

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GLOBAL COLOCATION SERVICES,		:	
LLC,		:	17cv9027
		:	
	Plaintiff,	:	<u>MEMORANDUM & ORDER</u>
		:	
	-against-	:	
		:	
HIBERNIA EXPRESS (IRELAND)		:	
LIMITED,		:	
		:	
	Defendant.	:	
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Plaintiff Global Colocation Services, LLC (“Global”) seeks a temporary restraining order enjoining Defendant Hibernia Express (Ireland) Limited (“Hibernia”) from terminating Global’s access to Hibernia’s undersea transatlantic cable (the “Cable”). Hibernia counters that such relief is unnecessary because the parties are participating in an emergency arbitration that will resolve the issues before this Court. (See Declaration of Bruce H. Lederman, ECF No. __ (“Lederman Decl.”) Ex. B; Letter from Scott Livingston, ECF No. 16 at 1.) For the reasons that follow, Global’s application for emergency relief is denied.

Under New York law, a court may issue a preliminary injunction when a pending arbitration could be rendered ineffectual without such relief. N.Y. C.P.L.R. § 7502(c). In making this determination, a court is to “consider[] the traditional standards governing preliminary injunction relief.” SG Cowen Sec. Corp. v. Messih, 224 F.3d 79, 84 (2d Cir. 2000). These standards require the moving party to establish: (1) a likelihood of success on the merits; (2) irreparable harm in the absence of injunctive relief; (3) that the balance of equities tips in the movant’s favor; and (4) that the injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). The same standards are applied in connection with a

request for a temporary restraining order. Free Country Ltd. v. Drennen, 235 F. Supp. 3d 559, 565 (S.D.N.Y. 2016).

After hearing oral argument on November 21 and November 27, 2017, and reviewing numerous submissions from the parties, this Court finds that Global has not established a likelihood of success on the merits or irreparable harm in the absence of emergency temporary relief.

First, Global fails to demonstrate a likelihood of success on the merits. Although it asserts that the parties' contract permits Global to share service with Virtu Financial, Inc. ("Virtu"), another trading company with whom Global recently merged, the weight of New York authority does not support that proposition. "Absent explicit language demonstrating the parties' intent to bind future affiliates of the contracting parties, the term 'affiliate' includes only those affiliates in existence at the time that the contract was executed." Ellington v. EMI Music, Inc., 21 N.E.3d 1000, 1004 (N.Y. 2014) (citing VKK Corp. v. Nat'l Football League, 244 F.3d 114, 130–31 (2d Cir. 2001)).

Second, the emergency arbitrator will soon determine whether Global may allow Virtu to "piggyback" on Global's Cable access, or whether such an arrangement would breach the contract between Global and Hibernia. (Lederman Decl. Ex. B at ¶¶ 3, 32.) This is essentially the mirror-image of the question presented to this Court—namely, whether Hibernia is entitled to terminate Global's service based on Global's planned integration with Virtu.

Once the emergency arbitrator decides this question, one of two events will occur: (1) either Virtu may utilize Global's access to the Cable; or (2) Global and Virtu will have to renegotiate a new agreement with Hibernia. A temporary restraining order would interfere with the emergency arbitration when briefing in that proceeding is nearly complete. And Hibernia

acknowledges that if it prevails, it will not terminate access until Global has a reasonable opportunity to negotiate a new service agreement. (Letter from Scott Livingston, ECF No. 16 at 5; Nov. 27, 2017 Hr'g Tr. at 20:7–21.)

Accordingly, Global's application for a temporary restraining order is denied. Mindful of the evolving nature of this dispute, either party may submit any additional applications they believe appropriate after the emergency arbitrator's decision on December 6, 2017. The parties should notify the Court if a briefing schedule needs to be fixed for Global's motion for a preliminary injunction.

Dated: November 29, 2017
New York, New York

SO ORDERED:


WILLIAM H. PAULEY III
U.S.D.J.