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Via FedEx & Electronic Mail

IRS EO Classification
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Re: Tax Exempt Organization Complaint Against Milwaukee World Festival, Inc. d/b/a Summerfest (EIN: 39-1049688)

Dear Sir or Madam:

I respectfully submit this Tax-Exempt Organization Complaint and supporting documentation to the Internal Revenue Service (“IRS”) regarding the activities of Milwaukee World Festival, Inc. d/b/a Summerfest (“MWF”) (EIN: 39-1049688). MWF is a Wisconsin corporation and tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the “Code”).

However, over the years, MWF has significantly diverged from its non-profit mission and instead operated as a commercial entity. As described in greater detail below, MWF has deliberately positioned itself to directly compete with for-profit firms in the Milwaukee area. MWF leverages its tax-exempt status to engage in anti-competitive behavior which has and continues to harm those for-profit firms, especially local concert promoters and venues. Along the way, MWF has amassed assets and capital reserves while simultaneously compensating its executives with salaries and benefits that rival the commercial sector and far exceed its non-profit counterparts. In 2020, when MWF lost over \$15 million and received nearly \$1 million in PPP money, its CEO, Don Smiley, was still paid a whopping \$1,292,068 in compensation. That same year, MWF’s primary programming—a concert event called Summerfest—was canceled due to COVID.

MWF’s operations are in clear violation of the commerciality doctrine. Because a 501(c)(3) must be operated exclusively for charitable, educational, or other exempt purposes, when a non-profit begins operating in a commercial manner, it must forfeit its tax-exempt status. I respectfully request that you review the attached materials and submit that they are evidence that MWF has ceased operating exclusively for charitable purposes and should no longer have the privilege of operating as a 501(c)(3).

A completed form 13909 is enclosed with this letter.

I. Background¹

¹ I have attempted to collect as much relevant information as possible from publicly available sources, including media stories, MWF’s tax filings and public records, and information available on the Internet.

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MWF was founded in 1965 as an “independent, private 501(c)(3) corporation.”² Summerfest is the trade name of the annual music festival produced by MWF each year. According to its 2020 Form 990, MWF’s mission is:

... [T]o promote an understanding of different ethnic cultures, the histories and traditions of various nationalities, harmony in the community, civic pride and provide a showcase of the performing arts, activities and recreation for the public and employment opportunities for the youth of the community.³

In addition to annually hosting Summerfest, an outdoor summer concert event presenting popular national and regional music acts, MWF maintains and improves Henry Maier Festival Park, located on 75 acres on the shores of Lake Michigan in Milwaukee.⁴ “In December 1985, the City of Milwaukee leased lakefront property to [MWF], a nonprofit corporation which organizes events such as Summerfest and several ethnic festivals on what is commonly known as the Summerfest grounds in Milwaukee. This property had earlier been conveyed to the City from the state by statute (ch. 151, Laws of 1929, and ch. 76, Laws of 1973). These statutes provide that the land will revert to the state if it is not used in a manner consistent with the public trust.” *State ex rel. J./Sentinel, Inc. v. Pleva*, 155 Wis. 2d 704, 706, 456 N.W.2d 359, 360 (1990).

Local media reported that, at least as of 2019, MWF leases the Festival Park from the City at below market rates highly favorable to MWF.⁵ In 2018 the combined rental and security fee Summerfest paid was \$1,593,677. *Id.* “By contrast, as Urban Milwaukee has reported, other rental agreements for groups leasing city land charge more. The for-profit Harbor House restaurant pays a minimum of \$200,000 and maximum of \$400,000 per year (based on a percent of its gross sales) for its 1.66 acres of land. At that price Summerfest would be paying \$9 million to \$18 million per year for its 75 acres.” *Id.* These reports also indicate that MWF may make more from sub-leasing the land to other entities, festivals, and events than it pays in rent to the city. “Thus, in 2016 Summerfest paid rent of \$1,439,500 and a fee for security provided by

Though I believe the information in this letter is accurate, I make this referral without the benefit of discovery or subpoena powers. I encourage you to corroborate any facts contained herein which are material to your analysis.

² “Learn About MWF”, available online at: <https://www.milwaukeeworldfestival.com/about/learn-about-mwf> (last visited 1-25-22).

³ **Ex. A**, MWF 2020 Form 990 (dated June 22, 2021).

⁴ “Learn About MWF”, available online at: <https://www.milwaukeeworldfestival.com/about/learn-about-mwf> (last visited 1-25-22).

⁵ “Summerfest Pays No Net Rent”, available at: <https://urbanmilwaukee.com/2019/11/26/murphys-law-summerfest-pays-no-net-rent/> (last visited 1-27-22).

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Milwaukee Police of \$122,987, or a total of \$1,562,487, while it earned \$1,849,000 in rental income. That provided a surplus of \$287,000 for Summerfest. In 2017 the combined rental and security fee Summerfest paid for the 75 acres of city-owned land it uses was \$1,577,877, while it earned \$1,904,000 in rental income, a surplus of \$326,000. In 2018 the combined rental and security fee Summerfest paid was \$1,593,677, while it earned \$1,875,000 in rental income, a surplus of \$281,000. Complete records for 2019 are not available.” *Id.*

MWF has invested heavily in concert venues capable of hosting a wide range of shows, blanketing the Milwaukee live music market. This ranges from crowds of a few thousand to crowds exceeding 23,000 people.⁶ The nine permanent stages include: the American Family Insurance Amphitheater (23,000 capacity), Miller Lite Oasis (11,400), Generac Power Stage (11,000), the BMO Harris Pavilion (10,000), Briggs and Stratton Big Backyard (8,600), Uline Warehouse (7,300), U.S. Cellular Connection Stage (5,700), the Johnson Controls World Sound Stage (3,200), and the South Pavilion Stage (2,700).⁷

To the best of my knowledge, since at least 2019, Frank Productions Company Live (“FPCL”) has operated as MWF’s exclusive promoter for its American Family Insurance Amphitheater and the BMO Harris Pavilion.⁸ LiveNation, one of the worlds’ largest live music event promoters, owns a controlling interest in FPCL.⁹ Prior to its purchase by LiveNation, the Madison-based Frank Productions was one of the largest independent concert promoters in the United States.¹⁰

II. MWF is Not Operated Exclusively for an Exempt Purpose.

Under section 501(c)(3), an organization is entitled to federal corporate income tax exemption if the following requirements are met:

⁶ “Venues”, available online at: <https://www.milwaukeeworldfestival.com/event-planning/venues/> (last visited 1-25-22).

⁷ *Id.*

⁸ “Summerfest taps Live Nation-backed promoter FPC Live to bring more concerts to the amphitheater, pavilion”, available at: <https://www.jsonline.com/story/entertainment/music/2019/10/08/summerfest-taps-live-nation-backed-fpc-live-book-more-shows/3907089002/>

⁹ “Madison-based concert promoter Frank Productions selling majority interest to Live Nation”, available at: <https://www.jsonline.com/story/entertainment/music/2018/01/11/madison-based-concert-promoter-frank-productions-selling-majority-interest-live-nation/1025688001/>

¹⁰ “Live Nation Partners with Leading U.S. Promoter Frank Productions”, available at: <https://www.livenationentertainment.com/2018/01/live-nation-partners-with-leading-u-s-promoter-frank-productions-2/> (last visited 1-26-22).

- (1) The organization is organized and *operated exclusively for exempt purposes* (i.e., charitable, religious, educational purposes); and
- (2) No part of the organization's net earnings benefits any private shareholder or individual; and
- (3) No substantial part of the organization's activities consists of carrying on propaganda, or otherwise attempting to influence legislation; and
- (4) The organization must not participate in any political campaigns.

26 § U.S.C. 501(c)(3) (emphasis added). The organization must be organized *and* operated exclusively for exempt purposes. If an organization fails to meet either the organizational test or the operational test, it is not exempt. Treas. Reg. (26 C.F.R.) § 1.501(c)(3)-1(a). Here, MWF fails the operational test by violating the Commerciality Doctrine.

a. Section 501(c)(3)'s Operational Test.

