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May 23, 2023

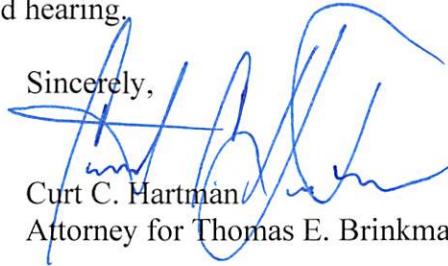
Ms. Melissa Autry
Clerk, Cincinnati City Council
801 Plum Street, Room 308
Cincinnati, OH 45202

Re: Petition for Removal of Members of Board of Trustees of the Cincinnati
Southern Railway

Ms. Autry:

Pursuant to the provisions of *Cincinnati Municipal Code 205-3*, please find enclosed for presentment to the Cincinnati City Council a *Petition for Removal of Members of the Board of Trustees of the Cincinnati Southern Railway* being tendered to you on behalf of Thomas Brinkman, Jr., a resident and taxpayer of the City of Cincinnati. Please advise me when the hearing mandated by *Cincinnati Municipal Code 205-3* will be conducted so that Mr. Brinkman can present the matter to the Cincinnati City Council at said hearing.

Sincerely,



Curt C. Hartman
Attorney for Thomas E. Brinkman, Jr.

cc:

Jan-Michele Lemon Kearney, Member, Cincinnati City Council (Room 356)(w/ encl.)
Victoria Parks, Member, Cincinnati City Council (Room 350)(w/ encl.)
Jeff Cramerding, Member, Cincinnati City Council (Room 346B)(w/ encl.)
Reggie Harris, Member, Cincinnati City Council (Room 354)(w/ encl.)
Mark Jeffreys, Member, Cincinnati City Council (Room 348)(w/ encl.)
Scotty Johnson, Member, Cincinnati City Council (Room 349)(w/ encl.)
Liz Keating, Member, Cincinnati City Council (Room 351)(w/ encl.)
Seth Walsh, Member, Cincinnati City Council (Room 346A)(w/ encl.)
Meeka Owens, Member, Cincinnati City Council (Room 352)(w/ encl.)
Emily Smart Woerner, Cincinnati City Solicitor (Room 214)(w/ encl.)

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CLERK OF COUNCIL

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PETITION FOR REMOVAL OF MEMBERS OF THE BOARD OF TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY

To: Clerk, Cincinnati City Council

WHEREAS, during the course of the negotiation of the *Asset Purchase Agreement* with Norfolk Southern¹ for the sale of the Cincinnati Southern Railway, all five trustees of the Board of Trustees of the Cincinnati Southern Railway agreed, on their own initiative, to forego the full *Purchase Price* provided for in the previously agreed *Memorandum of Understanding*; and

WHEREAS, all five trustees of the Board of Trustees of the Cincinnati Southern Railway specifically agreed in the final *Asset Purchase Agreement* to forego \$500,000 of moneys which should have been paid by Norfolk Southern for the benefit of the people of the City of Cincinnati; and

WHEREAS, all five trustees of the Board of Trustees of the Cincinnati Southern Railway agreed to forego the \$500,000 for the expressed purpose of helping to offset the moneys that Norfolk Southern intends to spend in support of passage of the referendum that would ultimately be held on the sale of the Cincinnati Southern Railway; and

WHEREAS, in providing a windfall of \$500,000 to the benefit of Norfolk Southern and to the detriment of the people of the City of Cincinnati, and doing so for the expressed purpose that such windfall be utilized to offset the moneys that Norfolk Southern intends to spend in support of passage of the referendum, all five members of the Board of Trustees of the Cincinnati Southern Railway have failed in the faithful performance of their trust; and

WHEREAS, *Cincinnati Municipal Code 205-3* provides that any trustee of the Board of Trustees of the Cincinnati Southern Railway may be removed based upon, *inter alia*, the “fail[ure] in the faithful performance of his or her trust”; and

