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January 7, 2002

INTERNAL REVENUE SERVICE  
CINCINNATI, OHIO

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RECEIVED  
TEGE DIVISION

VIA CERTIFIED MAIL

Internal Revenue Service  
Exempt Organizations  
Attn: John Jennewein, ID#: 31-07208  
Room 4508  
550 Main Street, Federal Building  
Cincinnati, OH 45202

RE: Everglades College, Inc.  
Form 1023, Application for Exemption Pursuant to Code Section 501(c)(3)  
IRS Letter dated December 18, 2001

Dear Mr. Jennewein:

The following information is being submitted in support of the Application for Exemption and in response to your letter dated December 18, 2001, a copy of which is attached hereto ("Letter").

Please be advised that I respectfully disagree with your interpretation of certain facts in the instant case, as well as your interpretation of the applicable tax law as it applies to the facts set forth in the instant case.

My disagreement with your interpretation of facts:

- In page 2 of your Letter, you refer to the Memorandum of Understanding dated August 20, 1998 ("Memorandum") and point out that American Flyers College, Inc. ("AFC") and American Flyers Schools, Inc. ("AFS") agreed to enter into a separate agreement, effective following the acquisition by Dr. Arthur Keiser ("Dr. Keiser") of the shares of AFC stock, upon such terms as mutually agreed to by AFC and AFS, whereby (i) AFC would provide AFS with a collegiate program for AFS flight

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students, and (ii) AFS would provide AFC with flight training services and programs for AFC's students. You further point out that the Memorandum provided that all of the flight training for the AFC students would be subcontracted by AFC to AFS flight schools. Based on these limited facts, you therefore conclude that Everglades College is "serving the private benefit of a for-profit entity." I respectfully disagree with your conclusion.

Your Letter fails to note that AFC and AFS did enter into a separate agreement, dated August 20, 1998, a copy of which has been provided to you ("Agreement"), whereby AFS agreed to provide flight training services to the AFC (now Everglades College) students at the regular rates. These services were, and currently are, provided to the Everglades students at normal customary rates. It should be noted that Everglades College does not have the necessary facilities to provide such flight training to its students and is, therefore, compelled to subcontract out such services. In this regard, please note that this contractual arrangement between Everglades College and AFS is being terminated, effective on or about February 28, 2002.

Your Letter also fails to point out that AFS and Everglades College are currently unrelated parties who are not controlled by the same directors or officers. Accordingly, your statement that Everglades College is serving the private benefit of a "for-profit entity" has no legal or factual basis.

2. At the top of page 3 of your Letter, you refer to the "scholarship program" of Everglades College and note that Everglades College awarded scholarships in the amount of \$500 to each of ten students who have completed associate degrees at Keiser College, a for-profit college owned by Dr. Keiser, Dr. Keiser's mother and Dr. Keiser's son. You, therefore, conclude that Everglades College is "serving the private benefit of a for-profit entity." I respectfully disagree with your conclusion.

The scholarship recipients were selected by an independent Board of Trustees (this independence will be addressed later on) on the basis of a variety of criteria and factors, a copy of which was previously furnished to you in connection with a discussion of scholarships available. These eligibility criteria/factors did not include any requirement that the scholarship recipients be graduates of Keiser College's associate's degree program. The initial selection of these scholarship recipients having Keiser College degrees was more attributable to the lack of scholarship candidates/applicants from other schools. It should also be noted that each of these scholarship recipients received the total sum of \$500 which is a relatively small sum

of money (i.e., 5%) in relation to the total annual tuition cost of approximately \$10,000. The conclusion which your Letter attempts to draw is that Keiser College, which has approximately 4,500 students, derived a significant benefit from these scholarships. I respectfully disagree with your conclusion in as much as these scholarships were nominal in amount and represented only one set of scholarships awarded by Keiser College. Keiser College also gives scholarships to the Florida Association of Post Secondary Schools and Colleges, as well as to the Career College Association. Keiser College is a regionally accredited 25-year institution, while Everglades College is only a 2-year institution and, therefore, to suggest that by having awarded these nominal scholarships Keiser College has received a substantial private benefit is simply not true. If there was a benefit given it was the benefit that Keiser College bestowed upon Everglades College by awarding these scholarships in order to encourage enrollment in Everglades College.

