UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EXPERI-METAL, INC.,
a Michigan corporation,

Plaintiff,

v.

COMERICA BANK,
a foreign banking organization,

Defendant.

Case No. 2:09-CV-14890

Hon. Patrick J. Duggan
Magistrate Judge Paul J. Komives

Richard B. Tomlinson (P27604)
Daniel R. Boynton (P30359)
Joseph W. Thomas (P33226)
DRIGGERS, SCHULTZ & HERBST, P.C.
Attorneys for Plaintiff
2600 West Big Beaver Road, Suite 550
Troy, MI 48084
(248) 649-6000
rtomlinson@driggersschultz.com

Todd A. Holleman (P57699)
Lara Lenzotti Kapalla (P67667)
Boyd White III (P72398)
MILLER CANFIELD PADDOCK AND STONE, PLC
Attorneys for Defendant Comerica Bank
150 W. Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-7420
holleman@millercanfield.com
kapalla@millercanfield.com

COMERICA BANK'S RESPONSE TO EXPERIMETAL'S "SUPPLEMENTAL BRIEF"

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page(s)

CASES

STATUTES

INTRODUCTION

The Court should reject Plaintiff Experi-Metal, Inc.'s "supplemental brief". Experi-Metal filed the brief without leave of the Court and without the agreement of defendant Comerica Bank. Trial briefs were to be filed and exchanged on the day of trial. Proposed findings of fact, and conclusions of law were to be filed a week after the trial finished. The Court made and has no provision in its scheduling order, its practice guidelines or its local rules that authorizes Experi-Metal's filing of its supplemental brief.

Experi-Metal's filing is not only unauthorized but also is unnecessary and unjustified. Experi-Metal previously had notice of the cases cited and relied on by Comerica when Comerica referenced those cases in its trial brief. Experi-Metal's failure to address those cases in its proposed findings of fact and conclusions of law should not be excused and no good cause or other justification has been offered or provided by Experi-Metal for its failure to do so. On this basis alone, Experi-Metal's unauthorized supplemental brief should be stricken and not considered by the Court. *See Ross, Brovins & Oehmke, P.C. v. Lexis/Nexis Group*, 463 F.3d 478, 488-89 (6th Cir. 2006) (holding that it was not an abuse of discretion to strike a supplemental brief because "[t]he district court does not have to accept every filing submitted by a party."); *see also LaSalle Nat'l Bank Ass'n v. Wonderland Shopping Ctr. Venture Ltd. P'ship*, 223 F. Supp. 2d 806, 808 n.1 (E.D. Mich. 2002) (refusing to consider supplemental brief filed without leave of the court).

Even if the Court considers Experi-Metal's supplemental brief, the argument contained in it should not change the conclusion that Comerica acted in good faith when it accepted wire transfer payment orders on January 22, 2009 that were submitted to it using Experi-Metal's financial controller Keith Maslowski's ID and password and authenticated by a commercially reasonable security procedure. And, then, when Comerica confirmed that the activity was

fraudulent, Comerica shut down that activity within approximately 20 minutes. It is undisputed that Comerica's employees did not intentionally delay and did not have any motive or opportunity for self-gain or self-profit in responding to the fraud once it was detected and confirmed.

I. COMERICA ACCEPTED WIRE TRANSER PAYMENT ORDERS ON JANUARY 22, 2009 FROM EXPERI-METAL'S ACCOUNT IN GOOD FAITH

Experi-Metal's reliance on a passage from an unidentified source of a comment to the UCC that has not been adopted by Michigan and is not incorporated in Michigan's version of the UCC is not helpful or persuasive on any point. There is no reference to the timing of when or if the historical changes cited there were made in Michigan or in the jurisdictions of the cases cited by Comerica in its trial brief and proposed conclusions of law.

Moreover, Experi-Metal does not and cannot rebut Comerica's analysis of the *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 (Maine 1999), decisions, which are factually and legally distinguishable from this case.

