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 (LMB/IDD)**
CHAIN BRIDGE BANK, N.A., Third-Party Plaintiff, v. JPMORGAN CHASE BANK, N.A., Third-Party Defendant.	

JPMORGAN CHASE BANK, N.A.'S OPPOSITION TO CHAIN BRIDGE BANK, N.A.'S MOTION TO ESTABLISH THE AMOUNT OF INDEMNIFIED FEES AND EXPENSES TO BE AWARDED FROM JPMORGAN CHASE BANK, N.A

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INTRODUCTION

Seeking nearly $6 million in attorneys' fees and expenses, Chain Bridge insists that it is entitled to all fees and expenses it incurred in litigating all the claims in this multi-party case—regardless of whether they are first-party, third-party, state-law, or U.C.C. claims, and regardless of whether they are against Chain Bridge itself or the individual defendant executive officers. In so doing, putting aside the question of the reasonableness of the amount sought, it improperly seeks hundreds of thousands of dollars in fees spent pursuing its claim to indemnification, and over one hundred thousand dollars more in fees to interpret its own insurance policies. All of this, Chain Bridge claims, is reimbursable because it somehow results from the cancellation of the wire. That argument fails because it ignores the limits of the U.C.C. and rests on a theory of causation with no apparent bounds, let alone one confined by applicable standards of but-for and proximate cause.

Under the Court's summary-judgment ruling, some fees and expenses are reimbursable to Chain Bridge—that is, those reasonably spent by Chain Bridge defending against Blue Flame's U.C.C. claims, which were premised on the cancellation of the wire. But other categories of Chain Bridge's demand are not, including fees and expenses spent defending Blue Flame's state-law claims, which are grounded in Chain Bridge's independent conduct; "fees on fees" in pursuit of indemnification and insurance; and fees and expenses that Chain Bridge would have spent even if the only claims asserted by Chain Bridge were non-indemnifiable. Moreover, many of the fee entries provided by Chain Bridge—for example, those for time billed to "[r]eview and respond to correspondence" (without elaboration)—are impossible to categorize because of Chain Bridge's insufficiently detailed records. The Court's ruling requires JPMC to pay reasonable fees and expenses arising from U.C.C. claims that were incurred "as a result of" the wire cancellation only. All other categories lack the statutory and causal nexus required by Article 4A's indemnification provision.

As Chain Bridge well knew since the beginning of this case, as the fee applicant it bears the burden to establish the reasonableness and recoverability of the fees and expenses it claims. It has failed to meet that burden, both because it demands categories of fees that are non-reimbursable and because it has provided inadequate documentation for the fees it demands. JPMC should not pay more than the Court's ruling requires—especially given JPMC's "commendable" conduct, *Blue Flame Med. LLC v. Chain Bridge Bank, N.A.*, 2021 WL 4341111, at *14 (E.D. Va. Sept. 23, 2021). The Court should therefore deny Chain Bridge's motion. JPMC does not oppose Chain Bridge being granted the opportunity to submit a revised fee request, accompanied by sufficiently detailed documentation, reflecting only fees for expenses incurred defending the U.C.C.-based claims asserted by Blue Flame.[1]

BACKGROUND

On June 12, 2020, Blue Flame filed a 10-count complaint against Chain Bridge and two of its executive officers (collectively, Defendants). Compl., Dkt. 1.

Counts I and II were grounded on the claim that Defendants violated "Federal Reserve Board regulations that strictly control whether, when, and under what circumstances a bank may agree to return or cancel a wire transfer it receives for a beneficiary account holder." Compl. ¶ 4; *see id.* ¶¶ 86-112. Specifically, those first two counts alleged violations of Article 4A of the U.C.C. as incorporated into the Federal Reserve Board's Regulation J, § 4A-404(a) (Count I) and

[1] JPMC respectfully disagrees with, and has appealed, the Court's ruling that JPMC is liable to Chain Bridge for indemnification at all. *See* Dkt. 181. For purposes of Chain Bridge's motion, JPMC does not contest the ruling here, but JPMC's arguments should not be construed in any way to waive or concede any aspect of its arguments on appeal.

§ 4A-204 (Count II). *See id*. ¶¶ 86-112. In substance, the counts asserted that Chain Bridge was not allowed to "cancel or amend the payment order after it had been accepted." *Id.* ¶ 93; *see id.* ¶ 110 (Chain Bridge "issued a new payment order on behalf of Blue Flame").[2]

Counts IV and V made an additional set of allegations. They alleged tortious interference with contract and business expectancy (respectively) by asserting that "Defendants knew of [Blue Flame's] contractual relationship" and "Blue Flame's business expectancy" "at the time Defendants unilaterally contacted California officials and accused Blue Flame of fraud, without basis." Compl. ¶¶ 128, 137. Count IX was also based on allegations that Defendants "contacted [California], and claimed that the transaction was fraudulent and made other false statements casting aspersions on the business and character of Blue Flame." *Id.* ¶ 166.

On October 13, 2020, Chain Bridge filed a third-party complaint against JPMC. Third-Party Compl., Dkt. 43. It asserted that, "under UCC § 4A-211(f) JPMorgan is liable to Chain Bridge Bank, N.A. for 'any loss and expenses, including reasonable attorney's fees, incurred … as a result of the cancellation' of JPMorgan's payment order." *Id.* ¶ 20.

Discovery ensued, which culminated in all parties moving for summary judgment. On September 23, 2021, the Court granted summary judgment for Chain Bridge on Blue Flame's U.C.C. claims. *Blue Flame Med. LLC v. Chain Bridge Bank, N.A.*, 2021 WL 4341111, at *1 (E.D. Va. Sept. 23, 2021). The Court also granted summary judgment for Chain Bridge on Blue Flame's state-law claims. *Id.* at *12-13. Finally, the Court granted summary judgment on Chain Bridge's indemnification claim against JPMC. *Id.* at *13-14. The Court made clear that its conclusion on indemnification was "not meant to punish or criticize JPMorgan" and noted that

[2] Five counts in the complaint (III, VI, VII, and VIII, and X) were dismissed as preempted by the U.C.C. Dkts. 31, 32.