The operational test requires both that an organization engage “primarily” in activities that accomplish its exempt purpose and that not more than an “insubstantial part of its activities” further a non-exempt purpose. Treas. Reg. § 1.501(c)(3)-1(c)(1)). Section 1.501(c)(3)-1(c)(1) provides:

(c) Operational test — (1) Primary activities. An organization will be regarded as ‘operated exclusively’ for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

“The purpose toward which an activity is directed, rather than the nature of the activity itself, determines whether the operational test is satisfied. The fact that an organization's activity constitutes a trade or business does not, in itself, disqualify that organization under section 501(c)(3).” *Pub. Indus., Inc. v. Comm'r*, 61 T.C.M. (CCH) 1626 (T.C. 1991) Though an incidental non-exempt purpose will not automatically disqualify an organization, the “presence of a single [nonexempt] purpose, if substantial in nature, will destroy the exemption, regardless of the number or importance of truly [exempt] purposes.” *Airlie Foundation v. I.R.S.*, 283 F. Supp. 2d 58, 62 (D.D.C. 2003) (citing *Better Business Bureau of Washington, D.C. v. United States*, 326 U.S. 279, 283 (1945)).

To satisfy the “operational test,” an organization must meet four requirements: (1) the organization must “engage primarily in activities which accomplish one or more of the exempt purposes specified in § 501(c)(3);” (2) “the organization's net earnings may not inure to the benefit of private shareholders or individuals;” (3) the organization

must not engage in substantial political or lobbying activities; and (4) the organization “must serve a valid public purpose and confer a public benefit.” *Church of Scientology v. Commissioner*, 823 F.2d 1310, 1315 (9th Cir.1987) (citing Treas. Reg. § 1.501(c)(3)–1(c)(1) – (c)(3)), *cert. denied*, 486 U.S. 1015 (1988) (citations omitted); *Freedom Church of Revelation v. United States*, 588 F. Supp. 693, 696 (D.D.C.1984) (organization must prove (1) that it is “operated exclusively” for tax exempt purposes and (2) that “no part of its net earnings inured to the benefit of any private individual.”). Failure to comply with any one of these four elements will cause the organization to lose its eligibility for tax exempt status. *Church of Scientology*, 823 F.2d at 1315.

b. MWF fails Section 501(c)(3)’s Operational Test according to the Commerciality Doctrine.

The I.R.S. and federal courts have stated that a (c)(3) fails the operational test – that is, it does not operate exclusively for an exempt purpose – when the non-profit operates as a commercial enterprise. In many instances, courts have found that, due to the “commercial” manner in which an organization conducts its activities, that organization is operated for nonexempt commercial purposes rather than for exempt purposes. *See B.S.W. Group, Inc. v. Comm’r*, 70 T.C. 352 (1978); *Schoger Found. v. Comm’r*, 76 T.C. 380 (T.C. 1981); *Easter House v. U.S.*, 846 F.2d 78 (Fed. Cir. 1988) *aff’g* 12 Cl. Ct. 476 (U.S.T.C. ¶ 9359) (Ct. Cl. 1987) *cert. den.*, 488 U.S. 907 (1988); *Living Faith, Inc. v. Comm’r*, 950 F.2d 365 (7th Cir. 1991); *Airlie*, 283 F. Supp 2d at 58.

This principle has become known as the Commerciality Doctrine. Among the major factors courts consider in assessing whether a non-profit violates the Commerciality Doctrine and thus fails the operational test because its activities are too commercial in nature are:

- the non-profit’s competition with for profit commercial entities
- the extent and degree of below cost services provided
- the non-profit’s pricing policies
- reasonableness of financial reserves, both in amounts and accrual
- whether the non-profit uses commercial promotional methods
- whether and to what extent the non-profit uses paid staff as opposed to volunteers
- the extent to which the organization receives charitable donations.

Living Faith, Inc., 950 F.2d at 372-6; *Airlie*, 283 F. Supp. 2d at 63.

In examining the Commerciality Doctrine factors used by the IRS and the federal courts, MWF is operating as a commercial entity and is not operating exclusively for exempt purposes. “When undertaking this inquiry, we look to various objective indicia. The particular manner in which an organization's activities are

conducted, the commercial hue of those activities, competition with commercial firms, and the existence and amount of annual or accumulated profits, are all relevant evidence in determining whether an organization has a substantial nonexempt purpose.” *Living Faith, Inc.*, 950 F.2d at 372. Because these factors – particularly MWF’s deliberate and intense competition with for-profit firms – indicate that MWF is operating as a commercial enterprise, I respectfully suggest that the IRS undertake an investigation of MWF’s business practices to determine if it is operating primarily for an exempt purpose as required by the Code.

i. MWF directly and strongly competes with for-profit firms.

