Autry, Melissa 202301701

From: Woerner, Emily
Sent: Thursday, June 8, 2023 6:09 PM
To: #COUNCIL; Aftab, Mayor
Cc: Long, Sheryl; Autry, Melissa; Fambro, Keizayla; Lair, Mollie; Faaborg, Erica; Haynes, Marion; Kunz, Lisa; Hardin, Roshani
Subject: Decision re: Petition for Removal of CSR Trustees
Attachments: 6.8.23 Memo to Council.pdf; 2023-06-07 Memo to City Solicitor Regarding Demand to Petition for Removal of CSR Trustees.pdf; June 6 Ltr-Solicitor Woerner.PDF; 060823 Response Ltr to Curt Hartman re 042423 Demand Remove CSR Trustees.pdf

Good evening Mayor and Councilmembers,

I have examined the facts and law, and I have decided that I will not petition City Council to remove the trustees of the Board of Trustees of the Cincinnati Southern Railway because there is no basis to do so. Attached you will find the following documents:

1. My non-privileged memo to you explaining my decision and my reasoning (6.8.23 Memo to Council).
2. An opinion for me about whether the trustees should be removed from outside counsel (2023-06-07 Memo to City Solicitor). I have waived the attorney-client privilege for this opinion.
3. A letter from outside counsel for the CSR Board outlining the Board's position (June 6 Ltr-Solicitor Woerner).
4. My letter to the attorney for Tom Brinkman, who is petitioning you to remove the CSR Trustees.

These documents are not privileged and can be publicly released. Please contact me if you have any questions.

city of CINCINNATI LAW

Emily Smart Woerner

City Solicitor

City Solicitor's Office

513/352-3307 (o) | 513/490-9997 (cell)

emily.woerner@cincinnati-oh.gov

Taft/

425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
Tel: 513.381.2838 | Fax: 513.381.0205
taftlaw.com

PRIVILEGED AND CONFIDENTIAL

TO: Emily Woerner, Solicitor, City of Cincinnati

FROM: Aaron Herzig
Dominick Gerace

DATE: June 7, 2023

RE: Analysis of Demand for City Solicitor to Petition City Council for Removal of Cincinnati Southern Railway Board of Trustees

---

The City of Cincinnati (the "City") owns the Cincinnati Southern Railway (the "CSR"). The CSR was founded under Ohio's Ferguson Act of 1869. The Ferguson Act provides that management of the CSR is entrusted to a five member Board of Trustees (the "Board" or "Trustees"). The Board recently agreed to sell the CSR to Norfolk Southern Corporation ("Norfolk") for $1.6 billion plus $24.5 million intended to cover CSR's transaction costs. In order for the sale to be completed, it must be approved by a vote of the people of the City of Cincinnati. It also required the Ohio General Assembly to pass, and Ohio Governor DeWine to sign, an amendment to the Ferguson Act. The purchase agreement therefore states that the transaction does not close, and the sale is not final, until both of those conditions take place. The transaction, if approved, is expected to more than double the amount the City receives on an annual basis.

Months after the purchase agreement was signed, and after the Ferguson Act was amended, Thomas Brinkman, a City resident and taxpayer, submitted a demand that the City Solicitor petition City Council to remove all five members of the Board pursuant to Cincinnati Municipal Code 205-3. The demand is based on his view that it was improper for the Board to accept a $24.5 million transaction fee under the purchase agreement with Norfolk when a previous non-binding Memorandum of Understanding offered by Norfolk proposed a transaction fee of $25 million. The City Solicitor has engaged Taft Stettinius & Hollister LLP to provide her with legal advice in connection with Mr. Brinkman's demand.[1]

FACTS

I. The CSR Board of Trustees.

The Trustees of the CSR Board are public officials appointed by the Mayor with the consent of City Council. *See* Cincinnati Municipal Code 205-1. They are required to be a bipartisan group. They are volunteers who are not compensated for their service. The Board consists of

---

[1] On May 23, 2023, while the Solicitor was considering his demand, Mr. Brinkman filed a premature petition for the removal of all five members of the Board with the Cincinnati City Council.

individuals who have been placed in positions of trust by Cincinnati and the broader community for decades:

- President Paul Muething, Chairman of Keating Muething & Klekamp PLL;
- Treasurer Paul Sylvester, a CPA licensed in the State of Ohio;
- Vice President Charles Luken, Cincinnati Mayor from 1993 to 1991 and 1999 to 2005, United States Congressman from 1990 to 1992, and an attorney with Calfee, Halter & Griswold LLP;
- Mark Mallory, Cincinnati Mayor from 2005 to 2013, State Senator from 1999 to 2005, and State Representative from 1995 to 1999; and
- Amy Murray, member of the Cincinnati City Council from 2013 to 2020 and Director of the Small Business Program for the U.S. Department of Defense from 2020 to 2021.

II. The Agreement to sell the CSR to Norfolk Southern.

Norfolk has leased the CSR from the City since 1987. Norfolk's existing lease expires in 2026. In 2020, Norfolk and the Board commenced negotiations for the renewal of Norfolk's lease. After over a year of negotiations, the Board and Norfolk were unable to agree on the terms of a new lease. In mid-2021, Norfolk expressed an interest in purchasing the CSR instead of leasing it. Under the Lease, Norfolk has a right of first refusal for any sale of the CSR.

The negotiations proceeded in a very typical manner for arm's length business transactions of this size and scope. First, the parties reached a common understanding of the sale price. Second, the parties negotiated a non-binding memorandum of understanding, which outlined common deal terms. And third, the parties negotiated a final purchase agreement, stating all of the rights and obligations of each party. There was no final agreement between the parties until the final purchase agreement was executed by the parties. And the transaction is not completed until all of the conditions precedent to closing are met.

The sale negotiations began with an offer from Norfolk to purchase the CSR for $865 million. In August 2021, Norfolk increased its offer to $915 million. In October 2021, the Board countered with an offer of $2 billion. In November 2021, Norfolk increased its offer to $1.015 billion. In January 2022, the Board offered to sell for $1.8 billion. Norfolk countered with an offer of $1.6 billion in April 2022.

The parties then moved to negotiating a Non-Binding Memorandum of Understanding (MOU). The Non-Binding MOU outlined the key terms of what a final, binding agreement between the parties might include. It provided that the purchase price for the railroad asset would be $1.6 billion. The Board also made a new demand. It sought to recover its estimated transaction costs and proposed that Norfolk pay an additional $25 million, including a nonrefundable accelerated transaction fee totaling $5 million, for a total price of $1.625 billion. On June 24, 2022, the Board and Norfolk entered into the MOU.

