

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of  
  
1-800 Contacts, Inc.,  
a Corporation

PUBLIC  
  
DOCKET NO. 9372

ORIGINAL

NON-PARTY LENS.COM, INC.'S MOTION  
FOR *IN CAMERA* TREATMENT OF PROPOSED EVIDENCE

Pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), Lens.com, Inc., a Nevada corporation (“Lens.com”) and a non-party to this action, seeks *in camera* treatment for certain documents containing confidential information that it has produced in response to subpoenas issued by Complaint Counsel in the course of this proceeding. The public disclosure of this information would divulge Lens.com’s confidential, competitive data to competitors and customers, and thereby inflict serious harm and irreparable injury to Lens.com.

**I. Factual Background**

On August 8, 2016, Complaint Counsel filed an Administrative Complaint (the “Complaint”) against 1-800 Contacts, Inc. (“1-800 Contacts”), initiating this current action. The Complaint’s allegations against 1-800 Contacts centered on Respondent’s alleged use of bilateral agreements with online contact lens retailers to curtail the use of certain terms, phrases, and keywords in their online marketing. Specifically, Complaint Counsel accused 1-800 Contacts of securing agreements with “at least 14” (Compl. ¶ 2) competitors to refrain from bidding against one another for certain words or phrases in search advertising auctions. These auctions, administered by search engine companies such as Google and Microsoft, normally would award prominent advertising spaces to the highest bidder (*id.* ¶¶ 10-11). Describing these arrangements in the Complaint, Complaint Counsel alleged that 1-800 Contacts had engaged in conduct that restrained competition for both search engine result auctions and contact lenses (*id.* ¶¶ 28-29).

As noted in the Complaint, Lens.com was the lone online seller of contact lenses that did not enter into a bilateral keyword-bidding agreement with 1-800 Contacts. (*Id.* ¶ 26.) Lens.com litigated 1-800 Contacts' trademark infringement claims all the way to the United States Court of Appeals for the Tenth Circuit, where the appeals court found there was no consumer confusion when an advertisement for Lens.com appeared in Internet search results responsive to a query for 1-800 Contacts. (*Id.*) At "significant expense" (*id.*), Lens.com vindicated itself against 1-800 Contacts' claims of trademark infringement after years of litigation.

Almost immediately after commencing this action, the Commission issued a Protective Order Governing Confidential Material (the "Protective Order") on August 8, 2016. The Commission entered the Protective Order to protect third parties against improper use and disclosure of confidential information, as provided by Commission Rule 3.31(d). 16 C.F.R. § 3.31(d). The Protective Order allowed for the disclosure of confidential material only to:

- (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding;
- (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter;
- (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent;
- (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and
- (e) any witness or deponent who may have authored or received the information in question.

(Protective Order Attachment A ¶ 7)<sup>1</sup>

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<sup>1</sup> Paragraph 8 of Protective Order Attachment A continues: "Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever."

On October 18, 2016, Complaint Counsel issued a Subpoena Duces Tecum to Lens.com for the production of certain documents and records sought under Commission Rule 3.34(b), 16 C.F.R. § 3.34(b), also providing Lens.com with a copy of the Protective Order on file in this action. Complaint Counsel propounded a second subpoena on Lens.com for additional records on October 27, 2016. Following significant discussions between Lens.com and Complaint Counsel about the confidential nature of the subpoenaed information,<sup>2</sup> the sensitivity and confidentiality of which Complaint Counsel acknowledged, Lens.com produced the agreed-upon data as confidential pursuant to the Protective Order. (Samourkachian Decl. ¶ 5)

Despite this Protective Order, Complaint Counsel notified Lens.com's counsel via letter on March 6, 2017, attached as Exhibit B, that it designated certain Lens.com documents as exhibits and intended to offer them into evidence at the administrative trial, potentially making them part of the public record. Complaint Counsel identified the following documents to be offered into evidence:

<b>Exhibit No.</b>	<b>Description</b>	<b>Date</b>	<b>Beginning Bates</b>	<b>End Bates</b>
CX1673	Deposition Transcript of Cary Samourkachian	4/28/2008	1800-FTC-00000741	1800_FTC-00000824
CX0574	Email from Cary Samourkachian to Michael Pierce, Jeff Cummings and Ryan van Horn re: technical contact	5/19/2008	CX0574-001	CX0574-002
CX1464	Lens.com Spreadsheet: Production of Data to FTC	12/29/2016	CX1464	CX1464

Lens.com, moving under Commission Rule 3.45(b), requests *in camera* treatment for proposed exhibit CX1464 ("Exhibit CX1464"), attached to this motion as Exhibit C. The public disclosure of this exhibit likely would result in a clearly defined, serious injury to Lens.com.

