**SO ORDERED,**

**Judge Neil P. Olack**
**United States Bankruptcy Judge**
**Date Signed: June 7, 2016**

**The Order of the Court is set forth below. The docket reflects the date entered.**

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

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| **OPUS MANAGEMENT GROUP JACKSON LLC, ET AL.,** | **CASE NO. 16-00297-NPO JOINTLY ADMINISTERED** |
| **DEBTORS.** | **CHAPTER 11** |

**ORDER DENYING: (1) MOTION FOR LEAVE TO FILE DOCUMENTS IN SUPPORT OF WORLD HEALTH INDUSTRIES, INC.'S PROOF OF CLAIM UNDER SEAL AND (2) MOTION FOR LEAVE TO FILE DOCUMENT IN SUPPORT OF WORLD HEALTH INDUSTRIES, INC.'S OBJECTION TO MOTION FOR AN ORDER APPROVING SETTLEMENT AMONG CERTAIN DEBTORS, M. CHAD BARRETT AND JOHN ADAMS, D.O. UNDER SEAL**

This matter came before the Court for hearing on June 2, 2016 (the "Hearing"), on the Motion for Leave to File Documents in Support of World Health Industries, Inc.'s Proof of Claim under Seal ("Motion to Seal POC Documents") (Dkt. 402) filed by World Health Industries, Inc. ("WHI") and the Motion for Leave to File Document in Support of World Health Industries, Inc.'s Objection to Motion for an Order Approving Settlement Among Certain Debtors, M. Chad Barrett and John Adams, D.O. under Seal (the "Motion to Seal Settlement Document" or, together with the Motion to Seal POC Documents, the "Motions to Seal") (Dkt. 403) also filed by WHI in the above-referenced bankruptcy case (the "Bankruptcy Case"). The Motions to Seal concern exhibits that WHI proposes to attach to: (1) its Proof of Claim ("POC")

(Cl. 5-1) in the amount of $34,500.00 and (2) the Creditor World Health Industries, Inc.'s Objection to Motion for an Order Approving Settlement Among Certain Debtors, M. Chad Barrett and John Adams, D.O. (the "Settlement Objection") (Dkt. 399), both filed by WHI on May 31, 2016. At the Hearing, David W. Houston, IV represented WHI, Christopher R. Maddux and Thomas M. Hewitt represented Opus Management Group Jackson, LLC, *et al.* (the "Debtors"), Kristina M. Johnson and Robert T. Higginbotham, Jr. represented John Adams, D.O. ("Dr. Adams"); Clarence Webster, III and John D. Moore represented M. Chad Barrett ("Barrett"); and Ronald H. McAlpin and Christopher J. Steiskal represented Henry G. Hobbs Jr., Acting U.S. Trustee for Region 5. During the Hearing, WHI withdrew its request to file under seal any documents other than the Barrett-WHI Master Settlement Agreement (the "MSA"). With respect to the MSA, the Court orally denied the Motions to Seal from the bench. This Order memorializes and supplements the Court's bench ruling.

## Jurisdiction

This Court has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. §1334(b). This matter is a core proceeding arising under 28 U.S.C. § 157(b)(2)(A) and (O). The Motions to Seal were filed the day before the Hearing, and as evidentiary motions, were heard at the Hearing without separate notice.

## Facts

On May 6, 2016, the Debtors filed the Motion of the Debtors Pursuant to §§ 105 and 363 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9019 for an Order Approving Settlement Among Certain Debtors, M. Chad Barrett, and John Adams, D.O. (the "Settlement Motion") (Dkt. 372). In the Settlement Motion, the Debtors asked the Court to approve a proposed Settlement Agreement (the "Settlement Agreement") (Dkt. 372-1) reached by and

among RX Pro of Mississippi, Inc., d/b/a McDaniel Pharmacy ("McDaniel Pharmacy") and Rx Pro Pharmacy & Compounding Inc., d/b/a OpusRx, a Florida Corporation ("Hallandale Pharmacy"), which are Debtors in this consolidated action, and Barrett and Dr. Adams. On May 31, 2016, WHI filed the Settlement Objection, asserting that the Court should not approve the Settlement Agreement because, *inter alia*: (1) it would constitute a breach of the MSA by Barrett and (2) it would allow Dr. Adams to collaterally attack the validity of the MSA when the authority of McDaniel Pharmacy and Hallandale Pharmacy to commence the Bankruptcy Case is contingent and premised on its enforceability. (Obj. at 2). WHI described the MSA as reflecting "a transfer [to Barrett] of ownership interests in companies formerly held by the WHI shareholders . . . on April 13, 2015." (Obj. at 4). WHI referred to the MSA extensively throughout the Settlement Objection, even quoting its two-paragraph indemnity provision in whole and a portion of its "cooperation" provision. (Obj. at 11 & 2, ¶ 3). On the same day it filed the Settlement Objection, WHI filed the POC without any supporting documents.[1]

