JUDGE PAULEY

17 CV 9027

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GLOBAL COLOCATION SERVICES LLC, Plaintiff, v. HIBERNIA EXPRESS (IRELAND) LIMITED, Defendant.	17 Civ. __________ **COMPLAINT**

Plaintiff Global Colocation Services LLC ("Global Colocation"), by its attorneys Paul, Weiss, Rifkind, Wharton & Garrison LLP, brings this action for injunctive relief in aid of arbitration against Defendant Hibernia Express (Ireland) Limited ("Hibernia").

NATURE OF THE ACTION

1. Plaintiff Global Colocation has commenced an arbitration against Hibernia seeking a declaratory judgment that Hibernia may not unilaterally terminate the parties' December 15, 2014 Express Service Master Services Agreement (the "KCG Agreement"), as Hibernia is now threatening to do. Global Colocation brings this action for an injunction to preserve the status quo pending arbitration.

2. Global Colocation, together with its parent KCG Holdings, Inc. and other affiliates (hereinafter, "KCG"), is a leading market-maker on exchanges worldwide. In 2014, Global Colocation contracted with Hibernia to gain access to Hibernia's new high-speed transatlantic cable (the "Hibernia Cable"), which KCG now uses to send critical, time-sensitive information and data between its trading operations in the United States and Europe in order to facilitate KCG's ability to trade in both jurisdictions.

3. [redacted] Under the terms of the KCG Agreement, Global Colocation guaranteed access to the Hibernia Cable through at least November 2020, unless Global Colocation is in Default under the specific provisions set forth in Section 11.1 of the KCG Agreement, in which case Hibernia is permitted to, among other things, terminate the Services (see Section 11.2 of the KCG Agreement).

4. Notwithstanding that Plaintiff is clearly not in Default under any of the provisions set forth in Section 11.1, Hibernia has nonetheless indicated that it will—in plain breach of the terms of the KCG Agreement—terminate the KCG Agreement unilaterally in December 2017, and shut off KCG's access to the Hibernia Cable.

5. Hibernia's threats to shut off access are completely unjustified and without basis under the express terms of the KCG Agreement and, if carried through, will likely cause serious and irreparable damage to KCG's operations, profitability and business reputation.

6. Disputes between Global Colocation and Hibernia are subject to arbitration in New York under the Rules of the International Chamber of Commerce ("ICC"). Accordingly, to prevent this improper termination of the KCG Agreement, Global Colocation filed a Request for Arbitration with the ICC against Hibernia on November 2, 2017, seeking a declaratory judgment that Hibernia may not terminate KCG's access to the Hibernia Cable, as Hibernia has threatened to do.

7. Despite the pendency of the arbitration, Hibernia has made clear that it will nonetheless go ahead with its plan to shut off KCG's access to the Hibernia Cable on or around December 7, 2017.

8. KCG and Hibernia agreed that the arbitration provision would "not operate to prevent either party from applying to a court of competent jurisdiction for an emergency injunction or other such relief." Accordingly, Global Colocation now brings this action in this Court seeking a temporary restraining order and preliminary injunction in order to preserve the status quo and maintain its access to the Hibernia Cable pending the outcome of the arbitration.

9. Absent such provisional relief pending resolution by the ICC, KCG stands to suffer immediate, irreparable, and unquantifiable harm. KCG uses the Hibernia Cable to place orders resulting in tens of thousands of trades every day, and has various contractual commitments to serve as a market-maker in European markets and exchange traded products. Without access to the Hibernia Cable, KCG expects that it will no longer be able to satisfy contractual market-making services in a commercially viable manner. It faces potential reputational harm, lost goodwill, and lost profits.

10. No arbitral award from the ICC could adequately compensate KCG for the harms its business would suffer in the interim if Hibernia shuts off KCG's access to the Hibernia Cable pending arbitration.

