic categories – Programming and Budget Issues. A summary of the arguments in each area include the following:

1. **Programming Issues**

- MOA has been actively planning programming to meet the Governmental Program along two parallel paths – one path based on the timely return of the Minnesota Orchestra and one path without the orchestra (Dec. 2 Letter, p.2);
- The Symphony Ball held on September 20 was a performing arts event (Dec. 2, Letter p. 2)
- Ten concerts are scheduled from December 1, 2013 to August 31, 2014 (one a month) (Dec. 2 Letter, P. 3);
- Other musical groups will come to Orchestra Hall (Dec. 2 Letter, p. 4)
- MOA has discretion in programming at Orchestra Hall and therefore compliance should be looked at over the decades of the long term of lease rather than the current situation (Dec. 20, Letter, p. 1); and
- There are scheduled corporate, civic and educational groups at Orchestra Hall that include music. (Dec. 20 Letter, P. 2).

2. **Budget or Finance Issues**

- The investment in Orchestra Hall was but one of many initiatives intended to increase revenues to support the viability of the organization (Dec. 2 Letter, p. 1);
- The Symphony Ball generated earned revenue to meet the 50% requirement for earned revenue from musical events in the Lease (Dec. 2 Letter, P. 2)
- MOA had 90% of its revenue from September 1 to November 30, 2013 as earned revenue (Dec. 2 Letter, P.3);
- The planned concert schedule for FY 2014 With the Orchestra meets the requirement for 51% of Earned Revenue (Dec. 2 Letter, P.3);
- The FY Budgets for 2014-2017 provided assume settlement of labor dispute (Dec. 2 Letter, P. 4 and Exhibit B)
- Board members owe a fiduciary duty to MOA, and to the generations of donors who have made development of a world-class orchestra possible, to preserve the operating solvency of the organization. (Dec. 20 Letter, p. 2);
- Budget for FY 2014 without resolution of labor dispute would be profitable and contribute to endowment (Dec. 20 Letter p. 4);

A short analysis of each of these claims judged against the requirements of the Lease is found below. The claims offered by Mr. Henson to support compliance with the Lease fail to meet even a cursory reading of the Lease and therefore CPED must determine that

MOA is not in compliance with its lease obligations and refer the matter to the City Council.

D. Analysis of The MOA Claims Justifying Compliance With the Lease.

1. Programming Issues

- **MOA has been actively planning programming to meet the Governmental Program along two parallel paths – one path based on the timely return of the Minnesota Orchestra and one path without the orchestra (Dec. 2 Letter, p.2);**

Analysis: Simply put, the Lease does not allow MOA to operate Orchestra Hall without the Minnesota Orchestra. The MOA argues in its letters that it has discretion as to the programming that occurs at Orchestra Hall and that therefore it can plan programming that does not include the Minnesota Orchestra. While it is true that the Lease provides some discretion to MOA, the allegation that MOA can plan programming for Orchestra Hall without the Minnesota Orchestra misstates the Lease requirements. Section 1 of the Lease states:

> Landlord further recognizes that Orchestra Hall will be utilized by multiple performing arts organizations, **in addition to the Minnesota Orchestra**, and that the success of the Governmental Program will consequently require Tenant to act as an overall facility master developer, operator and promoter.

(emphasis added)

The phrase "in addition to the Minnesota Orchestra" makes it explicit in the Lease that the Minnesota Orchestra is a mandatory part of the Governmental Program, not an optional program that the MOA can disregard. Its failure to offer Minnesota Orchestra concerts since May of 2012, and to argue that it can program for Orchestra Hall without the Minnesota Orchestra clearly breaches its obligations under the Lease.

