

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

IN RE: . Case No. 10-93904-BHL-11  
. .  
EASTERN LIVESTOCK CO., LLC, . 110 U.S. Courthouse  
. 121 West Spring Street  
. New Albany, IN 47150  
. .  
Debtor. . June 11, 2012  
. . . . . 9:03 a.m.

TRANSCRIPT OF TELEPHONIC HEARING  
BEFORE HONORABLE BASIL H. LORCH, III  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For Your Community Bank: Reed, Weitkamp, Schell & Vice, PLLC  
By: MICHAEL WAYNE OYLER, ESQ.  
500 West Jefferson Street, Suite 2400  
Louisville, KY 40202

For Superior Livestock Auction: Rubin & Levin, P.C.  
By: JOHN M. ROGERS, ESQ.  
ELLIOTT D. LEVIN, ESQ.  
CHRISTOPHER M. TRAPP, ESQ.  
342 Massachusetts Avenue, Suite 500  
Indianapolis, IN 46204

For James A. Knauer: Faegre, Baker, Daniels, LLP  
By: KEVIN M. TONER, ESQ.  
SARAH BOWERS, ESQ.  
300 N. Meridian Street, Suite 2700  
Indianapolis, IN 46204

Audio Operator: Amy Massey

Proceedings recorded by electronic sound recording, transcript  
produced by transcription service

---

J&J COURT TRANSCRIBERS, INC.  
268 Evergreen Avenue  
Hamilton, New Jersey 08619  
E-mail: jjcourt@jjcourt.com

(609) 586-2311 Fax No. (609) 587-3599

APPEARANCES (Cont'd):

For Fifth Third Bank: Vorys, Sater, Seymour and Pease, LLP  
By: RANDALL D. LaTOUR, ESQ.  
MELISSA S. GIBERSON, ESQ.  
52 East Gay Street  
Columbus, OH 43216

Vorys, Sater, Seymour and Pease, LLP  
By: ERIC W. RICHARDSON, ESQ.  
301 East Fourth Street, Suite 3500  
Great American Tower  
Cincinnati, OH 45202

For Superior Livestock,  
et al: Greenebaum, Doll & McDonald  
By: JOHN W. AMES, ESQ.  
C.R. BOWLES, JR., ESQ.  
CHRISTIE A. MOORE, ESQ.  
3500 National City Tower  
101 South Fifth Street  
Louisville, KY 40202

For First Bank & Trust: Faruki, Ireland & Cox, P.L.L.  
By: DANIEL J. DONNELLON, ESQ.  
201 East Fifth Street, Suite 1420  
Cincinnati, OH 45202

TELEPHONIC APPEARANCES:

For First Bank & Trust: Faruki, Ireland & Cox, P.L.L.  
By: STEVEN A. WEIGAND, ESQ.  
201 East Fifth Street, Suite 1420  
Cincinnati, OH 45202

For the U.S. Trustee: Office of the U.S. Trustee  
By: CHARLES R. WHARTON, ESQ.  
101 West Ohio Street, Suite 1000  
Indianapolis, IN 46204

For Arcadia, et al: W. Scott Newbern, P.L.  
By: WALTER SCOTT NEWBERN, III, ESQ.  
2982 East Gevemy  
Tallahassee, FL 32309

For Alton Darnell, et  
al: DelCotto Law Group, PLLC  
By: AMELIA MARTIN ADAMS, ESQ.  
200 North Upper Street  
Lexington, KY 40507

TELEPHONIC APPEARANCES (Cont'd):

For Friona: Sprouse, Shrader, Smith, PC  
By: JOHN FREDERICK MASSOUH, ESQ.  
701 South Taylor, Suite 500  
Amarillo, TX 79101

For First Bank & Trust: Ayres, Carr & Sullivan, P.C.  
By: JOHN R. CARR, III, ESQ.  
BRET S. CLEMENT, ESQ.  
251 East Ohio Street, Suite 500  
Indianapolis, IN 46204

For CPC Livestock: Snell & Wilmer, LLP  
By: JESSICA E. YATES, ESQ.  
1200 Seventeenth St., Suite 1900  
Denver, CO 80202

For J&F Oklahoma Holdings, Inc.: Naman, Howell, Smith & Lee, PLLC  
By: DAVID L. LeBAS, ESQ.  
8310 N. Capital of Texas Highway  
Suite 490  
Austin, TX 78731

For James A. Knauer: Kroger Gardis & Regas, LLP  
By: JAMES A. KNAUER, ESQ.  
JAY P. KENNEDY, ESQ.  
111 Monument Circle, Suite 900  
Indianapolis, IN 46204

For Allen Barry: By: DAVID A. SMITH, ESQ.