To assist the Board in considering Norfolk's interest in purchasing the CSR, the Board hired lawyers with expertise in railroads and transportation, as well as independent consultants to evaluate financial aspects of the transaction. These outside experts advised the Board throughout the negotiations with Norfolk.

Two financial services firms advised the Board regarding the value of the CSR. Using several valuation methods, the financial services firms estimated a wide valuation range, calculating values between $616 million and $2.4 billion. The Board also consulted with an independent investment firm that projected that, after placing the proceeds of the sale in a trust fund and conservatively investing the principal balance of $1.6 billion, the trust fund would earn $57.1 million in 2024, while the lease would result in earnings of $25.5 million. The investment firm also projected that, by 2066, the trust fund would result in earnings 123.8% greater than the earnings resulting from a hypothetical renewed lease.

The Board then transmitted the first draft of what would become the final agreement, called the Asset Purchase and Sale Agreement, for Norfolk's consideration. This draft included the $1.6 billion purchase price and the $25 million to cover the CSR's transaction costs contemplated in the Non-Binding MOU. This draft acknowledged that an amendment to the Ferguson Act and Cincinnati voter approval were conditions precedent to the deal—the sale would not be completed unless and until both of those events occurred. So the Board and Norfolk were obligated to "coordinate efforts ... to obtain the State Law Change and Cincinnati Voter Approval."

On July 1, 2022, the Board received from Norfolk a document entitled "Highlights of Proposed NS Changes to CSR Purchase & Sale Agreement," which stated, at Item 13, that Norfolk wished to "assign[] responsibility for costs to obtain State Law Change & Cincinnati Voter Approval to Seller, which the parties discussed being funded from the Accelerated Transaction Fee." Subsequently, the Board informed Norfolk that, under the City Charter, the Board could not spend money in support of a ballot measure seeking voter approval.

On August 23, 2022, in response to Norfolk's proposed revisions to the Asset Purchase and Sale Agreement (sent to the Board in late July 2022), Board President Paul Muething provided a memorandum to the Board, which stated that "[Norfolk] [is] reacting to [the Board] telling them that CSR can't spend its money supporting or trying to pass the City referendum. [Norfolk] say[s] that [it] thought that this was one of the intended uses of the $5,000,000 transaction fee. I would propose that we agree that the transaction fee be reduced by 50% of the money which [Norfolk] spends supporting the passage of the referendum up to $1,000,000."[2]

On September 12, 2022, Norfolk emailed Mr. Muething that "[Norfolk] agrees to an Accelerated Transaction fee of $4.5 million and to fund the promotion of the referendum, so long

[2] Mr. Brinkman's demand letter and his premature petition both cite as key evidence of his claim a version of Mr. Muething's memorandum in which the first sentence quoted here is redacted. It is unclear why Mr. Brinkman would use an incomplete and inaccurate version of the memorandum, when your office provided him with the unredacted version containing the entire quote on April 6, 2023, before he sent the letter on April 26, or the petition on May 23.

as such expense shall not exceed $2 million." This email noted that "[Norfolk's] consultants believe that a campaign will cost $1.25 to $1.75 million."

On September 14, 2022, the Board transmitted a working draft of the Asset Purchase and Sale Agreement, which, consistent with Norfolk's September 12 email, included an accelerated transaction fee of $4,500,000. This draft provided that Norfolk, and not the Board, had the obligation to pay the costs related to seeking voter approval of the ballot initiative that is required for the sale to close.

On November 21, 2022, the Board and Norfolk executed the Asset Purchase and Sale Agreement, agreeing to a purchase price of $1.6 billion and $24.5 million in transaction fees, including a $4.5 million accelerated transaction fee, for a total price of $1.6245 billion. Under the final version of the purchase agreement, Norfolk assumed responsibility for the costs associated with seeking Cincinnati voter approval of the deal.

On March 31, 2023, Governor DeWine signed House Bill 23, which had passed the General Assembly with near unanimous support. This legislation permitted the transaction process to continue and allowed the proceeds of the sale of the CSR to be placed into a trust fund.

III. The demand to file a petition for removal.

On April 24, 2023, City resident and taxpayer Thomas Brinkman, through counsel, submitted a demand to the City Solicitor for the removal of all five members of the Board pursuant to Cincinnati Municipal Code 205-3. Mr. Brinkman's demand letter claims that removal is appropriate because "the members of the Board of Trustees 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." He claims that the reduction in the amount the Board accepted to recover its transaction costs violates Article XII, Section 3 of the City Charter, which reads "no monies of the City of Cincinnati or any of its Boards or Commissions, from any source whatsoever * * * may be *expended* for the purpose of advocating the election or defeat of any candidate for any public office, or for the passage or defeat of any ballot issue."

IV. The Trustees' response.

On June 6, 2023, the Trustees, through counsel, submitted a response to the City Solicitor regarding the demand and petition submitted by Mr. Brinkman. The Trustees state that they "acted faithfully and diligently to maximize the value of the Railway and create the greatest possible benefit to the City and its taxpayers" by negotiating a base purchase price that is hundreds of millions of dollars more than Norfolk initially offered, obtaining for the City an additional $24.5 million in transaction costs, negotiating favorable indemnification and other terms under the purchase agreement, and securing changes to Ohio law that will ensure the proceeds of the sale will be held in trust for the benefit of Cincinnati taxpayers for generations. The Trustees note that many terms changed as they were negotiated among the parties, and that "[n]either the [CSR] nor [Norfolk] had agreed to any terms, financial or otherwise, until they were memorialized in the final, executed purchase agreement."

ISSUE

Is there reason to believe that the Trustees failed to faithfully perform their duties within the meaning of Cincinnati Municipal Code 205-3 by agreeing to sell the CSR for $1.6 billion, plus a transaction fee of $24.5 million, in the purchase agreement for the proposed sale of the CSR to Norfolk after signing a non-binding Memorandum of Understanding that called for sale of the CSR for $1.6 billion, plus a transaction fee of $25 million?

ANSWER

Our view is that the record does not establish reason to believe that the Trustees failed to faithfully perform their duties. The facts demonstrate that the Trustees acted in good faith and consistent with their duty to do what they believe to be in the best interests of the CSR and the City. The purchase agreement between the Board and Norfolk resulted from an arm's length negotiation during which the Trustees secured a total purchase price well above the initial price offered by Norfolk and at the higher end of the valuation range calculated by the Trustees' expert consultants. The facts further demonstrate that the Trustees negotiated the purchase agreement after receiving information from expert consultants that the agreement, if approved by voters, would generate revenues for the City that far exceed revenues expected from a hypothetical new lease. Under these circumstances, the Trustees rationally could conclude in good faith that the deal that it struck with Norfolk, including the $24.5 transaction fee, is in the best interests of the City.

