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, Third-Party Plaintiff, v. JPMORGAN CHASE BANK, N.A., Third-Party Defendant.	

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF BLUE FLAME MEDICAL LLC

ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP

Gary A. Orseck (admitted *pro hac vice*)
Matthew M. Madden (admitted *pro hac vice*)
Donald Burke (VA Bar No. 76550)
2000 K Street, N.W., 4th Floor
Washington, D.C. 20006
Tel: (202) 775-4500
Fax: (202) 775-4510
dburke@robbinsrussell.com

Counsel for Defendants

May 27, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Defendants are entitled to summary judgment because the undisputed evidence demonstrates that Blue Flame's claims fail as a matter of law. Blue Flame lacks any evidence of recoverable damages. California had an unfettered right to walk away from its transaction with Blue Flame, which is exactly what it did upon learning that Blue Flame was not what it had pretended to be. Moreover, Blue Flame had no hope of fulfilling California's order for 100 million N95 masks. There is simply no basis for the fantastical notion that Blue Flame—a days-old company with no relevant experience and which consistently failed to fulfill other customers' PPE orders—could somehow have attained that remarkable feat.

Blue Flame also cannot establish liability. Try as it might, Blue Flame cannot adduce evidence that it was entitled to receive payment on a wire transfer that it had procured from California by fraud. To the contrary, the wire transfer was cancelled, which nullified Chain Bridge's obligation to pay. And Blue Flame's patent failure to act in good faith bars all relief under the UCC. Nor can Blue Flame establish liability for defamation or tortious interference with contract by pointing to Defendants' indisputably true statements, which assisted California officials in safeguarding almost half a billion dollars of taxpayer funds.

I. Blue Flame Cannot Establish Damages

Blue Flame begins its opposition (at 13-15) by addressing the key defect that this Court has previously identified—namely, how Blue Flame could possibly hope to prove damages given its acknowledged inability to fulfill its *other* customers' orders for N95 masks because of supply-chain issues in China. Dkt. No. 32 (9/8/2020 Hr'g Tr.) 3, 5. Blue Flame has no persuasive answer.

A. Blue Flame Could Not Have Forced California To Proceed With Its Order

Blue Flame's damages case fails, even before considering Blue Flame's inability to fulfill California's order, because California had—and exercised—an unfettered right to terminate its order. There is no dispute that California decided not to move forward with the transaction after identifying Blue Flame's "credibility issue" and learning that it was a days-old enterprise with no relevant expertise. *See* Memo. 22-24.

Blue Flame does not dispute California's unilateral right to terminate, but contends that it nevertheless may recover *from Defendants* damages resulting from *California's* decision not to proceed because Defendants "interfered" and "caus[ed] California not to proceed with the transaction." Opp. 13. What Blue Flame appears to be relying on is Chain Bridge's sharing of indisputably true information about Blue Flame with California officials. *See id*. at 14 (referring to "facts Defendants improperly reported to the STO").[1] But Chain Bridge's truth-telling is distinct from its agreement to return California's wire transfer to JPMorgan. So even if California refused to do business with Blue Flame because Chain Bridge related facts about Blue Flame, that does not transform whatever profits Blue Flame speculates it could have derived from the California order into "damages resulting from [Chain Bridge's] refusal to pay." UCC § 4A-404(a).

Blue Flame also attempts to tie California's refusal to proceed with its order to Chain Bridge's alleged violations of Article 4A. *See* Opp. 13-14. But Blue Flame offers only "[u]nsupported speculation," *Sutherland v. SOS Int'l, Ltd.*, 541 F. Supp. 2d 787, 789 (E.D. Va. 2008), that California would have stuck with Blue Flame—credibility deficits and woeful inexperience aside—if only Blue Flame had wired out a portion of California's funds to one of the purported brokers with which Blue Flame had placed an order. That speculation "is not enough to withstand a motion for summary judgment." *Id*.

Moreover, Blue Flame's response is incoherent because even Blue Flame agrees that Chain

[1] Blue Flame contends (Opp. 14) that "no California witness testified that the State would have terminated the transaction if it had known in advance the facts Defendants improperly reported to the STO." That contention mischaracterizes the record, *see* pp. 14-16, *infra*, but in any event, it is irrelevant to Defendants' damages argument. The key point, for present purposes, is that California refused to do business with Blue Flame upon learning the true facts that Blue Flame had concealed.

Bridge was not required to wire California's funds out to Blue Flame's selected brokers *immediately*, and thus *before* California learned the truth about Blue Flame. As a new customer, Blue Flame was subject to Chain Bridge's Funds Availability Disclosure providing that "[f]unds from wire[] transfers . . . will be available on the first business day *after* the day of your deposit." Ex. 113 at 2610 (emphasis added).[2] Blue Flame also concedes (Opp. 21) that Chain Bridge could have continued to hold California's funds while conducting additional due diligence, and was under no obligation to wire any of those funds to Blue Flame's mask brokers.[3]

Those undisputed facts doom Blue Flame's damages theory. California had already learned the truth about Blue Flame—and decided not to proceed with the transaction—well before there was any basis for Blue Flame to insist that California's funds had to be released to it or to its brokers. Because any such damages arose *before* a payment right could have ripened, Blue Flame has no evidence of "damages resulting from [Chain Bridge's] refusal to pay." UCC § 4A-404(a).

