VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA,	
Plaintiff,	
v.	**Civil Case No. CL19001757**
ACKERMAN MCQUEEN, INC.	
and	
MERCURY GROUP, INC.	
Defendants.	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S REQUEST FOR AN EMERGENCY HEARING AND PLAINTIFF'S EMERGENCY MOTION FOR ENTRY OF AN ORDER STAYING THIS ACTION SO THAT PLAINTIFF MAY CONDUCT LIMITED DISCOVERY INTO DEFENDANT'S THEFT OF PLAINTIFF'S PROPERTY.

Defendants Ackerman McQueen, Inc. and Mercury Group, Inc, (collectively "Ackerman"), through undersigned counsel, respectfully submit this response to the Plaintiff National Rifle Association ("NRA") "*Request for an Emergency Hearing* and *Emergency Motion for Entry of an Order Staying this Action so that Plaintiff may conduct Limited Discovery into Defendants' Theft of Plaintiff's Property.*" The Motion should be denied as there is neither any "emergency" that warrants such relief nor anything meeting the definition of "theft" asserted anywhere in the motion. The reasons supporting our opposition are set forth below.

I. BACKGROUND

On April 12, 2019, the NRA initiated the present action against Ackerman in this Court. On or about April 23, 2019, Ackerman retained the law firm of Schertler & Onorato, LLP ("S&O")

to represent it in connection with this civil action. S&O had no involvement with Ackerman prior to being retained in this litigation. In the course of getting up to speed on the issues presented by the litigation, S&O began to gather documents and evidence from multiple sources within Ackerman McQueen and Mercury Group. S&O became aware that an employee of Mercury Group had been given a power-point presentation that may contain information pertaining to the NRA provided by its counsel, the Brewer Law Firm. S&O had no involvement in how that power-point presentation came into the possession of Ackerman employees and learned of it after the fact. As support for the factual recitation below, S&O has included declarations from its attorneys, David Schertler and David H. Dickieson. See Exhibits A and B.

Concerned, but unsure, that the power-point presentation might be privileged and whether the privilege may have been waived by the actions of the NRA or its attorneys, S&O immediately advised its client that the power-point presentation was not to be viewed or discussed by employees of Ackerman nor should any information about the power-point presentation be revealed to any attorneys representing Ackerman. S&O also advised that the power-point not be destroyed, but rather that it should be held by S&O for safe-keeping until S&O could determine how to address the matter. Initially, S&O was under the mistaken impression that the power-point presentation was located on a lap-top computer and that the lap-top computer would be delivered to S&O's offices.

Later during the week of April 29th, a thumb drive was delivered to S&O's offices by an Ackerman employee. The thumb drive was delivered to David H. Dickieson, an attorney with S&O, who was not aware of the contents of the thumb drive. Mr. Dickieson was unable to open the documents on the thumb drive (because it was formatted for an Apple computer), so he asked that Ackerman employee to provide the thumb drive in a different format. The following week,

another thumb drive formatted for a Windows-based computer was delivered to S&O by that same Ackerman employee. (That is the reason the power-point presentation is located on "two" thumb drives). Mr. Dickieson was still unaware of its specific contents beyond an understanding that it was a presentation from the recent NRA annual meeting in Indianapolis that was widely reported in the news media. When he later opened the file on his computer in order to examine it, he immediately saw a cover page that indicated the document was a power-point presentation from the Brewer Law Firm that was marked confidential and privileged.[1] Mr. Dickieson immediately closed the document and secured the thumb drive in his office. Neither Mr. Dickieson nor any other employee of S&O ever viewed the contents of the document. Following counsel's instruction, Ackerman delivered both thumb drives to S&O, where they were then kept in a locked safe.

Over the course of the next few days, S&O conducted an investigation as to how the power-point presentation came into the possession of Ackerman, consulted extensively with the client and with outside ethics counsel. S&O ultimately determined that while there was a basis to argue that any privilege applicable to the document was waived by the conduct of the NRA and the Brewer Law Firm, the more prudent course of action was to return any copies of the power-point to counsel for the NRA. For that reason, on May 15, 2019, David Schertler of S&O sent a letter[2] to James W. Hundley, counsel for the NRA, explaining the situation and offering to either destroy or return the two thumb drives. See Exhibit C. Another attorney for the NRA, Svetlana M.