<sup>2</sup> See Declaration of Cary Samourkachian ("Samourkachian Decl."), attached as Exhibit A, at ¶ 5.

Additionally, Lens.com has continuously sought to prevent the public disclosure of its confidential and proprietary information. It now requests that the Commission grant this exhibit and the information it contains *in camera* treatment.

## II. Argument

The Commission Rules and applicable precedent allow for *in camera* treatment of Lens.com's materials. Due to the highly sensitive nature of Exhibit CX1464, and the demonstrable injury Lens.com will suffer if its contents became public, it should be granted *in camera* treatment.

### A. Legal Standard for *In Camera* Treatment.

Commission Rule 3.45(b) allows for *in camera* treatment of materials when their "public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation" requesting that treatment. 16 C.F.R. § 3.45(b). A movant seeking *in camera* treatment satisfies this burden by showing that the documents are secret and material to the business. *In re General Foods Corp.*, 95 F.T.C. 352, Dkt. No. 9085, 1980 WL 338997 at \*3 (Mar. 10, 1980); *In re Bristol-Myers Co.*, 90 F.T.C. 455, Dkt. Nos. 8917, 8918, & 8919, 1977 WL 189054 at \*2 (Nov. 11, 1977). The decision to grant *in camera* status to documents evaluates their secrecy and materiality by weighing the following factors:

1. The extent to which the information is known outside of the business;
2. The extent to which it is known by employees and others involved in the business;
3. The extent of measures taken to guard the secrecy of the information;
4. The value of the information to the business and its competitors;
5. The amount of effort or money expended in developing the information; and
6. The ease or difficulty with which the information could be acquired or duplicated by others.

*In re Bristol Myers Co.*, 1977 WL 189054 at \*2. This showing may also be "inferred from the nature of the documents themselves." *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, Dkt. No. 7709, 1961 WL 65882 at \*4 (Mar. 14, 1961).

Lens.com's non-party status bears on the Commission's treatment of its produced information. The Commission previously recognized that third parties deserve "special solicitude" when requesting *in camera* treatment of confidential business information. See *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984) (holding that, as a policy matter, granting *in camera* treatment to third parties encourages cooperation with adjudicative discovery requests). It is well within the Commission's power to extend this treatment to Lens.com's records, as "[t]here can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible." *H.P. Hood & Sons, Inc.*, 1961 WL 65882 at \*2.

**B. The Proposed Exhibits Subject to this Motion Meet the Standard for *In Camera* Treatment Because their Public Disclosure Would Result in Serious, Clearly Defined Injury to Lens.com.**

Exhibit CX1464 contains Lens.com's valuable and closely guarded competitive information. Administrative law judges have broad discretion in determining whether to accord information *in camera* treatment. *General Foods Corp.*, 1980 WL 338997 at \*2. As set forth below and in the declaration of Lens.com's founder, president, and chief executive officer, Cary Samourkachian, the secrecy of the information within Exhibit CX1464 merits the exercise of that discretion to grant *in camera* treatment to its contents.

The information within Exhibit CX1464 is secret and material to Lens.com's business. Its contents required significant effort and investment of time to create, are not known to the public, and generally not known even within the company, as this information is kept closely guarded by Lens.com's owner. (Samourkachian Decl. ¶¶ 4, 6-8.) Because Lens.com is a privately-owned company with no public shareholders, this information is not and would not otherwise become publicly available. (*Id.* ¶ 4.) The company's president and chief executive officer invested a significant amount of time compiling this data for Lens.com's operations, and its lack of public

availability ensures that competitors could not recreate it without access to confidential company records. (*Id.*) In order to preserve the confidentiality of this information, Lens.com produced Exhibit CX1464 only after its president and chief executive officer had personally spoken with Complaint Counsel and been assured, to his satisfaction, that the information Lens.com produced would be protected from public disclosure. (*Id.* ¶¶ 5, 9.)

