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LATHAM & WATKINS LLP

January 19, 2024

Office of the Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: **Simon Property Group, Inc.**
Shareholder Proposal of the New York City Carpenters Pension Fund
Securities Exchange Act of 1934 – Rule 14a-8

To the addressee set forth above:

This letter is submitted pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended. Simon Property Group, Inc. (the "Company") has received a shareholder proposal, attached hereto as Exhibit A (the "Proposal"), from the New York City Carpenters Pension Fund (the "Proponent") for inclusion in the Company's proxy statement for its 2024 annual meeting of shareholders. The Company hereby advises the staff (the "Staff") of the Division of Corporation Finance that it intends to exclude the Proposal from its proxy statement for the 2024 annual meeting (the "Proxy Materials"). The Company respectfully requests confirmation that the Staff will not recommend enforcement action to the Securities and Exchange Commission (the "Commission") if the Company excludes the Proposal pursuant to (i) Rule 14a-8(i)(2) because the Proposal would require the Company to violate Delaware law and (ii) Rule 14a-8(i)(6) because the Company lacks the power to implement the Proposal.

By copy of this letter, we are advising the Proponent of the Company's intention to exclude the Proposal. In accordance with Rule 14a-8(j)(2) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D"), we are submitting electronically to the Staff:

- this letter, which sets forth our reasons for excluding the Proposal; and
- the Proponent's letter submitting the Proposal.

The Company intends to file its definitive Proxy Materials with the Commission on or about March 27, 2024. This letter is being sent to the Staff fewer than 80 calendar days before such date and the Company requests that the Staff waive the 80-day requirement with respect to this letter.

I. The Proposal

The Proposal requests that the Company's shareholders approve the following resolution:

> **RESOLVED:**
>
> That the shareholders of Simon Property Group, Inc. ("Company") hereby request that the board of directors take the necessary action to amend its director election resignation bylaw that requires each director nominee to submit an irrevocable conditional resignation to the Company to be effective upon the director's failure to receive the required shareholder majority vote support in an uncontested election. The proposed amended resignation bylaw shall require the Board to accept a tendered resignation absent the finding of a compelling reason or reasons to not accept the resignation. Further, if the Board does not accept a tendered resignation and the director remains as a "holdover" director, the resignation bylaw shall stipulate that should a "holdover" director not be re-elected at the next annual election of directors, that director's new tendered resignation will be automatically effective 30 days after the certification of the election vote. The Board shall report the reasons for its actions to accept or reject a tendered resignation in a Form 8-K filing with the U.S. Securities and Exchange Commission.

A copy of the Proposal and supporting statement are attached to this letter as Exhibit A.

II. Grounds for Exclusion

The Company hereby respectfully requests that the Staff concur in its view that the Proposal may be excluded from the 2024 Proxy Materials pursuant to (i) Rule 14a-8(i)(2) because the Proposal would require the Company to violate Delaware law and (ii) Rule 14a-8(i)(6) because the Company lacks the power to implement the Proposal.

A. Rule 14a-8(i)(2) – The Proposal Would Require the Company to Violate Delaware Law

Rule 14a-8(i)(2) permits a company to exclude a proposal if its implementation would cause the company to violate state, federal or foreign law applicable to the company. As discussed below and for the reasons set forth in the legal opinion provided by Potter Anderson & Corroon LLP, the Company's Delaware counsel, attached hereto as Exhibit B (the "Delaware Law Opinion"), we believe that the Proposal is excludable under Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law.

The Staff has on numerous occasions permitted exclusion under Rule 14a-8(i)(2) of proposals that would cause companies to violate state law by impermissibly infringing on the managerial authority of the board of directors and preventing directors from discharging their fiduciary duties to the company. For example, in *Bank of America Corp.* (avail. Feb. 23, 2012), the Staff permitted exclusion of a proposal under Rule 14a-8(i)(2) that requested the company take action, including amending the bylaws and any other actions needed, to "minimize" the indemnification rights afforded to directors. In its response to the company's no-action request, the Staff stated that "implementation of the proposal would cause Bank of America to violate state law," where the supplied opinion of counsel had opined that the proposal violated Section

141(a) of the Delaware General Corporation Law (the "DGCL") by removing from the board of directors its ability to determine whether (and to what extent) to provide indemnification to the company's directors. *See also Johnson & Johnson* (avail. Feb. 16, 2012) (permitting exclusion of a proposal under Rule 14a-8(i)(2) that would have required adoption of a bylaw that would disqualify directors from service on the company's compensation committee if they received "no" or "withhold" votes in excess of 10% of the votes cast, where the supplied legal opinion opined that the proposal violated state law by interfering with the exclusive grant of authority given to the board of directors to appoint directors to committees of the board); *Gillette Co.* (avail. March 10, 2003) (permitting exclusion of a proposal seeking a board policy establishing procedures for implementing shareholder proposals that receive majority support, where the supplied legal opinion argued the proposal would force the board of directors to implement shareholder proposals without considering their merit and that to do so would remove from the board of directors the judgment required to satisfy its duties under Delaware law).

Here, implementation of the Proposal would cause the Company to violate Delaware law because the Proposal impermissibly seeks to limit the decision-making authority of the Company's Board of Directors (the "Board") in contravention of its fiduciary duties. The Bylaws of the Company (the "Bylaws") require an incumbent director to promptly tender a conditional resignation to the Board, subject to acceptance by the Board, if the director does not receive the required vote for election in an uncontested election. The Bylaws further provide that the Governance Committee of the Board will make a recommendation to the Board as to whether to accept or reject the resignation. The Governance Committee of the Board, in making its recommendation, and the Board, in making its determination, are specifically permitted to take into consideration any factors or other information that they deem relevant or appropriate. The Proposal requests that the Board amend the Bylaws to require the Board to accept a director's resignation upon failure to obtain the required vote in an uncontested election "absent the finding of a compelling reason or reasons to not accept the resignation." The amendments to the Bylaws contemplated by the Proposal would impose a "compelling reason or reasons" standard on the decision made by the Board without any exception for compliance with the Board's fiduciary duties. In addition, if the Board determined that there was a "compelling reason or reasons" not to accept a director's resignation, then such director would continue to serve as a "holdover" director. The Proposal, if implemented, would also require the Board to amend the Bylaws so that, if such "holdover" director was not re-elected "at the next annual election of directors, that director's new tendered resignation will be automatically effective 30 days after the certification of the election vote."

As discussed in detail in the Delaware Law Opinion, Section 141(a) of the DGCL states that "[t]he business and affairs of every corporation organized under [the DGCL] shall be managed by or under the direction of a board of directors, except as may be otherwise provided in [the DGCL] or in its certificate of incorporation." Neither the DGCL nor the Company's certificate of incorporation modify the ability of the Board to manage the business and affairs of the Company with respect to the acceptance of director resignations. As a result, the directors are required to exercise their management power in respect of the acceptance of director resignations consistent with their fiduciary duties of loyalty and care, which require the Board to act in the best interests of the Company and its stockholders. As further discussed in the Delaware Law Opinion, Delaware courts have held that bylaws that dictate that decisions be made by the board

of directors without regard for the directors' fiduciary duties are invalid as a matter of Delaware law. The Proposal purports to do just that, by imposing a "compelling reason or reasons" standard that mandates a substantive decision on the part of the Board without regard to the application of the directors' fiduciary duties. Accordingly, the Delaware Law Opinion concludes that the Proposal violates Delaware law because it requires the Board to amend its Bylaws to adopt an exclusive "compelling reason or reasons" standard that does not permit the Board to consider its fiduciary duties. More specifically, the Proposal could require the Board to accept a resignation even though the directors do not believe that such acceptance would be in the best interests of the Company and its stockholders. Such acceptance of a resignation by the Board would not be in accordance with the directors' fiduciary duties and would accordingly cause the Company to violate Delaware law.

Accordingly, just as in Bank of America Corp, Johnson & Johnson, and the other precedents cited above, the Proposal may properly be excluded under Rule 14a-8(i)(2) because, as supported by the Delaware Law Opinion, implementing the Proposal would cause the Company to violate state law.

B. Rule 14a-8(i)(6) – The Company Lacks the Power to Implement the Proposal

Rule 14a-8(i)(6) allows a company to exclude a proposal if the company would lack the power or authority to implement the proposal. As described above, the Proposal would, if implemented, cause the Company to violate Delaware law. The Staff has on numerous occasions permitted exclusion under Rule 14a-8(i)(6) of proposals that would cause the company to violate the law of the jurisdiction of its incorporation. *See Arlington Asset Investment Corp.* (avail. April 23, 2021) (permitting exclusion of proposal that would violate Virginia law); *eBay Inc.* (avail. April 1, 2020) (permitting exclusion of proposal that would violate Delaware law); *Trans World Entertainment Corp.* (May 2, 2019) (avail. permitting exclusion of proposal that would violate New York law); *IDACORP, Inc.* (March 13, 2012) (avail. permitting exclusion of proposal that would violate Idaho law); *NiSource Inc.* (March 22, 2010) (avail. permitting exclusion of proposal that would violate Delaware law); *Schering-Plough Corp.* (avail. March 27, 2008) (permitting exclusion of proposal that would violate New Jersey law); *AT&T, Inc.* (avail. Feb. 19, 2008) (permitting exclusion of proposal that would violate Delaware law); *Noble Corp.* (avail. Jan. 19, 2007) (permitting exclusion of proposal that would violate Cayman Islands law).

III. Conclusion

For the foregoing reasons, the Company believes that it may properly exclude the Proposal from the Proxy Materials under (i) Rule 14a-8(i)(2) because the Proposal would require the Company to violate Delaware law and (ii) Rule 14a-8(i)(6) because the Company lacks the power to implement the Proposal. We respectfully request that the Staff not recommend any enforcement action if the Company excludes the Proposal from its Proxy Materials. If the Staff does not concur with the Company's position, we would appreciate an opportunity to confer with the Staff concerning this matter prior to the determination of the Staff's final position. In addition, the Company requests that the Proponent copy the undersigned on any response it may choose to make to the Staff, pursuant to Rule 14a-8(k).

