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** **The Honorable Leonie Brinkema**
CHAIN BRIDGE BANK, N.A. *Counterclaim Plaintiff,* **v.** **BLUE FLAME MEDICAL LLC** *Counterclaim Defendant.*	

REPLY IN SUPPORT OF PLAINTIFF/COUNTERCLAIM DEFENDANT
BLUE FLAME MEDICAL LLC'S MOTION TO DISMISS COUNTERCLAIMS

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PRELIMINARY STATEMENT

The Bank[1] fails in its Opposition to Blue Flame's Motion to Dismiss ("Opposition") to identify a single authority supporting its efforts to selectively enforce the fee-shifting provision in its Account Agreement with Blue Flame months after the Bank voluntarily and unilaterally terminated that agreement. Neither the terms of the agreement nor the clause at issue support the Bank's argument, and the Bank has identified no reason why the Court should decline to follow other courts in rejecting identical arguments under Virginia law. The Bank also fails to differentiate the fee-shifting clause at issue from a similar clause that the Virginia Supreme Court recently found unconscionable and unenforceable. Just like the clause in that case, the Account Agreement's fee-shifting provision benefits only the party that drafted the agreement and was presented to the non-drafting party for its assent on a take-it-or-leave-it basis. In fact, the fee-shifting provision at issue here is even more unfair than the one found unconscionable by the Virginia Supreme Court as its language cannot be limited to fees incurred in the context of litigation, let alone to fees incurred in a successful litigation. The Court should reject the Bank's effort to create leverage in this litigation through the threat of attorney's fee liability and dismiss the Bank's counterclaims.

ARGUMENT

I. THE BANK CANNOT ENFORCE AN ONGOING OBLIGATION UNDER A CONTRACT IT CHOSE TO TERMINATE.

The Bank identifies no authority to support its argument that it can enforce the fee-shifting provision in the Account Agreement. The Bank chose to terminate the Account Agreement months before Blue Flame initiated litigation to address the Bank's reckless

[1] All capitalized terms used herein have the same meanings as in the Memorandum in Support of Plaintiff/Counterclaim Defendant Blue Flame Medical LLC's Motion to Dismiss Counterclaims, ECF No. 47 (the "Motion").

interference with its business and destruction of its reputation. Instead, the Bank wrongly posits—without basis in fact or the terms of the Account Agreement—that the rights and obligations under the fee-shifting provision are not "ongoing" and therefore can be enforced by the Bank at any time, regardless of whether Blue Flame remains its customer. (*See* Opposition at 5-6.) That is not so, and courts applying Virginia law have rejected similar efforts to enforce contractual rights that had previously been extinguished by the party seeking to enforce them. (*See* Motion at 7-11.) The Bank's efforts to distinguish those authorities identified in Blue Flame's Motion fall flat and, in any event, the Bank offers no conflicting authority in support of its position.

The Bank's primary argument is that it is not attempting to enforce "ongoing obligations under a terminated contract" which would be unenforceable following the Bank's termination of the Account Agreement. (*See* Opposition at 5-6.) But that is exactly what the Bank's counterclaims seek to do, and its argument to the contrary ignores both the plain language of the Account Agreement and common sense. As noted in Blue Flame's Motion, the fee-shifting clause provides, in pertinent part: "You *will be liable* for our costs as well as 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." (Motion at 2 (quoting Exhibit B, § 3 (emphasis added)).)[2] The Bank fixates on the words "be liable" (*see* Opposition at 6), reading out the word "will" which clearly indicates that it is a prospective, ongoing obligation. While the Bank attempts to argue that it is seeking fees for a litigation arising out of Blue Flame's purported misconduct during the brief period when the Account Agreement was in force, the fee shifting clause is phrased as—and

[2] The fee-shifting clause goes on to provide examples of such disputes ("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") and the Bank's potential remedies (deduction of costs and attorneys' fees "from your account when they are incurred"), all of which are consistent with enforcement while the account in question remains open and active. (Motion at 2 (quoting Exhibit B, § 3).)

creates—a purely prospective contractual obligation which terminates with the rest of the contract. None of the fees related to this lawsuit concern disputes that existed while the Account Agreement was in force. Moreover, neither the fee-shifting clause nor any other portion of the Account Agreement provides that the obligation survives the termination of the Account Agreement. (*See* Motion at 2, Exhibits A and B.) The Court should decline the Bank's invitation to infer such a term where it does not exist.

