Nos. 21-2218 (L), 21-2219

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BLUE FLAME MEDICAL LLC,
Plaintiff-Appellant,

v.

CHAIN BRIDGE BANK, N.A.,
Defendant and Third Party Plaintiff-Appellee,

JOHN J. BROUGH; DAVID M. EVINGER,
Defendants-Appellees,

v.

JPMORGAN CHASE BANK, N.A.,
Third Party Defendant.

(Caption continued on inside cover)

Appeals from the United States District Court
for the Eastern District of Virginia (No. 1:20-cv-00658-LMB-IDD)

REPLY BRIEF FOR APPELLANT BLUE FLAME MEDICAL LLC

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BLUE FLAME MEDICAL LLC,
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTRODUCTION

CBB's briefing is calculated to mislead this Court about how Article 4A handles funds transfers involving multiple banks. That is disappointing, given that defendants Chain Bridge *Bank* and its top executives (and their sophisticated counsel) surely understand this technical but critical regulation. But more striking—and dispositive—is not what CBB argues, but what it concedes. CBB no longer contests the district court's findings that it credited Blue Flame's account, Resp.Br.37-38 n.14, or that JPMC's cancellation request was ineffective under §4A-211, Resp.Br.22 n.6. And while it disputes the nature of the payment order reproduced at App.Br.22, it doesn't even try to produce another payment order or other legal basis for its conceded debit from Blue Flame's account—despite our explicit challenge to provide one. *See id.* 34-35.

Those concessions make this case easy, and demonstrate the stakes for banking law if this Court gets it wrong. As Article 4A's drafters recognized, and as should be obvious to any bank customer, that law depends on the bedrock rule that a bank must be "entitled to payment from the customer" before it "debits the customer's account." *See* §4A-204 cmt.1. CBB's position that it needed neither an effective cancellation nor Blue Flame's permission to take Blue Flame's money from Blue Flame's account is thus as unlikely—and dangerous—as it seems.

CBB's response fares no better in defending the district court's summary judgment respecting damages. CBB tries *lots* of colorful storytelling to impugn the credibility of Blue Flame and its witnesses. *See, e.g.*, Resp.Br.1-3, 6-14, 42-44, 53-56. But all that can do is clarify that this case concerns competing factual stories that depend on the credibility of Blue Flame and its evidence. We certainly think Blue Flame's story about whether it would have achieved *some* profits under its California contract absent CBB's front-page-worthy failure to act like a normal bank is better supported by the voluminous record. But that is precisely what juries are for, and it makes a farce of the Seventh Amendment to pretend that a case so obviously rooted in pure factual disputes is a candidate for summary judgment on the ground that the plaintiff wasn't damaged "in any respect." JA3088.

ARGUMENT

I. JPMC's Failed Cancellation Request Is Irrelevant

We begin with a critical, global point. CBB's brief is peppered with vague suggestions that JPMC's cancellation request somehow affects its liability under Article 4A. *See* Resp.Br.31-32, 34-35, 37-38. For example, it invokes that allegedly unique circumstance to explain why its rule would not permit bank executives to wire their customers' cash wherever they please. *Id.* 58. Likewise, CBB suggests that it excuses its *now-conceded* decision to willfully issue an unauthorized payment order naming Blue Flame as originator and then debit the funds from Blue Flame's account. *Id.* 31-32, 34-35, 37-38. Elsewhere, CBB halfheartedly suggests that it might avoid the clear dictates of §§204(a) and 404(a) altogether because its "decision … to accommodate [JPMC's] cancellation request was governed by [§]4A-211." Resp.Br.58. But each of these arguments ignores that JPMC's cancellation order was concededly *ineffective* under §4A-211, and so couldn't possibly affect how Article 4A's "precise and detailed rules" governing a bank's "essentially mechanical" role in a funds transfer assign liability here. U.C.C. §4A-102 cmt.; *id.* §4A-104 cmt.3.

As with CBB's arguments about "fraud" and second thoughts, however, *see* App.Br.42-44, Article 4A's drafters already anticipated and rejected CBB's theory. As they put it, because "acceptance affects the rights of the originator and the beneficiary, it is *not appropriate to allow the beneficiary's bank to agree to cancellation* or amendment except in unusual cases." U.C.C. §4A-211 cmt.4 (emphasis added). Nevertheless, CBB's argument boils down to the assertion that it *was* free "to agree to cancellation" unilaterally, even outside those "unusual cases." That is incorrect.