- **The Symphony Ball held on September 20 was a performing arts event (Dec. 2, Letter p. 2)**

Analysis: The MOA argues in its letter that the Symphony Ball held on September 20, 2013 at Orchestra Hall was a performing arts event (and generated earned revenue) that assists in compliance with the Lease. The Symphony Ball is an annual fundraiser designed to generate donations to the MOA.[8] The most recent Symphony Ball which is the subject of this claim was described by an MOA spokesperson, not as a performing

[8] See the description on the MOA website: http://www.minnesotaorchestra.org/events-a-tickets/browse-calendar/icalrepeat_detail/533/-/-

arts event, but as "the largest fundraising event for the organization.[9] The same spokesperson also stated that "the funds (generated) will not be used until a contract is in place." *Id.*

The event was attended by 500 people and was not generally available to the public. While in most past years the Minnesota Orchestra has played for this event, this year there was a local band Belladiva "a show band" according to its website that performs at corporate events, parties and wedding receptions. This type of event does not meet the test for performing arts in a public facility subsidized by public funds, which are supposed to support and improve "the cultural fabric of the State and region and promoting economic development and tourism."

In the 110 year history of the MOA, the Symphony Ball (or WAMSO Ball as it used to be called) has never been promoted as anything other than a fundraising event for the MOA. While the MOA deserves accolades for the success of the Symphony Ball as a fundraiser, its assertion that it is a "performing arts event" is a credibility crushing claim. In a court of law, a jury would be told that if it found such a statement to be not credible, it would have the right to ignore every other statement made by the MOA during the trial. At the very least, this "out in left field" statement should make CPED cast a critical and skeptical eye on every other claim Mr. Henson has made in his communications regarding MOA's compliance with the Lease. The Symphony Ball was not a performing arts event and is not proof of MOA's compliance with its Governmental Program requirements.

- **Ten concerts are scheduled from December 1, 2013 to August 31, 2014 (Dec. 2 Letter, P. 3);**

Analysis: In the December 2, 2013 Letter Mr. Henson indicated that MOA had 10 concerts scheduled between December 1, 2013 and August 31, 2014. Four of those occurred on two days in December when two long scheduled college Christmas concerts were held.[10]

Examining the schedule also reveals that despite the rhetoric that MOA is scheduling music events, there is literally nothing scheduled. In reality (see next section below) there are only a couple of middle and high school musical performances on the schedule. That hardly qualifies as an ongoing program for performing arts to be conducted in Orchestra Hall "which shall achieve Landlord's goal of supporting and improving the cultural fabric of the State and region and promoting economic development and tourism."

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[9] http://www.startribune.com/entertainment/music/224661701.html

[10] In the December 20, 2014 letter, MOA claimed that other corporate events that might have some background music also qualified as a musical event. Of course, these events have a purpose other than a performing arts performance available to the general public. They are private events and the music is clearly secondary to the primary purpose for the meeting.

- **Other musical groups will come to Orchestra Hall (Dec. 2 Letter, p. 4)**

Although MOA has left Vocal Essence concerts on the schedule, Vocal Essence moved its fall concert out of Orchestra Hall because of the lockout and would presumably do the same for any future concerts if the lockout remains in place. Its March concerts have already been moved to Central Lutheran Church.[11] Both Bill Cosby and the Preservation Hall Jazz Band who were scheduled to perform in September have been rescheduled for May. Both initially canceled because of the lockout, and presumably neither would appear in May if the lockout remains in place. Angelica Cantanti, a youth choir group, is also scheduled in May, although if you look at the organization's web site, there is no location noted in regard to the May concert. Presumably this also means that they may find a new location if the lockout remains in place. The argument that other groups will come to Orchestra Hall is dis-proved by the MOA's own schedule and clearly does not meet the requirements of the Governmental Program.

- **MOA has discretion in programming in Orchestra Hall (Dec. 20, Letter, p. 1) and therefore compliance should be looked at over the decades of the long term of lease rather than the current situation**

Analysis: MOA attempts to avoid the consequences of this failure of programming by arguing that this is only temporary and the lease is long term. Yet, the reality is that virtually all professional musicians are part of the musicians' union. Accordingly, so long as this management maintains as the lynchpin of its bargaining strategy the lockout it initiated as an offensive weapon in this dispute, no professional musical groups will play at Orchestra Hall. Moreover, while the Lease gives MOA discretion in the timing and programming of concerts, there is nothing that suggests that its performance is to be measured over the life of the Lease. Rather, MOA is required on an annual basis to demonstrate compliance with the Governmental Program. This is logical since the purpose of the bonding money was to create a public asset that drives economic development and tourism. It does neither when it sits empty and unused. MOA has clearly failed to meet the Governmental Program requirements under the Lease.