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[1] This appears to be the same page referred to by Brewer Law Firm employee, Travis J. Carter, which Mr. Carter admitted to displaying in the presence of persons he did not know. Mr. Carter asserts that this page did not contain "detailed information or legal advice." Carter Affid. ¶ 5. This is the only page ever viewed by an S&O employee.

[2] That letter is also attached to Plaintiff's Motion as Exhibit C.

Eisenberg, by written letter dated May 16, 2019, asked that the thumb drives be returned to Mr. Hundley's law firm. A representative of Mr. Hundley's law firm retrieved the two thumb drives from S&O on May 20, 2019.

Shortly after the thumb drives were retrieved by Mr. Hundley as requested, and in defiance of the cooperation between counsel up to that point, Plaintiff filed without consultation or consent the present motion on May 23, 2019, styled: "*Emergency Motion for Entry of an Order Staying this Action so that Plaintiff may Conduct Limited Discovery into Defendants' Theft of Plaintiffs Property and to Determine Whether to Seek Sanctions.*" In its Motion, Plaintiff asks two things of the Court. First, Plaintiff asks that it be permitted to conduct "prompt, limited discovery regarding the events described in this motion." Plaintiff's Memorandum of Law, p. 1. Second, it asks the Court to stay these proceedings until this discovery is completed. *Id.* No hearing date has been set for this Motion.

For the reasons set forth below, Defendants oppose Plaintiff's Motion.

II. LEGAL ARGUMENT

In support of its Motion and the requested relief, Plaintiff submits two affidavits, one from NRA public relations employee, Andrew Arulanandam, and a second from a non-lawyer employee of the Brewer Law Firm, Travis J. Carter. The information contained in these affidavits, which was not available to Defendants when they notified NRA counsel of the power-point presentation, confirm our earlier suspicion that the actions of both the Plaintiff NRA and its counsel, representatives of the Brewer Law Firm, eliminated any protection of the attorney-client privilege to the power-point presentation. Moreover, the attached Affidavits from Defendant's counsel demonstrate that their actions followed every ethical principle and served to protect from disclosure the document that Plaintiff and its counsel failed to protect.

A. The NRA's Privilege Claim is Waived

The NRA asks the Court to stay the litigation it initiated against Ackerman in order to permit it to conduct "limited discovery" regarding the circumstances that led to Ackerman's possession of the power-point presentation, any review of the power-point presentation that occurred, and the steps taken by S&O before it returned the power-point presentation to the NRA. As to the first point – the circumstances that led to Ackerman's possession of the power-point presentation – the facts as the NRA recounts them in their sworn affidavits demonstrate that any attorney-client privilege or work-product protection that attached to the power-point presentation has been waived. For that reason alone, the NRA's request for a stay should be rejected.

As NRA attorney Travis Carter has attested, he "***handed Mr. Popp the thumb drive***" containing the power-point presentation, "***observed Mr. Popp plug the thumb drive into the laptop, and helped him select the correct file from the thumb drive***" to download. Carter Affid. ¶ 10. In other words, Mr. Carter knowingly provided the power-point presentation to Mr. Popp and watched him copy it to the hard drive of a laptop computer. Mr. Carter did so without asking Mr. Popp who he was, who he worked for, or whose laptop was being used. Carter Affid. ¶ 9 (stating that he "recogniz[ed]" that Mr. Popp and another individual "were operating in the capacity of AV professionals"), ¶ 10 (noting he "later learned" that Mr. Popp "was not an employee of the meeting venue, but rather an Ackerman McQueen employee"). Mr. Carter's affidavit recounts his surprise upon later learning of Mr. Popp's identity and claims that "[a]t no point leading up to this moment did I observe or hear anything that could have possibly disclosed that Mr. Popp was an employee of Ackerman McQueen, the litigation adversary discussed in the confidential PowerPoint presentation." Carter Affid. ¶ 14. But just one simple question – "Who are you?" – would have permitted Mr. Carter to "observe" and "hear" an answer and, through that

answer, to learn all he needed to know about Mr. Popp's identity and affiliation. By not taking that most basic step to ensure the confidentiality of the assertedly privileged and confidential communication, any privilege has been waived. No reasonable attorney would ever provide a sensitive and privileged document to a complete stranger and instruct that person to download the document on to that person's personal computer, if there was an intend to maintain and preserve privileged communication.

