

**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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**DEFENDANT COMERICA BANK'S MOTION *IN LIMINE* TO EXCLUDE
PLAINTIFF'S EXPERT WITNESS**

Defendant Comerica Bank (Comerica), by and through its attorneys Miller, Canfield, Paddock and Stone P.L.C. and pursuant to E.D. Mich. L.R. 7.1 and Fed. R. Evid. 402 and 403, moves this court for an order excluding the opinion and testimony of plaintiff Experi-Metal, Inc.'s proposed expert Jonathan Lance James. Mr. James is not qualified to render an opinion on the remaining issues in this case, and his testimony will not assist the trier of fact. He did not even consider the applicable law as a standard, and he has absolutely no experience, education or training in interpreting or applying banking agreements or determining what is good faith or reasonable commercial standards of fair dealing pertaining to the acceptance of wire transfer orders from a commercial customer by a bank.

In support of this Motion, Comerica relies upon the attached memorandum of law as though it is incorporated herein. Comerica has sought concurrence in the relief it seeks in this motion, but plaintiff has refused to concur.

Respectfully submitted,

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

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Dated: January 18, 2011

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT COMERICA BANK'S
MOTION *IN LIMINE* TO EXCLUDE PLAINTIFF'S EXPERT WITNESS**

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BRIEF STATEMENT OF THE ISSUES

- I. Should the testimony and opinion of Experi-Metal's proposed expert be excluded when he is unqualified to render an opinion on the issues that remain in the case and his testimony would not be helpful to the trier of fact?

Experi-Metal answers: No.

Comerica Bank answers: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Plaintiff Experi-Metal's proposed expert, Jonathan Lance James, is not qualified to testify or render an opinion as to whether Comerica acted in good faith when it accepted the wire transactions at issue or whether Experi-Metal's Controller Keith Maslowski was authorized to initiate those wire transfers, and his testimony will not assist the trier of fact in this bench trial. The introduction of expert testimony is governed by Federal Rule of Evidence 702 (Testimony by Experts):

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993), the Supreme Court charged trial judges with the task of determining whether expert testimony "will assist the trier of fact to understand or determine a fact in issue."

I. INTRODUCTION

This matter arises from an internet phishing scam that the plaintiff Experi-Metal, Inc. fell victim to. Experi-Metal released its confidential login and password information for its bank account with Comerica to a third party, who stole over approximately \$560,000 of Experi-Metal's money out of that account using unauthorized wire transfers. Experi-Metal thereafter filed a complaint against Comerica alleging that it was responsible for the loss. The Court granted Comerica's motion to strike Experi-Metal's jury demand, and this matter is scheduled to proceed to a bench trial.

Whether the risk of a loss for an unauthorized wire transfer falls on the bank or its customer is governed by M.C.L. § 440.4702. The risk of loss is on the customer if a fraudulent payment order is accepted by the bank after verifying the authenticity of the source of the order in compliance with a commercially reasonable security procedure. M.C.L. § 440.4702(2).

Comerica filed a motion for summary judgment on Experi-Metal's complaint, arguing that it had a commercially reasonable security procedure in compliance with M.C.L. § 440.4702. On July 8, 2010, the Court issued a written Opinion and Order Denying Defendant's Motion for Summary Judgment. *See* Exhibit A. However, in denying the motion, the Court held that Comerica's secure token technology, utilized and agreed to by Experi-Metal, by which Comerica authenticated and accepted Experi-Metal's wire transfer payment orders was commercially reasonable (Exhibit A, p. 12). The Court denied the motion because it held that two issues of material fact remained: (1) whether Comerica complied with the security procedure when it accepted the wire transfer orders initiated with Maslowski's user information on January 22, 2009, and (2) whether Comerica accepted the wire transfer orders in Experi-Metal's name on January 22, 2009 in "good faith" which means honesty in fact and in accordance with reasonable

commercial standards of fair dealing (Exhibit A, p. 13, 16).

Experi-Metal intends to call Mr. James as an expert witness to testify and render an opinion on the two remaining issues in this case. However, Mr. James has no education, experience or training that would somehow qualify him to testify as an expert on those issues. He himself has acted in bad faith by taking an active role in compromising Comerica's online banking system and forcing Comerica to threaten legal action against him personally, which makes any of opinion of his biased and unreliable. And, he relies on standards in his opinion that are inapplicable to the commercial relationship between Comerica and Experi-Metal. Accordingly, Mr. James' opinion and testimony will not assist the trier of fact, and the Court should exclude it.

II. STATEMENT OF FACTS

Experi-Metal named Mr. James as an expert witness to offer an opinion on the two remaining issues in this case. On January 6, 2011, Mr. James submitted his expert's report as required by Fed. R. Civ. P. 26.