- **There are scheduled corporate, civic and educational groups at Orchestra Hall which include music. (Dec. 20 Letter, P. 2);**

Analysis: In stark contrast to the small number of performing arts concerts scheduled, there are currently 38 corporate events and two wedding receptions scheduled. Only two or three of these have been identified as having even background music. It is difficult to believe that either the City or the State intended that its investment of $14 million of public bonding money for Orchestra Hall was intended to provide a facility where corporate meetings and wedding receptions has become the predominant use. Even background music at such events does not meet the public purpose of Orchestra Hall. The Lease provides that Orchestra Hall furthers the public purpose of a performing arts

[11] http://www.vocalessence.org/rutter_announcement

center and "is and will continue to be a preeminent concert hall and cultural asset in the State of Minnesota and throughout the upper Midwest." A corporate event center does not meet that test nor does it fulfill the requirement that Orchestra Hall is only to be used for events that meet the Governmental Program. Renting the facility for corporate events does not satisfy any of the requirements for the Governmental Program. MOA has clearly failed to meet the Governmental Program requirements under the Lease.

The Lease also provides that "no use shall be made or shall be permitted to be made of the Premises… which will jeopardize the tax-exempt status of the general obligation bonds that funded the State Grant Proceeds." Although this area may require further analysis, it appears that State Grant Proceeds are tax exempt if the use meets the federal tax law regulations for tax-exempt status. Under 501(c)(3) of the IRS Code, an organization must be operated exclusively for exempt purposes to maintain its tax exempt status. It is difficult to understand how operating Orchestra Hall primarily as a corporate event center meets the tax exempt purpose for which MOA was founded. At the very minimum, the renting of Orchestra Hall for corporate business purposes would appear to be unrelated business income that creates tax consequences for MOA. This is an area that should probably be reviewed further by the Attorney General's office responsible for the issuance of state tax-exempt bonds.

2. Budget or Finance Issues

- **The investment in Orchestra Hall was but one of many initiatives intended to increase revenues to support the viability of the organization (Dec. 2 Letter, p. 1);**

Analysis: MOA has long pitched the investment in Orchestra Hall as a necessary tool to increase the revenues of the organization so that it can better meet its obligations. Yet, when you look at MOA's own proposed budgets submitted to the City, there is almost no growth in earned revenues over the next three years and a miserably small return on its $52 million investment in Orchestra Hall.

MOA Financial Projections for Earned Revenue

Fiscal Year	2014	2015	2016	2017
Earned Revenue (in $$)	10,177,000	10,195,000	10,391,000	10,592,000
Revenue Growth (in $$)		18,000	196,000	201,000
Revenue Growth (in %)		0.0496%	1.9225%	1.9344%
Return on Investment (in %)		0.0033%	0.3769%	0.3865%

The forecast in revenue growth certainly would not justify a $52 million capital investment in the businesses of any of the Board members of the MOA. In fact, with these projections, the return on investment does not even exceed the ongoing cost of the capital (except for the fact that much of the investment capital was donated).

One would have expected a major promotion of the new hall when it was completed much like the opening of a new sports stadium where people are anxious to come and see the new facility and so they buy tickets to events. That has not happened and the good will associated with such an opening of the hall has certainly been lost by the lock out and the negative publicity from the lockout.

- **The Symphony Ball generated earned revenue to meet the 50% requirement for earned revenue from musical events in the Lease (Dec. 2 Letter, P. 2)**

Analysis: This is in many ways the most incredulous statement found in the Henson letters to the City. The MOA claimed that the Symphony Ball dinner ticket proceeds are properly counted toward the 50% requirement for earned revenue from musical events. Never before in the history of the MOA has it ever claimed that Symphony Ball (or WAMSO) proceeds constituted earned revenue. In its published financial statements year after year, the Symphony Ball or WAMSO proceeds are listed under "Contributed Revenue" which includes contributions and gifts and foundation distributions.[12]

When proceeds from the Symphony Ball ticket sales are excluded, MOA clearly has not met the 50% requirement for earned revenue from musical events. See analysis below.

