

PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

In the Matter of)
)
Tronox Limited et al.,)
)
Respondent)
_____)

Docket No. 9377

NON-PARTY K-BIN, INC.'S MOTION FOR *IN CAMERA* TREATMENT

Pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.45(b), non-party K-Bin, Inc. ("K-Bin") respectfully moves this Court for *in camera* treatment of one document, containing competitively-sensitive, confidential business information (the "Confidential Document"). K-Bin submitted this information under compulsory process in response to a third-party civil investigative demand in this matter. The Federal Trade Commission ("FTC") has now notified K-Bin that it intends to introduce the Confidential Document into evidence at the administrative trial in this matter. See Letter from the FTC dated April 19, 2018 (attached as Exhibit A). The Confidential Document, however, warrants protection from public disclosure given the sensitive business information it contains. Thus, K-Bin submits this Motion requesting indefinite *in camera* treatment of the Confidential Document in its entirety.

All of the information provided by K-Bin in the Confidential Document for which K-Bin is seeking *in camera* treatment constitutes confidential business information, such that if it were to become part of the public record, K-Bin would be significantly harmed in its ability to compete in the PVC compounding industry. For the reasons discussed in this Motion, K-Bin

requests that this Court afford its confidential business information indefinite *in camera* treatment. In support of this motion, K-Bin relies on the Declaration of Dennis H. Dodgen (“Dodgen Declaration”), attached as **Exhibit B**, which provides additional details on the information for which K-Bin is seeking *in camera* treatment.

I. The Document for which Protection is Sought

K-Bin seeks *in camera* treatment for the following Confidential Document, a copy of which is attached as **Exhibit C**.

Exhibit No.	Document Title/Description	Date
PX4235	Form of Certificate of Compliance attached to K-Bin’s response to Civil Investigative Demand FTC File No. 171-0085	Aug. 3, 2017

II. The Standard for *In Camera* Treatment

In camera treatment of material is appropriate when its “public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting” such treatment. 16 C.F.R. § 3.45(b). Applicants must “make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Jerk, LLC*, 2015 FTC Lexis 39, *2 (Feb. 23, 2015). In this context, courts generally attempt “to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

In considering both secrecy and materiality, the Court may consider: (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-*

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Myers Co., 90 F.T.C. 455, 456–57 (1977). Further, proponents can overcome the presumption that *in camera* treatment should not be afforded to information that is more than three years old by demonstrating that the information remains competitively sensitive. *In re Jerk, LLC*, 2015 FTC Lexis 39, *3–4.

III. K-Bin’s Information is Secret and Material such that Disclosure would Result in Serious Competitive Injury to K-Bin.

K-Bin respectfully submits that *in camera* treatment is warranted for the Confidential Document because it contains highly sensitive information of competitive significance to K-Bin, which is both secret and material to K-Bin’s business. Specifically, the Confidential Document contains commercially proprietary and confidential information regarding K-Bin’s costing, procurement spending, supply of raw material or inputs (in particular, the Chloride Dry at issue in this case), purchasing trends, frequency and outcome of negotiating efforts, and product technical detail. Dodgen Decl. at ¶ 5. As a PVC compounder, K-Bin depends on its ability to negotiate the most competitive price possible for its raw materials which is tied directly to its ability to maintain confidential supplier relationships over an extended period of time and to employ effective negotiation strategies. *Id.* at ¶ 3. Further, the total amount of raw materials purchased, together with the identities and allocations of its suppliers and the prices paid, is a central part of K-Bin’s strategic business planning and its goal of outperforming its competitors. *Id.*

As set forth in the Dodgen Declaration, all of this information is held in strict confidence by K-Bin. K-Bin has devoted significant resources and taken substantial measures to guard the secrecy of the information contained in the Confidential Document, limiting dissemination of such information and taking every reasonable step to protect its confidentiality. *Id.* at ¶ 5. Indeed, such information is disclosed only to particular employees of K-Bin on a need-to-know

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basis and K-Bin's employees, vendors, and customers are required to complete non-disclosure agreements. *Id.* It would be extremely difficult for K-Bin's competitors, other suppliers, or its customers to access or recreate the information in the Confidential Document. *Id.* These efforts demonstrate that K-Bin has gone to great lengths to preserve the confidentiality of the information contained in the Confidential Document.