PARTIES

11. Plaintiff Global Colocation is a limited liability company organized under the laws of Delaware, with its principal place of business in New York. Plaintiff Global Colocation is now an indirect subsidiary of Virtu KCG Holdings, LLC. ("KGC Holdings"), and acts as an intercompany service provider that contracts for, among other things, transatlantic data transfer services to facilitate KCG's trading business. On July 20, 2017, Plaintiff and its affiliates were indirectly acquired by Virtu Financial, Inc. ("Virtu").

12. Defendant Hibernia Express (Ireland) Limited is a company organized under the laws of Ireland, with its principal place of business in Ireland.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, because there is diversity of citizenship between the parties and the amount in controversy exceeds the sum of $75,000 exclusive of costs and interest.

14. This Court also has subject matter jurisdiction under the Federal Arbitration Act, 9 U.S.C. § 1.

15. This Court has personal jurisdiction over Hibernia pursuant to N.Y. CPLR § 302(a)(1) because it transacts business in the State of New York and contracted to provide services in New York, and because the parties contractually agreed that, "[a]ny dispute . . . will be referred to and finally resolved by arbitration in New York," and "governed by the law of the state of New York of the United States of America."

16. This Court also has personal jurisdiction over Hibernia pursuant to N.Y. CPLR § 7502(c), as Hibernia is party to an arbitration proceeding in New York City.

17. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to this action have occurred and/or will occur in this district, and because the parties have contractually agreed that, "[a]ny dispute . . . will be referred to and finally resolved by arbitration in New York."

FACTS

KCG's Business Requires Access to High Speed Technology

18. KCG is a leading financial firm that uses cutting-edge technology to act as a market-maker and generate liquidity that helps to create more efficient markets and provide trading and technology solutions to clients. A market-maker is "a firm that stands ready to buy and sell a particular stock on a regular and continuous basis at a publicly quoted price." (*See* U.S. Securities and Exchange Commission, Fast Answers, https://www.sec.gov/fast-answers/answersmktmakerhtm.html (accessed October 4, 2017).) In other words, as a market-maker, KCG acquires shares of a security to facilitate trading in the market by simultaneously quoting both a buy and a sell price for that security.

19. KCG places millions of orders, resulting in millions of trades per day, all across global markets in order to provide liquidity to those markets. Specifically, KCG trades in equities, commodities, currencies and other financial instruments. It also provides technology and trading solutions to its clients.

20. KCG's business fully depends on its being able to trade across global markets at least as fast as any other market participant. KCG relies on leading technology to quickly and efficiently conduct millions of trades each day in different markets across the globe.

21. To send critical, time-sensitive information and data between its trading operations in the United States and Europe, KCG currently relies on the Hibernia Cable. Access to the Hibernia Cable, through Global Colocation's contract with Defendant, is a critical component of KCG's ability to compete efficiently and effectively.

The Hibernia Cable

22. In 2014, Hibernia introduced its new high-speed (or "low latency") transatlantic cable. Hibernia represented that the Hibernia Cable would have the lowest latency—in other words, the fastest connection—of any existing transatlantic system between financial markets in the New York metropolitan area and London.[1]

23. In order to facilitate its high-speed trading in Europe, Global Colocation contracted with Hibernia for access to the Cable. Thus, on December 15, 2014, Global Colocation entered into the KCG Agreement with Hibernia to secure access to the Cable for KCG's trading operations.

24. The KCG Agreement expressly contemplated that access to the Cable would be available to all of Global Colocation's "affiliates."

25. Thereafter, KCG has used the Cable—and continues to use the Cable to this day—to send information and data across the Atlantic that result in tens of thousands of trades per day between New York and Europe. In short, the Cable has become a key part of KCG's technology infrastructure.

26. Without access to the Cable, KCG would be forced to shut down a significant portion of its trading activity with financial markets in Europe, which would have a significant impact on revenue and expose it to potential legal, regulatory and reputational risks.

The Terms of the KCG Agreement with Hibernia

27. The KCG Agreement is governed by New York law.

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1 Technically, the Hibernia Cable routes messages, such as trade orders, from a data center in Secaucus, New Jersey to a data center in Slough, England.