That the Trustees ultimately agreed to a transaction fee that is $500,000 less than the transaction fee contemplated in the non-binding MOU with Norfolk does not alter this conclusion. The sale of the CSR requires the approval of Cincinnati voters. If the Trustees believe in good faith that the deal with Norfolk is in the best interests of the City, it necessarily follows that the Trustees believe in good faith that it is in the best interests of City voters to support the referendum necessary to close the transaction the Trustees negotiated. The record indicates that the Trustees negotiated the transaction fee of $24.5 million for this purpose and to account for the costs that Norfolk alone would incur. The Trustees actions in this regard did not violate Article XII, Section 3, but rather were undertaken in an effort to achieve compliance with that provision.

LAW

Cincinnati Municipal Code 205-3 provides that if the City Solicitor has "reason to believe that any one of the [CSR] trustees has failed in the faithful performance of his or her trust, it shall be the solicitor's duty to apply to council by petition, praying that such trustee be removed, and another appointed in such trustee's place."

This ordinance also provides "[i]f the city solicitor fails to file a petition for removal after request of any holder of the bonds issued by the trustees or by a taxpayer of the municipal corporation, such bondholder or taxpayer may file a petition with the council in the name of the bondholder on behalf of the holders of such bonds or in the name of the taxpayer on behalf of the taxpayers for like relief. Council shall hear the matter and render its decision by majority vote."

We do not believe that this ordinance has ever been invoked by a Solicitor or a petitioner, so no court or other tribunal has interpreted its meaning. However, Ohio case law involving surety bonds for public officials provides useful guidance in defining what "faithful performance" means for purposes of Section 205-3. And other analogous legal concepts related to trustees and fiduciaries provide guidance in determining whether the CSR Trustees have faithfully performed their duties.

I. Definition of "faithful performance" in Ohio case law.

The bond requirements for CSR Trustees imposed by the Ferguson Act and the Cincinnati Municipal Code serve as the starting point for fashioning the definition of "faithful performance."

As originally enacted, Section 2 of the Ferguson Act required that the CSR Trustees "enter into bond to the city in such sum as the court may direct, with one or more sufficient sureties, to be appointed (approved) by the court, conditioned for the *faithful discharge* of their duties." In turn, Section 6 of the Act provided that the City Solicitor must apply for removal of a CSR Trustee if the Solicitor had reason to believe that the Trustee has "failed in the *faithful performance* of his trust." Because both terms in the Act defined a standard to which a Trustee must adhere to avoid removal or sanction, the Act's use of "faithful discharge" and "faithful performance" should be read as synonymous.

The Cincinnati Municipal Code uses language that mirrors the Ferguson Act. Under Cincinnati Municipal Code 205-1, CSR Trustees must enter into a bond conditioned on the "faithful discharge" of their duties, and under Section 205-3, the City Solicitor has a duty to apply for removal if a CSR Trustee has failed in the "faithful performance" of their duties.

Though Ohio courts have not addressed the meaning of "faithful performance" in the context of the Ferguson Act and the Cincinnati Municipal Code, Ohio courts have assigned meaning to that term while addressing surety liability with respect to bonds conditioned on the "faithful performance" of the duties of other public officials. This case law is instructive given that the Act and Municipal Code contain a similar bond condition for CSR Trustees.

In *United States Fid. & Guar. Co. v. Samuels*, 116 Ohio St. 586, 592 (1927), the Ohio Supreme Court faced the question of whether the surety, United States Fidelity & Guaranty Company, was bound to pay on a $500 bond that was conditioned upon the "faithful performance" of a police officer's duties. The officer had caused an injury while operating a vehicle in the course of his employment. In answering the question of whether the surety was liable on the bond, the Court held that public officials fail to faithfully perform their duty when they commit "nonfeasance, misfeasance, or malfeasance." *Id.* quoting *American Guar. Co. v. McNiece*, 111 Ohio St. 532 (1924).

Accordingly, when determining whether there is reason to believe that CSR Trustees have failed to faithfully perform their duties, the City Solicitor should examine whether there is reason to believe that the Trustees have committed nonfeasance, misfeasance, or malfeasance. The Ohio Supreme Court has explained that "[n]onfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do;

and malfeasance is the doing of an act which a person ought not to do at all." *State ex rel. Neal v. State Civ. Serv. Com.*, 147 Ohio St. 430, 434, 72 N.E.2d 69 (1947).

II. Other legal concepts informing whether trustees have "faithfully performed" their duties.

Because there is no precedent for applying the definition of "faithful performance" to actions taken by CSR Trustees in negotiating a business transaction, we look to other analogous legal concepts related to trustees and fiduciaries for additional guidance.

A. Trustees generally can only be removed for a serious breach of trust.

Since the members of the Board are Trustees, general trust law principles are instructive. A trustee "shall administer a trust in good faith," in accordance with the trust's terms. R.C. 5805.01. Courts have recognized that "[t]he removal of a trustee is generally considered a drastic action and the party seeking to remove a trustee must show a basis for removal by clear and convincing evidence." *Tomazic v. Rapoport*, 2012-Ohio-4402, 977 N.E.2d 1068, ¶ 33 (8th Dist.).

A breach of trust may be grounds to remove a trustee, but "not every breach of trust justifies removal of the trustee. The breach must be 'serious.'" Unif. Trust Code § 706; R.C. 5807.06 (removal permitted if "trustee has committed a serious breach of trust"); *Gorby v. Aberth*, 2017-Ohio-274, 81 N.E.3d 910, ¶ 31 (9th Dist.) ("[A] court may remove a trustee if the trustee has committed a serious breach of the trust."). "A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together." Uniform Trust Code § 706.

B. Directors of non-profit corporations are subject to the business judgment rule.

The Trustees can also be seen as analogous to the directors of a nonprofit corporation. Directors of a nonprofit corporation must perform their duties, "in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances." R.C. 1702.30(B).[3]

Courts apply the business judgment rule to the business decisions of the directors of nonprofit corporations. *Tuttle v. Collins*, 8th Dist. Cuyahoga No. 108909, 2020-Ohio-4062, ¶ 20 (applying the business judgment rule to review sale approved by a museum board of trustees). The business judgment rule "is a rebuttable presumption that directors are better equipped than the courts to make business judgments and that the directors acted without self-dealing or personal interest and exercised reasonable diligence and acted with good faith." *Id.* Under the business judgment rule "[t]he decisions of disinterested directors will not be disturbed if they can be

[3] "In performing the duties of a director, a director is entitled to rely on" information provided by competent professional experts, such as those hired by the Board to advise them during the negotiations with Norfolk. R.C. 1702.30(C)(2).

attributed to any rational business purpose." *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App. 3d 579, 590 (8th Dist. 1994).