B. There Is No Evidence That Blue Flame Could Have Fulfilled California's Order And All Relevant Evidence Is To The Contrary

Blue Flame also cannot establish damages because there is no record evidence that Blue Flame would have successfully fulfilled California's order even if Blue Flame had received California's funds. *See* Memo. 24-26. Tellingly, Blue Flame makes no effort to contest our showing (*id.* at 24) that supplying 100 million units of four specific models of Chinese-manufactured N95 masks was an impossible task given the market conditions that prevailed in

[2] Exhibits cited as Ex. 1 through Ex. 99 refer to exhibits to the Declaration of Donald Burke in support of Defendants'/Third-Party Plaintiff's motions for summary judgment, at Dkt. Nos. 130 and 131. Exhibits cited as Ex. 113 through Ex. 122 refer to exhibits to the Declaration of Donald Burke filed in support of this reply.

[3] As Blue Flame acknowledges (Opp. 21 & n.18), a "receiving bank" generally "has no duty to accept a payment order," UCC § 4A-209 cmt. 3, meaning that Chain Bridge was not required to accept a payment order from Blue Flame directing payment to its supposed brokers.

March 2020.[4] Blue Flame also glosses over its repeated failures to fulfill other customers' orders for N95 masks (at least 12 orders in total), which confirms that neither Blue Flame nor any of its supposed supply partners had the ability to fulfill California's order. *See id.* at 15, 25.

Blue Flame responds by pointing to its agreements with Great Health and Suuchi, and the orders it placed with those brokers. *See* Opp. 14. But given "the difficulty of sourcing N95 masks at that time," *id.*, merely placing an order with a purported mask broker provides no evidence that 100 million N95 masks actually would have been delivered. That much is confirmed by Blue Flame's inability to fulfill other customers' orders, despite placing its own orders with its supposed supply chain. *See* Memo. 25. Blue Flame likewise derives no support from its assertion (Opp. 14) that it "received confirmation" from Great Health's CEO, Henry Huang, that Great Health could deliver 100 million masks to California within 30 days. Whatever reassurances Blue Flame claims to have received from Huang are inadmissible hearsay, which is insufficient to avoid summary judgment. *See* Fed. R. Civ. P. 56(c)(1)(B); *Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991). And as already noted, Great Health was consistently unable to fulfill other orders that Blue Flame placed, despite also having agreed to provide those PPE products to Blue Flame.[5]

---

[4] Blue Flame does not dispute that California's order exceeded China's *total* exports of N95 masks to the United States between March and mid-April of 2020; that even by the end of April 2020, total Chinese production of N95 masks stood at roughly 5 million per day; that supplies of the particular N95 models that Blue Flame had agreed to sell were much more limited; and that Blue Flame faced fierce worldwide competition from other purchasers for even those limited supplies of masks. *See* Memo. 24; Ex. 22 (Faulkner Rep.) ¶¶ 30, 48, 51, 53-55.

[5] The documentary evidence Blue Flame cites does not support its assertion that it received confirmation from Huang that Great Health could supply California's order. On March 26, 2020, Thomas texted Huang: "Henry, Mike said you can get us 100m n95 over a 30 day period of time that's amazing." White Ex. 15 at 725. In response, Huang did not confirm that account, but merely said that "we will give it all our efforts here to fight for the most scarce resources during crazy times." *Id.* at 725-26.

In a last-ditch effort to save its case, Blue Flame has now revealed a declaration from Huang, *see* White Ex. 95, which Blue Flame presents as evidence that, although Great Health could not fulfill *other* orders for Blue Flame, Great Health nonetheless "had the capacity to supply the 100 million masks California purchased." Opp. 14. But Huang's declaration cannot support that proposition because it is not cognizable at summary judgment.[6]

First of all, basic fairness precludes any consideration of evidence provided by a witness like Huang, who has refused to make himself available for deposition. Defendants subpoenaed Huang's deposition in December 2020, but Huang refused, citing limitations imposed by Chinese law. Ex. 114 at 4-5. At the end of discovery, Defendants learned that Blue Flame's John Thomas had been in contact with Huang—his "very good friend[]," Ex. 115 (Gula Tr.) at 214—and that as a result Huang was considering traveling outside of China to give testimony at Blue Flame's request. Ex. 114 at 3. Defendants repeatedly asked to be included in any discussions regarding Huang's deposition, and followed up with a subpoena to Huang for the production of relevant documents, which were never provided. *Id.* at 1-3. When Huang responded, he advised that he was "currently still in China and will be for the near future." *Id.* at 1.

In similar circumstances, courts have rejected parties' attempts to end-run the ordinary discovery process by securing a declaration from a witness who has chosen to "ma[ke] himself unavailable for discovery." *Dedvukaj v. Equilon Enters., L.L.C.*, 301 F. Supp. 2d 664, 668 (E.D. Mich. 2004), *aff'd*, 132 F. App'x 582 (6th Cir. 2005). As courts have recognized, it is inherently unfair when "one party has been in continued contact with non-party affiants but the other party has been denied the ability to question their statements." *Henry v. Outback Steakhouse of Fla.,*

[6] Defendants' reply is the appropriate procedural vehicle for objecting to consideration of Huang's declaration. "There is no need to make a separate motion to strike." Fed. R. Civ. P. 56 advisory committee's note to 2010 amendment.

