

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

INDEPENDENT BANK,

Plaintiff,

v

Case No. 13-136485-CK

Hon. Wendy Potts

30500 VAN DYKE COMPANY, LLC, et al,

Defendants.

OPINION AND ORDER RE: 30500 VAN DYKE COMPANY, LLC AND DANNY HUTCHINS'S MOTION TO COMPEL TESTIMONY

At a session of Court
Held in Pontiac, Michigan
AUG 22 2014

Defendants 30500 Van Dyke Company, LLC and Danny Hutchins move the Court to compel Plaintiff Independent Bank's witnesses to answer questions regarding classification of Defendants' loan and the Bank's reasons for pursuing the October 2011 Loan Amendment. The Court has discretion to compel discovery. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). "Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998).

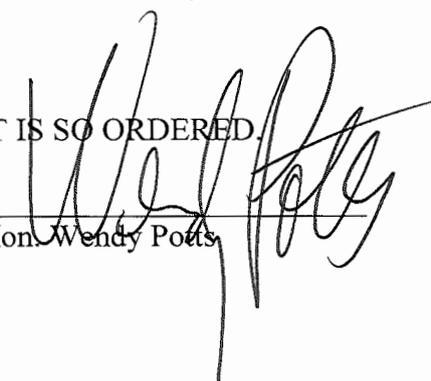
At the outset the Court cannot issue an opinion regarding the propriety of objections the Bank's counsel may make regarding questions that Defendants' counsel may ask in future depositions. The Court cannot issue an advisory opinion and cannot decide an issue until there is an actual controversy. *Rozankovich v Kalamazoo Spring Corp*, 44 Mich App 426, 428; 205 NW2d 311 (1973). To the extent that Defendants are asking the Court to order the Bank's witnesses to answer questions that have not yet been asked, the motion is denied without

prejudice. If the Bank's counsel raises an objection that Defendants believe is improper or unfounded, Defendants must bring a motion addressing the specific question asked and the specific objection raised.

The only actual controversy raised in Defendants' motion pertains to an objection the Bank's counsel raised in the May 20, 2014 deposition of its lending officer Stephanie Kimball. Defendants' counsel asked Ms. Kimball about an email discussing whether Defendants' loan "constitutes a TDR." Kimball testified that the acronym TDR refers to "troubled debt restructure" which "is an accounting and regulatory designation." When Defendants' counsel asked if the loan at issue here was a TDR, the Bank's counsel objected on the ground that under federal law "the bank is not permitted to answer these questions regarding information exchanged with regulators without written permission of the Federal Government." In its response to Defendants' motion, the Bank asserts that Kimball could not answer the question because it is subject to the bank examination privilege citing *In re Bankers Trust Co*, 61 F3d 465, 471 (CA 6, 1995). However, that qualified privilege applies to "agency opinions and recommendations and banks' responses thereto." *Id.* The Bank fails to explain how asking Kimball whether she considers Defendants' loan to be a TDR would reveal an opinion or recommendation of a regulatory agency or the Bank's response to agency opinions or recommendations. Further, the Bank provides no evidence supporting its position that Kimball would be violating federal law by answering the question. To the extent that Defendants intend to ask the Bank's witnesses whether they considered the loan to be a TDR, the Court overrules the Bank's objection and will allow the question.

Dated: **AUG 22 2014**

IT IS SO ORDERED.


Hon. Wendy Poets