C. Public officials generally are afforded great deference in policy decisions and the removal of public officials who are subject to political process is disfavored.

Because the decision to sell the CSR at a particular price and subject to particular terms is, in essence, a policy judgment by the Trustees, that decision may be considered analogous to a legislative decision made by public officials. Legislative decisions generally are afforded a "strong presumption of validity." *B&J Elec. Co. v. City of Cincinnati*, 2020-Ohio-3869, 156 N.E.3d 974, ¶ 15 (1st Dist.) ("Rational basis review requires that [state action] be upheld where it is rationally related to a legitimate governmental purpose."); *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (holding that, under rational basis review, policy judgments are afforded "a strong presumption of validity"). The U.S. Supreme Court instructs that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

Additionally, because the Trustees are appointed by elected officials, and because the voters of Cincinnati will have the ultimate say regarding whether the CSR should be sold to Norfolk under the terms of the agreement negotiated by the Trustees, it is appropriate to consider that Ohio law disfavors the removal of public officials who are subject to political process. *See Adamson v. Coroner*, 12th Dist. Brown No. CA2014-07-016, 2014-Ohio-5739, ¶ 12 ("The law, however, does not favor the removal of duly elected officials and a removal should not be ordered lightly for minor or isolated infractions."); *In re Augenstein*, 53 Ohio App.2d 327, 329, 374 N.E.2d 160, 162 (5th Dist.1977) (removal improper where public officials mistakenly, and without ill-intent, violated public bidding requirements); *State ex rel. Corrigan v. Hansel*, 20 Ohio St.2d 96, 206 N.E.2d 563 (1965). Public officials "should not be removed except for clearly substantial reasons and conclusions that his further presence in office would be harmful to the public welfare." *Corrigan*, 20 Ohio St.2d at 100; *In re Removal of Kuehnle*, 161 Ohio App.3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, ¶ 87 (12th Dist.) ("With respect to misfeasance, malfeasance, and nonfeasance ... all three require a substantial departure from what is required of a public official before they will result in removal."). Mistakes or "errors of judgment" are not sufficient grounds to remove an official. *Augenstein*, 53 Ohio App.2d at 329 (citing *State ex rel. Attorney General v. Hogan*, 64 Ohio St. 532, 60 N.E. 627 (1901)). "Removal is not to be ordered lightly for minor or isolated infractions" and "all relevant circumstances surrounding the conduct in question should be examined, including the degree of wrongdoing and the number of incidents involved." *Kuehnle* at ¶ 87.

Case examples highlight application of these principles. In *Augenstein*, the Ohio court of appeals reversed the removal of three members of a board of education for nonfeasance. 53 Ohio App.2d at 330. The trial court had found that the members of the board of education committed nonfeasance by failing to properly advertise bids with respect to the construction of a cement block building built by vocational education students. *Id.* at 328. The court of appeals reversed, concluding that, although the public officials violated public bidding requirements, the removal of these board members for an "isolated transaction which, insofar as the record of evidence in this

case is concerned, was entirely innocent" did not constitute "substantial departure on the part of any of the removed board members from the faithful performance of their official duties." *Id.* at 330.

In *Adamson*, the another Ohio court of appeals held that the trial court properly denied a complaint for removal of a duly-elected coroner who was alleged to have violated her statutory duties by, among other things, failing to secure valuable personal property, notify decedents' next of kin, and treat bodies she encountered with the "respect owed to the citizens of Brown County, whether alive or deceased." 2014-Ohio-5739 at ¶ 3. Although the trial court acknowledged that the coroner made "mistakes ... in the performance of her official duties," the court was "not convinced" that those mistakes "r[o]se to the level of gross neglect of duty, misfeasance, malfeasance or nonfeasance required by the law for her removal." *Id.* at ¶ 4. After reviewing the record, the court of appeals agreed with the trial court's conclusion, while commenting that "this case is not about whether the citizens of Brown County are being properly served by their duly elected officials, for that is a question for the ballot box, not the court." *Id.* at ¶ 20.

ANALYSIS

Under the legal principles identified above, the record does not establish reason to believe that the CSR Trustees failed in the faithful performance of their trust. Taking into account all of the evidence, it appears that the Trustees acted in good faith and consistent with their duty to act in what they believe to be the best interests of the City.

The Trustees engaged in extensive negotiations with Norfolk for the sale of the CSR for roughly two years and relied on experts to value the CSR and negotiate common market terms for the sale of a railroad asset. They consulted with independent experts to ensure that the sale of the CSR for $1.6 billion, plus transaction fees of $24.5 million, would be favorable for the City from a legal and financial perspective. According to information received by the Trustees, selling the CSR is projected to, on average, double the annual amount of income CSR provides for City infrastructure spending, far exceeding the revenue projected for a hypothetical renewed lease. Further, the total price negotiated for the sale is closer to the high end of the valuation range calculated by the Board's financial consultants. Under these circumstances, the Trustees could rationally conclude that the sale of the CSR at the agreed upon price and terms, including the $24.5 million transaction fee, is in the best interests of the City.

This conclusion is supported by the lack of allegations that the Trustees were anything other than disinterested in the transaction or otherwise maintained a relationship with Norfolk that went beyond an arm's length business relationship. To the contrary, the record indicates that the Board engaged in extensive negotiation with Norfolk and ultimately obtained an agreement involving a total purchase price that is well above the initial price offered by Norfolk (and well within the valuation range provided by the Board's expert consultants).

Mr. Brinkman claims that the Trustees failed to faithfully perform their duties because they agreed to reduce the transaction fee by $500,000 to offset Norfolk's costs related to the referendum campaign. He claims that the Board violated Article XII, Section 3 in so doing, which states that "no monies of the City of Cincinnati or any of its Boards or Commissions, from any source

whatsoever * * * may be *expended* for the purpose of advocating the election or defeat of any candidate for any public office, or for the passage or defeat of any ballot issue."