“Competition with commercial firms is strong evidence of the predominance of nonexempt commercial purposes.” *BSW Group, Inc.*, 70 T.C. at 358. MWF directly and vigorously competes with for-profit firms in the Milwaukee area, specifically, other concert promoters and venues that compete for the same performers and consumers. MWF utilizes a for-profit promoter (FPCL) to book its events. FPCL is an affiliate of the largest commercial concert promotion company on the planet (LiveNation). MWF, through FPCL, is known to pay 50% to 100% above market rate for acts to perform at Summerfest. I also understand that, in recent years, MWF has teamed up with for-profits FPCL and LiveNation to pay Summerfest acts the equivalent of substantially above-market rates, either by subsidizing those Summerfest bookings with revenue from for-profit performances in other markets, or by providing the acts a “double booking” at another nearby venue. The MWF-LiveNation-FPCL alliance arguably engages in these tactics only because that is what it takes to prevent the competing commercial bookers from contracting those same acts to play in competing venues.

Ostensibly benefitting from its tax-advantaged position and its ability to solicit tax-deductible donations from the public, MWF has positioned itself as the biggest player in the Milwaukee concert venue and promotion market. It has further positioned itself to become even more competitive with for-profit firms by requiring its performers to agree to restrictions on playing at other venues as a condition of performing and by engaging in strategic partnerships with for-profit firms to strengthen its grip on performance venues in the area, as discussed below.

MWF’s operations are comparable to those that failed to qualify for exemption in *Greater United Navajo Dev. Enterprises, Inc. v. Comm’r*, 74 T.C. 69 (1980), *aff’d*, 672 F.2d 922 (9th Cir. 1981). There, the petitioner argued (in part) that because it used the profits from the leasing of its oil well drilling equipment to further its charitable assistance to residents of the Navajo Nation, it was entitled to exemption, or, alternatively, that its commercial operations were only an insubstantial part of its activities. *Id.* at 77. However, the Tax Court noted that “numerous cases have held that the destination of business income for charitable uses will not transform the operation of an otherwise nonexempt trade or business into an exempt activity.” *Id.* at 81

(citations omitted). In concluding that the petitioner failed to qualify for exemption, the Tax Court found that petitioner's off-reservation activities, including its contractual relationship with a for profit entity to lease oil well drilling equipment, were not directly related to any exempt purpose and that the contract indicated that mutual profit was the goal of the venture. *Id.* at 79-80. MWF's relationship with FPCL is comparable. FPCL clearly exists to generate a profit and logically would not engage with MWF if the endeavor were not profitable. In turn, the MWF/FPCL relationship as well as MWF's control of nearly a dozen performance venues permits MWF to directly compete with the for-profit firms in Milwaukee, generating profits for both MWF and FPCL in the process.

1. Summerfest Requires Performers to Agree to Restrictions on Playing at Other Milwaukee Venues as a Condition of Performing.

As part of MWF's competitive (or anti-competitive) behavior, it is known to require performers to agree to contractual provisions in which the performers agree not to host other shows for a period of time (i.e., six months) prior to Summerfest. Through these restrictive provisions, the MWF/FPCL combination has already demonstrated its ability to corner the market on performers for most of the summer and early fall—a timeframe when it books all of the acts it pleases, leaving competitors to fight for scraps. Such exclusivity agreements create scarcity, drive up demand and prices, and are endemic to profit-seeking commercial activities; they are a far cry from the altruistic *expansion* of access to music and culture that that a 501(c)(3) aims to promote. Due to the size of the Milwaukee market, most performers do not play more than one Milwaukee venue in a twelve-month period. Thus, any performer that MWF books is unlikely to play any other venue in Milwaukee that same year. The competition for this single annual performance is artificially tilted in MWF's favor, as it leverages its exempt status to pay above market rates that other for-profit firms cannot afford.

2. MWF's Contemplated Agreement with LiveNation to Create For-Profit Monopoly.

To further compete with the commercial venues and promoters in Milwaukee, and to perhaps tighten its stranglehold on the live performance market in the city, MWF is currently considering a lease-and-construction project located on MWF property that would involve the construction of an 800-seat and a 4,000-seat venue. "The new concert venue would sit on a 1.25-acre parcel of land owned by Milwaukee World Festival Inc., the nonprofit parent company of Summerfest, Frank Productions CEO Joel Plant told the Journal Sentinel. The site is currently a service parking

lot.”¹¹. The land would remain owned by MWF but be developed by and leased to Marquee Ventures LLC, a real estate holding company, which in turn would sub-lease the venue to FPCL, who would operate the facility and be in charge of upkeep.¹² By this arrangement, MWF would permit a for-profit firm to construct two venues on its property to host overtly for-profit events promoted by a for-profit firm (FPCL).

