

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

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CITIBANK, N.A. as assignee of	:	
CITICAPITAL MUNICIPAL FINANCE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 2:11-cv 214
	:	
	:	
CITY OF BURLINGTON and	:	
MCNEIL, LEDDY & SHEHAN, P.C.,	:	
	:	
Defendants.	:	
-----X	:	

**DEFENDANT/COUNTERCLAIMANT CITY OF BURLINGTON’S OBJECTION
AND RESPONSE TO PLAINTIFF’S MOTION FOR A MANDATORY
PRELIMINARY INJUNCTION**

Defendant/Counterclaimant City of Burlington (hereinafter “Burlington”) by and through its attorneys, Burak Anderson & Melloni, PLC, objects to Plaintiff Citibank N.A.’s (“Citibank”) [as the purported assignee of CitiCapital Municipal Finance] Motion for Mandatory Preliminary Injunction and/or Preliminary Injunction and respectfully requests that said motion be denied. In support of its Objection, Burlington submits and relies upon the following Memorandum of Law, as well as such additional evidence as may be obtained through discovery and at the Court’s hearing presently scheduled for February 1 and 2, 2012.

As more fully set forth in Burlington’s Answer, Affirmative Defenses and Counterclaims (the “Answer”), Citibank comes to this Court seeking to avoid the consequences of its own documents and assumption of risk. In its Motion for a Mandatory Preliminary Injunction, Citibank attempts to portray Burlington’s exercise of

its rights under its **MASTER STATE AND MUNICIPAL LEASE/PURCHASE AGREEMENT** (the "Master Lease Agreement") – which resulted in the termination of the Master Lease Agreement – as a “default” or “breach” of that agreement. This was not, however, a loan or similar lending arrangement. Citibank designed the arrangement as 20 one-year leases subject to annual appropriation by Burlington. Burlington did not make such an appropriation for its fiscal year beginning July 1, 2010, thereby triggering Citibank’s rights under the Termination provisions of the Master Lease Agreement. There was no “breach” or “default” by Burlington.

Burlington acknowledged Citibank’s rights in the “Equipment” as defined in the Master Lease Agreement and repeatedly offered to negotiate an orderly turnover – or like/kind exchange – of the Equipment as well as a reasonable rental payment during the interim period of time. Citibank rebuffed each such effort, simply demanding full payment through the maximum term of the Master Lease Agreement and/or turnover of the Equipment without instructions as to how to effectuate the turnover. Moreover, Citibank’s request for a list of equipment that it financed underscores its lack of knowledge of the assets in question.

As Citibank is well aware, Burlington Telecom (“BT”) is a municipal utility providing essential services to approximately 3900 customers. Citibank’s demands in this Motion for Mandatory Preliminary Injunction are punitive and intended as a threat to others with whom it may have similar arrangements.¹ Regardless of Citibank’s other commitments, Burlington asks simply that this Court judge the Motion by the usual standards applicable to Mandatory Preliminary Injunction motions – outlined herein.

¹ “This case presents important and previously unaddressed questions of municipal finance law with potential reverberations well beyond Burlington, reaching established principles of national public finance and credit markets.” Memorandum at p. 31.

Burlington respectfully submits that, when judged against those standards, the Motion must be denied.

MEMORANDUM

I. Factual Background and Introduction

BT is an enterprise fund of the City of Burlington operated under the auspices of the Clerk Treasurer's Office, with headquarters at 200 Church Street in the City of Burlington. BT was formed under Article 96 of the City of Burlington's charter and Burlington was authorized to operate BT pursuant to a Certificate of Public Good ("CPG") duly issued by the Vermont Public Service Board ("PSB") on September 13, 2005. BT currently provides internet, phone and cable television services on a "fiber to the premises" network to approximately 3900 customers in Burlington. BT also provides the telecommunications network for the City of Burlington, the Burlington School District and all of Burlington's public safety and emergency service departments.

Beginning in 2002 Burlington, seeking to develop BT, sought private financing. In 2002, 2004 and 2006, Burlington executed lease agreements with Koch Financial Corp. ("Koch") in the aggregate of roughly \$22 million. In 2007, Burlington sought to refinance the Koch leases and obtain additional new funds. To that end, Burlington issued a Request for Bids ("RFB") to several potential providers of financing on or about June 13, 2007. The RFB was sent to, among others, Citicorp Vendor Finance, Inc., CitiCapital, and Municipal Leasing Consultants ("MLC"). Although the proceeds of this particular round of financing were to be used only to finance (and refinance) BT's expansion within Burlington, documents included with the RFB advised potential bidders of Burlington's intentions to expand its facilities outside of the city limits. MLC, of Grande Isle,

Vermont, was the successful bidder for the financing and, although Citicorp Vendor Finance, Inc., and CitiCapital had chosen not to submit bids, MLC proposed a transaction in which yet another Citibank entity, CitiCapital Municipal Finance (“CMF”), would provide financing in a two-step process. First, Burlington would enter into a Master Lease Agreement with MLC, and then MLC would assign its rights and obligations under the Master Lease Agreement to CMF.

