

**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 corporation,

Defendant.

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**COMERICA BANK'S AMENDED PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Defendant Comerica Bank (“Comerica”) hereby submits its proposed findings of fact and conclusions of law and requests that the Court enter judgment in its favor on plaintiff Experi-Metal, Inc.’s (“Experi-Metal”) claim.

FINDINGS OF FACT

I. KEITH MASLOWSKI WAS AUTHORIZED BY EXPERI-METAL TO INITIATE ELECTRONIC WIRE TRANSFER PAYMENT ORDERS TO COMERICA ON JANUARY 22, 2009

The parties’ agreements designated Mr. Maslowski as being authorized to initiate electronic wire transfers using Netvision/TM Connect Web

- A. On November 21, 2003, Experi-Metal’s president and CEO Valiena Allison signed a Treasury Management Services Agreement to obtain the Comerica NetVision Wire Transfer service (“Wire Transfer Service Agreement”). Exh. 1. She read every document. Allison Trial Transcript Jan. 21, 2011, Vol. 3 at 191.
- B. The Wire Transfer Service Agreement is governed by the Comerica Treasury Management Services Master Agreement dated August 2002 and any applicable implementation documents and user guides as such documents were amended from time to time. Exh. 1.
- C. Under the terms of the Wire Transfer Service Agreement, Experi-Metal was obligated to provide Comerica with correct and timely service implementation information requested by Comerica. Exh. 1, ¶ 1.
- D. Comerica requested and Experi-Metal provided the service implementation information that was then put on implementation documents, which governed, in part, the Wire Transfer Service Agreement. Exh. 3.
- E. Ms. Allison gave Brenda Paige of Comerica Keith Maslowski’s name and designated him to be a NetVision user. Ms. Paige put the information she received from Ms. Allison on the implementation worksheet. Exh. 3, p.3 Implementation Worksheet – Comerica NetVision User Profiles (Comerica003315); Paige Trial Transcript Jan. 24, 2011, Vol. 4 at 142.
- F. Ms. Allison also selected the services that Mr. Maslowski as a NetVision user would have access to and authorized him to use those services, which included the electronic initiation of wire transfer payment orders without approval. Exh. 3, p. 13 (Comerica003325), Implementation Worksheet – Comerica Netvision User Access form.

1. This selection and authorization is established by line 5b on the user access form where it states “YES” next to the code MTIN (450) Input. Exh. 3, p. 13 (Comerica003325), Implementation Worksheet – Comerica Netvision User Access form.
 2. Ms. Allison told Brenda Paige of Comerica that Mr. Maslowski was to be a NetVision user and stated to Ms. Paige that he as to have the access stated on the User Access form. Paige Trial Transcript Jan. 24, 2011, Vol. 4 at 145.
 3. The User Access form (Comerica003325) shows all of the NetVision service modules requested by Experi-Metal to be set up for the users and the two users were Valiena Allison and Keith Maslowski. Nosanchuk Trial Transcript, Jan. 24, 2011, Vol. 4 at 22.
 4. Because Mr. Maslowski’s NetVision user access included the “450” code, he had authority to initiate wire transfers and that service would have appeared on his NetVision screen. Nosanchuk Trial Testimony Jan. 24, 2011, Vol. 4 at 22-24.
- G. Experi-Metal provided Comerica with the names of Experi-Metal’s employees who were authorized to initiate electronic wire transfer payment orders and Comerica placed that information on the implementation worksheets. Exh. 3; Paige Trial Transcript Jan. 24, 2011, Vol. 4 at 142.
1. The implementation worksheets are documentation of the information provided by Ms. Allison of Experi-Metal to Comerica.
 2. The documentation names the Experi-Metal’s employees who were authorized to act on behalf of Experi-Metal and initiate wire transfer payment orders electronically. Exh. 3.
 3. The documentation (Exh. 3) satisfies Section 3.c of the Treasury Management Services Master Agreement. Exh. 51.
- H. Once Ms. Allison designated to Mr. Maslowski the authority to be a user on NetVision with the authority to initiate electronic wire transfer payment orders, the User Guide makes clear that Ms. Allison controlled that authority and could revoke it and then reinstate it at any time. Exh. 52 at 19-20; Exh. 53 at 32-33; Allison Trial Transcript Jan. 24, 2011, Vol. 4 at 37-38; Nosanchuk Trial Transcript Jan. 24, 2011, Vol. 4 at 20-21.
1. Ms. Allison was the administrative user and had the ability and authority to assign Mr. Maslowski permission to perform certain activities including the initiation of electronic wire transfer payment orders. Exh. 3, p.3; Exh.

52 at 19-20; Exh. 53 at 32-33; Nosanchuk Trial Transcript Jan. 24, 2011, Vol. 4 at 10.

2. Ms. Allison was trained by Comerica's representative Ms. Nosanchuk on how to be the administrative user and how to use the computer to change the rights assigned to the other user. Nosanchuk Trial Transcript Jan. 19, 2011, Vol. 1 at 46.
3. Ms. Allison never used her ability as the administrative user to change Mr. Maslowski's authority to initiate electronic wire transfer payment orders even though she had that ability and could have done it herself. Allison Trial Testimony, Jan. 21, 2011, Vol. 3 at 191; Allison Trial Testimony, Jan. 24, 2011, Vol. 4 at 29, 35-36.

Mr. Maslowski's ID was authorized on January 22, 2009 to initiate electronic wire transfer payment orders.

- I. The electronic wire transfer payment orders initiated on January 22, 2009 that resulted in money being fraudulently withdrawn from Experi-Metal's Comerica account were initiated using Mr. Maslowski's ID, password, PIN and secure token number. Exh. 61 at pp.11-108.
 1. Mr. Maslowski's user profile on January 22, 2009 showed that he had assigned to him the "450" code that allowed his ID to be used to initiate electronic wire transfers. Exh. 61 at 2-3.
 2. Mr. Maslowski was not an administrative user so someone with his credentials could not use his credentials to assign to him the authority to initiate electronic wire transfer payment orders if he did not already have that authority. Davis Trial Transcript Jan. 21, 2011, Vol. 3 at 98-99.