Further, MWF’s proposed arrangement with Marquee Ventures and FPCL will provide the for-profit FPPL a vertically-integrated platform that will give it an immediate competitive advantage against other for-profit promoters and venues in Milwaukee. That vertical platform will not only compete with the other for-profit venues and promoters for bookings; it will also permit the MWF-LiveNation-FPCL alliance to compete with other for-profit ventures in developing acts. Leveraging their relationship with MWF, LiveNation and FPCL will control venues capable hosting acts for crowds of as few as 100 and as many as 23,000. Controlling a complete range of venues also allows MWF’s for-profit alliance to effectively control the entire life cycle of new talent (that is, an act) as it matures and moves through those venues. It will control talent from its inception, playing in coffee shop back rooms, until it matures to marquee venues for crowds in excess of 23,000. The entire arrangement is designed to stifle competition and seize market control from Milwaukee’s other for-profit promoters and venues. This will only be possible because the MWF-LiveNation-FPCL triumvirate will control venues of all sizes in the Milwaukee region because of the unique competitive advantage of MWF’s favored, tax-exempt status. This contemplated agreement is at odds with Section 501(c)(3) and is wholly consistent with commercial competition.

ii. MWF sells goods and services to the public at large, rather than a limited charitable audience.

MWF advertises and sells goods and services to the public at large and does so in direct competition with commercial actors, rather than other non-profits. MWF does not limit the provision of its goods and services to other non-profits or defined charitable groups. *See B.S.W. Grp., Inc.*, 70 T.C. at 360 (collecting cases granting exemption on the grounds that non-profit serves only exempt organizations but stating that those cases “cannot be of assistance to petitioner since petitioner does not propose to limit its services exclusively to organizations exempt because they are described in section 501(c)(3).”). Rather, MWF’s primary programming – the Summerfest event – is essentially a mainstream, popular music event. MWF primarily caters to a

¹¹ “Madison’s Live Nation-backed FPC Live plans to open a new Milwaukee music venue”, available at: <https://www.jsonline.com/story/entertainment/music/2021/12/02/madisons-fpc-live-plans-open-new-milwaukee-historic-third-ward-music-venue-2023-live-nation/8826149002/> (last visited 1-26-22).

¹² See “What is the land deal for this project?”, available at: fpc-live.com/mke-venue/?fbclid=IwAR2mN8D9YvOBM9yN2TkL4aOASSx-wf9LCFZOklPzZP6bEp3bhRpvKqQvms0 (last visited 2-14-22)

mainline, consumer-driven market that perpetually exists even in the complete absence of altruistic effort or subsidy.

iii. MWF uses commercial methods to promote its goods and services.

MWF uses ordinary, commercial advertising. MWF advertises Summerfest in particular via the Internet, radio, television, social media, and virtually every other medium used in the commercial world. *See Christian Manner Int'l Inc. v. Comm'r*, 71 T.C. 661, 670 (1979) (books priced to return a profit which were distributed and marketed based on standard commercial practices weighed against exemption). In fact, according to its Form 990, MWF spent over \$327,000 on advertising and promotions in 2020 even though Summerfest was not held. **Ex. A**, Part IX. In 2019, it spent more than \$2,000,000 on advertising – a tremendous sum.

The use of promotional materials and “commercial catch phrases” to enhance sales are relevant factors in determining whether an organization “operate[s] in the same manner as that of any profitable commercial enterprise.” *Living Faith, Inc. v. Comm'r*, 950 F.2d 365, 373 (7th Cir. 1991) (citing *United Missionary Aviation, Inc. v. Commissioner*, 60 T.C.M. (CCH) 1152, 1156 (1990)). Summerfest, the “smile” logo, the Big Gig, and The World’s Largest Music Festival are registered trademarks or tradenames of MWF and may not be used without MWF’s written permission.