The commentary likewise clarifies that CBB can get no mileage out of the *failed* cancellation here, expressly warning that Article 4A contains "no concept of wrongful cancellation or amendment of a payment order." *Id.* cmt.1. Instead, "[i]f the conditions stated in this section are not met the attempted cancellation or amendment is not effective." *Id.* Put otherwise, there are effective cancellations and there are nullities, and because CBB does not argue that this cancellation was effective, all its arguments about cancellation can be safely ignored.

II. CBB Must Be Liable For Wiring Money Out Of Blue Flame's Account Under §204(a), State Law, Or Both

At the opening brief's core was a simple challenge to CBB to provide some law that would constrain banks from wiring their customers' money wherever they pleased if neither §204(a) nor state law applied here. CBB declined. Indeed, it has proffered no legal rule that would excuse its conduct without permitting some other bank to issue "*its own* payment order," Resp.Br.35, allowing it to freely debit its customer's account whenever it believed the money belonged elsewhere.

Faced with supporting this enormous loophole, CBB at best argues that adopting its rule here should create limited concern about future cases because this one involves only a bank choosing to comply with an ineffective cancellation request—as opposed to wiring money around "willy-nilly." Resp.Br.58. But as we have just seen, Article 4A treats ineffective cancellations as irrelevant nullities, *supra* pp.3-4, and CBB's rationale (which stems from its decision to issue "its own" unauthorized payment order) has no necessary, logical connection to any ineffective cancellation request. This Court should take no comfort in such a distinction without a difference, particularly when its decision will become the first and leading opinion construing the relevant provisions of Article 4A.

A. Section 204(a)

The heart of §4A-204(a) is a strict-liability rule: When "a receiving bank accepts a payment order issued in the name of its customer as sender," and that customer didn't authorize it, the bank has no right to take payment—and must refund any debits it made—from the customer's account. U.C.C. §4A-204(a) and cmt.1. That rule is tailor-made for this case: There is incontrovertible evidence from CBB's own files, reproduced at App.Br.22, that CBB accepted a payment order in Blue Flame's name and debited Blue Flame's account knowing full well that Blue Flame hadn't authorized it.

CBB's response is to characterize that evidence as showing only that CBB issued "*its own* payment order," Resp.Br.35, naming Blue Flame as "originator," *id.* 33, and not that CBB "accepted" or "received" any payment order here naming Blue Flame as "sender," *id.* 35-36. This is, frankly, a dispiriting effort to pull a fast one on this Court, rooted in the hope that it will misunderstand the counterintuitive way Article 4A defines certain terms to account for multi-bank transfers. *See* App.Br.33-34 & n.4. As we explain below, issuing "its own payment order" naming its customer as the "originator" is precisely how an originator's bank "accepts" the originator's payment order under Article 4A—indeed, that is what it *means* to accept a customer's payment order. Thankfully, the text and official commentary of Article 4A make this fairly obvious for transfers that (like this one) involve only two parties with different banks. CBB's failure to disclose and address this material is inexplicable.

1. A "funds transfer" is a "series of transactions [that] begin[s] with the originator's payment order." U.C.C. §4A-104(a). A "payment order" is "an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, … money to a beneficiary." *Id.* §4A-103(a)(1). And, critically, when the account that has the money is at a different bank than the account getting the money, there are always "***two payment orders*** [] involved." *Id.* §4A-104 cmt.1 ("Case #2") (emphasis added).

The first is the payment order the originator (*i.e.*, "the sender of the first payment order in a funds transfer," *id.* §4A-104(c)) delivers to their bank—which is called both the "originator's bank," *id.* §4A-104(d) and a "receiving bank," *id.* §4A-103(a)(4), because it receives this first payment order from the originator. The second is the payment order *that* bank sends to the beneficiary's bank—which also becomes a "receiving bank" when it receives this second payment order, *see id.*—directing it to pay the beneficiary. As the text makes pellucid, the first receiving bank "executes" the first payment order by issuing the second one. *Id.* §4A-301(a) (extremely clear). And in so doing, it thereby "accepts" the payment order it originally received for purposes of Article 4A. *See id.* §4A-209(a) (same).

CBB's theory that this transaction involved only one payment order—which it "issued" on "its own" to effectuate the funds transfer at 3:21PM, *see* JA2214—is thus a logical and regulatory impossibility. The only circumstance in which the "series of transactions" in a funds transfer involves only one payment order is when the subject accounts are at the same bank. U.C.C. §4A-104 cmt.1 ("Case #1"). And while CBB claims (at 31) that it "initiat[ed] a new wire transfer" "in response to [JPMC's] cancellation request," it immediately (and correctly) observes that JPMC's request was "not a payment order," *id.*, and so could not have been the catalyst for CBB's payment order to JPMC naming Blue Flame as the originator. Where has the first payment order gone? The simple answer, as CBB well knows, is that when CBB concededly issued a payment order to the beneficiary's bank (JPMC) directing payment to the beneficiary (California), and then debited the money it sent to JPMC from Blue Flame's account, it *necessarily* purported to "accept" a payment order naming its customer (Blue Flame) as the original sender of the funds transfer.