In an effort to sidestep the plain language of the Account Agreement, the Bank attempts to analogize its counterclaims to enforce the fee-shifting clause to a suit for damages for a material breach of contract. (*See* Opposition at 5-6.) But the Bank is not seeking damages for breach of contract against Blue Flame in its counterclaims (*see* Counterclaims, ¶¶ 18-24), nor would it have any basis to do so. Instead, the Bank plainly is seeking to benefit from Blue Flame's obligation to "be liable" for the Bank's costs and attorney's fees under the fee-shifting provision, despite having terminated its own obligations under the Account Agreement on March 26, 2020. Accordingly, the authorities Blue Flame has identified that reject attempts to enforce a contract after choosing to terminate it are directly on point, and foreclose the Bank's efforts to enforce the fee-shifting provision here. *See, e.g.*, *Texas Co. v. Northup*, 153 S.E. 659, 664 (Va. 1930); *see also* Motion at 8-10.

The Bank's attempt to distinguish those authorities depends entirely on its false construct that its counterclaims are akin to seeking damages for a breach of contract, even though the Bank has not made a breach of contract claim. For example, the Bank argues that the Virginia Supreme Court's decision in *Texas Co. v. Northup* is inapposite because it held that "the oil company was not entitled to receive an ongoing benefit under the lease contract . . . after termination of the broader contract," and that here the Bank is merely seeking to "impose liability under a terminated contract." (Opposition at 7.) Because the sole basis for the Bank's effort to "impose liability" *is* its "ongoing benefit" under the fee-shifting provision that it chose to terminate, *Texas Co.* does not support the Bank's position here.[3]

The Bank's efforts to differentiate *Siskin Enterprises Inc. v. W.B. Stoddard Jr. Inc.*, 147 F. Supp. 2d 1125 (D. Utah 2001), also fail. (*See* Opposition at 7-8.) That case concerned a distribution agreement with a bilateral fee-shifting provision that the plaintiff unilaterally terminated the day after it brought an action seeking a declaratory judgment that the defendant had breached the agreement. *See* 147 F. Supp. 2d 1125 at 1127-28. The defendant then asserted a counterclaim for wrongful termination of the agreement. *Id.* at 1128. Following a trial on the merits and a jury verdict in favor of the plaintiff on the defendant's counterclaims, the plaintiff then filed a motion for attorney's fees, which the court rejected. *Id.* at 1126-27.

The fee-shifting provision in that case was limited to "actions . . . enforcing" the contract. The question presented was whether the plaintiff's declaratory judgment action filed before terminating the agreement constituted an "enforcing" of the contract "*notwithstanding the unilateral and self operative action by plaintiff in terminating the agreement apart from the litigation*." *Id.* at 1128 (emphasis added). As the Bank notes, the district court concluded "that attorneys' fees were unavailable because the plaintiff's action had sought to validate its termination of the [] agreement, rather than to enforce its rights under the agreement." (Opposition at 7.) However, the court went on to add that "[i]n terminating its relationship with defendant …, plaintiff terminated all provisions of the agreement, *including the attorney fees provision*" and that "[n]o language in the contract provided a means whereby the contract could be partially

[3] All of the Bank's efforts to distinguish Blue Flame's other authorities for this argument depend on the same faulty premise that it is not trying to obtain ongoing benefits under the terminated Account Agreement. (*See* Opposition at 8 n.3.)

abrogated." 147 F. Supp. 2d 1125 at 1129 (emphasis added); *see also* Motion at 10. That reasoning suggests that the plaintiff's attorney's fee claim would have failed even if the fee-shifting provision had not been limited to "actions . . . enforcing" the contract. Accordingly, the court held that the plaintiff had "no contractual right to attorneys fees" or costs, not just in connection with the plaintiff's declaratory judgment action, but also in connection with the defendant's counterclaims for wrongful termination which were asserted after the plaintiff terminated the agreement. *See* 147 F. Supp. 2d 1125 at 1130.

