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January 8, 1993 Informal Opinion 1993-INF-0108

Board of Directors
Columbus Municipal Airport Authority
[redacted]

Dear Board Members:

You have asked for an application of the Ohio Ethics Law and related statutes to the following facts.

The Columbus Municipal Airport Authority (Port Authority) is a port authority created by the City of Columbus pursuant to Section 4582.30 of the Revised Code and City Ordinance. The Mayor of the City, with the advice and consent of City Council, appoints the members of the Board of Directors (Board). The Board consists of nine members, and the affirmative vote of five members is required for any action to be taken by the Port Authority.

The Port Authority has determined that additional passenger service should be sought and provided at Port Columbus International Airport (Airport) and that the Airport needs additional gates and related facilities to accommodate the additional passenger service. The Board has endorsed plans to construct and equip nine additional permanent gates and related facilities at the Airport. You state that the facilities were not planned or designated for any particular user. Construction and equipment of the nine permanent gates and facilities will take approximately two to three years to accomplish, and the Board has thus determined to acquire, construct, and equip nine modular gates and facilities to use until the permanent gates and facilities are completed. The Board intends to issue revenue bonds to fund construction of the nine modular gates and related facilities. When the permanent gates and facilities are completed, the nine modular gates could be sold or retained for future use.

The Port Authority is also considering a proposal to lease most of the facilities to be financed by the revenue bonds to an airline (Airline) that is currently leasing other facilities and providing passenger service at the Airport. You have stated that the law does not require that the lease provisions for the use of the aviation facilities be determined by competitive bidding. In accordance with the Port Authority's use agreements with other airlines operating at the Airport and in accordance with federal requirements, the Authority may not charge the Airline a more

favorable rental for the aviation facilities than it charges other airlines for comparable space and facilities.

The Airline is a publicly-held corporation that has filed a voluntary petition in a United States Bankruptcy Court to reorganize under Chapter 11. The Airline is currently operating under the supervision of the bankruptcy court, and any new lease for aviation facilities would have to be approved by the bankruptcy court. The Airline is contemplating expanding its operations at the Airport into a hub. The ability of the Airline to expand its operations at the Airport is dependent upon the availability of additional gates and the successful reorganization of the Airline.

One proposal for the reorganization contemplates a new stock offering of approximately one hundred million dollars to provide equity for the Airline. The Airline has been making presentations regarding the sale of new stock to individuals and companies in central Ohio. The Airline has been soliciting expressions of interest in the purchase of the proposed new stock to ascertain the feasibility of the proposed plan of reorganization, and several presentations have been made to individuals and companies in central Ohio. If the Airline determines that the proposed plan of reorganization and the sale of the proposed new stock are feasible, it must present the plan to the bankruptcy court for approval.

You have asked for an application of the Ethics Law to the nine directors of the Port Authority since several directors and/or their family members serve with, or otherwise have an interest in, companies which may purchase the proposed new stock of the Airline. This opinion will first address the situation where, at the time of Board consideration of the lease of facilities to the Airline, certain companies own or control five percent or less of the outstanding shares of the Airline.

Directors A and B

This opinion will first consider Directors A and B. Director A is the chairman and CEO of Company A, and he and his family own .0018 of the stock of Company A. Director B is the chairman and CEO of Company B, and he and his family own .0056 of the stock of Company B, with options to purchase up to .0112. Both Company A and Company B are considering purchasing stock in the Airline, but would purchase five percent or less of the stock.

Division (A)(4) of Section 2921.42 of the Revised Code reads as follows:

> (A) No public official shall knowingly do any of the following:

. . .

(4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

The members of the board of directors of the Port Authority are public officials who are subject to the prohibitions of Section 2921.42. See R.C. 2921.01(A); Ohio Ethics Commission Advisory Opinion No. 90-013.

The term "public contract" is defined in Division (E) of Section 2921.42 as follows:

(1) The purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either;

(2) A contract for the design, construction, alteration, repair, or maintenance of any public property. (Emphasis added.)

In this case, the Port Authority would lease aviation facilities to the Airline. You have stated that, under the lease, the Airline will undertake certain obligations, such as maintenance and operation of the facilities. It must be determined whether this lease is a "public contract" for purposes of R.C. 2921.42.