Mr. Carter's failure to take any precaution before disclosing assertedly privileged and confidential material to a litigation adversary is attributable to the NRA as well. As long-time NRA employee Andrew Arulanandam avers, he was present at the Indianapolis hotel where the NRA board meeting occurred and knew Mr. Popp as "a long-time employee of Ackerman McQueen." Arulanandam Affid. ¶¶ 6, 9. Mr. Arulanandam also was "aware that the NRA often receives technical assistance from meeting-venue staff *and from Ackerman McQueen*, in connection with setting up audio-visual ("AV") equipment and media for presentations at meetings." Arulanandam Affid. ¶ 4 (emphasis added). The NRA, through Mr. Arulanandam at a minimum and likely through many or all other NRA employees and/or board members present, thus had every reason to know that Ackerman – the entity against which the NRA had filed this lawsuit just weeks before the April 29 board meeting – was present and assisting with the audio-visual technology at this meeting, consistent with its practice "for many years." Arulanandam Affid. ¶ 5. Yet, according to Mr. Arulanandam, while he "was cognizant that there were staff assisting with AV setup, [he] did not specifically note their identities." Arulanandam Affid. ¶ 7. Mr. Arulanandam's inattention to Ackerman's role at the meeting meant that neither he nor anyone from the NRA alerted Mr. Carter, a public relations representative of their outside counsel, that a litigation adversary was on the premises as part of the AV team. Mr. Arulanandam claims that

"if" he had seen Mr. Carter provide the thumb drive to Mr. Popp and "realized" its contents, he "would have advised" against using an Ackerman employee for AV setup. Arulanandam Affid. ¶ 14. But Mr. Arulanandam knew enough. He knew that the NRA had sued Ackerman weeks earlier, that Ackerman employees, including Mr. Popp, were regular AV assistants at board meetings, and that a privileged presentation would occur in the executive session of the NRA board meeting that day. The NRA thus knew of the great potential that privileged and confidential materials would be disclosed to Ackerman, who was by then the NRA's litigation adversary. But the NRA took no precaution to prevent such a disclosure.

"While the attorney-client privilege serves a very important function in the administration of justice, it is subject to waiver, and the holder of the privilege is responsible for exercising reasonable caution to ensure that the privilege remains intact." *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 694 S.E.2d 545, 554 (Va. 2010). The Virginia Supreme Court utilizes a multi-factor analysis to assess whether a party's "inadvertent disclosure" of privileged materials – which includes "a failure to exercise proper precautions to safeguard the privileged document" – waives any applicable privilege. *Id.* at 552. The following non-exhaustive factors are to be considered:

> (1) the reasonableness of the precautions to prevent inadvertent disclosures, (2) the time taken to rectify the error, (3) the scope of the discovery,[3] (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege or protection for the communication has used its unavailability for misleading or otherwise improper or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances.

Id. Here, the record offered by the NRA indicates that they and their counsel eschewed the reasonable precautions that were readily available to them to prevent the disclosure of assertedly

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[3] As to this factor, the Court explained that when an inadvertent disclosure occurs in the context of pretrial discovery that is "not expedited or extensive," parties receive "less leeway" regarding the precautions they take to ensure that privileged materials are not disclosed. *Walton*, 694 S.E.2d at 554.