2. This brings us to JA2216, reproduced at App.Br.22, which certainly looks like a payment order naming Blue Flame as sender that CBB purported to accept by sending its own conforming payment order to JPMC and debiting Blue Flame's account. CBB's efforts to attack this incontrovertible evidence are untenable.

First, CBB says (Resp.Br.32) that this was actually "an internal [CBB] record of the wire transfer," thereby implying that it was not a payment order. This implication is not colorable, which is likely why CBB carefully avoids saying that this "internal record" is *not* a "payment order." *See id.* 32-33. It also oddly declines to explain how this "record" of the funds transfer was generated 22 minutes *before* the transfer itself. *Compare* JA2216, *with* JA2214.

Space-time discontinuity aside, it also makes no difference whether CBB's archives label this a "record" or "payment order." As §4A-103(a)(1) carefully notes, the "payment order" inheres in the "*instruction* of a sender to a receiving bank … to pay, or to cause another bank to pay, … money to a beneficiary," (emphasis added), and "the applicability of Article 4A does not depend upon the means used to transmit th[at] instruction." U.C.C. §4A-104 cmt.6. In the ordinary two-customer/two-bank case, such an instruction consists of five core pieces of information: (1) the customer originating the funds transfer; (2) the amount; (3) the ultimate beneficiary; and (4)/(5) the applicable account and ABA routing numbers for the originator's and beneficiary's banks, which will be respectively sending and receiving the inter-bank money transfer within the Federal Reserve's system. Whatever CBB calls it, JA2216 is thus a "record" *of a payment order* that falsely purports to have originated with Blue Flame, and that is what matters.

CBB's arguments only grow more disappointing from there. CBB says (at 32) that this can't be a payment order that, if executed, subjects it to liability under §4A-204(a) because §4A-204(a) concerns a payment order "issued in the name of its customer as sender," while this "record" identifies "Blue Flame as the *originator* of the funds transfer, not the sender of the payment order." But this "record" in fact identifies Blue Flame as simply the "originator," and (as CBB knows perfectly well) Article 4A defines "originator" as "*the sender of the first payment order in a funds transfer*." §4A-104(c) (emphasis added). Perhaps CBB was hoping the Court would not read Article 4A.

Likewise, CBB argues (at 33) that the payment order it issued to JPMC "lists [CBB] as the 'Sender,'" not Blue Flame. But that payment order actually records CBB as the "Sender *ABA*," together with its ABA routing number. JA2214 (emphasis added). CBB is willfully sowing confusion here; "Sender *ABA*" identifies the financial institution that will be sending cash reserves across the Fed's interbank system to consummate the transaction, not the sender (i.e., *originator*) of the *original* payment order.

Next, we hear that JA2216 cannot be a payment order executed in violation of §4A-204(a) because it "lists [*JPMC*] as the 'Receiving Bank,'" whereas CBB would have been the "receiving bank" as to a first payment order naming Blue Flame as sender. Resp.Br.32. Don't be fooled. As explained above, every funds transfer between customers of different banks will have ***two*** receiving banks, *see supra* p.6, and there's no need for the outgoing wire-transfer records of the first receiving bank to denote itself as a receiving bank because it is *always* a "receiving bank" in any such transaction. Conversely, it is natural for CBB's own records to refer to the next bank in the payment-order chain as "Receiving Bank" because that's the bank to which the first payment order instructs CBB to send *its* downstream order (and, ultimately, the funds).

CBB also contends that Blue Flame's straightforward reading of §4A-204(a) can't be right "because it would impose liability on a receiving bank even when it agrees to an *effective* cancellation" under §4A-211. Resp.Br.37. This argument is backwards, and proves our point.