Though MWF solicits corporate sponsors for Summerfest, I understand that those sponsors are often given “free” tickets to attend Summerfest that are distributed to customers and/or employees, stripping those contributions at least to some degree of their altruistic nature. It also trades tickets for airtime on TV¹³ and radio¹⁴ or space in print or online publications.¹⁵ MWF’s “donors” are receiving substantial commercial benefit in exchange for their presently-tax-exempt contributions. MWF’s marketing and advertisements are relatively indistinguishable from those used by for-profit entities.

iv. MWF handsomely pays its employees and contractors.

Courts have viewed a non-profit’s use of paid employees, rather than unpaid volunteers, as reflective of a commercial enterprise. *See Living Faith, Inc.*, 950 F.2d at 375 (distinguishing non-profit under examination from prior group operated by “student ministers,” who, unlike the Living Faith “volunteers,” received no salaries and whose total time was under ecclesiastical direction where non-profit’s records indicated it paid salaries of more than \$25,000 in fiscal year 1987 and \$63,000 in 1988); *B.S.W.*

¹³ <https://www.summerfest.com/ticket-trade-tv/>

¹⁴ <https://www.summerfest.com/ticket-trade-radio/>

¹⁵ <https://www.summerfest.com/ticket-trade-print-online/>

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Grp., Inc., 70 T.C. at 358 (weighing compensation to officers and research personnel in making commerciality determination).

MWF employed 153 people and had only 10 volunteers in 2020. **Ex. A**, p. 1, Part I, Lines 5-6. MWF pays substantial compensation to its employees, including at least 12 who are paid more than \$100,000 per year (**Ex. A**, Part VII, Line 2) and 6 of those whose compensation exceeds \$150,000 per year. **Ex. A**, Schedule J, Part II. I also understand that MWF's "low-level" workers are well-paid during MWF's primary programming (Summerfest). MWF reports that it paid over \$10,000,000 in salaries, other compensation, and employee benefits in 2019 and over \$6,000,000 in 2020. **Ex. A**, p. 1, Part I, Line 15. In 2020, MWF received a \$935,500 PPP loan¹⁶ and in 2021, it received a SVOG¹⁷ for \$10,000,000, allowing it to keep paying its employees substantial compensation without depleting MWF's financial reserves.

MWF has a very highly paid President, Don Smiley. From 2016 through 2020, Smiley was paid a total of \$6,369,091.00 according to MWF's tax filings, an average of over \$1.2 million per year. In 2020 alone, Smiley's total compensation amounted to \$1,292,068 even though Summerfest was not held that year and the organization reported a \$15,000,000 loss. **Ex. A**, Schedule J, Part II. By way of example, Smiley earned \$971,000 in 2017, while attendance at Summerfest was 831,769, meaning the equivalent of \$1.17 of every ticket went to compensate the organization's president. MWF also paid more than \$10,000 in 2020 for Mr. Smiley to be a member at two different "clubs". **Ex. A**, Schedule J, Parts I & III.

This compensation appears to be far more than other non-profit directors with similar responsibilities. For example, the director of the Wisconsin State Fair is paid a comparatively-scant \$140,310 salary even though the fair sees higher attendance than Summerfest. See "Summerfest CEO Collects \$2.49 Million", available at: <https://urbanmilwaukee.com/2022/01/18/murphys-law-summerfest-ceo-collects-2-49-million/>. The previous Summerfest CEO – Elizabeth Black – never earned more than \$207,000 in annual compensation, even after running the festival for 19 years. *Id.* According to an interview that Howard Sosoff – Board Chair and member of the personnel committee that oversees Smiley's compensation – MWF determines Smiley's compensation by comparing him to leaders of for-profit companies:

Sosoff admitted that Smiley is being compared to leaders of for-profit companies, noting that "the job responsibilities are no different than at a private company." He calls the tax-exempt, charitably-funded organization he oversees a "private corporation." Sosoff's predecessor as

¹⁶ Data on PPP Loan recipients is available on the Small Business Administration's website at: <https://data.sba.gov/dataset/ppp-foia/resource/c84fa84d-c047-4b66-8056-5748f6a2bfca>.

¹⁷ Data on SVOG grant recipients is available on the Small Business Administration's website at: <https://data.sba.gov/dataset/svog/resource/66dad48d-0618-4461-82fd-29464084da94>.