For Peoples Bank: Moyer White, LLP  
By: DAVID A. LAIRD, ESQ.  
16 Market Square, 6th Floor  
1400 16th Street  
Denver, CO 80202

For Bynum Ranch Group: Easterwood, Boyd & Simmons, PC  
By: JAMES BRYAN JOHNSTON, ESQ.  
623 N. Main Street  
Hereford, TX 79045

For Cactus Growers: Lovell, Lovell, Newsom & Isern, LLP  
By: JOHN LOVELL, ESQ.  
112 W. 8th Avenue, Suite 1000  
Amarillo, TX 79101  
  
By: SEARCY PEOPLES, ESQ.

TELEPHONIC APPEARANCES (Cont'd):

For CPC Livestock:           Polsinelli Shughart  
                                  By: ROBERT J. SELSOR, ESQ.  
                                  100 S. Fourth Street, Suite 1000  
                                  St. Louis, MO 63102

- - -

1 THE COURT: All right. We're on the record in  
2 Eastern Livestock. I have already been given a list of the  
3 attorneys who are appearing by phone. I would just ask that if  
4 you do speak that you identify yourself and of course keep us  
5 on mute and don't put us on hold. I would ask the attorneys in  
6 the courtroom to state the appearances for the record, please.

7 MR. TONER: Good morning, Your Honor, Kevin Toner  
8 from Faegre, Baker, Daniels here for James Knauer, the Eastern  
9 Trustee. Also with me today is Sarah Bowers, a summer  
10 associate in our Indianapolis office.

11 MR. LaTOUR: Good morning, Your Honor, Randall LaTour  
12 and Eric Richardson from Vorys, Sater, Seymour and Pease on  
13 behalf of Fifth Third Bank. With me in the courtroom is my  
14 associate Melissa Giberson.

15 MR. DONNELLON: Good morning, Your Honor, Dan  
16 Donnellon of Faruki, Ireland & Cox here for First Bank & Trust.  
17 I believe Steve Weigand is also on the telephone for First  
18 Bank.

19 MR. ROGERS: On behalf of Superior Livestock Auction  
20 with Rubin & Levin, John Rogers, Elliott Levin and Chris Trapp.

21 MR. AMES: Your Honor, John Ames, Chip Bowles, and  
22 Christie Moore of Bingham, Greenebaum, Doll & McDonald on  
23 behalf of Superior Livestock, Joplin and several others listed  
24 in our 9,019 disclosures or about 16 disclosures.

25 UNIDENTIFIED SPEAKER: Now Bingham, Greenebaum, Doll,

1 Your Honor.

2 (Laughter)

3 THE COURT: I'm glad you finally figured that out.

4 UNIDENTIFIED SPEAKER: He's even got the new  
5 briefcase.

6 THE COURT: All right.

7 MR. OYLER: Judge, I'm sorry I skipped. It's Mike  
8 Oyler for Your Community Bank.

9 THE COURT: And you don't have two other lawyers with  
10 you?

11 MR. OYLER: No, I'm by myself.

12 THE COURT: All right.

13 MR. OYLER: I can call some in if you need me to.

14 THE COURT: All right. I'm looking at the proposed  
15 agenda. We'll work our way through that.

16 MR. TONER: If I may, Your Honor, we tried a new  
17 format which I think does a better job of letting the Court  
18 know the status of things, but perhaps a poorer job letting the  
19 Court know exactly what needs to be dealt with in court today.

20 By my calculation, the only things we need to do are  
21 to talk about initial pretrial discussions in the new accounts  
22 receivable cases, there are a half a dozen of those starting on  
23 Page 3, and the other would be the confidentiality order.  
24 Preliminary hearing has been noticed on that. I don't know  
25 which you'd like to address first.

1 THE COURT: Let's do the --

2 (Attorney joining conference call)

3 THE COURT: Let's talk about the accounts receivable  
4 litigation, that should be fairly easy and maybe we can let  
5 some of the lawyers that are on the phone get off the phone.

6 MR. TONER: These are --

7 (Attorney joining conference call)

8 MR. TONER: -- newly filed adversary proceedings to  
9 collect certain accounts of the debtor. I think Jay Kennedy  
10 may be on the telephone from Mr. Knauer's office and he is the  
11 attorney of record in those cases for the Trustee. Jay, are  
12 you there?

13 THE COURT: Mr. Kennedy, are you there?

14 MR. KENNEDY: Yes, Your Honor, I'm sorry, this is  
15 Jay.

16 THE COURT: All right. You want to take me through  
17 the accounts receivable litigation?

18 MR. KENNEDY: Well, Your Honor, we are anticipating  
19 two items. First of all, the (indiscernible) litigation and  
20 second the note litigation. My understanding, Faegre & Daniels  
21 is handling most of the receivables litigation.

22 THE COURT: All right. Well, let's specifically talk  
23 about -- I don't know what these are by the caption. The  
24 Schroeder Feeders Starter Yard, is that one that you're  
25 handling, Mr. Kennedy?

