In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Chapter 11 Case
FRIEDMAN'S, INC., et al.	)	Jointly Administered
	)	
Debtor	)	Number 05-40129

ORDER ON ERNST & YOUNG LLP AND MICHAEL MCCARTHY'S MOTION FOR A STAY OF THIS COURT'S FEBRUARY 3, 2006, ORDER

Pursuant to Federal Rule of Bankruptcy Procedure 8005, Ernst & Young LLP and Michael McCarthy (collectively "E&Y") moved for a stay of the enforcement of this Court's February 3, 2006, "Order on Ernst & Young LLP and Michael McCarthy's Motion in Opposition to Rule 2004 Examination and for a Protective Order" (the "February 3, 2006 Order"). *See* Dckt. No. 1484 (February 3, 2006). Under Rule 8005, a motion for a stay pending appeal must ordinarily be first presented to the bankruptcy court that rendered the contested judgment, order, or decree. Previously, this Court entered an "Order on Ernst & Young LLP and Kris Spain's Motion for a Stay of this Court's December 15, 2005, Order" (the "January 25, 2006 Order"). *See* Dckt No. 1474 (January 25, 2006). In the January 25, 2006, Order, I concluded that E&Y had failed to demonstrate that the requirements for obtaining Rule 8005 had been satisfied. E&Y's motion to stay the February 3, 2006, Order raises the same arguments and issues that were addressed and rejected by this Court in the January 25, 2006, Order.

In a footnote, the January 25, 2006, Order briefly discussed E&Y's claim that this Court lacked post-confirmation jurisdiction to enforce Rule 2004 subpoenas. Because E&Y continued to stress this argument in the present motion, this issue of post-confirmation jurisdiction requires further comment.

In its Order approving the joint interest agreement between Friedman's, Inc., and its affiliated debtors (collectively "Friedman's") and the Creditors' Committee, this Court specifically permitted Friedman's to conduct Rule 2004 examinations to discover and develop any pre-petition causes of action that Friedman's might assert. *See* Dckt. No. 585, p. 5 (April 28, 2005). Friedman's served the subpoena at issue in this matter on November 17, 2005 pursuant to this authority to conduct Rule 2004 examinations. *See* Dckt. No. 1484 (February 3, 2006). Friedman's First Amended Joint Plan of Reorganization (the "Plan") was confirmed on November 23, 2005. *See* Dckt. No. 1338 (November 23, 2005). Both the approval of the joint interest agreement and the service of the November 17 subpoena on E&Y occurred *prior* to the confirmation of the Plan. Therefore, the Rule 2004 examination represented by the November 17 subpoena is a form of investigation that was *both authorized and commenced pre-confirmation*.

Despite the fact that disputes have now arisen with regard to these matters post-confirmation, this Court retains jurisdiction to enforce and interpret its own pre-confirmation orders. *See* In re Millenium Seacarriers, Inc., 419 F.3d 83, 97 (2d Cir. 2005); In re Petrie Retail, Inc., 304 F.3d 223, 230 (2d Cir. 2002)("A bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders, particularly when disputes

arise over a bankruptcy plan of reorganization."). In E&Y's motion opposing Rule 2004 examination and seeking a protective order, one of its primary arguments is that the November 17 subpoena exceeded the scope of this Court's Order authorizing discovery under the joint interest agreement. *See* Dckt. No. 1387 (December 6, 2005). Resolution of this argument will require an examination of this Court's Order approving the joint interest agreement and a determination of whether the November 17 subpoena falls within the scope of discovery authorized by the Order. This Court is the court that granted Friedman's the authority to serve the November 17 subpoena on E&Y. E&Y's contention that confirmation of the Plan terminates this Court's authority to interpret a provision in its own Order contravenes well-established jurisdictional principles. *See* In re Johns-Manville Corp., 97 B.R. 174, 180 (Bankr. S.D.N.Y. 1989)("[T]he bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders in aid of their proper execution.").

