

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PRESTON OLSEN & ELIZABETH OLSEN,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 26469-14.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER REGARDING PROTECTED INFORMATION

This case is one of numerous Tax Court cases (the “energy property cases”) that have been assigned to this Division of the Court for trial or other disposition. These cases involve a solar-power facility in Delta, Utah, about which certain third parties possess confidential trade secret and other proprietary information. These third parties are Neldon Johnson International Automated Systems Inc.; Rapower-3 LLC; LTB LLC; and LTB1 LLC (collectively, “third parties”). Respondent wishes to have one or more expert witnesses visit the solar-power facility and interview professionals employed by the third parties. The third parties have indicated that they will decline to discuss confidential trade secret and other proprietary information with these expert(s) in the absence of a protective order.

On December 10, 2015, petitioners filed with the Court a Motion for Protective Order Under Rule 103. On January 8, 2016, respondent filed an objection to petitioners’ Motion. During a telephone conference to discuss the Motion, respondent’s counsel was initially optimistic that the immediate problem could be resolved by having respondent’s experts execute nondisclosure agreements. Respondent’s counsel later informed the Court that the required approvals for the proposed nondisclosure agreements could not be obtained.

Rule 103(a)(7) of this Court’s Rules provides that, for good cause shown, the Court may make any order that justice requires with the goal that “a trade secret or other information [may] not be disclosed or be disclosed only in a designated way.” The confidential information possessed by the third parties includes information concerning proprietary manufacturing apparatus, elements of which are subject to patent applications. The third parties make significant efforts

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to safeguard the confidentiality of this information, limiting access to it even within their own organizations. The Court concludes that this information includes “trade secret” information deserving of protection.

By Order dated May 9, 2016, the parties were advised that petitioner’s Motion for Protective Order under Rule 103, filed December 10, 2015, was granted in part and that discovery was subject to certain restrictions. Due to inadvertent clerical error, the May 9th Order did not contain the Exhibit A referenced in that Order, an Acknowledgment and Agreement to Be Bound which must be executed by certain persons identified in paragraph 3 below prior to being given access to Confidential Information.

In light of the foregoing, it is hereby

ORDERED that the Court’s Order Regarding Protected Information dated May 9, 2016, is deemed vacated and set aside. It is further

ORDERED that petitioner’s Motion for Protective Order under Rule 103, filed December 10, 2015, is granted in that discovery shall be subject to the following restrictions and shall be conducted on the following terms and conditions:

1. As used herein, “Confidential Information” shall mean non-public information that, in the reasonable and good-faith belief of the Designating Party, constitutes a trade secret or constitutes confidential research, development, manufacturing, commercial, or financial information of the Designating Party. The term “Designating Party” means Neldon Johnson International Automated Systems Inc.; Rapower-3 LLC; LBT, LLC; LTB1 LLC; and/or any entity related or affiliated with the foregoing entities.

2. A Designating Party may designate documents and discovery responses, including electronic data, as Confidential Information by marking such information as “Confidential Information” as provided in paragraph 9 of this Order. All copies, summaries, or descriptions of Confidential Information shall be treated as Confidential Information.

3. Except as otherwise provided in this Order or by further order of the Court, access to Confidential Information shall be limited to: (a) the Court and its officers; (b) designated witnesses (as provided in paragraph 7 of this Order), (c) court reporters at depositions or other proceedings; (d) attorneys of record in this

case, including their secretarial, legal, and office staff; and (e) persons engaged by the parties or attorneys of record in this case to assist them, including independent experts and consultants and their employees (collectively, "Approved Persons"). Approved Persons having access to Confidential Information shall not disclose such information to any person not bound by this Order.

4. Except as otherwise provided in this Order or by further order of the Court, respondent may share Confidential Information with employees of the Internal Revenue Service, and with any person, entity, or agency described in section 6103 of the Internal Revenue Code, pursuant to respondent's normal procedures for sharing such information pursuant to section 6103.

5. Except as otherwise provided in this Order or by further order of the Court, Confidential Information shall not be used or disclosed by any party or by any person granted access thereto under this Order, for any purpose other than the preparation and trial of this case. Notwithstanding the foregoing, this Order does not restrict the right of a Designating Party to make such use or disclosure of its own documents or material that have been designated as Confidential Information as it otherwise is entitled to make.

6. Any person described in paragraph 3(e) of this Order, desiring access to Confidential Information, shall be informed of this Order and shall agree in writing to be bound by the terms of this Order by executing a copy of Exhibit A attached hereto (which shall be maintained by the attorneys of record in this action) prior to being given access to Confidential Information. Counsel for the parties in this case shall each maintain a list of the Approved Persons who have provided to counsel an executed copy of Exhibit A, along with the date on which the Approved Person executed Exhibit A, the date on which the Approved Person was given access to Confidential Information, and a description of the Confidential Information to which the Approved Person was given access.

7. Any party seeking to disclose Confidential Information to any witness, including an Approved Person, shall inform opposing counsel and the relevant Designating Party at least five (5) court days prior to making such disclosure. If the opposing counsel or the Designating Party objects to the disclosure, he may file a motion with the Court to prevent such disclosure, and no disclosure shall be made until the Court has ruled on such motion. Upon the filing of any such motion, the Designating party shall bear the burden of showing why the proposed disclosure should not be made. If there is no objection, the witness shall agree in writing to be bound by the terms of this Order by executing a copy of Exhibit A in

advance of receiving access to Confidential Information. Neither the parties nor their counsel shall discourage any witness from signing a copy of Exhibit A. However, if a witness refuses to execute a copy of Exhibit A, Confidential Information may not be disclosed to such witness.