LLC, No. 15-cv-10755, 2017 WL 1382292, at *2 (E.D. Mich. Apr. 18, 2017).[7]

Indeed, allowing a witness who has refused to participate in discovery to parachute into a case only at summary judgment, in order to "give unchallenged affidavit testimony[,] . . . would clearly violate the purpose of discovery." *McKellar v. State Farm Fire & Cas. Co.*, No. 14-cv-13730, 2016 WL 304759, at *8 (E.D. Mich. Jan. 26, 2016). And there is no question that Huang *chose* not to participate in discovery: As Huang's declaration acknowledges (White Ex. 95 ¶¶ 12-13), he could have left China to attend a deposition, and he would have been permitted to return. He did not do so (according to his untested declaration, at least) because of the quarantine restrictions he would have encountered upon returning to China. *Id.* ¶ 12.[8] Moreover, Huang's declaration fails to explain why he was willing and able to provide this declaration, but refused Defendants' document subpoena. Huang's evident partisanship further confirms that any consideration of his untested declaration would be profoundly unfair.[9]

---

[7] *See also, e.g.*, *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. Kg.*, No. CV 00-10343-NG, 2006 WL 8458370, at *1 (D. Mass. Mar. 14, 2006); *Bumpas v. Ryan*, No. 3:07-cv-0766, 2013 WL 2418258, at *2 (M.D. Tenn. June 3, 2013); *Lucas v. Jolin*, No. 1:15-cv-108, 2016 WL 2853576, at *8 (S.D. Ohio May 16, 2016).

[8] In some cases, courts have observed that the declarant was not only absent during the discovery period but also was unlikely to be available for trial. *E.g.*, *Dedvukaj*, 301 F. Supp. 2d at 668. Here, Huang's affidavit asserts that he "intend[s] to testify at the trial of this action, if needed." White Ex. 95 ¶ 13. But that assertion makes no difference, given that Huang attributes his choice not to make himself available to quarantine restrictions in China and his own work responsibilities. *Id.* ¶ 12. There can be no assurances as to when the Chinese government might loosen those restrictions or when Huang's responsibilities might change in a way that would lead Huang to choose to attend trial.

[9] It would be particularly unfair for the Court to consider Huang's untested declaration because Defendants would have had fertile grounds for cross-examination if Huang had not refused to be deposed. Huang's new assertion that Great Health could have supplied 100 million N95 masks for California is contradicted by his own warning to Blue Flame, on April 7, 2020, that orders for 10 to 50 million N95 masks "would be *impossible* to fulfill given the number of people that all want it." Ex. 83 (emphasis added). Blue Flame's Gula also observed that "I have been lied to up and down in China on when we were getting everything and product that was supposed to have shipped and wasn't," and that "Henry has completely lied and let us down." Ex. 116 at 9703-04. In addition, Defendants would have explored Huang's personal relationship with Thomas and whether Huang

In any event, Huang's belated declaration cannot save Blue Flame's bacon because it does not "set out *facts* that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4) (emphasis added). It is well settled that "summary judgment affidavits cannot be conclusory." *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996). Thus, a declarant's "unsupported assertions" will not be considered, *id.*, and "[u]nder Rule 56, affidavits based merely upon personal belief are inadmissible," *Crouse v. Wal-Mart Stores East, Inc.*, No. 1:01CV00079, 2002 WL 1046714, at *4 (W.D. Va. May 23, 2002). Yet that is all Huang offers here. For example, Huang asserts that Great Health "had the ability to obtain 100 million units of the N95 mask models specified by California as they were manufactured." White Ex. 95 ¶ 23.[10] But Huang offers no facts as to how Great Health would have accomplished this massive task. He does not identify any source of supply for the masks he claims he would have found. Nor does he articulate any plan for the massive increase in production that would have been required to fulfill California's order. In short, Huang's declaration offers only unsupported assertions and statements of Huang's own beliefs about Great Health's capabilities.[11] The declaration does not "set out facts that would be admissible in evidence," Fed. R. Civ. P. 56(c)(4), so it should not be considered.

C. Blue Flame Cannot Recover Damages Based On Other Transactions

Blue Flame cannot recover consequential damages for other unconsummated transactions. To begin with, Chain Bridge lacked sufficient notice of those transactions to make any such

---

has any financial interest in the outcome of this litigation.

[10] Even Huang cannot bring himself to endorse Blue Flame's outlandish tale that it would have fulfilled California's order within 30 days. He says instead that Great Health could have supplied 100 million N95 masks to Blue Flame within three months. White Ex. 95 ¶ 32.

[11] Huang's comments about the impact of the Chinese government's export restrictions on California's order are of a piece. Huang hazards his own foreign policy view that those restrictions "would not have impacted [Great Health's] shipment of masks to California due to the relative size and importance of that order." White Ex. 95 ¶ 40. But Huang's "[u]nsupported speculation," *Sutherland*, 541 F. Supp. 2d at 789, about that geopolitical question is not entitled to any weight.

damages recoverable under Section 4A-404(a). Memo. 26-27. Blue Flame cites (Opp. 15) evidence that it had shared information with Chain Bridge about its general business model, expected annual wire activity, and hopes to complete other PPE transactions in the future, but that sort of general information falls well short of what Section 4A-404(a) requires to permit recovery for damages—*viz.*, "notice of *particular* circumstances that will give rise to consequential damages." UCC § 4A-404(a) (emphasis added).[12]

In any event, these other unrelated transactions failed for reasons entirely independent of Defendants' conduct. *See* Memo. 27. Blue Flame asserts (Opp. 15) that its inability to fulfill these orders was a result of Defendants' conduct, on the theory that the failure of the California transaction deprived Blue Flame of capital that it would have used to finance additional orders. But Blue Flame fails to identify a single subsequent transaction that allegedly failed for that reason. In fact, Blue Flame repeatedly failed to fulfill orders for customers that had made upfront payments, which provided Blue Flame with the capital needed to purchase PPE items. *See* Ex. 85 (Stamm Rep.) ¶ 33. That track record confirms that the failure of these transactions was not attributable to any deprivation of capital. It is therefore unsurprising that Blue Flame told congressional investigators that it was unable to fulfill PPE orders because of Great Health's inability to source the required products and other supply-chain disruptions—not because of a lack of financing, or anything else that could be attributed to Defendants. *See* Ex. 73 at 3508-13.