1 MR. KENNEDY: No, Your Honor, I believe that's Faegre  
2 & Daniels.

3 MR. TONER: All right.

4 THE COURT: All right.

5 MR. TONER: Confusion in the wiring. My  
6 understanding is that these have just started and folks have  
7 started appearing and attorneys are preparing their initial  
8 case management plans to present to the Court.

9 Some matters have disappeared as quickly as they were  
10 launched with settlement discussions getting under way. But I  
11 will have to confess that I am not the attorney in the office  
12 who has actually appeared in those adversary proceedings,, as  
13 you can tell.

14 THE COURT: I kind of already surmised that. All  
15 right. Well, then, as to the matters listed on Page 3 of the  
16 agenda entitled accounts receivable litigation, that's the  
17 Schroeder Feeders, the Demaio Farms -

18 (Attorney joining conference call)

19 THE COURT: -- Allen Barry, Kenny Ogden, and Pesetsky  
20 Land and Cattle, as to those matters the Court's inclination is  
21 to continue those to the next omnibus date which would be on  
22 August the 20th at 10 a.m. and that I'll be looking for the  
23 parties to submit some scheduling orders and preliminary  
24 discussions to have taken place. Are there any attorneys that  
25 are appearing in any of those matters that would like to have



1 some input here this morning?

2 MR. TONER: Just so the record's clear, Your Honor,  
3 there is one other matter in that category that's on the top of  
4 Page 4.

5 THE COURT: Oh, yes.

6 MR. TONER: With Ron Shephard.

7 THE COURT: Yes. All right. So, as to those  
8 matters, we'll show them continued to the August 20th omnibus  
9 date at 10 a.m. and we'll hopefully know what's going on with  
10 those lawsuits at that time.

11 MR. TONER: While we're on Page 4 in the matter of In  
12 Re East/West Trucking, I'm informed now that that matter has  
13 been completely settled and we're waiting for the sufficient  
14 period of time to run to --

15 THE COURT: Yes, I saw that.

16 MR. TONER: -- to wrap that up.

17 THE COURT: That is out on notice I believe.

18 MR. TONER: With that, I think we're back to the  
19 confidentiality order. I understand that Fifth Third has a  
20 preliminary question that they wanted to raise with the Court  
21 on that.

22 THE COURT: What is -- is there anybody on here in  
23 Thomas and Patsy Gibson? Are either the Gibson lawyers or the  
24 Trustee in Gibson on?

25

1 (No audible response)

2 THE COURT: Probably not, there was nothing really  
3 scheduled. I was just a little curious about some of the  
4 developments in Kentucky that I have seen in some of the  
5 pleadings. I'm sure some of you are up to speed on that also.  
6 All right. Yes, Mr. Toner, what were you saying?

7 MR. TONER: The next item I guess would be back on  
8 Page 1, the confidentiality order and related matters set for  
9 preliminary hearing. I'm told by counsel for Fifth Third that  
10 they had a preliminary question they wanted to raise with Your  
11 Honor first.

12 THE COURT: All right. Yes, Mr. LaTour?

13 MR. LaTOUR: Good morning, Your Honor, Randall LaTour  
14 from Fifth Third Bank. I apologize for my scratchy throat, I'm  
15 fighting a summer cold.

16 Your Honor, I would like the Court to consider before  
17 we get into the merits of these issues, whether the matter is  
18 ripe for determination today and the manner in which it is to  
19 be determined. I think there are five reasons why it is not  
20 ripe for determination today and should not be considered in  
21 this particular environment.

22 Number one, Paragraph 8 of the confidentiality  
23 agreement that was incorporated into an order by this Court  
24 requires that notice of documents that seek to be designated as  
25 no longer confidential has to be given to Fifth Third Bank.

1 Fifth Third Bank is to be afforded an opportunity to respond to  
2 that and until and unless either the parties agree or the Court  
3 orders that they are no longer designated, they are to remain  
4 confidential. So this procedure is -- or not this procedure,  
5 but the motion currently before the Court is not ripe because  
6 that procedure has not been complied with.

7           Number two, Fifth Third Bank needs more than two  
8 business days to brief the issues involved in this that are  
9 much more involved than were presented in the initial motion.  
10 Today, for example, at 9:00 which was about an hour and 15  
11 minutes ago, another pleading was filed called objection of  
12 First Bank and Trust to Fifth Third's motion to seal exhibits  
13 that Fifth Third had appended to its own motion for contempt.  
14 The motion for contempt is premised upon the premature release  
15 of confidential information.

16           All three of these items are facets of the same  
17 issue. Whether the documents are to be de-designated, what the  
18 consequences of a premature release of the information is, and  
19 whether or not these documents should be submitted under seal  
20 today.

