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

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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August 24, 2020

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Blue Flame's opposition brief labors to obscure the fundamental absurdity of this litigation. Blue Flame has admitted to congressional investigators that it could not fulfill the orders for PPE its customers placed in March and early April—transactions that were dwarfed by the alleged contract with California to supply 100 million N95 masks. *See* Memo. 2-3. Time after time, Blue Flame was forced to refund its customers' payments. This lawsuit nevertheless seeks an extraordinary windfall from Chain Bridge because California's suspicions (unlike those of Blue Flame's other customers) were aroused immediately, and California and JPMorgan were able to secure California's money by cancelling the wire transfer within hours of sending it.

Not surprisingly, Blue Flame is unable to leverage its desire for such a windfall into a viable claim for relief. Blue Flame's claims under the UCC fail, because Blue Flame has no rights under the cancelled payment order and Chain Bridge did not accept an unauthorized payment order issued in Blue Flame's name. Blue Flame's kitchen sink of proposed common law claims fares no better: Chain Bridge did not convert any funds belonging to Blue Flame or breach a contractual duty owed to Blue Flame, and Blue Flame has not pleaded any cognizable theory of fraud. Nor can Defendants be held liable for reporting two accurate facts to California officials—that a political operative had opened Blue Flame's bank account, and had done so only the day before. That is not defamation, tortious interference with contract, or actionable negligence.

At bottom, all that is alleged here is that Chain Bridge—when it received a $456 million wire, earmarked for a three-day-old company and one-day-old bank account—contacted California to confirm that it knew those basic (and worrisome) facts. Blue Flame points to no authority that such reasonable due diligence by a financial institution is inappropriate. Indeed, the contrary is true: A bank would risk potential civil liability and regulatory action if it did *not* take care to avoid facilitating such suspicions transactions and taxpayers lost half a billion dollars as a result.

California and JPMorgan cancelled a wire, and Chain Bridge accommodated their request, as permitted by applicable regulations. There is no basis to impose liability against Chain Bridge.

I. Blue Flame Does Not State A Claim Under Section 4A-404(a) (Count I)

In Count I, Blue Flame alleges that Chain Bridge breached an obligation under Section 4A-404(a) because it accepted a payment order for California's wire transfer but then did not complete payment to Blue Flame. *See* Compl. ¶ 96. But that theory fails to state a claim because the payment order was cancelled. Memo. 9-10. That cancellation, in turn, "nullified" any acceptance of the payment order by Chain Bridge. UCC § 4A-211(e). Chain Bridge accordingly has no "obligation" to pay under Section 4A-404(a), and Blue Flame has no "right" to payment. *Id.*

A. Blue Flame's principal response (Opp. 12) is to deny that the Complaint alleges cancellation of the payment order for California's wire transfer. It argues that the Fedwire transmissions attached to our opening brief are not properly before the Court. But the Complaint incorporates the cancellation message by reference, by alleging that "California officials requested the return of the funds wired by California." Compl. ¶ 77. And courts may examine "documents incorporated into the complaint by reference" in deciding a motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). More fundamentally, Blue Flame is wrong to contend (Opp. 12) that the message somehow "contradict[s]" the Complaint's factual allegations. The message simply illustrates what is common ground—that Chain Bridge returned the funds in response to a request from California and its bank, JPMorgan. *See id.*

Blue Flame also argues (Opp. 12) that a request for return of California's funds does not count as an allegation of cancellation of the payment order, apparently because the Complaint does not use the word "cancel." But Blue Flame acknowledges that Chain Bridge acted in response to a request that the funds be returned to California, rather than paid to Blue Flame as the payment order had originally directed. That is the essence of cancellation.[1] Blue Flame calls the request "inscrutable" (*id.*) but does not identify how it could possibly be understood as anything other than a request to cancel the payment order.

B. Blue Flame separately contends (Opp. 12-14) that Chain Bridge remains liable, notwithstanding the cancellation of the payment order, because the Complaint's allegations do not establish that the cancellation was "effective" within the meaning of UCC § 4A-211(c). But Blue Flame has no persuasive response to the straightforward textual point that Section 4A-211(e) does not require an "effective" cancellation to nullify a bank's obligation under an accepted payment order. *See* Memo. 10 n.6. Rather, that provision states that no rights or obligations arise from the acceptance of *any* payment order that is "canceled." UCC § 4A-211(e). Critically, a bank's obligation to make payment after accepting a payment order is expressly "[s]ubject to Section[] 4A-211(e)," UCC § 4A-404(a)—and not to Section 4A-211(c)'s rules for when cancellation is "effective."

Blue Flame does not cite any case holding that a bank's obligation to pay under Section 4A-404(a) is subject to Section 4A-211(c), in addition to Section 4A-211(e). Instead, it relies (Opp. 13-14) on the commentary to Sections 4A-211 and 4A-404 of the UCC. But it is settled that the UCC's official comments do not themselves "have the force of law." *In re Financial Oversight & Mgmt. Bd. for P.R.*, 914 F.3d 694, 711 n.10 (1st Cir. 2019); *see also, e.g.*, *Platte Valley Bank v. Tetra Fin. Grp., LLC*, 682 F.3d 1078, 1085 n.7 (8th Cir. 2012). The commentary thus cannot displace the clear text of Sections 4A-404(a) and 4A-211(e).