- **MOA had 90% of its revenue from September 1 to November 30, 2013 as earned revenue (Dec. 2 Letter, P.3);**

Analysis: MOA claims that 90% of its revenue for this fiscal year came from musical events:

Event Type September 1 to November 30, 2013	Revenue from Ticket Sales Rental Fees/Other Earned Income	% of Revenue
Performing Arts Events	$600,990.00	90%
Non-performing Arts Events	$67,000.00	10%
Total	$667,990.00	100%

[12] See page 4 of the most recent annual report http://www.minnesotaorchestra.org/images/pr/pdf/1213_MOA_annualreport.pdf which covers 2013 and 2012; and page 7 from the 2011-2012 report which shows the same designation for those years: http://www.minnesotaorchestra.org/pdf/1112_Annual_Report/#/7/zoomed

Since the Symphony Ball proceeds cannot properly be characterized as earned revenue, if you eliminate the revenue attributable to the Symphony Ball[13] from this spreadsheet, it now looks like this:

Event Type September 1 to November 30, 2013	Revenue from Ticket Sales Rental Fees/Other Earned Income	% of Revenue
Performing Arts Events	$30,990.00	31%
Non-performing Arts Events	$67,000.00	69%
Total	$97,990.00	100%

Thus, as of December 1, 2013, MOA did not meet the requirement that at least half of the earned revenue is being generated by the production or presentation of music and other performance programs. Thus, MOA is in violation of the Lease.

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- **Planned Concert Schedule for FY 2014 with the Orchestra meets the requirement for 51% of Earned Revenue (Dec. 2 Letter, P.3).**

The MOA makes the argument that its planned concert series with the orchestra for this fiscal year also meets the requirements for 51% of earned revenue. This is a non-starter as the MOA is now in the 5th month of its fiscal year and has not offered a single orchestra concert that was on its proposed schedule (for purposes of this argument, we do not analyze the particulars of the concert series, although it has been widely panned in the press and includes things like Bugs Bunny and the Symphony). Given the state of the lockout and the almost total lack of other concerts scheduled, MOA cannot use a *proposed* schedule – which has not been implemented - as proof that it is meeting the earned income requirements of the Lease.

- **FY Budgets for 2014-2017 provided assume settlement of labor dispute (Dec. 2 Letter, P. 4 and Exhibit B)**

In its initial submission MOA provides budget estimates through 2017 which all assume the orchestra dispute is resolved. Of course, we are almost half way through fiscal 2014 and there has been no resolution, so the operating budget for 2014 is no longer accurate, if it ever was.

If you compare Exhibit A of the December 20, 2013 letter ("Exhibit A") with Exhibit B in the December 2, 2013 letter ("Exhibit B"), you will find significant discrepancies.

[13] MOA claims it makes $1 million a year on the Symphony Ball. http://www.minnesotaorchestra.org/about/press-room/678-symphony-ball-2013. In the December 2, letter, Mr. Henson indicated $430,000 of the proceeds were donations leaving $570,000 in earned income.

Exhibit A was submitted as part of the bonding application some time ago; Exhibit B should be the updated budget estimate. For example, in Exhibit A, the budget contemplates $360,610 in "Other Concert Revenue" which is the touring revenue category. Exhibit B contemplates $823,000 in Other Concert Revenue, or more than twice as much revenue from touring in this fiscal year than originally contemplated. It is difficult to understand how prudent budgeting would double the revenue for touring in FY 2014, when by December of 2014 (25% into the fiscal year) there was no resolution in sight to the lockout and MOA management had already canceled scheduled tours to Carnegie Hall in New York.

It is also interesting that the updated budget for FY 2014 assumes a drop of almost $300,000 in ticket sales, even after the major addition to Orchestra Hall was completed.

The MOA's budgets are grounded in the assumption that the labor dispute is resolved, when in fact, there is no end in sight. Such clearly erroneous financial calculations cannot be used to satisfy the Lease provisions which require MOA to provide budgets that show that income *will* exceed expenses over the next several fiscal years. While future projections require certain assumptions, the numbers in these projections have no bearing on reality and thus fail to meet the requirements of the Lease.