Ms. Allison had the corporate authority to designate and authorize Mr. Maslowski to initiate electronic wire transfer payment orders

- J. Ms. Allison was authorized by a corporate declaration of Experi-Metal to designate Mr. Maslowski to act on her behalf as an authorized signer to initiate electronic wire transfer payment orders. Exh. 9, ¶ 3; Carrubba Trial Transcript Jan. 24, 2011, Vol. 4 at 159, 179-80.
 1. Mr. Maslowski was designated by Ms. Allison to initiate electronic wire transfer payment orders in the implementation documents (Exh. 3) that govern the Wire Transfer Service Agreement (Exh. 1).
 2. Experi-Metal's corporate declaration recognizes that transfer requests and withdrawals are valid if ordered by any person designated in any other agreement entered by Experi-Metal and Comerica. Exh. 9, ¶ 3.

3. Thus, electronic wire transfer payment orders initiated using Mr. Maslowski's credentials are valid because they were ordered by Mr. Maslowski who was designated to do so in the Wire Transfer Service Agreement between Experi-Metal and Comerica (Exh.1 and Exh. 3). Carrubba Trial Transcript Jan. 25, 2011, Vol. 5 at 7-8.

Mr. Maslowski was a NetVision User designated and authorized to initiate electronic wire transfer payment orders as also demonstrated by the NetVision wire transfer contingency form.

- K. The Contingency Authorizations and Security Procedures form (Exh. 2) also establishes that Mr. Maslowski was authorized to initiate electronic wire transfer payment orders. Carrubba Trial Transcript Jan. 24, 2011, Vol. 4 at 189-90.
 1. Ms. Allison gave Mr. Maslowski the authority to initiate wire transfers by telephone to the Treasury Management department of Comerica if the NetVision application was not working. Exh. 2.
 2. Mr. Maslowski is identified as a "user" of NetVision on the "Contingency Authorizations" form (Exh. 2).
 3. A "user" is defined in the user guide as one that uses the NetVision system. Exh. 53, p.33.
 4. Mr. Maslowski was authorized to be a NetVision user by Experi-Metal and designated by Ms. Allison to initiate electronic wire transfer payment orders in NetVision. Exh. 3.
 5. The users that the Contingency Authorizations form (Exh. 2) refers to are users that have been designated to initiate electronic wire transfers when NetVision is operational. Carrubba Trial Transcript Jan. 24, 2011, Vol. 4 at 189-90.

Mr. Maslowski was authorized to initiate electronic wire transfers without a separate signed writing prepared by or submitted by Experi-Metal.

- L. No single writing signed by, submitted by or prepared by Experi-Metal expressly identifying Mr. Maslowski as being authorized to initiate electronic wire transfer payment orders is required. Carrubba Trial Transcript Jan. 25, 2011, Vol. 5 at 104-105.
 1. The Wire Transfer Service Agreement (Exh. 1) and Implementation Worksheets (Exh. 3) establish that Experi-Metal authorized Mr. Maslowski to initiate electronic wire transfer payment orders without

requiring any approval. Carrubba Trial Transcript Jan. 25, 2011, Vol. 5 at 7-8.

2. Without additional documentation, Mr. Maslowski admitted that he was authorized to initiate electronic wire transfer payment orders. Maslowski Trial Transcript Jan. 20, 2011, Vol. 2 at 25, 30.
3. Without additional documentation, Mr. Maslowski did initiate electronic wire transfer payment orders using his ID, password and PIN. Maslowski Trial Transcript Jan. 20, 2011, Vol. 2 at 26; Carrubba Trial Transcript Jan. 25, 2011, Vol. 5 at 8.
4. Without additional documentation, Mr. Maslowski's ID, password, PIN and secure token number were used to initiate electronic wire transfer payment orders on January 22, 2009. Exh. 61; Carrubba Trial Transcript Jan. 25, 2011, Vol. 5 at 8.
5. Mr. Maslowski was authorized to initiate electronic ACH transactions using NetVision and TM Connect Web from 2003 through 2009 without any single writing submitted, drafted or signed by Experi-Metal giving him that authority and without him being identified as an authorized signer on Experi-Metal's corporate declaration (Exh. 9). Allison Trial Transcript Jan. 21, 2011, Vol. 3 at 193; Allison Trial Transcript Jan. 26, 2011, Vol. 6 at 38-39.
 - a. ACH transactions like wire transfer transactions can result in the withdrawal of funds from Experi-Metal's accounts. Allison Trial Transcript Jan. 21, 2011, Vol. 3 at 193
 - b. Mr. Maslowski initiated electronic ACH transactions that resulted in funds being withdrawn from Experi-Metal's accounts using NetVision and TM Connect Web. Maslowski Trial Transcript Jan. 20, 2011, Vol. 2 at 10; Allison Trial Transcript Jan. 21, 2011, Vol. 3 at 193-94; Allison Trial Transcript Jan. 24, 2011, Vol. 4 at 57.
 - b. Experi-Metal cannot have it both ways and, on the one hand, state that Mr. Maslowski was authorized to initiate electronic ACH transactions without a single writing signed, submitted or prepared by Experi-Metal while, on the other hand, arguing that Mr. Maslowski was not authorized to initiate electronic wire transfer payment orders without a single writing signed, submitted or prepared by Experi-Metal.

6. The NetVision and TM Connect Web application was designed and presented to Experi-Metal as a self-managed application through which Ms. Allison as the administrative user had control over who did what in the application and Experi-Metal's accounts. Exh. 52; Exh. 53.
 - a. The process of changing whether Mr. Maslowski had the authority to initiate electronic wire transfer payment orders was an easy process that Ms. Allison could have done on her own at anytime without the need to submit any forms to Comerica. Nosanchuk Trial Transcript January 19, 2011, Vol. 1 at 50.
 - b. No forms were required to authorize Mr. Maslowski to initiate electronic wire transfer payment orders in NetVision/TM Connect Web or to remove that authorization because the application was set up so that the administrative user had that ability and authority. Carrubba Trial Transcript Jan. 25, 2011, Vol. 5 at 108-109.