"JPMorgan's quick and thorough investigation of potential fraud is commendable." *Id.* at *14. Recognizing that JPMC "went above and beyond for its customer, California," the Court suggested that JPMC could "work out with California, in the separate proceeding in California, how to allocate its losses." *Id.*

In March 2021, JPMC had submitted a notice of claim with California's Government Claims Program; on September 14, 2021, California rejected it.

LEGAL STANDARD

"[S]tatutory indemnification provisions should be strictly construed." *Galante v. Queens Borough Pub. Libr.*, 2016 WL 4573978, at *6 (E.D.N.Y. Sept. 1, 2016) (describing New York law). Similarly, authority for awarding attorneys' fees should be "interpreted narrowly." *C.F. Tr., Inc. v. First Flight Ltd. P'ship*, 359 F. Supp. 2d 497, 503 (E.D. Va. 2005). A party cannot recover attorneys' fees for a claim unless that claim is "vested with" an "independent statutory or contractual right to recovery"—even if the claim is "closely intertwined with the claims for which fees were awarded." *Hair Club for Men, LLC v. Ehson*, 2017 WL 1250998, at *4-5 (E.D. Va. Apr. 3, 2017). In other words, where "claims are not dependent on provisions of contract or statute that permits recovery of fees, the Court may not award fees for those claims." *Id.* at *5.

"[T]he fee applicant bears the burden of establishing entitlement to an award," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), and "proper documentation is key," *Auto. Fin. Corp. v. EEE Auto Sales, Inc.*, 2011 WL 3422648, at *2 (E.D. Va. Aug. 3, 2011) (Brinkema, J.). Specifically, the fee applicant "should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Hensley*, 461 U.S. at 437; *Fair Hous. Council of Greater Washington v. Landow*, 999 F.2d 92, 97 (4th Cir. 1993) ("applicant must make every effort to submit time records which specifically allocate the time spent on each claim"); *Colli v. S. Methodist Univ.*, 2012 WL 13027419, at *3 (N.D. Tex. Oct. 22, 2012) ("[W]hen a lawsuit involves multiple claims, the party seeking attorney fees must segregate recoverable fees from those incurred on claims for which fees are not recoverable."). A fee applicant "may recover 'only the portion of his fees that he would not have paid but for' the [fee-entitling claims]." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1187 (2017). "Accordingly, if a billing entry includes a description of both recoverable and nonrecoverable work but does not identify the amount of time spent on each type of work, the entire entry will be deducted from plaintiff's recoverable hours." *Salim v. Dahlberg*, 2016 WL 2930943, at *10 (E.D. Va. May 18, 2016) (Brinkema, J.).

ARGUMENT

I. CHAIN BRIDGE IS ENTITLED ONLY TO REASONABLE FEES AND EXPENSES INCURRED AS A RESULT OF BLUE FLAME'S U.C.C. CLAIMS—NOT BLUE FLAME'S STATE-LAW CLAIMS

Chain Bridge demands indemnification for fees and expenses spent defending the three state-law claims that survived dismissal: tortious interference with contract; tortious interference with business expectancy; and defamation. Chain Bridge is not entitled to that.

A. Article 4A, As The Exclusive Means For Determining Legal Obligations, Does Not Permit Chain Bridge To Recover Attorneys' Fees For Its Separate State-Law Claims

1. Article 4A is an exclusive remedy

"The rules adopted from Article 4A serve as the exclusive means for determining the rights, duties and liabilities of all parties involved in a Fedwire funds transfer." *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 223 (4th Cir. 2002). Thus, state-law causes of action "premised on conduct falling within the scope of [Article 4A], whether the state law conflicts with or is duplicative of [Article 4A]," are preempted. *Id.*; *see also Choice Escrow & Land Title, LLC v. BancorpSouth Bank*, 754 F.3d 611, 625 (8th Cir. 2014) ("Article 4A preempts common law causes of action 'in two specific areas: (1) where the common law claims would create rights, duties, or liability inconsistent with Article 4A; and (2) where the circumstances giving rise to the common law claims are specifically covered by Article 4A.'"). In this case, the Court held that the three state-law claims at issue here were *not* preempted by Article 4A. *See* Dkts. 31, 32. Necessarily, then, these state-law causes of action were *not* "premised on conduct falling within the scope of [Article 4A]," *Eisenberg*, 301 F.3d at 223, or given rise by "circumstances … specifically covered by Article 4A," *Choice Escrow*, 754 F.3d at 625.

Extending Section 4A-211(f)'s indemnification provision to cover fees and expenses incurred in defending against these state-law claims would violate those settled principles of law. It would create "rights" held by a U.C.C. indemnitee, "duties" incumbent upon a U.C.C. indemnitor, and "liabilities" running between them for common-law conduct falling outside the scope of the U.C.C.—defying the Fourth Circuit's command that "Article 4A serve[s] as the *exclusive means* for determining the rights, duties and liabilities of all parties" involved in a wire transfer. *Eisenberg*, 301 F.3d at 223 (emphasis added).

The reasoning of *Choice Escrow* is instructive. There, the Eighth Circuit held that a bank could sue its customer to enforce a contractual indemnification provision for attorneys' fees because Article 4A "contains no provision allocating attorney's fees between the bank and its customer in the event of litigation." *Choice Escrow*, 754 F.3d at 626. Where conduct falls outside the scope of Article 4A, parties are free to negotiate their own indemnification clauses that allocate the risk of loss for it. The Eighth Circuit explained that, "[a]lthough awarding attorney's fees to a bank under an indemnification agreement might reduce a [beneficiary]'s overall recovery against that bank, it would do so for reasons extrinsic to Article 4A's attempts to balance the risk of loss due to a fraudulent payment order." *Id*. *Choice Escrow* thus enforces the general proposition that indemnification for conduct outside of Article 4A's ambit must—if it is to be obtained—be arranged by some mechanism outside of the U.C.C. (*e.g.*, private agreement). The Court found no such private agreement here.

