THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

OFFICE OF THE GENERAL COUNSEL

K.C. WRIGHT ADMINISTRATION BUILDING
600 SOUTHEAST THIRD AVENUE, 11TH FLOOR
FORT LAUDERDALE, FLORIDA 33301
Telephone: (754) 321-2050
Facsimile: (754) 321-2705

BARBARA J. MYRICK
GENERAL COUNSEL

MEMORANDUM

TO: School Board Members

FROM: Barbara J. Myrick, General Counsel

DATE: August 3, 2020

SUBJECT: **Revision to H-2 Conflict of Interest Waiver Request – Munger, Tolles & Olson LLP for the August 4, 2020 Special School Board Meeting**

Attached is a revision for H-2 Conflict of Interest Waiver Request – Munger, Tolles & Olson LLP for the August 4, 2020 Special School Board Meeting.

At the request of the General Counsel, Munger, Tolles & Olson LLP amended the Conflict Waiver Request to cite the analogous Florida Bar Rule 4-1.7 regarding Conflict of Interest.

If you have any questions, please do not hesitate to contact me.

BJM:jcf
Enclosures

C: Cabinet

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ROBERT E.DENHAM
JEFFREY I. WEINBERGER
CARY B. LERMAN
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ROBYN K. BACON
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WESLEY T.L. BURRELL
KAREN A. LORANG
CRAIG JENNINGS LAVOIE
ADAM P. BARRY
JENNIFER L. BRYANT
ANDREW CATH RUBENSTEIN
HANNAH L. DUBINA
NICHOLAS D. FRAM

350 SOUTH GRAND AVENUE
FIFTIETH FLOOR
LOS ANGELES, CALIFORNIA 90071-3426
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

560 MISSION STREET
TWENTY-SEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-3089
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

1155 F STREET N.W.
SEVENTH FLOOR
WASHINGTON, D.C. 20004-1361
TELEPHONE (202) 220-1100
FACSIMILE (202) 220-2300

JOHN L. SCHWAB
ASHLEY D. KAPLAN
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STEPHANIE G. HERRERA
TERESA REED DIPPO
DANIEL BENYAMIN
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J. MAX ROSEN
RACHEL G. MILLER-ZIEGLER*
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ANNE K. CONLEY
GRAHAM B. COLE
KATHERINE G. INCANTALUPO
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SEGUN I. BABATUNDE II
CARSON C. ZHENG
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USHA CHILUKURI VANCE
BRIAN J. SPRINGER
TYLER HILTON
VINCENT LING
ALEXANDER S. GORIN
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STEPHEN HYLAS
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LLOYD MARSHALL
NATALIE KARL
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CARRIE C. LITTEN
BEAU C. TREMITIERE
ESTALYN S. MARQUIS
JAMES R. SALZMANN
ELIZABETH DOUGLAS
SAMIR HALAWI
ROBIN S. GRAY

OF COUNSEL

ROBERT K. JOHNSON
PATRICK J. CAFFERTY, JR.
PETER A. DETRE
BRAD SCHNEIDER
PETER E. GRATZINGER
JENNY H. HONG
KIMBERLY A. CHI
ADAM R. LAWTON
MATTHEW S. SCHONHOLZ
MICHAEL E. GREANEY

E. LEROY TOLLES
(1922-2008)

*ADMITTED IN DC, ALL OTHERS ADMITTED IN CA

July 31, 2020

Writer's Direct Contact
(213) 683-9232
(213) 683-4032 FAX
tamerlin.godley@mto.com

Broward County Public Schools
c/o Superintendent Robert Runcie
600 SE 3rd Ave.
Fort Lauderdale, FL 33301

Re: *NAACP, et al. v. DeVos*
U.S.D.C., D.D.C., Case No. 1:20-cv-01996

Ladies and Gentlemen:

We seek informed written consent to this firm's representing Broward County Public Schools (and/or its related entities) (collectively, "BCPS" or You) in the above-referenced matter, and corresponding consent to our continued and future representation of Juul Labs, Inc. (and/or its related persons and entities) (collectively, "JLI") as specified herein, notwithstanding any adversity of interests between You and JLI in any current or future matters in which we represent JLI.