LATHAM & WATKINS LLP

Please contact the undersigned at (202) 637-2332 to discuss any questions you may have regarding this matter.

Very truly yours,

Brian D. Miller
of LATHAM & WATKINS LLP

Enclosures

cc: Michael Piccirillo, New York City Carpenters Pension Fund
Steven E. Fivel, Simon Property Group, Inc.

Exhibit A

Proposal from the New York City Carpenters Pension Fund

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

NEW YORK CITY & VICINITY DISTRICT COUNCIL OF CARPENTERS

JOSEPH A. GEIGER
Executive Secretary - Treasurer

PAUL CAPURSO
President /Asst EST

DAVID CARABALLOSO
Vice President /Asst EST

395 HUDSON STREET - 9TH FLOOR
NEW YORK, N.Y. 10014
PHONE: (212) 366-7500
FAX: (212) 675-3118
www.nycdistrictcouncil.com

SENT VIA OVERNIGHT UPS

November 17, 2023

Steven E. Fivel
General Counsel and Secretary
Simon Property Group, Inc.
225 West Washington Street
Indianapolis, IN 46204

Dear Mr. Fivel:

I hereby submit the enclosed shareholder proposal ("Proposal") on behalf of the New York City Carpenters Pension Fund ("Fund"), for inclusion in the Simon Property Group, Inc. ("Company") proxy statement to be circulated in conjunction with the next annual meeting of shareholders. The Proposal relates to the issue of director resignations and is submitted under Rule 14(a)-8 (Proposals of Security Holders) of the U.S. Securities and Exchange Commission proxy regulations.

The Fund is the beneficial owner of shares of the Company's common stock, with a market value of at least $25,000, which shares have been held continuously for more than a year prior to and including the date of the submission of the Proposal. Verification of this ownership by the record holder of the shares, BNY Mellon, will be sent under separate cover. The Fund intends to hold the shares through the date of the Company's next annual meeting of shareholders. Either the undersigned or a designated representative will present the Fund's Proposal for consideration at the annual meeting of shareholders.

If you would like to discuss the Proposal, please contact Michael Piccirillo at Mpiccirillo@nycdistrictcouncil.org. Mr. Piccirillo will be available to discuss the proposal on Tuesday, December 5, or Tuesday, December 12, from 1:00PM to 5:00PM (ET) either day or other mutually agreeable date and time. Please forward any correspondence related to the proposal to Mr. Piccirillo, New York City District Council of Carpenters, 395 Hudson Street, 9th Floor, New York, NY 10014 or at the email address above.

Sincerely,

Joseph A. Geiger
Fund Co-Chair - Trustee

cc. Michael Piccirillo
Edward J. Durkin
Enclosure

Director Election Resignation Bylaw Proposal:

Resolved: That the shareholders of Simon Property Group, Inc. ("Company") hereby request that the board of directors take the necessary action to amend its director election resignation bylaw that requires each director nominee to submit an irrevocable conditional resignation to the Company to be effective upon the director's failure to receive the required shareholder majority vote support in an uncontested election. The proposed amended resignation bylaw shall require the Board to accept a tendered resignation absent the finding of a compelling reason or reasons to not accept the resignation. Further, if the Board does not accept a tendered resignation and the director remains as a "holdover" director, the resignation bylaw shall stipulate that should a "holdover" director not be re-elected at the next annual election of directors, that director's new tendered resignation will be automatically effective 30 days after the certification of the election vote. The Board shall report the reasons for its actions to accept or reject a tendered resignation in a Form 8-K filing with the U.S. Securities and Exchange Commission.

Supporting Statement: The Proposal requests that the Board amend its director resignation bylaw to enhance director accountability. The Company has established in its bylaws a majority vote standard for use in an uncontested director election, an election in which the number of nominees equal the number of open board seats. Under applicable state corporate law, a director's term extends until his or her successor is elected and qualified, or until he or she resigns or is removed from office. Therefore, an incumbent director who fails to receive the required vote for election under a majority vote standard continues to serve as a "holdover" director until the next meeting of shareholders. A Company resignation bylaw addresses the continued status of an incumbent director who fails to be re-elected by requiring such director to tender his or her resignation for Board consideration.

The proposed new director resignation bylaw will set a more demanding standard of review for addressing director resignations then that contained in the Company's current resignation bylaw. The resignation bylaw will require the reviewing directors to articulate a compelling reason or reasons for not accepting a tendered resignation and allowing an un-elected director to continue to serve as a "holdover" director. Importantly, if a director's resignation is not accepted and he or she continues as a "holdover" director but again fails to be elected at the next annual meeting of shareholders, that director's new tendered resignation will be automatically effective 30 days following the election vote certification. While providing the Board latitude to accept or not accept the initial resignation of an incumbent director that fails to receive majority vote support, the amended bylaw will establish the shareholder vote as the final word when a continuing "holdover" director is not re-elected. The Proposal's enhancement of the director resignation process will establish shareholder director election voting as a more consequential governance right.