3. In the middle of page 3 of your Letter, you note that the building in which Everglades College is located is subleased from Keiser College, which in turn leases the entire building from a partnership which is 42% owned by entities which are owned by Dr. Keiser and/or his family and 58% owned by unrelated parties. You note that the entire building leased by Keiser College comprises 83,824 square feet, "including the area [sic] occupied by Everglades College." You also note that housed in this facility are: Keiser Career Institute and Everglades Management Company. To begin with, it should be noted that Keiser Career Institute is not housed in this facility, but rather it is the Port Lauderdale campus of Keiser College which is housed in this facility. Also, what you failed to mention is that the property occupied by Everglades College is only approximately 4,634 square feet (which represents approximately 5% of the total square footage of the building leased by Keiser College) and that the rental rate charged to Everglades College (as supported by appraisal which was previously furnished to you) is less than the fair rental value of such property. Accordingly, I respectfully disagree with your conclusion that this "arrangement serves the private benefit of the Keisers and their [sic] related for profit entities." I fail to see how this "rent subsidy" which is being provided to Everglades College benefits Dr. Keiser or his family. Dr. Keiser's preference would be for Everglades College to be housed in a different facility; however, its cash flow and working capital needs will not allow for such a move at this time which would invariably result in a higher rental charge. In addition, it should be noted that students of Everglades College were allowed access to Keiser College's library and its research facilities without charge.

4. Other facts which should be brought to your attention (since in your discussion of the applicable law you allude to the apparent "control" which Dr. Keiser or his family somehow exert on Everglades College) are as follows:
- A. Although the current Board of Directors of Everglades College consists of Dr. Keiser, Dr. Keiser's wife, Belinda Keiser, and Jim Waldman, who is the Vice Mayor of Coconut Creek and is not an employee of Everglades College or any other entity owned or controlled by Dr. Keiser or his family (Florida law requires that there be three directors at all times), the only duties and functions of the Board of Directors under the Bylaws is the appointment or election of the initial Board of Trustees and the nomination of all Trustees to be elected thereafter. All other business matters involving Everglades College are specifically controlled by an independent Board of Trustees ("Board of Trustees"). See Article III, Section 1, of the Bylaws, a copy of which has been provided to you ("Bylaws").
  - B. All of the business and operational activities of Everglades College, including its day-to-day activities and election of officers, are solely the responsibility of the Board of Trustees and not the Board of Directors. See Article IV, Section 2, of the Bylaws.
  - C. The current Board of Trustees consists of the following individuals:
    - (i) Dr. Arthur Keiser - Chancellor of Everglades College  
c/o Keiser College  
1500 Northwest 49<sup>th</sup> Street  
Fort Lauderdale, FL 33309
    - (ii) Jim Waldman - Attorney and Vice Mayor of Coconut Creek  
2751 West Atlantic Boulevard  
Pompano Beach, FL 33069
    - (iii) Maria Kondracki - Insurance Agent and Financial Planner  
5900 N. Andrews Ave., Suite 250  
Fort Lauderdale, FL 33309
    - (iv) Lipton McKenzie - McKenzie Financial Services  
3520 West Broward Blvd., Suite 217

Fort Lauderdale, FL 33312

(v) Catherine McKenzie - Vice President of Bell South  
6451 North Federal Highway, Suite 1113  
Fort Lauderdale, FL 33308

(vi) Dr. Joseph Pace - Pacific Institute  
1230 South Southlake Drive  
Hollywood, FL 33020