21           There is extensive citations to authority in the  
22 document that was filed a little more than an hour ago. Fifth  
23 Third Bank is entitled by rule and by common sense to an  
24 opportunity to present in its briefing the law and argument  
25 supporting Fifth Third's position with respect to all of these

1 issues, with respect to whether the document should be  
2 de-designated as confidential, with respect to the issues  
3 raised in the motion for contempt, and with respect to the  
4 issues raised in this motion to seal.

5           Number three, the proceeding to consider those issues  
6 needs to be conducted in an in camera presentation. Fifth  
7 Third Bank in order to explain to the Court its position needs  
8 to talk about matters that it is maintaining must remain  
9 confidential. We can hardly do so in a public forum.

10           And until the Court determines that these items  
11 should not be confidential, the existing confidentiality should  
12 be maintained. And we ought to be able to present our law and  
13 our argument without being concerned that we are contributing  
14 to the very problem that we are trying to prevent, which is the  
15 misuse of the information.

16           Number four, this is a discussion about evidence. It  
17 is about initially 54 exhibits that were attached to First  
18 Bank's motion to de-designate. Now, that list has apparently  
19 expanded because additional documents have been referred to in  
20 the pleading that was mentioned today or filed today as  
21 objection to Fifth Third's motion to seal its own exhibits.

22           So, until we have an understanding of what documents  
23 are at issue, until we have an opportunity to examine for  
24 ourselves what is going on with those documents so that we can  
25 prepare an adequate argument to the Court, the Court can hardly

1 be expected to make a cogent ruling with respect to what the  
2 documents are about, whether they're confidential or not.

3           And finally, Your Honor, as I mentioned a moment ago,  
4 there are matters that relate to this motion to de-designate.  
5 There is the motion for contempt filed by Fifth Third which I  
6 assume First Bank is going to want to brief. There is the  
7 objection to Fifth Third's own motion to seal its own exhibits  
8 which has raised several pages of authority that Fifth Third  
9 would like the opportunity to brief.

10           I believe, Your Honor, that the appropriate response  
11 to this would be to allow briefing in accordance with the rules  
12 on the pleadings and let the parties brief these issues so that  
13 we could present an in camera presentation of the issues, show  
14 you exactly the documents that are at issue so that you can  
15 make an informed decision about whether or not the various  
16 positions of the parties have merit.

17           So, I think that as far as today goes, we should  
18 stop, the briefing should be allowed to finish in its ordinary  
19 course, and then a timely hearing set after the briefing is  
20 concluded.

21           MR. DONNELLON: Good morning, Your Honor, Dan  
22 Donnellon on behalf of First Bank. I'm going to try to address  
23 that, I thought it was supposed to be a threshold question, but  
24 I think I'm going to break it down into different parts is that  
25 there are really three matters that are within the realm of the

1 protective order issue as described on the docket.

2           The one is the motion for contempt which we certainly  
3 will want to brief and have a scheduled hearing on. There are  
4 questions whether under bankruptcy procedure and under Seventh  
5 Circuit law that has to be served with summons, it's a  
6 quasi-criminal proceeding, there is clear and convincing  
7 evidence, there are numerous other issues that we'll need to  
8 attach to the motion for contempt.

9           So, to put the brakes on that, I would suggest it  
10 could be sua sponte dismissed on a plain reading of it. But in  
11 order to schedule a full hearing so that both parties have the  
12 opportunity to be heard, I don't have any problem with that.

13           That relates also to this motion to seal. On the one  
14 hand, Fifth Third wants to hold First Bank, myself, and Mr.  
15 Weigand in contempt of court, but on the other hand does not  
16 want to show the public or even the alleged contemnors what the  
17 documents are that are allegedly subject to the confidentiality  
18 issue. They have not even identified what it is about the  
19 documents in question that are supposed to be some trade  
20 secret.

21           The reason we filed a brief, admittedly at the last  
22 minute, is this motion to seal came up just at the end of last  
23 week and we think before there is any procedure at all to  
24 address whether documents are filed under seal, the Court needs  
25 to be cognizant of the laundry list of Seventh Circuit

1 authority that simply says stamping a document confidential,  
2 even if we were to agree with Fifth Third it should be  
3 confidential, doesn't answer the question. Your Honor has to  
4 make the determination of whether Fifth Third has proven that  
5 the information that's contained in this -- these documents or  
6 testimony is, in fact, a trade secret of this bank that is  
7 deserving of protection.

8           And that leads me to the third issue of the three  
9 that we have in the -- Mr. LaTour's threshold question, and  
10 that is our motion to release from the strictures of the  
11 protective order the documents released into the public domain  
12 by the Metcalfe Circuit Court.

13           I would submit that Mr. LaTour is correct that if we  
14 were to challenge the confidential designation of particular  
15 documents saying that Document 023589 should not be viewed  
16 confidential, we can give notice of Fifth Third, they can come  
17 back and tell us what it is that's supposed to be confidential,  
18 and we can proceed in that fashion, similar to what Mr. Newbern  
19 did with the documents that are submitted in camera.