2. Courts narrowly construe indemnification provisions

Even aside from Article 4A's exclusivity, indemnification provisions are narrowly construed. For example, in *Industrial Enterprises, Inc. v. Penn America Insurance Co.*, the Fourth Circuit rejected the claim that a standard comprehensive general liability insurance (CGL) policy indemnified the insured for liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 637 F.3d 481, 489 (4th Cir. 2011). As the Fourth Circuit explained, "The standard CGL policy language … was formulated to address an insured's tort liability for property damage caused to third parties. The scope of that risk was well understood, and there is no evidence to indicate that the broad, indeterminate risks of CERCLA liability somehow became automatically includable in the term 'property damage[.]'" *Id.* Here, Section 4A-211(f) imposes liability on sending banks for the "reasonable attorney's fees" "incurred by" a receiving bank "as a result of [a] cancellation." The "scope of that risk" does not include "the broad, indeterminate risks," *Industrial Enters.*, 637 F.3d at 489, that arise from a receiving bank (Chain Bridge) unilaterally questioning a transaction with the sending bank's client (California). The latter "broad, indeterminate risks" resulted in Blue Flame's state-law claims for tortious interference and defamation. *Id.* Accordingly, those state-law claims are not covered by the U.C.C.'s indemnification provision.

In *Perdue Farms, Inc. v. Travelers Casualty & Surety Co. of America*, an insurance agreement covered expenses for ERISA claims but not wage-and-hour claims. 448 F.3d 252, 261-262 (4th Cir. 2006). Former employees sued the insured, asserting both types of claims. The district court concluded that "Travelers had a duty to indemnify all claims 'reasonably related' to those covered by its policy," but the Fourth Circuit held that to be erroneous. *Id.* at

260. As the Fourth Circuit explained, "even a suit with multiple claims will typically involve both a similar set of operative facts and overlapping legal theories," so "applying the reasonably related rule to indemnification would often leave insurers footing the bill for an entire judgment or settlement, even for those claims the policy did not reach." *Id.* at 261. Emphasizing that "Travelers is not liable for non-covered claims," the Fourth Circuit directed the district court, on remand, to determine an "apportionment of … amounts among covered and non-covered claims." *Id.* at 263. The same type of apportionment is imperative here.

The principal case Chain Bridge cites in support of its demand for reimbursement of state-law claim expenses is distinguishable. *See* Chain Bridge Fees Mem. ("Mem.") 10 (citing *Pike Creek Chiropractic Ctr., P.A. v. Robinson*, 637 A.2d 418 (Del. 1994)), Dkt. 195. *Pike Creek* concerned a demand for indemnification under a contract provision. At the threshold, the policies animating private indemnification agreements are not freely transferable to statutory indemnification regimes. *See Perconti v. Thornton Oil Corp.*, 2002 WL 982419, at *9 (Del. Ch. May 3, 2002) ("The policies behind the general contract law of Delaware, as enunciated in *Pike Creek*, are different from the particular considerations motivating the indemnification of officers and directors, whether directly pursuant to statute or through bylaws as authorized by statute."). Indeed, as several courts have held, "the [*Pike* Creek] decision was premised upon what the parties explicitly agreed in the contract[.]" *Leaf River Cellulose, LLC v. Mid-Continent Cas. Co.*, 2012 WL 1033477, at *8 (S.D. Miss. Mar. 27, 2012); *E.I. DuPont de Nemours & Co. v. Custom Blending Int'l, Inc.*, 1998 WL 842289, at *6 (Del. Ch. Nov. 24, 1998) ("The specific [provision] and its relevance here … distinguishes this situation from *Pike Creek*.").

Moreover, the *Pike Creek* contract provision was substantially broader than U.C.C. § 4A-211(f). It required the employee to indemnify the employer "against any liabilities and expenses, including attorney's fees which result from *any acts and admissions [sic] of the [e]mployee.*" 637 A.2d at 419-20 (emphasis added). Here, indemnification is limited to any loss and expenses "incurred by the bank as a result of *the cancellation.*" U.C.C. § 4A-211(f) (emphasis added). Those distinct clauses are by no means "practically indistinguishable," as Chain Bridge claims (Mem. 12). And distinct language demands tailored analysis as to each one's scope. Finally, as explained below (pp.16-17), *Pike Creek* occupies a minority position in its broad reading of what the indemnification provision permitted. *See Warren Drilling Co. v. Equitable Prod. Co*., 621 F. App'x 800, 806-807 (6th Cir. 2015) (listing *Pike Creek* to state the law of only "two jurisdictions" that "go the other way" from "most jurisdictions" in awarding "fees on fees"). Put simply, *Pike Creek* is inapplicable.

B. Fees Incurred As A Result Of State-Law Claims Were Not Incurred "As A Result Of The Cancellation"

There is a second, independent bar for reimbursement of Chain Bridge's state-law claims: Section 4A-211(f) imposes a causation standard that Chain Bridge cannot satisfy because the fees and expenses associated with Blue Flame's state-law claims were not incurred "as a result of the cancellation." The phrase "as a result" imposes both factual and proximate-cause standards. *See, e.g.*, *National Org. for Marriage, Inc. v. United States*, 24 F. Supp. 3d 518, 529 (E.D. Va. 2014) (citing *Paroline v. United States*, 572 U.S. 434, 445 (2014) for the "common maxim that a plaintiff must prove both proximate cause and actual cause to recover damages that are 'a result of' a particular defendant's conduct"); *Estate of Kalahasthi v. United States*, 630 F. Supp. 2d 1120, 1128 (C.D. Cal. 2008) ("use of 'arising out of' and 'relating to' was broader and more expansive than … 'as a result of'"). "The traditional way to prove that one event was a factual cause of another is to show that the latter would not have occurred 'but for' the former." *Paroline*, 572 U.S. at 449-50. Proximate cause "defies easy summary," but it "is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Id.* at 444-445.