- D. Please note that the Application for Exemption (IRS Form 1023), Part IV, Item 4, inadvertently listed Gary Markowitz as a member of the Board of Trustees. Mr. Markowitz, who is an employee of Everglades College, is not, and has never been, a member of the Board of Trustees.
- E. Please also note that Dr. Keiser is now the Chancellor of Everglades College and Susan Ziegelhofer is now the President of Everglades College.
- F. With the exception of Dr. Keiser, none of the other members of the Board of Trustees are employed by Everglades College or any other entity owned or controlled by Dr. Keiser or his family.
- G. The Bylaws provide that the members of the Board of Trustees shall serve staggered terms and that their replacements shall be elected by the Board of Trustees from persons nominated by the Board of Directors. The Bylaws further provide that (i) no more than two (2) members of the Board of Trustees may be related to a Director or an officer, and (ii) no more than two (2) members of the Board of Trustees are allowed to be an employee of Everglades College or to have any other business relationship with Everglades College. See Article IV, Section 3, of the Bylaws.
- H. Accordingly, it is clear that the Board of Trustees is an independent governing body of Everglades College. As specifically noted in Article IV, Section 1, of the Bylaws, the independence of the Board of Trustees is critical to ensure that Everglades College meets the needs of the communities in which it serves.

My disagreement with your interpretation of the law:

As a point of clarification, the "operational test" as described in Section 1.501(c)(3)-1(c) of the Treasury Regulations provides that an organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of exempt purposes. An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose. As a corollary to this, it must be noted that "incidental" benefits conferred upon disinterested persons would not cause an organization to fail the "operational test." See, e.g., Dettler Business Bureau v. United States, 326 U.S. 279 (1945), Church in Boston v. Commissioner, 71 T.C. 102 (1978), and Kentucky Bar Foundation v. Commissioner, 78 T.C. 921 (1982). Accordingly, I would like to point out that any benefits conferred upon Dr. Keiser, his family or any entities owned or controlled by him or his family as a result of the activities of Everglades College would clearly be regarded as "incidental" at best.

In your Letter, you cite to International Postgraduate Medical Foundation v. Commissioner, TC Memo 1989-36 (1989), Old Dominion Box Co., Inc. v. United States, 477 F. 2d 340 (4<sup>th</sup> Cir. 1973) and Revenue Ruling 76-441, 1976-2 C.B. 147, as authority for your position that the "operational test" has not been satisfied in the instant case. I respectfully disagree with your position for the following reasons:

1. The International Postgraduate Medical Foundation case, *supra*, involved a nonprofit corporation which was formed by the owner of a for-profit travel agency to conduct medical educational tours abroad. The court held that a substantial purpose of the nonprofit corporation's operations was to increase the income of the travel agency. In so holding, the court noted that approximately 90% of the nonprofit corporation's total revenue was expended on production and distribution of brochures which included material intended to solicit customers for tours arranged by the travel agency. The court further noted that the nonprofit corporation did not solicit competitive bids from any other travel agency and that the travel agency in question received \$399,667 in gross revenue for air fares and land arrangements as a direct result of the nonprofit corporation's tours. The court noted that the owner of the travel agency controlled the nonprofit corporation and exercised that control for the benefit of his travel agency.

This case is clearly distinguishable from the instant case. Everglades College was not formed to provide impermissible private benefits to for-profit entities. At the bottom of page 5 of your Letter, you incorrectly conclude that the operations of Everglades College and the operations of AFC prior to its acquisition are

"substantially, if not completely, similar" and that these operations are "so interrelated to be functionally inseparable." I disagree with your conclusion in that there have been significant changes from the time AFC was acquired in 1998 until the date of its conversion to Everglades College in March of 2000.

You state at the top of page 6 of your Letter that "Everglades College is "controlled by the Keisers despite the fact that they do not constitute a majority of the governing board." This statement has no factual basis. As previously noted, Everglades College is governed by an independent Board of Trustees. Dr. Keiser has no control over the Board of Trustees or its decisions. Likewise, your statement that Everglades College "appears to operate for the benefit of private interests of the Keisers" is without any factual basis. Neither Dr. Keiser nor his family derive any benefit from the operation and activities of Everglades College. In fact, now that Keiser College is planning to become a four-year program (rather than only a two-year program), Everglades College will actually become a "competitor" to Keiser College.

