

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

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

LIMITED OBJECTION OF FIFTH THIRD BANK, N.A. TO FIRST BANK AND TRUST COMPANY’S MOTION FOR EXTENSION OF TIME AND FOR CLARIFICATION OF DEPOSITION DISCOVERY PROTOCOL

Fifth Third Bank, N.A. (“Fifth Third”), by and through undersigned counsel, hereby files its Limited Objection to the Motion for Extension of Time and for Clarification of Deposition Discovery Protocol filed by First Bank and Trust Company (“First Bank”), Docket Number 1126 (the “Motion”)¹. In support of its Limited Objection, Fifth Third respectfully states as follows:

I. Discovery against Fifth Third has no bearing on the PSA Issue.

As an initial matter, First Bank states that it is unable to comply with this Court’s order of February 10, 2012², on the issue of Eastern Livestock’s classification under the Packers and Stockyards Act as to any one particular transaction (the “PSA Issue”)³. First Bank states that it is unable to comply with the May 10, 2012 deadline, as (a) Special Counsel has not concluded its investigation of Fifth Third, and (b) no discovery protocol with Fifth Third is presently in place. Neither asserted rationale has merit.

Fifth Third notes that discovery taken of *Fifth Third* has no bearing on the PSA Issue – i.e., whether and in what capacity Eastern Livestock acted in transactions vis a vis third parties.

¹ Fifth Third notes that the Motion was originally filed as a “Notice of Motion” on April 11, 2012 at Docket Number 1124. All references to the Motion should be construed to include the “Notice of Motion” to the extent necessary.

² Such order provided parties in interest 90 days (through and including May 10, 2012) to submit designations of evidence and complete additional briefing on the PSA Issue.

³ First Bank’s position is curious, as First Bank neither conducted *any* transactions with Eastern Livestock, nor filed a brief on the PSA Issue in the Friona Adversary (11-ap-59093), where the PSA Issue arose.

Whether Eastern Livestock acted as a market agency *selling* on commission (thus triggering trust obligations under the PSA) is *not* dependent upon actions of Eastern Livestock's lender, but rather the facts of *each specific transaction* engaged in by Eastern Livestock with such third party. As Fifth Third was not a party to those specific transactions, Fifth Third is not (and would not reasonably be expected to be) in possession of records relating to such transactions. These records are more appropriately found with Eastern Livestock, as well as the internal records of the counterparties to such transactions. Accordingly, the status of written discovery against Fifth Third is irrelevant to First Bank's (or any other party in interest's⁴) briefing of the PSA Issue. Similarly, deposition testimony by Fifth Third witnesses regarding transactions in which Fifth Third was not a party would not be relevant.

II. Fifth Third does not oppose a modest additional extension with respect to the PSA Issue; such extension should not, however, be tied to the unrelated discovery against Fifth Third.

To the extent First Bank and any other party believes additional time is needed to appropriately respond to this Court's February 10, 2012 Order, Fifth Third would not oppose an extension of the May 10, 2012 deadline for an additional sixty days - through and including July 10, 2012. Fifth Third proposes these dates certain so as to avoid indefinitely staying the PSA Issue artificially, pending resolution of the unrelated discovery issues specific to Fifth Third.

III. First Bank's second request for clarification as to the discovery protocol is both misleading and in error.

First Bank mistakenly continues to conflate the "discovery protocol" with the examination process commenced by Special Counsel in accordance with Fed. R. Bankr. Proc.

⁴ Both CPC (11-59093, Docket No. 421) and Cattle Producers (11-59093, Docket No. 422) have requested a 90 day extension of the PSA Issue deadline, ostensibly to permit Special Counsel to complete its investigation as to Fifth Third. Fifth Third reiterates that Fifth Third's actions are irrelevant to how Eastern Livestock acted with respect to any individual transaction is, as Fifth Third was never a party to any such transaction. Fifth Third objects to both CPC and Cattle Producers' requests for extension to the extent that such requests are improperly tied to Special Counsel's independent investigation of Fifth Third. Fifth Third does not oppose a sixty day extension of the PSA Issue deadline, as noted herein above.

2004 (the “Rule 2004 Procedures”). At the February Omnibus Hearing, this Court directed counsel for First Bank to circulate and negotiate a deposition discovery protocol with the intent of streamlining discovery in the main case and all related adversary proceedings. Also at the February Omnibus Hearing, this Court approved Special Counsel’s *separate* request to take examinations of Fifth Third pursuant to Rule 2004. Parties in interest, including First Bank, were expressly prohibited from actively participating in the 2004 examinations, being permitted to observe on a limited basis and participate only if and to the extent Special Counsel chose to cede its examination abilities to such observing parties.

Notwithstanding the clear separation between Special Counsel’s independent requests for 2004 examinations and this Court’s directive to circulate a comprehensive discovery protocol applicable to the adversary proceedings (“phase two discovery”), First Bank circulated a protocol which addresses *only* the 2004 examinations conducted by Special Counsel (the “Rule 2004 Draft”). Fifth Third expressly objected to the Rule 2004 Draft – Fifth Third explicitly informed Special Counsel that the protocol circulated by First Bank addressed the *wrong issues*.

Fifth Third’s objection resulted in a telephonic conference before this Court on February 22, 2012. The sole purpose of this conference was to clarify whether First Bank was to circulate a protocol addressing the 2004 examinations or addressing phase two discovery. This Court specifically noted that the discovery protocol was to address the phase two discovery – not Special Counsel’s pending 2004 examinations. See, Minute Entry/Order attached hereto as Exhibit A (noting “parties to negotiate protocol for *future depositions*” – not 2004 examinations).

On April 10, 2012, counsel for Fifth Third inquired of counsel to First Bank whether an updated draft of the discovery protocol was available. Counsel for First Bank responded the afternoon of April 10 by providing a copy of the Rule 2004 Draft circulated for comment in

February⁵. On April 11, 2012, First Bank filed the Motion. First Bank has yet to provide a draft of a discovery protocol addressing phase two discovery.

Fifth Third is ready, willing and able to provide comments to a draft discovery protocol which addresses phase two discovery in accordance with this Court's directive, issued February 13, 2012 and reiterated with this Court's telephonic clarification of February 22, 2012.

WHEREFORE, for the foregoing reasons, Fifth Third respectfully requests that this Court (a) deny the relief sought in First Bank's Motion; (b) direct First Bank to draft and deliver a protocol addressing "phase two discovery" for negotiation by and among parties in interest; and (c) granting such other and further relief as is just and proper.

Respectfully submitted,

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⁵ The only changes to the Rule 2004 Draft between February and April 10 were to incorporate the minor comments of Special Counsel, which Special Counsel made *prior* to the February 22, 2012 telephonic hearing.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2012, a copy of the foregoing *Limited Objection of Fifth Third Bank, N.A. to First Bank and Trust Company's Motion for Extension and for Clarification of Deposition Discovery Protocol* was served electronically through the Court's CM/ECF System to the following parties who are listed within the Court's Electronic Mail Notice System:

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