If such information were publicly disclosed, K-Bin would suffer serious competitive injury because its suppliers, competitors, and customers could use this non-public material information to their advantage and nullify the competitive advantages gained by K-Bin as the result of its own substantial investments and the development of its supplier relationships and procurement strategies. *Id.* at ¶ 6. Public disclosure of K-Bin's purchasing trends, procurement spending, and negotiation efforts would leave it exposed in future negotiations with suppliers, rendering it very difficult for K-Bin to negotiate competitive rates and negating the time and expense currently invested in the years of negotiation with its suppliers. *Id.* Competition would also be diminished as K-Bin's competitors would have a clear view into K-Bin's confidential supplier relationships, purchasing trends, and cost structure while K-Bin would have no way of discovering competitors' similar commercially-sensitive information. *Id.* In addition, disclosure of the information in the Confidential Document will likely result in the loss of business advantages with respect to its customers because the information would give customers increased negotiating leverage that they did not previously enjoy and that they would not have over K-Bin's competitors. *Id.*; see *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 at *7 (Dec. 23, 1999) ("The likely loss of business advantages is a good example of a 'clearly defined, serious injury.'"). In short, the confidential information concerning from whom and how K-Bin procures its raw materials, and negotiates,

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structures, and retains its contractual and business relationships with suppliers is material to K-Bin's business and its public disclosure would result in a clearly defined serious injury.

Finally, K-Bin's status as a third-party is relevant to the treatment of its information. The FTC has held that "[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*, 58 F.T.C. at 1186. This is especially so in the case of a third-party, which deserves "special solicitude" in its request for *in camera* treatment for its confidential business information. *See In re Kaiser Aluminum & Chem. Corp.*, 103 FTC 500, 500 (1984) ("As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests."). K-Bin's third-party status therefore weighs in favor of granting *in camera* status to the Confidential Document.

IV. Indefinite *In Camera* Treatment is Warranted.

Moreover, unlike ordinary business records, the competitive sensitivity, proprietary value, and need for confidentiality of the information at issue here, including the existence of long-standing supplier relationships, actually increases rather than diminishes over time because the length of the supplier relationships directly impacts K-Bin's bargaining power and pricing with respect to its suppliers. *See* Dodgen Decl. at ¶ 7. In light of these unusual circumstances and the particular sensitivity of this information, the competitive significance is not likely to decrease over time, and thus indefinite protection from public disclosure is warranted. *See* 16 C.F.R. § 3.45(b)(3).

V. K-Bin's 2014 Information Remains Competitively Sensitive.

Given the highly sensitive nature of the information contained in the Confidential Document, including the secret data from 2014, the Court should grant *in camera* treatment of all

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of the information. The 2014 data remains competitively sensitive for K-Bin as it reveals the identities of K-Bin's long-term suppliers—all of whom K-Bin continues to negotiate and do business with—as well as the types and quantities of raw materials it purchases and the prices it paid very recently. Dodgen Decl. at ¶ 8. Public disclosure of this confidential and competitively-significant information would harm K-Bin's business advantages and negotiating leverage with both its suppliers and its customers, who could use that information as a bargaining tool against K-Bin. *Id.* It would also cause serious injury to K-Bin with respect to its competitors, as it would unfairly reveal secret technical information about K-Bin's product compounds, confidential suppliers, and costing structure, which in large part are the same as they were in 2014. *Id.* As such, the 2014 information remains competitively sensitive and is also entitled to indefinite *in camera* treatment.