20           This is quite different. This is not an issue of us  
21 asking Fifth Third what is it that's confidential about that  
22 document. The fact of the matter is, back to the 1970s, the  
23 United States Supreme Court in the Cox Communication's case  
24 said that it cannot be a trade secret if it's released into the  
25 public domain. You cannot maintain that something is a trade

1 secret if the public has access to it.

2           And what we're demonstrating to Your Honor is in the  
3 course of the criminal proceedings against the Gibsons and Mr.  
4 McDonald, Judge Patton in the Metcalfe Circuit Court made a  
5 very reasoned decision that certain documents are going to be  
6 released to the public, that anyone in the public can obtain  
7 the documents if they so want.

8           There is also audiotape of interviews of witnesses  
9 and other information that was produced that Judge Patton said  
10 that should be released but it still should remain subject to  
11 some of these protections: you have to be an attorney, you  
12 have to say what your use of it is, and they actually make you  
13 sign something before you can obtain the audio transcripts of  
14 the Fifth Third witnesses and the victims and the others.

15           But the fact of the matter is, Judge Patton told the  
16 Kentucky Attorney General, redact the privacy information off  
17 of the 18,000 pages of documents, submit them to Laura Rigdon,  
18 the Clerk of Courts, and once you do that, anyone who wants to  
19 look at those documents can feel free to do so.

20           Rather than simply filing all of those documents and  
21 further risking the ire of Fifth Third, we simply move the  
22 Court to recognize that Judge Patton has said they're already  
23 in the public, therefore they should not be in any way subject  
24 to this order.

25           Not that we can ask Fifth Third what's confidential



1 about them and then remove the designation. They simply are in  
2 the public realm and therefore should not be subject to any  
3 restrictions under any circumstances.

4 So that issue is quite different than the issues  
5 under the protective order of what is the trade secrets that  
6 Fifth Third must identify.

7 THE COURT: I thought most of the documents in the  
8 criminal matter were the debtor's documents and statements made  
9 by the debtor. Am I wrong?

10 MR. DONNELLON: Yes.

11 THE COURT: Am I wrong about that?

12 MR. DONNELLON: Yes. The order from Judge Patton  
13 says there's documents from Your Community Bank, from Community  
14 Bank and Trust. They're what he called banking records of  
15 Eastern Livestock. Those include the Fifth Third documents,  
16 one from 18,000 and something, that the Attorney General  
17 tendered in March.

18 And the reason we identified on the schedule as we  
19 did the ones that are relevant and were marked by Mr. White, is  
20 to let the parties know what is in that record of 18,000  
21 documents. And I have a -- I have this with me and you can see  
22 what's in the documents, what's been redacted by the Kentucky  
23 Attorney General. Some of them contain redactions from Fifth  
24 Third. But the fact of the matter is, once those are released  
25 to the public there's no protection under any Court.

1 THE COURT: What do you -- now but you keep -- is the  
2 redacted part released to the public?

3 MR. DONNELLON: No, sir.

4 THE COURT: So, that's still confidential.

5 MR. DONNELLON: Well, I'm sorry, the redacted part  
6 released to the public. Yes, but the public can't see what's  
7 been redacted.

8 THE COURT: Well, I know that.

9 MR. DONNELLON: Okay.

10 THE COURT: What I'm saying --

11 MR. DONNELLON: That's what I didn't understand.

12 THE COURT: -- if a document is released but part of  
13 it is redacted, you're not saying that the part that's been  
14 scratched out and not seen is part of the public --

15 MR. DONNELLON: Absolutely not.

16 THE COURT: Okay.

17 MR. DONNELLON: And that's why we identify them on  
18 the schedule pursuant to the way in which the Kentucky Attorney  
19 General produced them. And I give you an example without  
20 trying to get into too much detail.

21 There's a key document executed by Fifth Third that  
22 lists Eastern Livestock account numbers and how Fifth Third is  
23 going to deal with this issue. The Kentucky Attorney General  
24 blacked out the account numbers of Eastern Livestock and kept  
25 in its full the preprinted language of Fifth Third and the

1 handwritten language of Fifth Third and the signatures of the  
2 Fifth Third persons. That's in the public domain. Anyone who  
3 wants to call Clerk of Courts from Metcalfe County can obtain  
4 that document.

5 THE COURT: But one of their allegations is -- just a  
6 moment, Mr. LaTour -- one of their allegations is that you  
7 released a lot of information in the lawsuit that you filed in  
8 Ohio prior to the release of the information in Kentucky.