Chain Bridge cannot show that the wire's cancellation was the factual, let alone proximate, cause of the fees it incurred defending the state-law claims. Blue Flame's state-law claims are grounded in alleged comments that Chain Bridge made to California officials that purportedly tarnished Blue Flame's reputation and scuttled its business relationship with the State. Chain Bridge made the allegedly offending statements *before* the cancellation, and thus necessarily did not do so "as a result of" it. *See*, *e.g.*, Ex. 21 to Loretta Decl. in Supp. of JPMC's Mot. for Summ. Judgment ("JPMC MSJ"), Dkt. 113-22, Gonzales Dep. 49:21-50:15 (California official testifying that Mr. Evinger conveyed, before the wire's return, that Blue Flame account was opened by a "political lobbyist" one day before transaction); *see also* Ex. 29 to Loretta Decl. in Supp. of JPMC MSJ, Dkt. 113-30, CBB00004453 at 4466 (internal Chain Bridge notes from same call, recording that "David [Evinger] and John [Brough] explained to [California officials] that the recipient's account was just opened yesterday by a client of the bank who is a political lobbyist," which "seemed to surprise them"). These alleged communications were animated by Chain Bridge's concerns about the wire, which preceded, and so would have existed even absent, cancellation. Moreover, such communication between receiving banks (Chain Bridge) and a non-customer accountholder (California) is not to be expected. *See* Ex. 21 to Loretta Decl. in Supp. of JPMC MSJ, Dkt. 113-22, Gonzales Dep. 97:22-98:22 (California employee testifying that "it's not typical for us to speak to the counterparty's bank"); *see also* Ex. 22 to Loretta Decl. in Supp. of JPMC MSJ, Dkt. 113-23, Baxter Rep. ¶¶ 42 ("remarkable step of contacting the State of California"), 74 ("unusual even in exceptional circumstances").

Blue Flame's defamation claim most easily illustrates why Chain Bridge cannot satisfy its causal burden. That claim was based on allegations that Defendants "contacted [California] and claimed that the transaction was fraudulent and made other false statements casting aspersions on the business and character of Blue Flame." Compl. ¶ 166. Cancellation is neither necessary nor sufficient to support defamation. Indeed, the defamation claim is predicated on alleged conduct divorced from JPMC's involvement in the transaction. Furthermore, Chain Bridge made its allegedly defamatory statements to California before the cancellation happened; therefore, the statements could not possibly have occurred "as a result of" the cancellation. *Cf. Gill v. Warden*, 2011 WL 2358531, at *3 (E.D. Va. June 9, 2011) ("Gill did not commit the offense for which the present 151-month sentence was imposed until [2001]. Therefore, he could not have been [in detention from 1985-1987] '*as a result of* the offense for which the [present 151-month] sentence was imposed[.]'") (emphasis added); *Mack v. Wilcox Cnty. Comm'n*, 2009 WL 4884310, at *5 (S.D. Ala. Dec. 9, 2009) ("Plaintiff's claim that he was terminated because he filed an EEOC [charge] fails … because … Plaintiff's termination preceded his EEOC charge; thus, the charge could not have triggered Plaintiff's termination and as a result, was not causally related to the discharge."). As a matter of plain language and common sense, Chain Bridge's expenses in defending against the defamation claim were not incurred "as a result of the cancellation."

Nor were fees for the tortious-interference claims incurred "as a result of the cancellation." Those claims asserted that "Defendants knew of [Blue Flame's] contractual relationship" and "Blue Flame's business expectancy" "at the time Defendants unilaterally contacted California officials and accused Blue Flame of fraud, without basis." Compl. ¶¶ 128, 137. Indeed, in Chain Bridge's motion for summary judgment against Blue Flame, Chain Bridge urged that there was no basis for the claims "that Defendants defamed Blue Flame or tortiously interfered with its contracts and business by informing California officials that Blue Flame's account had been opened the day before by a political lobbyist." Chain Bridge Mem. in Supp. of Mot. for Summ. Judgment Against Blue Flame 3, Dkt. 119. Chain Bridge continued, "Sharing that indisputably true information with the responsible California officials was rightful, not tortious." *Id.*; *see id.* at 29 ("Blue Flame's claims for tortious interference with contract (Count IV) and business expectancy (Count V) are [like the defamation claim] premised on allegations that Defendants 'unilaterally contacted California officials and accused Blue Flame of fraud, without basis.'") (quoting Compl. ¶¶ 128, 137). One can only assume, then, that the attorneys' fees Chain Bridge incurred defending these claims were spent on work that concerned Chain Bridge's independent conduct.

Driving home the point that the state-law claims arise from conduct distinct from the U.C.C. claims is the fact that the two categories of claims were brought against different defendants. Blue Flame brought the U.C.C. claims against Chain Bridge only (*see* Compl. 20, 23), and the state-law claims against Chain Bridge and its two executive officers, David Evinger (President) and John Brough (CEO) (*see id.* at 27, 28, 32). The state-law claims were based on conduct by two individual officers while the U.C.C. claims arose from the institutional act of a wire cancellation. The U.C.C. provides indemnification only for the latter.

Finally, there is no merit to Chain Bridge's refrain (Mem. 1-2, 3, 8, 9) that the Court already decided the causation question at issue here. Chain Bridge overreads the Court's opinion and fails to acknowledge the distinction between the causation issue at summary judgment and the analysis required now. At summary judgment, JPMC argued that Blue Flame's damages would have accrued whether or not JPMC cancelled the wire because Chain Bridge would not have given "Blue Flame unfettered access to the $456 million within enough time for Blue Flame to complete the deal with California." JPMC MSJ Reply 6, Dkt. 158. The Court rejected that argument as "'speculation.'" *Blue Flame Med. LLC v. Chain Bridge Bank, N.A.*, 2021 WL 4341111, at *14 (E.D. Va. Sept. 23, 2021). While JPMC respectfully disagrees with that conclusion, the causation point here is different. Here, JPMC asserts that Chain Bridge's attorneys' fees did not accrue "as a result of the cancellation" because the state-law claims are predicated on theories of liability distinct from the cancellation itself.

