

Founded in 1852
by Sidney Davy Miller

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July 15, 2010

VIA EMAIL AND FAX

Richard B. Tomlinson, Esq.
DRIGGERS, SCHULTZ & HERBST, PC
2600 W Big Beaver Road, Suite 550
Troy, MI 48084

Re: Experi-Metal, Inc v Comerica, Inc
Case No. 2:09-CV-14890

Dear Richard:

I am writing to follow up on several matters. First, two months ago I requested that Experi-Metal provide dates in June for the rescheduled depositions of Valiena Allison, Keith Maslowski, Lance James, and the corporate designee of Experi-Metal, but did not hear back. Please provide dates in August on which those four persons will be available for depositions.

Rescheduling the depositions for August should enable Experi-Metal to provide complete responses to Comerica's Interrogatories and Requests for Documents before the depositions occur. These responses are currently deficient. Most notably, Experi-Metal failed to sign its interrogatory responses under oath as required by FRCP 33. Comerica requests that Experi-Metal provide signed responses immediately, and that it address the following additional deficiencies in those signed responses:

- Interrogatory 1: Experi-Metal states that it attached a job description for Keith Maslowski to its response, but did not do so.
- Interrogatory 5: Experi-Metal did not provide a job description or duties for Valiena Allison.
- Document Request 1: Experi-Metal's response impermissibly attempts to limit Comerica's request to agreements regarding only TMC Web. Please either produce all agreements Experi-Metal has with Comerica Bank with respect to wire transfers, internet/online banking, or the Comerica Bank accounts from which the funds at issue were taken, or confirm that Experi-Metal has no such documents other than those produced by Comerica to date.

- Document Request 8: Experi-Metal states that it attached to its response a copy of the January 22, 2009 phishing email and subsequent phishing emails received by Experi-Metal, but it did not.
- Document Request 11: Experi-Metal answered that, as of May 10, 2010, it was still searching for documents supporting its allegation that “Comerica did not contact EMI until 10:50 a.m.” Experi-Metal alleged that Comerica contacted it by phone. *See* Compl. ¶ 21. In response to Comerica’s request for the phone records from 1/22/2009, Experi-Metal answered that they “will be produced at a mutually convenient time and date.” *See* Response to document request 23. Read together, these responses give the appearance that Experi-Metal is attempting to conceal unfavorable evidence. If that is not Experi-Metal’s intent, please produce the phone records immediately, confirm whether Experi-Metal’s search for other documents supporting this allegation is complete, and if it is not, state where else Experi-Metal intends to look.
- Document Request 15: Experi-Metal has not produced anything in response to a request for documents related to Experi-Metal’s allegation that “Comerica did not act in compliance with the written agreements between Comerica and EMI.” Please either produce the written agreements Comerica allegedly violated or consent to striking this allegation from the Complaint.
- Document Request 16: Experi-Metal has objected that documents responsive to this request are subject to the attorney/client privilege, but has not provided any information that would enable Comerica to assess the claim of privilege as required by FRCP 26(b)(5). Experi-Metal has also stated that it is still searching for responsive documents. Please produce any non-privileged documents Experi-Metal has located to date, provide a privilege log for documents claimed to be protected from disclosure, and disclose whether or not Experi-Metal has completed its search.
- Document Request 17: Experi-Metal produced a Statement of Victimization in response to this request, which is missing the attachments referenced in the statement, namely 1. the phishing email and 2. records printed by S.A. Kinsman. Please either produce these attachments or confirm that they are not in your possession, custody, or control. In addition, Experi-Metal produced a March 4, 2009 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. Please either provide print or electronic documents of any existing or available status updates, or confirm that they are no longer available.

- Document Request 19: Experi-Metal's response impermissibly attempts to limit Comerica's request to policies, procedures, or other documents related only to employee responses to requests for online banking information. Its response also attempts to limit the request to the timeframe when Experi-Metal received online banking services from Comerica. Please produce 1. the policies, procedures, or other documents Experi-Metal has related to employee responses for requests for data security information, computer or account login ids or passwords, 2. the policies, procedures, or other documents Experi-Metal has related to handling of confidential information, and 3. any policies regarding wire transfers or online banking Experi-Metal has adopted since leaving Comerica, or confirm no such documents exist.
- Document Request 22: Experi-Metal has failed to produce documents related to any insurance claim Experi-Metal made for losses related to the phishing attack. These documents are relevant to the calculation and mitigation of Experi-Metal's damages. Please produce the requested documents, or confirm Experi-Metal made no such claim.
- Document Request 23: Experi-Metal has failed to produce its phone records for January 22, 2009, but has stated they "will be produced at a mutually convenient time and date." There is no plausible reason for delay. Read together, Experi-Metal's responses to requests 11 and 23 give the appearance that Experi-Metal is attempting to conceal unfavorable evidence. If that is not Experi-Metal's intent, please produce these records immediately.
- Document Request 24: Experi-Metal has not provided a calculation for its alleged damages. As you know, under Fed. R. Civ. P. 26(a)(1)(A)(iii), Experi-Metal was required to disclose a computation of each category of its claimed damages in its initial disclosures to Comerica. When it failed to do so, Comerica asked Experi-Metal to supplement its initial disclosures to provide this information, and again renews its request for this information.
- Document Request 25: Experi-Metal has answered that it has not yet made any determination as to exhibits or demonstratives that it intends to use or rely upon at trial. Experi-Metal has a duty to supplement this response when it makes such a determination.
- Document Request 26: Experi-Metal's response suggests that it has attached responsive documents, but it does not appear to have done so. Please identify any documents produced in response to this 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.

As a final matter, we are still awaiting your position on our request to submit an order striking your client's jury demand. Since Experi-Metal and Comerica waived their rights to a jury in section 20 of the Treasury Management Services Master Agreement, and Judge Duggan's recent Opinion and Order confirms that the Master Agreement applies to this case, we trust this

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

Richard B. Tomlinson, Esq.

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July 15, 2010

issue can be resolved without a motion. I am re-attaching the proposed stipulated order striking Experi-Metal's jury demand for your review. Please review it and respond. Thank you.

Sincerely,

Miller, Canfield, Paddock and Stone, P.L.C.

By: Todd A. Holleman *by LK*
Todd A. Holleman

Enclosure

cc: Lara Kapalla

18,042,592.5\022754-01932

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EXPERI-METAL, INC.,

Plaintiff,

Case No. 2:09-CV-14890

v.

Hon. Patrick J. Duggan

COMERICA BANK,

Defendant.

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Daniel R. Boynton (P30359)
Joseph W. Thomas (P33226)
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STIPULATION AND ORDER TO STRIKE JURY DEMAND

At a session of the Court held on _____, 2010,
in Wayne County, Detroit, Michigan before
The Honorable _____

This matter having come before the Court on the stipulation of the parties through their undersigned counsel, and the Court being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiff's jury demand is stricken.

UNITED STATES DISTRICT JUDGE

Stipulated to and approved for entry by:

DRIGGERS, SCHULTZ & HERBST, P.C.

By _____
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