2. The Old Dominion Box Co., Inc. case, *supra*, involved a private foundation which was formed and controlled by certain family members for the alleged purpose of accepting charitable donations and disbursing the funds for charitable purposes. This foundation was involved in inflating the value of certain debentures which were contributed to the foundation by one of its founding members, thereby increasing the charitable contribution deduction for such member. The court held that such non-charitable activities destroyed its entitlement to an exemption, regardless of its other charitable undertakings, and revoked the foundation's tax-exempt status. As a result, the court disallowed a charitable contribution to the private foundation by a corporation owned by the controlling family members. While acknowledging the general rule that charitable deductions of innocent contributors to an organization whose exemption has been forfeited would not be retroactively disallowed, the court noted that this rule would not preclude the disallowance of deductions made by contributors who were aware of the foundation's activities. The court ruled that the contributor was not an "innocent contributor" as a result of the interlocking directors/officers and activities between the private foundation and the contributor.

On the top of page 6 of your Letter, you state that Everglades College is "similar" to the organization in the Old Dominion Box Co. case "because [Everglades College] operate[s] for the benefit of private parties." I respectfully disagree with your assessment. In the Old Dominion Box Co. case, it was clear that the founding members were using the private foundation for their own benefit in securing tax

deductions based on artificially inflated contributions and that the private foundation was a willing participant in this scheme. The interlocking directors/officers and activities in that case did not, in and of itself, result in the denial of tax-exempt status, but rather was used by the court to preclude the contributing party, which was clearly aware of the improper activities of the private foundation, from invoking the "innocent contributor" rule in order to secure a tax deduction which would otherwise be unavailable.

On page 6 of your Letter, you infer that Everglades College is "operating for the benefit of the Keisers." I respectfully disagree with your inference for the reasons previously stated. Everglades College does not provide any substantial benefit to Dr. Keiser or his family or to any entities owned or controlled by them. Any benefit which may be derived by the Keisers from Everglades College is clearly an "incidental" benefit at best.

3. Revenue Ruling 76-441, *supra*, sets forth two factual situations. The first situation involved a nonprofit school which purchased the assets of a for-profit school in an arms' length transaction at fair market value and leased the land and buildings from the former owners of the for-profit school at fair market rental. The former owners of the for-profit school were employed by the nonprofit school and received salaries commensurate with their responsibilities and which were reasonable compensation for their services. None of the officers or directors of the nonprofit school were related by blood or marriage to the former owners nor were any of them business associates of the former owners. The IRS ruled that the nonprofit school was operated to serve a public rather than a private interest. In so ruling, the IRS noted that the nonprofit school had purchased the property at fair market value in an arms' length transaction and was paying fair rental value for the leased property. The IRS also noted that the nonprofit school was paying the former owners reasonable compensation for their services.

Page 5 of your Letter states that part of the IRS's conclusion "was based on the independence of the board." In this ruling, the IRS did not refer to the "independence of the board" as the basis for its ruling. Rather, the IRS noted the arms' length nature of the purchase at fair market value and that the former owners were receiving reasonable compensation for their services. It is not clear from this ruling whether the IRS's position in the first situation would be the same if the nonprofit school was controlled by the former owners or related parties. Regardless of the outcome of this issue, this issue is moot in the instant case since, as I have previously described, the



Board of Trustees of Everglades College is clearly an independent governing body and is not controlled by Dr. Keiser or his family.