9 MR. DONNELLON: That's not true and I'll -- for two  
10 reasons. Number one, the information was released in Kentucky  
11 in March. We filed our lawsuit May 16th. We are simply  
12 bringing it to the Court's attention now because of the fact  
13 that --

14 THE COURT: All right.

15 MR. DONNELLON: -- Fifth Third ran to the State Court  
16 and asked to seal the complaint.

17 The other issue is, we have not released any  
18 confidential information. We were careful not to. Would I  
19 like to attach documents that support the evidentiary  
20 allegations made in my complaint? Of course. But I felt the  
21 necessity to at least allow Fifth Third its day in court to say  
22 keep that confidentiality protection on that particular  
23 document or that document.

24 There's nothing within the four corners of the  
25 complaint that alleges any trade secret of Fifth Third.

1 There's nothing that they could point to that says if this fell  
2 into the hands of Chase or PNC we would lose our competitive  
3 advantage.

4           Rather, they're embarrassed by the allegations, they  
5 want to have a blanket thrown over everything, and the overly  
6 broad definition of you can't use confidential information  
7 essentially means that anyone who's part of that protective  
8 order cannot sue Fifth Third because --

9           MR. LaTOUR: Your Honor, now that we've descended  
10 into character assassination and the attribution of motives, I  
11 must insist and interrupt. This is the uncontrolled, ad hoc,  
12 unprepared for, no evidence hearing that I did not want to  
13 have. This needs to be in camera.

14           Almost everything that Mr. Donnellon has said is not  
15 accurate. These documents were served on his office. His  
16 statement that he doesn't know what they are, not accurate.  
17 They were served on him. It was --

18           MR. DONNELLON: What are those documents? You felt  
19 free to interrupt me, I have to interrupt you. What are these  
20 documents you're (indiscernible)?

21           MR. LaTOUR: These are the documents that are the  
22 exhibits we sought to file under seal.

23           MR. DONNELLON: Under seal. Okay. I wasn't aware of  
24 that, Randy.

25           MR. LaTOUR: Was that because -

1 MR. DONNELLON: It said we want to seal everything,  
2 we don't want anyone to see it. It's one --

3 MR. LaTOUR: My point, Your Honor, is that having an  
4 evidentiary discussion without any evidence. He had a long  
5 recitation about what the order in the Kentucky Court said.  
6 The order's not in evidence and it doesn't say anything that he  
7 says it says.

8 MR. DONNELLON: The Court can take judicial notice of  
9 the State Court order and it is attached to our motion.

10 MR. LaTOUR: Your Honor, if they're going to have a  
11 discussion on the merits, Fifth Third is entitled to brief the  
12 issues to present its position unfettered by the very  
13 information that we're trying to protect.

14 THE COURT: All right. Here, look, why don't both of  
15 you sit down. Please. I do think one of the issues that Mr.  
16 LaTour raises is valid and that is -- I'm not saying only one  
17 is valid, I'm just saying I don't know how we're going to get  
18 to the bottom of this without going through some of these  
19 documents.

20 I don't know how I could -- and I don't know that I  
21 could spread those on the record until I make the  
22 determination. I mean that's why we do in camera review on  
23 occasion and so -- but, on the other hand, I mean, really what  
24 I think you need, I think you need someone to sit down with you  
25 off the record and go through these things and maybe I should

1 appoint another judge to do that or ask another judge to serve  
2 in that capacity. I can think of several that I would like to  
3 do that to.

4 (Laughter)

5 MR. DONNELLON: May I be heard on one issue, Your  
6 Honor?

7 THE COURT: No. Okay.

8 MR. DONNELLON: I was interrupted.

9 THE COURT: All right.

10 MR. DONNELLON: On the Metcalfe County issue, I think  
11 you can do that without looking document by document, but let's  
12 set that aside. On the other ones, I did say Fifth Third is  
13 entitled to a full briefing, everything else.

14 THE COURT: All right.

15 MR. DONNELLON: The problem is, you can look at the  
16 complaint and determine there are no trade secrets revealed.  
17 There is not one confidential document attached, there is not  
18 one confidential trade secret alleged. It is simply the use of  
19 the information which is why the cart is before the horse.

20 They have not proven that it is confidential  
21 material. And even if they could say you can't use it to read  
22 it and allege facts, would mean that no one could sue Fifth  
23 Third. You couldn't state a complaint that would rise to a  
24 Iqbal-Twombly standard without using the information.

25 And that's an issue I think you can discuss without

1 looking at one single document except the four corners of that  
2 complaint.

3 THE COURT: I've looked at the complaint. But I'm  
4 sure that -- I don't think he's going to agree with you on that  
5 issue. Do --

6 MR. LaTOUR: You can file it under seal and use it  
7 all day.

8 THE COURT: Has the judge -- the judge hasn't rule on  
9 your motion to seal the complaint?

10 MR. DONNELLON: It was withdrawn by Fifth Third. We  
11 asked for an evidentiary hearing on it under the Rules of  
12 Superintendence in Ohio that they have to come forward and  
13 identify specifically what paragraph or word in that complaint  
14 is a trade secret of theirs. And the day we filed a request to  
15 hold them to that clear and convincing proof, they withdrew the  
16 motion so there's nothing pending in front of the State Court  
17 judge.