Exhibit B

Delaware Law Opinion

Potter Anderson & Corroon LLP
1313 N. Market Street, 6th Floor
Wilmington, DE 19801-6108
302.984.6000
potteranderson.com

Potter Anderson

January 19, 2024

Simon Property Group, Inc.
225 West Washington Street
Indianapolis, IN 46204

Re: Stockholder Proposal on behalf of the New York City Carpenters Pension Fund

Dear Ladies and Gentlemen:

We have acted as special Delaware counsel to Simon Property Group, Inc., a Delaware corporation (the "Company"), in connection with a proposal (the "Proposal") submitted by the New York City Carpenters Pension Fund (the "Proponent") on November 17, 2023 that the Proponent intends to present at the Company's 2024 annual meeting of stockholders. In connection with the Proposal, you have requested our opinion as to certain matters under Delaware law.

For purposes of rendering our opinion as expressed herein, we have reviewed the following documents, all of which were supplied by the Company or were obtained from publicly available records: (i) the Restated Certificate of Incorporation of the Company, as filed with the Secretary of State of the State of Delaware on May 8, 2009, as amended by that certain Certificate of Designation of Series A Junior Participating Redeemable Preferred Stock of the Company, as filed with the Secretary of State of the State of Delaware on May 15, 2014 (collectively, the "Current Charter"); (ii) the Amended and Restated Bylaws of the Company, effective as of March 20, 2017 (the "Bylaws"); and (iii) the Proposal.

With respect to the foregoing documents, we have assumed: (i) the authenticity of all documents submitted to us as originals; (ii) the conformity to authentic originals of all documents submitted to us as copies; (iii) the genuineness of all signatures and the legal capacity of natural persons; and (iv) that the foregoing documents, in the forms thereof submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinion as expressed herein. We have not reviewed any document other than the documents listed above for purposes of rendering this opinion, and we assume that there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. In addition, we have conducted no independent factual investigation of our own but rather have relied solely on the foregoing documents, the statements and information set forth therein and the additional factual matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

The Proposal

The Proposal reads as follows:

> **Resolved**: That the shareholders of Simon Property Group, Inc. ("Company") hereby request that the board of directors take the necessary action to amend its director election resignation bylaw that requires each director nominee to submit an irrevocable conditional resignation to the Company to be effective upon the director's failure to receive the required shareholder majority vote support in an uncontested election. The proposed amended resignation bylaw shall require the Board to accept a tendered resignation absent the finding of a compelling reason or reasons to not accept the resignation. Further, if the Board does not accept a tendered resignation and the director remains as a "holdover" director, the resignation bylaw shall stipulate that should a "holdover" director not be re-elected at the next annual election of directors, that director's new tendered resignation will be automatically effective 30 days after the certification of the election vote. The Board shall report the reasons for its actions to accept or reject a tendered resignation in a Form 8-K filing with the U.S. Securities and Exchange Commission.

The correspondence containing the Proposal also sets forth the following supporting statement:

> **Supporting Statement**: The Proposal requests that the Board amend its director resignation bylaw to enhance director accountability. The Company has established in its bylaws a majority vote standard for use in an uncontested director election, an election in which the number of nominees equal the number of open board seats. Under applicable state corporate law, a director's term extends until his or her successor is elected and qualified, or until he or she resigns or is removed from office. Therefore, an incumbent director who fails to receive the required vote for election under a majority vote standard continues to serve as a "holdover" director until the next meeting of shareholders. A Company resignation bylaw addresses the continued status of an incumbent director who fails to be re-elected by requiring such director to tender his or her resignation for Board consideration.
>
> The proposed new director resignation bylaw will set a more demanding standard of review for addressing director resignations then that contained in the Company's current resignation bylaw. The resignation bylaw will require the reviewing directors to articulate a compelling reason or reasons for not accepting a tendered resignation and allowing an un-elected director to continue to serve as a "holdover" director. Importantly, if a director's resignation is not accepted and he or she continues as a "holdover" director but again fails to be elected at the next annual meeting of shareholders, that director's new tendered resignation will be automatically effective 30 days following the election vote certification. While providing the Board latitude to accept or not accept the initial resignation of an

incumbent director that fails to receive majority vote support, the amended bylaw will establish the shareholder vote as the final word when a continuing "holdover" director is not re-elected. The Proposal's enhancement of the director resignation process will establish shareholder director election voting as a more consequential governance right.