privileged information to Ackerman – a litigation adversary that was known to be performing technical support services on the premises. *See Federal Deposit Insurance Corporation v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 482 (E.D. Va. 1991) ("disclosures may occur under circumstances of such extreme or gross negligence as to warrant deeming the act of disclosure to be intentional"). Nor was this failure attributable to an expedited or extensive discovery process. While the NRA acted within one day to try to rectify its erroneous disclosure, the balance of *Walton* factors supports a finding of waiver. If, for any reason, any emergency discovery is deemed necessary – a procedural burden unwarranted in this case as discussed below, Defendants would be entitled to take reciprocal discovery into the five *Walton* factors to demonstrate that waiver has occurred.[4]

B. No Stay of this Action is Warranted

Regardless of whether a waiver is found on the current record, there is no need to stay this litigation to permit discovery on the collateral issues surrounding the power-point presentation. The party seeking a stay of litigation bears the burden of establishing its need and "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Landis v. North American Co.*, 299 U.S. 248, 255 (1936). *See Clinton v. Jones*, 520 U.S. 681, 708 (1997); *Aventis Pharma Deutschland GMBH v. Lupin Ltd.*, 403 F. Supp. 2d 484, 489 (E.D. Va. 2005) (party seeking stay must justify it by clear and convincing circumstances that weigh more heavily than the potential harm to the party against whom the stay applies). As explained above, no attorneys or employees of S&O ever viewed the contents of the presentation. Instead, undersigned counsel took prompt

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[4] During discovery, Plaintiff should also be required to provide the Court with the document for an *in-camera* review to allow the Court to evaluate the significance of the document.

precautions to safeguard the assertedly privileged materials, sought counsel on how to proceed consistent with attorney ethical rules, and returned the materials to the NRA. Disqualification of Defendants' counsel cannot conceivably be warranted.

As to the NRA's suggestion that it may seek sanctions against Ackerman, there is no clear and convincing need to halt this litigation in order to permit discovery solely on the issues surrounding the power-point presentation and a potential future motion for sanctions.[5] Instead, discovery should proceed in the ordinary course in this matter on all issues, including the NRA's proposed inquiries relating to the power-point presentation and Ackerman's reciprocal discovery into waiver. If the NRA subsequently concludes that there are any factual and legal grounds for seeking sanctions, which Defendants strongly deny, the NRA may seek such sanctions at any point in these proceedings and Ackerman will respond. Moreover, the first step in any analysis of this issue would be for the Court to determine whether the NRA and its attorneys waived the privilege.

As admitted by the NRA, its agent, a non-lawyer public relations employee of the NRA's counsel, handed the confidential file to an Ackerman employee and asked him to load it on his laptop computer. The file was later handed over to Ackerman's counsel and returned to the NRA's counsel. Such actions vitiate any claim of theft and point to the gross negligence and failure of the NRA and its agents to protect such information from disclosure.

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[5] As alleged in Defendants' Counterclaim, the NRA's abusive litigation strategy is to try this dispute in the press. This public relations strategy is the ulterior motive behind this Motion which presents neither an "emergency," nor any element of "theft." But by using those false words in the title of the Motion, the NRA seeks to concoct a narrative in the press that fails to match any reality described by the Plaintiff in its Affidavits or in the substance of its Motion.

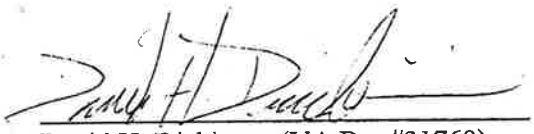
III. CONCLUSION

WHEREFORE, for the reasons set forth above, the Defendants request that the Court deny the Plaintiff's Emergency Motion and the relief requested therein.

Respectfully submitted,

ACKERMAN MCQUEEN, INC. and
MERCURY GROUP, INC.
By Counsel

Dated: June 3, 2019



David H. Dickieson (VA Bar #31768)
SCHERTLER & ONORATO, LLP
901 New York Avenue, NW, Suite 500
Washington, DC 20001
Telephone: 202-628-4199
Facsimile: 202-628-4177
ddickieson@schertlerlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2019, the foregoing pleading was served on the following counsel electronic mail and first-class mail upon:

James W. Hundley
Robert H. Cox
BRIGLIA HUNDLEY, PC
1921 Gallows Road, Suite 750
Tysons Corner, VA 22182
jhundley@brigliahundley.com
rcox@brigliahundley.com

David H. Dickieson.