18 MR. LaTOUR: Which simply means there is no urgent  
19 emergency today to decide. Once the bell has been rung, it's  
20 very difficult to unring it and so we did give up on trying to  
21 seal it. After it had been picked up by newspapers, after it  
22 had been published on websites, there was no longer much point  
23 in trying to seal that event.

24 Fifth Third Bank is trying to prevent further ringing  
25 of the bell and is trying to deal with the consequences of the

1 misconduct the first time. So, to say that Fifth Third  
2 recognized the reality that they had already disseminated the  
3 information wrongfully does not suddenly anoint the information  
4 with the correct attribution.

5           Similarly, the idea that this Metcalfe County  
6 decision guides everything and then depends upon his summary of  
7 it is misleading to the Court. If you read what the Metcalfe  
8 County order says, it says that if you sign a confidentiality  
9 agreement, you can have access to the information. Paragraph  
10 4.

11           When you read the confidentiality agreement, it says  
12 use of this documentation is limited to people who sold cattle  
13 in the sale -- cattle sale in Metcalfe County. And it further  
14 says they're bound by what the confidentiality agreement says.

15           THE COURT: I don't want to hear any more about this.  
16 All right. Here's what I'm going to do. I'm going to allow  
17 you to file your briefs. I'm going to appoint a judge to  
18 mediate this for one reason, or for several reasons, but one is  
19 if I have to make this determination, I'm going to make it on  
20 evidence that's admissible in court on all of these matters.  
21 And I want you to be able to talk freely to someone about  
22 things that maybe are not admissible in court and to show them  
23 whatever you want to show them and to make your various  
24 positions clear.

25           And the best reason is, also, I think this ought to



1 be resolved. I mean, you're talking about two banks here that  
2 are very sophisticated and have very sophisticated lawyers  
3 representing them.

4           So, let -- you know, I do think there's a frustration  
5 on the part of the one side that Fifth Third is being overly  
6 protective and, like you say, trying to avoid embarrassment. I  
7 don't -- I mean, I do think they're not entitled to not  
8 disclose information that's embarrassing to them.

9           They are entitled to certain protections of certain  
10 types of documents. But where those -- where that line is  
11 drawn is something that if ultimately you can't -- it seems to  
12 me like you all ought to be able to realize where that line is  
13 drawn. And I think if a judge is sitting in the room with you  
14 and having a very frank discussion with you about those  
15 matters, you should be able to do that.

16           The other thing is, you know, I don't know how much  
17 money the banks -- I would suggest you even do this mediation  
18 before you do the briefing because I really don't know that  
19 that's going to help a judge very much.

20           You might want to do short memos in support of your  
21 positions or mediation memos but, you know, how many more tens  
22 of thousands of dollars are you going to use fighting about  
23 documents? And I'm sure both banks have the money if that's  
24 the way they want to spend it, but it would seem to me like it  
25 would be better to get to the heart of the matter.

1 All right. So I'll do that. I'll issue an order.  
2 Now, you know, there are -- I can get some judges that will do  
3 it for free because they owe me because I've done this for  
4 other courts before. If you all would rather choose another  
5 mediator, there's former judges in Chicago that do this sort of  
6 thing, there's --

7 MR. LaTOUR: Your Honor, Fifth Third Bank's quite  
8 comfortable with your choice.

9 THE COURT: All right. I'll --

10 MR. DONNELLON: I'm quite comfortable with your  
11 choice, as well, Your Honor. We have a State Court judge who  
12 was planning to hear a motion to seal in Ohio and --

13 THE COURT: Well, I --

14 MR. DONNELLON: -- I don't understand why we --

15 THE COURT: -- I think it's -- there's a lot more at  
16 -- I mean, it is an order of this Court, I can't dodge it  
17 completely, although I'm working on it.

18 (Laughter)

19 THE COURT: There is an order -- I mean, you all  
20 stipulated as to confidentiality. I mean, it really wasn't my  
21 handiwork. I signed off and approved your stipulation and made  
22 it an order of this Court so I'm not willing just to totally --  
23 to wash my hands of it. Now, let me --

24 MR. DONNELLON: I'm comfortable with whomever you --

25 THE COURT: -- let me also say this. I'm not -- you

1 know, that's obviously not stayed in Ohio. This fight between  
2 the banks has a life of its own and I don't know what's going  
3 to happen in Ohio and how active that judge wants to be. You  
4 can tell him or her what we're going to do here and let Ohio  
5 make its own decisions.