Background

The Company has previously adopted certain processes and procedures in its Bylaws for considering a director's resignation when a director does not receive a majority of the votes cast in an uncontested director election at an annual meeting of the Company's stockholders. Article II, Section 2.02 of the Bylaws states, in pertinent part, the following:

> SECTION 2.02 NUMBER AND ELECTION OF DIRECTORS AND TERM OF OFFICE. The number of directors which shall constitute the whole Board of Directors shall be fixed from time to time by a duly adopted resolution of the Board of Directors, but shall in no event exceed the maximum number of Directors provided in the Charter. Subject to the rights of the holders of any class of stock to elect any directors voting separately as a class or series, at each annual meeting of stockholders, the directors to be elected at the meeting shall be chosen by the majority of the votes cast by the holders of shares entitled to vote in the election at the meeting, provided a quorum is present; provided, however, that if the number of nominees exceeds the number of directors to be elected, then directors shall be elected by the vote of a plurality of the votes cast by the holders of shares entitled to vote, provided a quorum is present. For purposes of this Section 2.02, a "majority of votes cast" shall mean that the number of votes cast "for" a director's election exceeds the number of votes cast "against" that director's election. If a nominee fails to receive the required vote and is an incumbent director, the director shall promptly tender his or her resignation to the Board of Directors, subject to acceptance by the Board of Directors. The Governance Committee (or the Nominating and Governance Committee if those Committees have been combined) will make a recommendation to the Board of Directors whether to accept or reject the tendered resignation, or whether other action should be taken. The Board of Directors will act on the tendered resignation, taking into account the Governance Committee's (or the Nominating and Governance Committee's) recommendation, and publicly disclose (by a press release, a filing with the SEC or other broadly disseminated means of communication) its decision regarding the tendered resignation and the rationale behind the decision within ninety (90) days from the date of the certification of the election results. The Governance Committee (or the Nominating and Governance Committee) in making its recommendation and the Board of Directors in making its decision may each consider any factors or other information that they consider appropriate and relevant. The director who tenders his or her resignation will not participate in the recommendation of the Governance

> Committee (or the Nominating and Governance Committee) or the decision of the Board of Directors with respect to his or her resignation. If an incumbent director's resignation is not accepted by the Board of Directors, such director shall continue to serve until the next annual meeting of stockholders and until his or her successor is duly elected, or his or her earlier resignation or removal. If a director's resignation is accepted by the Board of Directors, or if a nominee fails to receive the required vote and the nominee is not an incumbent director, then the Board of Directors may fill the resulting vacancy pursuant to the provisions of paragraph (b) of Article FIFTH of the Charter or may decrease the size of the Board of Directors pursuant to the provisions of this Section 2.2.

Under Delaware law, if a corporation has a majority voting standard for the election of directors in an uncontested election and one or more incumbent directors are on the slate nominated for election but do not receive the required majority vote, those directors will continue to serve as holdover directors until their successors are elected and qualified or until their earlier effective resignation. *See* 8 *Del. C.* § 141(b); *Comac Partners, L.P. v. Ghaznavi*, 793 A.2d 372, 380 (Del. Ch. 2001) ("It is, of course, the case that a director may holdover at the end of her term until her successor is seated"); *N. Fork Bancorp., Inc. v. Toal*, 825 A.2d 860, 871 (Del. Ch. 2000) ("Because I find that Dime's nominees were not re-elected, they continue to be in office as holdovers and have a right to remain in office only until their successors have been elected and qualified"), *aff'd sub nom. Dime Bancorp, Inc. v. N. Fork Bancorp., Inc.*, 781 A.2d 693 (Del. 2001). Article II, Section 2.02 of the Bylaws requires an incumbent director who does not receive the required vote to tender his or her resignation, which resignation will be subject to acceptance by the Board of Directors of the Company (the "Board").

The Proposal, if implemented, would request that the Board take the necessary action to amend this Bylaw in two respects. First, consistent with Delaware law, the Bylaw currently permits the Board to "consider any factors or other information that they consider appropriate and relevant" when determining whether to accept or reject a director's resignation in these circumstances (the "Facts and Circumstances Approach"). The current approach does not constrain the Board's decision-making and allows the Board to consider all factors and information it considers appropriate or relevant in exercising its fiduciary duties when determining whether to accept or reject a director's resignation tendered when an incumbent director has not received a majority vote for re-election. The Proposal seeks to have the Board amend this Bylaw to displace this standard and impose a new one, requiring the Board to accept a director's resignation "absent the finding of a compelling reason or reasons to not accept the resignation."

In addition, if the Board were to determine not to accept a resignation (under the new "compelling reason or reasons" standard), then such director would continue to serve as a "holdover" director. The Proposal, if implemented, also seeks to have the Board take the necessary action to amend this Bylaw so that, if such "holdover" director was not re-elected "at the next annual election of directors, that director's new tendered resignation will be automatically effective 30 days after the certification of the election vote."

We have been advised that the Company is considering excluding the Proposal from the Company's proxy statement for its 2024 annual meeting of stockholders under, among other reasons, Rule14a-8(i)(2) promulgated under the Securities Exchange Act of 1934, as amended ("Rule 14a-8(i)(2)"). We have been further advised that Rule 14a-8(i)(2) provides that a registrant may omit a proposal from its proxy statement when "the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject."

In connection with the foregoing, you have requested our opinion as to whether, under Delaware law, the Proposal, if implemented, would violate Delaware law.