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, Plaintiff, v. ACKERMAN MCQUEEN, INC. and MERCURY GROUP, INC. Defendants.	Civil Case No. CL19001757

DECLARATION OF DAVID SCHERTLER

I, David Schertler, do declare under penalty of perjury that the following is true and correct.:

1. My name is David Schertler and I am an attorney licensed to practice law in the District of Columbia. I am a partner in the law firm of Schertler & Onorato, LLP ("S&O"). I am counsel for Ackerman McQueen and the Mercury Group, Inc. (collectively "Ackerman"), in the above captioned litigation.

2. My law firm, Schertler & Onorato, LLP, was retained on or about April 25, 2019 to represent Ackerman in connection with this litigation. Prior to that time, S&O had no involvement in any matters with Ackerman.

3. I do not recall the precise date, but during the week of April 29, 2019, I was informed that employees of Ackerman were in possession of a document, which appeared as though it was prepared by lawyers representing the NRA and, upon hearing that, I was concerned the document

might be privileged or confidential, although at the time I did not know enough about the document or the circumstances surrounding its disclosure to the Ackerman employees, to make a conclusion on that question.

4. I advised the client that it should not discuss nor reveal the contents of the document to anyone, including other employees of Ackerman, third-parties, or any of the lawyers involved in this case. I never had any discussion with anyone regarding the contents of the document nor have I ever viewed the document.

5. I mistakenly believed that the document was on a lap-top computer and asked the client to deliver the lap-top computer to my offices for safe-keeping. That same week, a thumb drive was delivered to another attorney in my office, David H. Dickieson, who is also working on this matter. Mr. Dickieson was unaware of the contents contained on the thumb drive. My understanding is that Mr. Dickieson could not open that thumb drive to view the contents because it was formatted for an Apple computer product.

6. I understand that early in the week of May 6, 2019, a second thumb drive was delivered to our Offices by an Ackerman employee. I understand that when Mr. Dickieson opened this thumb drive, he viewed the cover page of the document and recognized that it was marked privileged and/or confidential. He immediately closed the document and advised me of what had occurred.

7. We understood that this document was contained only on the two thumb drives. We asked the client to deliver the initial thumb drive back to our Offices, where we then secured both thumb drives in a safe in our Office.

8. Subsequently, S&O attorneys conducted an investigation as to the circumstances surrounding the disclosure of the document to Ackerman employees. We submit the result of that investigation is protected by the attorney client and work product privilege. We also consulted

with outside counsel with expertise in ethical rules of conduct for attorneys, specifically in Virginia, as to the appropriate and ethical manner to address the situation. Also, as required by the ethical rules, we consulted closely with the client regarding the matter.

9. Based on the information available to us at the time, we decided to notify counsel for the NRA of the fact that Ackerman had the document in its possession. We understood from the client that the only copies of the document were on the two thumb drives. On May 15, 2019, I sent the attached letter to James W. Hundley, counsel for the NRA, explaining the situation and offering to return or destroy the thumb drives. I was later asked to deliver the thumb drives to Mr. Hundley and those thumb drives were picked up by a representative of Mr. Hundley's Office.

10. At no time did I ever see or review the document nor have I ever been informed of the contents of the document. My understanding is that no other employee of S&O has ever seen or reviewed the document nor been informed of the contents of the document.

Executed this 3rd day of June , 2019

David Schertler

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, Plaintiff, v. ACKERMAN MCQUEEN, INC. and MERCURY GROUP, INC. Defendants.	Civil Case No. CL19001757

DECLARATION OF DAVID H. DICKIESON

I, David H. Dickieson, do declare under penalty of perjury that the following is true and correct:

1. I am an attorney licensed to practice law in Virginia, Maryland, Pennsylvania, and the District of Columbia. I have been practicing law for 39 years. I am a partner in the law firm of Schertler & Onorato, LLP.

2. For 15 years at my prior law firm, I was the designated ethics counselor routinely providing in-house advice on scores of ethical situations and questions. I have taught continuing legal education courses in ethics. I have extensive experience in dealing with instances of "inadvertent disclosure" of confidential information.