[1] *See Cumis Ins. Soc'y, Inc. v. Citibank, N.A.*, 921 F. Supp. 1100, 1105 (S.D.N.Y. 1996) (equating an "agree[ment] to return . . . funds" transferred by wire with cancellation of the payment order at issue); *Banca Commerciale Italiana, N.Y. Branch v. Northern Tr. Int'l Banking Corp.*, 160 F.3d 90, 92-93 (2d Cir. 1998) (request that bank "return" funds treated as cancellation of payment order).

Blue Flame also demonstrably overstates the commentary's import. To take one example, Blue Flame is wrong to assert that "a bank 'may safely ignore any instruction by the originator to withhold payment to the beneficiary'" when it suspects potential fraud. Opp. 14 (quoting UCC § 4A-404 cmt. 3). In fact, courts have held that a bank may be subject to disgorgement liability for "funds that it knew or should have known were obtained illegally when it accepted a wire transfer." *Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267, 1275 (11th Cir. 2003); *see also BMO Harris Bank N.A. v. Salin Bank & Tr. Co.*, 442 F. Supp. 3d 1075, 1082-84 (S.D. Ind. 2020). They have noted that "[i]nterpreting Article 4A in a manner that would allow a beneficiary bank to accept funds when it knows or should know that they were fraudulently obtained, would allow banks to use Article 4A as a shield for fraudulent activity," and that "[i]t could hardly have been the intent of the drafters to enable a party to succeed in engaging in fraudulent activity, so long as it complied with the provisions of Article 4A." *Regions Bank*, 345 F.3d at 1276. And it is doubtful—to say the least—that federal law enforcement and bank regulators would accept the commentary's assurances as a shield from liability if a bank assists in a fraudulent scheme to divert hundreds of millions of dollars from a state's coffers.[2]

II. Blue Flame Does Not State A Claim Under Section 4A-204(a) (Count II)

Count II fails to state a claim because Section 4A-204(a) imposes liability only when a bank "*accepts* a payment order issued in the name of its customer as sender" that is either unauthorized and not effective or unenforceable against the customer. UCC § 4A-204(a)

[2] Blue Flame appears to invoke the anti-surplusage canon, objecting (Opp. 14) that our argument "would render the requirements of Section 4A-211(c) meaningless." But courts' "preference for avoiding surplusage constructions is not absolute," and it cannot justify a departure from a statute's "plain meaning." *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004). Here, the straightforward text of Sections 4A-404(a) and 4A-211(e) makes plain that *any* cancellation nullifies a bank's obligations based on acceptance of a payment order—whether or not the cancellation is effective.

(emphasis added). That provision has no application here because the Complaint does not allege that Chain Bridge accepted any payment order issued in Blue Flame's name. *See* Memo. 11-12.

Blue Flame's response is incoherent. It complains (Opp. 15) that our argument is simply to "split hairs in the phrasing of the Complaint." But the hair we are splitting is that the Complaint fails to allege a key element required to establish liability under Section 4A-204(a)—namely, that Chain Bridge accepted a payment order issued in Blue Flame's name. Because the Complaint contains no such allegation, Blue Flame instead resorts to rhetorical sleight-of-hand: Citing paragraph 110 of the Complaint, Blue Flame insists that Chain Bridge "must have caused the return of California's funds by 'accepting' and issuing a new and unauthorized payment order on behalf of Blue Flame." Opp. 15. But Blue Flame places air-quotes around the word "accepting," because that word does *not* appear in the cited paragraph of the Complaint. *See* Compl. ¶ 110. Nor does the Complaint allege that Chain Bridge ever received any instruction purporting to come from Blue Flame that it could have accepted. Instead, the Complaint alleges that Chain Bridge *issued* an unauthorized payment order on Blue Flame's behalf, by accommodating California and JPMorgan's request that the funds be returned. *See id.* Because that alleged conduct does not implicate Section 4A-204(a), Count II should be dismissed.[3]

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

A. Blue Flame Had No Property Or Possessory Rights In Particular Funds

Blue Flame contends that Defendants have the law on conversion "backwards," Opp. 19,

[3] Blue Flame's reliance (Opp. 15) on *Ma v. Merrill Lynch, Inc.*, 597 F.3d 84 (2d Cir. 2010), is misplaced. The Second Circuit held in *Ma* that Section 4A-204(a)—consistent with its plain text—imposes liability "[i]f a receiving bank *accepts a payment order issued in its customer's name*, and the customer did not authorize the payment order." *Id.* at 88 (emphasis added). That is the sense in which, under Section 4A-204(a), "banks bear the risk of loss from unauthorized wire transfers." *Id.* Because Blue Flame does not allege that Chain Bridge accepted any payment order issued in Blue Flame's name, *Ma* offers no support for its position here.

but does not dispute the "general rule" in Virginia law, *id.*, that "funds deposited in a bank account are not 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-TBD Union Bancair Privee*, 160 F.3d 146, 148 (2d Cir. 1998) (per curiam). Indeed, Blue Flame correctly recites that, "[u]nder Virginia law, money can only be the subject of a conversion claim . . . when it is part of a segregated or identifiable fund." Opp. 20 (ellipsis in original). And Blue Flame cannot deny that what it alleges is that the funds Defendants supposedly converted were deposited by wire transfer into Blue Flame's unrestricted, all-purpose, business checking account. The general rule against conversion claims involving such accounts squarely applies.