C. Fees Incurred As A Result Of State-Law Claims Must Be Excised From Chain Bridge's Fee Demand

Chain Bridge has made no effort to segregate the fees incurred on the three state-law claims (non-eligible for reimbursement) from the fees incurred on the two U.C.C. claims (eligible for reimbursement), with one ineffective exception. For defamation, in conclusory fashion, Chain Bridge has asserted that "Robbins Russell separately billed its fees and expenses related solely to defending against Blue Flame's defamation claim," which allegedly totaled $23,396.50. CB Mem. 9-10 n.3.[3] But that sum appears to exclude certain entries for work spent on defamation claims.[4] Chain Bridge has failed to explain the methodology or tracking system it

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[3] Chain Bridge asserts that it did so "for purposes relating to Chain Bridge's discussions with its insurers" (Mem. 9 n.3), but the fact that it did so at all reveals that it understood the necessity of segregating fees spent working on specific claims. It failed to do so.

[4] The $23,396.50 total apparently represents the sum of entries from invoices titled "Blue Flame – Defamation": from June 2020 ($1,391.50), July 2020 ($7,865.00), August 2020 ($12,580.00), and July 2021 ($1,560.00). Ex. 1 to Burke Decl. at 13, 30, 40, 234. But those invoices (and that total) exclude: an entry from February 2021 titled "Email P. Fitzgerald regarding defamation claim," an entry from March 2021 that specifically references the "defamation" section of the summary judgment brief, and several other entries that plainly included work on the defamation claim (*e.g.*, "Draft state law claim section of reply brief for D. Burke"). *Id.* at 150, 169, 217. Chain Bridge understood that time entries pertained to defamation work even when they did not bear the label "defamation," *see id.* 30 (including three entries titled "Edit Motion to Dismiss" under a Blue Flame-Defamation invoice), yet it failed to tally up all such entries. The $23,396.50 total also excludes three entries from Chain Bridge's

used in tallying the $23,396.50 figure, and so has failed to justify it. Chain Bridge bears the burden of doing so and should be required to do so by identifying which time entries fall under which category. *See Auto. Fin. Corp. v. EEE Auto Sales, Inc.*, 2011 WL 3422648, at *2 (E.D. Va. Aug. 3, 2011) (Brinkema, J.) ("proper documentation is key").

II. CHAIN BRIDGE IS NOT ENTITLED TO "FEES ON FEES" INCURRED IN PURSUIT OF INDEMNIFICATION AND INSURANCE

Chain Bridge not only seeks to recover fees it spent defending against Blue Flame's state-law claims, but also it expects JPMC to pay for fees that Chain Bridge spent trying to recoup fees and expenses from JPMC and Chain Bridge's insurers. Recovering fees incurred in pursuit of indemnification—so-called "fees on fees"—is not permitted absent an unmistakably clear directive, which Section 4A-211(f) lacks. Under the same principle, Chain Bridge is not entitled to recover for fees in pursuit of insurance.

A. "Fees On Fees" Are Available Only Where Specifically Authorized, And There Is No Such Authorization In Section 4A-211(f)

"Under the general and 'virtually unanimous rule,' an indemnitee may recover only those attorney fees reasonably incurred in defending the claim indemnified against; the indemnitee may not recover attorney fees incurred in establishing the right to indemnity." *James Constructors, Inc. v. Salt Lake City Corp.*, 888 P.2d 665, 673 (Utah Ct. App. 1994); *Wells Fargo Bank, N.A. v. Nat'l Bank of Com.*, 240 So. 3d 541, 547 (Ala. 2017) ("[T]he allowance of attorney fees is limited to the defense of the claim indemnified against and does not extend to services rendered in establishing the right of indemnity."); *In re Health Mgmt. Sys., Inc. Sec. Litig.*, 82

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insurance-coverage counsel (billed from January 9-January 10, 2021) relating specifically to the defamation claim. Ex. 2 to Burke Decl. at 32. To be clear, JPMC is not simply asking for those identified examples to be added to the defamation category; rather, these examples illustrate the unreliability of Chain Bridge's characterizations and the need for clearer records.

F. Supp. 2d 227, 236 (S.D.N.Y. 2000) ("[W]here a party is provided with indemnification by statute or agreement, it is nevertheless not entitled to its fees for enforcing its rights against the indemnitor absent specific language to that effect."), *aff'd sub nom. Baker v. Health Mgmt. Sys., Inc.*, 298 F.3d 146 (2d Cir. 2002). The same is true under federal law. *See, e.g.*, *In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d 851, 864 (8th Cir. 2010) ("Under maritime law, '[a] contract of indemnity includes the obligation to pay the costs and attorneys fees of the indemnitee against the third party, but not the right to costs and fees in connection with establishing the right to indemnification unless expressly stated.'"); *SPM Corp. v. M/V Ming Moon*, 22 F.3d 523, 526 (3d Cir. 1994) ("[T]he costs of prosecuting the indemnity claim itself may not be recovered.").