Finally, the Bank argues that enforcing the fee-shifting provision according to its plain language would produce "counterintuitive and obviously unintended results." (Opposition at 9.) It insists that doing so would deprive the Bank of the ability to seek attorneys' fees and costs under Account Agreements that it might terminate "whenever a customer of the Bank uses its account to defraud the Bank or to engage in other illegal activity." (*Id*.) Putting aside that Blue Flame did not engage in any fraudulent or illegal activity despite the Bank's defamatory assertions to California officials, if the Bank is concerned about this going forward, it can amend the terms of the Account Agreement to provide that the fee-shifting provision survives termination. What it cannot do is insist that the Court infer such a term where it does not exist.

There is nothing irrational about Blue Flame's interpretation of the fee-shifting provision, which is wholly consistent with the terms of the Account Agreement. Rather, it is the Bank's reading of the fee-shifting provision that would create absurd results not contemplated by parties to the contract. Under the Bank's logic, Blue Flame (and all of the Bank's other customers) would be liable forever for any attorneys' fees or costs incurred by the Bank for any reason related to its account, no matter who is responsible for generating those fees and costs or how much time has passed since the parties' commercial relationship ended. The Court should reject the Bank's invitation to read into the Account Agreement a perpetual and non-terminable obligation to pay the Bank's attorneys' fees and costs. Because the Bank no longer has the right to enforce the fee-shifting provision it chose to terminate, the Court should dismiss the Bank's counterclaims.

II. THE FEE-SHIFTING PROVISION IS UNENFORCEABLE UNDER VIRGINIA LAW.

Apart from the fact that the Bank chose to terminate the Account Agreement in its entirety, its efforts to enforce the fee-shifting provision should be dismissed because the provision is both procedurally and substantively unconscionable under established Virginia law. (*See* Motion at 11-14.) The Bank's arguments to the contrary misconstrue the Virginia Supreme Court's recent decision in *Flint Hill School v. McIntosh*, which rejected the positions that the Bank seeks to advance here.

First, the Bank insists that not every contract of adhesion is "invariably unconscionable" and unenforceable. (*See* Opposition at 10.) Blue Flame does not argue to the contrary. As argued previously, under Virginia law, a contract of adhesion is procedurally unconscionable and unenforceable when its terms also are substantively unconscionable. *Flint Hill Sch. v. McIntosh*, No. 181678, 2020 WL 33258, at *6 (Va. Jan. 2, 2020) [hereinafter *McIntosh II*].[4] In their *McIntosh* opinions, the Virginia Circuit Court and the Virginia Supreme Court addressed unconscionability as Blue Flame does here—as a non-dispositive, threshold inquiry that is satisfied where the contested provision is a contract of adhesion. *See McIntosh v. Flint Hill Sch.*,

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[4] Because Blue Flame does not argue that every contract of adhesion is unconscionable, the cases cited by the Bank for the opposite proposition, both of which addressed whether employee arbitration agreements were preempted by the Federal Arbitration Act, are wholly inapposite. *See Saturn Distribution Corp. v. Williams*, 905 F.2d 719, 727 (4th Cir. 1990) (holding that provision of Virginia law forbidding nonnegotiable arbitration provisions in automobile franchise agreements was preempted by Federal Arbitration Act); *Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 93 (4th Cir. 2005) (holding that employee's state law claims against employer were arbitrable under valid and enforceable arbitration agreement).