Lens.com's confidential business records are contained and reflected within the contents of Exhibit CX1464. (*Id.* ¶ 3.) The Commission has recognized the propriety of granting *in camera* treatment to business records. *See, e.g., In re McWane, Inc.*, No. 9351, 2012 WL 3862131 at \*2 (F.T.C. Aug. 17, 2012); *In re Champion Spark Plug Co.*, 1982 F.T.C. LEXIS 85 at \*2 (Apr. 5, 1982); *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1188-89; *Kaiser Aluminum*, 103 F.T.C. at 500. Thus, the information for which Lens.com seeks *in camera* treatment is eligible to receive it.

Additionally, Exhibit CX1464 contains certain sales and pricing information that is commercially valuable to Lens.com's competitors and customers, and is inherently material to its business. (*Id.* ¶¶ 4, 6, 7, 8, 10.) The Commission has previously recognized that this kind of information warrants *in camera* treatment because of the unearned advantages its disclosure would confer to competitors. *See McWane, Inc.*, 2012 WL 3862131 at \*3-4 (finding that customer data, pricing, and cost information was appropriate for *in camera* treatment); *General Foods Corp.*, 96 F.T.C. at 169 n.4 (affirming that sales and profit data generally are both secret and material to the producing company). For Lens.com's heretofore confidential information be publicly released, its competitors would obtain valuable information enabling them to unfairly compete with Lens.com based on pricing, product offerings, and marketing to consumers.

As a non-party to this action, there is no public right to information that will impinged by the Commission granting Exhibit CX1464 *in camera* treatment. The public's "understanding of

this proceeding does not depend on access to these data.” *Kaiser Aluminum*, 103 F.T.C. at 500. As Complaint Counsel recognized, Lens.com did not enter into an allegedly improper agreement with 1-800 Contacts, and as such its confidential information is not required for the public to understand the claims against Respondent.

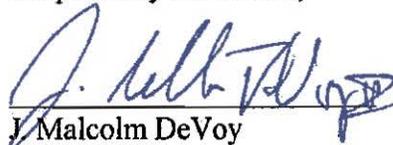
For these reasons, the information Lens.com provided within Exhibit CX1464 is reflective of the business advantage it enjoys in the online marketplace for contact lenses. Public disclosure of this information will likely result in the loss of Lens.com’s business advantage within that market, and cause it to suffer a “clearly defined, serious injury.” *See In re Dura Lube Corp.*, Dkt. No. 9292, 199 F.T.C. LEXIS 255 at \*7 (Dec. 23, 1999) (finding loss of business advantage to be an example of clearly defined, serious injury). If this information became public, Lens.com’s competitors will have knowledge otherwise unavailable about Lens.com’s confidential business activities and allow them to unfairly compete against Lens.com for contact lens consumers over the Internet. It is therefore both appropriate and proper for the Commission to grant *in camera* treatment of Exhibit CX1464.

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**III. Conclusion**

Lens.com respectfully requests that the Commission grant Exhibit CX1464 *in camera* treatment under Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b). Because of Lens.com's status as a non-party to this proceeding, and for the reasons set forth above, Exhibit CX1464 should be granted *in camera* status for a period of five years.

Respectfully Submitted,



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Fax: 702.977.9359  
ecf@devoylaw.com  
*Attorney for Non-Party  
Lens.com, Inc.*

Dated: March 27, 2017.

**CERTIFICATE OF SERVICE**

I hereby certify that on March 27, 2017, I filed the foregoing document and all attachments electronically using the FTC's e-filing system, which will send notification of such filing to:

Donald S. Clark  
Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W., Room H-172  
Washington, D.C. 20580

I also certify that on March 27, 2017, a copy of the foregoing document and all attachments was delivered via electronic mail, and will be sent by overnight courier to:

The Honorable D. Michael Chappell (oalj@ftc.gov)  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room H-110  
Washington, D.C. 20580

I further certify that on March 27, 2017, the foregoing document was delivered via electronic notification and service to:

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**U.S. Federal Trade Commission**

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March 27, 2017.



J. Malcolm DeVoy

**CERTIFICATE OF ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

March 27, 2017.