In Advisory Opinion No. 91-011, the Ethics Commission was asked if city officials and employees are prohibited by the Ohio Ethics Law and related statutes from lease-purchasing or directly buying housing units in a city financed housing project constructed on city property. The Ethics Commission, in determining whether these purchases or lease-purchases would constitute public contracts, stated:

> The Ethics Commission has held that a governmental entity's lease or conveyance of its property is a contract for the acquisition of services by and for the use of the governmental entity, and thus a "public contract," where the governmental entity is leasing or conveying its property in exchange for some benefit or service. See Advisory Opinions No. 78-003, 86-009, and 88-006. For example, in Advisory Opinion No. 86-009 the Commission addressed the specific question whether a city's lease of its park-land for farming was a "public contract" for purposes of R.C. 2921.42. The Commission

> held that the city's lease for such a purpose was a "public contract" as defined in R.C. 2921.42 (E) "since it is a contract for the purchase or acquisition of farming services or other productive use of public property by the city." Also, in Advisory Opinion No. 88-006 the Ethics Commission held that a city's land reutilization program in which the city sold vacant lots which it had acquired through real estate tax foreclosure proceedings to purchasers who agreed to pay a purchase price and construct improvements upon the lots, or otherwise utilize the property for a specific and useful purpose, was a "public contract" for purposes of R.C. 2921.42. The Commission determined that under the program the city was acquiring community development and revitalization services from the purchasers through its sale of vacant lots. (Emphasis added.)

Advisory Opinion No. 91-011. The Commission went on to compare Advisory Opinion No. 83-006, wherein the Commission held that the sale of "surplus" property, by the city, was not a public contract, in that there was no indication that the city acquired any property or service in exchange for the surplus items sold. See also Advisory Opinion No. 88-006.

In this instance, the Port Authority is leasing facilities to the Airline. However, you have stated that the Airline is obligated to maintain and operate the facilities, and the lease of facilities to the Airline will provide passenger service at the Airport. The Port Authority, then, is acquiring services from the Airline, and the lease is a "contract for the maintenance of any public property," in this case, the Port Authority's aviation facilities. Additionally, it is assumed that the Airline is required to utilize the property for a "specific and useful purpose," as discussed in Advisory Opinions No. 83-006 and 91-011. Accordingly, the lease in your question is a "public contract" for purposes of R.C. 2921.42 (E)(1) and (2).

An "interest" which is prohibited under R.C. 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. See Advisory Opinions No. 81-008 and 92-013. An individual who serves as the Chairman and CEO of a corporation and who owns stock in the corporation is generally deemed to have both a pecuniary and fiduciary "interest" in the contracts of the corporation. See Advisory Opinion No. 83-003. But see Division (B) of R.C. 2921.42 (providing an exemption to the prohibition of Division (A)(4) where inter alia, the interest is limited to owning or controlling shares of the corporation and the shares owned or controlled do not exceed five percent of the outstanding shares of the corporation). For example, Directors A and B would have a prohibited interest in a public contract with their own political subdivision under

Division (A)(4) if the Port Authority entered into a public contract with Companies A and B, respectively. However, this is not the case here.

In this instance, Companies A and B, the Companies in which Directors A and B have a financial and fiduciary interest, are not contracting with the Port Authority, but would purchase stock in the Airline which would then lease facilities from the Airport. As stated above, an interest which is prohibited under Section 2921.42 must be definite and direct in nature. See Advisory Opinion No. 92-013. Although Directors A and B hold fiduciary positions with Companies A and B, they hold no fiduciary relationship with the Airline. Directors A and B also own fractional shares of stock in their respective companies and those companies may purchase five percent or less of the Airline's stock. While Directors A and B may, as stockholders in their respective companies, have a financial interest in the contracts of businesses in which their companies own stock, it cannot be said that such interest is definite and direct in nature. If Companies A and B were to purchase five percent or less of the stock in the Airline, and the Airline were to lease facilities from the Port Authority and use the facilities to expand its passenger service, any resulting profit or benefit from the lease to Directors A and B, as holders of fractional interests in Companies A and B, would be so speculative and negligible that such interest could be considered, at best, to be indefinite and indirect. The interest would not rise to the level of being definite and direct. Compare Advisory Opinion No. 92-013.

