

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2380

KENNETH WALLACE, ex rel. DMT, LLC,

Plaintiff - Appellant,

v.

TRUIST BANK,

Defendant - Appellee,

and

EDDIE R. HUGHES, JR.,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at
Alexandria. Leonie M. Brinkema, District Judge. (1:21-cv-00838-LMB-IDD)

Submitted: June 28, 2022

Decided: July 6, 2022

Before KING, WYNN, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Laurin H. Mills, Mansitan M. Sow, SAMEK, WERTHER & MILLS, LLC,
Alexandria, Virginia, for Appellants. Mary Zinsner, Elizabeth M. Briones, TROUTMAN

PEPPER HAMILTON SANDERS, LLP, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kenneth Wallace, who filed the underlying complaint derivatively on behalf of DMT, LLC, appeals the dismissal of his complaint against Truist Financial Corporation. The complaint alleged breach of contract and statutory business conspiracy. Specifically, Wallace alleged that his business partner opened a bank account on behalf of DMT at a Truist branch. Wallace averred that the partner did not have the authority to open such account and that the partner then used the account to defraud and otherwise harm DMT. We affirm.

We review an order granting a Fed. R. Civ. P. 12(b)(6) motion de novo. *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Bare legal conclusions are not entitled to the assumption of truth and are insufficient to state a claim.” *King*, 825 F.3d at 214 (internal quotation marks omitted).

Wallace first asserts that, while there is no specific provision of DMT’s and Truist’s deposit agreement that supports his breach of contract claim, he nonetheless properly pleaded a breach of contractual duties under Title 8.4 of the Virginia Uniform Commercial Code (“UCC”). The district court ruled that Wallace failed to either identify the breached portion of the contract or assert a UCC statutory claim. Further, the court determined that Wallace could not use the UCC to somehow create a contractual obligation.

Wallace did not plead a statutory claim under the UCC, and he did not seek permission to amend either in district court or on appeal to add such a claim. In addition, he admits that his breach of contract claim is not based on the deposit agreement. Thus, Wallace's claim and appeal rest on his assertions that the UCC creates contractual duties between a customer and a bank.

Title 8.4 of Virginia's UCC "establishes the rights and duties between banks and their customers with regard to deposits and collections." *Nat'l Title Ins. Corp. v. First Union Nat'l Bank*, 559 S.E.2d 668, 670 (Va. 2002). The UCC preempts any common law claims inconsistent with its provisions. *Collins v. First Union Bank*, 272 Va. 744, 749-50 (2006). However, claims brought pursuant to the UCC are statutory claims, not contract causes of action. *See American Title Ins. v. Burke & Herbert Bank & Trust*, 813 F. Supp. 423, 429 n.7 (E.D. Va. 1993), *aff'd*, 25 F.3d 1038 (4th Cir. 1994).

Moreover, even if a UCC claim sounded in contract, Wallace does not specifically cite the portions of the UCC that were allegedly breached; instead, his complaint cites only to the definition of "customer," arguing that DMT was Truist's customer to whom certain duties were owed. *See* Va. Code Ann. § 8.4-104(a)(5). However, the statutory definition does not describe any duties and responsibilities; it merely states that a customer is "a person having an account with a bank or for whom a bank has agreed to collect items." *Id.* As such, even if a claim under the UCC could sound in contract, Wallace has failed to plead a breach of contract.

Next, the district court denied Wallace's statutory business conspiracy claim because there was not a sufficient allegation of malice. To recover in an action for business

conspiracy, a plaintiff must establish: “(1) a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in his business[;] and (2) resulting damage to plaintiff.” *Dunlap v. Cottman Transmission Sys.*, 754 S.E.2d 313, 317 (Va. 2014). “It is not necessary for a plaintiff to prove that the defendant conspirators acted with actual malice, i.e., ill-will, hatred, or spite directed toward the plaintiff.” *Id.* “Rather, a plaintiff must establish by clear and convincing evidence only that the conspirators acted with legal malice, i.e., intentionally, purposely, and without lawful justification.” *Id.* (internal quotation marks omitted).

We agree that Wallace failed to adequately allege malice. That is, the complaint did not sufficiently allege that Truist acted intentionally or purposefully. *See Rogers v. Deane*, 992 F. Supp.2d 621, 635 (E.D. Va. 2021) (noting that plaintiff must show that defendant “intended to hurt her business”). Here, Wallace alleged that Truist failed to investigate Wallace’s business partner’s representations upon opening an account on behalf of DMT and failed to take action after Wallace informed Truist that the account was unauthorized and being used for fraudulent purposes. While Wallace does conclusorily allege that “Truist acted intentionally, purposefully, and without lawful justification” because it wanted “DMT’s business,” (J.A. 34), Wallace alleges no facts from which it could be inferred that Truist acted intentionally to harm DMT or even that Truist was willfully blind to the partner’s misdeeds in order to keep DMT’s business. *See Skillstorm, Inc. v. Electronic Data Sys.*, 666 F. Supp.2d 610, 618-19 (E.D. Va. 2009) (granting motion to dismiss in face of allegations that defendant acted to “willfully and maliciously injure” plaintiff’s business because there was no factual support for the allegation); *Schlegel v.*

Bank of America, 505 F. Supp.2d 321, 329 (W.D. Va.) (holding that business conspiracy must be pleaded “with particularity” in order to prevent every business dispute from becoming a business conspiracy), *aff’d*, 258 F. App’x 543 (4th Cir 2007). Because the complaint failed to properly allege that Truist acted knowingly with the intent to harm DMT, the district court properly dismissed this claim.

Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED