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December 2, 2013

HAND DELIVERED

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

RE: Provision of Governmental Program during Labor Dispute

Dear Mr. Hanson Willis:

Our firm represented the Minnesota Orchestral Association (“MOA”) with respect to the construction of the expanded Orchestra Hall and continues to represent MOA regarding the Lease and Use Agreement (the “Lease”) for operation of the Hall. We are responding to Chuck Lutz’s letter of November 12, 2013 indicating an obligation to submit the first annual program report and budgets this December 1.

MOA appreciates the strong support of the City and the State in helping to bring the Orchestra Hall renovation and expansion to fruition as a world class performance venue. The contribution of the citizens of Minnesota through the State bonds allowed MOA to update this 40-year old building to modern functionality, safety and energy standards, positioning MOA to operate the Hall, in cooperation with the City, for many years into the future.

By separate letter from Michael Henson, MOA is providing information regarding Hall operations for the few months since physical completion of the Improvements. Although programming has been adjusted to account for the continuing labor dispute, the report demonstrates full compliance with the general programmatic test and the specific financial test under the Lease, even for this abbreviated period since MOA has regained occupancy of the Hall.

Notwithstanding the submission of MOA’s report in response to Mr. Lutz’s letter and the Lease compliance demonstrated by such report, we feel we must respectfully reserve the MOA’s position with

respect to several legal points regarding both the report and MOA's performance obligations under the Lease, as described below, in the event that, at some point in the future, further issues or questions arise regarding MOA's performance under the Lease that are dependent upon an interpretation of those points.

Initial Reporting Period. First, an initial report under the Lease is not required until December 1, 2014. This 2014 initial reporting date is clear from the plain language of the definition of "Completion Date" in both the Lease and the Grant Agreement.¹ In each instance, the Completion Date is defined as a date certain of December 1, 2013, and the first report is therefore due on the next December 1, or December 1, 2014. The date of physical completion of the Improvements was uncertain when the Lease and Grant Agreements were drafted and the parties contemplated that construction might not be fully complete until as late as December 1, 2013. December 1, 2013 was not contemplated to be the first reporting date, a date by which it was possible no operations would have yet occurred. (See, e.g., Lease Section 10(h).) It would be nonsensical and circular for the Lease to require that all Improvements be completed by the Completion Date, if the Completion Date was defined as the date all Improvements are completed. The only reasonable interpretation of the Lease is that the parties intended for "Completion Date" to mean December 1, 2013, the date by which all Improvements must be concluded, and the first report to be due the next December 1 – December 1, 2014.

The 2014 initial reporting date is also evident by the fact that much of the information now being reported was already provided to the City as part of the project approval. In connection with the project approval process, including the State Predesign and Legislative Chair approvals, the City and the State received, reviewed and approved the performance schedule being planned for 2013/2014, and the full fiscal year budgets for FY 2014, 2015 and 2016. All this information was included in the original MOA strategic plan and budget submissions, which were fully reviewed and approved by the City, and is again provided in MOA's current report.

As noted above, notwithstanding the plain language of the Lease regarding the initial reporting date, MOA understands the City's desire for information given the protracted labor dispute and is cooperating fully with the City's requests for responsive information.

Applicability of Force Majeure Clause. As noted in the report provided by Mr. Henson, MOA has pursued a dual track with its planning, creating alternative artistic programming during the labor dispute and also preparing to promptly commence programming with the Minnesota Orchestra and guest artists

¹ The Grant Agreement provides in Section 1.01: "'Completion Date' – means December 1, 2013, the date of projected completion of the Project." The Lease provides in Section 21: "The Improvements shall be substantially completed no later than December 1, 2013 (the "Completion Date") ..." Section 9 of the Lease states the annual reporting obligation occurs on each December 1, "commencing on the December 1 first following the Completion Date," such that the initial report is due December 1, 2014.

upon settlement of the dispute. Programming activities under both approaches are designed to fulfill the Lease terms and, even if this were not the case, MOA's operation of the Governmental Program would be excused under the *force majeure* clause in the Lease.

Sections 13 and 21 of the Lease recognize that performance will be excused in the case of Unavoidable Delays. "Unavoidable Delays" is defined as events "beyond the control of [MOA] and without the fault or negligence of either party, including but not limited to . . . *strikes and other similar labor troubles* . . ." (emphasis added). The current labor situation meets the requirements to constitute an Unavoidable Delay on two separate and independent grounds, each of which alone is sufficient to excuse performance under the Lease: (1) the Lease recognizes that "strikes and other similar labor troubles" are per se Unavoidable Delays; and (2) even if it were not among the enumerated delays, the circumstances of this labor dispute that are impacting MOA's performance are Unavoidable Delays because they are "beyond the control . . . and without the fault or negligence" of MOA.

