

**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

**REPLY SUPPORTING COMERICA BANK'S MOTION TO
STRIKE PLAINTIFF'S JURY DEMAND**

Experi-Metal made a clear, unequivocal promise to forego a jury trial on any litigation “regarding the performance or enforcement of, or in any way related to” its agreements for online banking services through Comerica. Experi-Metal does not deny making that promise. It does not deny that its agreement to waive a jury trial was knowing and voluntary. As this litigation regards Comerica’s provision of online banking services to Experi-Metal, this Court should enforce Experi-Metal’s agreement and strike its jury demand.

I. THE JURY WAIVER PROVISION IS PRESUMED ENFORCEABLE.

Where, as here, there is an express agreement to waive a jury trial, the Sixth Circuit has held that the burden is on the party opposing the waiver to demonstrate that the waiver should not be enforced.¹ See *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985). See also *Chesterfield Exchange, LLC v Sportsman’s Warehouse, Inc*, 528 F.Supp.2d 710, 715 (E.D. Mich. 2007) (knowing and voluntary contractual jury waivers are enforced absent a showing of “exceptional circumstances” by the opposing party). Experi-Metal has not met that burden here.

II. THE JURY WAIVER PROVISION CLEARLY APPLIES TO THIS CASE.

This Court has already determined that the terms of the wire transfer Services Agreement, and by incorporation the terms of the Master Agreement, apply to this case. See 7/8/2010 Opinion and Order at 10-12. Those terms include a plain, broad jury waiver clause that applies to this litigation:

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

¹ Citing a Ninth Circuit opinion, *United States v Cal Mobile Home Park Mgmt Co*, Experi-Metal suggests there should be a presumption that it did not waive a jury trial in this case. That is not so. Unlike this case, the *Cal Mobile Home Park* case did not involve a contractual jury waiver provision. Instead, the case concerned whether a party had *implicitly* waived her jury right through her conduct.

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 (emphasis added) attached as Ex C to Comerica's motion.

There is no doubt that the instant case is related to the performance of the wire transfer Services Agreement, and the Master Agreement.

By alleging a violation of M.C.L. § 440.4702(2), Experi-Metal has acknowledged that its claim arises from the Services Agreement. This statute is not applicable in the absence of such an agreement:

If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

M.C.L. § 440.4702(2).

In its Complaint, Experi-Metal specifically alleged that it entered into online banking agreements with Comerica, that the security procedure used under those agreements was not commercially reasonable, and that Comerica "did not act in compliance with the written agreements" it had with Experi-Metal. *See* Complaint ¶¶ 6, 28-30, 32. Thus, Experi-Metal's claim arises from and is related to Comerica's provision of wire transfer services under the Services Agreement and Master Agreement, and it falls within the jury waiver provision.

Even the unpublished Florida case Experi-Metal relies upon, *Riverside Portable Storage, Inc v PODS, Inc*, 2009 WL 804666 (M.D. Fla. Mar. 27, 2009), confirms that the jury waiver provision applies in this case. In *Riverside*, the plaintiff made two sets of claims. First, there were a number of counts related to breach of a written franchise agreement, which contained a jury waiver provision. Second, there were a number of claims related to breach of a separate oral agreement that covered different subject matter than the written agreement. In their separate oral agreement, the parties did not discuss the issue of jury waiver. Plaintiffs requested a jury trial on all of their claims. The *Riverside* court held that the jury demand was waived as to any claims arising from breach of the written agreement, finding that “[s]ince the events underlying these claims arose as a result of Plaintiff’s 2003 franchise agreement, the claims are connected to that agreement.” The Court permitted only the claims arising under the separate oral contract to proceed to a jury. As in *Riverside*, Experi-Metal’s claims arising under the Services Agreement are clearly subject to the jury waiver provision.

Experi-Metal cannot avoid its clear, unequivocal promise not to seek a jury trial simply because the lawsuit will involve a determination of whether Comerica performed under the Security Agreement in good faith. Comerica’s obligation to provide wire transfer services to Experi-Metal in good faith exists only because it agreed to provide these services to Experi-Metal in the first place. But for the Services Agreement and Master Agreement, Comerica would not have provided wire transfer services to Experi-Metal. Again, all issues in the litigation clearly regard the performance of wire transfer services under the Services Agreement, or are related to that Agreement.

Experi-Metal does not deny agreeing to the jury waiver provision, or deny that its waiver was knowing and voluntary. As the current litigation clearly falls within the plain, broad language of the waiver, the jury waiver provision should be enforced.

CONCLUSION

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.

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

Dated: August 9, 2010

kapalla@millercanfield.com

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 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
(313) 963-6420
kapalla@millercanfield.com