WHI did not attach the MSA as an exhibit either to the Settlement Objection or the POC, but in both the Settlement Objection and POC, indicated that it would move to admit the MSA under seal. (Obj. at 2 n.4; Cl. 5-1, Part 2). The day after filing the Settlement Objection and POC, WHI filed the Motions to Seal.

**A. Motion to Seal Settlement Document**

In the Motion to Seal Settlement Document, WHI asked the Court, pursuant to MISS. BANKR. L.R. 9018-1 and FED. R. BANKR. P. 9018, for an order granting WHI authority to file under seal the MSA as an exhibit to its Settlement Objection. In the proposed order submitted by WHI, the sealed MSA would be accessible only to WHI (as well as its counsel, experts, and

[1] WHI's counsel at the Hearing suggested that the POC was filed to establish WHI's standing as a party in interest to file the Settlement Objection.

financial advisors), the Debtors (as well as their counsel, experts and financial advisors), Dr. Adams (as well as his counsel and experts), the Court, and the Office of the U.S. Trustee. (Dkt. 403-1).

Apparently, the MSA resolved certain state court litigation initiated by Barrett against the then shareholders of WHI, which resulted in a "corporate divorce." WHI alleged that the MSA includes sensitive information about WHI's business relationships and litigation efforts. According to WHI, the existence of the MSA is not confidential, but it is labeled "confidential," and the parties previously agreed that the information and terms contained in the MSA would not be disclosed to the public. WHI reminded the Court that it had previously reviewed the MSA *in camera* as part of its deliberations regarding the Joint Emergency Motion to Quash and for Protective Order (the "Motion to Quash") (Dkt. 317) filed by Jason Rutland, Robert Durham, Nicole Hotard, Chris Merriwether, and James Bennett, who signed the MSA and are former shareholders of WHI (the "Former Shareholders").[2] In the Motion to Quash, the Former Shareholders alleged that the MSA was irrelevant to the then pending Motion for Appointment of Chapter 11 Trustee, or Alternatively, for Appointment of Examiner with Expanded Powers (the "Motion to Appoint Trustee") (Dkt. 238) filed by Dr. Adams. The Court entered the Order Granting in Part and Denying in Part Joint Emergency Motion to Quash and for Protective Order [Dkt. #317] (the "Protective Order") (Dkt. 352), granting Dr. Adams, his counsel of record, and any experts retained by Dr. Adams access to the MSA, but limiting any disclosure to anyone other than those individuals.

[2] The MSA was returned to WHI and, thus, the Court did not have the MSA before it in considering the Motions to Seal. (Obj. at 2 n.4).

## B. Motion to Seal POC Documents

In the Motion to Seal POC Documents, WHI asked the Court for permission to file under seal three (3) exhibits as attachments to its POC, including: (1) the MSA; (2) the promissory note entered into as part of a settlement with Shennaco Investment Corporation (the "Shennaco Note"); and (3) a wire confirmation/receipt (the "Wire Confirmation") evidencing WHI's payment of $100,000.00 to Shennaco Investment Corporation. During the Hearing, WHI withdrew its request to file under seal the Shennaco Note and Wire Confirmation. Thus, the only issue that remained for decision by the Court at the Hearing with respect to the Motion to Seal POC Documents was whether WHI could attach the MSA under seal as an exhibit to the POC. Although the relevancy of the MSA to the POC is not entirely clear, it appears that the MSA refers to payments made to Shennaco Investment Corporation. In support of the Motion to Seal POC Documents, WHI merely reiterated the arguments it made in support of the Motion to Seal Settlement Document with respect to its Settlement Objection.

## Discussion

There is a strong presumption of public access to court records. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978). A chapter 11 reorganization is an open book process, and the debtor operates in a fish bowl. *See* Brad B. Erens & Kelly M. Neff, *Confidentiality in Chapter 11*, 22 EMORY BANKR. DEV. J. 47, 49 (2005). This policy of openness as developed under common law is codified in 11 U.S.C. § 107(a), which provides:

> (a) Except as provided in subsections (b) and (c) of this section and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.