Furthermore, although a bankruptcy court's jurisdiction over a Chapter 11 case diminishes upon the confirmation of a plan of reorganization, this jurisdiction does not disappear completely. In re Resorts Int'l, Inc., 372 F.3d 154, 165 (3d Cir. 2004). A bankruptcy court retains post-confirmation jurisdiction over matters with a "close nexus" to a confirmed bankruptcy plan of reorganization that affect the interpretation, implementation, consummation, execution, or administration of that plan. Id. at 168-69. In this case, Friedman's unsecured creditors voted in favor of the Plan with the expectation that their distributions under the Plan would come only as a result of a diligent search for and recovery on Friedman's pre-petition causes of action. Because it is key to this search for pre-petition claims, the November 17 subpoena is an essential element to the confirmation and execution

of the Plan. *See* In re Recoton Corp., 307 B.R. 751, 755 (Bankr. S.D.N.Y. 2004)("The purpose of a Rule 2004 examination is to assist a party in interest in determining the nature and extent of the bankruptcy estate, revealing assets, examining transactions and assessing whether wrongdoing has occurred. The scope of Rule 2004 examination is very broad, broader even than discovery under the Federal Rules of Civil Procedure.").

In the Order confirming the Plan, this Court explicitly noted that "the use by the Trustee [of the Friedman's Creditor Trust] of Rule 2004 of the Federal Rules of Bankruptcy Procedure to investigate potential claims and causes of action assigned to the Trust is necessary and appropriate to the administration of the estate and implementation and consummation of the Plan." *See* Dckt. No. 1338, p. 20 (November 23, 2005). The Trustee is authorized to enforce any subpoenas issued by Friedman's prior to the confirmation of the Plan. *See* Dckt. No. 1338. p. 45 (November 23, 2005). Furthermore, under the Trust Agreement, this Court retains jurisdiction to hear motions relating to Rule 2004 subpoenas served both prior to and after the effective date of the Plan. *See* Dckt. No. 1235, p. 21 (November 4, 2005). The Trust Agreement is attached to the Plan as Exhibit G. Resolving disputes concerning the November 17 subpoena involves an interpretation of and implementation of a provision in the Plan, which again demonstrates a sufficiently close nexus between the subpoena and the Plan to dispel any question regarding this Court's post-confirmation jurisdiction.

In addition, an important distinction must be made between the facts of the present case and the facts of cases cited by E&Y to support its argument that the mere

possibility of increasing the size of funds available for unsecured creditors does not create a sufficiently close nexus to the Plan to support post-confirmation jurisdiction. For example, E&Y has cited In re Resorts Int'l. In that case, a litigation trust brought a post-confirmation lawsuit against the firm that provided it with auditing and tax-related services, alleging that it had committed malpractice that harmed the litigation trust. Id. at 158. The Third Circuit Court of Appeals[1] observed that the litigation claims lacked the required "close nexus" to the bankruptcy plan to confer post-confirmation jurisdiction upon the bankruptcy court. The debtor was not a party to the litigation, the resolution of the claim would not impact the success of the reorganized debtor's plan of reorganization, and the claim would not require an interpretation of the plan or agreement that created the litigation trust. Therefore the bankruptcy court lacked subject matter jurisdiction to hear the litigation trust's malpractice claim against the accounting firm. Id. at 169-71.

Unlike In re Resorts Int'l, the present case is still very much in the investigative phase. Friedman's is conducting Rule 2004 examinations so that it can uncover and evaluate pre-petition causes of action for the benefit of unsecured creditors, as outlined in the Plan. No defined, specific causes of action have been asserted against E&Y as they were against the party arguing against the bankruptcy court's post-confirmation jurisdiction in In re Resorts Int'l.[2] The discovery dispute requires this Court to interpret and enforce

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[1] This case is also relevant because it was the Third Circuit Court of Appeals that wrote the seminal decision concerning a bankruptcy court's "related to" jurisdiction under 28 U.S.C. § 157 in Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984). The Eleventh Circuit Court of Appeals has adopted Pacor's "related to" analysis. *See* In re Lemco Gypsum, Inc., 910 F.2d 784, 788 (11th Cir. 1990).

[2] In distinguishing In re Resorts Int'l, I neither adopt nor reject the Third Circuit's rationale that creditors in that case no longer had a "close nexus" to the bankruptcy plan or proceeding simply because they had exchanged their status as creditors for a pro-rata share of the litigation trust's claims. *See* 372 F.3d at 169. Nor is it clear whether the Eleventh Circuit will adopt the "close nexus" test of the Third Circuit or some other standard, as some

provisions in one of its orders entered prior to the confirmation of the Plan. Therefore, even applying In re Resorts Int'l to pre-litigation investigative discovery, I conclude that this dispute meets the "close nexus" test. This Court has post-confirmation jurisdiction to enforce the subpoenas.

O R D E R

For that reason, and based on the rationale of the January 25, 2006, Order, IT IS THE ORDER OF THIS COURT that E&Y's motion for Rule 8005 relief is DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of March, 2006.

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circuits have done. *See* Id. at 166.