In the course of the negotiations leading up to execution of the Master Lease Agreement, representatives of Burlington advised MLC, as the representative of CMF, that additional funding beyond that contemplated in the Master Lease Agreement would be necessary. MLC advised Burlington that CMF would provide the necessary financing. Ultimately, based on these representations, on or about, August 9, 2007, Burlington, as Lessee, entered into the Master Lease Agreement with MLC as Lessor, and on or about the same date, MLC assigned its rights to CMF. An opinion letter from co-Defendant McNeil, Leddy & Sheahan, P.C. was provided a week *after* CMF accepted this assignment. The final form of the Master Lease Agreement, which had been drafted by MLC and/or CMF, contained a “non-appropriation” clause at Section 7 which provided that should Burlington choose not to duly budget and appropriate funds to the Master Lease Agreement for a fiscal year, the Master Lease Agreement automatically terminated.

In 2008, Burlington requested the promised additional funding from CMF. CMF failed to honor its commitment and stated that it was out of the business of municipal leasing. Burlington was left without financing for BT and used unreimbursed pooled cash to pay the Master Lease Agreement and BT operating expenses. The Public Service

Board's Order in February, 2010, caused BT to be unable to make further lease payments from pooled cash. Citibank - the purported successor to CMF- then drew down, once in March and once in June, 2010, on an Escrow Reserve Fund established for use in the event a lease payment was not made. Shortly thereafter, Burlington chose not to budget and appropriate monies to the Master Lease Agreement and on June 30, 2010 the Master Lease Agreement terminated pursuant to Section 7. No event of default occurred.

Following the termination of the agreement, Burlington made a number of comprehensive proposals for restructuring and compromise that Citibank summarily rejected. Afterwards, Burlington offered to return all head end and facility equipment to a location designated by Citibank. At Citibank's choice, Burlington either would have returned all field equipment (optical node interfaces and set top boxes) pursuant to a de-installation schedule or provide replacement new equipment. Return of fiber cable would have been accomplished utilizing a "like-kind" exchange.² Alternatively, Burlington advised Citibank that a cash payment in lieu of a return was possible. Plaintiff responded only that it would prefer to receive the cost of the new fiber cable and set top boxes, and never followed up with Burlington on Burlington's proposals and suggestions. Nor did The Great American Group - collection agents purportedly hired by Citibank to arrange for the return of the equipment - ever contact Burlington.

When Citibank filed suit in this Court, its lease of equipment to Burlington pursuant to the Master Lease Agreement had been terminated for over a year, and equipment had been in use for a number of years. When it filed its instant Motion, roughly eighteen months had passed since lease termination. Although some of its

² Burlington would have provided identical specification fiber, in the overall length utilized in the network, on standard factory rolls.

prayers are labeled as seeking mandatory injunctions and others are labeled merely as asking for generic preliminary relief, all of the remedies sought envision the practical termination of delivery by BT of telephone, internet and cable television services to approximately 3900 subscribers, including Burlington's schools and its public safety services. Award of such an injunction against this statutorily authorized and regulated government activity would alter the *status quo* and bring disastrous consequences to the residents of Burlington.

Citibank's interest patently does not coincide with the public's. Notwithstanding its receipt of billions of taxpayers' bailout dollars during the period since it entered into the Master Lease Agreement, equating its desire to yet again be compensated with public funds for its business practices is fundamentally untenable.

Citibank must demonstrate a clear or substantial likelihood of success on the merits in order to obtain any of the scattershot categories of relief prayed for in its Motion. For the reasons set out below, Citibank is unable to do so.

II. Governing Law

A preliminary injunction is an "extraordinary remedy never awarded as of right," *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 376, 172 L.Ed.2d 249 (2008). "A plaintiff seeking a preliminary injunction must establish that he is (1) likely to succeed on the merits, that (2) he is likely to suffer irreparable harm in the absence of preliminary relief, that the (3) balance of equities tips in his favor, and that (4) an injunction is in the public interest." *Id.* at 374 (emphasis added); *see also Nolen v. City of Barre*, 2011 WL 805865, *1, *6 (D.Vt 2011). "The question is not whether the plaintiff has suffered irreparable harm, but whether it will be irreparably harmed in the

absence of an injunction. In other words, the injunction must prevent or remedy the harm.” *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 2011 WL 2811317 *1, *2 (D. Vt. 2011).

