

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

EXPERI-METAL INC.,  
a Michigan corporation,

Plaintiff,

vs.

Case No. 2:09-cv-14890  
Hon. Patrick J. Duggan

COMERICA BANK,

Defendant.

---

Richard B. Tomlinson (P27604)  
Daniel R. Boynton (P 30359)  
Joseph W. Thomas (P33226)  
DRIGGERS, SCHULTZ & HERBST, P.C.  
Attorneys for Plaintiff  
2600 West Big Beaver Road, Suite 550  
Troy, MI 48084  
Telephone: 248.649.6000  
Facsimile: 248.649.6442  
[rtomlinson@driggerschultz.com](mailto: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  
Telephone: 313.963.7420  
[holleman@millercanfield.com](mailto:holleman@millercanfield.com)  
[kapalla@maillercanfield.com](mailto:kapalla@maillercanfield.com)

---

**PLAINTIFF EXPERI-METAL INC.'S BRIEF IN RESPONSE TO  
DEFENDANT COMERICA BANK'S MOTION *IN LIMINE*  
TO EXCLUDE PLAINTIFF'S EXPERT WITNESS**

Defendant Comerica Bank asks this Court to exclude the proposed testimony of Plaintiff's expert, Jonathan Lance James. Comerica argues that Mr. James is not qualified to render an opinion on the remaining issues in this case and that his testimony will not assist the trier of fact. Both arguments are without merit.

As Defendant correctly states, the introduction of expert testimony at trial is governed by FRE 702:

“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 specific facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

Defendant Comerica first attacks Mr. James’ qualifications as an expert. These attacks are both self-serving and baseless. As set forth in Mr. James’ *curriculum vitae* attached as Exhibit A, he has extensive knowledge, skill, experience, training and education in the field of information security, with over 10 years of experience in programming, network security, malware research, cryptography design, cryptanalysis, attacking protocols, and other areas in information security. Mr. James’ experience is particularly extensive when one considers that his primary area of expertise is phishing, which did not even exist 10 years ago.

Mr. James began his professional computer career in 1998 for Affordable Networking Company designing, installing and configuring networks. Subsequently, he worked on a 3 month contract with Vera Matrix to design a software system and write the code for a program to prevent piracy and manage digital rights. He was then hired by Stream Tone on a 6 month contract to try and break through the cryptography in their digital rights management software. He was successful. He worked for Bakbone Software which provided back-up software to its customers from 1999 to 2004. He was a network security engineer for Bakbone, including monitoring of their systems for external threats.

While at Bakbone Software, Mr. James formed Secure Science Corporation to try and start his own business fighting phishing and malware. An early project was a study of a 2003 phishing attack on Citibank. The study resulted in an article entitled, “Banking Scam Revealed” which was published online by Symantec (Article attached as Exhibit B). The article analyzes the types of phishing emails sent to Citibank customers, and points to how the emails can be distinguished from other phishing emails. The article notes the changing nature of the phishing

emails over just a short period of several months as the purported fraudsters appeared to try and improve their fraud. As a result of the article Secure Science received its first client, the United Nations. Mr. James' company was hired by the United Nations to do a risk analysis of their software system and look for vulnerabilities. Secure Science Corporation was then hired by Wells Fargo and Mr. James left Bakbone. Secure Science Corp consulted for Wells Fargo doing a risk analysis of their information security systems.

Mr. James' recent concentration has been in the area of phishing, which is the central issue in this case, and Mr. James has authored "Phishing Exposed," a technical manual which discusses techniques to investigate and understand on-line fraud against financial institutions and other business. He is also the co-author of a second book, "Emerging Threat Analysis." The most recent years of Mr. James' professional life have been devoted to devising techniques to prevent, track, and detect phishing and malware attacks. He is an advisory board member of the Digital PhishNet (a Microsoft/NCFTA/FBI organization) and is a regular speaker at security conferences and a source of information utilized by various news organizations. Part of Mr. James activities while consulting with banks was to advise the banks on how to comply with the guidelines issued by the Federal Financial Institution Examination Council, which are discussed below.

In addition, as set forth in Exhibit A, Mr. James has been invited as a speaker by both businesses and government entities, including the United States House of Representatives, the United States Secret Service, the Central Intelligence Agency and the Federal Bureau of Investigation. Private clients of Mr. James include Wells Fargo, TD Waterhouse, TD Ameritrade, CitiGroup, Charles Schwab, Wachovia, and PNC Bank.

Comerica makes an issue of Mr. James not having a college degree, yet Comerica does not require its own Manager of Information Security and Engineering Department to have a

college degree. K. Scott Vowels testified to this Court on Friday, January 21, 2011, that he is the Manager of Information Security and Engineering Department at Comerica, is 43 years old, has no college degree, and considers himself an expert in information security. Mr. Vowels' expertise was acquired through self-teaching and training courses.

In short, Mr. James' knowledge, skill, experience, training and education in this field is virtually unmatched and clearly qualifies him as an expert under FRE 702.

Defendant Comerica next argues that Mr. James' testimony should be excluded because it will not assist the Court, as trier of fact, to "understand the evidence or to determine a fact in issue." FRE 702. In support of this argument, Comerica erroneously concludes that Mr. James' opinions, as set forth in his expert report, are no longer relevant to the case because of a very limited finding contained in this Court's Opinion and Order Denying Defendant's Motion for Summary Judgment.

