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**
CHAIN BRIDGE BANK, N.A., Counterclaim Plaintiff, v. BLUE FLAME MEDICAL LLC, Counterclaim Defendants.	

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS COUNTERCLAIMS

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TABLE OF CONTENTS

Page

Introduction 1

Background 2

A. Factual Background 2

B. Procedural Background 4

Legal Standard 4

Argument:

The Bank Has Validly Alleged That Blue Flame Is Liable To It Under The Account Agreement For An Award Of Reasonable Attorneys' Fees And Costs 5

A. Blue Flame Remains Liable For The Bank's Reasonable Attorneys' Fees And Costs Notwithstanding The Voiding Of Blue Flame's Account 5

B. The Account Agreement's Attorneys' Fees Provision Is Not Unconscionable As A Matter Of Law 9

C. The Account Agreement's Attorneys' Fees Provision Does Not Contravene Public Policy 15

Conclusion 16

TABLE OF AUTHORITIES

Cases: Page

7-Eleven, Inc. v. McEvoy,
300 F. Supp. 2d 352 (D. Md. 2004) 5

American Gen. Life & Accident Ins. Co. v. Wood,
429 F.3d 83 (4th Cir. 2005) 11

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 5

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 5

Carlson v. General Motors Corp.,
883 F.2d 287 (4th Cir. 1989) 12

Cases—Continued: Page

Chawla v. BurgerBusters, Inc.,
499 S.E.2d 829 (Va. 1998)....................13

Dan Ryan Builders, Inc. v. Nelson,
737 S.E.2d 550 (W. Va. 2012)....................10, 12

Darton Envt'l, Inc. v. FJUVO Collections, LLC,
332 F. Supp. 3d 1022 (W.D. Va. 2018)....................15

State ex rel. Dunlap v. Berger,
567 S.E.2d 265 (W. Va. 2002)....................11

Ebadom VA, LLC v. Lee, No. CL-2018-1535,
2020 WL 1704650 (Va. Cir. Ct. Apr. 06, 2020) 11, 13, 14, 15

Fishman v. LaSalle Nat'l Bank,
247 F.3d 300 (1st Cir. 2001)....................9

Flint Hill Sch. v. McIntosh, No. 181678,
2020 WL 33258 (Va. Jan. 2, 2020)....................10, 11, 13, 14

HGS Homes, Inc. v. Kelly Residential Grp., Inc.,
948 S.W.2d 251 (Mo. Ct. App. 1997)....................8

Kaplan v. RCA Corp.,
783 F.2d 463 (4th Cir. 1986) 12

Levine v. Employers Ins. Co. of Wausau,
887 F.3d 623 (4th Cir. 2018) 9

Menorah Chapels at Millburn v. Needle,
899 A.2d 316 (N.J. App. Div. 2006)....................8

Mount Aldie, LLC v. Land Tr. of Virginia, Inc.,
796 S.E.2d 549 (Va. 2017)....................9

Oil Workers Int'l Union, Local No. 463 v. Texoma Nat. Gas Co.,
146 F.2d 62 (5th Cir. 1944) 8

Pitchford v. Oakwood Mobile Homes, Inc.,
124 F. Supp. 2d 958 (W.D. Va. 2000) 15

S&R Corp. v. Jiffy Lube Int'l, Inc.,
968 F.2d 371 (3d Cir. 1992)....................5

Sanders v. Certified Car Ctr., Inc.,
93 Va. Cir. 404 (2016) 10, 12

Cases—Continued: Page

Saturn Distribution Corp. v. Williams,
905 F.2d 719 (4th Cir. 1990) 10

Siskin Enters. Inc. v. W.B. Stoddard, Jr. Inc.,
147 F. Supp. 2d 1125 (D. Utah 2001)....................5, 7, 8

Smyth-Bros.-McCleary-McClellan Co. v. Beresford,
104 S.E. 371 (Va. 1920)....................12, 13

Snyder v. Waterford Falls Church II, LLC, No. CL-2010-16609,
2012 WL 5550785 (Va. Cir. Ct. Oct. 23, 2012) 16

Southeast Lumber Exp. Co. v. Friend,
164 S.E. 372 (Va. 1932)....................8

State Farm Fire & Cas. Co. v. Sevier,
537 P.2d 88 (Or. 1975) 8

SunTrust Banks, Inc. v. Be Yachts, LLC, No. C18-840 MJP,
2020 WL 5759789 (W.D. Wash. Sept. 28, 2020) 11

