

**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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Joseph W. Thomas (P33226)
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COMERICA BANK'S MOTION TO COMPEL

Defendant Comerica Bank ("Comerica"), by and through its attorneys Miller, Canfield, Paddock and Stone, P.L.C., and pursuant to FRCP 37(a)(3)(B), moves to compel Plaintiff, Experi-Metal, Inc., to cure its deficiencies in its responses to Comerica's Requests for Production of Documents, and, in support, states as follows:

1. On March 22, 2010 Comerica served on Experi-Metal its Requests for Production of Documents, Interrogatories, and Requests to Admit. Experi-Metal served its responses to Comerica's document requests and interrogatories on May 10, 2010, and attached responsive documents.

2. However, Experi-Metal's responses and production were incomplete and deficient, and Comerica notified Experi-Metal of that in a letter dated July 15, 2010. In that letter, Comerica detailed the deficiencies in Experi-Metal's responses.

3. Experi-Metal responded to Comerica's letter on July 23rd with additional information and documents. However, Experi-Metal still failed to satisfactorily respond to several of Comerica's requests, ignoring some of the deficiencies altogether.

4. Subsequent deposition testimony in this case has revealed the existence of additional responsive documents.

5. Pursuant to FRCP 37 (a)(3)(B), a party seeking discovery may move for an order compelling production or inspection of documents where the opposing party fails to permit inspection of documents under Rule 34. Rule 37 (a)(4) explains that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Thus, the incomplete responses provided by Experi-Metal in response to Comerica's Requests for Documents constitute a failure to respond under this rule, and this Court can order such production in accordance with Rule 37.

6. Comerica still seeks the following documents and information from Experi-Metal or alternatively a confirmation that Experi-Metal does not have in its possession or have access to additional responsive documents:

- Correspondence Experi-Metal sent or received regarding the January 22, 2009 phishing attack, including, but not limited to, all internal emails

within Experi-Metal, between Experi-Metal and any law enforcement or regulatory agency, or between Experi-Metal and Comerica Bank;

- All documents related to the investigation of the January 22, 2009 phishing attack, including but not limited to any law enforcement findings or internal findings, including the FBI investigation status reports to which Experi-Metal has access;
- All documents related to any insurance claims Experi-Metal made for losses related to the phishing attack, including but not limited to any correspondence, insurance claim applications, and denials;
- All correspondence and other documents sent to or received from Plaintiff's proposed expert Lance James or any other third party related to the phishing attack on January 22, 2009 or Comerica Bank's online/internet banking services including, but not limited to, its wire transfer services;
- A privilege log pursuant to Rule 26 (b)(5) for any responsive documents withheld due to privilege.

7. For these reasons, which are more fully discussed in the accompanying brief, this Court should grant Comerica's motion compelling Experi-Metal to remedy its deficiencies in its responses to Comerica's Requests for Production of Documents.

8. FRCP 37 (a)(5)(A) requires that the party whose conduct necessitated the motion, or its attorney, pay the costs and attorneys fees incurred by the moving party if the moving party prevails on its motion or if the requested discovery is provided after the motion was filed. Thus, this Court should also order Experi-Metal to pay Comerica's expenses in connection with bringing this motion.

9. Counsel for Comerica has contacted counsel for Experi-Metal numerous times, explained the nature of this request and its legal basis and requested but did not obtain concurrence in the relief sought. The responsive documents still have not been produced.

WHEREFORE, Comerica Bank respectfully requests that this Court enter an order in the form attached to the accompanying brief requiring Experi-Metal to remedy the deficiencies in its

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COMERICA BANK'S BRIEF IN SUPPORT OF ITS MOTION TO COMPEL

ISSUE PRESENTED

Whether Experi-Metal should be required to provide complete responses to Comerica's discovery requests, and reimburse Comerica for the costs of its motion to compel, when these requests were not objectionable, and Comerica attempted to obtain full responses without court action?

CONTROLLING AUTHORITY

Fed. R. Civ. P. 37 governs motions to compel production when the opposing party fails to permit inspection. As stated in that rule, “an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.”

In addition, Fed. R. Civ. P. 37 provides that if the moving party prevails on its motion, the court “must” require that the party whose conduct necessitated the motion, that party’s attorney, or both “pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.”

INTRODUCTION

On May 10, 2010, Experi-Metal served upon Comerica responses to Comerica's Requests for Production of Documents that were incomplete and deficient. Although Comerica provided detailed notice to Experi-Metal of the deficiencies, Experi-Metal still failed to produce all of the requested information and responsive documents. Therefore, Comerica Bank brings this motion to compel Experi-Metal to cure the deficiencies in its responses and reimburse Comerica for the expenses incurred in bringing this motion.