[12] The absence of notice here is underscored by the "rule barring an award of speculative profits," which "generally precludes damages for lost profits caused by harm done to a new business." *LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n*, 830 F.2d 522, 529 (4th Cir. 1987); *see also Mullen v. Brantley*, 195 S.E.2d 696, 700 (Va. 1973) (observing that "a new business or enterprise . . . is a speculative venture, the successful operation of which depends upon future bargains, the status of the market, and too many other contingencies to furnish a safeguard in fixing the measure of damages"). Although Blue Flame may have *hoped* to complete transactions with other customers, any such profits were too speculative for Chain Bridge to be charged with notice.

II. Blue Flame Cannot Establish Liability Under UCC Section 4A-404(a) (Count I)

A. The Cancellation Of California's Wire Transfer Nullified Chain Bridge's Obligation To Pay

Blue Flame cannot establish liability on its claim for violation of UCC Section 4A-404(a) because California's wire transfer was cancelled. *See* Memo. 16-20. [13] Blue Flame contends (Opp. 16-21) that the cancellation was ineffective, but Blue Flame's arguments lack legal support and are contradicted by the undisputed factual record.[14]

1. Our opening memorandum explains (at 16-18) that the cancellation of California's wire transfer was effective because there was "a mistake by a sender in the funds transfer which resulted in the issuance of a payment order . . . that order[ed] payment to a beneficiary not entitled to receive payment from the originator." UCC § 4A-211(c)(2)(ii). California's payment order was issued by "mistake" because it was the product of Blue Flame's misrepresentations and concealment, which likewise meant that Blue Flame was not entitled to receive payment from California.

Blue Flame nonetheless maintains (Opp. 16-18) that cancellation is effective under Section 4A-211(c)(2)(ii) only in cases of mistaken *identity*, where a payment order directs payment to a beneficiary different from the one the originator had intended to pay. But there is no basis for that atextual limitation on Section 4A-211(c)(2)(ii)'s scope. To be sure, "case #3" set forth in the Official Comment to Section 4A-211 addresses a case of mistaken identity. But the cited comment makes clear that it is merely an "example[]" to "illustrate subsection (c)(2)." UCC § 4A-211 cmt. 4. That does not mean that Section 4A-211(c)(2)(ii)'s generic reference to "mistake" is *limited* to mistaken identity.

[13] In addition, Blue Flame never made a demand for payment from Chain Bridge, which provides an independent reason for summary judgment on Count I. *See* Dkt. No. 140, at 23.

[14] Blue Flame's arguments are also beside the point, because a cancellation need not be effective to nullify a bank's obligation to pay its customer. *See* Memo. 16.

Blue Flame invokes (Opp. 18) the Official Comment to Section 4A-404, which states that "reasonable doubt concerning the right of the beneficiary to payment" does not exist when an originator "alleg[es] that the beneficiary is not entitled to payment because of fraud against the originator or a breach of contract relating to the obligation." UCC § 4A-404 cmt. 3. But that comment is inapposite. Its conclusion that an originator's concerns of fraud do not, on their own, give rise to a reasonable doubt regarding the beneficiary's right to payment rests on the premise that "the originator of a funds transfer cannot cancel a payment order to the beneficiary's bank . . . because the originator is not the sender of that order." *Id.* In other words, the comment addresses a situation in which the beneficiary's bank has not received a cancellation request from the sender of the payment order, which would be the proper party to seek cancellation of that payment order. That has no logical bearing on the distinct question of what grounds for effective cancellation are available when the sender *does* make a cancellation request, as JPMorgan did here.

2. The conclusion that Chain Bridge acted properly by honoring JPMorgan's cancellation request is reinforced by the substantial regulatory jeopardy that Chain Bridge would have encountered had it released California's funds to Blue Flame. *See* Memo. 18-20. Blue Flame appears to misunderstand our argument. It suggests (Opp. 19) that Defendants rely on Bank Secrecy Act and Anti-Money Laundering concerns as a new basis for effective cancellation beyond those identified in UCC Section 4A-211(c)(2). But our point is a narrower one: If there is any lingering doubt as to whether effective cancellation was possible here under Section 4A-211(c)(2)—and there should be none, *see* p. 9, *supra*—then that doubt should be resolved to avoid an absurd reading that would require a payment to Blue Flame that could have triggered substantial regulatory jeopardy for Chain Bridge. *See* Memo. 20.

Blue Flame also downplays the red flags that surrounded the California transaction and the attendant potential for regulatory jeopardy. But what Blue Flame dismisses as "generic 'red flags'" (Opp. 20) in fact corresponded to specific guidelines for detecting and preventing fraud in PPE transactions. *See* Memo. 19-20. Blue Flame notes (Opp. 20-21) that Gula ultimately shared certain information with Chain Bridge about the California transaction. But he did so after first concealing the transaction from Chain Bridge when opening Blue Flame's account, only to come clean when it was no longer feasible to hide the size of California's incoming wire transfer. The limited information that Gula grudgingly shared with Chain Bridge indisputably raised concerns of potential illegality (including concerns that Blue Flame was itself being victimized by its foreign counterparties). And Gula, Thomas, and Bearman all exhibited unusual and suspicious behavior in their interactions with Chain Bridge—displaying an extreme level of urgency to receive the wire that was itself a red flag. *See* Ex. 53 (Grice Rep.) ¶¶ 93-97; Ex. 117 (Brough Tr.) at 359-60.[15]

