

**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.

Richard B. Tomlinson (P27604)
Daniel R. Boynton (P30359)
Joseph W. Thomas (P33226)
DRIGGERS, SCHULTZ & HERBST, P.C.
Attorneys for Plaintiff
2600 West Big Beaver Road, Suite 550
Troy, MI 48084
(248) 649-6000
rtomlinson@driggerschultz.com

Todd A. Holleman (P57699)
Lara Lenzotti Kapalla (P67667)
MILLER CANFIELD PADDOCK AND
STONE, PLC
Attorneys for Defendant
150 W. Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-7420
holleman@millercanfield.com
kapalla@millercanfield.com

COMERICA BANK'S MOTION TO STRIKE PLAINTIFF'S JURY DEMAND

Under Fed R. Civ. P 39(a)(2), Defendant Comerica Bank moves the Court for entry of an order striking the jury demand filed by Plaintiff Experi-Metal, Inc. In support of this Motion, Comerica states the following facts:

1. This case concerns online wire transfer services that Comerica Bank provided to Experi-Metal under a Services Agreement and Master Agreement.

3. In its 7/8/2010 Opinion and Order, this Court confirmed that the terms of the Services Agreement and Master Agreement apply to this case.

2. In the Master Agreement, both Comerica Bank and Experi-Metal agreed to “KNOWINGLY AND VOLUNTARILY AND FOR THEIR MUTUAL BENEFIT, WAIVE[] ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION REGARDING THE PERFORMANCE OR ENFORCEMENT OF, OR IN ANY WAY RELATED TO, THIS AGREEMENT.”

4. Ignoring its agreement, Experi-Metal filed a jury demand in this case and has repeatedly refused to stipulate to strike that demand.

5. The right to a civil jury trial is permissive, and can be waived by contract.

6. The jury waiver in the Master Agreement is clear and unambiguous, and should be enforced. Experi-Metal’s jury demand should be stricken.

7. Counsel for Comerica contacted counsel for Experi-Metal and explained the nature of this request and its legal basis and requested but did not obtain concurrence in the relief sought. A brief in support of this motion is attached and made a part hereof.

WHEREFORE, the Court should strike the jury demand accompanying Experi-Metal's Complaint and award Comerica its attorneys fees incurred in having to file this motion.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
Todd A. Holleman (P57699)
Lara Lenzotti Kapalla (P67667)

By: s/Lara Lenzotti Kapalla
Attorneys for Defendant Comerica Bank
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
kapalla@millercanfield.com

Dated: July 19, 2010

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kapalla@millercanfield.com

**BRIEF IN SUPPORT OF COMERICA BANK'S MOTION TO STRIKE PLAINTIFF'S
JURY DEMAND**

ISSUE PRESENTED

Whether Experi-Metal's jury demand should be stricken from its Complaint because Experi-Metal knowingly and voluntarily waived its right to a jury trial in the Master Agreement that it entered with Comerica.

AUTHORITY CITED

Franklin Bank v. Tindall, No. 07-13748, 2008 WL 937488 (E.D. Mich., April 07, 2008).....2, 3

JP Morgan Chase Bank, NA v. Winget, 639 F.Supp.2d 830 (E.D. Mich. 2009)2, 3

K.M.C. Co., Inc. v. Irving Trust Co., 757 F.2d 752 (1985)2

INTRODUCTION AND STATEMENT OF FACTS

This case concerns online wire transfer services that Comerica Bank provided to Experi-Metal under a Services Agreement and Master Agreement. In the Master Agreement, Comerica and Experi-Metal both agreed to waive trial by jury in any disputes that might arise related to Comerica's provision of these services to Experi-Metal. Notwithstanding its promise, Experi-Metal filed a jury demand in this case.