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MWF board chair, Ted Kellner, in the past defended the huge increases in Smiley's pay, saying they were in line with that of for-profit corporate CEOs. But on its federal tax form MWF describes its mission statement as follows: "A civic organization not organized for profit but operated exclusively for charitable and education purposes." In light of this, [Alderman Robert] Bauman said "I hope somebody raises this issue with the IRS, as something it should investigate."

Id.

When questioned about paying the City for police services circa 2019, Chairman Sosoff shocked City officials by declaring to Urban Milwaukee that the festival no longer considers itself a partner of the city. "Milwaukee World Festival, Inc., is not a public-private entity," he said. "It is a private corporation."¹⁸ MWF compares itself to for-profit entities in determining compensation because it sees itself as comparable in scope, size, and revenues to those commercial entities. The IRS should follow MWF's lead and view it as the commercial enterprise it is.

v. MWF has accumulated large financial reserves.

MWF's activities, including Summerfest, traditionally yield profits to MWF which have permitted it to amass both liquid reserves and substantial capital assets, primarily real estate and improvements thereon. "Substantial profits, while not determinative, also indicate an organization's primary purpose is commercial in nature." *United Missionary Aviation, Inc. v. Comm'r*, 60 T.C.M. (CCH) 1152 (T.C. 1990), *aff'd sub nom. United Missionary v. Comm'r*, 985 F.2d 564 (8th Cir. 1991) (*citing Scripture Press Foundation v. United States*, 152 Ct. Cl. 463, 470-471, 285 F.2d. 800, 803-804 (1961), *cert. denied* 368 U.S. 985 (1962)).

MWF's net assets are about \$30,000,000, but its most recent Form 990 shows that it holds over \$100,000,000 in total assets, a substantial portion of which (about 90%) are hard assets (i.e., real estate, buildings, and equipment). See **Ex. A**, Part I, Lines 20-22. MWF claims that a majority of those assets are in the form of leasehold improvements, rather than the value of the land and buildings themselves, which makes sense because the City owns and leases most of the valuable land on which MWF operates. See *Id.*, Schedule D, Part VI.

These are substantial reserves for a non-profit, particularly where the profits generated are held to further MWF's commercial reach by building and improving performance venues to make it and its commercial partners stronger competitors in the market. Given that MWF's program service revenue outpaces its contributions at approximately a four-to-one ratio, one can likely argue that MWF's assets were

¹⁸ "Summerfest Pays No Net Rent", available at: <https://urbanmilwaukee.com/2019/11/26/murphys-law-summerfest-pays-no-net-rent/> (last visited 1-27-22).

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accumulated largely by amassing its “altruistic” donations instead of expending them on exempt purposes. To the extent that MWF must operate these venues to further its purportedly “charitable” purpose, the operation of those venues occurs on a scale larger than is reasonably necessary to carry out any charitable purpose. See Rev. Rul. 73-127 (finding that nonprofit’s operation of cut-price retail grocery outlet which allocated small portion of earnings to provide on the job training to hardcore unemployed did not qualify for exemption where the size and manner of the food store operation and the facts relating to the actual purpose of the undertaking evidence that the operation of the store as a low-cost retail grocery outlet was itself an independent objective of the organization).

III. Conclusion

Summerfest was a dream that started over fifty years ago to promote harmony in the community, civic pride, and an understanding of different cultures through performing arts, activities, and recreation. Summerfest used to end early in the evening, with crowds flooding local establishments, including in ethnically diverse areas of the city. The festival was an asset to the city and its residents. The current version of Summerfest developed by MWF is unrecognizable: a behemoth bent on milking as much money as it can during its yearlong enterprise, without any consideration of its effect on the community or any fidelity to the laudable principles on which it was founded.

The Tax Code affords substantial benefits to non-profit organizations that further an exempt purpose. Donations to those organizations are tax deductible and most of the organization’s operations are tax exempt. Those benefits are afforded to organizations that engage in charitable, educational, or other activities that provide a benefit to the public at large and that may not otherwise be provided in the absence of the tax-exempt benefits. Although MWF has long enjoyed the various benefits of tax exemption, MWF is now in violation of the Code because it has been and is operating as a commercial entity, including by making concerted efforts to monopolize the Milwaukee concert venue market through restrictive contract provisions and partnerships with for-profit entities.

I thank you in advance for your time and attention to this serious matter and look forward to your investigation of this situation.

Respectfully Submitted,

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