Blue Flame nevertheless asserts (Opp. 19) that the wire transfer conveyed funds that are specific and identifiable, but that misses the point. The question is not whether the *funds* deposited into the bank were "specific and identifiable"; it is whether they are held at the bank in a segregated account, under terms that restrict the bank from commingling them with other funds. Blue Flame's conflating of these two concepts is fatal to its argument. Under Virginia law, a conversion claim can be stated as to bank-deposited funds *only* when those funds are in a segregated account and the bank is prohibited, by "clear agreement," from comingling them with other bank deposits. *See* Memo. 13 n.8. Otherwise, "an account is presumed to be a general account" and no conversion claim lies. *In re Nat Warren Contracting Co.*, 905 F.2d 716, 718 (4th Cir. 1990).

The Virginia cases on which Blue Flame principally relies did not involve general deposit accounts. *Lowe v. Wells Fargo Bank, N.A.*, No. 3:18cv00126 (REP), 2018 WL 3748418 (E.D. Va. July 9, 2018), involved payments on a mortgage loan—not any form of deposit account.[4] The

[4] The report and recommendation in *Lowe* was adopted by the district court. *See* 2018 WL 3749391 (E.D. Va. Aug. 7, 2018).

plaintiffs alleged that the bank had applied their loan payments in a way that violated loan covenants expressly restricting the bank's application of those payments. *Id.* at *13. Likewise, *Jones v. Bank of America Corp.*, No. 4:09-cv-162, 2010 WL 6605789 (E.D. Va. Aug. 24, 2010), involved amounts held in an escrow account, and in any event the court *rejected* the plaintiff's conversion claim. *See id.* at *5-6; *accord Georgia Lottery Corp. v. First Nat'l Bank of Grady Cty.*, 560 S.E.2d 345, 347 (Ga. Ct. App. 2002) (conversion claim involving funds in a segregated "lottery account," the uses of which were strictly restricted by state laws governing lottery proceeds); *Eva v. Midwest Nat'l Mortg. Banc, Inc.*, 143 F. Supp. 2d 862 (N.D. Ohio 2001) (mortgage account).[5]

Blue Flame's business checking account is, by contrast, just like any other general deposit account at any other bank. *See Eke v. Bank of Am., N.A.*, No. 3:09cv488, 2009 WL 10688932, at *1 (E.D. Va. Nov. 12, 2009) (foreign currency deposits into checking account were general deposits and therefore "a claim for conversion [could not] lie"). Blue Flame's conversion claim is premised on its allegations that the wire transfer was complete and funds appeared in Blue Flame's checking account, and that Defendants then converted those funds. But the general rule that depositors' money at their bank cannot be converted applies to funds that got into a checking account by wire transfer no less than it does to funds that arrived by cashed check, money order,

[5] Blue Flame's out-of-jurisdiction authorities are inapposite because, under the law in those states, "money need not be segregated or earmarked" to be the subject of a conversion claim. *Creative Trade Grp., Inc. v. International Trade All., Inc.*, No. 08 C 2561, 2009 WL 3713345, at *9 (N.D. Ill. Nov. 4, 2009) (internal quotation marks omitted) (Illinois law); *see also Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 723 S.E.2d 744, 750-51 (N.C. 2012) (North Carolina law allows conversion claims over comingled funds); *ADP Inv'r Commc'n Servs., Inc. v. In House Attorney Servs.*, 390 F. Supp. 2d 212, 224-25 (E.D.N.Y. 2005) (same rule under New York law). By contrast, Virginia law *does* require segregation of funds. *See Eke v. Bank of Am., N.A.*, No. 3:09cv488, 2009 WL 10688932, at *1 (E.D. Va. Nov. 12, 2009); *Kancor Ams., Inc. v. ATC Ingredients, Inc.*, No. 15-CV00589-GBL-IDD, 2016 WL 740061, at *9 (E.D. Va. Feb. 25, 2016).

or in a suitcase. "Money, after all, is fungible . . . ." *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004). Were it otherwise, every checking-account depositor could satisfy the "segregated or identifiable fund" exception, and thus state a conversion claim, simply by alleging that the funds in question trace back to the last few months of direct deposits from their employer.