The potential liability CBB identifies *is* real, but is accounted for by Article 4A itself—as the commentary (again) reveals to anyone who earnestly reads it. As it explains, Article 4A gave CBB complete discretion to refuse JPMC's post-acceptance cancellation request here *precisely because* of the risk that that acceptance had already caused CBB to incur liabilities it might be unable to recover under the law of restitution or mistake—whether the cancellation request was otherwise valid or not. *See* U.C.C. §4A-211 cmt.5. This risk is also why Article 4A provides for the very automatic indemnification that CBB successfully claimed from JPMC here. *Id.* Accordingly, the real upshot of CBB's one-horrible parade is that a bank like

JPMC or its underlying customer might be liable if a downstream bank accommodates a post-acceptance cancellation request and then is successfully sued or cannot recover amounts it already paid out. And that isn't remotely surprising: Article 4A exists because the risk of loss must be initially allocated to *someone*, and it is the sender and his bank who are best positioned to avoid the kinds of unauthorized payment orders and technical mistakes for which post-acceptance cancellation is sometimes available (but never required). That does not mean beneficiaries keep windfalls. It just means that, as Article 4A says repeatedly, whether the losing parties can recover their losses from the beneficiaries is a question governed by other sources of law. *See id.* cmt.4 (Cases #1-4).

3. Meanwhile, it is the consequences of CBB's argument that are truly unacceptable. CBB is stuck between a rock and hard place: It either (1) issued an unauthorized payment order naming Blue Flame as sender to implement an ineffective cancellation request, or (2, worse) was just playing Robin Hood—debiting its own customer's account based on its own notions of justice, without *any* purported legal basis for enforcing payment. Neither is consistent with the rule of law or a stable banking system, which is why the former requires a refund under §4A-204(a), and the latter is theft redressable through state law. Indeed, it is striking that—while CBB attacks the payment-order status of JA2216—it never even tries to identify a valid payment order or other legal basis for debiting Blue Flame's account to pay

for the outgoing transfer it concededly executed on "its own." Resp.Br. 35. This is why, as the opening brief explained, the district court's view that neither state law nor §4A-204(a) applies here must be rejected. Yet CBB defends the district court's reasoning while offering no intelligible legal rule to rein it in. This Court should be very wary of approving such an invitation for banks to wrongfully treat their customers' accounts as their own.

B. State Law

Indeed, the district court simply cannot be right that *neither* state law *nor* Article 4A proscribes CBB's conduct here. Article 4A preempts state-law claims only where "the challenged conduct in the state claim would be covered under [Article 4A] as well." *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 223 (4th Cir. 2002). Thus, if Article 4A does not apply, state law must. *See* U.C.C. §4A-102 cmt. (Article 4A preempts other law "in any situation covered by [its] particular provisions"). The better view, however, is that *both* apply because two distinct types of liable conduct are at issue.

Section 204(a) is a strict-liability rule for assigning the loss whenever a bank accepts an unauthorized payment order—no matter how innocently. And more broadly, Article 4A is concerned with how financial institutions process payment orders and the different liabilities they might incur throughout that process. It thus makes CBB liable for *executing* on the unauthorized payment instructions recorded in JA2216, without regard to fault.

But Article 4A isn't concerned with what happens before and after that process. Accordingly, Article 4A itself explains that state-law remedies are necessary to go after the fraudsters who *create* unauthorized payment orders or recover monies already paid out to beneficiaries. *See* U.C.C. §4A-211 cmt.4. Here, CBB seems to have conceded this kind of malfeasance as well: Its own story is that it generated "*its own* payment order" that named Blue Flame as the originator without authorization, and then debited money from Blue Flame's account without legal basis. That is either a conversion after the first funds transfer was complete or a fraud before the second one began (or both)—and Article 4A addresses neither. The Court should thus hold that Blue Flame's state-law claims are not preempted insofar as they address CBB's fraudulent issuance of the first payment order or its decision to debit Blue Flame's account without a legal basis. *See, e.g.*, *Eisenberg*, 301 F.3d at 224; *Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267, 1275 (11th Cir. 2003) (finding no preemption where "Article 4A is silent"); *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 89-90 (2d Cir. 2010) ("Not all common law claims are per se inconsistent with this regime. … [T]he critical inquiry is whether [Article 4A's] provisions protect against the type of underlying injury or misconduct alleged.").

III. The District Court Erred In Granting Summary Judgment For Lack Of Damages

As usual in litigation, each side here has its own story about what happened, including what *would* have happened had CBB followed the law. Here is Blue Flame's, along with just some of the record citations that support it:

Had CBB complied with the law, the funds that were undisputedly credited to Blue Flame's account on March 26, 2020, JA3140 2:09-2:27; JA2098; JA1544; JA3073, would have stayed put, and CBB's Assistant VP would have processed Blue Flame's outgoing wires to Suuchi on March 26, as she told Thomas she would, JA1560-62; *see* JA2074. This would have been consistent with CBB's Funds Availability Disclosure, which allows but doesn't require CBB to hold wire-transfer funds from new customers for one business day, *see* JA2839, and from which bank personnel may grant exceptions, JA188; *accord* JA2838 ("If you will need the funds from a deposit right away, you should ask us when the funds will be available.").

Upon receiving that $22,680,000, Suuchi would have honored the terms of its purchase agreement with Blue Flame, immediately shipping six million masks to California, JA1557; JA1767-68, arriving around April 6, 2020, JA608-09. Blue Flame would also have paid Great Health Companion, which would have started shipping masks in "tranches[,] as often and as soon as available." JA1771. Those masks would have started arriving around April 2, with more arriving almost daily through at least April 24, until Blue Flame delivered most if not all of the 100 million masks California said to "shoot for." JA608-09; JA1591.

Blue Flame was in close contact with California officials, JA1571-85; JA1587-96; JA1683-92, and its suppliers, JA2207-08; JA2589-92; JA1720-50, and would have been able to provide evidence of its ongoing performance. What's more, California's deal with Blue Flame contemplated a formal process for contract termination, JA1165-66, which could not have been effected instantaneously once Blue Flame began to perform. Especially with evidence of performance in hand, California—which had gone to a lot of trouble to hammer out the deal, *see* JA1571-85; JA1587-96; JA1683-92; JA1081-1103—would have been reluctant to undertake the termination process: The State "just needed the product" Blue Flame would have delivered, JA2889, and it "would have accepted" any and all of Blue Flame's N95 masks, JA3012. And, per its agreement with Blue Flame, it would have paid contract price for each mask it accepted. *See* JA1165-66.

China's brief export restrictions would not have significantly delayed these shipments. JA2795-97. And given California's dire need and Blue Flame's ongoing performance, any minor delays would not have caused California to immediately break the contract anyway: What's a few days, or even weeks, compared to the repeated, months-long failures California forgave by its next contractor to obtain the certification necessary to produce any masks at all? *See* App.Br.24-25 (California's subsequent course of conduct with BYD).

To be sure, CBB has a different story—a colorful one, often premised on dubious inferences, designed to disparage the credibility of Blue Flame and its principals at every turn. Resp.Br.1-3, 6-14, 42-44, 53-56. But all of that can—indeed, *must*—be ignored: In this posture, what matters is *Blue Flame's* story and whether *its* evidence, taken as true, supports it, after drawing every reasonable inference in Blue Flame's favor. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). Meanwhile, CBB's efforts to contest credibility are, if anything, a virtual guarantee that summary judgment was inappropriate, because weighing credibility is a core jury function. *See* App.Br.45.

Indeed, every sentence above is a factual judgment call, and each is either supported by competent record evidence or else a natural inference from those supported facts. Unlike CBB, we are not so brazen as to assume the jury will eventually side with us on every one. But at this stage, that is *exactly* the assumption the law requires this Court to make, because sorting and weighing all that conflicting evidence, assessing all the witnesses' credibility, and then making inferential, predictive judgments about the relative likelihood of the different hypothetical outcomes in the absence of a violation is *exactly* what juries do. This is not a close call: A jury trial over legal damages is a constitutional right, and if the Seventh Amendment means anything at all, it must cover a fight that is entirely about facts and inferences, like the one above, regarding a hypothetical world that doesn't exist because of defendants' legal violations.

A. CBB Could Not Have "Held" the Funds

CBB argues that "the relevant counterfactual was one in which 'the funds were *held* in Blue Flame's account'" rather than wired by CBB back to JPMC. Resp.Br.41 (quoting JA3084). But that's not right: CBB both credited Blue Flame's account, *see* JA3073, and concededly informed Blue Flame of the payment order's receipt, Resp.Br.14; JA140 ¶17. Article 4A gave CBB a legal obligation to pay Blue Flame when the earliest of these events occurred. *See* U.C.C. §§4A-209(b)(1)(ii), 4A-404(a); *accord id.* §4A-209 cmt.4 ("Acceptance by the beneficiary's bank means that the bank is liable to the beneficiary for the amount of the order.").

To be sure, CBB could theoretically have used its Funds Availability Disclosure to support a *one-day* hold on the funds in Blue Flame's account: Although §4A-404(c) provides that "[t]he right of a beneficiary to receive [immediate] payment and damages … may not be varied by agreement," a superseding regulation mandates that the funds be available no later than the next day. *See* 12 C.F.R. §§210.25(b)(1), 229.10(b) (Regulation CC). But that same law plainly forecloses CBB's suggestion that it could have held the funds indefinitely.