However, Directors A and B also serve in a fiduciary capacity with their respective companies, and these companies may purchase stock in the Airline. Thus, the issue becomes whether Company A and B would have an "interest" in the lease of facilities from the Port Authority to the Airline if the Companies purchased stock in the Airline. Generally, stockholders in a company are deemed to have an "interest" in the contracts of that company for purposes of Section 2921.42. Advisory Opinions No. 79-005 and 93-001. However, Division (B) states that in the absence of bribery or a purpose to defraud, a stockholder shall not be considered as having an interest in a public contract if the interest is limited to owning or controlling five percent or less of the outstanding shares of the corporation. You have stated that Companies A and B would own five percent or less of the stock of the Airline if they decided to purchase such stock. Therefore, Companies A and B would not be considered as having an "interest" in the contract between the Port Authority and the Airline. But see R.C.2921.42(B)(3) (requiring the official or shareholder, prior to the time the public contract is entered into, to file with the governmental agency, an affidavit giving his status in connection with the contractor).

Therefore, Directors A and B would not have a prohibited interest in a public contract entered into by the Port Authority, for purposes of Division (A)(4), if Companies A and B purchased five percent or less of the stock of the Airline and the Airline were to lease facilities from the Port Authority.

Division (A)(3) of Section 2921.42 of the Revised Code prohibits a public official, during his public service, and for one year thereafter, from occupying a position of profit in the prosecution of a public contract authorized by a board of which he was a member at the time of authorization, unless the contact was competitively bid and the contract from which he would profit was the lowest and best bid. A public official who serves on a board is subject to this prohibition regardless of whether he participated in the board's authorization of the public contract. See Advisory Opinion No. 88-008.

As explained in Advisory Opinion No. 92-013, the legislature's use of the words "occupy a position of profit in the prosecution of a public contract" in Division (A)(3) characterizes a different type of activity on the part of a public official than having "an interest in the profits or benefits of a public contract," for purposes of Divisions (A)(1) and (4). While an "interest" may be either pecuniary or fiduciary in nature, the term "profit" connotes only a pecuniary or financial gain or benefit. An individual who owns stock in a company occupies a position of profit in the contracts of that business for purposes of R.C. 2921.42(A)(3). See Advisory Opinions No. 90-003 and 93-001.

In this instance, both Directors A and B own stock in their respective companies which are contemplating purchase of Airline stock. Further, the lease of aviation facilities would not be made pursuant to competitive bidding. The fact that Companies A and B would purchase five percent or less of the Airline's stock is irrelevant for purposes of Division (A)(3), since the exemption of Division (B) does not apply to the prohibition of Division (A)(3). See Advisory Opinions No. 90-005 and 93-001. (See discussion of Division (B) below). However, as held in Advisory Opinion No. 92-013, the position of profit occupied by a public official in the prosecution of a public contract must, like the official's "interest" in the public contract, be definite and direct in order to be prohibited under R.C. 2921.42(A)(3). Again, any financial gain or benefit that Directors A and B would realize if Companies A and B purchased stock in the Airline, and the Port Authority leased facilities to the Airline, thus enabling the Airline to increase its passenger service, would be indefinite and indirect. Therefore, Directors A and B would not improperly occupy a position of profit in a public contract authorized by the Port Authority under R.C. 2921.42(A)(3) if Companies A and B were to purchase

stock in the Airline and the Port Authority were to lease facilities to the Airline.

Division (A)(1) of Section 2921.42 prohibits a public official from knowingly authorizing, or using the authority or influence of his office to secure authorization of, a public contract in which he, a member of his family, or any of his business associates has an interest. As discussed above, the fact that Directors A and B own fractional interests in Companies A and B does not mean that they personally would have a pecuniary interest in the lease of facilities by the Port Authority to the Airline if Companies A and B were to purchase five percent of less of the stock of the Airline. The same would hold true for the family members of Directors A and B who also have minimal stockholdings in Companies A and B. Also, as discussed above, Directors A and B would have no fiduciary interest in the lease of the facilities.

R.C. 2921.42 also prohibits a public official from authorizing a contract in which any of his business associates has an interest. Even if Companies A and B can be considered the business associates of Directors A and B, respectively, see Advisory Opinion No. 92-008, these Companies would not, as discussed above, have an "interest" in the lease. Furthermore, it cannot be said that the Airline itself would be the business associate of Directors A and B under the facts presented. Directors A and B serve with and own small amounts of stock in Companies A and B and these Companies may purchase five percent or less of the stock of the Airline. If the Companies do purchase stock of the Airline, the relationship between the Airline and Directors A and B would be too attenuated and remote to be considered a business association. See Advisory Opinion No. 93-001.