In his opinion, Mr. James submitted the following conclusions, which of course Comerica disputes:

1. Comerica did not meet industry standards in that Comerica did not have monitoring systems in place to detect unusual activity in Experi-Metal's accounts.
2. Comerica did not act in good faith and in compliance with its security procedures and any written agreement when it accepted the wire transfer initiated by the fraudster using Keith Maslowski's log in information.
3. Comerica did not act in good faith and in accordance with industry standards when it failed to take steps to protect and to warn its customer as to the phishing e-mails being sent to Comerica's customers.
4. Comerica did not act in good faith and in compliance with its security procedures in any written agreement when Comerica allowed the fraudster

to transfer non-existent funds from a zero balance account into Experi-Metal's sweep account in order to fund the continuation of the unauthorized wire transfers.

5. Comerica failed to act in good faith by failing to report the suspected fraud on a timely basis.
6. Comerica did not act in good faith and in accordance with industry standards when the fraudulent activity was reported to the Treasury Management Department.

See Exh. B, Plaintiff's proposed expert's report.

Comerica deposed Mr. James on December 13, 2011. *See* Exh. C, James Dep. Tr. Mr. James "fooled around" in the one or two college classes he took and has no college degree and no formal education in business, banking, payment systems, finance or contracts. *See id.* at 10-13. He has no experience working in any bank, drafting any banking agreement or applying the terms of any banking agreement to the transactions between a bank and its commercial customer. *See id.* at 87:6-88:23. He has never participated in any banking regulator's examination of a bank or its procedures, *see id.* at 36, and he has no evidence or indication that Comerica ever failed or was reprimanded by a regulator for any shortcomings in its processes or procedures. *See id.* at 50:14-19.

Mr. James is a self-titled information security expert who misleadingly lists on his resume' companies that merely attended seminars he spoke at as his clients to whom he has acted as a technical advisor. *See id.* at 22:14-20, 30:20-25; 31:24-32:1. His start up technology company is now defunct. *See id.* at 18-19. And, while, on the one hand, he purports to assist law enforcement track down cyber criminals, on the other hand, he himself has acted to give cyber criminals information to assist them in hacking into Comerica's internet application, which required Comerica to threaten legal action against him to remove from the internet the information he posted. *See id.* at 91:11-92:11; *see also* Exh. D Cease and Desist Letter.

Notwithstanding that the Court has already ruled that Comerica's wire transfer security procedure is commercially reasonable, Mr. James opines that Comerica should have had additional security procedures in place to detect and stop the criminals' activity in Experi-Metal's accounts.

Q. Essentially, you're asserting that Comerica did not act in good faith because it could have instituted additional security procedures that would have enabled it to detect unusual activity in its customers' accounts, is that right?

* * *

A. I didn't use the word -- term additional. I think that this system should have been in place as part of the normal industry standard concepts of security. They're not additional, its not, oh, I should get additional stuff because it would help us better. No, it's those systems at a bank should already be in place.

Q. But, if Comerica didn't have those, they would be additional to what Comerica had, right?

A. If Comerica had anything.

Q. So, if Comerica didn't have those, the systems you're saying it should have would be additional, right?

A. I would say that they are a necessary addition to their security components, yes.

Q. And, because Comerica didn't have them, you're saying -- or you're saying that Comerica didn't have them, you're saying Comerica wasn't acting in good faith, is that right?

A. Yes, it's not following industry standard practices for banking.

Exh. C at (emphasis added). However, the Court already expressly decided that the subject matter of Mr. James' opinion on this point does not go to the "good faith" issue, which remains in this case, but rather the already decided commercially reasonable issue.

As part of its argument that Comerica did not act in good faith, Experi-Metal contends that Comerica could have instituted additional security procedures

which would have enabled it to detect unusual activity in customers' accounts. In this court's view, this argument is relevant to whether Comerica's security procedure was commercially reasonable not the good faith issue.

Exh. A at 14 n.6. Thus, Mr. James' first opinion is altogether irrelevant and not properly before the Court. Mr. James did not even take the time to read the Court's decision. *See* Exh. C at 52:21-53:1.

Moreover, Mr. James, without citing them or ever actually reading them (*see* Exh. C at 38-43), relies on the federal Gramm Leach Bliley Act ("GLBA"), 15 U.S.C. § 6801 *et seq.*, and federal regulations enacted under the GLBA called Guidelines Establishing Standards for Safeguarding Customer Information, 17 C.F.R. § 248.1 *et seq.*, to establish what he opines to be guiding, but not mandatory or binding, industry standards. He further relies on the FDIC's examination procedures based on GLBA and "guidance" in the FFIEC examination handbook also based on GLBA. *See* Exh. C. at 44. However, none of these "standards" apply in the context of Comerica's commercial banking relationship with its business customer Experi-Metal.