CBB thus tries to conjure a "concession" on this point. But even if such purely legal questions could be "conceded" away,[1] the record below firmly establishes that no such concession occurred. *See* Dkt. 159 at 5. And given the evidence above about California's inability and likely disinclination to instantaneously terminate the contract once the transaction was consummated, *supra* pp.15-16, there is no evidence (let alone conclusive evidence at the summary-judgment stage) that a one-day hold would have made any difference at all.

B. CBB's Factual Assertions Are Disputed by Record Evidence

CBB argues along two additional lines that there are no meaningful record disputes. Resp.Br.39-50. It is wrong at every turn.

1. California's Post-Transfer Conduct

CBB claims that, "within hours of initiating the wire transfer, California officials decided not to proceed with the transaction." Resp.Br.39. It then argues (at 40) that, because California could have terminated its contract with Blue Flame at will, nothing "would have been different" if CBB had released the funds to Blue Flame. This line of argument fails twice over.

[1] *But see United States v. Gomori*, 437 F.2d 312, 314-15 (4th Cir. 1971) ("[C]oncessions of law have not before been thought to bind us.").

First, CBB ignores that California's conduct on March 26 was *premised* on CBB's §4A-404(a) violation and the groundwork CBB laid to effect it. Like JPMC's and CBB's own employees, California officials clearly knew the State would face unacceptable legal liability if it tried to unwind a transfer after Blue Flame's account had been credited. *See, e.g.*, JA1054 ("[W]e asked [Evinger] if the money had been credited to the client account at that time, and he said no. And we said, well, please wait until we can find out additional information."); JA804 (Evinger depo.) ("[T]he conversation was [about] the bank maintaining that hold while—while they did more research."); *see also* U.C.C. §4A-211(f). Indeed, upon learning that California was terminating the relationship, one State official was confused: "Please clarify[,] as we had a confirmation that the wire transfer went through." JA481. Had CBB told the truth about crediting Blue Flame's account, California would almost certainly not have risked liability by trying to unwind the wire transfer, much less broken the contract and sued for return of the money before giving Blue Flame even a few days to demonstrate that it could deliver the product California needed so badly. *See supra* pp.14-16. Indeed, armed with the evidence detailed above and the need to make contested inferences about what *would* have happened had CBB followed the law, a reasonable jury could certainly have rejected CBB's speculative assertion that California was destined to immediately cancel the contract no matter what. *See id.*

Second, the record does not establish the underlying facts upon which CBB premises the inferential judgment that California was bound to cancel right away. CBB asserts that, upon receiving CBB's flurry of calls, California "*immediately*" "decided not to proceed with the transaction," and that "California officials eagerly supported reversal of the wire transfer." Resp.Br.39. But none of CBB's record cites supports these statements. The best CBB can provide is an intraoffice email, JA1070, from *one* California official whose job was to manage the State's "short-term cash position," and she "just … want[ed] to know where [the wire was] in the process," because she would have to "account for and deal with" the money upon its return, JA1057-58 ("I did not request the wire to be recalled. … It wasn't anything that I had communicated to [JPMC]. I was told the wire was coming back."). And recall the standard: The record need not be devoid of evidence that California might have terminated quickly; it need only be two-sided enough to permit a reasonable juror to believe the opposite.

2. Blue Flame's Damages

Meanwhile, crediting the story above and the facts detailed at App.Br.11-12, Blue Flame has plainly established genuine disputes of fact regarding its damages, and CBB cannot seriously argue otherwise.

Consider CBB's contention, *contra supra* pp.14-15, that Blue Flame's suppliers could not have fulfilled its purchase orders. To take just one piece of contrary evidence, Blue Flame's *expert* averred—in a report CBB's brief simply ignores—that it could have. JA2789. Once again, this is the end of the summary-judgment fight: The standard of review is de novo; CBB's burden is to establish the absence of *any* competent evidence of damages; and it has chosen to ignore a valid expert report entirely. That alone precludes summary judgment, and this Court need say no more.

But there's certainly more one could say. For example, CBB claims that "there is no evidence to support" Blue Flame's assertions that CBB's destruction of the California deal damaged Blue Flame's ability to fulfill future orders. Resp.Br.43 n.16. But again, that just ignores record evidence—plainly identified in the opening brief (at 23-24, 52)—that the demise of the California deal damaged both Blue Flame's reputation with its suppliers, JA2529; JA2207, and its ability to lock in production lines to fulfill future orders, JA2530-31. At trial, CBB is free to pretend such evidence doesn't exist or merit any weight given its contrary story, but it cannot defend the summary-judgment holding that way.