B. Chain Bridge Did Not Complete Payment To Blue Flame

Blue Flame is also wrong that it had the right to possess the funds wired by California before Chain Bridge honored California and JPMorgan's wire cancellation request. Although the Complaint alleges that the funds were credited to Blue Flame's checking account, UCC § 4A-405(a) distinguishes between such a credit and the "right to withdraw" (*i.e.*, take possession of) credited funds. *See First Sec. Bank of N.M., N.A. v. Pan Am. Bank*, 215 F.3d 1147, 1156-57 (10th Cir. 2000) (distinguishing between credit to account and completed payment under Section 4A-405). Blue Flame does not dispute that it and Chain Bridge had agreed to a written funds-availability policy that expressly restricted Blue Flame's right to withdraw and possess deposited funds to the next business day—*after* the alleged conversion had already taken place.[6]

Blue Flame's only response is to point to its allegation that a bank employee told it that the funds were "available" in Blue Flame's account. Opp. 22 (citing Compl. ¶ 62). But a generic statement that the funds had arrived and were "available" does not establish that Blue Flame had an immediate right to withdraw the funds, in violation of the funds-availability policy that it had agreed to the day before. After all, there does not appear to be any dispute that Chain Bridge

[6] Blue Flame misdescribes the Bank's funds-availability policy as an "internal polic[y]." Opp. 22. As Blue Flame does not appear to contest, the Bank's policy (which is consistent with the governing federal statutory and regulatory rules) was expressly incorporated in Blue Flame's deposit agreement. *See* Memo. 5.

denied Blue Flame the right to withdraw the wired funds. Indeed, that is Blue Flame's premise in Count I, which alleges that Chain Bridge breached the UCC by *failing* to complete payment to Blue Flame.

Blue Flame's reliance on the bank employee's alleged statement also cannot be reconciled with the express, agreed-upon, funds-availability policy limiting Blue Flame's right to withdraw funds. Blue Flame must allege "convincing evidence" that any waiver or modification of the written policy, in whatever mode it was supposedly communicated, was "clear" and "unequivocal." *Orthopaedic & Spine Ctr. v. Muller Martini Mfg. Corp.*, 737 S.E.2d 544, 549 (Va. Ct. App. 2013) (quoting *Reid v. Boyle*, 527 S.E.2d 137, 145 (Va. 2000)). The substance of the bank employee's phone call is not a "clear, unequivocal" waiver. Further, any modification would need to have been supported by separate consideration. *See, e.g.*, *Zurich Gen. Accident & Liab. Ins. Co. v. Baum*, 165 S.E. 518, 519 (Va. 1932); *Land & Marine Remediation, Inc. v. BASF Corp.*, No. 2:11CV239, 2012 WL 2415552, at *4 (E.D. Va. June 26, 2012). Blue Flame alleges no such thing.[7]

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

Blue Flame's claim for breach of contract fails because the Complaint does not identify any contractual obligation that Chain Bridge breached. *See* Memo. 16-17. Blue Flame seeks to rectify that omission by offering in its brief the theory that Chain Bridge breached an obligation under the Account Agreement and the incorporated funds-availability policy to make deposits

[7] There is likewise no merit to Blue Flame's suggestion (Opp. 22) that giving effect to the funds-availability policy would be inconsistent with representations made by Defendants Brough and Evinger to Blue Flame. The Complaint alleges that, in a telephone conversation on March 25, Brough and Evinger "indicated" that Chain Bridge "would accept the wire transfer" from California. Compl. ¶ 42. It does not allege that they offered Blue Flame any assurances that Chain Bridge would depart from the funds-availability policy that governed Blue Flame's account.

available for withdrawal. Opp. 29.

But even if it were possible to read such a theory into the Complaint's general allegations, it would still run headlong into Subpart B's preemptive force. Because Chain Bridge had a right, under Subpart B, to accommodate the requested cancellation of California's wire transfer, state common law cannot be used to impose liability for that decision. *See* Memo. 17-18; *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 223 (4th Cir. 2002).

Blue Flame nonetheless insists (Opp. 29) that preemption is irrelevant because its claim challenges the removal of funds from Blue Flame's account, rather than Chain Bridge's handling of the wire transfer. But that description of the claim is inaccurate. As explained above, the wire transfer was not complete—as a matter of federal law—at the time the funds were returned to California. Even accepting the Complaint's allegation that the funds had appeared in Blue Flame's account, Blue Flame did not yet have any right to withdraw them. *See* pp. 8-9, *supra*. In substance, therefore, Blue Flame's breach of contract claim necessarily challenges the Bank's decision not to complete the transfer by paying the funds to Blue Flame. Chain Bridge has no obligation to make payment under UCC § 4A-404(a), *see* pp. 2-4, *supra*, and that result cannot be varied by state common law. The breach of contract claim accordingly should be dismissed.[8]

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

The parties agree on the law that governs Blue Flame's fraud claims: Mere "unfulfilled promises or statements of future events" are not fraudulent because they are not false *when made*. Memo. 19; Opp. 24. By contrast, "a promisor who makes a promise without an intent to perform

[8] Blue Flame's attempt to impose common law liability for the Bank's decision not to complete the wire transfer is preempted whether the alleged liability arises under the express terms of the Account Agreement or under the implied duty of good faith and fair dealing. *See* Opp. 30. In both situations, Blue Flame would be using state common law to impose liability for the Bank's exercise of a right guaranteed by Subpart B, which is impermissible.

. . . makes a misrepresentation of present fact" that can be actionable in fraud. Opp. 24. Blue Flame fails to grapple with the fact that the Complaint pleads only an unfulfilled promise.

The Complaint alleges that, the day before the wire transfer, Brough and Evinger "indicated" to Blue Flame that Chain Bridge "would accept the wire transfer for Blue Flame's account" and could resolve any issues associated with receiving a large wire transfer. Compl. ¶¶ 42 & 43. The Complaint then alleges that Defendants "reversed course" the next day, soured on completing the transfer, and goaded California officials into requesting its reversal. *Id.* ¶¶ 146, 155. Blue Flame's brief tells the same story: It relates that Defendants initially said that "the Bank was willing and able to facilitate Blue Flame's receipt of a wire transfer in excess of $450 million," but later acted "contrary to [their] express representations." Opp. 23-24. But neither the Complaint, nor even the brief, ever alleges that Brough and Evinger *falsely* stated to Blue Flame their *then-present belief* that the Bank would facilitate the incoming wire. Rather, the Complaint alleges only that Defendants had a change of heart and "reversed course" the next day after the wire transfer actually arrived. That is not fraud.[9]

Blue Flame is thus wrong to rely on cases in which the plaintiffs *did* allege that promises about future performance were knowingly false *when made*. In *Viano v. THD At-Home Services, Inc.*, No. 1:19-cv-1272, 2020 WL 1815681 (E.D. Va. Apr. 9, 2020), Home Depot falsely represented to plaintiffs that it was a one-stop-shop for their roofing project, and able to repair any rotted or damaged wood discovered during the project. *Id.* at *2. After Home Depot removed the

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[9] Blue Flame contends in a footnote (Opp. 24 n.11) that its fraud claim is "supported" by Defendants' reliance in their brief on the parties' funds-availability policy, which did not provide Blue Flame a right to possess incoming funds until the next business day. But the fact that the funds-availability policy precludes Blue Flame's conversion claim (Memo. 14-15) has no bearing on whether the Complaint sufficiently pleads that Brough and Evinger believed the Bank would not process Blue Flame's wire when they allegedly said that it would.

plaintiffs' roof and found rotted wood underneath, however, it confessed that it did not have the carpentry skills needed to repair the rotted wood. *Id.* The plaintiffs alleged that Home Depot had lied to them about its ability in order to obtain the roofing project—evidently gambling, after inspecting the property, that no wood damage would be found requiring the carpentry services it promised but could not, in fact, perform. *Id.*; *see also Hazaimeh v. U.S. Bank National Association*, 94 F. Supp. 3d 741, 745, 749 (E.D. Va. 2015) (lies regarding bank's intent to pursue foreclosure).[10]

Here, Blue Flame does not allege that Brough and Evinger knowingly lied about what the Bank was willing and able to do for Blue Flame, but merely that they later changed their minds about it. Nor is there any plausible motive for Defendants' supposed fraudulent misstatement. What possible reason would Defendants have had for misleading Blue Flame that the Bank was willing and able to process a large, imminent wire transfer if they did not believe that to be true? They stood to gain exactly nothing from encouraging the wire transfer if they *already* had concluded that "accepting a wire transfer of that size would not be in the Bank's economic interest." Compl. ¶ 74. It is far more plausible that, had Defendants actually reached such a conclusion, they would have told Blue Flame to send the wire elsewhere. The Complaint therefore fails to plead that Brough and Evinger had any reason to lie to Blue Flame.

In all events, Blue Flame's constructive fraud claim (Count VII) should be dismissed. "Under no circumstances . . . will a promise of future action support a claim of constructive fraud." *Hazaimeh*, 94 F. Supp. 3d at 748. Otherwise, "every breach of contract would potentially give rise to a claim of constructive fraud." *SuperValu, Inc. v. Johnson*, 666 S.E.2d 335, 342 (Va. 2008).

[10] Blue Flame also relies on *Yuzefovsky v. St. John's Wood Apartments*, 540 S.E.2d 134 (Va. 2001), as distinguishing between nonactionable statements of opinion and actionable statements of present facts. Opp. 25. But Defendants did not argue that Brough and Evinger were stating opinions. *See* Memo. 18-19. *Yuzefovsky* also involved numerous false statements of *present* fact, 540 S.E.2d at 142, which are not alleged here.

VI. Blue Flame's Claims For Defamation, Tortious Interference, And Negligence Should Be Dismissed (Counts IV, V, VIII, And IX)

A. The Complaint Does Not Plausibly Allege That Defendants Accused Blue Flame Of Fraud

Blue Flame bases four claims—defamation, tortious interference with contract and with business expectancy, and negligence—on its conclusory allegation that Defendants "accused Blue Flame of fraud, without basis" during a call with California officials. Opp. 26. But neither the Complaint, nor the public statements it cites, support that assertion. *See* Memo. 20-21.

Blue Flame responds by insisting that the Complaint's conclusory allegation that Defendants accused it of fraud must be accepted as true. Opp. 26. But the court "need not credit conclusory allegations. If 'the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct,' the motion to dismiss must be granted." *Haramalis v. Lengyel*, No. 1:17-cv-946 (LMB/MSN), 2018 WL 476156, at *3 (E.D. Va. Jan. 18, 2018) (citation omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). The Court therefore should look past Blue Flame's unsupported declaration that Defendants accused it of fraud and consider the sufficiency of the Complaint's well-pleaded facts.

The relevant factual allegation is that Defendants "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.'" Compl. ¶ 73. For starters, Blue Flame does not dispute that Defendants *accurately* stated that Blue Flame's account had been opened the day before, and by a political operative (Gula). Indeed, Blue Flame confirms that those were the "facts," as pleaded in its Complaint. Opp. 26. Those truthful statements cannot have been defamatory, tortious, or negligent.

That leaves the allegation—made "[u]on information and belief" based on "news reports and public statements"—that Defendants said the Bank was "concerned [the transaction] *was* *fraudulent*" because of the circumstances of Blue Flame's creation and account opening. Compl. ¶ 73 (emphasis added). Blue Flame agrees that those "news reports and public statements" are incorporated into the Complaint and also subject to judicial notice. Opp. 7 n.1.[11] And Blue Flame's quotation from those materials in its brief demonstrably fails to support the allegation:

- *Sacramento Bee*, May 6, 2020 (https://tinyurl.com/SBBFM): Blue Flame quotes (at Opp. 7) Treasurer Ma's recounting of what Defendants told her office. She says only that Defendants told her office "that the Blue Flame Medical LLC account had been opened just the day before by a political operative and that they were not comfortable completing the transfer."

- *California Globe*, May 7, 2020 (https://tinyurl.com/CalGBFM): Blue Flame quotes (at Opp. 8) officials' recounting that they "received a call from the bank warning that the bank account the money went to had only been opened the day before."

- Assembly hearing, May 11, 2020 (https://tinyurl.com/CalTestimony): Blue Flame quotes (Opp. 8) Ma's testimony that defendants informed officials that "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."

None of that supports Blue Flame's conclusory allegation that Defendants accused Blue Flame of fraud. The words "fraud" or "fraudulent" are never ascribed to Defendants. These news reports and public statements show only that Defendants *truthfully* reported the recency of Blue Flame's account opening, the political day job of its principal, and Defendants' discomfort completing a large wire transfer under those circumstances. Because conclusory allegations must give way to contrary documents incorporated into the Complaint and subject to judicial notice, *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002), the Complaint's four causes of action premised on Defendants' supposed accusation that Blue Flame was a fraud all fail to state a claim.

B. Blue Flame Otherwise Fails To State A Defamation Claim

Even assuming (counterfactually) that Blue Flame has sufficiently pleaded that Defendants

[11] Blue Flame nevertheless later contends that these are "extrinsic materials" that "cannot contradict" the Complaint's text. Opp. 26. That is inconsistent with Blue Flame's earlier concession, and in any event it is mistaken.

told California officials that Chain Bridge was concerned that the transaction was fraudulent, it still fails to state a defamation claim.

First, Defendants' alleged statement of the Bank's *concern* that the transaction was fraudulent, because Blue Flame's account had been opened one day earlier by a political operative, is a statement of opinion and not an actionable statement of fact. Blue Flame argues (Opp. 27) that the statement of concern conveyed information "capable of being proved false" that can support a defamation claim. That is not correct. A statement that the circumstances surrounding the wire transfer gave rise to "concerns" of fraud is not objectively verifiable. In any case, Blue Flame has no response to the Fourth Circuit's holding (Memo. 22), that "[e]ven when a statement is subject to verification . . . it may still be protected if it can best be understood from its language and context to represent the personal view of the author or speaker." *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1288 (1987). The only plausible understanding of Defendants' statement of concern is that it conveyed the Bank's own view of the facts.

Blue Flame also lacks any answer to black letter law that the expression of a derogatory view about someone can be defamatory only if the speaker does not disclose the facts on which that view is based. *See* Memo. 22; *see also Steele v. Goodman*, 382 F. Supp. 3d 403, 419 (E.D. Va. 2019) (an actionable "negative characterization" must be "coupled with a clear but false implication that the [speaker] is privy to facts about the person that are unknown to the general [listener]") (alterations in original).[12] Here, according to the Complaint, Brough and Evinger

[12] Blue Flame's reliance on *Steele* is misplaced for the additional reason that its facts bear no resemblance to this case. There, the plaintiff alleged an "unprecedented smear campaign" over a course of months that consisted of "at least a dozen videos" making "disparaging remarks" about the plaintiff. 382 F. Supp. 3d at 413. The defendant charged that the plaintiff had "perpetrated a deliberate fraud," was "a cheap con man," had orchestrated "a pretty serious financial scam," was "defrauding people across state lines," and was engaging in "very criminally actionable"

disclosed to California officials the *concededly accurate*, factual basis for their concern. *See* Compl. ¶ 73. California could (and did) make up its own mind about what those facts meant, and was not left to guess that Defendants were privy to any damaging secret information.