3. I am counsel of record for Ackerman McQueen and the Mercury Group, Inc. (collectively "Ackerman"), in the above captioned litigation.

4. I was the primary person receiving evidence and documents from the client relating to the case. Previously, I received other documents from prior counsel and I had received background documents from various client representatives.

5. On or about May 3, 2019, I received a call from an employee of our client who had evidence on a thumb drive that he wanted my law firm to preserve. I learned only that the evidence was a presentation made at the NRA Annual Meeting in Indianapolis, but did not gain any further information about the contents of the presentation

6. It is my recollection that the employee first brought the thumb drive to my office the same day as his phone call. I tried to load the thumb drive on my computer, but my Windows-based desktop computer was incompatible with the Apple formatting on the thumb drive and I could not see or open any documents on the thumb drive, so I returned the thumb drive to him.

7. On either May 6 or 7, 2019, the employee delivered another thumb drive that he believed would be compatible with my Windows-based computer. I did not have time to review the thumb drive at that time. At about 3 p.m. on May 7, 2019, I opened up the document file on my computer.

8. I opened the document file and saw only the cover page. I saw that the cover page indicated the document was from the Brewer Law Firm. I knew that the Brewer Law Firm was adversarial to our client in this litigation. The first page stated that the document was privileged and confidential. Based on my past experience in dealing with confidential disclosure issues, I immediately closed the file and reported the matter to my law partners.

9. I do not know what is contained on the thumb drive beyond that first cover page. I did not review the contents of the document nor have I ever discussed the contents with anyone.

10. I recognized the first page as something that looked like a power point presentation.

11. Subsequently, I participated in an investigation into the circumstances surrounding the disclosure of the document to Ackerman employees. We also consulted with outside counsel with expertise in ethical rules of conduct for attorneys as to the appropriate and ethical manner to address the situation.

12. We notified counsel for the NRA, James Hundley, that we had the confidential document in our possession on two thumb drives and that those thumb drives had been quarantined in the firm safe.

13. At no time did I ever see or review the contents of the document nor have I ever been informed of the contents of the document.

14. All of my law firm's actions were wholly consistent with my understanding of the ethical rules based on my long experience in handling ethical matters.

Executed this 3rd day of June, 2019

David H. Dickieson

SCHERTLER & ONORATO, L.L.P.

May 15, 2019

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

James W. Hundley
Briglia Hundley, P.C.
1921 Gallows Road
Suite 750
Tysons Corner, VA 22182

RE: *National Rifle Association of America v. Ackerman McQueen, Inc.*, CL19001757

Dear Jim:

As you know, this law firm represents Ackerman McQueen in connection with the above-captioned litigation. We recently became aware that our client came into possession of a power-point presentation used in connection with an Executive Session meeting of the NRA's Board of Directors on April 29, 2019. The power-point presentation may contain confidential material. To our understanding, at the direction of an attorney or employee of the Brewer Law Firm, the power-point presentation was loaded on a laptop computer belonging to Ackerman McQueen and remained on that laptop computer when it was retrieved later by an Ackerman McQueen employee.

We understand there are two thumb drives that contain a copy of the power-point presentation. An attorney in our office, without knowing the contents of the file, opened one of the thumb drives, viewed the first cover page and realized that the document appeared to be confidential. He immediately closed the file without viewing any of its contents and reported the existence of the document to me.

The two thumb drives have been secured in a safe in our offices. Our understanding is that those are the only two copies of the power-point presentation in our possession or in our client's possession. No attorney or other employee at our firm or any other law firm has reviewed the power-point presentation nor are we aware of the contents or substance of that document. We would be happy to either destroy those two thumb drives or deliver them to you, at your discretion.

If you have any questions regarding this matter, please feel free to contact me.

Sincerely,

David Schertler

ATTORNEYS AT LAW | 901 New York Avenue, NW Suite 900 Washington, D.C. 20001 | 202.628.4199 202.628.4177 fax www.schertlerlaw.com

EXHIBIT C