No. CL-2018-1929, 2018 WL 9393020 at *14-15 (Va. Cir. Ct. Sep. 17, 2018) [hereinafter *McIntosh I*]; *McIntosh II*, 2020 WL 33258, at *6. The fee-shifting provision here, like that in *McIntosh*, is a contract of adhesion because it was prepared by the Bank and presented to Blue Flame for signature without affording Blue Flame a "meaningful choice regarding the terms." *McIntosh II*, 2020 WL 33258, at *6. The Bank has not alleged otherwise, nor could it. Blue Flame did not negotiate any of the terms of the Account Agreement which, just like the enrollment contract in *McIntosh*, was presented to Blue Flame for electronic signature via Docusign on a take-it-or-leave-it basis. *See McIntosh I* at *15; *see also* Motion at 2, 13; Complaint ¶ 34; Answer ¶ 34; Counterclaims ¶¶ 5-7. Thus, while the fact that the fee-shifting provision is a contract of adhesion does not end the Court's inquiry as to unconscionability, it is sufficient to establish a basis for procedural unconscionability, consistent with the Virginia Supreme Court's decision in *McIntosh II*. *See* 2020 WL 33258, at *6.[5]

The Bank urges that procedural unconscionability is a "factbound" inquiry that should not be resolved on a Motion to Dismiss. (Opposition at 11-12.) But the Bank offers no authority holding that discovery is required to determine unconscionability, nor does it explain how discovery could be enlightening where, as here, the contract term in question was not subject to any negotiation. All of the Bank's authorities regard disputes about the unconscionability of

[5] The cases cited in the Bank's Opposition are not to the contrary. In *Ebadom VA, LLC v. Lee*, the court found that the fee-shifting provision at issue was not a contract of adhesion because it had been *actually negotiated* by the parties. No. CL-2018-1535, 2020 WL 1704650, at *2 (Va. Cir. Ct. Apr. 06, 2020). In *SunTrust Banks, Inc. v. Be Yachts, LLC*, the court did not address whether the fee-shifting provision at issue was a contract of adhesion and based its holding primarily on an analysis of the provision's substance. No. C18-840, 2020 WL 5759789, at *2 (W.D. Wash. Sept. 28, 2020). That provision, contained in a loan agreement, applied only to lawsuits brought by the lender for a deficiency by the borrower, *id.*, and thus was far more limited in scope than the Bank's fee-shifting provision, which applies whenever the Bank talks to its lawyers about a matter concerning a customer's account. (*See* Motion at 2 (quoting Exhibit B, § 3).)

disclaimers of the implied warranty of merchantability under Article 2 of the Uniform Commercial Code, which does not apply to contracts like the Account Agreement here. *See Walker v. Caterpillar Indus., Inc.*, 34 F.3d 1067 (4th Cir. 1994) (applying Virginia law); *Carlson v. General Motors Corp.*, 883 F.2d 287, 292 (4th Cir. 1989) (applying South Carolina law); *Kaplan v. RCA Corp.*, 783 F.2d 463, 467 (4th Cir. 1986) (applying New Jersey law). As the Fourth Circuit stated in *Carlson*, Article 2 of the UCC expressly requires that "[w]hen it is claimed or appears . . . that [a] contract or any clause thereof may be unconscionable[,] the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." *Carlson*, 883 F.2d 287, 293 (4th Cir. 1989) (quoting Uniform Commercial Code § 2–302(2)). That UCC provision does not apply to contracts for the rendering of services like the Account Agreement. *See, e.g.*, *Princess Cruises v. Gen. Elec. Co.*, 143 F.3d 828, 832 (4th Cir. 1998). As such, the unconscionability of the fee-shifting provision at issue can be resolved on a motion to dismiss.

Second, as to substantive unconscionability, the Bank attempts to distract from the plain overbreadth of the fee-shifting provision by recycling an argument the Virginia Supreme Court has already rejected: that the provision's "reasonableness limitation" should be interpreted to save the provision and, specifically, to preclude a losing party in litigation from recovering its attorney's fees. (*See* Opposition at 12-15.) The Bank asserts that the fee-shifting provision, then, "*ordinarily* would not authorize the Bank to recover its attorneys' fees if it does not prevail in litigation." (*Id.* at 13-14 (emphasis added).)[6] However, in *McIntosh II*, the Virginia Supreme

[6] Unwilling to abandon hope of an attorney's fee award in the event that Blue Flame prevails in this litigation, the Bank asserts in a footnote that "[i]n 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." (Opposition at 14 n. 4.) To support that proposition, the Bank cites the