Discussion

The General Corporation Law of the State of Delaware (the "DGCL") sets forth the management structure for a Delaware corporation. Section 141(a) of the DGCL states that "[t]he business and affairs of every corporation organized under [the DGCL] shall be managed by or under the direction of a board of directors, except as may be otherwise provided in [the DGCL] or in its certificate of incorporation." 8 *Del. C.* § 141(a). Delaware courts, in interpreting this language, have explained that it is a "cardinal precept" of Delaware corporate law "that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

Delaware law requires directors to exercise their management power consistent with "certain fundamental fiduciary obligations to the corporation and its shareholders." *Id*. These "fundamental fiduciary obligations" consist of a duty of loyalty and a duty of care to the corporation and all of the corporation's stockholders. *See, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986) ("In discharging this function the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders."). "The duty of loyalty requires corporate fiduciaries to act in good faith for the benefit of the corporation." *Se. Pennsylvania Transp. Auth. v. Facebook, Inc.*, 2019 WL 5579488, at *7 (Del. Ch. Oct. 29, 2019). *See Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) ("The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest."); *Adams v. Calvarese Farms Maint. Corp., Inc*., 2010 WL 3944961, at *18 (Del. Ch. Sept. 17, 2010) ("Directors of a Delaware Corporation also owe stockholders a duty of loyalty whereby they must pursue the best interests of the company in good faith."). In addition to the duty of loyalty, "the duty of care requires that fiduciaries inform themselves of material information before making a business decision and act prudently in carrying out their duties." *United Food & Commercial Workers Union & Participating Food Indus. Employers Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1049-50 (Del. 2021).

Section 141(a) of the DGCL provides two avenues by which the management structure can be, or is, modified. First, the board of directors' power to manage the corporation is subject to the other provisions of the DGCL. 8 *Del. C.* § 141(a). Numerous provisions of the DGCL limit the board of directors' ability to act unilaterally and require stockholder consent or approval before

the board of directors can proceed with its desired corporate action. For example, the DGCL specifically requires stockholder approval of a board of directors' decision with respect to, among other things (i) certain mergers or combinations involving a Delaware corporation, (ii) certain amendments to a Delaware corporation's certificate of incorporation, and (iii) sales of all or substantially all of a Delaware corporation's assets. *See* 8 *Del. C.* §§ 242(b), 251(c), 271(a). In addition, other provisions of the DGCL set forth strict limitations on actions that can be taken by the board of directors. *See* 8 *Del. C.* §§ 109(a) (providing that, after a corporation has received payment for its stock, the board of directors' cannot further amend the bylaws unless the certificate of incorporation provides the board of directors with the power to adopt, amend or repeal bylaws); 170(a) (specifying limitations on the board of directors' power to declare and pay dividends); 216 ("A bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors."). While the DGCL specifically addresses the election of directors of a Delaware corporation and the resignation of directors of a Delaware corporation, none of those provisions limits, or otherwise imposes a specific standard with respect to, a board of directors' exercise of business judgment in connection with its consideration of whether to accept or reject director resignations. *See* 8 *Del. C.* §§ 141(b), 211(b), 216(3).

The management structure of a Delaware corporation under Section 141(a) can also be modified pursuant to a Delaware corporation's certificate of incorporation. *See* 8 *Del. C.* § 141(a); *New Enter. Associates 14, L.P. v. Rich*, 295 A.3d 520, 555 (Del. Ch. 2023) ("Section 141(a) thus consists of a grant of authority followed by an exception. The first sentence gives the board nearly plenary authority over the business and affairs of the corporation 'except as may be provided otherwise in this chapter or in its certificate of incorporation' . . . .") (quoting 8 *Del. C.* § 141(a)). If such modification is made in a Delaware corporation's certificate of incorporation, then the DGCL provides that "the powers and duties conferred or imposed upon the board of directors by [the DGCL] shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation." 8 *Del. C.* § 141(a). This language in the DGCL counsels that Delaware corporations can tailor the board of directors' power, authority and duties through restrictions in its certificate of incorporation. *See Rich*, 295 A.3d at 555 ("Because the board's authority under Section 141(a) provides the foundation for the directors' fiduciary duties, it follows that modifying the board's authority under Section 141(a) should modify the directors' fiduciary duties."). The Current Charter does not modify the default management structure for the Company in a manner that would affect the exercise of the default fiduciary duties governing the board of directors' decision-making when considering whether to accept or reject a director's resignation.

Because the Company has not, in the Current Charter, altered the default management structure in a manner that could validly alter the standards applicable to the Board's exercise of fiduciary duties when making decisions with respect to considering a director's resignation and the DGCL contains no specific limitations or restrictions on the Board's consideration of a director's resignation, the default management structure and fiduciary principles and standards under Delaware law apply to the directors' decision-making when considering whether to accept

or reject a director's resignation following such director's failure to receive a majority of the votes cast in an uncontested director election at an annual meeting of the corporation's stockholders. Therefore, the Proposal should be analyzed within the context of the default management structure and fiduciary duties under Delaware law.