Texas Co. v. Northup,
153 S.E. 659 (Va. 1930)....................6, 7

Transit Cas. Co. v. Hartman's, Inc.,
239 S.E.2d 894 (Va. 1978)....................9

Travis v. Travis,
203 A.2d 173 (D.C. 1964) 5

Update, Inc. v. Samilow,
311 F. Supp. 3d 784 (E.D. Va. 2018) 15

Walker v. Caterpillar Indus., Inc., Nos. 93-2388, 93-2482,
1994 WL 406563 (4th Cir. Aug. 4, 1994)....................12

Webb v. R. Rowland & Co.,
800 F.2d 803 (8th Cir. 1986) 10

Statute and Rule:

28 U.S.C. § 2412(d)(1)(D)....................14

Fed. R. Civ. Proc. 12(b)(6) 4

Miscellaneous:

Black's Law Dictionary (11th ed. 2019)..11

E. Allan Farnsworth & Zachary Wolfe, *Farnsworth on Contracts* (4th ed. 2019)..................6

Restatement (Second) of Contracts (1981)..6, 12

Defendant/Counterclaim Plaintiff Chain Bridge Bank, N.A. (the Bank), respectfully submits this memorandum in opposition to the motion to dismiss the Bank's counterclaims filed by Plaintiff/Counterclaim Defendant Blue Flame Medical LLC (Blue Flame).

INTRODUCTION

When Blue Flame opened a commercial banking account with the Bank on March 25, 2020, Blue Flame agreed that it would "be liable" for the Bank's "costs . . . [and] reasonable attorneys' fees, to the extent permitted by law, whether incurred as a result of collection or in any other dispute involving [Blue Flame's] account." Counterclaim Compl. Ex. B § 3. That liability extends to "any action that [Blue Flame] or a third party takes regarding the account that causes [the Bank], in good faith, to seek the advice of an attorney." *Id.*

The claims asserted against the Bank and its officers in this case fall squarely within Blue Flame's agreement to be liable for the Bank's costs and reasonable attorneys' fees. They all arise from Blue Flame's inducement of California officials to wire more than $456 million to the Bank for Blue Flame's benefit on March 26, 2020. That wire was recalled shortly thereafter, when suspicions arose about Blue Flame's contract to supply California with 100 million N95 masks, and California and its bank requested that the funds be returned. Blue Flame's claims in this case now seek to impose liability based on the Bank's decision to honor that request, as well as interactions between the Bank's officers and California officials in connection with the wire transfer. The costs and fees that the Bank has incurred in defending this litigation are thus directly attributable to an "action that [Blue Flame] . . . [took] regarding [its] account" that has "cause[d] the Bank], in good faith, to seek the advice of an attorney." Counterclaim Compl. Ex. B § 3.

Blue Flame nevertheless wants to escape from its contractual agreement to pay the Bank's costs and reasonable attorneys' fees. That effort should be rejected. Blue Flame is wrong to argue that, because the Bank terminated Blue Flame's account shortly after the wire transfer was returned, the Bank's counterclaims violate a general rule that contracts may not be terminated only in part. That rule is inapplicable here because the events giving rise to Blue Flame's claims occurred *before* the termination of Blue Flame's account. And there is no merit to Blue Flame's alternative arguments that its agreement to pay the Bank's costs and reasonable attorneys' fees is unconscionable or otherwise contravenes public policy under Virginia law. Blue Flame's motion to dismiss should accordingly be denied.

BACKGROUND

A. Factual Background

1. On March 25, 2020, the Bank entered into a contract with Blue Flame, acting by and through one or more of its principals, Michael C. Gula and John S. Thomas, in connection with the opening of a commercial banking account for Blue Flame. Counterclaim Compl. ¶ 3. The parties' contract was memorialized in an Account Agreement. *Id.*; *see also id.* Ex. A.[1]

The Account Agreement incorporated by reference a series of additional documents governing the details of the parties' contractual relationship, including the Terms and Conditions for Blue Flame's account. Counterclaim Compl. ¶ 4; *id.* Ex. B. In the Account Agreement, Gula, acknowledged receipt of those Terms and Conditions on behalf of Blue Flame. Counterclaim Compl. ¶ 4; *id.* Ex. A.