Experi-Metal ignores *Wachovia Bank, N.A. v. Federal Reserve Bank of Richmond*, 338 F.3d 318 (3d Cir. 2003), wherein the court stated the following:

> The U.C.C. defines "good faith" as (1) "honesty in fact" and (2) "the observance of reasonable commercial standards of fair dealing." § 25-3-103(a)(4). As to the second prong of the good faith test, the question is not whether a bank acted in accordance with "reasonable commercial standards," but whether the bank's actions conformed to "reasonable commercial standards *of fair dealing.*" White & Summers, *supra*, § 17-6 (4th ed. 1995). To determine whether Wachovia acted in conformity with reasonable commercial standards of fair dealing, we consider the fairness of Wachovia's actions, rather than any negligence on its part.

Id. at 322-23.

The court then drew the same distinction that this Court should draw here. The court refused to analyze "good faith" on the basis of whether the bank complied with reasonable

commercial standards and instead looked to whether the bank complied with reasonable commercial standards of fair dealing. The court found and held that:

> [t]he FRB has not come forward with evidence demonstrating that Wachovia's failure to review high-dollar checks manually was not honest in fact or did not conform to reasonable commercial standards of fair dealing. While the FRB does allege that Wachovia's check-processing procedures did not conform to reasonable commercial standards, the FRB has not made a showing that Wachovia failed to comply with reasonable commercial standards *of fair dealing.* This distinction is critical. In order to survive summary judgment, the FRB must point to evidence in the record indicating that Wachovia acted in an unfair or dishonest manner, rather than in a negligent manner. Because the FRB has not demonstrated that a question of material fact exists as to Wachovia's honesty or fair dealing, the FRB cannot prevail on its defense that Wachovia lacked good faith in paying the check.

Id. at 323 (underline added).

Like in *Wachovia*, here, the distinction between acting according to reasonable commercial standards and the observance of reasonable commercial standards of fair dealing is critical. Comerica established that its employees did not act unfairly or dishonestly. Experi-Metal's allegation that Comerica employees failed to act in accordance with reasonable commercial standards is irrelevant to the good faith analysis. The critical distinction overlooked by Experi-Metal is that acting in accordance with reasonable commercial standards is different than observing reasonable commercial standards of fair dealing. *See Wachovia*, 338 F.3d at 323. Experi-Metal's arguments in its "supplemental brief" and criticisms of the cases cited by Comerica are based on that oversight by Experi-Metal and on an incomplete and narrow review of the cited cases and should be rejected.

Experi-Metal criticizes Comerica's reliance on *Walter Thompson, USA Inc. v. First Bank Americano*, 518 F.3d 128, 137, 139 (2d Cir. 2008), for the position that the determination of whether a bank acted in good faith does not involve a negligence or ordinary care standard. This is not a position unique to the Second Circuit or the *Walter Thompson* court. *See Wachovia*, 338

F.3d at 322-23. And, Experi-Metal overlooks that Comerica first quoted from the comment to Michigan's UCC, which expressly states:

> Although fair dealing is a broad term that must be defined in context, it is clear that it is concerned with the fairness of conduct rather than the care with which an act is performed. Failure to exercise ordinary care in conducting a transaction is an entirely different concept than failure to deal fairly in conducting the transaction.

MICH. COMP. LAWS § 440.3103(1)(d), cmt 4 (emphasis added). It is clear that an alleged failure to exercise good faith is different then and does not involve a determination of whether Comerica was negligent or failed to exercise ordinary care. *See Wachovia*, 338 F.3d at 323.

The *Walter Thompson* decision supports and adopts that same position. There, the court stated: "[w]e also hold that the standard of 'good faith' for a drawee/payor bank under the U.C.C. is one that commands a 'duty of fair dealing' and not a 'duty of care.'" *Walter Thompson*, 518 F.3d at 137. Contrary to Experi-Metal's "supplemental brief" argument, the court also addressed the meaning of the good faith element of "reasonable commercial standards of fair dealing" when it stated:

> [t]he good faith requirement incorporates standards of honesty and fair dealing but not of negligence. In other words, the good faith requirement does not impose a standard of care but, rather, a standard of *fair dealing*. Because FBA has not alleged that BoA acted unfairly or dishonestly, this distinction is fatal to FBA's argument that BoA did not act in good faith.

Id. at 139. Thus, the court did address the "fair dealing" element of the "good faith" analysis and stated that it required acting unfairly – something different than simply action in accordance with reasonable commercial standards. .