This assertion is misplaced for several reasons. First, it mischaracterizes the facts. After obtaining a favorable $1.6 billion purchase price for the CSR, the Board also pushed Norfolk to pay an additional transaction fee. As is common in large transactions, the Board demanded that Norfolk, as buyer, pay the transaction costs of the CSR, as seller. Norfolk believed that some of the transaction costs would include money the Board would spend in a campaign to urge City voters to approve the transaction. And when the Board told Norfolk that the Board could not spend money in that fashion, Norfolk reduced its offer, because the transaction costs that it agreed to cover had decreased. Moreover, the Board actually got Norfolk to commit to spend more money on the necessary campaign than Norfolk originally intended. Consequently, the negotiated reduction in the transaction cost figure is not indicative of an act of bad faith.

Second, the plain language of Article XII, Section 3 does not prohibit the Trustees from accounting for the costs that Norfolk would incur to support the referendum. Article XII, Section 3 prohibits the Board from "expend[ing]" funds to support a political campaign. But agreeing to a certain transaction fee to account for funds that another party may spend does not constitute an expenditure. While Mr. Brinkman characterizes the Trustees' decision in this regard as an attempted end-run around the law, the record indicates that the Trustees made this decision to allow for the expenditure of money on the referendum while also maintaining compliance with the law. And the Trustees had a rational basis to conclude that monies should be spent in support of the referendum. Indeed, if the Trustees rationally could conclude, as discussed above, that the deal with Norfolk is in the best interests of the City, they also rationally could conclude that spending money to support the referendum necessary to implement the deal is in the City's best interests.

Third, while Mr. Brinkman's demand focuses on the $500,000 reduction in the transaction fee, the amount of that reduction must be viewed against the totality of the deal in assessing the Trustees' actions. A $500,000 reduction constitutes just 0.03% of the $1.625 billion purchase price initially negotiated by the parties. Such a small reduction in the overall price lacks materiality insofar as it does not significantly alter the "total mix" of the deal. *E.g.*, *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (noting that, in the context of securities law, materiality requires "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available."). And the Board's decision to agree to that reduction, even if it could be considered a breach of trust, could not be considered a "serious breach" warranting removal of a trustee. *Gorby*, 2017-Ohio-274, 81 N.E.3d 910, at ¶ 31 ("[A] court may remove a trustee if the trustee has committed a serious breach of the trust.").

Fourth, Mr. Brinkman's assertion argues that the Trustees failed in the faithful performance of their duties by taking actions to ensure that the CSR complied with the City Charter. We find no law in Ohio or elsewhere suggesting that a public official fails to faithfully perform their duties by following the law. Misfeasance, malfeasance, and nonfeasance all involve some deviation from the law, not compliance with it.

Fifth, faithful performance of duty does not require a public official to be correct or perfect in every decision. Public officials might make errors; they might make choices that people disagree with; they can be wrong—a deal might not turn out the way that they had hoped. The public official must act in what they believe to be the best interests of the entity they serve. As long as they do that, they are acting in faithful performance of their duty, even if they turn out to be wrong. In this situation, as in most political situations, the voters have the ultimate say over whether the deal is a good one.

All said, the deal appears to be favorable for the City—doubling the annual revenue the CSR provides to the City's infrastructure. We see no reason for "second-guessing" the Board's business decision to reduce the CSR total purchase price by just 0.03%, particularly when it appears that the Board's decision, on the whole, was rational and made in good faith based on their view of what is in the City's best interest, and when the Cincinnati voters will have the ultimate say.

CONCLUSION

Based on the foregoing, we conclude that there is no reason for you to believe that the CSR Trustees failed in the faithful performance of their duties. We therefore recommend that you decline Mr. Brinkman's demand that you petition City Council to remove the Trustees.

SQUIRE PATTON BOGGS

Squire Patton Boggs (US) LLP
201 E. Fourth St., Suite 1900
Cincinnati, Ohio 45202

O +1 513 361 1200
F +1 513 361 1201
squirepattonboggs.com

Scott A. Kane
T +1 513 361 1240
scott.kane@squirepb.com

June 6, 2023

Emily Smart Woerner, Esq.
City Solicitor, City of Cincinnati
801 Plum Street, Suite 214
Cincinnati, Ohio 45203
emily.woerner@cincinnati-oh.gov

Re: Board of Trustees of the Cincinnati Southern Railway — Response to Petition for Removal

Dear Solicitor Woerner:

As you know, I represent the Trustees of the Cincinnati Southern Railway (the "Railway"). This letter is the Trustees' response to the demand and petition by Thomas Brinkman (ostensibly in his capacity as a taxpayer of the City) submitted to you, and now to Cincinnati City Council, demanding that the Trustees be removed from the Board of the Railway.

The Trustees have always faithfully and diligently performed their duties. Their good faith, capable stewardship of the Railway has maximized its value to the great benefit of the City of Cincinnati and its citizens. The Trustees have effectively negotiated a proposed transaction for the sale of the Railway that will generate approximately **1.6 billion dollars** to be placed in trust, which will benefit the citizens and taxpayers of Cincinnati for generations to come. The projected economic value of the transaction is much more than the Railway could reasonably have expected to receive if the prospective purchaser, instead of purchasing it, continued to lease the Railway, which it exercised the contractual right to do through the year 2051.

Thanks to diligent and capable negotiation by the Trustees, the final $1.6 billion base purchase price for the proposed sale is nearly double the amount initially offered by the prospective purchaser. Beyond the $1.6 billion base purchase price, the financial terms of the proposed sale include $24.5 million of ***additional*** compensation to pay the expenses of the Railway, including a $4.5 million "Accelerated Transaction Fee" payable to the Railway even if the proposed sale is not consummated. In addition to these favorable financial terms, the proposed sale includes many advantageous non-economic terms, like indemnity by the purchaser for future environmental claims and protection from liability that benefit the Railway and the City and, by extension, the taxpayers of Cincinnati.

The petition for removal argues that, because in the course of negotiating the final terms of the proposed sale agreement a single component of the transaction was $500,000 less than

contemplated in an initial non-binding memorandum of understanding ("MOU"), the Trustees have somehow performed unfaithfully. This accusation is both false and fundamentally unsupportable. Neither the Railway nor the prospective buyer had agreed to any terms, financial or otherwise, until they were memorialized in the final, executed purchase agreement.