6 MR. DONNELLON: We'll do that, Your Honor. One other  
7 issue that I want to point out because it is your order and it  
8 is something that I was involved in the original drafting of  
9 and turned that over to Ms. Moore of Bingham Greenebaum and  
10 didn't review the final order.

11 And I am subject to the extraordinary motion for the  
12 first time in 26 years to hold me in contempt and I can assure  
13 you we were cognizant of what Your Honor had signed and made  
14 very careful reading of the complaint to be certain that there  
15 were no trade secrets. And as I said, although we would have  
16 liked to attach documents that we disagree with Fifth Third on  
17 --

18 THE COURT: I noticed there --

19 MR. DONNELLON: -- we chose not to.

20 THE COURT: -- I noticed there were no documents  
21 attached to the complaint. I did notice that. But of course  
22 that's --

23 MR. DONNELLON: And I think we need, if we're going  
24 to send this to the judge, a procedural determination, whether  
25 you'll make that or the other judge will, but -- for example --

1 THE COURT: The other judge is not going to be a  
2 judge in this -- oh, you mean Ohio or here?

3 MR. DONNELLON: No, no, no. How are they going to  
4 handle it? There are some procedural issues. And it's our  
5 position that the order says confidential material as a  
6 conjunctive, it means under Rule --

7 THE COURT: All right.

8 MR. DONNELLON: -- 26(c) protected and stamped.

9 THE COURT: No, the other judge is going to be a  
10 mediator. He or she is not going to make any rulings. He's  
11 going to try to bring you all together and try to resolve it.  
12 If there's any rulings that need to be made, it will come back  
13 to me.

14 MR. DONNELLON: Will there be any briefing or  
15 hearings scheduled? As I said --

16 THE COURT: I think he'll --

17 MR. DONNELLON: -- I'm subject to a motion of  
18 contempt --

19 THE COURT: -- I think he'll get you --

20 MR. DONNELLON: -- that I've had to, you know,  
21 disclose to my carrier. Other extraordinary issues are  
22 involved in this, that I'm happy to mediate and follow the  
23 path, but we need to have something set procedurally and  
24 evidentiary --

25 THE COURT: I think --

1 MR. DONNELLON: -- on this extraordinary motion Fifth  
2 Third is filing.

3 THE COURT: I think he'll get you on the phone and  
4 set up a scheduling -- and talk to you about scheduling.

5 MR. DONNELLON: Scheduling the mediation or  
6 scheduling a hearing before Your Honor?

7 THE COURT: Scheduling the mediation. I'm not going  
8 to take up the contempt matter until after the mediation  
9 because I'm hoping that's something you'll be able to resolve  
10 with the mediation also.

11 MR. DONNELLON: I am, as well. So we wouldn't have  
12 to file any brief or opposition to that until --

13 THE COURT: I would not file any brief in opposition  
14 to that. I would not file any briefs, at all. As I said  
15 earlier, one of the advantages -- it may turn out to be an  
16 advantage of going this way is that you can cover what you want  
17 to tell the mediator in terms of a mediation statement, which  
18 I'm sure you're all very familiar with, and it doesn't have to  
19 be a full blown brief, but it can be an outline of your  
20 position. And -- because we're going to look for a practical  
21 solution here that allows the things that can be made public to  
22 be made public expeditiously and prohibits anything that should  
23 be confidential from being made public.

24 And so, I would think this is something that would  
25 save your clients money and resolve this in a prompt manner so

1 that we can get on to other matters in this case such as a plan  
2 and a more global resolution of a lot of issues. I mean,  
3 everybody likes to see banks fight, but it's not going to be  
4 the centerpiece of what happens in this case.

5 MR. DONNELLON: Nor should it, Your Honor, I  
6 appreciate that.

7 THE COURT: Nor should it, right. And I'm being  
8 facetious with some of these remarks, I hope you understand  
9 that. All right. What else, Mr. Toner?

10 MR. TONER: Nothing further, Your Honor.

11 THE COURT: Does anybody else want to bring anything  
12 before the Court this morning? Now, who needs to be involved?  
13 Is it just the two banks that need to be involved in this? I  
14 believe that's --

15 MR. DONNELLON: I don't see anything else.

16 THE COURT: I mean, when I have the judge -- when I  
17 tell the judge who's going to be involved and try to -- it's  
18 just the two banks, right?

19 MR. LaTOUR: Just the two banks, Your Honor, yes.

20 THE COURT: That's what I thought, yes. The Trustee  
21 doesn't need to be involved nor any other party.

22 MR. TONER: No, Your Honor.

23 THE COURT: All right. Anything else?

24 MR. TONER: No.

25 THE COURT: All right. We're adjourned.

\* \* \* \* \*

C E R T I F I C A T I O N

I, JANET D. PERSONS, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Janet D. Persons

JANET D. PERSONS

J&J COURT TRANSCRIBERS, INC.

DATE: June 15, 2012