This presumption against "fees on fees" derives from the American Rule, which requires that each side, winner and loser, bears its own attorneys' fees. *See Galante v. Queens Borough Pub. Libr.*, 2016 WL 4573978, at *6 (E.D.N.Y. Sept. 1, 2016) (explaining, "[s]tarting from the general American Rule," why there was insufficient statutory authority for "fees on fees"). The American Rule is "a longstanding legal principle, and one 'deeply rooted' in our nation's common law tradition, with origins dating back perhaps as early as 1796." *In re Crescent Cty. Ests., LLC*, 588 F.3d 822, 825-26 (4th Cir. 2009); *id.* at 826 (noting judicial "duty to keep the American Rule intact"). Section 4A-211(f) preserves the American Rule in the "fees on fees" context because it lacks any indication that sending banks should have to pay fees spent by receiving banks in pursuing their claims for indemnification. The text of the provision covers "any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation." If that language were deemed enough to encompass "fees on fees," nearly every indemnification provision would do so, and that is clearly not the law. *Cf. Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 548 N.E.2d 903, 905 (N.Y. 1989) (clause obligating defendant "to 'indemnify and hold harmless [plaintiff] … from any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees'" was "typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim" and lacked "language clearly permitting plaintiff to recover from defendant the attorney's fees incurred in a suit against defendant").

For the same reason Chain Bridge cannot recover fees in pursuit of indemnification, it cannot saddle JPMC with the fees it spent exploring the scope of its private insurance coverage. The principle underlying the American Rule is that the "cost of recovering damages" is properly borne by the party that recovers damages, *Bradford v. HSBC Mortg. Corp.*, 280 F.R.D. 257, 262 (E.D. Va. 2012)—even if that "cost" of recovery depresses the total amount of recovery. Chain Bridge is free to engage legal help to maximize its amount of insurance recovery, but the cost of doing so cannot be shunted to JPMC.

There is another problem here too: these insurance fees lack the requisite causal connection to the cancellation. It bears emphasis that Chain Bridge has failed to adequately specify what kind of insurance work its fees were spent on, including whether insurance was sought only for the state-law claims described above. Many of Chain Bridge's entries are simply impossible to categorize. *See* Ex. 2 to Burke Decl. at 37 ("Checking in"); *id.* at 38 ("Memo"). But in any event, allowing insurance-fee recovery would put sending banks on the hook for any kind of expenses a receiving bank—even one like Chain Bridge who insists it was *certain* from the start of its "'built in'" right to indemnification, *see, e.g.*, *Blue Flame Med.*, 2021 WL 4341111, at *14—might opt to spend.

To support "fees on fees," Chain Bridge again cites *Pike Creek* (*see* Mem. 11-12). But *Pike Creek* has been roundly criticized for that holding, which occupies a "distinct minority" position. *Warren Drilling Co. v. Equitable Prod. Co.*, 621 F. App'x 800, 806 (6th Cir. 2015) ("[M]ost jurisdictions hold that, absent a clear statement to the contrary, the indemnified party may not recover attorney's fees incurred in the course of determining the meaning or scope of an indemnity clause.") (collecting cases); *id.* at 807 ("Just two jurisdictions appear to go the other way.") (citing *Pike Creek*); *Nova Rsch., Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 288 n.6 (Md. 2008) (*Pike Creek* embraces a "distinct minority view").

And Chain Bridge's citation to Delaware state law (Mem. 12 (citing *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555 (Del. 2002))), also provides it no help. In fact, it provides a helpful illustration of the rule that does *not* apply here. Under Delaware law, "fees on fees" *are* recoverable unless specifically disclaimed. *See Rekor Sys., Inc. v. Loughlin*, 2020 WL 6898271, at *16 (S.D.N.Y. Nov. 23, 2020) ("The Delaware Chancery Court has held that under *Stifel*, fees on fees are 'an inherent right of [a] party materially successful in asserting a claim for indemnification or advancement,' unless the applicable bylaws 'specifically exclude' them."); *see Weaver v. ZeniMax Media, Inc.*, 2004 WL 243163, at *7 (Del. Ch. Jan. 30, 2004) ("Under *Stifel Financial*, if a corporation does not want to incur the obligation to pay 'fees on fees,' it must expressly preclude any such right."). In *Stifel*, the applicable bylaw permitted indemnification "to the 'fullest extent permitted by law'" and there was "no express prohibition in the law against indemnification of expenses incurred in prosecuting the indemnification suit." *Stifel Fin.*, 809 A.2d at 560. Naturally, then, under the Delaware rule, "fees on fees" were recoverable. This case is not in Delaware state court, nor is it governed by Delaware law. And Delaware law runs contrary to the default rule. *See Thor 725 8th Ave. LLC v. Goonetilleke*, 675 F. App'x 31, 34 (2d Cir. 2017) ("An award of 'fees on fees' requires 'specific language to indicate that time spent in justifying a fee application was to be included.'").

Chain Bridge also cites (Mem. 13-14) a number of fee cases that have no bearing here. For example, awarding fees under the removal statute (28 U.S.C. § 1447(c)) intends to "deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 140 (2005). There is no such deterrence objective here. Similarly inapplicable are fee-shifting statutes like the Clean Air Act and 42 U.S.C. § 1988, which aim to "promote citizen enforcement of important federal policies." *Lyle v. Food Lion, Inc.*, 954 F.2d 984, 988 n.1 (4th Cir. 1992). No such incentive exists here. Instead, the default rule of no "fees on fees" applies.

B. Indemnification And Insurance Fees Must Be Excised From Chain Bridge's Fee Demand

Chain Bridge asserts (Mem. 11 n.4) that its "fees on fees" amount to "$343,929.50 to Robbins Russell and $31,280 to CRI Compliance." A fee applicant must present its case using "billing time records in a manner that will enable a reviewing court to identify distinct claims," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), not by mere say-so. Chain Bridge has failed to do so; for example, it billed over 8 hours to drafting and revising an outline for the deposition of Natalie Gonzales, an employee of the California State Treasurer's Office. Ex. 1 to Burke Decl. at 21-22. During the Gonzales deposition, Chain Bridge pursued lines of questioning relating to its indemnification claim and relating to other claims. It is Chain Bridge's burden to identify which time entries account for "fees on fees" and to subtract those from its fee demand.