11 U.S.C. § 107(a). On a practical level, the sealing of court records inflicts a burden on the judicial system. *City of Hartford v. Chase*, 942 F.2d 130, 137 (2d Cir. 1991) (Pratt, J.,

concurring). The aforementioned factors weigh heavily for open access to court records in the bankruptcy court. *See In re Northstar Energy, Inc.*, 315 B.R. 425, 428 (Bankr. E.D. Tex. 2004) (stating that "[11 U.S.C.] § 107(a)'s directive for open access flows from the nature of the bankruptcy process—which is heavily dependent upon creditor participation, and which requires full financial disclosure of debtor's affairs") (citation omitted).

The right of public access to court records, however, is not absolute. 2 COLLIER ON BANKRUPTCY ¶ 107.03 (16th ed. 2016). In certain circumstances, a court may deny access to judicial documents. The statutory exception to the general right of access to court documents provides in pertinent part:

> (b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—
>
> > (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information.

11 U.S.C. § 107(b). Similarly, Rule 9018 of the Federal Rules of Bankruptcy Procedure, which implements 11 U.S.C. § 107, provides that the "court may make any order which justice requires . . . to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information." FED. R. BANKR. P. 9018. The corresponding Uniform Local Rule of the U.S. Bankruptcy Court for the Southern District of Mississippi, MISS. BANKR. L.R. 9018-1, requires, *inter alia*, that any order sealing a document or proceeding "identify who shall have access to sealed documents and terms and conditions of the maintenance and the ultimate disposition of same."

Assuming for the sake of argument that the MSA relates to confidential commercial information within the meaning of 11 U.S.C. § 107(a), the Court finds that WHI waived the confidentiality of the MSA by making the MSA an issue in this contested matter. By analogy,

the Fifth Circuit Court of Appeals has held that the attorney-client privilege "was intended as a shield, not a sword" and that when confidential communications are made a material issue in a judicial proceeding, "fairness demands treating the defense as a waiver of the privilege." *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989); *see also Nguyen v. Excel Corp.*, 197 F.3d 200, 207 n.18 (5th Cir. 1999) (recognizing "a client's inability to, at once, employ the privilege as both a sword and a shield") (quotation omitted). In other words, the "placing at issue" waiver occurs when the holder pleads a defense in such a way that it will inevitably have to "draw upon a privileged communication in order to prevail. . . . The focus is on the privilege holder, and the sole concern is whether the privilege holder has committed himself to a course of action that will require the disclosure of a privileged communication." *Conoco Inc. v. Boy Bros. Constr. Co.*, 191 F.R.D. 107, 110 (W.D. La. 1998) (quotation omitted); *see also Forever Green Athletic Fields, Inc. v. Babcock Law Firm, LLC*, Civil Action No. 11-633, 2014 WL 29451 (M.D. La. Jan. 3, 2014); *Asset Funding Group, LLC v. Adams & Reese, LLP*, Civil Action No. 07-2965, 2008 WL 4186884 (E.D. La. Sept. 9, 2008). The Court finds that the holder of confidential commercial information, like the holder of the attorney client privilege, may waive the narrow protection afforded by 11 U.S.C. § 107(b) by placing the protected information "at issue."

Here, WHI placed the MSA at issue by asserting in its Settlement Objection that the proposed Settlement Agreement will result in a breach of the MSA and that the validity of the commencement of the Bankruptcy Case depends on the validity of the MSA. It would be unfair to permit WHI to insist on the confidentiality of the MSA when it intends to use the MSA as the primary, if not sole, basis for its opposition to the Settlement Agreement. Moreover, waiver occurred by quoting in the Settlement Objection certain provisions of the MSA "at issue." To isolate these provisions from their surroundings and consider them apart from other provisions in

the MSA would conflict with general rules of contract interpretation that require courts to harmonize and give effect to all provisions of an agreement. *See, e.g., Mustang Tractor & Equip. Co. v. Liberty Mut. Ins. Co.*, 76 F.3d 89, 91 (5th Cir. 1996). For these reasons, the Court denies WHI's request to seal the MSA.[3] This decision is not inconsistent with the previous Protective Order entered in connection with the Motion to Appoint Trustee. Contrary to its position in this matter, the Former Shareholders argued in the Motion to Quash that the MSA was unrelated to the Motion to Appoint Trustee. (Mot. to Quash at 6-7).

IT IS, THEREFORE, ORDERED that the Motions to Seal are hereby denied.

##END OF ORDER##

[3] Ultimately, the MSA was not admitted into evidence at the Hearing because of the absence of any witness who could testify as to its authenticity. *See* FED. R. EVID. 901.