STATEMENT OF FACTS

Experi-Metal, Inc. ("Experi-Metal") used Comerica Bank ("Comerica") for its banking needs, including internet banking. On January 22, 2009, Experi-Metal received a fraudulent "phishing" email. Despite Comerica's warnings, Keith Maslowski, an Experi-Metal employee and authorized computer system user, clicked on the link and gave Experi-Metal's ID, PIN and password to an unknown third party. After Experi-Metal gave the third party its security information, that party used that information to access Experi-Metal's accounts and place numerous wire transfer payment orders.

Following the security procedure Experi-Metal agreed to, Comerica authenticated the wire transfer payment orders with Experi-Metal user's ID, PIN and password. When Comerica noted that a number of transfers had been made, it contacted Experi-Metal. Contrary to its agreement with Comerica, Experi-Metal asked the Bank not to honor any of the wire transfers, including those that had already been executed. Comerica put a hold on the account and tried to recover what funds it could. Though Experi-Metal's credentials were used to authorize \$1,901,269 in wire transfers, Comerica was able to recover all but \$560,000 for Experi-Metal.

The Proceedings

Experi-Metal filed this lawsuit, claiming that Comerica was liable for the fraudulent wire transfers under section 440.4702 of Michigan's Uniform Commercial Code. Pursuant to Section 440.4702, wire transfer orders are effective as orders of the customer, even though the customer did not authorize the payment orders, if: (1) the bank and customer agreed that the authenticity of payment orders would be verified pursuant to a security procedure; (2) the security procedure is commercially reasonable; and (3) the bank accepted the orders in good faith and in compliance with the security procedure and any written agreement or instruction of the customer. *See Mich. Comp. Laws § 440.4702(2)*. In its lawsuit, Experi-Metal asserts that these three factors are not satisfied in this case, thereby rendering Comerica liable for the fraudulent wire transfers, not Experi-Metal.

In its opinion denying Comerica's motion for summary judgment, the Court held that Comerica had conclusively established the first two factors and that there were no genuine issues of material fact as to them. *See Opinion and Order Denying Defendant's Motion for Summary Judgment*. However, the Court found genuine issues of material fact as to the third factor. Therefore, the issue remaining in this case is whether Comerica accepted the wire transfer orders in Experi-Metal's name on January 22, 2009 in "good faith" and specifically in accordance with the written agreement and instructions of Experi-Metal. *See Opinion and Order Denying Defendant's Motion for Summary Judgment*.

Comerica's Discovery Requests

Comerica has diligently sought discovery in this case. Comerica has issued document requests, interrogatories, and requests to admit, and now taken two depositions. Despite Comerica's efforts to obtain relevant information from Experi-Metal, Experi-Metal has still not

satisfactorily fulfilled its discovery obligations, leaving Comerica without relevant documents that should have been produced.

On March 22, 2010 Comerica served on Experi-Metal its Requests for Production of Documents, Interrogatories, and Requests to Admit. *See* Exh A. Experi-Metal served its responses to Comerica's document requests and interrogatories on May 10, 2010, and attached responsive documents. *See* Exh B. However, Experi-Metal's responses and production were incomplete and deficient, and Comerica notified Experi-Metal of that in a letter dated July 15, 2010. *See* Exh. C. In that letter, Comerica detailed the deficiencies in Experi-Metal's responses. Experi-Metal responded to Comerica's letter on July 23rd with additional information and documents. *See* Exh D. However, Experi-Metal still failed to satisfactorily respond to several of Comerica's requests, ignoring some of the deficiencies altogether.

Because the Court's Opinion and Order has narrowed the relevant issues in the case, Comerica is not seeking full and complete responses to all of the requests to which it was entitled, however, of the deficient responses detailed in Comerica's July 15th letter, four of significance still remain unaddressed by Experi-Metal.

Request 16 requested production of "all correspondence Experi-Metal sent or received regarding the January 22, 2009 phishing attack, including, but not limited to, all emails with Experi-Metal, between Experi-Metal and any law enforcement or regulatory agency, or between Experi-Metal and Comerica Bank." *See* Exh A. Experi-Metal objected in part based on the attorney/client privilege and also stated that it was "still searching for responsive documents." *See* Exh. B. In Comerica's July 15th letter, it asked Experi-Metal to "produce any non-privileged documents Experi-Metal has located to date, provide a privilege log for documents claimed to be protected from disclosure [pursuant to FRCP 26(b)(5)], and disclose whether or not Experi-Metal

has completed its search.” *See* Exh C. In Experi-Metal’s July 23rd letter it did not respond to these requests, apparently ignoring them completely, and Experi-Metal has not produced any additional documents or a privilege log. *See* Exh. D. At Ms. Allison’s deposition, it became clear that some documents responsive to this request do exist, but were simply never produced. Ms. Allison testified that, as a result of Mr. Maslowski disclosing his login information to the phishers, a disciplinary note was placed in his payroll file. *See* Exh. F at 38:20-41:13. It is likely that this note speaks to the cause of the alleged loss and who is at fault. Following the deposition, counsel for Comerica specifically requested production of this note, but it has not been produced.