28. Under the KCG Agreement, Hibernia agreed to provide Global Colocation with "low latency transport services" between the United States and Europe. (*See* KCG Agreement, Section 7.1.) The term of Global Colocation's access to the Cable is through November 2020.

29. Under Section 2 of the KCG Agreement, the agreement "shall remain in effect until the expiration of the last Service provided hereunder, unless earlier terminated as provided in this Master Services Agreement."

30. Sections 11.1 and 11.2 of the KCG Agreement, in turn, provide that Hibernia may only terminate the KCG Agreement before November 2020 if Plaintiff is in Default, as that term is defined by Section 11.1 of the KCG Agreement. Specifically, Section 11.1 states in relevant part:

> A default shall exist with respect to a Service if: (a) Customer fails to pay any undisputed amount due with ten (10) Business Days after written notice specifying such breach; (b) in the case of any other material breach, either party fails to cure such breach within (10) Business Days (a default shall not have occurred so long as the relevant party has commenced to cure within said time period and thereafter diligently pursues such cure to completion), (c) either party makes a material misrepresentation in any submission to the other party, (d) an Event of Insolvency occurs with regard to a party, or (e) the Service fails to conform with the SLA.

31. Section 11.2 provides as follows: "In the event of any default, the non-defaulting party may immediately and without further notice avail itself of one or more of the following remedies: . . . (b) terminate the Service . . . ."

32. Significantly, Plaintiff is not in Default pursuant to Section 11 of the KCG Agreement, nor has it been in Default. Accordingly, because no Default exists, Hibernia may not terminate the KCG Agreement.

33. The KCG Agreement provides that Global Colocation may access the Hibernia Cable on behalf of itself "and its Affiliates." (See Section 7.1).

34. Hibernia's threats to shut off Global Colocation's access to the Cable are thus completely unjustified and without basis under the express terms of the KCG Agreement.

Virtu Provides Notice of Termination and Hibernia Threatens to Wrongfully Terminate Global Colocation's Access

35. In fact, Defendant's threats to terminate the KCG Agreement with Global Colocation have nothing to do with Global Colocation and have everything to do with generating leverage in a separate contractual dispute with Virtu, which acquired KCG (and Global Colocation) in July 2017.

36. Virtu is another leading worldwide market-maker and, prior to its acquisition of KCG, had also entered into its own agreement with Hibernia (the "Virtu Agreement"). Similar to the KCG Agreement at issue here, in the Virtu Agreement, Hibernia agreed to provide Virtu with access to the Cable through 2020.

37. Under the terms of the Virtu Agreement, however, Hibernia expressly agreed to allow Virtu to terminate its agreement for access to the Cable if any person offered a service that is equal to or faster than the service provided by Hibernia through the Cable.

38. On August 9, 2017, Virtu provided notice to Hibernia of a newly available technology which was as fast as or faster than the Cable, provided the requisite documentation demonstrating such, and notified Hibernia that it would be terminating its agreement with Hibernia on or about December 7, 2017.

39. The new technology was developed internally by Virtu and is faster than the Hibernia Cable, but subject to certain capacity constraints such that KCG cannot switch all of its activity off the Hibernia Cable and to Virtu's new technology.

40. Hibernia has disputed that Virtu is permitted to terminate its agreement, and repeatedly threatened to retaliate against Virtu by shutting off KCG's access to the Hibernia Cable.

41. On November 2, 2017, Global Colocation filed a Request for Arbitration against Hibernia seeking declaratory judgment that Hibernia may not terminate Global Colocation's access to the Hibernia Cable, arguing that Virtu's termination is not grounds for Hibernia to terminate the KCG Agreement.

42. On November 13, 2017, Hibernia filed a Request for Joinder and Arbitration against Virtu seeking damages for breach of contract, anticipatory breach, specific performance, and injunctive relief. Hibernia also filed an Application for Emergency Measures before the ICC, seeking an order directing: (1) Virtu not to use Global Colocation's access to the Hibernia Cable until the completion of arbitration; and (2) Global Colocation not to permit Virtu to use Global Colocation's access to the Hibernia Cable pending the completion of arbitration.