In that Opinion and Order, the Court held that "Comerica's secure token technology was commercially reasonable." (Opinion, p. 12) The secure token technology, however, was merely the vehicle through which bank customers such as Experi-Metal could access its accounts and perform certain tasks. As the Court further explained, the finding that this technology was commercially reasonable does not end the Court's inquiry. Comerica still has the burden to prove that "it accepted the wire transfer orders in good faith and in compliance with commercially reasonable security procedures and any instruction by Experi-Metal restricting acceptance of payment orders issued in the company's name." (Opinion, p. 15)

This Court must therefore determine from the evidence presented at trial whether Comerica acted in "good faith." Article 4A of the UCC defines "good faith" as "honesty in fact *and* the observance of reasonable commercial standards of fair dealing." MCL 440.4605(1)(f). As this Court noted in its Opinion Denying Comerica's Motion for Summary Judgment, the

Third Circuit has explained that “good faith,” as defined in the UCC, “has both a subjective prong – “honesty in fact” – and an objective prong – observance of “reasonable standards of fair dealing.” *In re Jersey Tractor Trailer, Inc.*, 580 F3rd 147, 156 (3<sup>rd</sup> Cir, 2009); see also UCC Section 1-203, Cmt. 20. That court also adopted the two-part test established by the Maine Supreme Court for evaluating the second component: “First, whether the conduct...comported with industry or ‘commercial’ standards applicable to the transactions and, second, whether those standards were reasonable standards intended to result in fair dealing.” *In re Jersey Tractor Trailer, Inc.*, 580 F3rd at 157 (citing *Maine Family Fed. Credit Union v Sun Life Assurance Co. of Canada*, 727 A2d 335, 343 (ME, 1999)).

Therefore, in applying the “good faith” test outlined above, this Court must determine whether Comerica’s conduct comported with industry or commercial standards applicable to the transactions at issue and whether or not those standards were reasonable standards intended to result in fair dealing. As discussed more fully in Plaintiff’s Trial Brief (pp. 15-18), courts have relied on applicable laws, regulations and governmental guidelines to determine the industry or commercial standards that apply and that are intended to result in fair dealing. Industry standards that apply to the bank and the instant case are established by the Federal Financial Institution Examination Council (“FFIEC”) and in particular, its Information Technology Examination Handbook, which includes e-banking and information security booklets which prescribe revisions to regulations and guidelines as may be necessary to ensure the financial institutions have policies, procedures and controls in place to deter and detect activities proscribed under 15 USC 6825.

The proposed testimony of Mr. James, as set forth in his expert report, goes directly to these issues. Mr. James will offer testimony to support Plaintiff’s contention that Comerica did

not act in good faith and in compliance with commercially reasonable security procedures in the following respects:

1. Comerica's monitoring systems did not meet industry standards and therefore failed to detect unusual activity in Plaintiff's accounts;
2. Comerica did not act in accordance with its security procedures and with written agreements when it accepted the wire transfers initiated by a third party, using Keith Maslowski's log in information;
3. Comerica failed to act in accordance with industry standards by failing to take steps to protect and to warn its customers regarding phishing emails being sent to its customers;
4. Comerica allowed the third party to transfer nonexistent funds from a zero balance account into Plaintiff's sweep account in order to continue to fund unauthorized wire transfers;
5. Comerica failed to report the suspected fraud on a timely basis;
6. Comerica did not act in accordance with industry standards when the fraudulent activity was reported to the Treasury Management Department;
7. Comerica did not act in accordance with industry standards when its wire transfer room accepted payments on wire transfers after discovery of the fraud and after the wire transfers had been flagged and stopped at the wire transfer room.

Each of these areas of Mr. James' testimony are unrelated to the secure token technology and go directly to the good faith issues upon which this Court has ruled there are genuine issues of material fact. Given Mr. James' knowledge, skill, experience, training and education in the area of information security in general and in phishing in particular, his testimony will assist the Court to understand the evidence and to determine these facts at issue.

Comerica's witness, Annie Goldman, testified to Comerica's knowledge of the multitude of phishing attacks over the last 4 years. She indicated that the phishing attacks are all different and as the technology of the phishing attacks changed she had to write new procedures for responding to phishing attacks. Ms. Goldman's testimony demonstrates the relevance of Mr. James' testimony, an expert in phishing who has been advising banks on industry standard

methodologies to prevent successful phishing attacks, as Ms. Goldman indicates there have been a lot of phishing attacks and they are all different.

Finally, Mr. James is not biased against Comerica. The information posted by Mr. James concerning Comerica's website was posted as "snapshots," thus not providing enough information for amateur security enthusiasts to abuse the information. The snapshots did not detail how the vulnerability worked. The vulnerability could be found without the information posted by Mr. James. This practice of posting vulnerabilities online is common in the information security industry. The purpose is to encourage major websites to take better care of their security. Comerica fixed the vulnerability within a week, which was the goal. The fact Comerica sent a letter concerning the posting does not create bias on the part of Mr. James.

In light of the foregoing, Plaintiff Experi-Metal Inc. respectfully requests that this Court deny Defendant Comerica Bank's Motion in Limine to Exclude Plaintiff's Expert Witness, Jonathan Lance James.

By: s/Richard B. Tomlinson  
Richard B. Tomlinson (P27604)  
DRIGGERS, SCHULTZ & HERBST, P.C.  
Attorneys for Plaintiff  
2600 West Big Beaver Road, Suite 550  
Troy, MI 48084  
Telephone: 248.649.6000  
Facsimile: 248.649.6442  
[rtomlinson@driggerssschultz.com](mailto:rtomlinson@driggerssschultz.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on January 24, 2011, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system, which will send notification of such filing to the following ECF participants: Todd A. Holleman (P57699), Lara Lenzotti Kapalla (P67667) and Boyd White, III (P72398).

Richard B. Tomlinson  
2600 W. Big Beaver Rd., #550  
Troy, Michigan 48084  
Phone: (248) 649-6000  
E-mail: [cmaeperson@driggerssschultz.com](mailto:cmaeperson@driggerssschultz.com)  
P27604