Therefore, Division (A)(1) of Section 2921.42 would not prohibit Directors A and B from participating in the Port Authority's deliberations and decision to lease facilities to the Airline even if Companies A and B purchased five percent or less of the stock of the Airline.

However, Division (D) of Section 102.03 of the Revised Code reads as follows:

> No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

A member of a port authority is subject to the prohibitions of Division (D) of Section 102.03. See R.C. 102.01 (B) and (C); Advisory Opinion No. 90-013. The term "anything of value" is defined to include money and every other thing of value. R.C. 1.03. See R.C. 102.01(G). A definite, pecuniary benefit is considered to be a thing of value under R.C. 102.03(D). See Advisory Opinion No. 88-004.

R.C. 102.03(D) prohibits a public official or employee from participating, formally or informally, in a particular matter which would result in a definite and particular, personal pecuniary benefit being realized by the official, his family member, business associate, private employer, an organization in which he has a fiduciary interest, or other party where the official would be subject to a conflict of interest. See Advisory Opinions No. 88-004, 88-005, 89-005, 89-008 and 92-013. A public official is prohibited from participating in any matter involving the interests of another party where the relationship between the official and the other party is such that the official's objectivity and independence of judgment could be impaired with regard to matters that affect the interests of that party. Advisory Opinion No. 88-004. The application of R.C. 102.03(D) is dependent upon the facts and circumstances of each individual situation. See Advisory Opinion No. 92-013.

The personal, pecuniary interest of Directors A and B in the lease between the Port Authority and the Airline is so remote and speculative that it cannot be said to be of such character as to manifest an improper influence upon Directors A and B. See generally Advisory Opinions No. 88-005, 91-004, and 93-001.

However, Directors A and B are the Chairmen and CEO's of their respective Companies. The Ethics Commission has held that R.C. 102.03(D) prohibits a public official from participating in any matter which affects the interests of an organization where he is an officer, board member, or employee of the organization, or in any matter where the organization would have a contingent interest in the outcome of the decision made by the public official or his agency. See Advisory Opinions No. 89-005, 91-004, and 92-008. Therefore, Directors A and B would be prohibited by R.C. 102.03(D) from participating in any matter which would provide a definite, pecuniary benefit to their Companies or where the Companies would have a contingent interest in the outcome of the matter.

As discussed above, Companies A and B would not, if they purchased stock in the Airline, have an "interest" in the contracts of the Airline since they would own five percent or less of the stock of the Airline and would fall within the exemption of Division (B) of Section 2921.42. The issue remains, however, whether Companies A and B would derive a particular pecuniary

benefit from the lease of Port Authority facilities to the Airline if they purchased stock in the Airline, or would have a contingent interest in the lease of facilities. The fact that an "interest" in a public contract may not exist for purposes of R.C. 2921.42 does not necessarily mean that an official or his organization may not derive a definite or contingent pecuniary benefit from the contract. See Advisory Opinion No. 92-013.

As discussed above, stockholders and others who have an ownership interest in a company are generally deemed to have an "interest" in the contracts of that company for purposes of R.C. 2921.42. Therefore, Companies A and B, as stockholders in the Airline, would generally be deemed to have an "interest" in the contracts of the Airline, except that Division (B) of Section 2921.42 provides an exemption to the prohibition of Section 2921.42 in cases where the stockholder owns five percent or less of the company's outstanding shares. Stockholders in a company financially benefit from the contracts of that company. It is apparent that the objectivity and independence of judgment of a public official who also serves in a fiduciary capacity with an organization could be impaired with respect to matters upon which the financial interests of the organization are contingent. See generally Advisory Opinions No. 88-004 and 88-005. In this instance, Directors A and B serve in a fiduciary capacity with their respective Companies. If the Companies purchase stock in the Airline, the Companies would derive a definite and particular benefit from the business conducted by the Airline. The lease between the Port Authority and Airline would enable the Airline to expand its passenger service and establish a hub at the Airport. Companies A and B, as stockholders in the Airline, would benefit from this increased business. Therefore, the interests of the Companies are contingent upon the Port Authority's approval of the lease with the Airline. Thus, if Companies A and B purchase stock of the Airline, the lease would be of such character as to manifest an improper influence upon Directors A and B, who hold fiduciary relationships with Companies A and B.