VI. Conclusion

For the reasons set forth above and in the accompanying Dodgen Declaration, K-Bin respectfully requests that this Court grant indefinite *in camera* treatment for the Confidential Document in its entirety.

Dated: May 1, 2018

Respectfully submitted,

/s/ Eric D. Wade

Eric D. Wade

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ATTORNEY FOR K-BIN, INC.

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STATEMENT REGARDING MEET AND CONFER

The undersigned certifies that counsel for Non-party K-Bin, Inc. notified counsel for the parties via email on or about April 27, 2018 that it would be seeking *in camera* treatment of the Confidential Document. Counsel for the Federal Trade Commission, indicated that they would not object to K-Bin's motion. As of the filing of the above motion, counsel for Tronox Limited, National Industrialization Company, National Titanium Dioxide Company Limited, and Cristal USA Inc. have not responded.

Dated: May 1, 2018

/s/ Eric D. Wade

Eric D. Wade

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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600 Pennsylvania Ave., NW, Rm. H-113
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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Washington, D.C. 20580

I also certify that I caused the foregoing document to be served via email to:

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Counsel for Respondent Tronox Limited

*Counsel for Respondents National
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Counsel Supporting the Complaint

/s/ Eric D. Wade

Eric D. Wade

Notice of Electronic Service

I hereby certify that on May 01, 2018, I filed an electronic copy of the foregoing Non-Party K-Bin, Inc.'s Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C - Confidential - Redacted in Entirety, Proposed Order, with:

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Chief Administrative Law Judge
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Washington, DC, 20580

Donald Clark
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Washington, DC, 20580

I hereby certify that on May 01, 2018, I served via E-Service an electronic copy of the foregoing Non-Party K-Bin, Inc.'s Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C - Confidential - Redacted in Entirety, Proposed Order, upon:

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I hereby certify that on May 01, 2018, I served via other means, as provided in 4.4(b) of the foregoing Non-Party K-Bin, Inc.'s Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C - Confidential - Redacted in Entirety, Proposed Order, upon:

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Eric Wade
Attorney

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

In the Matter of)
)
Tronox Limited et al.,)
)
Respondent)

Docket No. 9377

[PROPOSED] Order

Upon consideration of non-party K-Bin, Inc.'s ("K-Bin") Motion for *In Camera* Treatment, it is HEREBY ORDERED that the following document is to be provided indefinite *in camera* treatment from the date of this Order in its entirety.

Exhibit No.	Document Title/Description	Date
PX4235	Form of Certificate of Compliance attached to K-Bin's response to Civil Investigative Demand FTC File No. 171-0085	Aug. 3, 2017

Ordered:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

Notice of Electronic Service

I hereby certify that on May 01, 2018, I filed an electronic copy of the foregoing Non-Party K-Bin, Inc.'s Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C - Confidential - Redacted in Entirety, Proposed Order, with:

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EXHIBIT A

DRAFT

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Bureau of Competition
Mergers II Division

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

April 19, 2018

VIA EMAIL TRANSMISSION

K-Bin
c/o David Tidholm
5616 E. Hwy. 332
Freeport, TX 77541
dtidholm@shin-tech.com

RE: *In the Matter of Tronox Limited et al.*, Docket No. 9377

Dear David:

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 intends to offer the documents referenced in the enclosed Attachment A into evidence in the administrative trial in the above-captioned matter. For your convenience, a copy of the documents and testimony will be sent to you in a separate email with an FTP link.

The administrative trial is scheduled to begin on May 18, 2018. All exhibits admitted into evidence become part of the public record unless Administrative Law Judge D. Michael Chappell grants *in camera* status (i.e., non-public/confidential).

