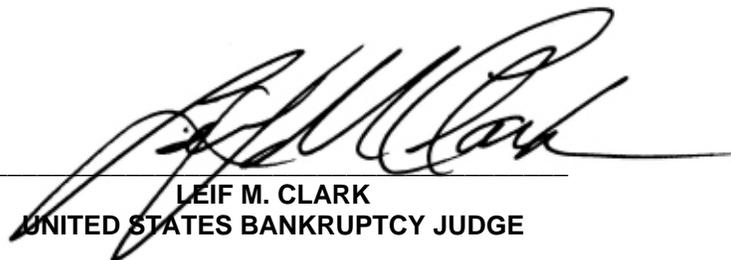


The motion for leave to obtain limited expedited discovery is moot, for the reasons stated. The motion for preservation order is denied, for the reasons stated.



SO ORDERED.

SIGNED this 16 day of February, 2006.


LEIF M. CLARK
UNITED STATES BANKRUPTCY JUDGE

United States Bankruptcy Court

Western District of Texas
San Antonio Division

IN RE
SCHLOTZSKY'S, INC., ET AL.
<i>DEBTORS</i>
OFFICIAL COMMITTEE OF UNSECURED CREDITORS
<i>PLAINTIFF</i>
v.
JOHN C. WOOLEY, JEFFREY J. WOOLEY, FLOOR MOUTHAN & RAYMOND A. RODRIGUEZ
<i>DEFENDANTS</i>

BANKR. CASE NO.
04-54504-C
(JOINTLY ADMINISTERED)
CHAPTER 11

ADV. No. 05-5055-C

DECISION AND ORDER ON MOTION FOR LEAVE TO OBTAIN LIMITED EXPEDITED DISCOVERY AND FOR PRESERVATION ORDER

CAME ON for consideration the foregoing matter. Defendants Wooleys seek leave to obtain limited expedited discovery and entry of a preservation order against a third party, Schlotzsky's, Ltd. A response was filed by Schlotzsky's, Ltd.

The motion of the defendants was filed approximately two weeks before the plaintiff filed its motion for partial summary judgment. The defendants, in January of this year, filed a motion to suspend the partial summary judgment (awaiting a ruling by this court on permitting limited discovery). They also filed a motion for extension of time to respond to the motion for summary judgment. In early February, the plaintiff and the defendants entered into a stipulation regarding the timing of filing responses to the motion for partial summary judgment. Days later, the clerk of court issued a scheduling order, setting deadlines for the completion of discovery and setting other dates for this case.

Once the scheduling order issued, the parties were free to commence discovery, without leave of court. The motion for leave to obtain limited expedited discovery has thus been rendered moot. *See* FED.R.CIV.P. 26(f), *see also* FED.R.BANKR.P. 7026. Furthermore, the motion to suspend hearing on the motion for partial summary judgment has also been rendered moot by both the issuance of the scheduling order and the parties' stipulation regarding response to the motion for partial summary judgment.¹

What remains for consideration is the motion seeking entry of a preservation order. The defendants cite no authority for the entry of such an order with regard to a non-party, nor do they allege that there is an immediate danger that certain evidence might be lost or destroyed or otherwise be placed beyond the reach of normal discovery. *See Capricorn Power, Inc. V. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433-34 (W.D.Pa. 2004) (discussing the standard for entry of such an order with respect to parties).² To the contrary, the defendants have failed to

¹ A separate order will be entered on that motion consistent with this ruling.

² The court discusses three relevant factors for entry of a preservation order: (1) the extent to which the court rightly fears that the evidence might be lost absent the entry of an order, (2) any irreparable harm that the entry of such an order might impose on the party against whom it is directed, and (3) the ability (and attendant costs) of preserving the evidence in a usable and accessible format. *Capricorn Power*, 220 F.R.D., at 433-34.

address their affirmative duty *not* to impose undue burden or expense on persons who are not parties but who might otherwise be subject to subpoena or other means of compelling production. *See* FED.R.CIV.P. 45(c)(1); *see also* FED.R.CIV.P. 34(c) (making Rule 45 the applicable device for obtaining materials and things from non-parties). Schlotsky's Ltd., in response to the motion, lays out in great detail the extent to which it has already afforded the defendants ready access to the materials and information in the possession of Schlotsky's Ltd. (as well as the extent to which the defendants have failed to take advantage of the opportunities to examine documents and other materials over the past six months).

The efforts of Schlotsky's Ltd. that have already been expended exceed its legal obligations under the federal rules. They also show that the defendants have already had ample opportunity to fully examine materials relevant to this case, such that they can not be heard now to complain if they have not *already* taken the necessary steps to copy whatever they think they might need. It is true that Schlotsky's Ltd. intends to move its headquarters operations, but the defendants cannot rationally maintain that Schlotsky's Ltd. has any duty to preserve materials, at its own cost, that have been available to defendants for many months already. They have no right whatsoever to insist that Schlotsky's Ltd. affirmatively *index* these materials, at its own cost, for the convenience of the defendants.

If the defendants want the materials preserved, they may make appropriate arrangements for their preservation at the *defendant's* cost. If they want the materials indexed for easy research and future access, they may make appropriate arrangements for that as well, at the defendant's cost. The court will not impose this cost on an innocent third party who has already gone well above the call of duty in accommodating these parties to date.

For these reasons, the motion for entry of a preservation order against Schlotsky's Ltd. is

denied.

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