In this instance, Companies A and B would purchase five percent or less of the Airline's stock. As discussed above, Division (B) of Section 2921.42 provides an exception to the prohibition of Division (A)(4) with respect to such smaller stockholdings. Division (D) of Section 102.03 contains no such exception for smaller stockholdings, and provides no specific minimal amount below which a matter will not be considered to have an improper influence on the public official. See Advisory Opinion No. 93-001. Division (D) does, however, require that the thing of value be of such character as to manifest a substantial, as well as improper, influence upon the public official or employee. Id. For example, the Commission, in analyzing whether a public official or employee may accept travel, meal, and lodging expenses or gifts,

has held that a definite and particular pecuniary benefit which is not nominal or de minimis is of "substantial" value for purposes of R.C. 102.03. See Advisory Opinions No. 89-014, 90-001, 92-014, and 92-015. The Commission has held that, for purposes of R.C. 102.03, the word "substantial" means "of or having substance, real, actual, true; not imaginary; of considerable worth or value; important." Advisory Opinion No. 89-014 (quoting Advisory Opinions No. 75-014 and 76-005). Examples of items which the Commission has found not to be of substantial value generally include a meal provided to a public official or employee in conjunction with a speech, Advisory Opinion No. 86-011, and one tee-shirt given to a public official or employee, Advisory Opinion No. 92-014.

In Advisory Opinion No. 93-001, the Commission held that the treasurer of a technical college is not prohibited from participating in the college's award of a contract to a bank in which he holds stock where he owns only a minimal amount of the corporation's outstanding shares of stock such that he would not realize a substantial pecuniary benefit from the contract. In Advisory Opinion No. 93-001, the official owned .0025641 of the bank's stock, and the contract between the college and the bank was merely for the deposit of the college's payroll and checking accounts, from which the bank earned services fees. Under those circumstances, the Commission found that the treasurer would not substantially benefit from the contract. In this instance, by contrast, Companies A and B would purchase stock in the Airline as part of the Airline's plan to reorganize and emerge from bankruptcy, and the Companies' financial interests would be dependent or contingent upon the Port Authority's lease of facilities to the Airline, enabling the Airline to expand its operations at the Airport and improve its financial condition. See generally Advisory Opinions No. 88-005 and 91-004. The benefit to the Companies from the increased business at the Airport and the resulting improved financial condition of the Airline would be "substantial," even though the Companies would own five percent or less of the Airline's stock. Therefore, R.C. 102.03(D) would prohibit Directors A and B from participating in the Port Authority's deliberations and decisions to lease the aviation facilities to the Airline if Companies A and B purchase stock of the Airline. R.C. 102.03(D) would prohibit them from voting or participating in any part of the Port Authority's decision-making process authorizing or approving the lease. R.C. 102.03(D) would also prohibit them from exercising their power and influence as Port Authority Directors to affect the decision-making process of the Port Authority regarding the lease, even if they abstain from voting and participating in official proceedings. If Companies A and B purchase stock of the Airline, Directors A and B are prohibited from discussing, deliberating, advocating, recommending, speaking with other Directors or employees of the Port Authority, or otherwise using their authority or influence, formally or

informally, to secure the lease for the Airline, or with respect to any other matter involving the interests of the Airline. The prohibitions of R.C. 102.03(D) also extend beyond the initial approval of the lease, and prohibit Directors A and B from participating in any matter or decision which would affect the continuation, implementation, or terms and conditions of the lease, or payment thereunder.

Director G

Director G owns .0001 stock of Company A and his spouse is the beneficiary of a trust that owns .00006 of Company A. Director G does not have a fiduciary relationship with Company A.

Under the analysis set forth above, Director G would neither have a definite and direct pecuniary interest in, nor occupy a position of profit in the prosecution of, the public contracts of the Airline for purposes of R.C. 2921.42, if Company A were to purchase five percent or less of the Airline's stock. Furthermore, Director G does not have a fiduciary relationship with the Airline or Company A. Therefore, Director G would not have an improper interest in, or improperly profit from, the lease between the Airline and the Port Authority for purposes of Divisions (A)(4) and (3) if Company A were to purchase stock in the Airline.

For purposes of Division (A)(1) of Section 2921.42, Director G does not, as discussed above, have an interest in the Airline. Similarly, his spouse has no "interest" in the Airline for purposes of Division (A)(1) of Section 2921.42. However, Division (A)(1) also prohibits a public official from authorizing, or using the authority or influence of his position to secure authorization of, any public contract in which any of his business associates has an interest. The issue remains, therefore, whether any business associates of Director G would have such an interest in the contracts of the Airline so as to prohibit Director G from participating in the Port Authority's decision to lease the facilities.