Request 17 requested production of “all documents related to the investigation of the January 22, 2009 phishing attack, including but not limited to any law enforcement findings or internal findings.” *See* Exh. A. Experi-Metal responded “See attached Victim Statement.” *See* Exh. B. While the Statement of Victimization was responsive to the request, it was missing the referenced attachments. In the July 15th letter, Comerica asked Experi-Metal to “produce those attachments or confirm that they are not in your possession, custody, or control.” *See* Exh. C. Also, Comerica pointed out that Experi-Metal produced a letter from the U.S. Department of Justice “which suggests that Experi-Metal had the ability to receive information about the status of the investigation of its case, including via a website which may still contain such information.” *See* Exh. C. The letter from the U.S. Department of Justice is attached as Exhibit E. Comerica asked Experi-Metal to “either provide print or electronic documents of any existing or available status updates, or confirm that they are no longer available.” *See* Exh. C. Experi-Metal responded that it had produced the phishing email and that the records printed by Special Agent. Kinsman were not in its possession, but failed to address Comerica’s request for status

update information from the web site only available to Experi-Metal. *See* Exh. D. Ms. Allison testified that the investigation is still open. *See* Exh. F at 118:14-119:11. As such, the website materials should still be available and produced in response to the discovery request.

Request 22 requested production of “all documents related to any insurance claim Experi-Metal made for losses related to the phishing attack, including but not limited to any correspondence, insurance claim applications, and denials.” *See* Exh. A. Experi-Metal objected to that request as requesting information that is not relevant and not calculated to lead to the discovery of admissible evidence. *See* Exh. B. In its July 15th letter, Comerica explained that “these documents are relevant to the calculation and mitigation of Experi-Metal’s damages” and asked Experi-Metal to either produce them or confirm that Experi-Metal made no such claim. *See* Exh. C. Again, Experi-Metal completely ignored that request. *See* Exh. D. At Ms. Allison’s deposition, she testified that Experi-Metal did in fact make a claim for reimbursement to its insurance company, and received a payment. *See* Exh. F at 105:22-107:8. Following the deposition, counsel for Comerica again specifically requested production of documents related to this insurance claim and payment, but they have not been produced.

Finally, Request 26 requested production of “all correspondence and other documents sent to or received from [Plaintiff’s proposed expert] Lance James or any other third party related to the phishing attack on January 22, 2009 or Comerica Bank’s online/internet banking services including, but not limited to, its wire transfer services.” *See* Exh. A. In response, Experi-Metal simply wrote “See attached.” *See* Exh. B. Although Experi-Metal’s response suggests that it attached documents responsive to this request, Comerica found none that appeared to be responsive. Thus, in its July 15th letter, Comerica asked Experi-Metal to “identify any documents produced in response to the request, and confirm that Experi-Metal does not have

any other responsive documents in its possession, nor the right, authority nor ability to obtain them, including from its retained expert.” See Exh. C. Again, Experi-Metal completely ignored that request. See Exh. D.

As detailed above, Experi-Metal’s responses were deficient. Though Comerica has tried to obtain full responses to its requests without Court action, it has been unable to do so. Even after supplementation, Experi-Metal’s responses remain deficient and ignore a number of Comerica’s requests. As a result, Comerica is deprived of relevant documents that should have been produced to it. As of today, Experi-Metal has not further supplemented its responses to the Requests or further responded to Comerica’s July 15th letter. Therefore, Comerica moves to compel Experi-Metal to cure the deficiencies in its responses and to address the issues and provide the information requested in Comerica’s July 15th letter and as set forth herein.

ARGUMENT

I. Standard of Review

Pursuant to FRCP 37 (a)(3)(B), a party seeking discovery may move for an order compelling production or inspection of documents where the opposing party fails to permit inspection of documents under Rule 34. Rule 37 (a)(4) explains that “an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.” Thus, the incomplete responses provided by Experi-Metal in response to Comerica’s Requests for Documents constitute a failure to respond under this rule, and this Court can order such production in accordance with Rule 37.

II. This Court Should Require Experi-Metal to Cure the Deficiencies in its Responses to Comerica’s Requests for Production of Documents.