Second, the stated concern was that "*the transaction*" was fraudulent, not that *Blue Flame* was a fraudulent enterprise. Compl. ¶ 73 (emphasis added); *see also id.* ¶ 166 (claiming defamation based on Defendants' alleged statement "that the transaction was fraudulent"). Blue Flame is mistaken that those are the same thing. It is not true that, as Blue Flame puts it, "[t]he only other participant in the transaction was the State of California." Opp. 27. The other participants include the unnamed Chinese manufacturers with whom Blue Flame intended to do business. Expressing concern that the transaction might be fraudulent was equally consistent with the possibility that those manufacturers might be taking advantage of individuals who were brand new to international trade. The suggestion that a company might unwittingly be tied up in a fraudulent scheme conveys no "defamatory sting," and is certainly not "defamation per se." *Id.*[13]

Finally, Defendants' alleged defamatory statements are protected by Virginia's qualified privilege for statements "made in good faith, to and by persons who have corresponding duties or interests in the subject of the communication." *Doe v. Roe*, 295 F. Supp. 3d 664, 676 (E.D. Va.

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misconduct. *Id.* at 414. Even on those facts, the only two statements that were deemed actionable were defamatory because, in context, they would have been understood as adopting other parties' specific accusations of fraud against the plaintiff. *See id.* at 421. Nothing remotely comparable is alleged here.

[13] Blue Flame cites only *Warren v. Bank of Marion*, 618 F. Supp. 317, 323 (W.D. Va. 1985), for the proposition that "the suggestion that a plaintiff has been a party to a fraudulent transaction raises a sufficient 'defamatory sting.'" Opp. 27. *Warren* holds no such thing. In that case, the plaintiff alleged she was defamed by the allegation that *she* had acted with the intent to defraud her creditors in a particular transaction. Blue Flame otherwise cites three cases (*id.*) for the unremarkable proposition that "statements that impute to a person the commission of some criminal offense involving moral turpitude" or "prejudice a plaintiff in its profession or trade" are defamatory *per se*. But the Complaint does not allege any such statements.

2018); *see* Memo. 23-24. Blue Flame does not contest that the privilege applies here, but it argues that the privilege is overcome by the Complaint's boilerplate allegation that Defendants spoke with "reckless disregard for the truth." Opp. 28. But such conclusory allegations of recklessness do not suffice. *See* Memo. 24 (citing cases). Moreover, the supposed recklessness that Blue Flame posits relates to how California would *react* to the information it was provided—not reckless disregard for the *truth* of that information. *See* Opp. 24. Once again, the facts Defendants allegedly conveyed to California officials about Blue Flame's account-opening and the background of its principals were undisputedly true.

C. The Complaint Otherwise Fails To State Tortious Interference Claims

Blue Flame's claims for tortious inference with contract (Count IV) and tortious inference with business expectancy (Count V) fail as a matter of law because Blue Flame does not allege that Defendants employed any "improper means" or that Defendants acted with a wrongful intent Memo. 25-26. Blue Flame's arguments to the contrary are unpersuasive.

1. The Complaint Does Not Allege Improper Means

a. The tortious interference theory alleged in the Complaint is that Defendants "unilaterally contacted California officials and accused Blue Flame of fraud, without basis," Compl. ¶¶ 128, 137, which "caused California to breach its agreement to purchase medical supplies from Blue Flame," *id.* ¶¶ 129, 138. Under that theory, Defendants' communications with California were the "improper means" they used to interfere with Blue Flame's contract and business expectancy.

But Defendants' statements to California were not defamatory and, even if they were, the statements were protected by a qualified privilege that the Complaint does not overcome. Memo. 23-25. Those statements therefore cannot supply the "improper means" necessary to support a tortious interference claim. *See Shirvinski v. United States Coast Guard*, 673 F.3d 308, 322 (4th Cir. 2012).

Blue Flame's opposition hardly contends otherwise. Although Blue Flame suggests (Opp. 17) that Defendants' statements to California officials were defamatory, it makes no effort to establish that those statements could independently support the tortious interference claims if they do not also state a claim for defamation. Because Blue Flame's defamation claim fails as a matter of law, it follows that the tortious interference claims must also be dismissed.

b. Faced with a dead-end for the tortious inference theory it actually pleaded, Blue Flame now attempts to replead its Complaint by arguing that it was the reversal of the wire payment itself that constituted "improper means." Opp. 18. But "it is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Elliot v. Great Point Partners, LLC*, Nos. 1:10cv1019 (JCC/JFA), 1:10cv1046 (JCC/JFA), 2011 WL 63657, at *3 n.4 (E.D. Va. Jan. 5, 2011) (internal quotation marks omitted). Blue Flame cannot salvage its defective pleading by introducing a wholly new theory of tortious interference in its opposition brief.[14]

Even if Blue Flame's new theory were procedurally proper, it would fail on the merits. For the return of California's funds to constitute "improper means," it would have to be an "illegal or independently tortious" act. *Duggin v. Adams*, 360 S.E.2d 832, 836 (Va. 1987). But there was nothing illegal or tortious about Chain Bridge's decision to honor California's cancellation request: That decision did not violate the UCC, and it is not actionable as conversion. *See* pp. 5-9, *supra*.

2. The Complaint Does Not Allege A Wrongful Intent

Blue Flame's tortious interference claims are subject to dismissal for the additional and independent reason that the Complaint fails to allege that Defendants acted with a wrongful intent

[14] Straining to find some foothold in the Complaint for its newly minted theory, Blue Flame invokes (Opp. 18) paragraphs 130 and 139 of its Complaint, which refer vaguely to violations of "the Bank's obligations pursuant to the Uniform Commercial Code and applicable Federal Reserve Board regulations." But the cited paragraphs offer no hint as to *what conduct* is alleged to have breached those legal restrictions.

to interfere with Blue Flame's alleged contract rights or business expectancies. *See* Memo. 26.

In response, Blue Flame does not contend that Defendants acted with a purpose or desire to interfere with its contract rights. Indeed, any such suggestion would contradict Blue Flame's own allegation that Defendants were motivated by *their own* economic self-interest, rather than by a purpose to inflict harm. *See* Compl. ¶ 74; Memo. 26.

Instead, Blue Flame asserts that Defendants' conduct is actionable because they knew it was "certain or substantially certain" to result in interference with Blue Flame's contract rights or business relations. Opp. 18 (quoting *Commerce Funding Corp. v. Worldwide Sec. Servs. Corp.*, 249 F.3d 204, 212-13 (4th Cir. 2001)). The Complaint, however, does not plausibly support that conclusion with any factual allegations.

Blue Flame invokes (Opp. 18) paragraph 39 of the Complaint, but it alleges there only that Defendants Brough and Evinger were informed that "Blue Flame would immediately begin using" the funds it expected to receive from California. Neither paragraph 39 nor anything else in the Complaint suggests that Defendants had any reason to think that Blue Flame's contract with California was so tenuous that it would be jeopardized by even a modest period of delay, as California investigated the bona fides of the newly formed business to which it was asked to entrust hundreds of millions of dollars. To the contrary, even after the funds were returned to California, California officials might well have chosen to complete the transaction by wiring the funds to Blue Flame a second time—*if* those officials had ultimately determined that Blue Flame and the proposed transaction were legitimate. *See* Memo. 26.[15] Under these circumstances, there is no

[15] Perhaps, in fact, California officials would not have reached that conclusion, given that Blue Flame had apparently misrepresented that it had 100 million N95 masks waiting to be delivered in the Port of Long Beach. *See* Memo. 3 n.2. But that is a consequence of Blue Flame's own actions, not Defendants'. And if Blue Flame *really did* have such a massive supply of masks already in

basis to charge Defendants with knowledge that their conduct was substantially certain to result in any inference with Blue Flame's alleged rights.

D. The Complaint Otherwise Fails To State A Negligence Claim

Blue Flame's negligence claim fails as a matter of law because (i) Blue Flame's theory that Defendants acted negligently in raising fraud concerns with California does not involve a violation of any cognizable legal duty, and (ii) any conceivable claim based on Chain Bridge's decision to void Blue Flame's Account Agreement would sound in contract law, not in negligence. Memo. 26-28. Blue Flame addresses the negligence claim only in a brief footnote (Opp. 29 n.12), in which it suggests that, if the Account Agreement was voided by the time California's wire transfer arrived, then Chain Bridge would have assumed a duty of ordinary care as a bailor. That suggestion is unresponsive to the arguments in our opening memorandum. Blue Flame does not address—let alone overcome—our showing that a claim for publication of injurious falsehoods cannot proceed on an allegation of mere negligence. Memo. 26-27. And Blue Flame does not explain how its speculation about the consequences of closing its account would support a claim that Chain Bridge's decision to void the account was made "without basis." Compl. ¶ 163. Blue Flame thus offers no basis to avoid dismissal of its negligence claim.

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For the foregoing reasons and those stated in our opening memorandum, Blue Flame's Complaint should be dismissed with prejudice.

California—more than twice the amount of N95 masks accumulated in the Strategic National Stockpile—California presumably would have done everything necessary to acquire them, including by promptly issuing a new wire transfer. *See* Shira Stein et al., *Nurses' Pleas Spur U.S. Pledge to Tap 44 Million-Mask Stockpile*, Bloomberg (July 31, 2020), https://tinyurl.com/N95Bloomberg.

Date: August 24, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 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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