The court went on to elaborate. After finding that the bank was not negligent, the only issue that remained was whether the bank acted with honesty in fact and in accordance with reasonable commercial standards of fair dealing. *See id.* at 139 n.14. The court then held:

> FBA and the Atlanta Fed point to no action or inaction that would suggest, much less establish, that BoA did not act with "honesty in fact." Instead, they suggest that BoA acted negligently because it should have closed the Account of its own accord or employed more advanced fraud detection capabilities, such as payee matching. While these alleged failures, if proven, might arguably establish negligence, they do not demonstrate a lack of "honesty in fact" or a failure to "observ[e] ... reasonable commercial standards of fair dealing." U.C.C. § 3-103(4). Indeed, the Fourth Circuit has held that a payor bank's reliance on a Positive Pay system, instead of on other methods of fraud detection, precluded a finding of a lack of good faith. *See Fed. Reserve Bank*, 338 F.3d at 323. We conclude, therefore, that BoA acted in good faith within the meaning of section 4-207 and can properly claim the benefit of the presentment warranty.

Id. at 140.

This holding is instructive because it shows that in the UCC "good faith" analysis a court must not divorce the "fair dealing" element from the "reasonable commercial standards" phrase. While in *Walter Thompson* "reasonable commercial standards may have called for the bank to close the account or employ more advanced fraud detection capabilities, those factors, when considered, were part of a negligence analysis and not the "good faith" or "reasonable "commercial standards of fair dealing" analysis. This is clear because the court stated that the bank acted in good faith, which includes observing reasonable commercial standards of fair dealing, even when it did not close the bank account sooner or employ more advanced fraud detection capabilities – remarkably similar to the alleged actions that Experi-Metal asserts comprise a lack of good faith and a failure to observe reasonable commercial standards of fair dealing by Comerica here. Experi-Metal's criticism of Comerica's citation to this case is completely misplaced. *Walter Thompson* should be embraced and followed here.

Likewise, in *Auto-Owners Insurance Company v. Bank One*, 852 N.E.2d 604 (Ind. Ct. App. 2006), *vacated on other grounds*, 879 N.E.2d 1086 (Ind. 2008), the court cited the same "good faith" standard that applies to this case under the Michigan UCC: "'[g]ood faith' means honesty in fact and the observance of reasonable commercial standards of fair dealing." *Id.* at

615 (quoting Indiana Code § 26-1-3-103(a)(4). Like the *Walter Thompson* court, the *Auto-Owners* court refused to divorce the "fair dealing" element from the "reasonable commercial standards" phrase when it conducted its "good faith" analysis.

> "A finding of bad faith is warranted if a bank for an extended period of time and despite bank policies dictating otherwise permits a person to deposit stolen checks to an account that does not belong to the payee." *Continental Cas. Co. v. Fifth/Third Bank*, 418 F. Supp. 2d 964, 973 (N.D. Ohio 2006). Nevertheless, "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." *Shearson Lehman Bros., Inc. v. Wasatch Bank*, 788 F. Supp. 1184, 1194 (D. Utah 1992). "Accordingly, absent some indication that the bank has acted in a subjectively dishonest or intentional manner in improperly accepting a check over a forged indorsement, the bank will be held to have acted in good faith." *Id.*
>
> Here, between 1991 and 1998, Bank One accepted forged checks from Wulf for deposit. In doing this, though, there is no evidence that Bank One violated its own policies or acted contrary to reasonable commercial standards of fair dealing. . . . Because the name of the Account and the endorsements on the checks were substantially similar to the payee names on the checks, Bank One had no reason to believe that the checks Wulf deposited into the Account were forged or stolen. This indicates that Bank One did not act in a subjectively dishonest or intentional manner when it took the checks for deposit. Therefore, we conclude that Bank One took the checks deposited by Wulf in good faith.

Id. As the court's findings and holding make clear, there has to be a showing of intent or motive on behalf of the bank for there to be a finding that the bank did not observe reasonable commercial standards of fair dealing as part of the good faith analysis.