The MOU clearly and expressly states the parties' intention and agreement that the MOU was not binding, not an enforceable obligation of either the Railway or the prospective purchaser, and that the parties intended to negotiate the actual, binding terms in the form of a final purchase agreement. After continuing negotiations, the Trustees accomplished exactly that, to the great benefit of the Railway and the citizens of Cincinnati. The petitioner insists that, because the final financial terms of the more than $1.6 billion transaction changed approximately 0.03% (*i.e.*, three one-hundredths of a percent) from a single point during non-binding negotiations, the Trustees should be removed. This contention is absurd on its face. Among other things, it ignores that the Trustees effectively negotiated to ***increase*** the purchase price by almost $760 million from the original non-binding offer to purchase the Railway. The Trustees faithfully and successfully negotiated to maximize the value of the Railway to the ultimate benefit of the City and its taxpayers.

By any measure, the Trustees have well and faithfully performed their duties. They have successfully negotiated a final and binding agreement for the proposed sale transaction that maximizes the value of the Railway to the benefit of Cincinnati taxpayers for decades to come. The petition for their removal lacks any basis in fact, law, or basic common sense. For these reasons, and as further explained below, the petition should be rejected.

Background Concerning the Board of Trustees

The Board of Trustees of the Railway is a bi-partisan body consisting of five Cincinnati residents appointed by the Mayor with the approval of City Council. The Trustees are appointed for five-year terms. The Board's current members include Trustees associated with both the Democratic and Republican parties, including two former Democratic Mayors and a former Republican member of City Council. The political affiliations of the Trustees are disclosed, and no more than three Trustees affiliated with the same political party may serve on the Board. The Trustees are not employees or elected officials of the City and they govern the Railway independently pursuant to the provisions of the Cincinnati Municipal Code.

The Trustees are not compensated for their service on the Board. Each of the Trustees volunteers significant amounts of personal time to serve on the Board of the Railway for the benefit of the citizens of Cincinnati. They have no financial interest in the Railway, its operations, or the proposed sale transaction. The Trustees have no personal incentive — financial, political, or otherwise — to prefer a proposed sale of the Railway over continued leased operations. The Trustees are pursuing the proposed sale of the Railway because, in their reasoned and independent judgment, that proposed transaction best maximizes the value of the Railway and the benefit to the City of Cincinnati and its residents both now and in the future.

The Current Lease and Proposed Sale of the Railway

The Railway is currently leased to the Cincinnati, New Orleans and Texas Pacific Railway Company ("CNOTP"), which is a subsidiary of the Norfolk Southern Railway Company and its ultimate parent, the Norfolk Southern Corporation (collectively "NS"). Under the existing lease of the Railway, CNOTP makes lease payments to the City of Cincinnati. In 2021, the lease payments were $23,359,043.[1] Pursuant to a Cincinnati City Council resolution adopted in 1987, the Railway lease revenue received by the City of Cincinnati is limited to use for payment of the expense of infrastructure restoration per the recommendations of the Cincinnati Infrastructure Commission.

The existing lease with CNOTP runs through December 31, 2026. However, CNOTP had an option to extend the term for an additional 25 years.[2] CNOTP exercised that option on December 14, 2021 and extended the lease through 2051. Future payments under the extended lease were not fixed and had to be agreed by the parties or established through an arbitration procedure specified in the lease.

The parties began negotiations of future lease payments in 2020, even prior to the extension of the term of the lease. The Board of Trustees proposed an annual lease payment of $65 million beginning in 2027. NS (negotiating for its subsidiary, CNOTP) initially proposed $28.9 million. The parties held firm in these proposals through several rounds of offers and counteroffers until NS increased its lease offer to $37.3 million in April of 2022, shortly before the date that either party could elect to proceed to arbitration. The Trustees made the entire history of negotiations, including specific offers and counteroffers, available to the public on the Railway's website.[3]

In July of 2021, during the course of negotiations concerning lease payments to be made under the extended lease, NS first proposed to purchase the Railway for $865 million. Through multiple rounds of negotiations during 2021 and 2022, the Trustees (with the assistance and guidance of experienced legal and financial advisors) were able to increase the purchase price to $1.6 billion plus an ***additional*** $24.5 million of transaction fees payable to the Railway, $4.5 million of which is payable to the Railway as an "Accelerated Transaction Fee" regardless of whether the proposed sale transaction closes. These financial terms are reflected in the final Asset Purchase and Sale Agreement dated November 21, 2022 (the "Purchase Agreement") agreed to by the Board of Trustees, CNOTP, and NS.

---

[1] *See* 2021 CSR Board of Trustees Financial Statements, publicly available at: https://www.cincinnatisouthernrailway.org/documents/2020%20and%202021%20Financial%20Statements.PDF. All of the Railway's financial statements and other materials are publicly available on its website at: https://www.cincinnatisouthernrailway.org/public-information/.

[2] *See* Jan. 1, 1987 Supplementary Agreement § 2, publicly available at: http://cincinnatisouthernrailway.org/documents/Supplementary-Agreement-Jan-1-1987.pdf.

[3] *See* Potential Sale of the Cincinnati Southern Railway to Norfolk Southern — Frequently Asked Questions, publicly available at: https://www.cincinnatisouthernrailway.org/documents/csr-sale/Final%20FAQ%20for%20Publication%20-%20CSR%20(2.6.2023).pdf.

The Trustees consistently and effectively negotiated to increase the purchase price to be received by the Railway for the benefit of the City and its taxpayers. These negotiations resulted in a total purchase price in the Purchase Agreement that is approximately 188% higher than NS's initial offer. Throughout these negotiations, the Trustees were guided and advised by an experienced team of professional advisors, including financial advisors analyzing the valuation of the Railway under various methodologies. All of this supports the Trustees' faithful determination that the $1.6 billion base purchase price, together with the additional $24.5 million of transaction costs, is a fair valuation and that the proposed transaction benefits the Railway, the City, and its taxpayers.

The False and Unsustainable Premise of the Petition for Removal

The petition for the removal of the Trustees is based on the false allegation that, because the purchase price payable to the Railway under the Purchase Agreement includes $24.5 million of additional transaction expenses payable to the Railway instead of $25 million mentioned during prior, non-binding negotiations, the Trustees somehow reduced the amount of money "due" from NS.[4] This allegation is both factually and legally misplaced.

No money was ever possibly "due" from NS until the final terms of the Purchase Agreement were established. The MOU that referenced a possible figure of $25 million of transaction expenses is the basis for petitioner's repeated contentions about the amount allegedly "due" from NS, that "should have been paid" to the City, and the purportedly "agreed upon" purchase price.[5] Even the most cursory reading of the MOU contradicts this attempted characterization.

