IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

BLUE FLAME MEDICAL LLC, Plaintiff, v. CHAIN BRIDGE BANK, N.A., JOHN J. BROUGH, and DAVID M. EVINGER, Defendants.	**Civil Action No. 1:20-cv-00658**

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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July 20, 2020

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Defendants Chain Bridge Bank, N.A., John J. Brough, and David M. Evinger submit this memorandum in support of their motion to dismiss Plaintiff's Complaint.

INTRODUCTION

As the COVID-19 pandemic began to wreak havoc in mid-March 2020, states scrambled to obtain N95 masks and other personal protective equipment (PPE). As has been widely reported, states competed intensely to purchase scarce supplies for medical personnel, first responders, and others on the front lines.

This case involves just such a transaction. On March 26, 2020, the state of California, acting through its bank, JPMorgan Chase Bank, N.A. (JPMorgan), originated a wire transfer for $456,888,600 to Chain Bride Bank, N.A (Chain Bridge, or the Bank) for the benefit of Blue Flame Medical LLC (Blue Flame). The wire was supposed to be California's down payment on a $609 million purchase of 100 million N95 masks. Chain Bridge knew, however, that Blue Flame had come into existence only three days earlier and had opened its bank account just the previous day. The Bank also understood that the brand-new company was run by a pair of political fundraisers, not by medical supply professionals. And it knew that one of Blue Flame's principals had been champing at the bit to get Chain Bridge to wire California's money back out the door just as soon as it came in.

To say the least, receiving nearly half a billion dollars earmarked for a three-day-old company raised concerns at Chain Bridge, as well as at California's own bank, JPMorgan. And so Chain Bridge officials spoke with California officials and with their counterparts at JPMorgan—as any responsible bank would have done under the circumstances. Chain Bridge confirmed that Blue Flame's bank account had been opened just the day before by principals whose background was in politics. Within hours, California officials and JPMorgan requested the return of the wired funds, and Chain Bridge accommodated that request. Since then, Blue Flame's dealings with California and other states have become the subject of a federal criminal investigation, multiple state investigations, and an inquiry by the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee.[1]

Blue Flame has now filed this Complaint, hoping to extract an enormous windfall, at Chain Bridge's expense, by contending that Chain Bridge must pay on the wire despite having agreed to California and JPMorgan's request to cancel the wire and return the funds. The suggestion is that Chain Bridge—a mere conduit for transferring payment to Blue Flame—violated the Uniform Commercial Code (UCC) and should be held responsible for California and JPMorgan's decision to cancel the wire.

The Complaint further charges that Defendants' actions—speaking with California officials and then accommodating the request to cancel the wire transfer—"significantly harmed Blue Flame's business and the reputations of Blue Flame and its principals." Compl. ¶ 7. According to the Complaint, all of Blue Flame's ills can be traced back to the Defendants' actions: By a cascading chain reaction, the failure of the transaction with California (which Blue Flame insists would otherwise have gone off without a hitch) diminished the company's standing with other customers and led to adverse press and government investigations. *Id.* ¶ 5.

In the weeks since the Complaint's filing, however, that narrative has unraveled. According to Blue Flame's own response to congressional investigators, the company consistently

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[1] *See, e.g.*, Tom Hamburger & Juliet Eilperin, *Justice Department Investigates Blue Flame Medical After Claims That It Failed to Provide Masks to Maryland*, Wash. Post (May 6, 2020), https://tinyurl.com/BlueFlameWP; Kenneth P. Vogel, *Firm Set Up by G.O.P. Operatives Under Scrutiny Over Virus Contracts*, N.Y. Times (May 6, 2020), https://tinyurl.com/BlueFlameNYT; House Comm. on Energy & Commerce, *Pallone & Degette: E&C Will Open Inquiry Into Blue Flame Medical LLC* (May 12, 2020), https://tinyurl.com/BlueFlameEC.

failed to fulfill orders for PPE placed in late March and early April. *See* Letter from Howard Waltzman to Hon. Frank Pallone, Jr. & Hon. Diana DeGette 4-9 (June 22, 2020) (attached hereto as Exhibit A). Blue Flame attributes those failures to Chinese export restrictions, to Blue Flame's China-based supplier, and to other market and supply-chain disruptions—not anything to do with Defendants. *Id.* at 2, 4-9. For eighteen such transactions, Blue Flame was forced to issue a full refund after failing to meet its customers' requirements, and Blue Flame issued a partial refund in three other cases. *Id.* Blue Flame also remains mired in a dispute with Maryland after failing to deliver *a single one* of the 1.55 million N95 masks that Maryland ordered on April 1. *Id.* at 4-5. Under these circumstances, the notion that the cancellation of California's wire transfer was what prevented Blue Flame from fulfilling an order that was more than *6000 percent larger* is incredible, to put it mildly.[2]

But all of that is beside the point for present purposes, because Blue Flame's Complaint is dismissible on its face. Blue Flame's primary theory, advanced in Count I of the Complaint, is that Chain Bridge remains liable to pay on California's wire transfer. That claim fails as a matter of law because the wire transfer was cancelled, and Blue Flame thus has no right to demand payment. Nor is there any merit to Blue Flame's motley collection of tacked-on counts. The Complaint does not plausibly state a claim that Chain Bridge accepted an unauthorized instruction to transfer funds from Blue Flame's account (Count II), and it does not state a claim for conversion

[2] In testimony before the California legislature, the Director of California's Office of Emergency Services explained that Blue Flame had "indicated that they had 100 million N95 masks in the port of Long Beach." California State Assembly, Accountability & Administrative Review Comm., Hearing Video Recording (May 11, 2020), https://tinyurl.com/CalTestimony (at 1:01). That claim cannot be squared with Blue Flame's inability to supply Maryland with a single N95 mask, as well as with Blue Flame's own acknowledgement that its anticipated primary supplier of PPE "would not have the capacity to fulfill California's mask order on its own." Exhibit A at 3-4.

or breach of contract (Counts III and X), tortious interference, negligence or defamation (Counts IV, V, VIII, IX), or fraud (Counts VI and VII). Each of Blue Flame's claims should be dismissed.