Furthermore, Chain Bridge has identified $158,650.50 in fees paid to "insurance-coverage counsel," Weisbrod Matteis & Copley, "relating to legal advice about the assertion of coverage for Blue Flame's claims." CB Mem. 2. Chain Bridge has failed to identify the amount of time its litigation counsel, Robbins Russell, spent on insurance issues—much less explain whether any insurance analysis went to reimbursable U.C.C. issues or non-reimbursable state-law issues. The time records from Robbins Russell make clear that it spent at least some time working on insurance. *See* Ex. 1 to Burke Decl. at 47 ("Emails re insurance issues"). Chain Bridge bears the burden of identifying which time entries count towards insurance fees; those fees must be subtracted from Chain Bridge's award.

III. CHAIN BRIDGE IS NOT ENTITLED TO FEES IT WOULD HAVE INCURRED REGARDLESS OF THE U.C.C. CLAIMS

Finally, certain issues are common to Blue Flame's U.C.C. and state-law claims—most notably, discovery and briefing related to Blue Flame's damages. JPMC should not be responsible for fees that Chain Bridge would have incurred regardless of the U.C.C. claims for which JPMC has been held to have an indemnification obligation, and it is Chain Bridge's burden to identify which fees those are. Chain Bridge's time records fail to do so. Moreover, those records often contain vague, abstract descriptions that preclude the necessary categorization and review.

A. Chain Bridge Has Failed To Disaggregate Fees It Would Have Incurred Absent The Indemnification-Triggering Conduct

Federal courts apply a "but-for causation standard" to fee shifting where, as here, some categories of fees are reimbursable and others are not. *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1187 (2017) (fees shifted pursuant to court's inherent sanctions authority); *Fox v. Vice*, 563 U.S. 826, 836 (2011) (fees shifted pursuant to 42 U.S.C. § 1988); *Beastie Boys v. Monster Energy Co.*, 112 F. Supp. 3d 31, 58 (S.D.N.Y. 2015) ("strip[ping] out the legal work that, but for the Lanham Act claim, would not have been done").[5] Specifically, the "complaining

[5] Where a fee-shifting provision uses language like "caused by" (Federal Rule of Civil Procedure 37(b)(2)(C)), "directly resulting from" (Rule 11(c)(4)), or "because of" (28 U.S.C. § 1927), it is particularly clear that "causal connection" is required. *Goodyear Tire*, 137 S. Ct. at 1186 n.5. Here, of course, the fee-shifting provision permits recovery of attorneys' fees incurred "as a result." U.C.C. §4A-211(f). "[F]ee-shifting statutes' similar language is 'a strong

party … may recover 'only the portion of his fees that he would not have paid but for' the [fee-entitling claims]." *Goodyear Tire*, 137 S. Ct. at 1187 (quoting *Fox*); *Caraway v. City of Elizabeth City*, 854 F. App'x 472, 474 (4th Cir. 2021) (Where the fee applicant incurred expenses relating to both reimbursement-eligible and non-eligible claims, the court may award attorney's fees … 'only for costs that the [applicant] would not have incurred but for the [eligible] claims."); *Mulugeta v. Ademachew*, 2019 WL 7945712, at *2 (E.D. Va. Nov. 6, 2019) ("Fees are awardable if they would not have been incurred but for the [reimbursement-eligible work]."). "When a 'defendant would have incurred [an] expense in any event[,] he has suffered no incremental harm from the [fee-entitling] claim,' and so the court lacks a basis for shifting the expense." *Goodyear Tire*, 137 S. Ct. at 1187 (quoting *Fox*).[6]

The "but-for causation standard generally demands that a district court assess and allocate specific litigation expenses." *Goodyear Tire*, 137 S. Ct. at 1187. "The court's fundamental job is to determine whether a given legal fee—say, for taking a deposition or drafting a motion—would or would not have been incurred in the absence of the [fee-entitling claims]." *Id.* "The award is then the sum total of the fees that, except for the [fee-entitling claims], would not have accrued." *Id.*

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indication' that they are to be interpreted alike." *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989).

6 Fee-shifting in the sanctions context is shaped by the principle that sanctions "must be compensatory, not punitive." *Salgam v. Advanced Software Sys., Inc.*, 2020 WL 6322857, at *5 (E.D. Va. July 2, 2020) (explaining rationale behind *Goodyear*'s causation standard). The same principle animates fee-shifting here. *See* U.C.C. § 4A-211 cmt. 5 (when a receiving bank "agrees to cancellation" it "should not incur a risk of loss in doing so"). Section 4A-211(f) is designed to make receiving banks whole for losses incurred as a result of a cancellation—not to punish sending banks by forcing them to cover expenses that receiving banks incurred as a result of distinct and independent conduct that happened to occur around the same time as the cancellation. That point is particularly salient here where Chain Bridge acted unilaterally vis-à-vis California and where the Court's conclusion regarding indemnification was explicitly "not meant to punish or criticize JPMorgan." *Blue Flame*, 2021 WL 4341111, at *14.

Here, Chain Bridge "would have incurred," *Goodyear Tire*, 137 S. Ct. at 1187, many of its fees if the only claims asserted against it were ones not held to be eligible for fee-shifting—*i.e.*, the state-law claims Blue Flame brought because of Chain Bridge's unilateral, independent, and antecedent-to-cancellation communication with California. Those include, at least, fees expended on contesting the existence of Blue Flame's damages, *see Blue Flame*, 2021 WL 4341111, at *12 (granting summary judgment on tortious interference claims "for the same reason that Count I failed: there is insufficient evidence in this record from which a reasonable factfinder could conclude that Blue Flame could have fulfilled California's order and that California would not have cancelled the contract and insisted on a return of the funds in that event"), and general litigation management (or at least some allocable portion of it), *see, e.g.*, Ex. 1 to Burke Decl. at 175 ("Weekly team strategy meeting").