The second situation in Ruling 76-441, *supra*, involved a nonprofit school which received all of the stock of a for-profit school in a gift transaction. The nonprofit school dissolved the for-profit school and assumed all of its liabilities, including promissory notes owed to the former owners of the for-profit school. The total liabilities of the for-profit school exceeded the fair market value of its assets. The Board of Directors of the nonprofit school was comprised of the former owners of the for-profit school. The IRS ruled that the Directors of the nonprofit school benefited in their individual capacities from the nonprofit school's acceptance of the transfer of the stock in the for-profit school and the nonprofit school's assumption of all preexisting liabilities of the for-profit school. Since these liabilities included promissory notes owed to such Directors and the liabilities of the for-profit school exceeded the fair market value of its assets, the IRS concluded that the nonprofit school was substantially serving the Directors' private interests in honoring these notes. The IRS noted that the Directors were, in fact, dealing with themselves and will benefit financially from the transaction. As a result, the IRS ruled that the nonprofit school was not operated exclusively for educational and charitable purposes.

This second situation is clearly distinguishable from the instant case. Upon the conversion of AFC to Everglades College, neither Dr. Keiser nor any of his family members or any entities owned or controlled by them benefitted financially from this transaction. The IRS, in ruling that the Directors had received an impermissible benefit from the nonprofit school, emphasized the interrelationship between the for-profit school and the nonprofit school due to the obvious financial benefit gained by the Directors, i.e., the nonprofit school had assumed the obligation to pay the Directors on their notes while at the same time the nonprofit school received assets having a value less than the aggregate amount of the obligations assumed. This is clearly not the case with regard to Everglades College which was converted to a nonprofit corporation for the sole and exclusive purpose of operating as a tax-exempt educational organization within the meaning of Section 501(c)(3) of the Internal Revenue code of 1986, as amended.

Page 6 of your Letter states that the "manner in which you operate leads to conclude that your school bestows significant private benefit for the Keisers and their for-profit corporation." I respectfully disagree with your conclusion. Your Letter fails to set

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forth any factual basis for your conclusion. Instead, your Letter merely cites to two cases (International Postgraduate Medical Foundation case and the Old Dominion Box Co., Inc. case) and an IRS ruling (Revenue Ruling 76-441), all of which are clearly distinguishable from the facts of our case.

4. The present case is more clearly analogous to Bob Jones University Museum and Gallery, Inc. v. Commissioner, TC Memo 1996-247 (1996). This case involved a nonprofit corporation, which operated a museum and art gallery ("Museum") and which was located on the campus of Bob Jones University, a for profit university ("University") which had previously lost its tax-exempt status. Prior to the loss of its tax-exempt status, the Museum had been part of the University. The Museum, which was housed in the same building as the museum operated by the University, leased its facility from the University pursuant to a written lease agreement. The rent charged to the Museum was substantially less than the fair rental value of the property. The Museum's Board of Directors consisted of five persons, two of whom were employed by the University.

The IRS claimed that the Museum did not satisfy the "operational" test and, as a result, issued an adverse ruling denying the Museum tax-exempt status. In its ruling, the IRS stated that the Museum was not operated exclusively for exempt purposes and that its operation resulted in substantial private benefit to the University. The IRS further ruled that the Museum was not operated for a substantial non-exempt purpose.

The IRS listed certain factors supporting its position. These factors included: (i) the Museum's payment of rent to the University; (ii) the Museum's use of artwork lent by the University; (iii) excessive control; (iv) enhancement to reputation; and (v) cumulative effect of these factors. The court rejected each of these factors and held that the Museum's operation did not result in an impermissible private benefit to the University.

Set forth below is a discussion of each of these factors and the court's response to these factors:

- A. Museum's Payment of Rent to the University. The IRS contended that the Museum's payment of rent to the University conferred on the University an impermissible private benefit. The court noted that the principal inquiry in determining whether rental arrangements create private benefit or inurement

is whether the rental payments are excessive. The court concluded that the Museum's payment of below-market rent constituted an "ordinary and necessary" expenditure and did not confer an impermissible private benefit on the University. The court rejected the IRS's argument that payments for less than fair market value can create private inurement.

Similarly, the below-market rental payments by Everglades College to Keiser College would not confer an impermissible private benefit.