This firm currently represents JLI in a number of matters. This includes litigation brought by BCPS and others that challenges JLI's marketing and sales practices pertaining to its JUUL products and, in the case of BCPS and other school districts, asserts that those practices have targeted minors and therefore adversely impacted BCPS and other school districts. BCPS's litigation against JLI is *The School Board of Broward County, Florida v. Juul Labs, Inc. et al.*, United States District Court for the Northern District of California, Case No. 3:19-cv-8289-WHO (the "BCPS/JLI Litigation"), and has been consolidated with many other cases in MDL

No. 2913, *In re: Juul Labs, Inc. Marketing, Sales Practices, and Products Liability Litigation*, also pending in the United States District Court for the Northern District of California. If additional related claims or proceedings are filed, BCPS should assume for current purposes that we will represent JLI in those matters as well.

BCPS has now asked this firm to represent it as an additional plaintiff in the above captioned litigation NAACP, *et al.* v. DeVos (the "DeVos matter"). The DeVos matter is a challenge to the United States Department of Education's Interim Final Rule, which requires school districts to set aside funds for equitable services for the benefit of private schools based upon the total private school population instead of the percentage of students in poverty in private schools in complete contradiction to the CARES Act or alternatively burdens and limits the expenditure of CARES Act funds, again in contradiction of the Act.

The DeVos matter is not substantially related to the BCPS/JLI Litigation or any other matter in which this firm represents JLI. We do not believe that any confidential information that BCPS would provide to us in the DeVos matter would be material to the BCPS/JLI Litigation or any other matter in which we represent JLI. Of course, we may receive confidential information from JLI in the BCPS/JLI Litigation that may be material to BCPS in other respects. It would be our professional responsibility to keep this information confidential and not disclose it to others, including BCPS. We believe that we could zealously represent you in the DeVos matter notwithstanding our representation of JLI adverse to you in the BCPS/JLI Litigation. Nevertheless, you should consider whether that adversity will impact our loyalty to you, or our zealousness in protecting your interests in the DeVos matter.

As attorneys, we are governed by specific rules relating to actual or potential conflicts of interest. Specifically, Rule 1.7 of the Rules of Professional Conduct of the State Bar of California provides as follows:

> Rule 1.7 Conflict of Interest: Current Clients
>
> (a) A lawyer shall not, without informed written consent from each client . . . represent a client if the representation is directly adverse to another client in the same or a separate matter.
>
> (b) A lawyer shall not, without informed written consent from each affected client . . . represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests.

Rule 1.0.1(e) defines "informed written consent" to mean written agreement after written disclosure of the relevant circumstances and the material risks of the proposed course of conduct. Although we are not Florida lawyers bound by the Florida Rules of Professional Conduct, we also note the analogous Florida rule:

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

> Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if: (1) the representation of 1 client will be directly adverse to another client; or (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; RRTFB July 27, 2020 (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

In connection with this request, we note that JLI may in the future want to engage this firm to represent it in additional matters, including other proceedings relating to the subject matter of the BCPS/JLI Litigation, and other matters adverse to BCPS, and BCPS may in the future want to engage this firm to represent it in additional matters. The consent we seek would remain valid and binding notwithstanding our undertaking, and apply equally to, any such additional matters. However, the consent would not apply to representation of JLI in a matter substantially related to the DeVos matter or any future matter in which we agree to represent BCPS.

We request that you signify your informed written consent to our representation of you in the DeVos matter, and corresponding consent to our continued and future representation of JLI notwithstanding the adversity between you and JLI in the BCPS/JLI Litigation or any other current or future matter as set forth in this letter, by having an authorized representative countersign this letter as indicated below and returning the fully executed letter to us. Your consent will include you agreement neither to assert a conflict of interest nor to seek to disqualify this firm or any of its personnel from any such representation.

We encourage you to seek independent counsel regarding the import of this consent, and we emphasize that you remain completely free to seek independent counsel at any time even if you decide to sign the consent set forth below. If you should have any questions concerning this letter or the consent, please discuss them with us or independent counsel before signing and returning this letter.

Very truly yours,

/s/ Tamerlin J. Godley

AGREED AND CONSENTED TO:

Dated: _____

_____
Signature

_____
Print Name

On behalf of Broward County Public Schools