  
J. Malcolm DeVoy

**ORIGINAL**

# **EXHIBIT A**

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

1-800 Contacts, Inc.,  
a Corporation

**PUBLIC**

DOCKET NO. 9372

**DECLARATION OF CARY SAMOURKACHIAN IN SUPPORT OF NON-PARTY  
LENS.COM, INC.'S MOTION FOR *IN CAMERA* TREATMENT OF PROPOSED  
EVIDENCE**

I, Cary Samourkachian, make the following declaration under 28 U.S.C. § 1746:

1. I am the founder, president, and chief executive officer of Lens.com, Inc. a Nevada corporation ("Lens.com"). On that basis, I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could testify competently under oath to such facts.

2. I have reviewed the documents referenced in Exhibit C to the motion for *in camera* treatment that this declaration supports, and which is identified as exhibit CX1464 by Complaint Counsel in this proceeding ("Exhibit CX1464").

3. I have previously certified to Complaint Counsel that the information found in Exhibit CX1464 is my true and correct, accurate summary of Lens.com's business records that were made at or near the time of the transactions reflected within Exhibit CX1464. The records I summarized in Exhibit CX1464, at the expense of a significant amount of personal time, were maintained in the course of Lens.com's regularly conducted business activity, and maintained as a standard practice within Lens.com's regularly conducted business activities. I am familiar with the information contained in Exhibit CX1464 by virtue of my position within Lens.com, and being the sole individual with access to such data to produce it to Complaint Counsel.

4. The information contained within Exhibit CX1464 is highly sensitive and confidential; the data within that exhibit required substantial effort to collect over a period of years, and a large investment of time to organize for the business' benefit. Lens.com has taken substantial measures to guard this information by limiting its dissemination of the information within Exhibit CX1464 and taking every reasonable step to protect its confidentiality. I am the only employee, contractor, or agent of Lens.com who receives or knows of the information contained within Exhibit CX1464. This information is not known outside of myself, except to the extent necessary to engage in confidential contract negotiations for product ordering, and to prepare State and Federal tax filings. Because Lens.com is not a publicly traded company, is leanly staffed with no other employees or contractors with access to all of the information contained in Exhibit CX1464, and I am the only individual responsible for collecting and aggregating the company's financial data, the information contained within Exhibit CX1464 would be extremely difficult, if not impossible, for Lens.com's competitors or other third parties to access or duplicate.

5. I produced the information contained within Exhibit CX1464 with the understanding that it would be treated as confidential in the above-captioned matter. My counsel, and myself personally, spoke with Complaint Counsel at length about Lens.com's privacy and confidentiality concerns relating to the information being produced within Exhibit CX1464. Complaint Counsel provided assurances that it routinely handled highly sensitive data from the world's largest companies, and that the confidentiality provided in its protective order would be enforced for the highly sensitive data I produced to Complaint Counsel in compliance with its subpoenas.

6. I believe that disclosure of Exhibit CX1464 would inflict serious competitive injury upon Lens.com. My belief is based upon my review of Exhibit CX1464 and the data it contains, as well as my substantial knowledge of Lens.com's business and the strong confidentiality protection that both I and Lens.com afford this information.

7. Lens.com is a participant in the online contact lens market, and sells contact lenses to consumers over the Internet. Exhibit CX1464 relates to and contains information regarding Lens.com's prices, inventory, and sales, which are critical to Lens.com's business, marketing, sales, competitiveness, and profitability. Competitors and third parties with access to this information would gain a significant business advantage in the online contact lens marketplace at Lens.com's expense. Additionally, customers with this information could unfairly use this information to Lens.com's detriment.

8. Exhibit CX1464 details highly sensitive information regarding Lens.com's prices, sales, and financial performance. Disclosure of the information within Exhibit CX1464 would be highly detrimental to Lens.com, as doing so would provide customers and competitors with competitively significant information, causing serious and irreparable harm to Lens.com. Lens.com would then, as a result, lose a business advantage that it has fairly created for itself in the marketplace. Lens.com's competitors would, by reviewing the information contained in Exhibit CX1464 and potentially reverse-engineering the same, be able to unfairly compete on price with Lens.com and exploit their knowledge of Lens.com's operations in operating their own competing business in a manner that harms Lens.com.

9. Lens.com places significant value upon maintaining the secrecy and confidentiality of its sales, pricing, and financial data. This information is closely guarded and known in full only to myself. I produced this information to Complaint Counsel in compliance

with its subpoena only after receiving significant, repeated assurances of its confidential treatment under the protective order entered in this proceeding.