- B. Museum's Use of Artwork Lent by the University. The IRS contended that the Museum's use of the University's artwork without charge conferred an impermissible private benefit on the University. The court rejected this argument and noted that the Museum did not pay the University anything for the use of its artwork.

Similarly, the use of Keiser College's library and research facilities by students of Everglades College without charge would not confer an impermissible private benefit.

- C. Excessive Control. The IRS contended that persons on the Museum's Board of Directors who are affiliated with the University will cause the Museum to be managed for the purpose of benefitting the University. The court noted that there are no "bright-line" standards that address the effect on exempt status, if any, of overlapping boards of directors. The court held that overlapping boards of directors do not automatically prevent an organization from qualifying for tax-exempt status. In so holding, the court noted that in Revenue Ruling 66-358, 1966-2 C.B. 218, the IRS had concluded that a nonprofit organization spun off from a taxable corporation was tax exempt even though the nonprofit organization's board of directors consisted of the taxable corporation's officers.

The court noted that two factors supported the taxpayer's position. First, the University controlled less than fifty percent of the votes on the Museum's Board of Directors (i.e., two out of five). Second, the court held that the issue of control would be relevant only if the Museum and the University were to engage in transactions in which the Museum paid the University unreasonable amounts for goods or services. Accordingly, the court concluded that the current composition of the Museum's Board of Directors

did not preclude the Museum from satisfying the tax-exempt requirements under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended ("Code").

Similarly, the composition of the Board of Trustees of Everglades College should not preclude it from satisfying the tax-exempt requirements of Code Section 501(c)(3).

- D. Location. The IRS contended that the Museum's location on the University's campus conferred a private benefit on the University. The court held that any benefit the University derived from the Museum's location on the campus of the University was merely an "incidental" benefit. The court noted that the IRS did not cite, and the court did not find, any cases suggesting that the location of an organization may affect its eligibility for tax-exempt status.

Similarly, the location of Everglades College being in close proximity with Keiser College should not adversely affect the eligibility of Everglades College for tax-exempt status.

- E. Enhancement to Reputation. The IRS contended that the Museum's name and location served to "enhance the University's educational and spiritual reputation" and thus conferred a private benefit on the University. The court, while agreeing that the University did receive an intangible benefit from the Museum's name and location, concluded that such benefit was minimal and incidental.

Similarly, the presence of Everglades College in close proximity to the Keiser College should not be regarded as conferring any significant private benefit. Rather, any such benefit would, at most, be minimal and incidental.

- F. Cumulative Effect of These Factors. The IRS conceded that "most of the individual factors...may not appear to result in more than incidental private benefit" but contended that the "cumulative effect" of these factors created a private benefit. The court rejected this argument and concluded that the Museum satisfied all of the requirements of Code Section 501(c)(3) in substance as well as in form. The court noted that while there is no doubt that the University did receive certain benefits from the Museum's existence, these benefits were merely incidental.

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Similarly, the existence of Everglades College should not be regarded as conferring any significant private benefit. Rather, any such benefit or benefits, when taken as a whole, would be merely incidental.

I am hereby requesting that you reconsider your current stated position and allow a favorable determination letter to be issued in regarding the tax-exempt status of Everglades College, especially in light of the factors discussed in the Bob Jones University Museum and Gallery case, cited above, which offers similarities to our case.

Please note that I am willing to schedule a conference call with you and/or any members of your review staff in order to discuss the issues presented herein and to answer any questions which you and/or your review staff may have. Again let me reiterate that neither Dr. Keiser nor any members of his family or any entities owned or controlled by them have derived, or will derive, any non-incidental private benefit attributable to Everglades College.

I look forward to hearing from you. If you have any questions or require additional information, please do not hesitate to contact me.

Very truly yours,

BERGER SINGERMAN



Nick Jovanovich

NJjb

I, Arthur Keiser, as Chancellor of Everglades College, Inc., hereby declare that I have examined the facts presented in this letter, and to the best of my knowledge and belief, they are true, correct and complete.



ARTHUR KEISER