- **Board members owe a fiduciary duty to MOA, and to the generations of donors who have made development of a world-class orchestra possible, to preserve the operating solvency of the organization. (Dec. 20 Letter, p. 2).**

MOA often makes this argument to justify its lockout of the musicians. Of course, the tactics employed are like injecting a lethal dose of medicine into a cancer patient in a desire to cure the cancer. MOA has severely damaged the standing and reputation of the Minnesota Orchestra in the Twin Cities, the state and around the world by its actions. Destroying the orchestra and its world class reputation in the name of "operating solvency" may itself be a breach of the fiduciary duties of the board members. There are/were many ways to deal with the budget shortfalls that have confronted major symphony orchestras over the last several years. Other major orchestras have solved their economic issues through a variety of different approaches all of which have sought to preserve the artistic quality of the orchestra. A good example can be found in Cleveland with the Cleveland Orchestra.[14] Thus, the arguments that reducing musician salaries by one-third is the only method by which the orchestra finances can be improved is inaccurate and misleading. Arguments related to fiduciary duty have no bearing on whether MOA is in compliance with its financial obligations under the Lease.

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[14] See a summary of the Cleveland Orchestra Annual Report found here: http://www.cleveland.com/musicdance/index.ssf/2013/12/cleveland_orchestra_reports_ba.html and the actual report found here: http://issuu.com/theclevelandorchestra/docs/tco-annual-report-1213-v15-final-hi. A comparison of the Minnesota Orchestra and Cleveland Orchestra situations can be found here: http://www.orchestrateexcellence.org/a-tale-of-two-orchestras/

- **Budget for FY 2014 without resolution of labor dispute would be profitable and contribute to endowment (Dec. 20 Letter p. 4).**

It takes some hutzpah to report to the City that by locking out the musicians, and putting on no orchestra concerts, the MOA can be profitable and add to its endowments. Starbucks has periodically dealt with astronomical increases in the price of coffee caused by freezing temperatures in South America. Its response was not to stop selling coffee and therefore report higher profits. Howard Schultz, the founder of Starbucks, relates this story in his book, "*Pour Your Heart Into It*" and concludes:

> The more profound lesson of the 1994 crisis hit me months after the event. What if we had opted for the easy solution and cut corners on our coffee?
>
> We could save millions of dollars every year if we bought even slightly cheaper coffee…If you can raise profits by shaving costs on your main product and 90 percent of your customers wouldn't even notice, why not just do it?
>
> Because we can tell the difference… If we compromise who we are to achieve higher profits what have we achieved? Eventually all our customers would figure out that we had sacrificed our quality, and they would no longer have a reason to walk that extra block for Starbucks.
>
> Higher profits at the cost of poorer quality? The best people would leave. Morale would fall. The mistake would eventually catch up with us. And the chase would be over.
>
> Every business has a memory. The memory of sacrificing quality for profit would have been fixed in the minds of Starbucks people forever. It would havce been an impossible price to pay.

Id. at p. 242

What MOA seeks to hide by trumpeting its concert-less profit, is that it spent $13 million in the last fiscal year without putting on a single concert. It balanced its books by drawing down on endowments that were given for the production of great classical music to pay administrative expenses and lawyers. For example, the Oakleaf Trust, which constitutes half of the Minnesota Orchestra's Endowment has as its purpose: "to enhance the quality of the Minnesota Orchestra." One can reasonably ask whether the payment of administrative expenses and lawyers in a year that did not include a single orchestra concert, was the expenditure of endowment funds to enhance the "quality" of the Minnesota Orchestra. In fact, one could argue that attempting to reduce musician salaries by one-third and deliberately seeking to downgrade the quality of the orchestra is a breach of the Oakleaf Trust agreement. That however is not a decision that the City needs to make; however, it raises questions and refutes the argument that the continuing lockout is somehow creating profit for the MOA. Under that theory, the MOA can leave

Orchestra Hall dark for the remainder of its lease, and continue to grow the endowments with their annual profit. That certainly is not what the renovations of Orchestra Hall were intended to accomplish. The argument that this year will be a profitable year for MOA should, if anything, be an alarm bell to the City that there are serious problems with the MOA performance under the Lease.