Finally, several of the cases Blue Flame cites (Opp. 20 & n.16) support Defendants' position, not Blue Flame's, because they hold that a bank's strict compliance with Article 4A in processing a wire transfer does *not* preclude a claim against the bank under certain circumstances. In *Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267 (11th Cir. 2003), the court held that a claim "requir[ing] a receiving or beneficiary bank to disgorge funds that it knew or *should have known* were obtained illegally when it accepted a wire transfer" would not be barred by Article 4A. *Id.* at 1275 (emphasis added). To be sure, the court held that this standard was not satisfied on the facts of the case, *id.* at 1278-79, but the possibility of vindication after years of litigation does not require a bank to discount the risk of refusing to honor a cancellation request under suspicious

[15] The red flags of potential fraud that characterized the California transaction, in combination with JPMorgan's request for cancellation, also gave rise to Chain Bridge's "reasonable doubt concerning [Blue Flame's] right to payment" under UCC § 4A-404(a), which provides an independent ground for rejecting Blue Flame's claim under that section. *See* Memo. 20 n.10; Dkt. No. 140, at 20-21.

circumstances—especially where JPMorgan had conveyed its own concerns of fraud.[16]

B. Blue Flame's Breach Of Its Obligation Of Good Faith Forecloses Any Remedy Under The UCC

Blue Flame's claim for violation of UCC Section 4A-404(a) is independently barred by Blue Flame's multiple breaches of its obligation to act in good faith in enforcing remedies under the UCC. *See* Memo. 21-22.

1. The Court should reject Blue Flame's series of meritless legal arguments that are designed to avoid having this Court pass upon its bad faith misconduct. First, Blue Flame misunderstands Chain Bridge's Section 1-304 argument in suggesting (Opp. 22-23) that it somehow seeks to use a breach of Blue Flame's *account agreement* as a defense to Blue Flame's claims arising under federal law—*viz.*, the UCC provisions incorporated into claims under Regulation J. Our point is more straightforward: Blue Flame's Section 4A-404(a) claim seeks to exercise a right created by the UCC. Blue Flame may do so only if it has complied with its "obligation of good faith in . . . enforcement." UCC § 1-304; *see also id.* cmt. 2. And if the Court concludes that Blue Flame has not acted in good faith, then that breach will "make[] unavailable, under the particular circumstances, [the] remedial right or power" that Blue Flame is seeking to exercise. *Id.* cmt. 1. The defense arises directly under the UCC.

Blue Flame also insists (Opp. 23-24, 25 n.23) that its fraud against California and Chain Bridge does not demonstrate any breach of its "obligation of good faith in . . . enforcement" of

[16] In *Go-Best Assets Ltd. v. Citizens Bank of Massachusetts*, 972 N.E.2d 426 (Mass. 2012), the court reasoned that Article 4A required that wired funds be deposited in the customer's account, but held that this obligation would not preclude a duty of care requiring the bank "to take reasonable steps to prevent" misappropriation, "by freezing the account or otherwise ensuring that the . . . funds were safeguarded." *Id.* at 433 & n.6. That duty could be triggered by "actual knowledge of an intended or *apparent misappropriation*." *Id.* (emphasis added); *see also Simple Helix, LLC v. Relus Techs., LLC*, 493 F. Supp. 3d 1087, 1107 (N.D. Ala. 2020) (permitting claims against bank that "knowingly pays a person not entitled to the originator's payment").

rights created by the UCC.[17] But that argument ignores the undeniable linkage between Blue Flame's fraud and the UCC payment right it is now seeking to enforce against Chain Bridge. Indeed, Blue Flame is seeking to enforce a payment right against Chain Bridge that is attributable to its fraudulent transaction with California, even though the underlying fraud would provide a defense to a claim brought against California. Blue Flame is also seeking to take advantage of its fraud in inducing Chain Bridge to open an account, by enforcing a payment right that could not conceivably exist in the absence of that fraud. Section 1-304's requirement of good faith precludes exactly this sort of bad-faith opportunism, where a party asserts that wooden, literal compliance with Article 4A requires a court to give effect to a fraud. As the Eleventh Circuit has emphasized—in specific reliance on the UCC's good faith obligation—"[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.[18]

Finally, Blue Flame contends (Opp. 24-25) that its fraud on California is irrelevant because its UCC claims seek recovery from Chain Bridge, rather than California. But Chain Bridge is not pursuing a "claim" under Section 1-304, so it makes no sense to speak of Chain Bridge's

---

[17] Blue Flame's reliance (Opp. 24) on the Fourth Circuit's non-precedential, per curiam decision in *Synovus Bank v. Tracy*, 603 F. App'x 121 (2015), is misplaced. There, the court concluded that the plaintiff bank had not engaged in fraud. *See id.* at 125-26. Thus, it had no occasion to decide whether a plaintiff can insist on literal compliance with the UCC when the result would be to give effect to the plaintiff's own fraud.

[18] Blue Flame attempts to distinguish *Regions Bank* on the ground that it involved preemption of a state-law claim, rather than a claim for violating the UCC. *See* Opp. 23 n.20. But that was simply a result of the case's procedural posture: The defrauded party brought a claim to recover funds from the bank that had received a wire transfer, and the court held that Article 4A could not serve "as a shield for fraudulent activity." 345 F.3d at 1276. If anything, the principle announced in *Regions Bank* applies with added force here because Blue Flame is asking this Court to put its imprimatur on Blue Flame's own fraud. *Cf. United States v. $3,000 in Cash*, 906 F. Supp. 1061, 1066-67 (E.D. Va. 1995) ("It is well settled that courts will not permit anyone to reap the benefits of a contract or an agreement, the carrying out of which involves his complicity in any fraudulent act[.]") (internal quotation marks omitted).