Comerica has repeatedly asked Experi-Metal to comply with the terms of the Master Agreement and stipulate to strike the jury demand, but Experi-Metal has ignored these requests. *See* Ex A. After this Court confirmed that the terms of the Services Agreement and Master Agreement apply to this case, *see* Opinion and Order at 10-12, Comerica again asked Experi-Metal to honor the jury waiver provision in the Master Agreement. *See* Ex B. Experi-Metal continues to ignore Comerica's request, making this motion necessary.

There is no plausible reason for Experi-Metal to refuse to stipulate to dismissal of the jury demand. The right to a civil jury trial is permissive, and can be waived. Experi-Metal waived this right in no uncertain terms. The Master Agreement states:

CUSTOMER AND BANK ACKNOWLEDGE THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED. EACH PARTY, AFTER CONSULTING OR HAVING HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL OF THEIR CHOICE, KNOWINGLY AND VOLUNTARILY AND FOR THEIR MUTUAL BENEFIT, WAIVES ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION REGARDING THE PERFORMANCE OR ENFORCEMENT OF, OR IN ANY WAY RELATED TO, THIS AGREEMENT.

Exhibit C, Master Agreement § 20 (emphasis in original). These terms are clear, unambiguous, and should be enforced. Experi-Metal's demand for a jury should be stricken in its entirety.

Comerica also asks for an award of its attorney's fees and costs expended on this motion, which

were made necessary by Experi-Metal's repeated, unreasonable refusal to stipulate to the relief requested.

ARGUMENT

Although the right to a jury trial in civil cases is a constitutionally protected right, it can be waived just like other rights. Specifically, the right to a jury trial can be waived by contract. *See K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 755 (1985) ("It is clear that the parties to a contract may by prior written agreement waive the right to jury trial."). *See also JP Morgan Chase Bank, NA v. Winget*, 639 F.Supp.2d 830 (E.D. Mich. 2009) (enforcing contractual jury waiver contained in loan guaranty); *Franklin Bank v. Tindall*, No. 07-13748, 2008 WL 937488 (E.D. Mich., April 07, 2008) (attached as Ex D) (enforcing jury trial waiver contained in commercial loan documents).

In this case, Experi-Metal clearly and unequivocally waived its right to a jury trial in its contract with Comerica. The Master Agreement contains a section entitled "GOVERNING LAW; VENUE; JURY TRIAL WAIVER," which explicitly states that neither Experi-Metal nor Comerica can request a jury for any actions under the Agreement:

CUSTOMER AND BANK ACKNOWLEDGE THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED. EACH PARTY, AFTER CONSULTING OR HAVING HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL OF THEIR CHOICE, KNOWINGLY AND VOLUNTARILY AND FOR THEIR MUTUAL BENEFIT, WAIVES ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION REGARDING THE PERFORMANCE OR ENFORCEMENT OF, OR IN ANY WAY RELATED TO, THIS AGREEMENT.

Master Agreement § 20.

This Court's 7/8/2010 Opinion and Order left no doubt that the terms of the Master Agreement apply to this case. *See* Opinion and Order at 10-12. The jury waiver provision in the Master Agreement is clear and unambiguous. Experi-Metal is presumed to have waived its right

to a jury knowingly and voluntarily, and the jury waiver provision should be enforced. *See JP Morgan Chase Bank, supra; Franklin Bank, supra.*

For the aforementioned reasons, the Court should enforce Experi-Metal's agreement to waive a trial by jury and strike Experi-Metal's jury request. Further, because Experi-Metal's unreasonable refusal to stipulate to the relief requested forced Comerica to file this motion, this Court should award Comerica its attorneys fees and costs for doing so.

Respectfully submitted,

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By: s/Lara Lenzotti Kapalla
Attorneys for Defendant Comerica Bank
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Detroit, MI 48226
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kapalla@millercanfield.com

Dated: July 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 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.

Richard B. Tomlinson - rtomlinson@driggerschultz.com

s/Lara Lenzotti Kapalla
Miller, Canfield, Paddock and Stone, PLC
150 West Jefferson, Suite 2500
Detroit, MI 48226
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kapalla@millercanfield.com