The term "business associate" is not defined by statute for purposes of R.C. 2921.42. In Advisory Opinion No. 93-001, the Commission held that a person whose sole relationship to a corporation is that of a stockholder is not a "business associate" of the corporation, unless the facts otherwise indicate that the official and corporation act together to pursue a common business purpose. Thus, Director G and Company A are not considered to be "business associates" for purposes of R.C. 2921.42(A)(1).

Even if Company A were the business associate of Director G, Company A would not, as discussed above, have an "interest" in the contracts of the Airline, since Company A would purchase five

percent or less of the Airline's stock. Therefore, Company A, Director G, and Director G's family members would hold no interest in the lease of facilities between the Port Authority and the Airline, and R.C. 2921.42(A)(1) would not prohibit Director G from participating in the Port Authority's deliberations and decision with respect to the lease.

With respect to R.C. 102.03(D), Company A would, as discussed above, derive a definite pecuniary benefit from the lease if Company A purchased stock in the Airline. However, Director G does not hold a fiduciary relationship with Company A. The mere fact that Director G and his spouse own a de minimis fractional interest in Company A and Company A would purchase five percent or less of the stock of the Airline does not rise to a substantial influence upon Director G with respect to the lease. Therefore, Division (D) of Section 102.03 would not prohibit Director G from participating in the Port Authority's deliberations and decision with respect to the lease of facilities.

Director H

Director H is the CEO of Company H, which is a privately owned corporation. The stock of Company H is owned entirely by Director H and his family. Company H owns .0057 of the stock of Company B, and Director H and his spouse own .0006 of Company B. Under the analysis set forth above, Director H and his spouse would not have an improper interest in, or improperly profit from, the lease between the Airline and Port Authority if Company B were to purchase five percent or less of the stock of the Airline, for purposes of R.C. 2921.42. Also, Company H, as a stockholder in Company B, would not have an "interest" in the contracts of the Airline, nor derive a direct benefit from, or have a contingent interest in, the approval of the lease. Neither R.C. 2921.42(A)(1) nor R.C. 102.03(D) would prohibit Director H from participating in the Port Authority's deliberations and decision regarding the lease of facilities.

Director F

Director F is a member of the board of directors of Company B and owns .0004 stock of Company B. His spouse owns .00002 of the stock of Company A. Under the analysis set forth above, the stockholdings of Director F and his spouse in Companies A and B would not constitute an improper interest or position of profit in the lease between the Port Authority and the Airline, and would not, in and of itself prohibit Director F from participating in the Port Authority's deliberations and decision-making with respect to the lease.

However, Director F is also a member of the board of directors of Company B, and as discussed above, R.C. 102.03(D) would prohibit him from participating in the Port Authority's deliberations and decision to lease facilities to the Airline and other matters involving the interests of the Airline, if Company B purchases stock of the Airline.

Director D

Director D is President and CEO of Company DD, which is a wholly-owned subsidiary of Company D. Company D is contemplating purchase of Airline stock. Director D owns .000014 of the stock of Company D and holds options on up to .00019. Director D's spouse owns .000003 of the stock of Company B.

Under the analysis set forth above, the mere fact that Director D's spouse owns .000003 of the stock of Company B imposes no restrictions under R.C. 2921.42 or 102.03(D) upon Director D, even if Company B purchases stock of the Airline. Similarly, the fact that Director D owns .000014 of the stock of Company D would, in and of itself, impose no restrictions upon Director D if Company D were to purchase five percent or less of the outstanding shares of stock of the Airline.

However, as noted above, Director D is also the President and CEO of Company DD, which is a wholly-owned subsidiary of Company D. Company DD is not contemplating the purchase of stock in the Airline. Company D may purchase stock in the Airline. Company D owns all of the stock of Company DD, and thus would have a financial interest in the contracts of Company DD. However, Company DD, as Company D's subsidiary, would not conversely have a definite and direct interest in the contracts of Company D. Although it may be said that a subsidiary may have an indirect interest in the contracts of its parent company, such interest is not definite and direct. Therefore, the fact that Director D is the President and CEO of Company DD would not mean that Director D would have an improper interest or position of profit in the lease for purposes of R.C. 2921.42(A) if Company D purchased Airline stock. Furthermore, if Company D purchases five percent or less of the Airline stock, then Company D would have no interest in the Airline's contracts for purposes of R.C. 2921.42(A)(1), even if Company D could be considered Director D's business associate.