The current labor dispute falls squarely within the itemized occurrence of "strikes and other similar labor troubles," an event that is by definition an Unavoidable Delay. This common *force majeure* provision is intended to protect against interference with the federally protected rights of employers and employees to collectively bargain over the terms and conditions of employment and to ensure the full use of economic pressures and leverage available to the parties in contract negotiations. Although the term "lockout" is not specifically used in the Lease, strikes and lockouts are parallel rights of parties to a labor negotiation and are undoubtedly "similar labor troubles." See *California ex rel. Lockyer v. Safeway, Inc.*, 371 F. Supp. 2d 1179, 1190 (C.D. Cal. 2005) (explaining that the "linkage of strikes and lockouts demonstrates that they are *two sides of the same coin* under national labor policy. . ." (emphasis added)); cf. *Independent Sch. Dist. No. 12 v. Minn. Dep't of Educ.*, 788 N.W.2d 907, 913 (Minn. 2010) (stating that the use of the term "include" introduces a non-exhaustive list of examples). This interpretation is further confirmed by the parties' awareness at the time of the Lease negotiations that labor difficulties were possible. MOA fully disclosed to the City that significant restructuring of the union contract was necessary to meet budgets and financial projections. The *force majeure* provision was intended to directly address the possibility, while not desirable, that labor unrest could occur as a result of efforts to reach a financially sustainable contract.

Also, the circumstances of this dispute and the lack of a resolution with the musicians are factors well "beyond the control" of MOA. A party in a labor dispute is not obligated to settle on economically untenable terms, even though such a settlement is always within the party's theoretical control by agreeing to the other party's demands, whether the work stoppage is due to strike or lockout. An employer has no reasonable choice but to initiate a lockout when labor demands are financially unsustainable, but such action is not within the employer's reasonable control or due to the employer's "fault or negligence." See *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales*, 729 F.2d 1530, 1539-42 (5th Cir. 1984) (applying a reasonableness limitation to the control analysis of a *force majeure*

provision); *Powers v. Stats*, 70 N.W.2d 344, 348-49 (Minn. 1955) (concluding that a significant deviation in expense could excuse nonperformance); Williston on Contracts § 77:92 (4th ed. 2013).²

MOA also cannot control the fact that the musicians' union has not been willing to engage in meaningful bargaining. While MOA has made numerous concessions and compromises, the union has only once offered a substantive contract proposal during the course of the past 20 months; instead it has repeatedly presented an ultimatum to MOA: reinstate employment at prior salaries as a precondition to their participation in substantive negotiation over the contract terms. Because MOA cannot compel the musicians to come to the table and compromise, and cannot afford to reinstate the prior salary levels for an indefinite period, resolution of this labor dispute is beyond the control of MOA.

Finally, other actions by musicians and other third parties have also interfered with MOA's efforts to present arts programming in the Hall, further reflecting the existence of "similar labor troubles" and other events beyond MOA's control. Picketing, adverse publicity, and other labor dispute tactics have resulted in multiple cancellations and delays in performance by music organizations scheduled to perform in Orchestra Hall.

Conclusion. The Minnesota Orchestral Association desires to cooperate with the City and so has provided the requested report demonstrating compliance with the requirements of the Lease in the short period prior to December 1, 2013. It has further described its program for future musical performances and its commitment to a rapid return to performances by the Minnesota Orchestra, upon settlement of the current labor dispute.

MOA is a non-profit organization made up of hundreds of supporters of orchestral music. It has served the community for decades as the community's vehicle for bringing symphonic music to the Twin Cities. While MOA appreciates the assistance of the citizens of the State in the Hall's renovation, it must be recognized that MOA also brings to this endeavor significant assets that make the Orchestra possible: its endowment and annual fund-raising capability, private investment in the Hall far in excess of the State Bond funds, its devoted management and staff and its board members' decades-long commitment of volunteer time and financial resources to symphonic music performances. MOA did not seek salary concessions from its union lightly, but does so because the continued erosion of the endowment is unsustainable. MOA remains committed to a negotiated settlement with its musicians that will ensure sustainability of the Orchestra for the full duration of the Lease term.

² The economic viability of MOA requires a material reduction in expenses from the expired labor contract, a contract that was entered into before the Great Recession and that provided significant salary increases to musicians during a period of years when investment earnings and contributions declined and other MOA expenses were cut. The result has been large draws from endowment well over a sustainable 5% level. The compensation levels of the expired contract cannot be supported even over a short duration by the endowment, let alone over the 50-year Lease term.

Mr. Jeremy Hanson Willis

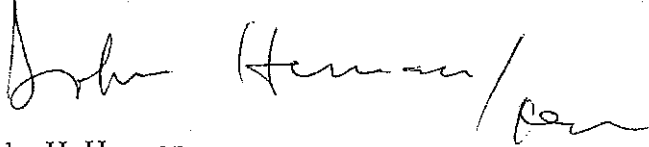
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December 2, 2013

We believe the MOA has demonstrated compliance with the Lease in its submission, but we must respectfully reserve the MOA's positions with respect to the contract terms discussed above, so as to preserve the normal interplay of labor and management negotiations that are necessary to resolve the current labor dispute. Thank you for your consideration of these issues as part of your review of MOA's program submission. Please call me or my partner Kathy Noecker (612/766-8604) with any questions or to discuss these issues at any time.

Sincerely,

FAEGRE BAKER DANIELS LLP

A handwritten signature in cursive script that reads "John H. Herman" followed by a stylized flourish.

John H. Herman

HERJH

cc: Shelley Roe/Minneapolis City Attorney (via hand delivery)
Charles T. Lutz, Deputy Director (via hand delivery)
Michael Henson
Bryan Ebensteiner
Kathy Noecker