8. An Approved Person may disclose Confidential Information in response to a subpoena or appropriate court order, but not prior to the return date or date of production specified in the subpoena or order. Upon receipt of any such subpoena or order, the Approved Person shall give counsel for the parties and the relevant Designating Party written notice within five calendar (5) days of receipt of such subpoena or order. Such Approved Person may produce Confidential Information in compliance with the subpoena or order unless the Approved Person has been given timely advance notice that an order quashing or limiting the subpoena or staying or limiting the order of disclosure has been issued or that a motion for such an order has been filed.

9. In the production of documents or responses to discovery in this case, Confidential Information shall be designated by marking each document in which such Confidential Information is contained. Such marking shall be made prior to the transmission of a physical copy of such document to the party requesting such document, and shall be in substantially the following form:

CONFIDENTIAL INFORMATION
SUBJECT TO PROTECTIVE ORDER
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The foregoing designation shall be applied to the document by a rubber stamp, clear sticker, or other suitable means. In the production of electronically stored information, Confidential Information shall be designated by marking each electronic storage device or file in which such Confidential Information is contained with the foregoing designation.

10. If any Confidential Information is used or referred to during any deposition, counsel for any party may require that only Approved Persons, the deponent, the court reporter, and the camera operator (if the deposition is videotaped), shall be present for the portion of the deposition during which Confidential Information is discussed. Counsel shall serve a copy of this Order upon the deponent, the court reporter, and/or the camera operator, and require that each execute a copy of Exhibit A prior to further questioning. Within thirty (30) days of receipt of the completed deposition transcript, counsel for the relevant

Designating Party shall designate by page and line the portions for which a claim regarding Confidential Information is made and shall give written notice of this designation to the court reporter and all other parties. This designation shall be placed on the first page in the original and all copies of the deposition by the court reporter and by counsel for the parties. Pending such designation, the deposition and all exhibits shall be treated in their entirety as Confidential Information. Those portions of the deposition that are subsequently designated as Confidential Information shall be bound separately under seal and prominently marked “Confidential Subject to Protective Order.”

11. Any party may at any time notify in writing other parties and the relevant Designating Party of its objection that some or all of the information designated as Confidential Information is not entitled to such protection under Tax Court Rule 103 and the terms of this Order. Upon the sending of such written notice, the parties and the Designating Party shall meet and confer in good faith regarding such designation. If agreement cannot be reached, the party challenging the designation may move the Court for an appropriate order, and the Designating Party shall bear the burden of showing that the information is properly designated as Confidential Information.

12. All Confidential Information produced pursuant to this Order shall be maintained in a secure facility with all reasonable measures being taken by the party with custody of such Confidential Information to ensure the confidentiality of such information in accordance with the terms of this Order.

13. If a person subject to this Order becomes aware that disclosure of Confidential Information has been made to other than an Approved Person, such person shall immediately inform counsel for the parties and the Designating Party of the circumstances surrounding such disclosure and shall promptly take all reasonable measures to prevent further unauthorized disclosure of the Confidential Information.

14. If a Designating Party discovers that it has produced information not designated as Confidential Information but which it intended to have so designated, the Designating Party shall immediately confer with the party to whom the information has been produced with a view to designating such information as Confidential Information.

15. The application of this Order is limited to the production and use of Confidential Information during the discovery phase and trial preparation of this

case. Petitioner may move the Court for a separate order governing all trial practice with respect to the Confidential Information, including how Confidential Information shall be submitted to the Court and the proper disposition, upon final conclusion of this case, of all Confidential Information in the possession of the parties and other persons.

16. This Order applies only to the production and use of Confidential information in Docket No. 26469-14. To the extent that a party believes it would be desirable or necessary to have a parallel protective order in place during the discovery phase of other energy property cases, that party may move the Court for an appropriate order.

17. This Order shall be without prejudice to the right of any party to challenge the propriety of discovery on other grounds, and nothing contained herein shall be construed as a waiver of any applicable privilege, nor of any objection that might be raised as to the admissibility at trial of any evidentiary material. The parties reserve all rights to apply to the Court for an order modifying this Order or seeking further protection on this or other issues, and this Order shall not be construed to preclude a party from applying for or obtaining such further protection.

It is further

ORDERED that petitioner shall provide a copy of this Protective Order to the third parties who will be Designating Parties under this Protective Order. It is further

ORDERED that petitioner shall, on or before June 14, 2016, provide the Court with addresses for the third parties who will be Designating Parties under this Protective Order, so that the Court can make service on the third parties should that be necessary.

**(Signed) Albert G. Lauber
Judge**

Dated: Washington, D.C.
June 7, 2016

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

Preston Olsen and Elizabeth Olsen v. Commissioner Tax Court Docket No. 26469-14

I, _____ [print or type full name], of _____ [print or type full address], declare under penalty of perjury that I have read, and I understand and agree to comply with and be bound by the Order Regarding Protected Information issued by the United States Tax Court in the above captioned case on [date]. I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt, and I further agree to submit to the jurisdiction of the United States Tax Court for the purpose of enforcing the terms of the Order, even if such enforcement proceedings occur after termination of this action.

Date:

Printed name:

Signature: