

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

EXPERI-METAL, INC.,
a Michigan corporation,

Plaintiff,

Case No. 2:09-CV-14890

v.

Hon. Patrick J. Duggan

COMERICA BANK.,
a foreign banking organization,

Defendant.

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**COMERICA BANK'S SUPPLEMENTAL FILING IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

On June 23, 2010, this Court heard oral argument on Comerica's Motion for Summary Judgment. In response to the Court's inquiries during the hearing, Comerica undertook to provide the Court with additional information, which is hereby submitted:

I. Experi-Metal expressly authorized Keith Maslowski to initiate online wire transfers

The Court inquired if Comerica had any writing from Experi-Metal designating or authorizing Mr. Maslowski to be a user of the NetVision (subsequently renamed TM Connect Web) system. That document is entitled "Treasury Management Implementation Worksheet" and is attached as Exhibit 13. It identifies Mr. Maslowski as a NetVision user authorized to

initiate wire transfers for Experi-Metal, and that there was no dollar limit set for the transfers he could send. *See* Ex. 13, Section II, Section IV. *See also* Ex. 9 at ¶ 8 (Nosanchuk declaration). This establishes, along with the evidence already before the Court, that there is simply no *genuine* issue of material fact as to Mr. Maslowski having been an authorized user at the time that he provided his login information to the criminals.

II. “Good Faith” under the UCC provision at issue considers only honesty in fact and fair dealing

Experi-Metal’s cause of action against Comerica is a statutory claim under the Michigan UCC, specifically M.C.L. § 440.4601 *et seq.* The definitional section of the statute, M.C.L. § 440.4605(f), mirrors the definition of “good faith” stated in M.C.L. § 440.3103(1)(d): “‘Good faith’ means honesty in fact and the observance of reasonable commercial standards of fair dealing.” The official comments to this section state:

The definition requires not only honesty in fact but also “observance of reasonable commercial standards of fair dealing.” Although fair dealing is a broad term that must be defined in context, it is clear that **it is concerned with the fairness of conduct rather than the care with which an act is performed. Failure to exercise ordinary care in conducting a transaction is an entirely different concept** than failure to deal fairly in conducting the transaction. Both fair dealing and ordinary care, which is defined in Section 3-103(a)(7), are to be judged in the light of reasonable commercial standards, but those standards in each case are directed to different aspects of commercial conduct.

MCL § 440.3103(1)(d), cmt 4 (emphasis added). Experi-Metal does not allege that Comerica acted dishonestly or unfairly, as defined by the statute, when Comerica accepted the payment orders submitted using Experi-Metal’s online credentials, and there is no evidence of any dishonest or unfair conduct.

Conclusion

For these reasons and those presented at the hearing and in Comerica's opening and reply briefs, the Court should grant Comerica's motion for summary judgment.

Respectfully submitted,

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Dated: June 28, 2010

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system and the Court will send notification of such filing to the parties.

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