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Dennis McConnell, Esq.
County Counsel
County of Sussex
One Spring Street
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Via E-mail: dmcconnell@sussex.nj.us

Re: Freeholder Gail Phoebus

Dear Mr. McConnell:

I write further to your recent conversation with Freeholder Phoebus, during which you cited the non-disparagement clause in the settlement agreement she voted against and cautioned her not to publicly criticize Sunlight General.

Sunlight General deserves to be publicly criticized. It squandered millions of taxpayer dollars, failed to build-out the solar projects, lost a $66 million arbitration award, defaulted payments, was found by the arbitration panel to have breached its express and implied covenants of good faith and fair dealing, made affirmative misrepresentations to Power Partners MasTec and, during the arbitration proceeding, raised "numerous unjustified legal and factual arguments and issues that needlessly increased the costs of arbitration."

Under the circumstances, Freeholder Phoebus's public characterization of Sunlight General as a "terrible company" was wholly justified. She should be thanked for speaking truth and exercising restraint, not called out by county counsel in a misguided effort to censor her speech.

As applied to the freeholder board, the non-disparagement clause contained in the settlement agreement is a legal nullity, void as a matter of policy and law. There is no question that it violates the First Amendment. Freeholder Phoebus has every right to express her views. It is well-established that a public official, no less than any other person, has a First Amendment right to advocate. See, e.g., Buckley v. Valeo, 424 U.S. 1, 54 (1976) (First Amendment is designed "to assure unfettered interchange of ideas for the bringing about of political and social

changes desired by the people."). Freeholder Phoebus's constitutionally-protected right to free speech cannot validly be abridged by a resolution passed by three of her colleagues.

Moreover, the non-disparagement clause contains no liquidated damages provision. It proscribes making disparaging remarks and comments but carries no penalty for doing so, which is unusual. Typically, non-disparagement clauses contain language that provides for the payment of damages or the denial of settlement funds in the event that one party disparages the other. Even then, the party that wishes to invoke the clause has to file a court action and prove that the alleged disparagement caused them measurable harm. Given its track record and claimed "insolvency," I seriously doubt that Sunlight has much appetite to go anywhere near a courthouse at this point.

In short, the non-disparagement clause is impotent and non-binding; it has a muted bark and a toothless bite. Freeholder Phoebus should disregard it.

In fact, I encourage all of the freeholders to disregard the non-disparagement clause. Elected officials who hide behind gag orders drafted by lawyers do a disservice to themselves and the public they serve. As a matter of common sense, public policy and law, the freeholders would do well to ignore the non-disparagement clause even if they voted in favor of the settlement.

Finally, I have considered the possibility that you may disagree with my legal analysis. In the event that you see things differently, I ask you to cite legal the authority that supports your position that a freeholder's First Amendment rights can validly be suspended or cabined by resolution. Ultimately, Freeholder Phoebus is prepared to seek a declaratory judgment in Superior Court striking the non-disparagement clause from the settlement agreement.

Please contact me if you have any questions or wish to discuss these matters further.

Sincerely Yours,

Daniel M. Perez

DANIEL M. PEREZ, Esq.

cc: Freeholder Gail Phoebus
Freeholder Director Phillip Crabb
County Administrator John Eskilson