WHEREAS, *Cincinnati Municipal Code 205-3* further provides that, if the Cincinnati City Solicitor shall fail to seek the removal of any trustee of the Board of Trustees of the Cincinnati Southern Railway due to the failure in the faithful performance of his or her trust, then any taxpayer of the City of Cincinnati may file a petition with the Cincinnati City Council in his or her own name in order to seek the removal of any trustee of the Board of Trustees of the Cincinnati Southern Railway based upon the failure in the faithful performance of his or her trust; and

WHEREAS, *Cincinnati Municipal Code 205-3* also provides that, upon any taxpayer filing a petition with the Cincinnati City Council seeking the removal of any trustee of the Board of Trustees of the Cincinnati Southern Railway based upon the failure in the faithful performance of his or her trust, then the Cincinnati City Council shall conduct a hearing thereon and render its decision by majority vote; and

¹ As used herein, references to Norfolk Southern includes Norfolk Southern Railway Company and any related entities, including The Cincinnati, New Orleans and Texas Pacific Railway Company.

WHEREAS, on April 24, 2023, and through his legal counsel, Thomas E. Brinkman, as a taxpayer and resident of the City of Cincinnati, previously made a demand upon the Cincinnati City Solicitor to seek the removal of all five trustees of the Board of Trustees of the Cincinnati Southern Railway due to their failure in the faithful performance of their trust arising from all five trustees providing a windfall of \$500,000 to the benefit of Norfolk Southern and to the detriment of the people of the City of Cincinnati, and doing so for the expressed purpose that such windfall be utilized to offset the moneys that Norfolk Southern intends to spend in support of passage of the referendum; and

WHEREAS, the Cincinnati City Solicitor has refused to seek from the Cincinnati County Council the removal of all five trustees of the Board of Trustees of the Cincinnati Southern Railway due to their failure in the faithful performance of their trust.

NOW THEREFORE, and pursuant to the provisions of *Cincinnati Municipal Code 205-3*, Thomas Brinkman, as a resident and taxpayer of the City of Cincinnati, **HEREBY PETITIONS** the Cincinnati City Council to immediately remove each of the five trustees of the Board of Trustees of the Cincinnati Southern Railway based upon the failure in the faithful performance of his or her trust, as well as immediately scheduling a hearing on this *Petition* in order to render its decision by majority vote.

IN SUPPORT HEREOF, the following is tendered:

- on **June 24, 2022**, the Board of Trustees of the Cincinnati Southern Railway and Norfolk Southern entered into a *Memorandum of Understanding* setting forth the terms and conditions for which an ensuing *Asset Purchase Agreement* would be drafted in order to provide for the purchase the Cincinnati Southern Railway by Norfolk Southern or a related entity.
- in **paragraph 1(a) of the *Memorandum of Understanding***, the Board of Trustees and Norfolk Southern agreed upon the *Purchase Price* for the sale of the Cincinnati Southern Railway as follows:
 - (i) a *Base Purchase Price* of \$1.6 billion; and
 - (ii) a *Transaction Fee* totaling \$25 million, of which \$5 million was designated as a *Non-Refundable Payment* payable at the time of execution of the *Asset Purchase Agreement*.
- on **November 21, 2022**, the Board of Trustees and Norfolk Southern entered in the *Asset Purchase Agreement* for the purchase the Cincinnati Southern Railway by Norfolk Southern.
- in **paragraph 2.04 of the *Asset Purchase Agreement*** executed on November 21, 2022, the *Purchase Price* for the sale of the Cincinnati Southern Railway was set forth as follows:

- (i) a *Base Purchase Price* of \$1.6 billion, payable at the ultimate *Closing* of the sale;
- (ii) a *Deferred Transaction Fee* of \$20 million, payable at the ultimate *Closing* of the sale; and
- (iii) a non-refundable *Accelerated Transaction Fee* of \$4.5 million payable at the time of the execution of the *Asset Purchase Agreement*.

Thus, with slight variation in terminology (but not substance) between the *Memorandum of Understanding* and the *Asset Purchase Agreement*, the *Purchase Price* for the sale of the Cincinnati Southern Railway was broken into three components, including a transaction fee due at time of execution of the *Asset Purchase Agreement* (characterized as either the *Non-Refundable Payment* or the *Accelerated Transaction Fee*).