Or take the Suuchi masks. John Thomas's testimony that these six-million masks were available to be shipped immediately upon payment, JA1557, conclusively establishes that fact for summary-judgment purposes. CBB thus tries to void this testimony with an evidentiary objection, arguing that Thomas "could articulate no basis in his personal knowledge to support" it. Resp.Br.43-44. But CBB omits that *it* was deposing Thomas at the time, *see* JA535-36, and *didn't ask him* to "articulate" his "basis" for this testimony, *see* JA1557. Unsurprisingly, CBB cites no case excluding a deponent's testimony for failure to undergird his factual assertions with a sua sponte explanation of his personal knowledge. CBB's lack of a contemporaneous objection is therefore fatal. But more importantly, this is what we have jury trials for: If CBB thinks Thomas has no basis for this factual testimony, it can prove that when he's on the stand. Until then, this Court must proceed from the assumption that, if CBB hadn't violated §4A-404(a) and denied Blue Flame payment, Suuchi would have delivered six million masks to California almost immediately.

Faced with such summary-judgment-precluding facts, CBB tries a goalpost move, suggesting (without any authority) that instead of putting forth evidence of *some* damages (which is the legal element for having a claim), Blue Flame must instead show that it could have produced *all* 100 million masks because it somehow forfeited the former approach. Resp.Br.48. In fact, Blue Flame has consistently claimed all its lost profits as damages, *e.g.*, JA36 (defendants "caused Blue Flame to lose all profits"), without ever disclaiming its entitlement to its profits from delivering fewer than 100 million masks. And it is certainly entitled to press such an argument on appeal from the district court's holding that CBB's "return of the wire transfer did not damage [Blue Flame] *in any respect*." JA3088 (emphasis added). Meanwhile, no one could seriously believe that a contract like this one—which set a plainly aspirational goal, *see* App.Br.12, in the midst of wild uncertainty—was designed to be valueless to Blue Flame unless it delivered every one of 100 million masks on time.

C. Until It Returns Blue Flame's Funds, CBB Is in Continuing Violation of 404(a)

U.C.C. §4A-404(a) clearly states that "if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary." And §4A-404(c) expressly contemplates "[t]he right of a beneficiary to receive payment *and* damages." UCC §4A-404(c) (emphasis added); *accord id.* §4A-209 cmt.4 ("Acceptance by the beneficiary's bank means that the bank is liable to the beneficiary for the amount of the order."). While Blue Flame has certainly argued for "damages" as §4A-404(a) defines them, *e.g.*, JA3034-36, it has also always asserted its entitlement to the original payment, *e.g.*, JA40 (CBB's "acceptance of the payment order obligated it to pay Blue Flame"); *id.* (listing items of consequential damages as being "among other harms" caused by CBB's U.C.C. violations). The assertion that this argument is waived (at Resp.Br.50-51) accordingly fails.

Indeed, Blue Flame's entitlement to payment is crystal clear under *both* §4A-204(a) *and* §4A-404(a)—an overlap it had no need to break apart until the order on appeal here unexpectedly rejected both bases for liability on different legal grounds. That accounts for Blue Flame's failure to earlier emphasize the straightforward fact that, if the Court found that CBB was violating the law by not paying all the money to Blue Flame, the remedy would have to begin with paying the money to Blue Flame. Indeed, because CBB's failure to pay the money itself is an ongoing violation of §4A-404(a), it would be pointless to call this argument waived anyway, because Blue Flame can file a new, timely claim for redress until the "continuing violation" ends and CBB pays the funds transfer as the law requires. *See DePaola v. Clarke*, 884 F.3d 481, 486-87 (4th Cir. 2018).

CBB's contrary theory—that §4A-404(a) "[b]y its plain terms" limits a customer's recovery to consequential damages, Resp.Br.51—is not only foreclosed by the "plain terms" but also completely zany. Under CBB's view, a bank could seize billions from a wire beneficiary, pay off only the consequential damages of which it had notice, and then just walk away with the principal. Happily, however, Article 4A clearly covers this case by obliging CBB to "pay the amount of the order," and CBB will continue to have that enforceable duty until it complies with the law.

D. CBB's "Bad Faith" Argument Is Plainly Specious

CBB's unseemly argument about the "good-faith" principle enshrined elsewhere in the U.C.C., Resp.Br.52-56, merits little attention because it could not be more clearly foreclosed. Indeed, Article 4A's commentary explicitly states that "resort to principles of law or equity outside of Article 4A is *not appropriate* to create rights, duties and liabilities inconsistent with those stated in this Article." U.C.C.