Experi-Metal did not notify Comerica that Mr. Maslowski was not authorized to initiate wire transfer payment orders in NetVision/TM Connect Web.

- M. Ms. Allison received a secure ID token from Comerica on April 25, 2008 for Mr. Maslowski, and she gave that token to Mr. Maslowski. Exh. 21; Allison Trial Transcript Jan. 24, 2011, Vol. 4 at 60. She did not report to Comerica that Mr. Maslowski was no longer a TM Connect Web user.
- N. Ms. Allison checked to see what Mr. Maslowski was allowed or authorized to do in NetVision/TM Connect Web and did not find that anything was wrong. Allison Trial Testimony, Jan. 21, 2011 Vol. 3 at 223.
- O. Experi-Metal never submitted written notice to the address stated in the User Guide (Exh. 52 at 23; Exh. 53 at 38) as required by Treasury Services Master Agreement § 22.b. to revoke Mr. Maslowski's authorization to initiate electronic wire transfer payment orders in NetVision/TM Connect Web.
 1. The contact information in the User Guide is not Ms. Cassa's contact information.

II. THE 2007 DOCUMENTS DID NOT REVOKE MR. MASLOWSKI'S AUTHORITY TO INITIATE ELECTRONIC WIRE TRANSFER PAYMENT ORDERS

- A. Exhibit 17 authorizes Ms. Allison to initiate telephone wire transfer payment orders.
1. Exh. 17 does not mention Mr. Maslowski.
 2. Exh. 17 does not mention NetVision.
 3. Exh. 17 is not a Treasury Management form. Pniewski Trial Transcript Jan. 20, 2011, Vol. 2 at 102-104.
 4. This form gives Ms. Allison authority she did not previously have.
 5. This form was not submitted to remove Mr. Maslowski's authority to initiate electronic wire transfer payment orders. Cassa Trial Transcript Jan. 19, 2011, Vol. 1 at 82.
 6. The form limits telephone wire transfer payment orders to an amount less than or equal to \$250,000.
- B. Exhibit 19 authorizes Ms. Allison and Mr. King to initiate telephone wire transfer payment orders.
1. Exh. 19 does not mention Mr. Maslowski.
 2. Exh. 19 does not mention NetVision.
 3. Exh. 19 is not a Treasury Management form. Pniewski Trial Transcript Jan. 20, 2011, Vol. 2 at 102-104.
 4. This form gives Ms. Allison and Mr. King authority they did not previously have.
 5. This form was not submitted to remove Mr. Maslowski's authority to initiate wire transfer payment orders in NetVision. Cassa Trial Transcript Jan. 19, 2011, Vol. 1 at 84.
- C. Exhibit 18 is a corporate declaration that authorizes Ms. Allison and Mr. King to enter into wire transfer services agreements or designate those who may enter into such agreements. It does not speak to who is authorized to initiate wire transfer payment orders. Carrubba Trial Transcript Jan. 24, 2011, Vol. 4 at 184-85.

1. Exh. 18 ratifies the earlier signed Wire Transfer Service Agreement under which Ms. Allison designated Mr. Maslowski the authority to initiate electronic wire transfer payment orders.
 2. Exh. 18 is not a Treasury Management form. Pniewski Trial Transcript Jan. 20, 2011, Vol. 2 at 102-104.
- D. Exhibits 17-19 have nothing to do with NetVision or TM Connect Web. Cassa Trial Transcript Jan. 19, 2011, Vol. 1 at 81-83.
- E. Ms. Allison did not advise Ms. Cassa in late October 2007 that Mr. Maslowski would no longer be authorized to initiate wire transfers on behalf of Experi-Metal. Cassa Trial Transcript Jan. 19, 2011, Vol. 1 at 81-83.
- F. Ms. Cassa did not advise Ms. Allison in late October 2007 that Ms. Cassa would prepare all necessary documents to eliminate the authorization of Mr. Maslowski to be a wire transfer initiator on behalf of Experi-Metal. Cassa Trial Transcript Jan. 19, 2011, Vol. 1 at 81-83.
- G. Ms. Cassa did not advise Ms. Allison that Ms. Allison was the only authorized initiator of wire transfers on behalf of Experi-Metal either by phone, electronically or otherwise as of November 1, 2007. Cassa Trial Transcript Jan. 19, 2011, Vol. 1 at 81-83.
- H. Ms. Allison did not advise Ms. Cassa that the only two authorized initiators of wire transfers would be Ms. Allison and Mr. King as they were owners of the company. Cassa Trial Transcript Jan. 19, 2011, Vol. 1 at 81-83.
- I. Ms. Cassa did not confirm to Ms. Allison that Mr. Maslowski was no longer an authorized initiator of wire transfers. Cassa Trial Transcript Jan. 19, 2011, Vol. 1 at 81-83.
- J. Ms. Cassa did not confirm that Mr. King and Ms. Allison could only initiate wire transfers on behalf of Experi-Metal. Cassa Trial Transcript Jan. 19, 2011, Vol. 1 at 81-83.
- K. Ms. Cassa referred Ms. Allison to the Treasury Management department if Ms. Allison inquired about NetVision or TM Connect Web. Cassa Trial Transcript Jan. 19, 2011, Vol. 1 at 81-83.
- L. If Ms. Allison had requested that the Treasury Management department revoke Mr. Maslowski's authority to initiate electronic wire transfer payment orders, a Treasury Management customer relations representative would have helped Ms. Allison make the change herself in NetVision or TM Connect Web. Pniewski Trial Transcript Jan. 20, 2011, Vol. 2 at 100-01.