"standing" in this context. *Id*. Rather, Chain Bridge asserts, as a *defense*, that Blue Flame has breached its "obligation of good faith in . . . enforcement" of UCC rights against Chain Bridge. UCC § 1-304. Blue Flame is seeking to give effect to its fraud against California by enforcing rights against Chain Bridge, and it is perfectly natural for that fraud to provide a defense to Blue Flame's claims. *Cf.* Restatement (Third) of Torts: Liability for Economic Harm § 17 cmt. k (2020); *Hunter v. Holsinger*, No. 5:15-cv-00043, 2016 WL 1169308, at *14 (W.D. Va. Feb. 19, 2016).

2. Blue Flame also denies that it has acted in bad faith. *See* Opp. 24-25. But its insistence (*id.* at 25) that it did not procure California's order through fraud cannot be squared with the undisputed evidence. First of all, Blue Flame cannot explain away Thomas's repeated misrepresentations to Controller Yee. As explained in our opening memorandum (SUF ¶ 4), Thomas told Yee that Blue Flame (i) had 100M N95 masks; (ii) had "almost sold all" of them; (iii) was "delivering another 100m units of n95 mask[s]" to additional customers; and (iv) would have "100m units every week" for sale. Not a word of that was true. *See* Ex. 2 (Thomas Tr.) at 101, 119-20.[19] Those misrepresentations were critical to Yee. Ex. 16 (Chivaro Tr.) at 73-74, 78. And Yee was not hermetically sealed from California's decision to purchase from Blue Flame, as Blue Flame now suggests. Yee interceded with the Governor's office to promote Blue Flame, referred Blue Flame to the Department of General Services (DGS), and expedited and facilitated

[19] Blue Flame never had "'proof of life' documentation" (Opp. 2) for 100 million 3M N95 masks at the Port of Long Beach. Blue Flame points to a grainy video (White Ex. 88) that Thomas apparently circulated within Blue Flame on March 25. *See* Ex. 118 at 819. It is impossible to tell where the video was taken, when it was taken, or who took it. And it arrived days *after* Thomas told Yee that the Long Beach masks were no longer available. *See* Ex. 12 at 119. Moreover, the same video appears to have circulated widely as fictitious "proof of life" during the COVID-19 crisis. *See* J. David McSwane, *How Profit and Incompetence Delayed N95 Masks While People Died at the VA*, ProPublica (May 1, 2020), https://perma.cc/95RT-YSYM (recounting the story of a would-be PPE purchaser who received the same video as "proof of life" for 6 million N95 masks at the Port of Los Angeles, which also turned out to be non-existent).

the State's warrants authorizing the wire to Blue Flame. Ex. 119 (Chivaro Tr.) at 90-95; *see also* Ex. 120 (Wong Tr.) at 85-87 (describing coordination between DGS and Controller's Office regarding payment to Blue Flame). Approval from the Governor's office—not just DGS—was ultimately required for the wire transfer to proceed. *See* Ex. 121 (Kim Tr.) at 63-65.[20]

Thomas also made false representations directly to the DGS personnel who were negotiating with Blue Flame regarding California's order. He falsely claimed that Blue Flame had connections with "manufacturers" in China, and DGS relied on that misstatement. *See* Memo. SUF ¶ 5; Ex. 121 (Kim Tr.) at 92; Ex. 122 at 6516. He sent DGS a fictitious delivery schedule that contemplated delivery of 100 million N95 masks within 30 days. Memo. SUF ¶¶ 7-8. And he told DGS that Blue Flame "cages the money" for PPE transactions, Ex. 120 (Wong Tr.) at 58, conveying the false impression that Blue Flame had held money to pay manufacturers on behalf of other customers. In fact there were no other customers, and Blue Flame did not yet even have a bank account in which to "cage" money.

Finally, Blue Flame wrongly contends (Opp. 4) that it had no obligation to volunteer basic information regarding its own background and experience to California—including the fact that the company was formed only days earlier, had no relevant expertise, and had never delivered a single N95 mask to anyone. It was surely a "basic assumption" of the transaction that Blue Flame was a bona fide vendor of PPE, and because Thomas knew that California was mistaken on this point, he had a duty to correct that mistake. *See* Restatement (Third) of Torts: Liability for Economic Harm § 13(c) (2020). Indeed, Blue Flame effectively concedes the point, by arguing that Chain Bridge's informing California officials of these very facts "was reasonably calculated

[20] Yee's text messages with Thomas confirm her central role. *See* Ex. 12 at 119-21 (Yee has "been bugging chief of staff and others"); *id.* at 124 ("I will get my folks working on how to facilitate prepayment"); *id.* at 130 ("I will see to it that the wire happens first thing this morning").

to cause California to re-think its transaction with Blue Flame." Dkt. No. 128, at 28. It cannot be that the *omission* was immaterial, but the *disclosure* was significant. Moreover, Thomas was under an obligation to disclose these facts to correct the misleading impression created by his own statements that depicted Blue Flame as an experienced PPE vendor. *See* Restatement (Third) of Torts: Liability for Economic Harm § 13(c) (2020); *Paradise Wire & Cable Defined Benefit Pension Plan v. Weil*, 918 F.3d 312, 318 (4th Cir. 2019).