For documents or testimony that 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 and 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 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re Jerk, LLC*, 2015 FTC LEXIS 39 (Feb. 23, 2015); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the material. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). For your convenience, we included, as links in the cover email, an example of a third-party motion (and the accompanying declaration or affidavit) for *in camera* treatment that was filed and granted in an FTC administrative

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proceeding. If you choose to move for *in camera* treatment, you must provide a copy of the document(s) for which you seek such treatment to the Administrative Law Judge. Also, you or your representative will need to file a Notice of Appearance in the administrative proceeding. For more information regarding filing documents in adjudicative proceedings, please see <https://www.ftc.gov/faq/ftc-info/file-documents-adjudicative-proceedings>.

Please be aware that under the current Second Revised Scheduling Order (revised on February 23, 2018), the deadline for filing motions seeking *in camera* treatment is May 1, 2018. A copy of the February 23, 2018 Second Revised Scheduling Order and the December 20, 2017 original Scheduling Order, which contains Additional Provisions, can be found at <https://www.ftc.gov/enforcement/cases-proceedings/171-0385/lenoxcrystal-usa>.

If you have any questions, please feel free to contact me at (202) 326-3390.

Sincerely,

/s/ Lily Rudy

Lily Rudy

Counsel Supporting the Complaint

Attachment

Attachment A

DRAFT

Exhibit No.	Full Name	Date	BegBates	EndBates
PX4235	K-Bin Inc's Responses to Civil Investigative Demand	8/3/2017	PX4235-001	PX4235-004

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DRAFT

Notice of Electronic Service

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I hereby certify that on May 01, 2018, I served via other means, as provided in 4.4(b) of the foregoing Non-Party K-Bin, Inc.'s Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C - Confidential - Redacted in Entirety, Proposed Order, upon:

Joonsuk Lee
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FTC

Eric Wade
Attorney

DRAFT

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EXHIBIT B

DRAFT

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of
Tronox Limited et al.,
Respondent

Docket No. 9377

DECLARATION OF DENNIS H. DODGEN IN SUPPORT OF NON-PARTY K-BIN, INC.'S MOTION FOR *In Camera* TREATMENT

I, Dennis H. Dodgen, pursuant to 28 U.S.C. § 1746 hereby declares as follows:

1. "I am the President of K-Bin, Inc. ("K-Bin"). I make this declaration in support of Non-Party K-Bin, Inc.'s Motion for *In Camera* Treatment (the "Motion"). I have personal knowledge of the matters stated herein and, if called upon to do so, could competently testify about them.

2. I have reviewed and am familiar with the document K-Bin produced in the above-captioned matter in response to a civil investigative demand from the Federal Trade Commission. I provided a certification of authenticity as to the information contained in the document that is the subject of the Motion. Given my position at K-Bin, I am familiar with the type of information contained in the document at issue and its competitive significance to K-Bin. Based on my review of the document, my knowledge of K-Bin's business, and my familiarity with the confidentiality protection afforded this type of information by K-Bin, I submit that the disclosure of this document to the public and to K-Bin's suppliers, competitors, and customers would cause serious competitive injury to K-Bin.

3. K-Bin is a PVC compounder that manufactures PVC compound and sells it to PVC extrusion and injection molding companies that produce vinyl products such as bottles, windows, doors, pipe, pipe fittings, siding as well as other building products. In order to succeed in the competitive PVC compounding market, K-Bin depends on its ability to negotiate the most competitive price possible for its raw materials which is tied directly to its ability to maintain confidential supplier relationships over an extended period of time and to employ effective negotiation strategies. The total amount of raw materials K-Bin purchases, together with the identities and allocations of its suppliers and the prices it pays, is a central part of K-Bin's strategic business planning and its goal of outperforming its competitors.