3. Conclusion

Under any number of combinations of the factors above, it is impossible for the City to conclude that the MOA is in compliance with its obligations under the Lease. The Director of CPED should make the determination that the MOA is not in compliance with its Lease obligations and refer the matter to the City Council for further action.

E. Legal Defenses Raised By MOA In Its Legal Letter

In an unusual step for an entity reporting on its performance activities to demonstrate compliance with its Lease obligations, MOA submitted a letter from one of its lawyers, with legal arguments as to why MOA should not have to perform under the Lease. These arguments are twofold: (a) MOA has no obligation to report anything until December 1, 2014; and (b) the Force Majeure Clause in the Lease should excuse any MOA performance while the lock out remains in place. Each argument will be addressed below.

1. The December 1 Reporting Date Applies in 2013.

MOA argues that the Lease contemplates an initial report in December of 2014. This is not correct and in any event, the City has the right to demand information demonstrating compliance with Lease requirements at any time.

MOA tries to argue that December 1, 2014 is the first required reporting date by using a definition found in the Grant Agreement. However, the Lease itself contains a different definition. Section 21 of the Lease defines the Completion Date as follows:

> The Improvements shall be substantially completed no later than December 1, 2013 (the "Completion Date").

By definition the Completion Date could be any date up to but not later than December 1, 2013 so long as the improvements were substantially completed.

The reporting obligations are as follows:

> On or before each December 1, commencing on the December 1 first following the Completion Date Tenant shall submit…

If the completion Date was to be an exact date of December 1, 2013, then the definition in the Lease would not have included the phrase "no later than." In fact, the parties contemplated that the construction would be completed in the late summer of 2013 so the time period to December 1 was just extra time in case there were construction issues. Given that Orchestra Hall was in use in late August or early September 2013, the Improvements were clearly substantially completed well before December 1, 2013. That makes the first report due on December 1, 2013. The MOA argument that it provided some of the required information when the bonding approval was given by the City in 2010 is hardly an excuse for not providing actual information after the improvements were completed.

Further, Section 9a of the Lease gives the Landlord the right to ask for information at any time. Thus the argument that no reporting was required is a flimsy excuse and has no support in the documents.

2. *Force Majeure* Does Not Apply To The Current Situation.

MOA makes implicit threats to the City that any adverse action by the City will be met with potential litigation in which MOA will argue that the management imposed lockout is an event outside the control of MOA and thus excuses performance under the *force majeure* clause in the Lease.

This of course, is an extraordinary position to take, particularly when the MOA's chosen mediator suggested a path to end the lockout and commence negotiations that was accepted by the musicians and then rejected by MOA – and rejected by the MOA because it believed that ending the lockout would "reduce its leverage" in the contract negotiations.[15] It is also amazing that MOA would take this position, when it used the lockout as an offensive maneuver in the labor negotiations, and essentially would not discuss the situation. *See pp. 1-2 above.*

The Lease defines "Unavoidable Delays" in a section entitled "Construction of Orchestra Hall Improvements" as

> …subject to delays in the performance obligations for construction of the Orchestra Hall Improvements due to the unforeseeable causes beyond the control of the Tenant and without the fault or negligence of either party, including but not limited to adverse or sever weather conditions, acts of God, acts of the public enemy, strikes and other similar labor troubles, fire, floods, epidemics, quarantines, unavailability of power, unavailability of materials, delays due to damage or destruction of the Premises or the equipment used to construct the same, discovery of hazardous materials or other concealed site conditions including environmental issues, or delays of contractors due to such discovery, and litigation commence by third parties which by injunction or other similar

[15] http://www.startribune.com/entertainment/music/219851071.html

> judicial action directly results in delays and other casualty to the Premises, or affect the validity of this Lase ("Unavoidable Delays").

On its face, this language relates to the actual construction of the Orchestra Hall improvements and grants relief from the required completion date if extraordinary events occur related to the actual construction.

The Lease then states in Section 13:

> Throughout the term of this Lease, the operation of the Governmental Program on the Premises shall be subject to Unavoidable Delays, as defined in Section 21 herein.

This language raises more questions than it answers. Given the general strictness with which *force majeure* clauses are interpreted, the language in Section 13 could easily be interpreted to mean that future construction related events that might impact operations of the Hall would be subject to *force majeure*. It is quite a stretch however, to argue that MOA's relationship with the musicians of the Minnesota Orchestra – the purpose for which the hall was built is somehow subject to construction related *force majeure* provisions.