The MOU was "non-binding," as indicated in its very title and repeated numerous times throughout the document.[6] Rather than establishing what was "due" and "should have been paid" between the parties, the MOU expressly and repeatedly provides that the actual terms of the transaction would be established if, and only if, the parties reached a subsequent written "Agreement." The MOU states, for example, that only the subsequent Agreement would "contain the definitive provisions" of the transaction; that "**no contract or agreement providing for the Proposed Transaction . . . shall be deemed to exist** between [the parties] unless and until the Agreement has been executed and delivered"; and that the statements in the MOU "shall not be deemed to constitute . . . [or announce] any offer, acceptance or legally binding agreement and **such statements do not create any rights or obligations for or on the part of any Party.**"[7] Further, each party reserved "the right, in its sole discretion, for any reason or no reason, to reject

[4] *See* April 24, 2023 Letter to Solicitor Woerner regarding "Demand for Removal of Board of Trustees of the Cincinnati Southern Railway" (the "Removal Demand").

[5] *See* April 24, 2023 Removal Demand at 1–2.

[6] *See* Nonbinding Memorandum of Understanding dated June 24, 2022.

[7] *See* Nonbinding Memorandum of Understanding, § 4 (emphasis added).

any and all proposals made to it or its representatives with regard to the Proposed Transaction and to terminate discussions and negotiations with the other Party at any time."[8]

Petitioner's allegations against the Trustees based on the MOU ignore the explicit, unambiguous language of the MOU itself. Negotiations of potential terms of a possible future agreement are not the same thing as final, binding terms in an executed contract. Either petitioner and his counsel do not grasp this basic concept or, more likely, are pretending not to for purposes of political theater.

Moreover, the reasons for the slight change in terms is not a mystery. Petitioner's April 24, 2023 demand references and quotes a partially redacted August 2022 memorandum regarding continued negotiation of the transaction fee.[9] Petitioner's counsel insists that he received the memorandum in only a redacted form. That contention is incorrect, as communicated in writing to petitioner's counsel by the City Solicitor's office.[10] Although petitioner's counsel possesses the full, unredacted memorandum, his May 23, 2023 Petition to Cincinnati City Council again references only the redacted form.[11]

This is likely because the actual language of the memorandum disproves petitioner's attempted characterization. The actual language of the memorandum, which references some changes in NS's proposed draft of the Purchase Agreement in July of 2022 (after the MOU), describes the reason for the continued negotiation of the transaction fees: "[T]hey are reacting to us telling them that CSR can't spend its money supporting or trying to pass the City referendum. **They say that they thought that this was one of the intended uses of the $5,000,000 [accelerated] transaction fee."**[12] The Trustees resisted NS's efforts in drafts of the Purchase Agreement to make the Railway or the Trustees responsible for the vote to approve the proposed transaction, explaining that this was not permissible under applicable law. But the Trustees still needed to address NS's view that the figure from the MOU did not reflect the terms to be included in the final agreement.

Directly contrary to petitioner's attempted characterization of the issue, these communications make clear that in August of 2022 (***after*** the June 2022 non-binding MOU): 1) NS's payment and the amount of the accelerated transaction fee was still being negotiated, among numerous other issues the parties were still negotiating in an effort to reach a final, binding agreement; and 2) one reason for the continued negotiation was NS's misplaced belief that part of the Accelerated Transaction Fee referenced in the MOU would be expended by the Trustees to support voter approval. When the Trustees explained that this was not possible (and insisted that the terms of the Purchase Agreement reflect that), the issue was negotiated to conclusion in the final Purchase Agreement. NS and the Trustees reached a mutually acceptable resolution, and the

---

[8] Nonbinding Memorandum of Understanding, § 4.

[9] *See* Demand for Removal at 4.

[10] *See* May 3, 2023 Letter from Solicitor Woerner to C. Hartman.

[11] *See* May 23, 2023 Petition for Removal of Members of Board of Trustees of the Cincinnati Southern Railway, at 4.

[12] *See* April 6, 2023 Open Records Response at 659 of 662.

Trustees obtained NS's final and binding commitment to pay $24.5 million of the Railway's transaction costs under the terms of the Purchase Agreement.

Nothing about this resolution was improper. The Trustees had no legal or practical ability to force NS to pay any portion of the Railway's transaction expenses or to somehow enforce non-binding, non-contractual provisions of the MOU. NS could have refused to pay any portion of the Accelerated Transaction Fee. The Trustees' reasoned judgment regarding the best way to finalize the terms of the Purchase Agreement and negotiate a resolution of this issue does not support any conclusion about a lack of faithful performance. For example, courts around the country recognize under the business judgment rule that good faith decision-making of leaders of organizations should not be disturbed by those who seek to second guess it later.

As discussed above, the slight change to the financial terms of the transaction between the MOU and the final Purchase Agreement represents approximately 0.03% (*i.e.*, three one-hundredths of one percent) of the total financial consideration payable to the Railway under the terms of the Purchase Agreement. It was both reasonable and prudent for the Trustees to secure NS's binding agreement to the terms of the Purchase Agreement (unlike the non-binding terms of the MOU), including the $1.6 billion base purchase price, the additional $24.5 million of purchase consideration, and the valuable non-economic terms benefitting the Railway and City.

Finally, while not necessary to reject petitioner's baseless allegations, it is worth observing that they are irrational in addition to being unsupported. The Trustees had already negotiated to **increase** the purchase price by literally hundreds of millions of dollars more than initially offered by NS. In addition to negotiating a base purchase price nearly double what NS originally offered, the Trustees obtained NS's agreement to pay the additional $24.5 million of transaction expenses. There is no logical or rational reason to suppose that the Trustees would unfaithfully agree to provide a $500,000 "windfall" to NS as gratuitously alleged by petitioner in a context where the Trustees had aggressively negotiated to obtain a purchase price hundreds of millions of dollars more than originally offered by NS. Contrary to this illogical accusation, the actual record demonstrates that the Trustees faithfully, diligently, and effectively discharged their duties at every turn and obtained terms in the Purchase Agreement that greatly benefit the Railway and the citizens of Cincinnati.

Benefits to the Railway and City of the Terms of the Proposed Purchase Agreement

Notably, the proposed sale pursuant to the Purchase Agreement is expected to generate significantly more value to the citizens of Cincinnati than continued payments under the current or extended lease. In 2024, payments under the current lease running through 2026 would be $25.5 million. Projected earnings from a $1.6 billion trust[13] investing the sale proceeds from the

[13] In connection with the proposed sale of the Railway, the Trustees pursued and obtained changes to Ohio law providing that the proceeds from the possible sale of the Railway would be placed into a "railway proceeds trust," the investment proceeds from which would be paid to the City of Cincinnati limited to funding the rehabilitation, modernization, or replacement of existing infrastructure improvements but not for other purposes. The Ohio general assembly approved these changes to state law. *See* Am. Sub. H.B. No. 23 (as passed by the Ohio Senate). Accordingly,

Purchase Agreement are projected to be $57.1 million, even after reserving an additional approximately $30 million to grow the trust as a hedge against inflation.[14] By this measure, the proposed transaction under the Purchase Agreement is projected to generate around twice as much funding for roads and other existing infrastructure to the benefit of the taxpayers of Cincinnati.