Utilizing this framework, the Proposal, if implemented, would request that the Board take the necessary action to amend the Bylaws to displace the current, non-exclusive Facts and Circumstances Approach with an exclusive "compelling reason or reasons" standard for the Board's determination of whether to accept or reject a director's resignation in connection with such director's failure to receive a majority of the votes cast in an uncontested director election at an annual meeting of the Company's stockholders. The "compelling reason or reasons" standard that the Proposal seeks to implement does not contain an additional exception to enable the directors to comply with their fiduciary duties in a situation in which the standard is in tension with the proper exercise of directors' fiduciary duties (such as a "fiduciary out" exception), and "compelling reason" is undefined.

Delaware law prohibits "contractual arrangements that commit the board of directors to a course of action that would preclude them from fully discharging their fiduciary duties to the corporation and its shareholders." *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 238 (Del. 2008). *See Unisuper Ltd. v. News Corp.*, 2005 WL 3529317, at *7 (Del. Ch. Dec. 20, 2005) ("Generally speaking, [*Paramount*, *Quickturn* and *Omnicare*] stand for the proposition that a contract is unenforceable if it would require the board to refrain from acting when the board's fiduciary duties require action."). This prohibition applies equally to a Delaware corporation's bylaws and its commercial contracts. *See AFSCME Employees Pension Plan*, 853 A.2d at 235-40 (analyzing bylaw provision); *Gorman v. Salamone*, 2015 WL 4719681, at *5-6 (Del. Ch. July 31, 2015) (analyzing stockholder adopted bylaw provision); *In re Primedia, Inc. Shareholders Litig.*, 67 A.3d 455, 490-96 (Del. Ch. 2013) (analyzing a merger agreement provision).

Corporate bylaws that dictate the decisions to be made by the board of directors without regard for the directors' fiduciary duties or that otherwise unreasonably intrude on the directors' exercise of their fiduciary duties when making decisions are invalid as a matter of Delaware law. *See, e.g.*, *AFSCME Employees Pension Plan*, 953 A.2d at 240; *Salamone*, 2015 WL 4719681, at *5-6; *see also Bebchuk v. CA, Inc.*, 902 A.2d 737, 742-43 (Del. Ch. 2006) (indicating that one of the analyses undertaken by the Delaware courts when determining whether a bylaw is facially invalid is whether the adopted bylaw is "an unreasonable intrusion into the board's exercise of its fiduciary duties"). In *CA, Inc. v. AFSCME Employees Pension Plan*, the Delaware Supreme Court addressed whether a bylaw could dictate that the board of directors of a Delaware corporation take a specific action without requiring the directors to consider its fiduciary duties. 953 A.2d at 238. In that case, the stockholder proposed bylaw would have required that the board of directors cause the corporation to reimburse a stockholder or group of stockholders for its or their reasonable expenses in a proxy contest to elect less than a majority of the directors on the corporation's board of directors. *Id*. at 229-30. The Delaware Supreme Court concluded that, when applying such bylaw within the context of the directors' fiduciary duties, "[u]nder at least one such hypothetical,

the board of directors would breach their fiduciary duties if they complied with the [b]ylaw." *Id*. at 237-38. The Court further noted that the bylaw would violate Delaware law "because the [b]ylaw contains no language or provision that would reserve to [the corporation's] directors their full power to exercise their fiduciary duty to decide whether or not it would be appropriate, in a specific case, to award reimbursement at all." *Id*. at 240.

Similarly, in *Gorman v. Salamone*, a stockholder adopted bylaw purported to give the stockholders of the corporation the ability to remove officers of the corporation and required the board of directors to implement any removal of an officer that had been authorized by the stockholders. 2015 WL 4719681, at *2. The Delaware Court of Chancery invalidated this stockholder adopted bylaw due to, among other reasons, the requirement in the bylaw that would force the board to "immediately implement . . . [the] removal of an officer by the stockholders." *Id*. at *6. The Court stated that this "directive could compel board action, potentially in conflict with its members' fiduciary duties." *Id*.

The Delaware courts' invalidation of the bylaws in *AFSCME Employees Pension Plan* and *Salamone* is consistent with similar decisions by the Delaware courts to invalidate provisions in agreements or rights plans that would prevent or limit the directors' ability to act in accordance with their fiduciary duties by exercising their own independent, good faith business judgment in the manner they determine to be in the best interests of the corporation and its stockholders. *See, e.g., Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 938-39 (Del. 2003) (holding that a merger agreement and voting agreements were "invalid and unenforceable" because "they were combined to operate in concert" in a manner that subsequently prevented the board from "effectively discharging its ongoing fiduciary responsibilities"); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1292 (Del. 1998) (holding that a "delayed redemption provision" in a shareholder rights plan was invalid because it "prevent[ed] a newly elected board of directors from completely discharging its fiduciary duties to protect fully the interests of [the corporation] and its stockholders"); *Paramount Commc'ns Inc. v. QVC Network Inc*., 637 A.2d 34, 48 (Del. 1994) (finding unenforceable a no-solicitation provision in a merger agreement, which precluded the target from negotiating with other bidders or seeking alternatives, because merger agreement provisions "may not validly define or limit the directors' fiduciary duties under Delaware law or prevent the [corporation's] directors from carrying out their fiduciary duties under Delaware law"); *Primedia*, 67 A.3d at 492 (stating that Delaware corporations cannot agree to provisions in merger agreements that would prevent the board of directors from complying with its fiduciary duties to provide "a current and candid merger recommendation"); *McAllister v. Kallop*, 1995 WL 462210 at *24 (Del. Ch. July 28, 1995) (holding that a contract restricting exercise of fiduciary duties by limiting director's ability to make an independent, good faith determination regarding appropriate corporate action is invalid), *aff'd*, 678 A.2d 526 (Del. 1996); *Chapin v. Benwood Found., Inc*., 402 A.2d 1205, 1210 (Del. Ch. 1979) (holding that an agreement by which a board of a charitable corporation committed years in advance to fill particular board vacancy with certain named person, regardless of circumstances that existed at time vacancy occurred, thus effectively relinquishing duty of directors to exercise their best judgment on such matter, was unenforceable), *aff'd*, 415 A.2d 1068 (Del. 1980); *Abercrombie v. Davies*, 123 A.2d 893, 611 (Del. Ch. 1956) (invaliding a