R.C. 102.03(D) would not prohibit Director D from participating in the lease of facilities to the Airline since Company DD, which he serves in a fiduciary capacity, would not benefit from the lease. Furthermore, under the analysis set forth above, the fact that Director D owns a fractional interest in the stock of Company D and his spouse owns a fractional interest in the stock of Company B would not be of such character as to manifest a

substantial and improper influence upon Director D with respect to his duties as Director of the Port Authority if Company D or Company B purchases stock of the Airline. Also, his relationship with Company D as the President and CEO of a wholly-owned subsidiary of Company D is sufficiently remote that he is not required to abstain.

Director E

Director E is a member of the board of directors and an employee of Company E which is a privately held corporation. Director E and his family own stock in Company E and Company EE, another privately-owned company. Company E owns less than five percent of the stock of Company B. Company E has provided services to the Airline, and is owed less than one percent of the Airline's indebtedness.

The prohibitions of R.C. 2921.42 and 102.03 would not be implicated if Company B were to purchase five percent or less of Airline stock, since neither Director E or his family members, nor Company E would have a definite and direct interest in the lease of facilities for purposes of R.C. 2921.42(A)(1) and (4), or benefit from or have a contingent interest in the outcome of the Port Authority's decision to enter into the lease for purposes of R.C. 102.03(D). Director E would not improperly occupy a position of profit in the lease for purposes of R.C. 2921.42(A)(3).

If Company EE were to purchase five percent or less of stock in the Airline, then the stockholdings of Director E and his family in Company EE would not create an issue under R.C. 2921.42, under the analysis set forth above. However, the interests of Company EE would, as discussed above, benefit from or be contingent upon, the approval of the lease. You have not specified the amount of stock that Director E and his family own in Company EE. That amount could be considerable, such that the benefit to Company EE from the lease would be of such character as to substantially and improperly influence Director E with respect to approval of the lease. Therefore, Director E would be prohibited by R.C. 102.03(D) from participating in the lease if Company EE purchased stock in the Airline, unless the stockholdings of Director E and his family in Company EE are not sufficient to impair the objectivity and independence of judgment of Director E with respect to the Airline's interests.

If Company E were to purchase stock in the Airline, then, the first issue would be whether Company E would have an "interest" in the contracts of the Airline for purposes of R.C. 2921.42, in light of the fact that Company E is a creditor of the Airline, and would, then, also be a stockholder. Again, the "interest" must be definite and direct in order to fall within the prohibitions of

R.C. 2921.42. The fact that Company E is owed less than one percent of the Airline's indebtedness, taken together with the fact that Company E would own five percent or less of the stock of the Airline does not mean, as a matter of law, that Company E would have a definite and direct interest in the lease. However, this could easily change if the amount of indebtedness or stockholding increases at any point, and the Commission should be contacted again if the facts with regard to Company E should change. The Commission is cognizant of Division (B) of R.C. 2921.42, which provides that a party will not be deemed to have an interest in the contracts of a corporation when the interest of such party is limited to owning or controlling shares of the corporation or being a creditor of the corporation, and the shares owned or controlled do not exceed five percent of the shares of the corporation, and the amount due the party as creditor does not exceed five percent of the total indebtedness of the corporation. In this instance, the amount of stock purchased would not exceed five percent, and the amount owed to Company E by the Airline does not exceed five percent. However, Company E would not be eligible for the exemption of Division (B) since the exemption is available only to those persons who are either a stockholder or a creditor. It is not available to a party who is both, regardless of the amount of stock owned or debt owed.

Under the analysis set forth above, Director E would be prohibited by R.C. 102.03(D) from participating in the Port Authority's deliberations and decision with regard to the lease of facilities to the Airline and other matters involving the Airline if Company E purchases stock of the Airline, since Company E's financial interests, as a stockholder in the Airline, would be contingent upon and benefit from approval of the lease, and in light of the fact that Director E holds a fiduciary relationship with Company E, Director E and his family own stock, perhaps a substantial amount of stock, in Company E, and Company E is a creditor of the Airline. Also, if Company E continues to do business with the Airline, it must be assured that Company E would have no interest in the lease. For example, R.C 2921.42(A)(4) would prohibit Company E from providing services to the Airline to maintain the facilities, once they have been leased from the Port Authority. R.C. 102.03(D) and (E) would also impose restrictions on Director E with respect to the manner in which he conducts business with the Airline. See, e.g. Advisory Opinions No. 89-006, 89-010, 89-013, and 89-014.