The terms of the proposed Purchase Agreement, beyond the purchase price, also include other beneficial terms for the Railway and City. These include NS's assumption of obligations and potential liabilities of the Railway, including assumption of all environmental liabilities of both the Railway and the City of Cincinnati arising either before or after the closing date of the proposed sale relating to the condition, ownership, or use of the real property and other assets to be acquired by NS under the Purchase Agreement.[15] NS and CNOTP agreed to indemnify the Railway and the City of Cincinnati against these and other obligations and potential liabilities.[16]

Importantly, the terms of the proposed sale under the Purchase Agreement are (and always have been) subject to approval by the voters of the City of Cincinnati. The Trustees have pursued the transaction under the Purchase Agreement because, in the exercise of their reasoned, faithful judgment, guided by the advice of experienced legal and financial advisors, the Purchase Agreement best maximizes the value of the Railway for the City of Cincinnati and its residents. But it will be the voters of Cincinnati, not the Trustees, who make the final determination whether to proceed with the Purchase Agreement.

In all respects, the Trustees have acted faithfully and diligently to maximize the value of the Railway and create the greatest possible benefit to the City and its taxpayers. This has included negotiating to increase the base purchase price for the potential sale of the Railway by hundreds of millions of dollars more than initially offered, obtaining NS's agreement to pay an additional $24.5 million of transaction costs in connection with the potential sale, obtaining indemnification for the Railway and the City by NS and CNOTP under the terms of the Purchase Agreement, and obtaining amendment of Ohio law to ensure that the proceeds of the sale of the Railway will be held in trust for the benefit of Cincinnati taxpayers for generations to come. Rather than failing in the faithful performance of their duties, the Trustees have dedicated themselves through countless hours of volunteer service to deliver a remarkable result and benefit to the City and its citizens should the Purchase Agreement be approved by the voters. The baseless, politically motivated petition demanding their removal should be rejected.

---

the Trustees have ensured that the value of the Railway will be preserved for the benefit of Cincinnati taxpayers for generations to come.

[14] *See* Potential Sale of the Cincinnati Southern Railway to Norfolk Southern — Frequently Asked Questions, at 5–7, publicly available at: https://www.cincinnatisouthernrailway.org/documents/csr-sale/Final%20FAQ%20for%20Publication%20-%20CSR%20(2.6.2023).pdf.

[15] *See* Purchase Agreement, § 2.04(d).

[16] *See* Purchase Agreement, § 13.02.

Please feel free to contact me if you have any questions regarding the foregoing.

Sincerely,

Scott A. Kane

cc: Aaron M. Herzig, Esq.
Board of Trustees of the Cincinnati Southern Railway

city of CINCINNATI LAW

June 8, 2023

Via email @hartmanlawfirm@fuse.net
Curt C. Hartman, Esq.
The Law Firm of Curt C. Hartman
7394 Ridgepoint Drive, Suite 8
Cincinnati, OH 45240

Mr. Hartman:

This letter serves as my response to your client's April 24, 2023 demand, that I, in my capacity as City Solicitor, petition the City Council to remove all of the Cincinnati Southern Railway trustees pursuant to Cincinnati Municipal Code 205-3. In short, I will not be petitioning the Council to remove the trustees because I see no basis on which to conclude any of the trustees have failed in their faithful performance of their trust.

To ensure that your client's demand was thoroughly and objectively considered, I engaged the Taft Stettinius & Hollister firm to provide me with legal advice and analysis on the proper considerations for assessing whether the trustees failed to faithfully perform their duties such that a petition for their removal is appropriate. I additionally engaged the Squire Patton Boggs firm to represent the Cincinnati Southern Railway Board and its trustees to ensure their perspectives on the matter were accurately presented.

I have now received the work product from these two firms, and I have carefully reviewed and considered their analyses and conclusions. In addition, I have reviewed your April 24 letter to me and the premature petition you submitted to the Clerk of Council on behalf of your client on May 23, 2024. Furthermore, I have my own independent familiarity with the thousands of pages of public records that document the years-long negotiations between the Board and Norfolk Southern – records which you also have in your possession.

From these materials, it is clear to me that there is simply no factual or legal basis justifying the weighty step of petitioning the Council for the trustees' removal. The voluminous record of the negotiation demonstrates that the trustees, who serve as unpaid volunteers, acted with care, diligence, and skill, with appropriate consultation and guidance from experts in the field, to negotiate a proposed sale that would more than double the annual revenue the City receives from the rail line. Rather than appropriately considering the transaction in its entirety, your client instead seeks to

remove the Trustees based on a narrow aspect of the negotiation that amounts to 0.03% of its total value. Yet, even considering that single aspect of the transaction, I fail to see how the trustees's diligent correction of Norfolk Southern's misunderstanding that the trustees would fund a campaign to approve the proposed sale by accurately communicating they were legally prohibited from doing so and then accepting an offer that was .03% less could possibly serve as a basis for concluding they acted inappropriately.

Finally, although you cite no applicable or analogous source of law that supports your client's position, the legal opinion provided by outside counsel does. In my view, every possible source of law analogous to this situation counsels that removal is unsupported and inappropriate under these facts.

I recognize that CMC 205-3 now provides your client with the ability to directly petition the Council for their removal. Though your client's May 23, 2024 petition was premature, the City will not require you to resubmit the petition. The Mayor has agreed to place the petition on the Council Calendar for the June 14, 2023 regular meeting of Council. City Council convenes at 2 p.m. in Council Chambers located on the 3rd floor of City Hall, 801 Plum Street. When this item is called, your client will receive ten minutes to present his arguments in favor of removal. The trustees, if they desire, will then receive ten minutes to provide a response. The Council, if it desires, will have the opportunity to ask questions of your client and the trustees and then will take a vote on the petition.

I am enclosing with this response the letter I received from Squire Patton Boggs on behalf of the Trustees and the opinion I received from Taft. I have waived the privilege for the Taft memorandum.

Sincerely,

Emily Smart Woerner

Emily Smart Woerner
City Solicitor