Even if the Section 21 definition arguably applies to Orchestra Hall operations, including performances by the orchestra musicians, the language does not excuse MOA from presenting performances because of the lockout.

The commonly understood meaning of "delay" is to "postpone until a later time;" "to defer;" "to cause to be later or slower than expected or desired." [dictionary citation omitted] The Orchestra's 2012-2013 season was not "delayed;" it was *cancelled*. The 2013 season began in September with no announcement of any proposed concerts. The December 2, 2013 letter was the first identification of a proposed concert schedule and most of it has already been canceled. All of the concerts that have been cancelled are not subject to the *force majeure* clause since they will never be rescheduled. MOA's failure to operate the Hall in accordance with its obligations is thus not excused by this provision.

The Section 21 definition of "Unavoidable Delays" is in the conjunctive: "beyond the control of [MOA] ***and*** without the fault or negligence . . . "[Emphasis added.] Thus, the absence of "fault or negligence" is not enough to get MOA off the hook under this provision; the delay *also* must be "beyond the control of [MOA]."

A strike called by the Union would be "beyond the control" of MOA. Accordingly, "similar *other* labor troubles" must be interpreted as being the other generally recognized tactics of *unions*, e.g., slowdowns, intermittent or sit-down work stoppages, work-to-rule, wildcat strikes, etc. In contrast, far from being beyond the control of MOA, the lockout was *initiated by management* as an offensive weapon to enhance its bargaining power in

negotiations. This interpretation is underscored by the obvious omission of the term "lockouts" from the list of "similar other labor troubles." The rejection of Senator Mitchell's proposal to engage in mediation because it would cause MOA to lose leverage is further proof that the cause for non-performance here is not beyond the control of MOA.

There are other problems with the *force majeure* argument. By its express language, the alleged cause must be unforeseeable. Labor problems with the musicians were certainly not unforeseeable at the time the Lease was signed. In fact, MOA makes much of the fact that it told the City that it had to reduce the salaries paid to orchestra musicians by millions of dollars:

> …when discussing the Lease and bond financing we fully informed the City of the need to reduce labor costs by several million dollars…

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MOA argues that it should not have to perform under the Lease if it causes the MOA to lose money. The Uniform Commercial Code which governs the sale of goods (and does not apply directly here) deals with commercial impracticability, but makes clear that just losing money is not an excuse to performance:

> 4. Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.

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There has been no unforeseen contingency which alters the essential nature of the performance. Nor does a rise or fall in the market justify non-performance. MOA had and has many options with respect to raising revenue and raising more donations to fund the orchestra. Determining that the only way it was going to balance its books was on the backs of the musicians does not meet the requirements for *force majeure*.

There are numerous other issues that can be analyzed with respect to this issue that would require a separate legal brief. However, for purposes of determining whether MOA has met its obligations under the Lease, the force majeure arguments raised by MOA's counsel fail to provide any basis to excuse performance under the Lease. In fact, it is extremely difficult to imagine a circumstance, other than in the construction phase of the improvements, or some catastrophic fire or other damage to Orchestra Hall, where the City would voluntarily agree that force majeure applies.

F. Conclusion

The issues raised in this letter have been caused by a relatively small number of management level people within MOA. Many of the MOA board members have a deep love for the Minnesota Orchestra and I suspect are aghast at the current state of events, even if they are not free to state that publicly. It is clear that MOA has not met its obligations as the Tenant under the Lease. CPED's determination supporting that conclusion is required under any rational review of MOA's performance under the Lease. Making the determination and commencing the process under the Lease for review and potential cures is a very important factor that may bring some rational discussion to the overall dispute and lead to changes that will ensure future compliance with the Lease and the continuation of a world-class orchestra in Minnesota. That should be everyone's goal. The City has an important role to play.

Thank you for your consideration of these important issues.

Very truly yours,

Lee A. Henderson

cc: Hon. Betsy Hodges, Mayor
Charles T. Lutz, Deputy Director
Susan Segal, Esq., Minneapolis City Attorney