

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

IN RE:) Chapter 11
)
EASTERN LIVESTOCK CO., LLC, et al.,¹) Case No. 10-93904-BHL-11
)
Debtor.) Hon. Basil H. Lorch III

MOTION FOR RULE 2004 EXAMINATIONS

James A. Knauer, Chapter 11 Trustee, by counsel, pursuant to Rule 2004(c) of the Federal Rules of Bankruptcy Procedure, respectfully moves the Court for an Order providing for the examinations of eleven (11) current and former employees of Fifth Third Bank, N.A. (the “Deponents”) on the following grounds:

I. JURISDICTION

1. This Court has jurisdiction of this proceeding under 28 U.S.C. §1334(a) and 157 (b), and this matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (O). Venue is proper in this district pursuant to 18 U.S.C. §1409(a).

2. The authority for the relief requested herein is Rule 2004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

II. FACTUAL BACKGROUND

3. Petitioning creditors commenced the above-captioned chapter 11 case (“Chapter 11 Case”) against Debtor on December 6, 2010 (“Petition Date”) by filing an involuntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (“Bankruptcy Code”). This Court entered its *Order For Relief In An Involuntary Case And Order To Complete Filing* [Docket #110] on December 28, 2010.

¹ The Debtor entities are Eastern Livestock Co., LLC and Okie Farms, L.L.C.

4. On December 27, 2010, the Court entered its *Order Approving The Appointment Of James A. Knauer As Chapter 11 Trustee* [Docket #102] ("Trustee Order"), approving the United States Trustee's *Notice Of Appointment And Application for Order Approving Appointment of Trustee* [Docket #98] pursuant to 11 U.S.C. § 1104.

5. This Court, by order dated February 1, 2011 [Docket #248], approved the Trustee's retention of Hoover Hull as special counsel to investigate claims against Fifth Third. Such claims may relate to the property and liabilities of the Debtors, may affect the administration of the estate, the source of money or property needed to consummate a plan, and other matters relevant to this case. Accordingly, the Trustee's investigation of claims against Fifth Third falls within the scope of Bankruptcy Rule 2004(b).

6. At a hearing on December 14, 2011, the Court instructed Special Counsel to provide the Court with a preliminary report on its investigation by March 13, 2012.

7. Pursuant to that charge, the undersigned counsel, by letter dated January 10, 2012, requested the availability of the following Fifth Third Bank employees for deposition:

Anne Kelly, Relationship Manager for Eastern Livestock;
Dave Fuller, Vice President, Structured Finance Group Team Lead, initial relationship manager for Eastern Livestock;
Lori Hart, Operations Manager, Structured Finance Group;
Timothy Spurlock, Investigator in the Bank Protection Department;
Sean Kelly, Field Exam Department;
Devon Morse, Investigator;
Sara Chapman;
Amber Whitehouse;
Shannon Hughes;
Patty Voss; and
Darren Steinmann.

A true and accurate copy of Special Counsel's January 10, 2012 letter is attached hereto as **Exhibit A**. Special Counsel requested deposition dates during the weeks of January 30, 2012, and February 14, 2012. *See Ex. A.*

8. Notwithstanding repeated calls requesting the witnesses' availability during the week of January 30, Mr. Britt, counsel for Fifth Third stated on January 25, 2012, no witnesses were available the week of January 30.

9. On January 26, 2012, Mr. Britt, in a telephone conversation, stated that the following Fifth Third witnesses are available on the following dates:

Darren Steinmann, February 14, 2012;
Anne Kelly, February 14 or 15, 2012,
David Fuller, February 14 or 15, 2012,
Lori Hart, February 14 or 15, 2012;
Amber Whitehouse, the morning of February 22, 2012;
Timothy Spurlock, February 21 or 22, 2012; and
Shannon Hughes, February 21 or 22, 2012.

Mr. Britt further stated he would confirm the availability of the remaining witnesses and provide those dates by letter.

10. In a call later that day regarding whether Vorys, Sater, Seymour and Pease LLP, (who is also counsel for Fifth Third) would accept service of a subpoena for Wayne Stoffel, Stoffel Consulting Services, Inc. and Agribusiness Consulting Group, LLC, (who conducted field audits of Eastern Livestock in May and October 2010), Messrs. Richardson and Britt, counsel for Fifth Third, raised, for the first time, whether the Trustee would notice the depositions of the Deponents in the bankruptcy case and also in each pending adversary proceeding. Since the Court requested a preliminary report by March 13, the undersigned counsel stated his initial reaction was to only notice the depositions of the Deponents in the bankruptcy case to avoid delaying the depositions.

11. On January 30, 2012, counsel for Fifth Third by e-mail asked the undersigned if the Trustee would notice the depositions in each adversary as well as the bankruptcy case.