§4A-102 cmt. (emphasis added). Moreover, as the opening brief explained, App.Br.43-44, Article 4A directs a beneficiary's bank to stay out the relationship between the originator and beneficiary by sticking to its mechanical role, paying the beneficiary, and leaving the resolution of disputes about the parties' respective duties, breaches, and acts of good or bad faith to other sources of law. Accordingly, it is unsurprising that the sole appellate case CBB cites on this issue cuts directly against it. In *Regions Bank*, the Eleventh Circuit observed that "[t]he legislative intent reflected in [Article 4A] is that carefully drafted provisions are not to be sidestepped when convenient by reference to other sources of law." 345 F.3d at 1275 (citation and alteration omitted). It thus turned to alternate sources of law only after finding that "Article 4A [was] silent" on the issues presented there, *id.*, which can hardly be said here.

Given the clarity with which Article 4A's drafters foreclosed arguments like this one, it is fair to assume that it appears here as a hook for casting irrelevant aspersions at Blue Flame. *See, e.g.*, Resp.Br.8-10, 55. Blue Flame obviously disputes any assertion that it engaged in any fraud—a claim that CBB has been all too happy to toss out without any obligation to prove it.[2] But the more important point is that

[2] The record is replete with evidence refuting these aspersions. Thomas's statements to Controller Yee regarding 3M masks were based on information, including "proof of life" documentation, provided to Thomas by an individual with

neither Article 4A nor basic rule-of-law principles allow a bank to use a half-baked and underproved allegation of fraud on some other party to avoid liability for its own Article 4A violations.

IV. Factual Disputes Preclude Summary Judgment On Blue Flame's Tortious-Interference Claims

Apart from the same arguments about damages discussed above, *see supra* pp.14-23, CBB's defense of the district court's summary-judgment grant on tortious interference rests on two additional ineffective arguments.

First, CBB seeks (at 61-62) to transform the district court's statement—that "there are issues with the validity of the contractual relationship and business expectancy between Blue Flame and California," JA3090—into a finding that, as a matter

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whom Blue Flame Strategies had a referral-partner agreement. JA2499-2507; JA2512-13; JA3131; JA2533-39. And his statements regarding Blue Flame's other transactions were based on ongoing negotiations between Blue Flame and other referral partners, relayed to Thomas by Gula. JA2514-15; JA2521-23; JA2621-25. This all proved irrelevant to Blue Flame's deal with California anyway, because no California official negotiated with Blue Flame to purchase any 3M-brand N95 masks, and California in fact wanted *other* mask models expressly approved by the Department of Public Health. *See* JA1590 (Wong specifying model numbers); JA615 (Wong: "[W]e can only accept … the model numbers I texted you"); JA2557-58 (Wong confirming none of those models were 3M). Yee played no role in California's negotiations with Blue Flame or general procurement of PPE. JA2584 (Yee "was not influencing or attempting to influence" other California officials to "do a deal" with Blue Flame); JA2585-87. And there is no evidence that Thomas's statements about other deals, *see* Resp.Br.8, were ever made known to any California official with authority over California's decision to contract with Blue Flame.

of law, fraud occurred and neither the contract nor expectancy was valid. Were that so, one would expect the district court to have identified the elements of fraud in the inducement and applied law to fact, which it did not. So even if the district court had held that identifying some "issues" sufficed to justify its summary judgment on this claim (which, again, it didn't), reversal would still be required for failure to identify any record evidence matching up to any identified law regarding fraud.

Second, CBB confuses the intent standard to suggest that CBB could only have tortiously interfered if CBB was "substantially certain" that its conduct would scuttle the contract. Resp.Br.62-63. That is wrong; the "substantially certain" requirement is just a method of proving intent (through an action and knowledge of its likely consequences), and so is obviously unnecessary if there is direct evidence of intent to interfere. *See* Restatement (Second) of Torts §766 & cmt.j. Here, there *is* substantial evidence that CBB was trying to blow up the deal to protect its capital ratios, which CBB does not contest outside a single footnote. *See* Resp.Br.75 n.26. And that footnote provides only post-hoc testimony about whether there actually was a capital-ratios problem, which of course says nothing about whether Blue Flame's undisputed evidence shows that CBB *believed* there was a capital-ratios problem at the time. Having left that issue uncontested, CBB has no way to defend the district court's summary judgment on this claim.

CONCLUSION

This Court should direct judgment for Blue Flame on its §4A-204(a) claim, and reverse and remand for trial on Blue Flame's state-law, §4A-404(a), and tortious-interference claims.

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Respectfully submitted,
s/ Eric F. Citron

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