Blue Flame also contends (Opp. 24) that it did not fraudulently induce Chain Bridge to open its account. But it is not true that Gula was unaware of the expected size of California's imminently arriving wire transfer when he came to Chain Bridge to open Blue Flame's account. Ex. 32; Ex. 27 at 805, 813. He simply chose to conceal that information from Chain Bridge—despite having been warned by Blue Flame's own attorney *before visiting Chain Bridge to open the account* that he should alert Chain Bridge to the incoming wire. Ex. 32. Moreover, Blue Flame does not contest that Gula falsely told Chain Bridge that Blue Flame would be a "consulting" business rather than a high-risk "import/export" business. That caused Chain Bridge to open an account that it otherwise would not have opened without additional investigation. Ex. 33.[21]

III. Blue Flame's Claim Under UCC Section 4A-204 Fails As A Matter Of Law (Count II)

Blue Flame's claim under UCC Section 4A-204 fails because Chain Bridge did not "accept[] a payment order issued in the name of [Blue Flame] as sender" that was either unauthorized and not effective or unenforceable. Memo. 27-28 (citing UCC § 4A-204(a)). Blue Flame's one-paragraph defense of Count II does not contest any of the operative facts. *See* Opp.

[21] Blue Flame's suggestion (Opp. 5) that Gula disclosed $1.5 billion in annual wire activity is baseless. Blue Flame is aggregating, and annualizing, the figures that Gula supplied for both incoming *and* outgoing wires. Gula plainly offered no hint that a $456 million wire would be arriving that same day.

26. It is undisputed that JPMorgan's cancellation request was not a payment order, and both parties agree that, in response to that cancellation request, Chain Bridge sent a payment order to JPMorgan returning California's funds.[22] Instead, Blue Flame responds with the baffling assertion that "Chain Bridge reversed the Wire Transfer by sending—and thereby accepting—a payment order identifying Blue Flame as the 'originator' to [JPMorgan]." *Id.* But the payment order that Chain Bridge sent to JPMorgan listed *Chain Bridge* as the "sender," not Blue Flame, Ex. 68, so it was not "a payment order *issued in the name of [Chain Bridge's] customer as sender*," UCC § 4A-204(a) (emphasis added). And Chain Bridge could not "accept" *its own* payment order by sending it to JPMorgan. Rather, a bank's issuance of a conforming payment order to the next bank in a funds transfer constitutes execution, and thus acceptance, of the prior "payment order *received by the bank*." UCC § 4A-301(a) (emphasis added); *see also* UCC § 4A-209(a); Dkt. No. 140 (Defs. SJ Opp.) 25. Here, as just explained, there was no such prior payment order: Chain Bridge did not receive any payment order in connection with the cancellation of California's wire transfer that it could have accepted, which means it could not have violated Section 4A-204(a).[23]

IV. Defendants Are Entitled To Summary Judgment On Blue Flame's State-Law Claims

A. Blue Flame's Defamation Claim Fails As A Matter Of Law (Count IX)

As our opening memorandum explains (at 28-29), Blue Flame's defamation claim fails as a matter of law because Defendants did not make any false statement of fact to California officials and because Defendants' statements were privileged.

1. Blue Flame does not dispute that Defendants made no false statements of fact. Instead,

[22] Blue Flame asserts (Opp. 11) that JPMorgan sent its cancellation message at 1:45 PM, rather than 2:05 PM. Nothing turns on the point, but we note that Blue Flame has stipulated (correctly) that JPMorgan sent its message at 2:05 PM on March 26, 2020. *See* Dkt. No. 96, at ¶ 29.

[23] Blue Flame's claim under Section 4A-204(a) is independently foreclosed by Blue Flame's breach of its obligation of good faith. *See* pp. 12-16, *supra*.

Blue Flame decries what it calls "Defendants' narrow focus on the truth of their individual statements" and insists that defamation may be premised on supposed "insinuations" that Blue Flame was engaged in fraud. Opp. 29. But that gets the law of defamation backwards. The touchstone of a defamation claim is "a false factual statement." *Hyland v. Raytheon Tech. Servs. Co.*, 670 S.E.2d 746, 750 (Va. 2009). Blue Flame's observation (Opp. 29) that "[i]sinuations may constitute defamatory statements" does not undermine that principle, because it addresses situations in which an expression of opinion can be understood to have a "provably false factual connotation." *Cashion v. Smith*, 749 S.E.2d 526, 531-32 (Va. 2013).[24] It does not cover the converse situation, in which the plaintiff contends that the recipient of a statement would draw the wrong conclusion from indisputably true facts.[25]

2. Blue Flame maintains (Opp. 29-30) that Defendants' statements could not be privileged because California had no interest in verifying the legitimacy of the wire transfer after it was sent. Nonsense. California had just sent a wire transfer for nearly a half-billion dollars to a three-day-old company that had never delivered a single product to anyone. California plainly had an interest in making sure that taxpayer funds were not put at risk, and that interest did not vanish the moment California initiated the wire transfer.

Blue Flame also errs in contending (Opp. 30) that it can overcome the privilege because Defendants acted with malice. To the contrary, the statements Defendants made to California

[24] *See also Carwile v. Richmond Newspapers, Inc.*, 82 S.E.2d 588, 592 (Va. 1954) (defendant's "suggest[ion] . . . that the plaintiff could and should be subjected to disbarment proceedings" conveyed message that plaintiff was "guilty of unethical and unprofessional conduct").

