

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

In re:	:	Chapter 11
EASTERN LIVESTOCK CO., LLC,	:	Case No.: 10-93904-BHL-11
	:	
Debtor.	:	Hon. Basil H. Lorch III

**FIFTH THIRD BANK’S RESPONSE TO FLORIDA CREDITORS’ MOTION TO SEAL
REPLY TO TRUSTEE RESPONSE AND NOTICE OF FILING EVIDENTIARY
MATERIALS IN SUPPORT OF FLORIDA CREDITORS’ RULE 7042 MOTION TO
CONSOLIDATE AND FOR EXPEDITED HEARING**

Fifth Third Bank, N.A. (“Fifth Third”), by and through undersigned counsel, hereby responds to Defendants Hilliard-McKetrick Investments, Inc. d/b/a Arcadia Stockyard, Cattlemen’s Livestock Market, Inc., Columbia Livestock Market, Inc., Hardee Livestock Market, Inc., North Florida Livestock Market, Inc., Ocala Livestock Market, Inc., Okeechobee Livestock Market, Inc., Sumter County Farmers Market Inc., Madison County Livestock Market, Inc. d/b/a Townsend Livestock Market, Ron Sizemore Trucking, Inc., Oak Lake Cattle Co., Eagle Bay, Inc., and Daniel M. Byrd’s (collectively “Florida Creditors”) Motion to Seal Reply to Trustee’s Response and Notice of Filing Evidentiary Materials in Support of Florida Creditors’ Rule 7042 Motion to Consolidate and for Expedited Hearing (the “Motion”) [Doc. 1027]. Fifth Third agrees that confidential materials must be filed under seal in accordance with the Stipulated Confidentiality Agreement (the “Confidentiality Agreement”) [Doc. 722]. Fifth Third is, however, compelled to address Florida Creditors’ off the cuff comments questioning the appropriateness of the confidential designation of documents produced by Fifth Third. In support of its response, Fifth Third respectfully states as follows:

1. The Confidentiality Agreement defines the term “Confidential Material” to include “any trade secret or other confidential research, development agreement, financial information or commercial document, information or other material as used in Rules 26(c)(1)(g) and 45(c)(3)(B)(i) of the Federal Rules of Civil Procedure.” (Confidentiality Agreement, ¶ 1). It then states that all materials received by a Receiving Party that are designated as “Confidential” by a Disclosing Party are subject to restrictions on such information’s use. Specifically, “[i]n *consideration of the disclosure of Confidential Material*,” Receiving Parties are required to “hold the Confidential Material in trust and confidence and shall refrain from making such information available to others.” (Confidentiality Agreement, ¶ 5 (emphasis added)). Further, parties to the Confidentiality Agreement may use “Confidential Material in support of any pleading filed with the Court, *but such pleadings, as well as the Confidential Material, shall be filed under seal.*” (Confidentiality Agreement, ¶ 11 (emphasis added)).

2. The documents identified by Florida Creditors’ Motion—Exhibits F, G, H, and K of Florida Creditors’ Reply to Trustee Response and Notice of Filing Evidentiary Materials in Support of Florida Creditors’ Rule 7042 Motion to Consolidate—fall squarely within the definition of Confidential Material. They include: (1) two internal reports from Fifth Third’s Field Exam Division, each revealing trade secrets regarding the procedures Fifth Third uses to conduct field exams of its commercial loan recipients, such as specific tests performed by Fifth Third in auditing a customer, particular samples chosen for investigation, and how the bank chooses to treat different categories of funds in evaluating a customer’s compliance with loan terms; (2) one internal Request for Credit Commitment, disclosing Fifth Third’s confidential business practices used in evaluating whether or not to extend credit to a customer, including loan terms, amortization periods, fees, interest rates, internal credit ratings, guarantor

requirements, detailed financial information relied upon in making a credit request, underwriting exceptions, collateral analysis, and Fifth Third's internal analysis of the cattle industry; and (3) an internal email with Fifth Third's commercial field examiner, discussing the procedures of Fifth Third's Field Exam Division and commercial lending practices. All four of these documents reveal Fifth Third's proprietary business information, and thus, are Confidential Materials under the Confidentiality Agreement.

3. The Florida Creditors offer no explanation as to why these materials should be made matters of public record rather than being filed under seal pursuant to the agreed terms of the Confidentiality Agreement. Additionally, the Florida Creditors have failed to follow the guidelines for challenging a Confidential designation provided in the Confidentiality Agreement. In particular, Paragraph 8 states, "[w]ithin 20 days of receipt of materials designated as 'Confidential,' the Receiving Party may apply to the Court for a ruling to determine whether a document designated as such is entitled to such status and protection." Fifth Third is not aware of any application made by the Florida Creditors for a court ruling on the confidentiality of these documents within the 20 day period. As such, the Florida Creditors' roundabout challenge of the confidentiality of Fifth Third's documents is not only inappropriate and unfounded, it is also untimely.

4. Thus, while Fifth Third does not oppose the Florida Creditor's Motion insofar as it seeks to seal a brief that incorporates Confidential Material, Fifth Third does ask that the Court ignore the Florida Creditor's improper petition to challenge the confidentiality of Fifth Third's documents as it is unfounded, untimely, and improperly before the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2012, a copy of the foregoing *Response to Florida Creditors' Motion to Seal Reply to Trustee Response and Notice of Filing Evidentiary Materials in Support of Florida Creditors' Rule 7042 Motion to Consolidate and for Expedited Hearing* was filed and served electronically through the Court's CM/ECF System to the following parties who are listed on the Court's Electronic Mail Notice List:

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