III. EXPERI-METAL'S VERSION OF WHAT TOOK PLACE IS INCONSISTENT WITH THE EVIDENCE

- A. Ms. Allison discovered that Mr. Maslowski was authorized to initiate electronic wire transfers in May or June of 2007 but did not do anything to change that at that time and instead waited until November 2007. Allison Trial Transcript Jan. 24, 2011, Vol. 4 at 118-19.
- B. Experi-Metal did not initiate another electronic wire transfer payment order after June 2007 so there is nothing that would have raised the issue of Mr. Maslowski having the authority to initiate wire transfer payment orders in late October or November of 2007.
- C. Ms. Allison knew that Mr. Maslowski had authority to initiate electronic wire transfer payment orders in 2005 and did not take any action to change that at that time. Exh. 12.
 - 1. Ms. Allison's assumption that Mr. Maslowski was going to initiate the wire transfer by telephone is nonsensical because that would assume that NetVision was inoperable as Mr. Maslowski only had authority to initiate wire transfer payment orders by telephone when NetVision was inoperable. Allison Trial Transcript Jan. 24, 2011, Vol. 4 at 38-40.
- D. There was no telephone call to Experi-Metal by Comerica to report suspicious activity in Experi-Metal's accounts at 10:50 A.M. on January 22, 2009.
 - 1. Comerica was not aware of the suspicious activity until approximately 11:30 A.M. Ruff Trial Transcript Jan. 19, 2011, Vol. 1 at 117.
 - 2. Ms. Ling of Comerica called Ms. Allison to inquire about the suspicious activity at approximately 12:05 P.M. on January 22, 2009. Ling Trial Transcript Jan. 19, 2011, Vol. 1 at 181; Exh. 34 (Ling phone records showing call to Experi-Metal number 586-977-7800 at 12:05 P.M.).
 - 3. Mr. Maslowski testified to Experi-Metal receiving the call at 10:50 A.M. but at deposition conceded that he did not know when the call actually was received. Maslowski Trial Transcript Jan. 20, 2011, Vol. 2 at 22-23.
 - 4. Ms. Allison was scared by the word "fraud" but did not call Comerica to follow up on the alleged initial 10:50 A.M. call for approximately two hours. Allison Trial Transcript Jan. 24, 2011, Vol. 4 at 137.
- E. Mr. Maslowski was incorrect when he testified that there was a block of blank white space on his computer screen when his authorization to initiate electronic wire transfer payment orders was allegedly removed.

1. The TM Connect Web in court demonstration showed that when the authorization to initiate electronic wire transfer payment orders is revoked no blank white space appears on the screen. Nosanchuk Trial Transcript Jan. 24, 2011, Vol. 4 at 21.
 2. Mr. Maslowski's user profile had the "450" code assigned to it on January 22, 2009, which means that the ability to initiate electronic wire transfer payment orders displayed on his screen. Nosanchuk Trial Transcript Jan. 24, 2011, Vol. 4 at 22-24.
- F. Ms. Allison is a highly educated and experienced business person with an undergraduate degree in marketing and a masters degree in business administration who had the training from Comerica or the resources available to her through the Treasury Management customer relations center to remove Mr. Maslowski's authority to initiate electronic wire transfer payment orders if she had wanted to do that before January 22, 2009. Allison Trial Transcript Jan. 24, 2011, Vol. 4 at 23, 32.
1. Ms. Allison had previously contacted Treasury Management to address other NetVision/TM Connect Web issues. Exh. 14, Exh. 15.
- G. Neither Ms. Allison nor Mr. Maslowski asked Comerica how the wire transfers could have been initiated by Mr. Maslowski's credentials when he was not authorized to initiate electronic wire transfer payment orders.
1. Mr. Maslowski reported on January 22, 2009 that the wires may have been because he had clicked on the fraudulent email and provided his credentials when they were requested. Mr. Maslowski failed to explain why he would have thought the wires were initiated by his credentials if his credentials did not have the authority to initiate electronic wire transfers.
 2. Ms. Allison did not report to the FBI in her official sworn statement that Mr. Maslowski was not authorized to initiate electronic wire transfer payment orders. Exh.
- H. Longtime veteran Comerica employees told a consistent and truthful version of the facts and how Comerica's procedures operate. They repeatedly stated that they did not intentionally delay or have any motive or opportunity for self-gain, profit or advantage as a result of the January 22, 2009 phishing attack on Experimetal and their response to it. Pniewski Trial Transcript; Jan. 20, 2011; Vol. 2 at 154; Jernigan Trial Transcript; Jan. 20, 2011; Vol. 2 at 190; Ruff Trial Transcript; Jan. 19, 2011; Vol. 1 at 128; Ling Trial Transcript; Jan. 19, 2011; Vol. 1 at 186; Murphy Trial Transcript; Jan. 21, 2011; Vol. 3 at 176.

- I. Experi-Metal and Ms. Allison had a great working relationship with Comerica leading up to January 22, 2009. Allison Trial Transcript Jan. 24, 2011, Vol. 4 at 28. However, she now asserts that she repeatedly asked for documents but did not get them.

IV. COMERICA'S SECURITY PROCEDURE WAS COMMERCIALY REASONABLE

- A. The Court previously held that Comerica's security procedure was commercially reasonable. July 8, 2010 Opinion and Order at 12.
- B. The Court previously held that the issue of whether Comerica should have implemented additional measures to detect suspicious activity is an issue that goes to the commercial reasonableness of the security procedure, which has already been decided, and does not go to the issue of whether Comerica acted in good faith in accepting the wire transfer payment orders it received on January 22, 2009. July 8, 2010 Opinion and Order at 14 n.6.
- C. The Court previously held that Comerica has established that NetVision and TM Connect Web are the same application and the change represents nothing more than a name change. July 8, 2010 Opinion and Order at 9.