"To whatever extent any portion of the fee claim cannot be segregated into the allowable component and the component that is not allowed, that risk should be borne by the fee claimants." *Madeira v. Affordable Hous. Found., Inc*., 323 F. App'x 89, 92 (2d Cir. 2009). The Fourth Circuit recognizes that "some claims may have such a common core of facts and legal theories so as to prevent any allocation of the fees to the applicant's separate claims," but it "admonish[es] all parties that a blind adherence to this argument runs the risk of incurring a complete denial of fees." *Fair Hous. Council of Greater Washington v. Landow*, 999 F.2d 92, 97 (4th Cir. 1993). Chain Bridge's fee demand reflects such a "blind adherence," *id.*, as it has declined thus far to separate any single time entry from any other. Moreover, it ignores the basic deficiencies in certain descriptions. For example, Chain Bridge's counsel billed 7.70 hours to "Draft deposition outline." Ex. 1 to Burke Decl. at 72; *see also id.* at 71 (billing 2.50 hours to same); *id.* at 73 (billing 6.80 hours to same). It is unclear whether that deposition outline was for the non-reimbursable, indemnification-related deposition of Charles Grice (Chain Bridge's expert on indemnification) or for a different witness.

Chain Bridge's failure to isolate its indemnifiable fees from its non-indemnifiable fees is particularly unjustified because Chain Bridge has known, from the earliest days of this litigation, that it would have that obligation. *See In re Navidea Biophamaceuticals Litig*., 2021 WL 2323380, at *1 (S.D.N.Y. Apr. 21, 2021), *report & recommendation adopted sub nom. In re Navidea Biopharmaceuticals Litig*., 2021 WL 2156276 (S.D.N.Y. May 27, 2021) ("[I]t should have been abundantly clear to … counsel, from the get-go, that, should their client wish to seek … indemnification … of his attorneys' fees in this case, he would have to be able to segregate the time spent by counsel in defending each of the different claims[.]"). As in *Navidea*, Chain Bridge's lawyers "failed to make efforts to identify the particular claims on which they were working." *Id.*[7]

Finally, Chain Bridge failed to describe its fees with appropriate particularity. Thus, JPMC has also been unable to determine whether they are "excessive, redundant, or otherwise unnecessary," *Hensley*, 461 U.S. at 434, in violation of Section 4A-211(f)'s provision for "reasonable" attorneys' fees. As just one example, a time entry called "Update cast of characters" charges JPMC $1,331. Ex. 1 to Burke Decl. at 83. It is unclear what that means and

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[7] "Inadequate documentation includes the practice of grouping, or 'lumping,' several tasks together under a single entry, without specifying the amount of time spent on each particular task." *Guidry v. Clare*, 442 F. Supp. 2d 282, 294 (E.D. Va. 2006). This practice is known as "block billing," and it is inadequate for fee applications because it renders courts unable "to ascertain how much time was spent on each task for which a fee is requested." *Jones v. Southpeak Interactive Corp. of Del.*, 2014 WL 2993443, at *9 (E.D. Va. July 2, 2014), *aff'd*, 777 F.3d 658 (4th Cir. 2015). The problem is particularly pronounced here where fees for some block-billed tasks are reimbursable while others are not. *See* Ex. 1 to Burke Decl. at 35 ("Work on draft MTD reply, including revisions to brief, reviewing comments from clients and emails re same, *discussion with insurance counsel*, and finalizing for filing") (emphasis added).

therefore whether 2.20 hours is an excessive amount of time to spend on it. *See also id.* at 143 ("Deposition matters."); *id.* at 146 ("Review correspondence."). JPMC reserves all rights to challenge not only the recoverability but the reasonableness of Chain Bridge's fees, upon production of appropriately particularized supporting documentation.

B. Fees That Would Have Been Incurred Absent Blue Flame's U.C.C. Claims Must Be Excised From Chain Bridge's Fee Demand

As with the other categories of excludable fees, it is Chain Bridge's burden to identify, with particularity, fees that would have been incurred absent Blue Flame's U.C.C. claims and to subtract those from its fee demand.

CONCLUSION

Respectfully, the Court should deny Chain Bridge's motion with prejudice as to fees and expenses related to (1) non-U.C.C. claims, (2) fees in pursuit of its indemnification and insurance, and (3) fees that would have been incurred in the absence of the U.C.C. claims. JPMC does not oppose Chain Bridge being granted an opportunity to submit a revised fee request as to those fees and expenses unrelated to the above categories, accompanied by sufficiently detailed documentation to enable adequate review.

Dated: November 18, 2021

Respectfully submitted,

WILMER CUTLER PICKERING HALE AND DORR LLP

/s/ Meredith K. Loretta
Meredith K. Loretta (92369)
Albinas J. Prizgintas (*pro hac vice*)
Whitney Russell (*pro hac vice*)
1875 Pennsylvania Avenue N.W.
Washington, DC 20006
Tel.: (202) 663-6981
Fax: (202) 663-6363
meredith.loretta@wilmerhale.com

Alan E. Schoenfeld (*pro hac vice*)
Marissa W. Medine (*pro hac vice*)
7 World Trade Center
250 Greenwich Street
New York, NY 10007
Tel.: (212) 230-8800
Fax: (212) 230-8888
alan.schoenfeld@wilmerhale.com

Felicia Ellsworth (*pro hac vice*)
60 State Street
Boston, MA 02109
Tel.: (617) 526-6000
Fax: (617) 526-5000
felicia.ellsworth@wilmerhale.com

Margarita M. Botero (*pro hac vice*)
1225 17th Street, Suite 2600
Denver, CO 80202
Tel.: (720) 274-3135
Fax: (720) 274-3133
margarita.botero@wilmerhale.com

Attorneys for Third-Party Defendant JPMorgan Chase Bank, N.A.

CERTIFICATE OF SERVICE

I certify that on this 18th day of November, 2021, I electronically filed the foregoing using the Court's CM/ECF system, which will then send a notification of such filing to all counsel of record.

<u>/s/ Meredith K. Loretta</u>
Meredith K. Loretta
1875 Pennsylvania Avenue N.W.
Washington, DC 20006
Tel.: (202) 663-6981
Fax: (202) 663-6363
meredith.loretta@wilmerhale.com