12. By letter dated February 1, 2012, the undersigned counsel again asked counsel for Fifth Third Bank to confirm the availability of the Fifth Third Bank employees for deposition. A true and accurate copy of Special Counsel's February 1, 2012 letter is attached hereto as **Exhibit B**.

13. On February 2 and 3, the undersigned counsel left voicemails for Kent Britt and David Hine, counsel for Fifth Third requesting them to call him regarding the depositions. Had counsel for Fifth Third returned the calls from undersigned counsel, they would have learned that the Trustee had agreed to conduct the depositions in both the bankruptcy case and in each adversary proceeding as requested.

14. Fifth Third, without making any attempt to have a discovery conference required by S.D. Ind. L.R. 37.1 (made applicable hereto by S.D. Ind. B-9014), and contrary to the discovery protocols ordered in this case, filed a Motion to Limit Discovery or Alternatively, for Protective Order on February 3, 2012 (the "Discovery Motion"). In the Discovery Motion, Fifth Third seeks a protective order to have the depositions of the Deponents noticed in the bankruptcy case and each adversary proceeding. Fifth Third further seeks to limit the depositions of each witness by all attending counsel to one business day of seven hours, relief which was never informally requested prior to the Discovery Motion.

15. By letter dated February 6, 2012, Trustee counsel notified Fifth Third of its agreement with Fifth Third's request to proceed with noticing the depositions in the bankruptcy and each of the adversary proceedings. A true and accurate copy of Special Counsel's February 6, 2012 letter is attached hereto as **Exhibit C**. The Trustee's counsel further informed Fifth Third it would proceed with the following schedule to depose certain Fifth Third Bank employees in accordance with the bank's proposed schedule:

Darren Steinmann, February 14, 2012;
Anne Kelly, February 14 or 15, 2012,
David Fuller, February 14 or 15, 2012,
Lori Hart, February 14 or 15, 2012;
Amber Whitehouse, the morning of February 22, 2012;
Timothy Spurlock, February 21 or 22, 2012; and
Shannon Hughes, February 21 or 22, 2012.

Id. Undersigned counsel for the Trustee also stated his intention to formally notice the depositions of the remaining Deponents if Fifth Third did not provide convenient dates for their depositions by Wednesday, January 8, 2012. *Id.*

16. On February 7, Fifth Third, by counsel, offered to withdraw its Discovery Motion only if all parties to this bankruptcy proceeding will stipulate that Fifth Third's witnesses will only be subjected to one seven (7) hour deposition of each witness by all counsel. A true and accurate copy of the February 7, 2012 e-mail from counsel for Fifth Third is attached hereto as

Exhibit D. In response, the undersigned counsel replied:

As stated, the Trustee has no objection to the depositions being noticed in the bankruptcy case and the adversary proceedings. However, we cannot agree to a limit of one deposition of seven hours. It is unreasonable to agree in advance to a seven hour time limit that restricts all parties and requires complete coordination among them for the limited time. As special counsel we would go first and make every effort to make the deposition efficient. I am certain that other counsel would agree to make similar representations. But as Dan and others have pointed out, it is premature to agree in the abstract that everyone will be able to complete all of their questions in seven hours. Moreover, we do not have a complete production of documents from Fifth Third. Finally, Fifth Third did not even raise this issue until you after informed us that its employees were unavailable the week of Jan. 31. We need to get these depositions scheduled so that we can complete our investigation.

See Ex. D.

17. In the course of the February 7 call, Eric Richardson and Kent Britt, counsel for Fifth Third stated that Fifth Third will not produce any witnesses until the Court rules on its Discovery Motion. Counsel for Fifth Third refused to identify whether any of the Deponents are

available to be deposed the weeks of February 14, and 20, 2012, notwithstanding their prior representations on January 26, 2012.

III. RELIEF REQUESTED

18. The Trustee requests the Court to enter an Order authorizing the Trustee to take the depositions of Fifth Third's current and former employees as follows:

Darren Steinmann	February 14, 2012
Lori Hart	February 14 or 15, 2012
Anne Kelly	February 14 or 15, 2012
David Fuller	February 16, 2012
Sean Kelly	February 17, 2012
Timothy Spurlock	February 21 or 22, 2012
Shannon Hughes	February 21 or 22, 2012
Amber Whitehouse	February 22, 2012
Devon Morse	February 23 or 24, 2012
Patty Voss	February 24, 2012
Sara Chapman	February 24, 2012

WHEREFORE, the Trustee respectfully requests that the Court enter an Order authorizing the Rule 2004 examinations of the Deponents from day to day until completed and to direct that these depositions take place at the offices of Vorys Sater Seymour and Pease LLP, 221 East Fourth St., Suite 2000, Atrium Two, Cincinnati, OH 45202 on the dates set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2012, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

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