The FBI has warned "of an increased potential for fraudulent activity dealing with the purchase of COVID-19-related medical equipment" in which "scammers may promise equipment they do not have access to." FBI Press Release, *FBI Warns Health Care Professionals of Increased Potential for Fraudulent Sales of COVID-19-Related Medical Equipment* (Mar. 27, 2020), https://tinyurl.com/FBI-PPE. The FBI urged "due diligence and appropriate caution" in transactions with counterparties "with whom [customers] have never worked and/or of which they've never heard." *Id.* Among other things, the FBI advised "to be on the lookout for any suspicious activity," including "[u]nusual payment terms" (such as a "supplier asking for up-front payments") or a supplier's "[u]nexplained source of bulk supply." *Id.*

In our financial system, "[b]anks are the first layer of defense against" suspicious transactions. *United States v. Zarrab*, No. 15 CR 867 (RMB), 2016 WL 6820737, at *14 (S.D.N.Y. Oct. 17, 2016). The Treasury Department's Financial Crimes Enforcement Network has explained, moreover, that "[c]ustomer due diligence is universally recognized as fundamental to mitigating illicit finance risk." 81 Fed. Reg. 29,401 (2016). And, as participants in a heavily regulated industry, banks face the possibility of substantial fines and other enforcement actions if they fail to discharge their responsibilities appropriately.[3] In this case, Blue Flame seeks to put Chain Bridge on the horns of a dilemma, by imposing punitive liability against the Bank for taking reasonable steps when it identified exactly what the FBI has described as "suspicious activity." That misguided effort should be rejected.

[3] *See, e.g.*, *In re Deutsche Bank AG*, Consent Order Under N.Y. Banking Law §§ 39 and 44 (July 6, 2020), https://tinyurl.com/DBdecree (imposing $150 million penalty based on bank's compliance failures in its relationships with Jeffrey Epstein and related individuals and entities).

BACKGROUND

Because this case is before the Court on a motion to dismiss, we narrate the factual background according to the Complaint's allegations, as supplemented by materials that are incorporated by reference into the Complaint or otherwise subject to judicial notice at this stage of the proceedings.

A. Michael Gula And John Thomas Form Blue Flame

Before the COVID-19 pandemic, Michael Gula and John Thomas were political operatives. Compl. ¶ 22. Gula and Thomas each ran "political consulting," "communications," or "opinion research" firms. *Id.* Neither had any prior experience managing medical supply sales and logistics. *See id.* But eager to seize the opportunity presented by desperate shortages of PPE, Gula and Thomas began negotiating with California on March 20, 2020, to supply the state "hundreds of millions" of N95 masks and other PPE. *Id.* ¶ 19.

At the time, Blue Flame did not even exist. Gula and Thomas formed the Delaware corporation the following Monday, March 23. Compl. ¶ 23. The newly formed company approached Chain Bridge about opening a checking account that could receive wire transfers, and completed an account agreement on March 25. *Id.* ¶¶ 26, 30. A copy of Blue Flame's account agreement, executed by Gula, is attached hereto as Exhibit B. *See* Compl. ¶ 4 (invoking the account agreement). The account agreement expressly provides that Blue Flame's rights were qualified by, among other additional documents, the "Funds Availability" policy attached hereto as Exhibit C. Under that policy, as a new customer, funds that Blue Flame received via wire transfer would be made available for withdrawal on the next business day after deposit. *See* Exhibit C.

Meanwhile, Blue Flame was busy negotiating with California for a staggering $609 million purchase of 100 million N95 masks. Compl. ¶ 25. The arrangement required California to pay 75% of the price—more than $456 million—up-front before Blue Flame delivered any masks. *Id.*

Blue Flame alleges that Gula discussed the anticipated wire transfer from California with the Bank on March 25, including the wire's expected size and Blue Flame's need for "immediate email notification" as soon as it arrived. Compl. ¶¶ 32, 35-37. Defendants Brough and Evinger called Gula to discuss Blue Flame's business and the incoming wire. *Id.* ¶ 38. Gula described the California transaction, Blue Flame's medical supply sources, the wire size, and Blue Flame's intention to "immediately" wire all of the money to mask manufacturers at their bank accounts in the United States. *Id.* ¶ 39. Gula also told Brough and Evinger that the California transaction was going to be life-changing for him; he would "shut down" his political business and "exit the world of politics" as soon the transaction was underway. *Id.* ¶ 41.

According to the Complaint, Defendants Brough and Evinger "indicated to Mr. Gula that the bank would accept the wire transfer for Blue Flame's account" and could resolve any regulatory challenges posed by a wire transfer of that size. Compl. ¶¶ 42-43.

B. California Sends, Then Cancels, Its $456 Million Wire Transfer

The next day, March 26, at 11:20 a.m. eastern time, California's bank, JPMorgan, sent the wire transfer to Chain Bridge. Compl. ¶ 59; *see also* Exhibit D (notification of incoming wire transfer). The transfer was sent over the Federal Reserve's Fedwire Funds Service. Compl. ¶ 89. Fedwire transactions are subject to Federal Reserve Board regulations and guidance, including Subpart B of its Regulation J. 12 C.F.R. §§ 210.25-210.32. Subpart B of Regulation J, in turn, incorporates Article 4A of the UCC. *Id.* § 210.25(b)(1); 12 C.F.R. pt. 210, subpt. B, app. B; *see also Donmar Enters., Inc. v. Southern Nat'l Bank of N.C.*, 64 F.3d 944, 948 (4th Cir. 1995). Article 4A treats Fedwire transfers as a form of "funds transfer"—that is, a series of transactions by which the "originator" causes a "beneficiary" to receive payment through instructions to one or more banks. UCC § 4A-104(a).[4] Those instructions, which form the individual steps of a funds transfer, are known as "payment orders." *Id.* § 4A-103(a)(1).

Blue Flame alleges that, at 11:57 a.m. eastern time, Chain Bridge issued a notice indicating that it had received the wire transfer from California and, two minutes later, sent Gula an email containing a link to the notice. Compl. ¶ 61. According to the Complaint, Thomas immediately got to work arranging for wire transfers from Blue Flame's account at Chain Bridge to putative PPE manufacturers but, because the account was so new and did not yet have electronic wire initiation functionality, Chain Bridge required Thomas to complete paperwork to initiate the outbound wire transfers. *Id.* ¶ 63. Before completing the paperwork, Gula emailed every client of his political consulting business to announce that he "had built another business outside politics and would be no longer be [*sic*] reachable." *Id.* ¶ 66. He "wished his former clients the best of luck in politics and life." *Id.*

Blue Flame alleges that at approximately 1:20 p.m. eastern time, Gula discovered he was no longer able to electronically access Blue Flame's account. Compl. ¶ 68. He reached out to Brough and Evinger, requesting that someone call him. *Id.* ¶ 69. Approximately 20 minutes later, Brough emailed Gula stating that Chain Bridge "received official notice from the sending bank to return the wire," and that Gula should "resolve directly with the state of California." *Id.* ¶ 70. As the Complaint alleges, "California officials [had] requested the return of the funds wired by California." *Id.* ¶ 77; *see also* Exhibit E (Fedwire transmission memorializing cancellation request). The "Defendants agreed to the California officials' request immediately, and the funds

[4] Unless otherwise indicated, all references in this brief to provisions of Article 4A of the UCC are to the version of that law incorporated by reference in Subpart B of Regulation J and reprinted as an appendix to Subpart B.

wired by California were returned to" JPMorgan, California's bank. Compl. ¶ 78. Chain Bridge then sent Gula voided copies of Blue Flame's account opening documents and closed Blue Flame's account. *Id.* ¶ 71.