Experi-Metal's criticism of the *Auto-Owners* court's reliance on the *Shearson Lehman* case is misplaced. The quote from the *Shearson Lehman* court was good law then and remains good law now. A bank's alleged failure to follow commercially reasonable banking procedures, on its own, is an altogether different consideration than the consideration of whether a bank acted in good faith by observing reasonable commercial standards of <u>fair dealing</u>. The former does not include or consider "fair dealing" and the latter does. The former focuses on the standard of care

(negligence) and the latter focuses on fairness (good faith).[1] Thus, the *Shearson Lehman* court correctly stated that the failure to follow commercially reasonable banking procedures on its own is not a lack of good faith. This is entirely consistent with the current UCC definition of "good faith".

In *Continental Cas. Co. v. Fifth Third Bank*, 418 F.Supp.2d 964 (N.D. Ohio 2006), the court, like those cited above, held that "'mere failure to follow commercially reasonable banking procedures or to comply with its own policies' does not *per se* equal bad faith." *Id.* at 973 (quoting *Pavex, Inc. v. York Fed. Sav. & Loan Assoc.*, 716 A.2d 640, 645 (Pa. Super. 1998)). The court held that "bad faith" required more. *See id.* Where there was no evidence of the bank having made a deliberate decision to ignore obvious fraud, there was no showing of bad faith. *See id.* Experi-Metal's attempt to distinguish this case raises a distinction without a difference. Experi-Metal argues that the *Continental* court did not consider the definition of good faith and only whether there was a showing of bad faith. In order for Comerica to prove it acted in good faith here, it has to show that it did not act in bad faith. Comerica has done so because it established through the testimony of the employees that were involved that there was no intentional delay and no opportunity or motive for self-gain or self-profit. Moreover, the

---

[1] *See State Bank of the Lakes v. Kansas Banker Surety Co.*, 328 F.3d 906, 909 (7th Cir. 1997)("Even Article 3 of the UCC, which contains a definition of "good faith" resembling what Kansas Bankers Surety proposes-"honesty in fact and the observance of reasonable commercial standards of fair dealing" . . . links commercial reasonableness to "fair dealing." Avoidance of advantage-taking, which this section is getting at, differs from due care.").

Experi-Metal criticizes this citation and calls it *dicta*, but, however viewed, the case provides a clear standard that the United States Court of Appeals for the Seventh Circuit, recognizes as applying to the UCC's "good faith" analysis, which is consistent with the other courts cited herein. Commercially reasonableness, on its own, relates to negligence and due care. *See id.* Observation of commercially reasonable standards of fair dealing relates to fairness and avoids advantage taking. *See id.*; *see also FDIC v. Rayman*, 117 F.3d 994, 1000 (7th Cir. 1997) (holding, in a different context but still evaluating the duty of good faith and fair dealing, that "'[g]ood faith' is a compact reference not to take opportunistic advantage . . . .")

evidence establishes that once Comerica confirmed the fraudulent activity it stopped it. Like in *Continental*, there was no evidence that Comerica made a deliberate decision to ignore the fraud once it became obvious. Like in *Continental*, here, there is no showing of bad faith and, thus, Comerica has established it acted in good faith.

As the courts in *Wachovia*, *Walter Thompson*, *Auto-Owners* and *Continental* have all consistently made clear, a failure to observe reasonable commercial standards of fair dealing requires a showing of fundamental unfairness or an intent or motive for self-profit or self-gain. That showing is not present here. Comerica established that its employees did not intentionally delay and that they did not act with any motive or opportunity for self-profit or self-gain.

CONCLUSION

Comerica established at trial that it and its employees acted in good faith by accepting the wire transfer payment orders submitted to them on January 22, 2009 when those orders were submitted using Experi-Metal's controller's ID and password, which unbeknownst to Comerica, he had given away to a third party, and were authenticated with a commercially reasonable security system. The Court should enter judgment in Comerica Bank's favor.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
Todd A. Holleman (P57699)
Lara Lenzotti Kapalla (P67667)
Boyd White III (P72398)

By: s/Todd A. Holleman
Attorneys for Defendant Comerica, Inc.
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
holleman@millercanfield.com

Dated: February 22, 2011

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2011, 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 parties.

Richard B. Tomlinson - rtomlinson@driggersschultz.com

s/Todd A. Holleman
Miller, Canfield, Paddock and Stone, PLC
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
holleman@millercanfield.com

18,828,574.1\022754-01932