V. COMERICA ACTED IN GOOD FAITH ON JANUARY 22, 2009

- A. On January 22, 2009 at approximately 7:35 A.M., despite being warned by Comerica that it would never ask for a customer's confidential user ID, password or PIN in an unsolicited email, Mr. Maslowski received such an unsolicited email, clicked on a link in it and proceeded to give away his user ID, password, PIN and secure token number to criminals who then used Mr. Maslowski's "key" to access Experi-Metal's Comerica bank accounts and initiate electronic wire transfer payment orders. Maslowski Trial Transcript Jan. 20, 2011, Vol. 2 at 12-13.
- B. Comerica received notice of suspicious activity in Experi-Metal's accounts at approximately 11:30 A.M. when Millerton Ruff received a telephone call from J.P. Morgan Chase advising her of six suspicious wires. Ruff Trial Transcript January 19, 2011: Vol. 1 at 117.
- C. Ms. Ruff called the Treasury Management customer relations center at about 11:39 A.M. after printing information on several of the suspicious wires. Ruff Trial Transcript Jan. 19, 2011; Vol. 1 at 123; Ling Trial Transcript; Vol. 1 at 177-78.
- D. Ms. Ruff spoke to Ms. Denise Ling for about five minutes during which she described the suspicious wire transfers related to Experi-Metal. Ruff Trial Transcript Jan. 19, 2011; Vol.1 at 124.

- E. Ms. Ling printed an activity report for Experi-Metal so that she could answer any questions that Experi-Metal might ask. The report prints at approximately 11:48 A.M. Ling Trial Transcript Jan. 19, 2011; Vol. 1 at 179-180.
- F. Ms. Ling reported the suspicious activity to her supervisor Rita Pniewski between 11:48 A.M. and 11:59 A.M. Ling Trial Transcript Jan. 19, 2011 at 180.
- G. Ms. Pniewski reported the potential fraud to Cathy Davis of Comerica's fraud group at 11:59 A.M. Pniewski; Pniewski Trial Transcript Vol. 2 at 94-95
- H. Ms. Ling telephoned Ms. Allison and confirmed with her at 12:05 A.M. that the suspicious activity was fraud and unauthorized. Ling Trial Transcript Jan. 19, 2011, Vol. 1 at 181.
- I. Ms. Ling immediately at 12:05 P.M. sent an email to Ms. Ruff to stop all wires and start recalling others. Ruff Trial Transcript; Jan. 19, 2011; Vol.1 at 125; Ling Trial Transcript Jan. 19, 2011; Vol. 1 at 181.
- J. Ms. Ling made a follow up phone call to Ms. Ruff at approximately 12:15 P.M. Ruff Trial Transcript January 19, 2011, Vol. 1 at 124.
- K. Ms. Ruff put a flag on the accounts to hold wires for review at 12:24 P.M. Ruff Trial Transcript Jan. 19, 2011, Vol. 1 at 124.
- L. Ms. Pniewski in the meantime contacted Connie Jernigan to disable the Experi-Metal users' IDs. Ms. Jernigan disabled the user IDs at 12:25 P.M. Pniewski Trial Transcript Jan. 20, 2011; Vol. 2 at 92.
- M. Ms. Ruff's supervisor confirmed the flag on Experi-Metal's accounts at 12:27 P.M. Ruff Trial Transcript, Jan. 19, 2011; Vol. 1 at 126.
- O. The process of disabling Experi-Metal's user IDs and stopping all wires takes only twenty minutes once Ms. Ling confirms that the activity in Experi-Metal's accounts is fraudulent. "That's really not that long." Murphy Trial Transcript Jan. 21, 2011, Vol. 3 at 61:2.
- P. One wire was released after 12:27 as the result of a mistake by a wire room operator who approved one of the held wires. The wire was not released intentionally and it was released without any motive or opportunity for self-gain, profit or advantage by Comerica. Murphy Trial Transcript Jan. 21, 2011, Vol. 3 at 72-73.
- Q. Ms. Jernigan also made a mistake by not "killing" the session being used by the criminals to initiate the wire transfers but the policy in effect at the time did not reference killing the session because in response to previous phishing attacks

disabling the IDs was sufficient when there was no active and ongoing fraud. Jernigan Trial Transcript Jan. 20, 2011, Vol. 2 at 190, 192.

- R. Experi-Metal named its business accounts including one that it called “employee savings” but that account was not a traditional savings account. Exh. 7; Allison Trial Transcript, Jan. 24, 2011, Vol. 4 at 54 (“It was a business account . . .”); Davis Trial Transcript Jan 21, Vol. 3 at 82.
- S. Comerica, at its discretion, can honor electronic wire transfer payment orders or internal account transfers that result in overdrafts. There is no policy that prohibits Comerica from allowing an account to be overdrawn.
1. Experi-Metal would several times a year conduct transactions that would result in overdrafts that Comerica covered. Cassa Trial Transcript Jan. 19, 2011, Vol. 1 at 88-89.
 2. Two of Experi-Metal’s accounts were set up to not allow overdrafts. Exh. 59; Pniewski Trial Transcript Jan. 20, 2011, Vol. 2 at 96-98.
 3. The accounts that were set up to not allow overdrafts were not overdrawn by the criminals on January 22, 2009. Exh. 45, Davis Trial Transcript Jan. 21, 2011, Vol. 3 at 80.
- S. Comerica’s security procedure was working as intended on January 22, 2009, and Mr. Maslowski’s credentials were authenticated according to the parties’ agreement. Stipulation – Trial Transcript Jan. 21, 2011, Vol. 3 at 130-31; Exh. 61; Allison Trial Transcript Jan. 24, 2011, Vol. 4 at 116.
1. The electronic wire transfer payment orders were accepted from Experi-Metal and authenticated by the parties agreed upon commercially reasonable security procedure. Carrubba Trial Transcript Jan. 25, 2011, Vol. 5 at 9-10.
 2. The Treasury Management Services Master Agreement states that payment orders are properly executed if the order is authorized by the customer or complies with the security procedure. Exh. 51, § 7.C p.17.
 3. Thus, those payment orders are deemed to be authorized by the customer. Carrubba Trial Transcript Jan. 24, 2011, Vol. 4 at 172 (“Q. So if it complies with the security procedure does this provision make it authorized? A. Yes, it does.”).
- T. Comerica recovered approximately \$1.4 million that Experi-Metal would have otherwise been responsible for and also waived approximately \$10,000 in fees and costs owed by Experi-Metal. Exh. 45; Exh. 46; Davis Trial Transcript Jan. 21, 2011, Vol. 3 at 80-85.

1. Ms. Allison did not incur any losses in her personal accounts as all of the money taken from those accounts was returned to her. Davis Trial Transcript Jan. 21, 2011, Vol. 3 at 81.
 2. Experi-Metal has not taken any steps to pursue a law suit or make a claim against the individuals who actually received the money. Allison Trial Transcript Jan. 24, 2011, Vol. 4 at 59.
 3. Experi-Metal collected \$10,000 from its insurance company. Exh. 57.
- U. Sending all customers anticipatory emails advising them of a phishing threat was unrealistic. It is not a standard in the industry to send all customers email warnings about “spam” emails they may receive. Carrubba Trial Transcript Jan. 25, 2011, Vol. 5 at 21-23; Goldman Trial Transcript Jan. 21, 2011, Vol. 3 at 154-56 (“[It] would be impossible to contact all of our customers and all of our users.”).
- V. The fraudulent email received by Mr. Maslowski appeared to him to be more legitimate than others because it had been forwarded to him by an owner of the company Mr. King. Maslowski Trial Transcript Jan. 20, 2011, Vol. 2 at 84;

VI. COMERICA HAD NO DUTY TO MONITOR THE TRANSACTIONS IN EXPERI-METAL’S ACCOUNTS

- A. ExperiMetal wanted and chose to use internet banking at Comerica. Exh. 1; Allison Trial Transcript Jan. 24, 2011, Vol. 4 at 28.
- B. Experi-Metal and Comerica are commercial entities and their relationship is a commercial relationship. Exh. 1.
- C. Comerica made clear to Experi-Metal and Experi-Metal agreed that Comerica was not monitoring wire transfer payment orders for errors or monitoring the content of wire transfer payment orders. Exh. 1, ¶ 3; Exh. 2, p.3.
- D. Comerica and Experi-Metal agreed that the security procedure offered by Comerica and utilized by Experi-Metal was commercially reasonable, and, based on that agreement, the Court held that the security procedure is commercially reasonable. The Court further held that the issue of whether Comerica should have taken additional measures to identify suspicious activity in Experi-Metal’s accounts was already decided against Experi-Metal when the Court held that the security procedure was commercially reasonable.
- E. Lack of monitoring did not result in the loss to Experi-Metal. Rather, Mr. Maslowski gave away his credentials to criminals, which gave the criminals access to Experi-Metal’s accounts and enabled them to transfer funds out of the

account. If he had followed Experi-Metal's and Comerica's policies and maintained the confidentiality of his credentials there would have been no loss. Maslowski Trial Transcript Jan. 20, 2011, Vol. 2 at 13.

Even banks such as the Bank of New York and J.P. Morgan Chase, which Experi-Metal and Mr. James hold up as models, took nearly four hours to identify the suspicious activity and notify Comerica of that it. Bank of New York did not even become aware of the suspicious wires until the Bank of Moscow advised it of them. Exh. 148, 150 (Comerica002574, Comerica002523).

- F. Experi-Metal's expert Lance James' opinion that Comerica should have had monitoring in place is based on inapplicable and non-binding guidelines.
1. The FFIEC guidelines and Mr. James' report are based on the Gramm Leach Bliley Act provisions as they pertain to safeguarding consumer (household) financial information and not commercial financial information. Exh. 55 at 1, B.1 at 1, B.2 at 30.
 2. Mr. James relies on the FFIEC guidelines for his opinion. Exh. 55.
 3. There is no evidence in the record that Comerica has ever failed a banking examination on the basis of the FFIEC guidelines. James Trial Transcript Jan. 25, 2011, Vol. 5 at 218.
 4. The FFIEC guidelines provide guidance only and are not binding. James Trial Transcript Jan. 26, 2011, Vol. 6 at 4-5.
- G. Mr. James' opinion is based on banks that are not the same size as Comerica and are five times the size of Comerica with additional resources available to them. James Trial Transcript Jan. 25, 2011, Vol. 5 at 205.
1. Mr. James has not consulted on or worked with Treasury Management systems such as the NetVision/TM Connect Web application at issue in this case. James Trial Transcript Jan. 25, 2011, Vol. 5 at 203-04.
 2. Mr. James, without anything to substantiate his assertion, states generally that almost all banks have monitoring, but he relies only on his work with three banks that are all significantly larger than Comerica and fails to identify how or where such information is publicly available.
- H. Mr. James' opinion is flawed because he is biased against Comerica having publicized a vulnerability in Comerica's internet web site that may have resulted in losses to Comerica and its customers. Comerica was forced to hire attorneys to send Mr. James a cease and desist letter and threaten further legal action before he agreed to remove his posting. Mr. James remained defiant and criticized

Comerica for taking action to protect itself from his efforts. James Trial Testimony Jan. 25, 2011, Vol. 5 at 208-10.

- I. Without being required to do so, Comerica did utilize a service provided by a company named Mark Monitor to search for counterfeit Comerica internet web sites and fraudulent emails and shut them down when they are located. Vowels Trial Transcript Jan. 21, 2011, Vol. 3. at 133-34.

CONCLUSIONS OF LAW

- I. Comerica need only prove its defense by a preponderance of the evidence, which means that it is more likely than not that it acted in good faith and in compliance with the security procedures and any written agreement or instruction of Experi-Metal restricting acceptance of payment orders issued in Experi-Metal's name. *See United States v. Laughton*, 437 F. Supp. 2d 665, 670-71 (E.D. Mich. 2006) (quoting *Pipe and Products of California v. Constr. Laborers Pension trust for S. California*, 508 U.S. 602, 622 (1993)) (“The burden of showing something by a ‘preponderance of the evidence,’ the most common standard in the civil law, ‘simply requires the trier of fact to believe the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’”).
- II. Wire transfer payment orders are enforceable as to the Experi-Metal even if Experi-Metal did not authorize them if (1) Comerica and Experi-Metal 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 proves that it accepted the orders in good faith and in compliance with the security procedure and any written agreement or instruction of the customer. Mich. Comp. Laws § 440.4702(2).
- III. The Court has already determined that the parties agreed that the authenticity of the payment orders would be verified pursuant to a security procedure and that the security procedure agreed to by the parties was commercially reasonable. *See* July 8, 2010 Opinion and Order.
- IV. There is no dispute that Comerica accepted the wire transfer payment orders in compliance with the security procedures in place. *See* July 10, 2010 Opinion and Order at 15 n.7. The security procedure was working and the wire transfer payment orders submitted to Comerica on January 22, 2009 using Keith Maslowski’s user ID, password and secure token number were authenticated using that security procedure.
- V. Comerica proved that accepted the electronic wire transfer payment orders on January 22, 2009 in compliance the written agreements with and instructions from Experi-Metal.
 - A. Experi-Metal is bound by the terms of the contract that it agreed to regardless of whether its representative actually read all of the terms of the implementation documents, the Treasury Management Master Services Agreement and the user guides that it acknowledged receiving and that it agreed governed the contract.

See Draeger v. Kent Co. Savings Ass'n, 242 Mich. 486, 489, 219 N.W. 637 (1928) (holding that a party cannot avoid the enforceability of the clear language of a contract when they fail to read it).

- B. The terms of the parties' agreements establish that Experi-Metal authorized Keith Maslowski to initiate electronic wire transfer payment orders using NetVision/TM Connect Web and never revoked that authorization.
 - C. Experi-Metal never gave Comerica notice required by the terms of the parties' agreement to remove Mr. Maslowski's authority to initiate electronic payment orders using Net Vision/TM Connect Web, and, the designation of other individuals to initiate telephone wire transfers to other departments of Comerica did not revoke his authority and was insufficient to do so.
 - D. The electronic wire transfer payment orders submitted on January 22, 2009 using Mr. Maslowski's user ID, password and secure token number were authenticated using a commercially reasonable security system that had been agreed upon by the parties and, thus, the payment orders are deemed authorized by the parties' agreement. *See* Exh. 51 § 7.C, p.17; *see also* § 7.F, p.17 (“[A]ny Payment Order . . . that complies with the Security Procedure will be deemed enforceable as authorized by the Customer.”).
 - E. The parties agreed that overdrafts would be allowed in accounts not coded to otherwise prohibit overdrafts from occurring. No overdrafts occurred in accounts coded not to allow them.
 - F. When Comerica confirmed with Experi-Metal that the January 22, 2009 wire transfer activity was fraudulent, Comerica was allowed a reasonable time to follow Experi-Metal's instructions to stop all future wires, which it did within 22 minutes, a reasonable amount of time under the circumstances. *See* Mich. Comp. Laws § 440.4702(2) (“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.”).
 - G. Thus, Comerica complied with the parties' written agreements and the instructions of Experi-Metal when it processed the electronic wire transfer payment orders submitted to it using Mr. Maslowski's credentials on January 22, 2009.
- VI. Comerica proved that it accepted the payment orders initiated on January 22, 2009 using Keith Maslowski's ID, password, PIN and secure token number in good faith.
- A. “Good faith” means honesty in fact and in accordance with reasonable commercial standards of fair dealing. *See* Mich. Comp. Laws §§ 440.4605(1)(f); 440.3103(1)(d).

- B. It does not involve consideration or application of a negligence or ordinary care standard. *See* Mich. Comp. Laws § 440.3103(1)(d), cmt 4; *See Walter Thompson, USA Inc. v. First Bank Americano*, 518 F.3d 128, 137, 139 (2d Cir. 2008) (good faith is not a negligence standard); *Auto-Owners Insurance Company v. Bank One*, 852 N.E.2d 604, 611-12 (Ind. Ct. App. 2006), *vacated on other grounds*, 879 N.E.2d 1086 (Ind. 2008) (“a bank’s failure to follow commercially reasonable banking procedures or to comply with its own policies generally will not constitute a lack of good faith.”); *State Bank of the Lakes v. Kansas Banker Surety Co.*, 328 D.3d 906, 909 (7th Cir. 1997) (“Avoidance of advantage-taking, which this section is getting at, differs from due care”).
1. Thus, mistakes made by Ms. Jernigan and the Comerica wire room employee that allowed one wire to escape after the Experi-Metal accounts had been flagged to not allow wires to be processed do not equate to “bad faith”.
 2. In addition, there is no bad faith from Ms. Jernigan’s mistake in not “killing the session” when the policy in effect on January 22, 2009 stated only to disable the user’s ID. Previous phishing attacks that Comerica had encountered were resolved by disabling the user’s ID and those previous phishing attacks did not involve, as this one did, an active session in which the phisher/criminal was still active.
 3. Mistake such as these that occurred on January 22, 2009 might be considered if the Court were to apply a negligence or ordinary care standard but that is not the analysis the Court is to apply under the Mich. Comp. Laws § 440.4702(2) when determining whether a party acted in good faith.
- C. Instead, whether Comerica acted in good faith hinges upon the bank’s motives when it accepted the wire transfer payment orders. *See id*; *see also FDIC v. Rayman*, 117 F.3d 994, 1000 (7th Cir. 1997) (“‘Good faith’ is a compact reference not to take opportunistic advantage”); *Continental Cas. Co. v. Fifth/Third Bank* 418 F.Supp.2d 964 (N.D. Ohio 2006) (although bank accepted deposit checks for large sums over a protracted period of time, court concluded it accepted them in good faith because there was no evidence indicating that the bank’s behavior resulted from a deliberate decision to ignore obvious fraud); Black’s Law Dictionary (6th Ed.) at 595-96 (defining “fair” as “Having the qualities of impartiality and honesty; free from prejudice, favoritism and self interest. Just; equitable; even-handed, equal, as between conflicting interests.”).
1. The electronic wire transfer payment orders submitted to Comerica using Mr. Maslowski’s login ID, password and secure token number on January 22, 2009 were authenticated using the parties agreed upon and commercially reasonable security system.

2. Comerica had no knowledge of that the wire transfer payment orders initiated by Mr. Maslowski's login ID, password and secure token number on January 22, 2009 were indeed fraudulent until 12:05 P.M.
3. Neither Comerica nor any of its employees had any intent, motivation or opportunity for self-gain, profit or advantage when Comerica processed the electronic wire transfer payment orders submitted to it on January 22, 2009 using Keith Maslowski's ID, password and secure token number.
4. Comerica's employees did not delay in stopping the fraud once they confirmed that the wire transfer orders were fraudulent.
5. Comerica's employees did not purposefully allow any fraudulent wires to leave the bank once the fraud was confirmed.
6. Comerica took immediate and prompt measures to stop the fraud and recover Experi-Metal's money.
7. Comerica recovered approximately \$1.4 million for Experi-Metal and waived approximately \$10,000 in fees that Experi-Metal would otherwise have been responsible for.
8. Comerica was entitled to rely on its customer Experi-Metal's assurance that it would keep confidential its login ID, password and secure token number.
9. While not obligated to do so, Comerica did engage a company to search out and stop fraudulent emails and internet web sites from using Comerica's name to dupe its customers. The Mark Monitor service was being used in January 2009.
10. Thus, Comerica acted honestly and in accordance with reasonable commercial standards of fair dealing when it accepted the wire transfer payment orders submitted to it on January 22, 2009 using Mr. Maslowski's authenticated user ID, password and secure token number and in the way that it responded to the phishing event when it confirmed that the orders were not authorized.
11. *In re Jersey Tractor Trailer Training, Inc.*, 580 F.3d 147 (3d Cir. 2009), and *Maine Family Fed. Credit v. Sun Life Assurance Co. of Canada*, 727 A.2d 335 (ME 1999), are distinguishable because in each case the issue arose under Article 3 of the Uniform Commercial Code and whether a party was a holder in due course of a check. Under such circumstances there is a motive or opportunity present that was not present here for a party to act for its own self gain or interest.

- a. In *Jersey Tractor*, the court held that Yale (a collection company) had to prove it acted fairly to Wawel Bank in order for Yale to be a holder in due course of funds it collected for its own benefit from receivables owed to Wawel's debtor and subject to Wawel's security interest. The court applied the Maine test for determining whether Yale acted in accordance with reasonable commercial standards of fair dealing.

Yale had done a substandard UCC search when it looked to determine whether anyone else, including Wawel, had a security interest in the receivables. There was no evidence that Yale's search was intentionally substandard or that it intended to do a substandard search to obtain holder in due course status to overcome Yale's claim, but, under those circumstances, it would be unfair to Wawel for Yale to have done a substandard search when there was an opportunity for Yale to obtain holder in due course standard as a result. There was an advantage to be gained by Yale, vis-à-vis Wawel, that gave rise to the two prong test under the good faith standard applied there. Those circumstances are not present here. There is no opportunity for Comerica to have benefitted as a result of allowing the wire transfers to continue to go out as they did. Comerica would not obtain any protected status as to them like a holder in due course that gains rights to the money when it can establish the good faith element.

- b. In *Maine Family*, the court held that the Maine legislature must have intended to slow down commercial transactions when it adopted the "reasonable commercial standards of fair dealing" prong of the "good faith" requirement. There is no similar indication that the Michigan legislature intended that the statute would slow down commercial transactions that are subject to Article 4A and the parties' ability to contract for the protections and services that they want.

Moreover, there, unlike here, there was evidence that credit union's policies had inherent risks in them, that the credit union did not follow its own discretionary policy and there were other things the credit union could have easily done that would have stopped the loss that other banks were doing but the credit union did not do. Here, Comerica followed its policies and the parties agreed upon security procedure.

VII. Comerica was under no duty or obligation to monitor the activity in Experi-Metal's accounts

- A. The parties agreed that Comerica would not be monitoring electronic wire transfer payment orders submitted by Experi-Metal for errors or content.

- B. The Court has already ruled that the issue of whether Comerica could have instituted additional security procedures which would have enabled it to detect unusual activity in customers' accounts is not part of the "good faith" analysis that is at issue. *See* July 8, 2010 Opinion and Order at 14 n.6. **unts.**
- C. The guidelines relied on by Mr. James and Experi-Metal to assert such a duty or obligation are not applicable as they are based on the Gramm Leach Bliley Act and its provisions with respect to the protection of the "non public personal information of its customers". 15 U.S.C. § 6801.
1. 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 C.F.R. §248.3(g)(1).
 2. The scope of the statute and its provisions do not apply to the commercial relationship between Comerica and Experi-Metal that is governed by Article 4A of the Uniform Commercial Code. This is made clear by 17 C.F.R. § 248.1(b), which states:

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.
 3. Mr. James' and Experi-Metals citation to 15 U.S.C. § 6821 and 15 U.S.C. § 6825 does not support their position. The FFIEC guidelines are not based on those provisions that prohibit obtaining customer information by false pretences.
- D. Moreover, there is no credible evidence in the record that monitoring of electronically initiated wire transfer payment orders using a self-managed treasury management application for commercial transactions by a bank the size of Comerica was the standard in the industry in January 2009.
1. Mr. James' testimony is suspect given his lack of education, his inflated credentials, his nefarious conduct as to Comerica that required it to threaten legal action against him, his lack of experience with treasury management applications and his unequal comparisons to banks five times larger than Comerica.