But as the foregoing demonstrates, one significant and material change occurred between the *Memorandum of Understanding* being executed on June 24, 2022, and the *Asset Purchase Agreement* being entered into on November 21, 2022 – the *Non-Refundable Payment* of \$5 million provided for in the *Memorandum of Understanding* was reduced to \$4.5 million as the *Accelerated Transaction Fee* in the *Asset Purchase Agreement*.² This \$4.5 million, and not the \$5 million, was wired transferred to the City of Cincinnati on November 21, 2022.

As a result of the reduction in the *Accelerated Transaction Fee* in the *Asset Purchase Agreement*, Norfolk Southern has already paid \$500,000 less than the amount provided for in the *Memorandum of Understanding*. And it is this reduction of \$500,000 to the financial benefit of Norfolk Southern and to the detriment of the people of the City of Cincinnati that serves as the basis for the removal of all members of the Board of Trustees of the Cincinnati Southern Railway pursuant to *Cincinnati Municipal Code 205-3*.

Simply stated, the reduction of the *Transaction Fee* by \$500,000 to the financial benefit of Norfolk Southern and to the detriment of the people of the City of Cincinnati:

- (i) was undertaken at the initiative and behest of the Board of Trustees; and
- (ii) was undertaken with the express intent and purpose that Norfolk Southern utilize the windfall of \$500,000 as part of its expenditures in support of the passage of the referendum on the sale of the Cincinnati Southern Railway, with the total expenditures in support of the referendum projected to be between \$1.25 million and \$1.75 million.

This is evident from the following timeline:

- **June 24, 2022:** the *Memorandum of Understanding* specifically provides for a *Non-Refundable Payment* of \$5 million due at time of execution of the *Asset Purchase*

² Thus, while the *Memorandum of Understanding* provided for a total *Transaction Fee* of \$25 million, the *Asset Purchase Agreement* set that amount only at \$24.5 million; the difference was in the amount of the *Non-Refundable Payment* or the *Accelerated Transaction Fee* which was reduced from \$5 million to \$4.5 million

Agreement, in addition to payment of the *Base Purchase Price* of \$1.6 billion and the \$20 million balance on the *Transaction Fee* both due at *Closing* on the sale.

- **July 1, 2022:** the Board of Trustees tenders the first *Working Draft of the Asset Purchase Agreement* that is consistent with the monetary payments provided for in the *Memorandum of Understanding*, i.e., the *Base Purchase Price* of \$1.6 billion, a *Deferred Transaction Fee* of \$20 million, and a non-refundable *Accelerated Transaction Fee* of \$5 million.
- **July 29, 2022:** Norfolk Southern provides its edits, comments, etc., to the *Working Draft of the Asset Purchase Agreement* of July 1, 2022. Within the *Working Draft* received back from Norfolk Southern on this date, no comments or edits are made with respect to the *Purchase Price*, including the non-refundable *Accelerated Transaction Fee* of \$5 million.
- **August 23, 2022:** on the eve of a meeting of the Board of Trustees, the current *Working Draft of the Asset Purchase Agreement* is provided to the members of the Board of Trustees, said draft containing comments or edits by Stinson LLP (the outside legal counsel for the Board of Trustees) and by Ms. Geiger, the clerk for the Board of Trustees. Within this *Working Draft of the Asset Purchase Agreement*, there are no comments or edits with respect to the *Purchase Price*, including the non-refundable *Accelerated Transaction Fee* of \$5 million.
- **August 23, 2022:** on the eve of a meeting of the Board of Trustees, the president of the Board of Trustees tenders a memorandum to the other members of the Board of Trustees specifically proposing a reduction in the non-refundable *Accelerated Transaction Fee* and doing so in order to offset the moneys Norfolk Southern will spend in support of passage of the referendum:

ATT/CLNT PRIVILEGE

ATT/CLNT PRIVILEGE I would propose that we agree that the transaction fee be reduced by 50% of the money which NS spends supporting the passage of the referendum up to \$1,000,000.

