

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

ESTATE OF RICHARD MCWILLIAM,	)		
DECEASED, VIVIANNE B. MCWILLIAM,	)		
SPECIAL ADMINISTRATOR, ET AL.,	)		
	)		
Petitioners,	)		
	)		
v.	)	Docket No. 15049-12,	19980-12,
	)	21101-12,	24218-12.
COMMISSIONER OF INTERNAL REVENUE,	)		
	)		
Respondent	)		

**SYM**

**ORDER**

Petitioner in No. 15049-12 filed his petition on June 12, 2012, to which was attached a notice of deficiency issued by the Internal Revenue Service (“IRS”) on March 15, 2012. Petitions in three related cases were filed later that same year, and the cases were consolidated in January 2014. The records in these cases were, as usual, open to the public pursuant to section 7461. Almost three years after the first petition was filed, petitioners first moved on June 5, 2015, for a protective order to seal the record in the consolidated cases, but they thereafter withdrew the motion. On January 27, 2017--four years and nine months after the first petition was filed (during which time the record has been open)--petitioners again moved for a protective order, again requesting that the Court seal the entire record in these consolidated cases, or, alternatively, that the Court seal the public electronic docket index available on the Tax Court website.

Petitioners’ motion

Petitioners’ motion asserts that good cause exists to seal the record in this case, citing concerns as to the financial health of petitioner Upper Deck Company (“UDC”) as well as harassment of UDC employees. Petitioners’ motion asserts that petitioners and others have been subject to harassment, blackmail threats, and in addition, that “[c]ompetitors, former employees, business partners, and industry

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trolls are using confidential information about the petitioners' business strategies, financial stability, and going concern to destroy petitioners' ability to maintain favorable commercial and consumer relationships." Petitioners' motion does not provide further details about whether such confidential information became known by reason of anything filed in this case.

In support of the motion, petitioners filed a declaration of UDC's general counsel, Brittany Hysni. This declaration essentially repeats and supports the assertions contained in the motion itself, and adds examples of: angry phone calls from prior employees of UDC seeking payments in 2013; threatening emails from a former UDC executive to a current UDC employee in 2014; a lawsuit filed against UDC and various UDC employees in 2013; threats and attempted blackmail against Ms. Hysni and other UDC employees in 2013 and thereafter; a convict performing surveillance of a UDC employee's property; and other similar instances of blackmail or threats.

The following is representative language from the declaration: "\* \* \* UDC has received numerous inquiries from individuals and entities interested in business opportunities associated with UDC. The ability of these companies to engage in business negotiations, partnerships or joint ventures would be severely compromised by the failure to seal the pleadings."

The motion and the declaration in support thereof are sparse in terms of ills that actually stem from this litigation. The declaration does state that one of UDC's distributors was emailed a copy of "tax court litigation documents" before UDC's annual distributor meeting, and that UDC employees have received emails from "significant third party partners such as distributors, regarding UDC's tax litigation documents found online." (Unlike Tax Court orders and opinions, and unlike the docket entries for a Tax Court case, parties' filings in Tax Court cases are not publicly accessible on the Tax Court's website. We therefore assume that a third party either obtained the documents from a party or obtained them by requesting them from the Tax Court, and then posted them online.)

#### Respondent's opposition to petitioner's motion

Respondent avers that a party seeking a protective order of the kind petitioners request must show (1) that the material in question is confidential, and (2) that there is good cause for protection. As to the first prong, respondent notes that "the petitioners have allowed the record, with all information contained therein, to be open for over four years," and consequently, such information is

already public knowledge. As to the second prong, respondent asserts that any effect on petitioners' business activities caused by information in this suit being public is somewhere between speculative and unproven, and that "the alleged harassment, extortion and threats are general in nature, lack specification or substantiation \* \* \* ." Respondent further asserts that there is no substantiated allegation that there will be economic harm to petitioners if this motion is denied.

### Analysis

Section 7458 provides that "[h]earings before the Tax Court and its divisions shall be open to the public"; and section 7461(a) provides that, "[e]xcept as provided in subsection (b), all reports of the Tax Court and all evidence received by the Tax Court and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public."

Section 7461(b) provides two exceptions. The latter (section 7461(b)(2)) may apply after the decision of the Tax Court has become final (which is not the case here.) The former, section 7461(b)(1), provides that "[t]he Tax Court may make any provision which is necessary to prevent the disclosure of trade secrets or other confidential information, including a provision that any document or information be placed under seal to be opened only as directed by the court."

Tax Court Rule 103 ("Protective Orders") provides in subsection (a) that, upon motion and for "good cause shown," the Court may make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense.

Common law, statutory law, and the United States Constitution generally support the proposition that official Tax Court records are open for public inspection. Willie Nelson Music Co., 85 T.C. at 917 (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978)). "Nevertheless, the presumptive right to access may be rebutted by a showing that there are countervailing interests sufficient to outweigh the public interest in access." 85 T.C. at 919.

Petitioners have failed to demonstrate such countervailing interests. While we assume correct the facts laid out in petitioners' motion and supporting declaration, many of them took place years ago, and some of them apparently bear no possible relationship to this case or anything filed herein.

As to petitioners' two concerns that have some arguable nexus with documents filed in this case (i.e., that UDC distributors and employees have received emailed copies of documents filed in this case that were found online), any harm of disclosure has already occurred, and no remedy within our power could affect future harm. Given how long the record in this case has not been sealed, and given petitioners' allegation that the documents are already "online" and in circulation, we have no way to identify or locate extant copies already available to the public--much less to order their suppression. Neither sealing the record nor sealing the publicly available docket entries would achieve what petitioners seek.

Because the past ills that petitioners claim and the future ills they foresee could not be cured by a protective order sealing the record in this case, it is

ORDERED that petitioners' motion for a protective order is denied.

**(Signed) David Gustafson  
Judge**

Dated: Washington, D.C.  
March 16, 2017