[1] In this brief, we narrate only those facts underlying the Bank's counterclaims against Blue Flame. Although Blue Flame's memorandum contains a self-serving summary of Blue Flame's allegations against the Defendants in this case (Memo. 1-5), Blue Flame does not contend that those allegations are relevant to the disposition of the Bank's counterclaims. We therefore do not respond to Blue Flame's summary here.

The Terms and Conditions provide that Blue Flame would be liable for the Bank's costs and reasonable attorneys' fees in disputes relating to Blue Flame's account. In particular, Section 3 of the Terms and Conditions provides:

> You [*i.e.*, Blue Flame] will be liable for our [*i.e.*, the Bank's] costs as well as for our reasonable attorneys' fees, to the extent permitted by law, whether incurred as a result of collection or in any other dispute involving your account. This includes, but is not limited to, disputes between you and another joint owner; you and an authorized signer or similar party; or a third party claiming an interest in your account. This also includes any action that you or a third party takes regarding the account that causes us, in good faith, to seek the advice of an attorney, whether or not we become involved in the dispute.

Counterclaim Compl. Ex. B § 3.

2. Blue Flame induced California officials to initiate a wire transfer of $456,888,600 to the Bank on March 26, 2020, which was recalled shortly thereafter. The payment order for California's wire transfer was sent via California's bank, JPMorgan Chase Co. (JPMorgan), based on wire transfer instructions that Blue Flame had provided to California, and it arrived at the Bank at approximately at 11:55 am on March 26, 2020. Counterclaim Compl. ¶¶ 7, 9. The funds were intended by California as a down payment for a purchase of 100 million N95 masks from Blue Flame. *Id.* ¶ 8. Neither Gula nor Thomas, however, had any experience in the medical supply industry. *Id.* To the contrary, both had previously worked as political operatives, and Blue Flame in fact had no ability, then or ever, to procure and provide the 100 million N95 masks that it had promised to California. *Id.* Blue Flame nevertheless falsely represented to California that it could provide them within a matter of days. *Id.*

Within hours of the Bank's receipt of the payment order for California's wire transfer, JPMorgan notified the Bank that JPMorgan and California would be canceling that payment order by requesting return of the $456,888,600. Counterclaim Compl. ¶ 10. At 2:05 pm on March 26, JPMorgan sent a message to the Bank, through the Fedwire funds transfer system operated by the United States Federal Reserve Banks, in which JPMorgan requested cancellation of the payment order. *Id.* ¶ 11. At 3:21 pm, the Bank honored that cancellation request by returning $456,888,600 to JPMorgan by wire transfer. *Id.* ¶ 12. At 3:36 pm, the Bank notified Blue Flame that Blue Flame's account had been voided. *Id.* ¶ 13.

B. Procedural Background

1. On June 12, 2020, Blue Flame filed this lawsuit against the Bank and two of its officers, John J. Brough, and David M. Evinger. Blue Flame's complaint seeks to impose liability based on the Bank's decision to honor JPMorgan and California's request to cancel the wire transfer and based on interactions between Messrs. Brough and Evinger and California government officials in connection with the wire transfer. *See* Compl. ¶¶ 86-179.

On September 8, 2020, this Court entered an order granting Defendants' motion to dismiss Blue Flame's complaint in part. *See* Dkt. No. 31. The Court dismissed five of Blue Flame's ten counts, permitting the remainder to proceed to discovery. *See id.*

2. Defendants answered Blue Flame's complaint on September 29, 2020. The Bank also counterclaimed for costs and attorneys' fees under the Account Agreement. The Bank's counterclaims allege that Blue Flame is liable to it because the fees incurred by the Bank in this case are attributable to an "action that [Blue Flame] . . . [took] regarding [its] account" that has "cause[d] [the Bank], in good faith, to seek the advice of an attorney"—namely, Blue Flame's inducement of California officials to initiate the March 26, 2020 wire transfer. Counterclaim Compl. ¶ 16; *id.* Ex. B § 3. The Bank accordingly seeks an award of damages for the Bank's reasonable attorneys' fees and costs in defending against Blue Flame's claims in this litigation, as well as corresponding declaratory relief. *See* Counterclaim Compl. ¶¶ 18-24.

LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted only 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)).