Directors C and I

You have provided no facts which would indicate that Directors C and I have a potential conflict of interest. Under the facts presented, they would not be prohibited from participating in the

Port Authority's actions concerning the Airline or aviation facilities.

Purchase of Stock Subsequent to Lease

You have also asked about the situation where no companies have purchased stock in the Airline at the time the Port Authority takes action to approve the lease, but subsequent to the Port Authority's decision and vote on the lease, one or more of the companies buys stock in the Airline.

If none of the companies owned stock in the Airline at the time the Port Authority approves the lease, then the prohibitions of R.C. 2921.42 and 102.03 would not be applicable at that time. However, if a company were to purchase stock in the Airline subsequent to the approval of the lease by the Port Authority, the analyses set forth above would apply to the respective directors with regard to subsequent actions of the Port Authority affecting the Airline.

Furthermore, the applicability of R.C. 102.03(D) must be considered further within this context to a member of the Board of Directors who votes or otherwise participates with respect to the lease, and subsequently his Company purchases stock in the Airline. Taking into consideration the facts and analyses set forth above, there is no need to address this issue with respect to Directors C, D, G, H, or I at this time.

As discussed above, the application of R.C. 102.03(D) is dependent upon the facts and circumstances of each particular situation. R.C. 102.03(D) does, however, prohibit a public official who serves in a fiduciary capacity with an organization from using the authority or influence of his official position to secure future financial benefits for that organization. See generally Advisory Opinion No. 87-004. It is apparent from the facts that have already transpired that Companies A, B, D, E, and EE are, at least to some extent, contemplating the purchase of stock. If Directors A, B, E, and F were to participate and vote on the lease, knowing that the Companies with which they have fiduciary relationships will invest in the Airline and benefit from the increased business which is dependent upon the lease, or having reason to believe their Companies might invest, it is apparent that they would have used their authority and influence in violation of R.C. 102.03(D), just as they would if the Companies already owned stock at the time the Port Authority acted upon the lease. If the Directors abstain from participating in the lease, then their Companies may subsequently purchase stock in the Airline without implicating the Directors' liability under R.C. 102.03(D). If, however, a Director participates in the lease, the subsequent purchase of stock by his Company would indicate that the Director

may have acted in contravention of R.C. 102.03(D), depending on the particular facts and circumstances. Therefore, a Director who participates to approve the lease and whose Company then purchases stock in the Airline may violate R.C. 102.03(D).

This is not to say that the Companies can never purchase stock in the Airline, without creating liability for the Directors under R.C. 102.03(D). See generally Advisory Opinion No. 87-008. For example, if a sufficient time has passed after the Port Authority's approval of the lease to indicate that the Director had not, by voting on the lease, used the authority or influence of his position to secure something of value for his Company, then the Company may purchase stock without creating liability for the Director. Id. However, this will be a very fact-specific issue, and the Ethics Commission should be contacted again if this issue should arise in a particular context.

Other Provisions of the Ethics Law

The members of the Port Authority should also be aware of R.C. 102.04 (C), which prohibits a public officer from receiving compensation for personally rendering services on a matter pending before his own governmental agency, and R.C. 102.03(A), which prohibits a public official, during his public services, and for one year thereafter, from representing any person before any public agency on any matter in which he personally participated while in public service.

As a final matter, the directors are also subject to Division (B) of Section 102.03, which reads:

> No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

The directors are prohibited from disclosing confidential information, which they acquired in their official capacity, to their Companies, the Airline, or any other party, or from using such information, without appropriate authorization. See Advisory Opinion No. 89-006. This limitation is applicable during each

Director's public service, and after, and remains in effect so long as the information is confidential. Id.

Your letter of request has raised a myriad of complex factual and legal issues. Although the Commission has, of course, intended to answer your concerns in this opinion, please do not hesitate to contact this Office again if issues remain, or if additional issues should arise in the future.

This informal advisory opinion was approved by the Ethics Commission at its meeting on January 8, 1993. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. of the Revised Code and does not purport to interpret other laws or rules. If you have any questions, please feel free to contact this Office again.

Sincerely,

Melissa A. Warheit

Melissa A. Warheit
Executive Director