4. The FTC has informed K-Bin that it intends to use the document K-Bin produced in response to the civil investigative demand at the administrative hearing in this matter. However, because the document contains particularly sensitive business information, K-Bin seeks indefinite *in camera* protection of the following document as discussed in the Motion:

Exhibit No.	Document Title/Description	Date
PX4235	Form of Certificate of Compliance attached to K-Bin's response to Civil Investigative Demand FTC File No. 171-0085	Aug. 3, 2017

5. PX4235 contains commercially-proprietary and confidential information regarding K-Bin's costing, procurement spending, supply of raw material or inputs (in particular, the Chloride Dry at issue in this case), purchasing trends, frequency and outcome of negotiating efforts, and product technical detail. K-Bin keeps this information in strict confidence because it would be harmful to K-Bin's ability to negotiate competitive rates from suppliers and with customers if this competitively sensitive information is publicly disclosed. K-Bin has devoted significant resources and taken substantial measures to guard the secrecy of the information contained in the Confidential Document, limiting dissemination of such information and taking

every reasonable step to protect its confidentiality. Such information is disclosed only to particular employees of K-Bin on a need-to-know basis and K-Bin's employees, vendors, and customers are required to complete non-disclosure agreements. It would be extremely difficult for K-Bin's competitors, other suppliers, or its customers to access or recreate the information in the Confidential Document.

6. If the information contained in PX4235 were publicly disclosed, it would cause serious competitive harm to K-Bin because its suppliers, competitors, and customers could use this non-public material information to their advantage and nullify the competitive advantages gained by K-Bin as the result of its own substantial investments and the development of its supplier relationships and procurement strategies. Public disclosure of K-Bin's purchasing trends, procurement spending, and negotiation efforts would leave it exposed in future negotiations with suppliers, rendering it very difficult for K-Bin to negotiate competitive rates and negating the time and expense currently invested in the years of negotiation with its suppliers. Competition would also be diminished as K-Bin's competitors would have a clear view into K-Bin's confidential supplier relationships, purchasing trends, and cost structure while K-Bin would have no way of discovering competitors' similar commercially-sensitive information. In addition, disclosure of the information in PX4235 will likely result in the loss of business advantages with respect to its customers because the information would give customers increased negotiating leverage that they did not previously enjoy and that they would not have over K-Bin's competitors.

7. The competitive sensitivity, proprietary value, and need for confidentiality of the information contained in PX4235, including the existence of long-standing supplier relationships, actually increases rather than diminishes over time because the length of the

supplier relationships directly impacts K-Bin's bargaining power and pricing with respect to its suppliers. In light of these unusual circumstances and the particular sensitivity of this information, the competitive significance is not likely to decrease over time, and thus K-Bin seeks indefinite protection from public disclosure of the information.

8. Further, the information from 2014 contained in PX4235 remains competitively sensitive for K-Bin as it reveals the identities of K-Bin's long-term suppliers—all of whom K-Bin continues to negotiate and do business with—as well as the types and quantities of raw materials it purchases and the prices it paid very recently. Public disclosure of this confidential and competitively-significant information would harm K-Bin's business advantages and negotiating leverage with both its suppliers and its customers, who could use that information as a bargaining tool against K-Bin. It would also cause serious injury to K-Bin with respect to its competitors, as it would unfairly reveal secret technical information about K-Bin's product compounds, confidential suppliers, and costing structure, which in large part are the same as they were in 2014. Accordingly, K-Bin is also seeking indefinite *in camera* protection of the 2014 information contained in PX4235 because it remains competitively sensitive.

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

EXECUTED on April 27, 2018.

Dennis H. Dodgen
Dennis H. Dodgen

Notice of Electronic Service

I hereby certify that on May 01, 2018, I filed an electronic copy of the foregoing Non-Party K-Bin, Inc.'s Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C - Confidential - Redacted in Entirety, Proposed Order, with:

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

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

I hereby certify that on May 01, 2018, I served via E-Service an electronic copy of the foregoing Non-Party K-Bin, Inc.'s Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C - Confidential - Redacted in Entirety, Proposed Order, upon:

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Eric Wade
Attorney

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PUBLIC

EXHIBIT C

Confidential – Redacted in Entirety

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