Notwithstanding this Court's statement that Sections 440.4702 and 440.4703 of Michigan's Uniform Commercial Code govern the resolution of this case (Exhibit A at 7), Mr. James did not review and is unaware of those statutes or Article 4A of the Uniform Commercial Code that apply to wire transfer payment orders between a bank and its commercial customer. *See id.* at 49:5-14. Moreover, Mr. James did not review any of the agreements between Comerica and Experi-Metal that establish the standards for and govern the wire transfer transactions between the two companies. *See id.* at 78:17-24; 114:3-9.

III ARGUMENT

Mr. James is not qualified to testify or render an opinion as to whether Comerica acted in good faith when it accepted the wire transactions at issue or whether Experi-Metal's Controller

Keith Maslowski was authorized to initiate those wire transfers, and his testimony will not assist the trier of fact in this bench trial.

The introduction of expert testimony is governed by Federal Rule of Evidence 702 (Testimony by Experts):

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In determining whether an expert qualifies under Rule 702, courts must determine “whether the expert's training and qualifications relate to the subject matter of his proposed testimony.” *Berry v. Crown Equipment Corp.*, 108 F. Supp. 2d 743, 749 (E.D. Mich. 2000). “Thus, the trial court must determine whether the expert’s training and qualifications provide a foundation for a witness to answer a specific question.” *Id.*; see also *Taylor v. Certainteed Corp.*, No. 01-74544, 2003 WL 25695244 at *3 (E.D. Mich. October 9, 2003) (“In the absence of any showing that Mr. Przepiora is qualified to render an opinion as to load securement on curtainside trailers, his testimony must be excluded. Simply put, Mr. Przepiora's training and qualifications do not relate to the subject matter of his proposed testimony.”).

In re Unisys Savings Plan Litigation, 173 F.3d 145, 155–156 (3rd Cir.1999), the court considered the reliability of an expert’s opinion in light of the expert’s untruthfulness during *voir*

dire. The court held that the trial court sitting as trier of fact did not abuse its discretion by refusing the proposed testimony of the expert due to such untruthfulness. The court stated: “[T]he Supreme Court refers to the District Court’s ‘gatekeeper’ role of screening such evidence to ensure that it is not only relevant but reliable. ... [T]he Court’s emphasis on reliability as well as on relevancy embraces within its standard the credibility of the witness proffering expert opinion. This is particularly true where, as here, it is the district court judge sitting as a finder of fact who must rule on issues of evidence.” *Id.* at 156.

Here, there are only two issues remaining for the Court, sitting as trier of fact, to consider. Mr. James’ is not qualified to testify to either and his testimony would not assist the Court in resolving those issues. His first opinion goes to an issue already decided by the Court and not to the “good faith” issue that remains. His second through sixth opinions all are based on his interpretation of “good faith” arising from industry standards and “guidance” that do not even apply to the relationship between Comerica and Experi-Metal.

The GLBA and its regulations require a bank to protect the “non public personal information of its customers”. 15 U.S.C. § 6801. The statute defines “non public personal information” as “personally identifiable financial information provided by a consumer to a financial institution.” 15 U.S.C. § 6809(4)(A). “Consumer” is defined as “an individual who obtains from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes, and also means the legal representative.” 15 U.S.C. § 6809(9); *see also* 17 CFR §248.3(g)(1).

If Mr. James had taken even a moment to review the statute and the regulations on which he bases his opinion, he would have clearly seen that they do not apply here:

Scope. . . this subpart applies only to nonpublic personal information about individuals who obtain financial products or services primarily for personal,

family, or household purposes from the institutions listed below. This subpart does not apply to information about companies or about individuals who obtain financial products or services primarily for business, commercial or agricultural purposes.

17 C.F.R. § 248.1(b).

Even if Mr. James had some basis for his opinions on the applicable law or the agreements between the parties, he is unqualified to give any such opinion because opining on the “good faith” of Comerica in accepting wire transfer payment orders from Experi-Metal is not his area of expertise. He purports to be a computer security expert. He is not an expert on banking practices, banking operations, wire transfers or the interpretation or application of the UCC or the parties’ agreements. Moreover, he is altogether biased against Comerica for shutting down his rogue attempt to pressure and embarrass Comerica to address a vulnerability he found in its internet application, and his “credentials” are inflated and misleading. Factors that alone call for him to be excluded as an expert. *See In re Unisys Savings Plan Litigation*, 173 F.3d 145, 155–156 (3rd Cir.1999) (affirming decision to exclude expert witness for untruthfulness and for less than stellar credentials).

IV. CONCLUSION

Mr. James’s proposed testimony is neither reliable nor helpful and, thus, should be excluded by this Court. For the reasons stated, Comerica requests that the Court grant its motion to exclude the proposed expert testimony of Mr. James.

Respectfully submitted,

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Dated: January 18, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2011, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

Respectfully submitted,

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