Court specifically rejected an argument that a reasonableness limitation saved the overly broad fee-shifting provision at issue there from being unconscionable, and held the provision was unconscionable because the obligation to pay "as stated in the provision" was unconscionable. 2020 WL 33258, at *5-6 ("The 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.") (emphasis added).[7]

Here, the obligation imposed by the Bank's fee-shifting provision is unconscionable because it expressly calls for Blue Flame to pay the Bank's attorney's fees any time the Bank "seek[s] the advice of an attorney, whether or not [the Bank] become[s] involved in the dispute." (Motion at 2 (quoting Exhibit B, § 3).) Thus, it is not limited to situations where there is litigation involving the Bank and the Bank is a prevailing party, as the Bank now suggests. Indeed, the obligation stated in the fee-shifting provision would hold Blue Flame liable for the Bank's attorney's fees whenever the Bank "seek[s] the advice of an attorney" "in any dispute involving [Blue Flame's] account," no matter who initiates the dispute, no matter whether the Bank

Equal Access to Justice Act's fee-shifting provision. 28 U.S.C. § 2412(d)(1)(D). The Bank provides no explanation of how a fee-shifting provision in an inapplicable federal statute bears on the interpretation of a fee-shifting provision in a bank account agreement governed by state law.

[7] The Bank attempts to distinguish *McIntosh* on the basis that the "reasonableness limitation" at issue in that case was implied as a matter of Virginia law, rather than appearing in the language of the fee-shifting provision. (Opposition at 15.) But the Virginia Supreme Court did not suggest it would have given greater weight to an express reasonableness limitation when it rejected the argument that an implied reasonableness limitation rendered the provision enforceable. *See* 2020 WL 33258, at *5-6. Furthermore, the Bank's reference to "Virginia courts' general reluctance to 'blue pencil' impermissibly overbroad contract provisions" only underscores why the Court should decline the Bank's invitation to interpret "reasonable" to mean "prevailing party only." *See Update, Inc. v. Samilow*, 311 F. Supp. 3d 784, 788 (E.D. Va. 2018) (citation omitted) ("[C]ourts have no authority under Virginia law to 'blue pencil' or otherwise rewrite the contract to eliminate illegal overbreadth."); *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).

is involved in any resulting litigation, and no matter whether the Bank prevails in any such litigation. (*See id*.) A plain reading of the fee-shifting provision suggests that Blue Flame is liable any time the Bank picks up its phone to ask an attorney a routine question prompted by Blue Flame's account. A finding that such an extraordinarily far-reaching fee-shifting provision "shocks the conscience" is entirely consistent with the Virginia Supreme Court's decision in *McIntosh*. *See* 2020 WL 33258, at *6. Accordingly, the Court should find the fee-shifting provision void as unconscionable and dismiss the Bank's counterclaims.

III. THE FEE-SHIFTING PROVISION IS FACIALLY OVERBROAD AND VOID AS AGAINST PUBLIC POLICY.

Finally, in arguing that the fee-shifting provision is not void as against public policy, the Bank again relies on the provision's purported "reasonableness limitation." (*See* Opposition at 15.) That argument fails because, as explained above, it does not limit the provision's application outside of the litigation context. The Bank also argues that the phrase "to the extent permitted by law" precludes an interpretation of the provision that would allow it to violate public policy. But as the Bank itself points out, "courts have no authority under Virginia law to 'blue pencil' or otherwise rewrite the contract to eliminate illegal overbreadth." (*See id.* (citing *Update, Inc.*, 311 F. Supp. 3d at 788).) Yet that is precisely what the Bank asks the Court to do here to avoid the fee-shifting clause's facial overbreadth. The Bank should decline that request and dismiss the Bank's counterclaims as void as against public policy for the reasons stated in Blue Flame's Motion. (*See* Motion at 14-15.)

CONCLUSION

For the foregoing reasons, the Counterclaims should be dismissed in their entirety.

Dated: November 9, 2020

Respectfully submitted,

/s/ *Peter H. White*

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2020, I caused the foregoing document to be filed and served electronically using the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: November 9, 2020

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