ARGUMENT

THE BANK HAS VALIDLY ALLEGED THAT BLUE FLAME IS LIABLE TO IT UNDER THE ACCOUNT AGREEMENT FOR AN AWARD OF REASONABLE ATTORNEYS' FEES AND COSTS

A. Blue Flame Remains Liable For The Bank's Reasonable Attorneys' Fees And Costs Notwithstanding The Voiding Of Blue Flame's Account

Blue Flame first contends (Memo. 6-11) that the Bank cannot enforce the Account Agreement's attorney's fee provision because the Bank terminated Blue Flame's account in March 2020. According to Blue Flame, imposing liability under these circumstances would violate the principle that, "in the absence of an express provision therefor, a contract cannot be partially abrogated under a provision for its termination." *Id.* at 6 (quoting *Siskin Enters. Inc. v. W.B. Stoddard, Jr. Inc.*, 147 F. Supp. 2d 1125, 1129 (D. Utah 2001)). That contention is incorrect.

1. Blue Flame's argument rests on a misunderstanding of the general rule against partial termination. Under that rule, a party that has elected to terminate a contract—and thus to withhold its own future performance—ordinarily cannot expect the other party to continue to perform ongoing obligations under the contract. In other words, a party "cannot accept the benefits" of an agreement while "shirk[ing] the burdens." *Travis v. Travis*, 203 A.2d 173, 175-76 (D.C. 1964); *see also, e.g., S&R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 376 (3d Cir. 1992); *7-Eleven, Inc. v. McEvoy*, 300 F. Supp. 2d 352, 358 (D. Md. 2004).

But the principle that termination relieves the parties to a contract of their *ongoing* obligations does not preclude an award of damages under a terminated contract. Indeed, the standard remedy for a party that has elected to terminate a contract in response to another party's material breach is an award of damages to "compensate the injured party for the loss that it will suffer as a result of being deprived of the balance of the other party's performance." E. Allan Farnsworth & Zachary Wolfe, *Farnsworth on Contracts* § 8.16, at 8-135 (4th ed. 2019); *see also, e.g.*, Restatement (Second) of Contracts § 236 illus. 2 (1981) (discussing claim for damages after cancellation in response to material breach). Yet no one contends that this standard remedy for breach of contract amounts to an impermissible effort to "enforce . . . contractual term[s]" that the terminating party "chose to extinguish." Blue Flame Memo. 11.

By the same token, the Bank's counterclaims in this case do not seek to secure ongoing benefits for the Bank under the Account Agreement. Rather, they seek an award of damages (and corresponding declaratory relief) based on events that occurred *while the Account Agreement was in force*. *See* Counterclaim Compl. ¶ 17. Blue Flame induced California officials to initiate a wire transfer to the Bank while the Account Agreement was in force, and that is an "action that [Blue Flame] . . . [took] regarding [its] account" that has given rise to the attorneys' fees and costs in this litigation. *See* Counterclaim Compl. Ex. B § 3. By executing the Account Agreement, Blue Flame agreed that it would "be liable" for the Bank's reasonable attorneys' fees and costs in connection with any such dispute. *Id.* Because the Bank's counterclaims seek to enforce that liability, rather than to impose ongoing obligations under a terminated contract, the rule against partial termination has no application here.[2]

2. The authorities Blue Flame cites do not undermine that conclusion. Blue Flame principally relies on *Texas Co. v. Northup*, 153 S.E. 659 (Va. 1930), but that case is inapposite. The question in *Northrup* was whether an oil company could continue to rent a wharf property

[2] Of course, the *amount* of Blue Flame's liability for the Bank's reasonable attorneys' fees and costs continues to increase on an ongoing basis, as the Bank continues to incur expenses in defending against Blue Flame's claims in this litigation. But the key point is that the action by Blue Flame that has given rise to this litigation occurred while the Account Agreement was in force.

from its former distributor for a nominal payment of $25 per year, despite having exercised a right to terminate its sales contract and license agreement with the distributor. *See id.* at 659-61. The Virginia Supreme Court held that the three contracts were in fact "parts of a single agreement," *id.* at 660, which could not "be partially terminated by the company so as to take to itself all of the substantial benefits of the lease and at the same time to repudiate all of its own obligations . . . under the inseparable sales and license agreements," *id.* at 664. Thus, the court in *Northrup* simply held that the oil company was not entitled to receive an ongoing benefit under the lease contract—continued occupancy of the leased premises—after termination of the broader contract. That holding is entirely consistent with the conventional formulation of the rule against partial termination described above, and it offers no support for Blue Flame's much broader contention that any effort to impose liability under a terminated contract is impermissible.

Siskin Enterprises, *supra*, likewise does not assist Blue Flame. In that case, the plaintiff terminated a distributorship agreement and filed an action seeking a declaration that the defendant distributor had been in default under the agreement. 147 F. Supp. 2d at 1127. After succeeding on its claim for declaratory relief, the plaintiff asserted a claim for attorneys' fees under a provision of the agreement that authorized recovery of "the costs incurred . . . in *enforcing* this Agreement, including reasonable attorney's fees." *Id.* at 1126. The court rejected the claim, reasoning that attorneys' fees were unavailable because the plaintiff's action had sought to validate its termination of the distributorship agreement, rather than to enforce its rights under the agreement. *Id.* at 1130. That rationale, which turned on the specific language of the provision at issue in *Siskin Enterprises*, has no application here. In this case, the Account Agreement's attorneys' fees provision is not limited to actions seeking to enforce the Account Agreement's terms. Rather, Blue Flame agreed that it would "be liable" for the Bank's costs and reasonable attorneys' fees incurred in connection with "any . . . dispute involving [Blue Flame's] account," including "any action that [Blue Flame] or a third party takes regarding the account that causes [the Bank], in good faith, to seek the advice of an attorney." Counterclaim Compl. Ex. B § 3.

The court in *Siskin Enterprises* also reasoned that, because the plaintiff had terminated the distributorship agreement, its "declaratory judgment action could not be deemed to 'enforce' other terms of the then non-existent contract." 147 F. Supp. 2d at 1130. That observation is consistent with the conventional understanding of the rule against partial termination, under which a party that has terminated a contract would no longer be entitled to ongoing benefits under the contract of the sort that might conceivably be enforced through a declaration of the parties' respective rights and obligations. The court was not faced with a claim for damages based on events that occurred while the contract was in force, as is the case here. Thus, this portion of the court's reasoning also has no bearing on the Bank's counterclaims.[3]

[3] Blue Flame's remaining cases, which it cites in passing, are in the same vein. Some of those cases invoked the rule against partial termination to prevent a party from retaining ongoing benefits under a contract while refusing to perform its own obligations. *See Southeast Lumber Exp. Co. v. Friend*, 164 S.E. 372, 374 (Va. 1932) (company could not retain funds invested by plaintiff after terminating contract to employ him); *HGS Homes, Inc. v. Kelly Residential Grp., Inc.*, 948 S.W.2d 251, 255 (Mo. Ct. App. 1997) (after terminating contract with developer, homebuilder could not exercise contractual option to purchase particular lot). Others held that the retention of ongoing benefits under a contract precluded a finding of termination. *See Oil Workers Int'l Union, Local No. 463 v. Texoma Nat. Gas Co.*, 146 F.2d 62, 64 (5th Cir. 1944) (parties' ongoing performance under labor contract was inconsistent with termination); *State Farm Fire & Cas. Co. v. Sevier*, 537 P.2d 88, 93 & n.4 (Or. 1975) (insurance carrier could not rescind insurance policy after retaining premium payment throughout policy period). And one case did not involve termination at all, but rather stated that a party "may not repudiate one part of a nondivisible contract," *Menorah Chapels at Millburn v. Needle*, 899 A.2d 316, 322 (N.J. App. Div. 2006), to support a conclusion that a party that had breached a contract in part could not recover based on itemized contract prices for the portion of the contract that it did perform. *See id.* at 322-23. Thus, none of Blue Flame's cases suggests that a party may not seek damages under a terminated contract based on events that occurred prior to termination.

3. Blue Flame's proposed reading of the Account Agreement would also produce counterintuitive and obviously unintended results. It would mean that, whenever a customer of the Bank uses its account to defraud the Bank or to engage in other illegal activity, the Bank could invoke its contractual right to recover attorneys' fees incurred in remedying the customer's wrongdoing *only* so long as it continues to do business with the wrongdoer. But the first thing any responsible bank would do in that situation is to terminate its relationship with the customer. There is no plausible reason to think the parties would have agreed that the Bank could take that reasonable, self-protective step only upon pain of losing its ability to recover for the costs incurred as a result of its customer's misconduct.

Virginia courts have long recognized that, when they are faced with questions of contract interpretation, "the construction adopted should be reasonable, and absurd results are to be avoided." *Transit Cas. Co. v. Hartman's, Inc.*, 239 S.E.2d 894, 896 (Va. 1978); *see also, e.g.*, *Levine v. Employers Ins. Co. of Wausau*, 887 F.3d 623, 632 (4th Cir. 2018) ("Virginia courts will not read contracts to produce absurd results."). That well-established rule reflects a strong "presumption . . . that the parties 'were trying to accomplish something rational.'" *Mount Aldie, LLC v. Land Tr. of Virginia, Inc.*, 796 S.E.2d 549, 555 (Va. 2017) (quoting *Fishman v. LaSalle Nat'l Bank*, 247 F.3d 300, 302 (1st Cir. 2001)). The irrational results produced by Blue Flame's argument thus provide an additional reason for this Court to reject it.

B. The Account Agreement's Attorneys' Fees Provision Is Not Unconscionable As A Matter Of Law

Blue Flame separately argues (Memo. 11-14) that the Account Agreement's attorneys' fees provision is unconscionable under Virginia law. As Blue Flame correctly acknowledges (Memo. 11), that defense requires it to demonstrate that the attorneys' fees provision "is both procedurally and substantively unconscionable." *Sanders v. Certified Car Ctr., Inc.*, 93 Va. Cir. 404, 406 (2016). Blue Flame fails to show either one.

1. Determining whether a contract provision is procedurally unconscionable requires an inquiry into any "inequities, improprieties, or unfairness in the bargaining process and the formation of the contract." *Sanders*, 93 Va. Cir. at 406 (quoting *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 558 (W. Va. 2012)). Here, Blue Flame's argument that the attorneys' fees provision is procedurally unconscionable rests entirely on the Virginia Supreme Court's non-precedential decision in *Flint Hill School v. McIntosh*, No. 181678, 2020 WL 33258 (Va. Jan. 2, 2020), where the court refused to enforce a fee-shifting provision contained in an enrollment contract between a private school and the parents of a student. *See id.* at *1, *5-6. Blue Flame observes (Memo. 12-13) that the *McIntosh* court found the fee-shifting provision to be unconscionable in part because it concluded that the enrollment contract was a contract of adhesion. *See* 2020 WL 33258, at *5-6. Blue Flame argues that the Account Agreement was likewise a contract of adhesion because it was prepared by the Bank and then presented to Blue Flame for electronic signature.

But Blue Flame vastly overreads *McIntosh*. The court did not suggest that a contract of adhesion is invariably unconscionable. Rather, the court stated only that whether a provision is part of an adhesion contract is "a relevant factor to consider." 2020 WL 33258, at *5. And other decisions confirm that this single factor should not be accorded talismanic significance. The Fourth Circuit has explained, for example, that "Virginia adheres to the general rule that . . . [t]he use of a standard form contract . . . does not invalidate an otherwise valid contractual provision," even where the parties have "admittedly unequal bargaining power." *Saturn Distribution Corp. v. Williams*, 905 F.2d 719, 726 (1990) (quoting *Webb v. R. Rowland & Co.*, 800 F.2d 803, 807 (8th

Cir. 1986)). Indeed, because "the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable." *American Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 88 (4th Cir. 2005) (quoting *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 273 (W. Va. 2002)).

The facts of this case also differ from *McIntosh* in significant respects. Most obviously, the enrollment contract at issue in *McIntosh* was a contract between a business (the private school) and consumers (the parents of a student). *See* 2020 WL 33258, at *1. The court drew attention to that point in its definition of an adhesion contract as a "standard-form contract prepared by one party, to be signed by another party in a weaker position, *usually a consumer*, who adheres to the contract with little choice about the terms." *Id.* at *5 (emphasis added) (quoting *Black's Law Dictionary* 403 (11th ed. 2019)). Here, by contrast, Blue Flame purported to be a substantial business concern that entered into a $600 million contract with the State of California, and it established a business checking account with the Bank. *See* Counterclaim Compl. ¶ 3; *id.* Ex. A. Those facts undercut Blue Flame's effort to depict the Account Agreement as an unconscionable contract of adhesion. *See, e.g.*, *Ebadom VA, LLC v. Lee*, No. CL-2018-1535, 2020 WL 1704650, at *2 (Va. Cir. Ct. Apr. 06, 2020) (distinguishing *McIntosh* in part on this ground); *SunTrust Banks, Inc. v. Be Yachts, LLC*, No. C18-840 MJP, 2020 WL 5759789, at *2 (W.D. Wash. Sept. 28, 2020) (distinguishing *McIntosh* in part because party claiming unconscionability "could not be described as an unwitting consumer").

More broadly, determining whether a contract provision is unconscionable is an inherently factbound inquiry that requires a court to consider a wide range of factors, including "the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Kaplan v. RCA Corp.*, 783 F.2d 463, 467 (4th Cir. 1986) (New Jersey law); *see also Walker v. Caterpillar Indus., Inc.*, Nos. 93-2388, 93-2482, 1994 WL 406563, at *2 (4th Cir. Aug. 4, 1994) (per curiam) (applying the same factors to a dispute governed by Virginia law); Restatement (Second) of Contracts § 208 cmt. d. For that reason, "unconscionability claims should but rarely be determined on the bare-bones pleadings—that is, with no opportunity for the parties to present relevant evidence of the circumstances surrounding the original consummation of their contractual relationship." *Carlson v. General Motors Corp.*, 883 F.2d 287, 292 (4th Cir. 1989).

In this case, therefore, the Court should consider Blue Flame's particular characteristics and the circumstances under which Blue Flame agreed to the Account Agreement. That inquiry would necessarily include consideration of the other options that were available to Blue Flame at the time, and Blue Flame should be required to explain why, if it found the Bank's terms to be overreaching, it could not have chosen to do business with one of the more than five thousand other FDIC-insured commercial banks and savings institutions across the country. This Court should reject Blue Flame's invitation to dismiss the Bank's counterclaims as a matter of law, which would pretermit that required inquiry.

2. Blue Flame also fails to demonstrate that the Account Agreement's attorneys' fees provision is substantively unconscionable as a matter of law. "Substantive unconscionability involves unfairness in the terms of the contract itself." *Sanders*, 93 Va. Cir. at 406 (quoting *Dan Ryan Builders, Inc.*, 737 S.E.2d at 558). The required showing is demanding: "[A]n inequitable and unconscionable bargain has been defined to be 'one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other.'" *Smyth-*

Bros.-McCleary-McClellan Co. v. Beresford, 104 S.E. 371, 382 (Va. 1920). Indeed, "[t]he inequality must be so gross as to shock the conscience." *Id.*

Here, again, Blue Flame's argument rests entirely on a comparison to the fee-shifting provision held to be unconscionable in *McIntosh*. The provision at issue there provided that the parents "agree[d] to pay all attorneys' fees and costs incurred by [the private school] in any action arising out of or relating to this Enrollment Contract." 2020 WL 33258, at *1. The Virginia Supreme Court held that this provision was substantively unconscionable because it was "overly broad," in that it "require[d] the signatory to pay 'all attorneys' fees and costs incurred by [the School] in any action arising out of or relating to' the Enrollment Contract." *Id.* at *6. The court stressed that the provision would have required the parents "to pay the School's attorneys' fees even if the School was the one to initiate a proceeding eventually found to be without merit." *Id.*

Contrary to Blue Flame's contention (Memo. 13), the Account Agreement's attorney's fee provision does not share that critical feature with the contract language at issue in *McIntosh*. Here, Blue Flame's liability is expressly limited to the Bank's "*reasonable* attorneys' fees." Counterclaim Compl. Ex. B § 3 (emphasis added). That provision thus differs from the fee-shifting provision in *McIntosh*, which required the parents to pay "*all* attorneys' fees" incurred by the private school "in *any* action arising out of or relating to" the parties' contract. 2020 WL 33258, at *1 (emphases added). And that difference is significant: Because "the results obtained" in litigation are among the factors that Virginia courts consider in determining whether an award of attorneys' fees is reasonable, *Chawla v. BurgerBusters, Inc.*, 499 S.E.2d 829, 833 (Va. 1998), a litigant that has lost "would have a hard time persuading a court [that] its fees were reasonable," *Ebadom VA, LLC*, 2020 WL 1704650, at *2. Thus, unlike the contract at issue in *McIntosh*, the

Account Agreement ordinarily would not authorize the Bank to recover its attorneys' fees if it does not prevail in litigation.[4]

Blue Flame nonetheless argues (Memo. 14 n.6) that the Account Agreement's express reasonableness requirement does not make a difference. That is so, Blue Flame submits, because the *McIntosh* court rejected the school's argument that the fee-shifting provision at issue there was not unconscionable because any award of fees would be limited by a reasonableness standard implied by Virginia law. *See* 2020 WL 33258, at *6. In reaching that conclusion, the court stated that "[t]he issue is not whether the amount of attorneys' fees would be unconscionable; the issue is whether the *obligation* to pay the School's attorneys' fees as stated in the provision is unconscionable." *Id.*