[25] Our opening memorandum also explains (at 29 n.18) that Defendants' statements lacked defamatory "sting." In response, Blue Flame cites *Steele v. Goodman*, 382 F. Supp. 3d 403 (E.D. Va. 2019), but Blue Flame misdescribes that case. The defendant's statements there did not merely "imply[]" that the defendant was engaged in fraud, as Blue Flame misleadingly asserts. Opp. 29 n.30. Rather, the defendant stated that the plaintiff was "a serious con man" who was engaged in "a serious fraud." *Steele*, 382 F. Supp. 3d at 421.

officials were factually true, so they could not have been made with "knowledge that they were false," as required to prove malice. *Cashion*, 749 S.E.2d at 533. Nor did Defendants act in bad faith on the theory that their concerns about the legitimacy of the California transaction were a pretext for concerns about Chain Bridge's balance sheet. *See* Defs. SJ Opp. 7-9, 11.

B. Blue Flame's Tortious Interference Claims Fail As A Matter Of Law (Counts IV and V)

Blue Flame's claims for tortious interference with contract (Count IV) and business expectancy (Count V) fail because Defendants did not employ any improper methods, act with any wrongful intent to interfere, or induce any breach of contract by California. *See* Memo. 29-30. Blue Flame's opposition does nothing to rehabilitate these claims.

1. Blue Flame contends (Opp. 27) that Defendants' statements to California officials were defamatory and thus supply the "improper methods" necessary for a tortious interference claim. But Defendants' statements were true and otherwise privileged against a defamation claim, *see* pp. 17-19, *supra*, so they cannot support a claim for tortious interference, *see Shirvinski v. United States Coast Guard*, 673 F.3d 308, 322 (4th Cir. 2012).

Blue Flame glancingly suggests (Opp. 27-28 & n.29) that Defendants employed improper methods by violating "accepted banking practices." As we have previously explained, however, no reasonable factfinder could conclude that Defendants' decision to contact California officials while investigating the wire transfer was a departure from the sort of clearly established industry norms that would be required to support tortious interference liability. *See* Defs. SJ Opp. 29.

Blue Flame is also wrong to argue (Opp. 28) that Chain Bridge's alleged violations of Article 4A amount to "improper methods." Chain Bridge did not violate Article 4A. *See* pp. 9-17, *supra*. Moreover, this version of Blue Flame's tortious interference theory is preempted by Subpart B of Regulation J, which "preempts any state law cause of action premised on conduct falling within the scope of Subpart B." *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 223 (4th Cir. 2002). In *Eisenberg*, the Fourth Circuit held certain clams not preempted "insofar as they challenge[d] the opening and management of" a customer's account, because they were "premised on conduct *not covered by Subpart B*." *Id.* at 224 (emphasis added). Here, by contrast, Blue Flame's theory is preempted because it is *expressly premised* on a violation of Regulation J.

2. Blue Flame fails to respond to our argument (Memo. 30) that Defendants did not act with any wrongful intent to interfere with Blue Flame's contract rights. Elsewhere, Blue Flame has argued that Defendants acted with wrongful intent because their statements to California were "substantially certain" to lead California to revisit its decision to purchase from Blue Flame. Dkt. No. 128, at 28-29 (quoting *Commerce Funding Corp. v. Worldwide Sec. Servs. Corp.*, 249 F.3d 204, 212 (4th Cir. 2001)). But that argument rests on the audacious premise that Defendants were required to *assume* that Blue Flame was perpetrating a fraud on California that Defendants' truthful statements would reveal. That is entirely unpersuasive. *See* Defs. SJ Opp. 26-27.

3. Blue Flame appears to agree with our submission (Memo. 30) that Defendants did not induce any breach of contract by California, as Blue Flame's Complaint alleged. Compl. ¶¶ 129, 138. Instead, Blue Flame now asserts (Opp. 27) that Defendants are liable not for inducing a breach, but rather for inducing "termination" of Blue Flame's contractual relationship with California. But there can be no liability for inducing termination of a contract that was procured by fraud and thus was not valid in substance. *See* Restatement (Third) of Torts: Liability for Economic Harm § 17 cmt. k; *Hunter*, 2016 WL 1169308, at *14; Defs. SJ Opp. 25-26.[26]

[26] The same principle forecloses Blue Flame's business expectancy claim. In its pleadings, Blue Flame has referred to its "contract to deliver 100 million masks to the state of California" as *both* a "valid contract and business expectancy." Dkt. No. 128, at 27. In any event, whatever hope of future business with California that Blue Flame may have had was also procured by Blue Flame's misrepresentations and concealment, and thus is not entitled to protection.

Date: May 27, 2021

Respectfully submitted,

/s/ Donald Burke
Gary A. Orseck (admitted *pro hac vice*)
Matthew M. Madden (admitted *pro hac vice*)
Donald Burke (VA Bar No. 76550)
ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
2000 K Street, N.W., 4th Floor
Washington, D.C. 20006
Tel: (202) 775-4500
Fax: (202) 775-4510
dburke@robbinsrussell.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2021, 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:

Peter H. White, Esq. (VA Bar No. 32310)
SCHULTE ROTH & ZABEL LLP
901 Fifteenth Street, NW, Suite 800
Washington, DC 20005
Phone: (202) 729-7476
Fax: (202) 730-4520
Email: peter.white@srz.com
Counsel for Plaintiff

Meredith K. Loretta, Esq. (VA Bar No. 92369)
WILMER CUTLER PICKERING HALE & DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
Phone: (212) 663-6981
Email: meredith.loretta@wilmerhale.com
Counsel for Third-Party Defendant

/s/ Donald Burke
Donald Burke (VA Bar No. 76550)
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
2000 K Street, N.W., 4th Floor
Washington, D.C. 20006
Tel: (202) 775-4500
Fax: (202) 775-4510
dburke@robbinsrussell.com