FRCP 26 (b)(1) defines the scope of discovery. It states that a party may obtain in discovery “any nonprivileged matter that is relevant to any party’s claim or defense” or if the

discovery “appears reasonably calculated to lead to the discovery of admissible evidence.” The documents Comerica seeks from Experi-Metal, but which have thus far not been produced, all fall within the proper scope of discovery.

Moreover, Comerica does not seek privileged documents. To the extent Experi-Metal has objected to a request based on the attorney/client privilege, Comerica seeks only a privilege log, which Experi-Metal is required to produce anyway pursuant to FRCP 26 (b)(5).

Comerica first seeks correspondence regarding the phishing attack, as requested in Request 16. Experi-Metal did not object to the relevancy of these documents. Despite its lack of objection to relevance, and its promise to search for responsive documents, Experi-Metal has still failed to produce *any* responsive documents or to even inform Comerica whether it has completed its search. This Court should require Experi-Metal to complete its search for non-privileged responsive documents, inform Comerica of the results of its search, and produce to Comerica any responsive documents. As noted above, to the extent Experi-Metal objected that some documents responsive to this request may be protected by attorney-client privilege, Comerica requested a privilege log, which Experi-Metal was already obligated to provide under Rule 26, but which it failed to provide. This Court should require Experi-Metal to comply with Rule 26(5)(A) and produce information about the documents responsive to Request 16 for which Experi-Metal claims a privilege.

Comerica also seeks documents related to the investigation of the phishing attack, as requested in Request 17. Experi-Metal did not object to this request. Documents produced by Experi-Metal and the testimony of Ms. Allison demonstrate that Experi-Metal had, and still has access to the FBI’s investigation status updates, which would certainly be responsive to this request. *See* Exhs. E; F at 118:14-119:11. Comerica has repeatedly asked Experi-Metal to

produce these documents, to no avail. Comerica also attempted to obtain the FBI investigation status reports by way of a FOIA request but was unsuccessful. Therefore, the only means Comerica has to obtain this information is through Experi-Metal. As such, this Court should require Experi-Metal to produce the above mentioned investigation status reports which relate directly to the issue of whether any restitution is or might be collected by Experi-Metal.

Comerica also seeks documents related to any insurance claim Experi-Metal has made related to the phishing attack. Experi-Metal objected to the requested documents as not relevant. However, the availability of insurance to cover losses sought to be recovered in this suit is unquestionably relevant to the issue of the calculation of damages in this case. The Federal Rules emphasize the relevance of insurance information by making it subject to mandatory disclosure under Rule 26 (a)(1)(iv). Ms. Allison has testified that Experi-Metal received at least some money from one insurance company. *See* Exh. F at 105:22-107:8. If Experi-Metal submitted other requests for payouts that were denied, if its payout was limited because of a finding that Experi-Metal was negligent, or if it may receive additional payouts covering its losses, that information is important in this case, as it affects the alleged damages claimed by Experi-Metal. Accordingly, this Court should require Experi-Metal to produce documents responsive to Request 22.

Comerica also seeks documents to or from Experi-Metal's proposed expert, Lance James, or other third-parties related to the phishing attack or Comerica's internet banking services, as requested in Request 26. Experi-Metal did not object to this request, but stated that responsive documents were attached. Because Comerica found no documents that appeared to be responsive, it asked Experi-Metal to identify the documents produced in response to this request and to confirm that it had no other responsive documents, but Experi-Metal did not do so.

Accordingly, this Court should require Experi-Metal to produce any additional documents responsive to Request 26, if it has any, identify the documents already produced in response to Request 26, and otherwise confirm that it has produced all responsive documents.

As demonstrated herein, Experi-Metal has failed to respond to Comerica's Requests for Production of Documents as contemplated under FRCP 37 (a)(4). Comerica has tried to resolve Experi-Metal's deficient response without Court action, but has been unable to do so. This Court should therefore grant Comerica's motion to compel pursuant to FRCP 37 (a)(3)(B)(iv) and enter an order in the form attached hereto.

In addition, FRCP 37 (a)(5)(A) provides that if the moving party prevails on its motion or if the opposing party provides the requested discovery only after the motion is filed, the court "*must*" require that the party whose conduct necessitated the motion, that party's attorney, or both "to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." (emphasis added) Accordingly, Comerica also requests that this Court order Experi-Metal to pay Comerica's reasonable costs and fees incurred in connection with bringing this motion.

CONCLUSION

For all the reasons discussed above, Comerica Bank respectfully requests that this Court enter an order in the form attached requiring Experi-Metal to remedy the deficiencies in its responses to Comerica's Requests for Production of Documents and award Comerica its reasonable costs and fees incurred in connection with bringing this motion.

Respectfully submitted,

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Dated: August 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 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 following parties:

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