10. The information within Exhibit CX1464 is material to Lens.com's business and to its competitive position in the marketplace. Lens.com would experience a significant loss in its business advantage, and irreparable injury to its competitiveness based on pricing and awareness of consumer preferences and trends, if this information were to be publicly disclosed. Any such disclosure would provide Lens.com's competitors and customers with information that Lens.com expends significant efforts to keep confidential, and is critical to Lens.com's business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 27<sup>th</sup> day of March, 2017.



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Cary Samourkachian  
Founder, President, and Chief Executive  
Officer of Lens.com, Inc.

**ORIGINAL**

# **EXHIBIT B**



Bureau of Competition  
Anticompetitive Practices Division

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

March 6, 2017

**Via E-Mail**

Lens.com  
c/o J. Malcolm DeVoy  
DeVoy Law P.C.  
2575 Montessouri Street, Suite 201  
Las Vegas, NV 89117

RE: *In the Matter of 1-800 Contacts, Inc., Federal Trade Commission Dkt. No. 9372*

Dear Mr. DeVoy:

By this letter we are providing formal notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that Complaint Counsel intend to offer the documents and testimony referenced in the enclosed Attachment A into evidence in the administrative trial in the above-captioned matter. The administrative trial is scheduled to begin on April 11, 2017. All exhibits admitted into evidence become part of the public record unless *in camera* status is granted by Administrative Law Judge D. Michael Chappell.

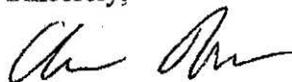
For documents or testimony which include sensitive or confidential information that you do not want on the public record, you must file a motion seeking *in camera* status or other confidentiality protections pursuant to 16 C.F.R. §§ 3.45, 4.10(g). Judge Chappell may order that materials, whether admitted or rejected as evidence, be placed *in camera* only after finding that their public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment.

Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Jerk*, 2015 FTC LEXIS (Feb. 23, 2015); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); and *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). You must also provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

Please be aware that under the current Scheduling Order dated September 7, 2016, the deadline for filing motions seeking *in camera* status is March 27, 2017.

If you have any questions, please feel free to contact me at (202) 326-3696.

Sincerely,

A handwritten signature in black ink, appearing to read 'Aaron Ross', written in a cursive style.

Aaron Ross

Counsel Supporting the Complaint

Exhibit No.	Description	Date	BegBates	EndBates
CX1673	Deposition Transcript of Cary Samourkachian	4/28/2008	1800_FTC-00000741	1800_FTC-00000824
CX0574	Email from Cary Samourkachian to Michael Pierce, Jeff Cummings and Ryan Van Horn re: technical contact	5/19/2008	CX0574-001	CX0574-002
CX1464	Lens.com Spreadsheet: Production of Data to FTC	12/29/2016	CX1464	CX1464

**ORIGINAL**

# **EXHIBIT C**

**REDACTED – CONFIDENTIAL INFORMATION**

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of  
  
1-800 Contacts, Inc.,  
a Corporation

PUBLIC  
  
DOCKET NO. 9372

ORIGINAL

**[PROPOSED] ORDER  
ON NON-PARTY LENS.COM, INC.'S MOTION FOR *IN CAMERA* TREATMENT OF  
PROPOSED EVIDENCE**

Upon consideration of non-party Lens.com, Inc.'s Motion for *In Camera* Treatment of Proposed Evidence, and finding good cause, it is HEREBY ORDERED that the following documents are to be provided *in camera* treatment of a period of five years from the date of this Order:

Exhibit No.	Description	Date	Beginning Bates	End Bates
CX1464	Lens.com Spreadsheet: Production of Data to FTC	12/29/2016	CX1464	CX1464

ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Dated: \_\_\_\_\_, 2017.

Notice of Electronic Service

I hereby certify that on March 27, 2017, I filed an electronic copy of the foregoing Non-Party Lens.com, Inc.'s Motion for In Camera Treatment of Proposed Evidence, Exhibit A, Exhibit B, Exhibit C, Proposed Order, with:

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

I hereby certify that on March 27, 2017, I served via E-Service an electronic copy of the foregoing Non-Party Lens.com, Inc.'s Motion for In Camera Treatment of Proposed Evidence, Exhibit A, Exhibit B, Exhibit C, Proposed Order, upon:

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