- **August 24, 2022:** the Board of Trustees conducts a meeting, though there is no public comments, discussions, or deliberations by the members of the Board of Trustees concerning the proposal of the president of the Board of Trustees to reduce the amount of the non-refundable *Accelerated Transaction Fee*, though the Board of Trustees does meet in an illegal executive session during the course of this meeting.
- **September 13, 2022:** the Board of Trustees conducts a meeting, through there is no public comments, discussions, or deliberations by the members of the Board of Trustees concerning the proposal of the president of the Board of Trustees to reduce the amount of the non-refundable *Accelerated Transaction Fee*, though the Board of Trustees does meet in an illegal executive session during the course of this meeting.

- **September 14, 2022:** the Board of Trustees transmits its latest *Working Draft of the Asset Purchase Agreement* to Norfolk Southern, with the latest counterproposals and comments on behalf of the Board of Trustees therein. With specific reference to the non-refundable *Accelerated Transaction Fee* within this *Working Draft*, the Board of Trustees initiates the reduction of the *Accelerated Transaction Fee* from \$5 million to \$4.5 million:

"Accelerated Transaction Fee" - ~~\$5,000,000~~ \$4,500,000.

"Acquired Assets" – As defined in the Recitals.

"Affiliates" – As defined in Rule 12b-2 under the Securities Exchange Act of 1934, as amended, and solely as it pertains to Seller, shall be the Public Parties.

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- **November 21, 2022:** the *Asset Purchase Agreement*, with the *Accelerated Transaction Fee* at \$4.5 million, is approved by Board of Trustees and Norfolk Southern. In turn, Norfolk Southern wires \$4.5 million to the City of Cincinnati, not the \$5 million originally within the *Memorandum of Understanding*.

As the foregoing timeline establishes, something transpired between August 23 and September 14, 2022, whereby the Board of Trustees decided and agreed to provide a windfall of \$500,000 to the benefit of Norfolk Southern.

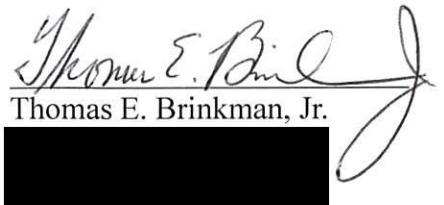
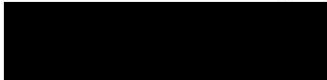
Clearly, during the course of the executive session held at either the meeting of August 24 or the meeting of September 13, or both, the Board of Trustees considered and ultimately agreed to forego for the benefit of the people of the City of Cincinnati the *Accelerated Transaction Fee* of \$5 million and, instead, to reduce said amount, i.e., to allow Norfolk Southern to retain \$500,000 of that amount. And as the memorandum from the president of the Board of Trustees confirms, the *raison d'être* for the \$500,000 reduction in the amount of the *Accelerated Transaction Fee* to an amount less than the *Non-Refundable Payment* provided for in the *Memorandum of Understanding* was clear and unequivocal, i.e., to afford a windfall to Norfolk Southern of money which should have been paid to the benefit of the people of the City of Cincinnati and, instead, to divert the \$500,000 to be used for the political purpose of attempting to influence the people of the City of Cincinnati in the referendum to support the sale of the Cincinnati Southern Railway.

BASED UPON THE FOREGOING, instead of engaging in the "faithful performance" of their trust to the people of the City of Cincinnati, the five trustees of the Board of Trustees, on their own initiative and behest, reduced by \$500,000 the amount of money due from Norfolk Southern in order that Norfolk Southern could use such funds to support the passage of the referendum on the sale of the Cincinnati Southern Railway. Such action by the five trustees of the Board of Trustees, both in terms of foregoing moneys for the benefit of the people of the City of Cincinnati and doing so in order that such moneys may be used as part of a political campaign

relating to the referendum on the sale, clearly rises to the level of all five trustees failing in the faithful performance of their trust so as to mandate their immediate removal.

NOW THEREFORE, and pursuant to the provisions of *Cincinnati Municipal Code 205-3*, Thomas Brinkman, as a resident and taxpayer of the City of Cincinnati, **HEREBY PETITIONS** the Cincinnati City Council to immediately remove each of the five trustees of the Board of Trustees of the Cincinnati Southern Railway based upon the failure in the faithful performance of his or her trust, as well as immediately scheduling a hearing on this *Petition* in order to render its decision by majority vote.

Respectfully submitted,


Thomas E. Brinkman, Jr.


Dated: May 23, 2023