stockholders agreement that required directors to vote in a particular way, because of, among other things, provisions of the stockholders agreement that "substantially encroach[ed] on the duty of directors to exercise independent judgment"), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957).

Consistent with the foregoing, when considering whether to accept or reject a director's resignation, the board of directors of a Delaware corporation must act in a manner consistent with each director's fiduciary duties to the corporation and its stockholders. *See City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc*., 1 A.3d 281, 291 (Del. 2010) (considering, in the context of a Section 220 demand under Delaware law for books and records relating to the board of directors' rejection of director resignations, that "the question arises whether the directors, as fiduciaries, made a disinterested, informed business judgment that the best interests of the corporation require the continued service of these directors, or whether the Board had some different, ulterior motivation"). The Proposal, if implemented, would replace the non-exclusive Facts and Circumstances Approach with an exclusive "compelling reason or reasons"-only standard. The Facts and Circumstances Approach, consistent with the Delaware law described above, allows the Board to consider all factors and other information it views as appropriate or relevant in connection with the exercise of its fiduciary duties and to determine whether or not to accept a resignation in the exercise of the directors' good faith business judgment, taking into account all such factors and information. The factors and other information the Board might deem appropriate or relevant when making this decision include, among other things, (i) the context and rationale for the director's failure to receive a majority of the votes cast at the annual meeting, (ii) the director's tenure on the Board and any committees thereof and the role of such director on the Board or any committees thereof, (iii) the director's institutional knowledge, qualifications (including any unique qualifications or expertise relating to the Company's business or operations) and contributions to the Company, (iv) whether such director is affiliated with a significant stockholder of the Company, (v) whether accepting the director's resignation would cause the Company to (1) violate any agreements with stockholders of the Company, (2) not comply with the applicable laws, rules and regulations relating to the Company, including any securities exchange on which the Company's stock trades, or (3) would otherwise result in an adverse impact to the Company, and (vi) the potential costs and timing matters related to identifying, selecting and appointing any replacement director and the impact of any vacancy on the Company's corporate governance and continuing operations.

The "compelling reason or reasons" standard that the Proposal seeks to implement necessarily limits the exercise of the directors' fiduciary duties because "compelling reason" (while not defined in the Proposal) would have meaning in this context only if it is intended to alter generally applicable fiduciary duty standards and to require directors to accept a resignation even in circumstance in which the directors, in the exercise of their good faith business judgment, were otherwise to determine that rejection of the resignation is in the best interests of the Company and its stockholders. In other words, the Proposal requests amendments to the Bylaws that could require the directors to act in a manner other than a manner they determine, in the exercise of their good faith business judgment, to be in the best interests of the Company and its stockholders and thus could require directors to act in violation of their fiduciary duties. The Proposal contains no

"fiduciary out" or other exception to the "compelling reason or reasons" standard that would enable the directors to act in accordance with their fiduciary duties. Because circumstances exist in which there may be no "compelling reason or reasons" to reject a director's resignation but the Board collectively believes, in the exercise of good faith business judgment, that accepting the resignation would not be in the best interests of the Company and its stockholders, and thus not in keeping with the directors' fiduciary duties, it is our opinion that the Proposal, if implemented, would violate Delaware law.

Conclusion

Based upon and subject to the foregoing and subject to the limitations stated herein, it is our opinion that the Proposal, if implemented, would violate Delaware law.

Our opinion is limited to Delaware law. We have not considered and express no opinion on the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or of any other regulatory body.

The opinion expressed herein is rendered as of the date hereof and is based on our understandings and assumptions as to present facts, and on the application of Delaware law as the same exists on the date hereof. We assume no obligation to update or supplement this opinion letter after the date hereof with respect to any facts or circumstances that may hereafter come to our attention or to reflect any changes in the facts or law that may hereafter occur or take effect.

Our opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the Securities and Exchange Commission and to the Proponent in connection with the matters addressed herein, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Sincerely yours,

Potter Anderson + Corroon LLP