For two reasons, however, Blue Flame's reliance on the *McIntosh* court's reasoning is misplaced. First, although the *McIntosh* court stated that the private school had argued that "a court could determine its reasonable attorneys' fees to be zero dollars," 2020 WL 33258, at *5, the court's unsigned, non-precedential opinion contains no suggestion that the court considered and rejected an argument that a reasonableness limitation would preclude *any* award of fees in most cases in which a litigant does not prevail, as the circuit court later concluded in *Ebadom VA, LLC*, 2020 WL 1704650, at *2. Thus, *McIntosh* did not directly address the argument pressed by the

[4] Although the Bank ordinarily would not be entitled to recover its fees if it does not prevail in litigation, that generalization is not invariably true. In an appropriate case, an award of fees could be reasonable, within the meaning of the Account Agreement, even if the Bank does not secure a fully favorable result. For example, a provision of the Equal Access to Justice Act authorizes an award of attorney's fees against the federal government when "the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case." 28 U.S.C. § 2412(d)(1)(D). The same logic underlying that provision could justify an award for fees incurred by the Bank in defending against an unreasonably excessive demand for damages, even if a court were to conclude that the Bank was liable for a modest amount of damages.

Bank here. Second, and in any event, Blue Flame errs by conflating the *implied* reasonableness limitation that the court considered in *McIntosh* with the *express* contractual reasonableness limitation in the Account Agreement here. The *McIntosh* court's refusal to treat an implied limitation as a basis to avoid a finding of unconscionability is akin to Virginia courts' general reluctance to "blue pencil" impermissibly overbroad contract provisions by reducing them to their maximum permissible scope. *See, e.g.*, *Update, Inc. v. Samilow*, 311 F. Supp. 3d 784, 788 (E.D. Va. 2018); *Darton Envt'l, Inc. v. FJUVO Collections, LLC*, 332 F. Supp. 3d 1022, 1031 (W.D. Va. 2018); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958, 966 (W.D. Va. 2000). By contrast, simply giving effect to the Account Agreement's express reasonableness limitation would raise no similar concerns. *See Ebadom VA, LLC*, 2020 WL 1704650, at *2 (stressing fee-shifting provision's express limitation to "reasonable" fees as distinguishing the provision from the broader language at issue in *McIntosh*).

C. The Account Agreement's Attorneys' Fees Provision Does Not Contravene Public Policy

As a final fallback argument, Blue Flame suggests (Memo. 14-15) that the Account Agreement's attorneys' fees provision is void as against public policy under Virginia law. That is wrong as well.

1. The premise of Blue Flame's public-policy argument is that the attorneys' fees provision "poses a bar to potentially meritorious lawsuits" (Memo. 15) because it inevitably requires an award of attorneys' fees in favor of the Bank in any dispute with Blue Flame, whether or not the Bank prevails in the litigation. As we have explained, however, that premise is incorrect. The Account Agreement's express limitation to "reasonable" attorneys' fees (Counterclaim Compl. Ex. B § 3) authorizes the Court to take the results of litigation into account before awarding attorneys' fees to the Bank, and if the Bank is not a prevailing party an award in favor of the Bank

would be appropriate only in rare circumstances. *See* pp. 13-15, *supra*. There is thus no basis to conclude that the attorney's fee provision would inhibit Blue Flame from pursuing potentially meritorious litigation against the Bank.

2. Blue Flame's public-policy argument also fails because the Account Agreement makes Blue Flame liable for the Bank's reasonable attorneys' fees and costs only "to the extent permitted by law." Counterclaim Compl. Ex. B § 3. By its express terms, the attorney's fee provision does not purport to require an award of fees under circumstances that would contravene public policy. Thus, even if the Account Agreement's express reasonableness limitation were not itself sufficient to avoid any unlawful results, there would still be no basis to hold the attorneys' fees provision void in its entirety. Rather, the correct approach would be to decline to award fees in individual cases if doing so would violate public policy. *See Snyder v. Waterford Falls Church II, LLC*, No. CL-2010-16609, 2012 WL 5550785, op. letter at 7 (Va. Cir. Ct. Oct. 23, 2012) (contract language requiring indemnification "to the full extent of the law" permitted enforcement of clause that otherwise would have violated public policy against indemnification of a party for its own wrongdoing).

CONCLUSION

Blue Flame's motion to dismiss the Bank's counterclaims should be denied.

Date: November 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 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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