43. Even though arbitration is pending before the ICC, Hibernia is still attempting to coerce Virtu to withdraw its termination notice and continue to make payments under the Virtu Agreement by threatening to irreparably harm KCG by shutting off KCG's access to the Hibernia Cable.

44. By letter dated November 8, 2017, Global Colocation requested the Hibernia confirm that it will not terminate KCG's access to the Hibernia Cable before the arbitral panel resolves Global Colocation's claim. Given the potential serious harm to KCG's business that could ensue from its losing access to the Hibernia Cable, Global Colocation warned that without confirmation, Global Colocation would have no choice but to seek an injunction in aid of arbitration to prevent Hibernia from terminating its access.

45. By letter dated November 13, 2017, Hibernia responded that it would shut off Global Colocation's access to the Hibernia Cable unless: (1) Global Colocation remains current on its

payment obligations to Hibernia and otherwise does not default under the parties' service agreement; and (2) Global Colocation agrees not to, and does not, give Virtu access, either directly or indirectly, to Global Colocation's access to the Hibernia Cable.

46. Global Colocation does intend to remain current on its payment obligations to Hibernia and not otherwise default under the parties' service agreement. However, as discussed above, the KCG Agreement expressly contemplated that access to the Hibernia Cable would be available to all of Global Colocation's "affiliates." (*See supra* ¶ 24.) Hibernia thus has no basis to demand that Virtu not use Global Colocation's access, or vice versa. Moreover, Virtu and KCG have merged as of July 2017, and they continue to integrate their operations. As a practical matter, therefore, what Hibernia demands is not possible.

47. The parties have not been able to reach a resolution. Notwithstanding that KCG continues to perform under the contract, and has not manifested an intent to cease performing under the contract, Hibernia continues to threaten to terminate service to KCG, in breach of the KCG Agreement, as soon as December 7, 2017, unless Global Colocation will agree to an unreasonable and impossible condition.

48. On information and belief, Hibernia would not be harmed, and will not incur any substantial additional costs, by continuing to provide access to the Hibernia Cable to KCG pending a resolution of the instant disputes in ICC arbitration.

49. KCG, by contrast, will suffer significant damages if its access to the Hibernia Cable is shut off imminently. Not only does KCG use the Cable to conduct significant trading, it also has contractual commitments to serve as a market-maker in European markets and exchange trade products. Without access to the Cable, KCG expects that it would no longer be able to satisfy

contractual market-making services in a commercially viable manner. It also faces potential reputational harm, lost goodwill, and lost profits as high as hundreds of thousands of dollars per day.

CLAIM FOR RELIEF

(Injunctive Relief in Aid of Arbitration)

50. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 49 above as if fully set forth here.

51. Under the KCG Agreement, Hibernia is required to provide access to the Hibernia Cable to KCG through November 2020.

52. Hibernia's threat to terminate KCG's access to the Hibernia Cable upon valid termination of the Virtu Agreement on or around December 7, 2017 violates the KCG Agreement.

53. On November 2, 2017, Global Colocation filed a Request for Arbitration against Hibernia seeking declaratory judgment that Hibernia may not terminate Global Colocation's access to the Hibernia Cable.

54. Pursuant to CPLR § 7502(c), the Federal Arbitration Act, and this Court's inherent authority, Plaintiff seeks a temporary restraining order and preliminary injunction because any arbitration award to which KCG may be entitled would be rendered ineffective without provisional relief that maintains the status quo pending arbitration.

55. KCG is likely to prevail on the merits of its claims in an arbitration that Hibernia may not terminate Global Colocation's access to the Hibernia Cable.

56. KCG will suffer irreparable injury if the requested provisional relief is not granted; and the balance of equities favors granting relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff hereby requests judgment against Defendant as follows:

(a) Issuing a temporary restraining order and preliminary injunction in aid of arbitration that bars Defendant from terminating or interrupting Plaintiff's access to the Hibernia Cable under the KCG Agreement pending arbitration;

(b) An award of costs; and

(c) Such other relief as this Court deems just and proper.

Dated: New York, New York
November 17, 2017

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

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