Blue Flame alleges that after Chain Bridge accepted the wire transfer, but before California asked that the funds be returned, Chain Bridge contacted the California State Treasurer's Office and shared that "the Bank was not comfortable with the transaction and was concerned it was fraudulent because Blue Flame's bank account had been opened the previous day by a 'political operative.'" Compl. ¶ 73. Blue Flame predicates this allegation on "public statements by the California State Treasurer, Fiona Ma." *Id.* In the very same statement that Blue Flame cites, however, Ma explained that it was "one of [California's] depository banks who flagged the transaction with concerns about possible fraudulent activity," not Chain Bridge. *See* California State Assembly, Accountability & Administrative Review Comm., Hearing Video Recording (May 11, 2020), https://tinyurl.com/CalTestimony (at 2:17).[5] According to Blue Flame, Chain Bridge's alleged fraud concerns were but a fig leaf for Chain Bridge's ulterior motive in seeking to cancel the transfer: to avoid any additional reserve requirements associated with accepting such a large deposit. Compl. ¶ 76.

C. Blue Flame's Claims

On June 12, 2020, Blue Flame filed this suit. Blue Flame asserts two claims under the UCC, as incorporated into Regulation J: that Chain Bridge violated UCC Section 4A-404 by

[5] Because Ma's statements are "incorporated into the complaint by reference," this Court may examine them in considering Defendants' 12(b)(6) motion. *See Feeley v. Total Realty Mgmt.*, 660 F. Supp. 2d 700, 707 (E.D. Va. 2009). In the alternative, because they are contained in a video hosted by a government website, Ma's statements are subject to judicial notice. *See, e.g.*, *Blatt v. Pambakian*, 432 F. Supp. 3d 1141, 1165 (C.D. Cal. 2020) (taking judicial notice of a video interview posted by CNN because it was "referenced in the Complaint," "publicly available," and "from a source whose authenticity cannot be questioned").

refusing to pay Blue Flame after accepting a payment order for Blue Flame's benefit (Count I); and that Chain Bridge violated UCC Section 4A-204 by returning the wired funds at California's request (Count II). Blue Flame also asserts eight claims under Virginia common law: conversion (Count III), tortious interference with contract and tortious interference with business expectancy (Counts IV and V), actual fraud and constructive fraud (Count VI and VII), negligence (Count VIII), defamation (Count IX), and breach of contract (Count X). Blue Flame demands judgment for compensatory and punitive damages, as well as interest, costs, and attorneys' fees.

LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted if the complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In addition to the allegations of the complaint itself, the court may consider "documents incorporated into the complaint by reference," *Feeley v. Total Realty Mgmt.*, 660 F. Supp. 2d 700, 707 (E.D. Va. 2009), and "relevant facts obtained from the public record," *Papasan v. Allain*, 478 U.S. 265, 283 (1986).

ARGUMENT

I. Blue Flame Does Not State A Claim For A Violation Of UCC Section 4A-404(a) (Count I)

In Count I of the Complaint, Blue Flame alleges that Chain Bridge breached an obligation under UCC Section 4A-404(a), as incorporated into Subpart B of Federal Reserve Regulation J, because Chain Bridge accepted a payment order for California's wire transfer but then did not complete payment to Blue Flame. *See* Compl. ¶ 96. That theory fails to state a claim because the payment order at issue was cancelled. Thus, even assuming for the sake of argument that the

Complaint validly alleges acceptance of the payment order by Chain Bridge, Blue Flame has no right to demand payment.

Section 4A-404(a) of the UCC provides that, as a general matter, "if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order." UCC § 4A-404(a). But that general rule is expressly "[s]ubject to Section[] 4A-211(e)." *Id.* And Section 4A-211(e) provides, in turn, that "[i]f an accepted payment order is canceled, the acceptance is nullified, and no person has any right or obligation based on the acceptance." *Id.* § 4A-211(e).

Here, the Complaint alleges cancellation of the payment order: Blue Flame alleges that "California officials requested the return of the funds wired by California." Compl. ¶ 77; *see also* Exhibit E. Blue Flame further alleges that "Defendants agreed to the California officials' request immediately." Compl. ¶ 78. As a result of that cancellation, any acceptance of the payment order was "nullified," Chain Bridge has no "obligation" to pay under Section 4A-404(a), and Blue Flame has no corresponding "right" to receive payment. UCC § 4A-211(e). Because Chain Bridge is not liable under Section 4A-404(a), Count I should be dismissed.[6]

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[6] The Complaint alleges, in conclusory fashion, that "under these circumstances the Bank could not cancel or amend the payment order after it had been accepted, and the Bank had no basis to agree to cancel or amend the payment order or to otherwise return the transferred funds." Compl. ¶ 93. But Section 4A-211(e) makes clear that a cancellation can occur after acceptance of a payment order. Insofar as Blue Flame means to rely on the rules set forth in Section 4A-211(c) governing when a post-acceptance cancellation is "effective," UCC § 4A-211(c), that reliance is misplaced. Section 4A-211(e), the provision to which a bank's Section 4A-404(a) payment obligation is expressly "[s]ubject," UCC § 4A-404(a), provides that no rights or obligation arise from *any* payment order that is "canceled," UCC § 4A-211(e). It does not require that the cancellation be "effective" within the meaning of Section 4A-211(c).

II. Blue Flame Does Not State A Claim For A Violation Of UCC Section 4A-204(a) (Count II)

Blue Flame alleges, "[u]pon information and belief," that Chain Bridge violated UCC Section 4A-204(a) because, when it returned funds to California, it "issued a new payment order on behalf of Blue Flame, which was neither authorized by Blue Flame nor effective as Blue Flame's order." Compl. ¶ 110. According to Blue Flame, Section 4A-204(a) "provides a private right of action to a bank customer whose bank *issues* a payment order that purports to be on behalf of the customer but in fact is not authorized and not effective as the order of the customer." *Id.* ¶ 109 (emphasis added).

That is not what Section 4A-204(a) says. Rather, Section 4A-204(a) requires a "receiving bank"—here Chain Bridge—to refund its customer when the bank "*accepts* a payment order issued in the name of its customer as sender" that is either unauthorized and not effective (under Section 4A-202) or unenforceable against the customer (under Section 4A-203). UCC § 4A-204(a) (emphasis added). But the Complaint does not allege that the Bank ever received or accepted an instruction "in the name of" Blue Flame to return the funds to California. What the Complaint alleges is that the Bank accommodated *California's* request that the funds be returned to it. Section 4A-204(a) does not apply here.

The reported cases addressing Section 4A-204(a) are consistent with its plain text. They uniformly address unauthorized payment orders that a bank *accepts* from someone—usually a person purporting to be the bank's customer or the customer's agent. *See, e.g.*, *Gold v. Merrill Lynch & Co.*, No. 09-318-PHX-JAT, 2009 WL 2132698, at *1 (D. Ariz. July 14, 2009) (payment orders from plaintiff's retirement account that his wife "had completed . . . by forging [plaintiff's] signature"); *Regatos v. North Fork Bank*, 838 N.E.2d 629, 630-31 (N.Y. 2005) (payment order "from someone [the receiving bank] believed to be [its customer], but failed to follow agreed security procedures to confirm" (footnote omitted)); *see also Ma v. Merrill Lynch, Inc.*, 597 F.3d 84, 86-87 (2d Cir. 2010) (payment orders for which financial advisor assigned by bank "forged [the customer's] signature . . . and falsely noted that she had confirmed the transfers with [the customer]").

Because Blue Flame does not allege that Chain Bridge acted as a "receiving bank" by "accepted[ing]" a payment order from anyone—let alone a payment order "issued in the name of its customer"—Section 4A-204 provides no cause of action here.[7]

III. Blue Flame Does Not State A Claim For Conversion (Count III)

In Count III, Blue Flame alleges that Chain Bridge's return of the wired funds to California was a conversion of those funds. To state a conversion claim, Blue Flame must allege "(i) the ownership or right to possession of the property at the time of the conversion and (ii) the wrongful exercise of dominion or control by defendant over the plaintiff's property, thus depriving plaintiff of possession." *Airlines Reporting Corp. v. Pishvaian*, 155 F. Supp. 2d 659, 664 (E.D. Va. 2001) (citing *Universal C.I.T. Credit Corp. v. Kaplan*, 92 S.E.2d 359, 365 (Va. 1956)). Blue Flame alleges that Defendants, by removing funds from Blue Flame's bank account, "exercised dominion and control over those funds and thereby deprived Blue Flame of their possession." Compl. ¶ 123. But the conversion claim fails because Blue Flame had no such right to possession.

[7] In Count II, Blue Flame strains to establish that Chain Bridge had completed payment to Blue Flame at the time the funds were returned to California. *See* Compl. ¶¶ 104-05. As we explain below in connection with Blue Flame's conversion claim, the Complaint's allegations do not establish completed payment. *See* pp. 14-15, *infra*. That dispute is irrelevant for purposes of Count II, however, because Section 4A-204 does not provide a cause of action here for the reasons stated in the text—whether or not Blue Flame ever received payment.

A. As A General Depositor, Blue Flame Could Not Acquire A Right To Possession Of Particular Funds

Blue Flame's conversion theory is foreclosed by settled law about rights to bank deposits. In general, a bank customer does not have a property right in funds deposited with a bank. Rather, "the relation between a general depositor and the bank in which his deposit is made is simply that of debtor and creditor." *Bernardini v. Central Nat'l Bank of Richmond*, 290 S.E.2d 863, 864 (Va. 1982). "[M]oneys deposited immediately become the property of the bank, and the [bank] becomes debtor of the depositor." *Id.*[8] By the same token, a depositor has no right to possession of particular funds that are "sufficiently specific and identifiable, in relation to the bank's other funds, to support a claim for conversion against the bank." *Fundacion Museo de Arte Contemporaneo de Caracas v. CBI-TDB Union Bancaire Privee*, 160 F.3d 146, 148 (2d Cir. 1998) (per curiam).

Blue Flame thus fails to plead any interference with an ownership or possessory right that Blue Flame had over the funds at issue. A "claim for conversion of funds will not lie when," as in this case, the plaintiff alleges only "failure to repay by the defendant and the relationship between the parties is one of a debtor-creditor." *Kancor Ams., Inc. v. ATC Ingredients, Inc.*, No. 1:15-cv00589-GBL-IDD, 2016 WL 740061, at *9 (E.D. Va. Feb. 25, 2016); *see also, e.g.*, *Guill v. Academy Life Ins. Co.*, No. 89-1509, 1991 WL 105502, at *3 (4th Cir. June 19, 1991) (South Carolina law); Restatement (Second) of Torts § 242 cmt. f (1965). Count III therefore should be dismissed.

[8] The general rule is qualified by an exception for "special deposits," where there is "a clear agreement" between the "depositor and the bank . . . that the bank [is] to have no right to use the funds but should hold them for specific repayment to the depositor." *Williams v. Dickenson Cty. Bank*, 7 S.E.2d 885, 887 (Va. 1940). That exception is inapplicable here.

B. Blue Flame Had No Right To Possession Of Any Funds Because Payment Was Not Complete

Blue Flame's conversion theory should be dismissed for the additional reason that it proceeds from the incorrect premise that Chain Bridge had completed payment to Blue Flame when the funds at issue were returned to California. Compl. ¶ 117. Blue Flame reasons that payment was complete because Blue Flame's account received credit for the amount of California's wire transfer and those funds appeared in Blue Flame's online access portal. *Id.* ¶¶ 115-16. But those allegations are insufficient to support a conclusion that Blue Flame had received payment. Thus, even aside from the basic principles of Virginia banking law just discussed, Blue Flame could not have acquired any property or possessory right in the funds.

Whether a beneficiary's bank has made payment to the beneficiary of a wire transfer is governed by Section 4A-405 of the UCC, as incorporated into Subpart B of Regulation J. As is pertinent here, that provision states that, "[i]f the beneficiary's bank credits an account of the beneficiary," payment "occurs when and to the extent that (i) the beneficiary is notified of the right to withdraw the credit, (ii) the bank lawfully applies the credit to a debt of the beneficiary, or (iii) funds with respect to the order are otherwise made available to the beneficiary by the bank." UCC § 4A-405(a).

None of those potential methods of payment are alleged here. In particular, the appearance of funds in Blue Flame's online account portal was not a notification that the funds were available to be withdrawn. To the contrary, as a new customer, Blue Flame's account was subject to a funds availability policy providing that "[f]unds from wire[] transfers . . . will be available on the first business day *after* the day of your deposit." Exhibit C (emphasis added).[9] Blue Flame thus had no right to withdraw any funds upon their appearance in its online account portal. And it likewise follows that the funds were not "otherwise made available" to Blue Flame, UCC § 4A-405(a)(iii), even on the most expansive understanding of that phrase. *See First Sec. Bank of N.M., N.A. v. Pan Am. Bank*, 215 F.3d 1147, 1157 (10th Cir. 2000) (holding that payment does not occur when a bank "credits a beneficiary's account but holds withdrawal of funds").[10]

In short, at the time Chain Bridge agreed to cancellation of California's wire transfer and returned the funds at issue, the funds had not been paid to Blue Flame under the governing federal regulations. It therefore follows that Chain Bridge could not have converted the funds in violation of any property or possessory right that Blue Flame held in them.[11]

IV. Blue Flame Fails To State A Claim For Breach Of Contract (Count X)

Count X of the Complaint seeks to impose liability for returning the funds based on the alternative theory that Chain Bridge breached its Account Agreement with Blue Flame by accommodating the cancellation of California's wire transfer. That claim fails as a matter of law

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[9] The UCC provides that, in general, payment to a beneficiary "is due on the payment date of the order." UCC § 4A-404(a). Under the Expedited Funds Availability Act (EFAA), however, the deadline for making funds received by a bank by wire transfer available for withdrawal is the business day *after* the business day on which such funds are received. 12 U.S.C. § 4002(a)(1)(B); *see also* 12 C.F.R. pt. 229 (Federal Reserve's implementing regulations). Chain Bridge's funds availability policy for new customers is consistent with that rule. *See also* 12 C.F.R. § 210.25(b)(4) (providing that the UCC provisions incorporated by reference in Regulation J do not displace the EFAA's rules with respect to the availability of funds).

[10] There is no suggestion that Chain Bridge applied the funds to a debt owed by Blue Flame.

[11] The Complaint does not appear to assert that any contrary, common-law definition of payment governs Blue Flame's conversion claim, and the Complaint elsewhere acknowledges that "Section 4A-405 of the [UCC] . . . governs . . . which actions by the beneficiary's bank constitute payment of the bank's obligation to the beneficiary." Compl. ¶ 100. In any event, any attempt to impose liability under state law based on a contrary definition of payment would be preempted by the governing federal regulations. *See* pp. 17-18, *infra*.

because Blue Flame does not plead a breach of any contractual duty and because the theory Blue Flame does plead is preempted by the governing federal regulations.

A. Blue Flame Does Not Plead A Breach Of Any Contractual Obligation

To state a claim for breach of contract, a plaintiff must plead "(1) a legally enforceable obligation of a defendant . . . ; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Sunrise Continuing Care, LLC v. Wright*, 671 S.E.2d 132, 135 (Va. 2009). It is incumbent upon the plaintiff to identify a particular contractual obligation that the defendant is alleged to have breached. *JTH Tax, Inc. v. Hines*, No. 2:15cv558, 2018 WL 1135558, at *2 n.3 (E.D. Va. Mar. 2, 2018), *aff'd*, 740 Fed. Appx. 49 (4th Cir. 2018).

Blue Flame does not meet that pleading obligation. The Complaint does not identify any specific contractual restriction that the Bank allegedly breached or any duty that the Bank failed to perform. Blue Flame instead makes the puzzling assertion that "the Bank had no contractual right to return the funds paid to Blue Flame by California." Compl. ¶ 173. But that is backwards: A breach of contract does not arise because the *defendant* cannot demonstrate that his contract did not affirmatively give him the *right* to do something he did. Rather, a contract claim arises only when a *plaintiff* plausibly alleges that the defendant violated some *duty* it owed to its counterparty under the contract. Because Blue Flame does not plead that Chain Bridge violated any relevant contractual duty, its claim for breach of contract should be dismissed. *See, e.g*, *JTH Tax, Inc.*, 2018 WL 1135558, at *2 n.3; *Barber & Ross Co. v. Wachovia Bank Nat'l Ass'n*, Adv. No. 09-05083, 2010 Bankr. LEXIS 6293, at *52-54 (Bankr. W.D. Va. Apr. 5, 2010).

Resort to the implied covenant of good faith and fair dealing (*see* Compl. ¶¶ 175-78) does not cure Blue Flame's pleading deficiency. The implied covenant does not "establish new and independent rights or duties" apart from the terms of the contract. *De Vera v. Bank of Am., N.A.*, No. 2:12cv17, 2012 WL 2400627, at *3 (E.D. Va. June 25, 2012); *see also Wolf v. FNMA*, 830 F. Supp. 2d 153, 169 (W.D. Va. 2011), *aff'd*, 512 Fed. Appx. 336 (4th Cir. 2013). Yet that is necessarily how Blue Flame seeks to deploy the implied covenant here, by pursuing a theory that is untethered to any term of the parties' contract. Blue Flame does not contend, for example, that the Bank abused discretion afforded to it under some provision of the parties' contract. *See Wolf*, 830 F. Supp. 2d at 169. Instead, Blue Flame's premise is that the implied covenant can supply a freestanding contractual duty. Because that assumption is incorrect, Blue Flame's implied covenant theory fails.

B. Blue Flame's Breach Of Contract Theory Is Preempted By Federal Law

Even if it were otherwise sufficient to state a claim for breach of contract under Virginia law, Blue Flame's theory that Chain Bridge "had no contractual right to return the funds paid to Blue Flame by California" (Compl. ¶ 173) would still fail because it is preempted by federal law.

1. Because this "conflict arises out of a funds transfer," the court must "look first and foremost to [UCC] Article 4–A," *Sheerbonnet, Ltd. v. American Express Bank, Ltd.*, 951 F. Supp. 403, 407 (S.D.N.Y. 1995), which is expressly incorporated into Subpart B of Regulation J to "provide[] rules to govern funds transfers through . . . Fedwire," 12 C.F.R. § 210.25. The Federal Reserve's official commentary to Subpart B explicitly addresses preemption:

> [R]egulations of the Board may preempt inconsistent provisions of state law. Accordingly, subpart B of this part supersedes or preempts inconsistent provisions of state law. It does not affect state law governing funds transfers that does not conflict with the provisions of subpart B of this part, such as Article 4A, as enacted in any state, as it applies to parties to funds transfers through Fedwire whose rights are not governed by subpart B of this part.

12 C.F.R. pt. 210, subpt. B, app. A, cmt. to § 210.25.

UCC Article 4A's commentary also addresses the role of common law claims when a dispute arises from a funds transfer. The UCC recognizes that the provisions of Article 4A were the result of a "deliberate decision . . . to treat a funds transfer as a unique method of payment to be governed by unique rules that address the particular issues raised by this method of payment." UCC § 4A-102 cmt. The rules of Article 4A, therefore, "are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article." *Id.*

Relying on the standards set out in Subpart B and the UCC, the Fourth Circuit has held that Subpart B "preempts any state law cause of action premised on conduct falling within the scope of Subpart B, whether the state law conflicts with or is duplicative of Subpart B." *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 223 (4th Cir. 2002). Thus, whether "a state law claim is preempted by Regulation J turns on whether the challenged conduct in the state claim would be covered under Subpart B as well." *Id.*

2. Those well-settled preemption standards mean that Chain Bridge cannot be required to demonstrate a "contractual right" (Compl. ¶ 173) to agree to California's cancellation of its wire transfer. Section 4A-211 of the UCC, as incorporated into Regulation J, provides that a bank may agree to cancel a payment order. *See* UCC § 4A-211(e). Cancellation of a payment order is thus a "situation covered by particular provisions" of Article 4A (UCC § 4A-102 cmt.) and "conduct . . . covered under Subpart B" (*Eisenberg*, 301 F.3d at 223). It follows that state contract law cannot be employed to engraft an additional requirement onto Chain Bridge's right, under Subpart B, to agree to the requested cancellation of California's wire transfer.

V. Blue Flame Fails To State A Fraud Claim (Counts VI and VII)

Blue Flame's claims of actual fraud (Count VI) and constructive fraud (Count VII) are premised on allegations that (i) Blue Flame disclosed "all relevant details" about the California transaction and wire to Chain Bridge (Compl. ¶¶ 144, 153), (ii) "[a]t no point did Defendants indicate in response to those details any concern regarding the legitimacy of the transaction or indicate that the Bank might not wish to complete the transaction (*id.* ¶¶ 145, 154), and

(iii) "Defendants reversed course and decided to take action to undo the transaction" (*id.* ¶¶ 146, 155).

That is not an actual or constructive fraud claim. The elements of both fraud claims include that the defendant made a "false representation" to the plaintiff. *Glaser v. Enzo Biochem, Inc.*, 464 F.3d 474, 476 (4th Cir. 2006) (actual fraud); *see also Sales v. Kecoughtan Hous. Co.*, 690 S.E.2d 91, 94 (Va. 2010) (constructive fraud). The misrepresentation must be a statement "of a present or pre-existing fact" that is false at the time it is made. *SuperValu, Inc. v. Johnson*, 666 S.E.2d 335, 342 (Va. 2008). Federal Rule of Civil Procedure 9(b) requires Blue Flame to "state with particularity the circumstances constituting fraud."

The Complaint does not identify *any* actionable statements that were false *when they were made*—let alone identify them with the particularity Rule 9(b) demands. The supposed misrepresentations, according to Blue Flame, came on a phone call the day before the wire transfer. *See* Compl. ¶¶ 38-45. After that, according to the Complaint, Defendants "reversed course" and allegedly intervened to "undo the transaction." *Id.* ¶¶ 146, 155. But such a change of heart would not make prior, contrary statements actionable. When someone changes her mind about something, that does not make everything she previously said about it a lie. Mere "unfulfilled promises or statements of future events" are not actionable as fraud. *Stone Castle Fin. Inc. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652, 663 (E.D. Va. 2002). Because the Complaint does not identify any false statement "of a present or pre-existing fact" or assert that the Bank made the alleged misrepresentations "with the present intention of never fulfilling" them, Blue Flame's fraud claims should be dismissed. *Enomoto v. Space Adventures, Ltd.*, 624 F. Supp. 2d 443, 455 (E.D. Va. 2009); *see also, e.g.*, *SuperValu, Inc.*, 666 S.E.2d at 342; *GIV, LLC v. IBM*, No. 3:07CV067-HEH, 2007 WL 1231443, at *5 (E.D. Va. Apr. 24, 2007); *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 507 S.E. 2d 344, 348 (Va. 1998).

VI. Blue Flame Fails To State Defamation, Tortious Interference, Or Negligence Claims Premised On Defendants' Alleged Statements To California Officials (Counts IV, V, VIII, And IX)

Blue Flame's claims of defamation (Count IX), tortious interference with contract and business expectancy (Counts IV & V), and negligence (Count VIII) are all premised on this allegation, in Paragraph 73:

> Upon information and belief, in the minutes following the Bank's acceptance of the wire transfer on March 26, Mr. Brough and/or Mr. Evinger contacted the California State Treasurer's Office regarding the transaction. According to multiple news reports and public statements by the California State Treasurer, Fiona Ma, an "executive of the Bank" stated that the Bank was not comfortable with the transaction and was concerned it was fraudulent because Blue Flame's bank account had been opened the previous day by a "political operative."

The four claims premised on that allegation are implausible, first and foremost because the relied-upon "news reports" and "public statements by the California State Treasurer" do not say what Blue Flame (on "information and belief") alleges they do. Rather, they make clear that it was *California's* bank that suggested the possibility of a fraudulent transaction to California.

What is more, none of the four claims are well-stated in any event. It does not state claims of defamation, tortious interference, or negligence to allege that a bank in receipt of a $456 million wire transfer to a three-day-old company confirmed with California the undisputed facts that a political operative had opened Blue Flame's bank account just the day before. Those facts *are* fraud concerns, just as the FBI advised the nation the very next day. *See* p. 4, *supra*.

A. The Allegation That Defendants Stated A Fraud Concern To California Is Implausible And Not Supported By The Reports Blue Flame Cites

Blue Flame alleges that Defendants raised fraud concerns with California on "information and belief." Compl. ¶ 73. That form of pleading is "tenuous at best." *Raub v. Bowen*, 960 F.

Supp. 2d 602, 615 (E.D. Va. 2013). And here, Blue Flame's "belief" about what Defendants said is contradicted by the public "information" on which Blue Flame purports to rely.

The Complaint traces its account of the alleged statement "to multiple news reports and public statements by the California State Treasurer, Fiona Ma." Compl. ¶ 73. But Ma's public statements contradict the Complaint's allegation that Defendants raised concerns of fraud with California. In testimony before the California legislature, Ma explained that it was "one of [California's] depository banks who flagged the transaction with concerns about possible fraudulent activity." California State Assembly, Accountability & Administrative Review Comm., Hearing Video Recording (May 11, 2020), https://tinyurl.com/CalTestimony (at 2:17). She separately stated that Chain Bridge had "called Director Mark Hariri and informed him the account was opened a day before by a Washington, D.C. based lobbyist and the bank was not comfortable accepting this large wire transfer." *Id.* We are unaware of any news report or public statement, by Ma or any other California official, that attributed concerns about potential fraud to *Chain Bridge* rather than to California's own bank.

A court cannot "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002). In this case, the public record contradicts Blue Flame's only articulated basis for its inherently "tenuous" pronouncement that Chain Bridge raised concerns of fraud with California. *Raub*, 960 F. Supp. 2d at 615. There is accordingly no sound basis for this Court to accept the key allegation that is the predicate for Blue Flame's claims of defamation, tortious interference, and negligence.

B. The Complaint Otherwise Fails To State A Defamation Claim

Even if the Complaint's unsupported account of Defendants' alleged statements to California were accepted, it does not support a defamation claim (Count IX). Defendants' supposed statement that Chain Bridge was "concerned" about potential fraud was a mere statement of opinion, not an actionable false statement of fact. Questioning possible fraud in the mask-purchase transaction, moreover, also lacks the requisite defamatory "sting." And, finally, a diligence discussion among a wire transfer's receiving bank and originator is privileged absent allegations of malice that are not pleaded here.

1. In order to support a claim for defamation, a statement must be false and defamatory. *See Schaecher v. Bouffault*, 772 S.E.2d 589, 594 (Va. 2015); *Goulmamine v. CVS Pharmacy, Inc.*, 138 F. Supp. 3d 652, 659 (E.D. Va. 2015) ("Whether a statement is actionable is a matter of law."). A statement of opinion—that is, a statement "best . . . understood from its language and context to represent the personal view of the author or speaker who made it"—is not actionable. *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1288 (4th Cir. 1987).

Here, Defendants' alleged statement that the Bank was "concerned" about potential fraud in connection with California's mask purchase was a statement of opinion. The Bank is not alleged to have told California that Blue Flame or its principals were, in fact, crooks and fraudsters. A statement reflecting only the speaker's "concern" necessarily states only his "personal view," *Potomac Valve & Fitting Inc.*, 829 F.2d at 1288, and not any objective fact that can falsely defame someone. Nor are Defendants alleged to have expressed a "derogatory opinion without disclosing the facts on which it is based." Restatement (Second) of Torts § 566 cmt. c (1977). According to the Complaint, the Bank said it was "concerned" that the transaction "was fraudulent *because* Blue Flame's bank account had been opened the previous day by a 'political operative.'" Compl. ¶ 73 (emphasis added). Thus, the factual basis stated for the alleged fraud concern was both provided to California *and true*, as the Complaint itself narrates. *See id.* ¶¶ 22, 30.

2. The alleged statement at issue here is also not actionable because it lacks "the requisite defamatory 'sting' to [Blue Flame's] reputation." *Schaecher*, 772 S.E.2d at 594. That requirement

imposes a high bar: A statement is defamatory only if it "tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him," or "tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous." *Id.* That determination must be made by reference to the statement itself, in its context, and without regard to the reactions of others. *See Edwards v. Schwartz*, 378 F. Supp. 3d 468, 508 (W.D. Va. 2019); *Virginia Citizens Def. League v. Couric*, 910 F.3d 780, 786 (4th Cir. 2018) (media or news impression of statement irrelevant to whether the statement is, as a matter of law, defamatory).

Blue Flame alleges only that the Bank raised concerns that "the *transaction* was fraudulent." Compl. ¶ 74 (emphasis added). That statement, in context, does not cast any aspersion upon *Blue Flame* as an organization. Indeed, it was not even the expression of a concern that Blue Flame *itself* was attempting to defraud California. The alleged statement was equally consistent with the possibility that Blue Flame was an unwitting participant in, or even the victim of, a fraudulent scheme perpetrated by the supposed PPE supplier that was to receive payment from Blue Flame. Under these circumstances, Defendants' alleged statement did not subject Blue Flame to "contumely, shame, or disgrace" or "render [it] infamous, odious, or ridiculous." *Schaecher*, 772 S.E.2d at 594.[12]

3. Even if the alleged statement about fraud concerns was defamatory, moreover, it is protected by a qualified privilege that the Complaint does not allege facts to overcome. Virginia law protects otherwise defamatory statements "made in good faith, to and by persons who have

[12] The Complaint also alleges that Defendants made "other false statements casting aspersions on the business and character of Blue Flame." Compl. ¶ 166. That hopelessly general allegation is insufficient because it is no more than "a mere recitation of the legal standard." *Mayfield v. NASCAR, Inc.*, 674 F.3d 369, 378 (4th Cir. 2012).

corresponding duties or interests in the subject of the communication." *Doe v. Roe*, 295 F. Supp. 3d 664, 676 (E.D. Va. 2018) (quoting *Government Micro Res., Inc. v. Jackson*, 624 S.E.2d 63, 70 (Va. 2006)). Such interests include the financial interests of the speaker or the recipient of the statement. Restatement (Second) of Torts §§ 594-595. Whether the privilege protects a defendant's statements is a question of law. *Doe*, 295 F. Supp. 3d at 676. Defendants' alleged statement to California officials that Chain Bridge "was not comfortable with the transaction and was concerned it was fraudulent," Compl. ¶ 73, is privileged and not subject to defamation liability because it furthered common duties to guard against possible financial fraud. *See, e.g.*, *Adler v. Virginia Commonwealth Univ.*, 259 F. Supp. 3d 395, 409-10 (E.D. Va. 2017), *aff'd*, 709 Fed. Appx. 189 (4th Cir. 2018); *Professional Recovery Servs., Inc. v. General Elec. Capital Corp.*, 642 F. Supp. 2d 391, 401 (D.N.J. 2009) (defendant's statements to other financial institutions regarding plaintiff debt collector were privileged because the financial institutions shared "a legitimate interest and duty to prevent consumer fraud and . . . the theft of sensitive financial records").

In order to overcome that qualified privilege, Blue Flame would have to allege facts that, taken as true, would support a finding by clear and convincing evidence that Defendants acted with malice. *Echtenkamp v. Loudon Cty. Pub. Schs.*, 263 F. Supp. 2d 1043, 1062 (E.D. Va. 2003). Thus, Blue Flame must allege that Defendants' statements were "made with knowledge that they were false or with reckless disregard for their truth." *Cashion v. Smith*, 749 S.E.2d 526, 533 (Va. 2013). But the Complaint makes those allegations only in threadbare, conclusory fashion. Compl. ¶ 167. Such "unsupported and conclusory statements" cannot "satisfy [the plaintiff's] burden." *Adler*, 259 F. Supp. 3d at 410; *see also Owen v. Liberty Univ.*, No. 6:19-cv-00007, 2020 WL 1856798, at *14 (W.D. Va. Apr. 13, 2020), *appeal pending*, No. 20-1596 (4th Cir., docketed May 28, 2020). And, in fact, the FBI has identified the very things that Chain Bridge was concerned about as being indicia of potential fraud in PPE transactions. *See* p. 4, *supra*. Blue Flame thus alleges no facts from which the Court can plausibly infer that the Bank's statement was made maliciously. Courts routinely grant motions to dismiss defamation claims when the complaint alleges malice in such general terms, without any factual support. *See, e.g.*, *Mayfield v. NASCAR, Inc.*, 674 F.3d 369, 377-78 (4th Cir. 2012); *Owen*, 2020 WL 1856798, at *14; *Jarrett v. Goldman*, 67 Va. Cir. 361, 375-76 (2005). The same result is warranted here.

C. The Complaint Otherwise Fails To State Tortious Interference Claims

Blue Flame's claims that Defendants tortiously interfered with its contract (Count IV) and business expectancies (Count V) fail because privileged statements are not "improper means" and Chain Bridge is not alleged to have acted with any intent to interfere with Blue Flame's alleged contract rights or business expectancy.

First, to state claims for tortious interference, Blue Flame would have to allege that Defendants employed "improper means" to interfere with Blue Flame's contract rights or business prospects. *DurretteBradshaw, P.C. v. MRC Consulting, L.C.*, 670 S.E.2d 704, 706 (Va. 2009); *Goulmamine*, 138 F. Supp. 3d at 672.[13] Under Virginia law, a communication that is privileged against a defamation claim cannot supply the wrongful means necessary to state a tortious inference claim. *Shirvinski v. United States Coast Guard*, 673 F.3d 308, 322 (4th Cir. 2012). Because Defendants' alleged statement to California officials was privileged and Blue Flame has not adequately pleaded abuse of that privilege, *see* pp. 23-24, *supra*, it follows that the tortious interference claims must be dismissed.

[13] The "improper means" requirement applies to Blue Flame's claim for tortious interference with contract because Blue Flame has not alleged that it had a contract with California that was not terminable at will. *See Duggin v. Adams*, 360 S.E.2d 832, 835-36 (Va. 1987).

Second, Blue Flame has not alleged that Defendants harbored a wrongful intent to interfere with its contracts or business expectancy. Blue Flame does not plead that Defendants acted with "the purpose of, or a partial desire to, interfere with the performance of" Blue Flame's alleged contract rights, or that Defendants acted with the knowledge that calling California was "certain or substantially certain" to cause California to breach any contractual commitment to Blue Flame. *Commerce Funding Corp. v. Worldwide Sec. Servs. Corp.*, 249 F.3d 204, 212-13 (4th Cir. 2001) (citing Restatement (Second) of Torts § 766 cmt. j); *DurretteBradshaw, P.C.*, 670 S.E.2d at 707.

To the contrary, the Complaint alleges (albeit inaccurately) that Defendants had concluded that "accepting a wire transfer of that size would not be in the Bank's economic interest." Compl. ¶ 74. The allegation that Defendants acted in pursuit of the Bank's *own* economic interest thus negates any suggestion that their *purpose* was to interfere with Blue Flame's contract rights or business expectancies. Moreover, the Complaint does not allege any basis to conclude that it was "certain or substantially certain" that Defendants' alleged conduct would lead California to breach any contractual duty it owed to Blue Flame. *Commerce Funding Corp.*, 249 F.3d at 212-13. At most, it could be argued that raising concerns of fraud was likely to lead California to *delay* making payment to Blue Flame, as it investigated Blue Flame's bona fides. But the Complaint does not allege any contractual deadline by which California was to pay, so there is no basis to conclude that any delay introduced by such an investigation would lead to a breach of contract—much less that *Defendants were aware* that delay would lead to a breach. As a consequence, the Complaint fails to allege the wrongful state of mind necessary for Blue Flame's tortious interference claims.

D. The Complaint Otherwise Fails To State A Negligence Claim

Blue Flame's allegation that Defendants acted negligently in raising fraud concerns with California does not involve a violation of any cognizable legal duty owed to Blue Flame. In substance, the closest analogy is a claim for publication of injurious falsehood—*i.e.*, an allegation that Chain Bridge "publishe[d] a false statement harmful to the interests of [Blue Flame]" and is therefore "subject to liability for pecuniary loss." Restatement (Second) of Torts § 623A. But that tort applies only when, among other things, the defendant "knows that the statement is false or acts in reckless disregard of its truth or falsity." *Id.*; *see also General Prods. Co. v. Meredith Corp.*, 526 F. Supp. 546, 554 (E.D. Va. 1981) (applying the same standard of fault to claim labeled as "product disparagement"); Dan B. Dobbs et al., *The Law of Torts* § 657 (2d ed. 2020). Simple negligence—which is all Blue Flame alleges here—does not suffice.

Moreover, as we have explained above, the statements the Complaint attributes to Chain Bridge were protected by a privilege that Blue Flame cannot overcome. See pp. 23-24, *supra*. The same privilege would preclude a claim for publication of injurious falsehood even if, contrary to fact, Blue Flame had pleaded the required state of mind. *See* Restatement (Second) of Torts § 646A (noting that the same rules on privileges to publish defamatory matter apply to publication of injurious falsehood); *cf. Shirvinski*, 673 F.3d at 322 (plaintiff cannot use a tortious interference claim to avoid a privilege to publish a defamatory statement).

Finally, to the extent that Blue Flame's negligence claim turns not on Defendants' statements to California officials, but rather on their decision to close Blue Flame's account and void the Account Agreement (it is impossible to tell), *see* Compl. ¶ 163, that version of the claim also fails. Virginia law does not permit tort claims where the relevant duty "arises solely out of the commercial contract between the parties." *NationsBank of Virginia, N.A. v. Mahoney*, No. 119920, 1993 WL 946352, at *5 n.7 (Va. Cir. Ct. Dec. 6, 1993) (citing *Foreign Mission Bd. of S. Baptist Convention v. Wade*, 409 S.E.2d 144, 148 (Va. 1991)). And Blue Flame does not allege any duty separate and apart from a contractual relationship with Chain Bridge. *See* Compl. ¶ 161 ("As a result of the Bank's agreement to provide banking services to Blue Flame . . . Defendants undertook a duty of care in providing banking services to Blue Flame."). Indeed, as we have explained, *see* p. 13, *supra*, a depository bank typically has a debtor-creditor relationship with its customer, which gives rise to only a contractual relationship. *Barber & Ross Co.*, 2010 Bankr. LEXIS 6293, at *52-54; c*f. Van Leer v. Deutsche Bank Sec., Inc.*, 479 Fed. Appx. 475, 481 (4th Cir. 2012) (bank does not owe a common law duty to its customer under Maryland law). It follows that Blue Flame cannot bootstrap an allegation that Chain Bridge wrongfully terminated a contract into a claim sounding in tort.

CONCLUSION

Blue Flame's Complaint should be dismissed with prejudice.

Date: July 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2020, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

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