To receive an injunction, a plaintiff must also show that “he or she has no adequate remedy at law.” *Gour v. Morse*, 652 F. Supp. 1166, 1172 (D. Vt. 1987) *citing Newman v. State of Alabama*, 683 F.2d 1312, 1319 (5th Cir.1982); *see also Campbell Inns, Inc. v. Banholzer, Turnure & Co., Inc.* 148 Vt. 1, 4 527 A.2d 1142, 1144 (1987) (“Where the right to relief is clear and a remedy at law is inadequate, specific performance by injunction is appropriate”). Monetary relief is a legal remedy. *See Feltner v. Columbia Pictures Television, Inc.* 523 U.S. 340, 118 S.Ct. 1279 (1998). If money damages can make the party seeking the injunction whole, the grant of an injunction is improper as no irreparable harm will result. *See e.g. Lucente v. International Business Machines Corp.* 310 F.3d 24 (2d Cir. 2002).

If the movant seeks to alter, rather than maintain the status quo, *i.e.* seeks a mandatory injunction, “[it] ‘must meet the more rigorous standard of demonstrating a ‘clear’ or ‘substantial likelihood’ of success on the merits.” *Nolen v. City of Barre, supra* at *6, *citing Doninger v. Niehoff*, 527 F. 3d 41, 47 (2d Cir. 2008), and *Rossini v. Republic of Argentina*, 2011 WL 2600404 *1 (2d. Cir 2011).

When the actions of a government entity, such as Burlington, are challenged, “(a) party seeking to enjoin ‘government action taken in the public interest pursuant to a statutory or regulatory scheme cannot rely upon the ‘fair ground for litigation’ alternative...” [treated by the Second Circuit, in *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F. 3d 30 (2d Cir. 2010) as surviving *Winter*,

but almost immediately held to be unavailable in suits against governments] *See Oneida Nation of New York v. Cuomo*, 645 F. 3d 154, (2d. Cir. 2011); *Monserate v. N. Y. State Senate*, 599 F. 3d 148 (2d Cir. 2010).

III. Argument

a. Likelihood of Success on the Merits

It is difficult to respond to Citibank's bald assertion that it is "virtually certain" to succeed on the merits. As an initial matter, it is unclear whether Citibank is seeking to enforce its rights under the Master Lease Agreement or seeking compensation for a vaguely defined breach of some poorly defined contract. In its Memorandum at page 25, Citibank asserts that it will likely succeed on the merits of Count III of the Complaint asserting Breach of Contract seeking damages in excess of \$33,500,000 as well as punitive damages. It is abundantly clear from Burlington's Answer and Affirmative Defenses and Counterclaims ("Burlington's Answer") that Burlington has scrupulously complied with the requirements of the Master Lease Agreement, including the termination provisions. The Master Lease Agreement has been terminated, and there has been no breach of that agreement.

Citibank – intentionally or otherwise – conflates and confuses termination of the lease with default or breach of contract. Then, Citibank repeatedly asserts that Burlington has admitted to breach of contract. However, each so-called admission offered up by Citibank relies on documents and statements in which Burlington has acknowledged termination of the Master Lease Agreement and further acknowledged its obligations under the Master Lease Agreement after such termination. Burlington's statements constitute no evidence that Burlington has breached an agreement with Citibank.

Citibank relies on certain representations contained in the Master Lease Agreement and an opinion letter – both executed in August 2007 – in an attempt to "bootstrap" the limited rights available to it under its Master Lease Agreement into rights it might otherwise have had if it had negotiated a loan agreement or similar borrowing arrangement. However, Citibank offers no proof the representations and opinions were false; much less, that the representations and statements were false at the time they were made in August, 2007, or even that they were the direct cause of any harm.

Citibank appears to believe that the simple fact that Burlington terminated the lease – in and of itself – constitutes indisputable proof that Burlington must have breached something. For example, Citibank claims, again without support, that this is "a textbook example of breach of the implied covenant of good faith and fair dealing." Apparently, that textbook was written prior to adoption in Vermont of the economic-loss doctrine. *See, e.g., Springfield Hydroelectric Company, v. Lawrence D. Copp and Jonathan Downer.*, 172 Vt. 311, 779 A.2d 67 (2001). Citibank offers no proof that would support tort liability in this case. The merits of the "unjust enrichment," conversion and indemnification claims will be addressed, if necessary, at the hearing. Suffice to say, Citibank's offerings do not support a finding that Citibank will likely succeed on the merits.

Burlington acknowledges – as it has always acknowledged – that the Master Lease Agreement terminated in accordance with the terms set forth in the Master Lease Agreement. Burlington has acknowledged its responsibilities upon termination of the Master Lease Agreement. However, as more fully discussed in Counterclaim Paragraphs 51-75 of Burlington's Answer, incorporated herein by reference, Citibank has steadfastly

refused to enter into discussions necessary for the orderly return of the Equipment³, preferring instead, the *in terrorem* impact of a threat that, if made good, would interrupt utility services – internet, phone and cable – for approximately 3900 customers and destroy any enterprise value yet retained by BT.

Citibank is well aware that the fiber cable, if de-installed, would be without significant value. Citibank has failed to respond to offers of a like kind exchange for new cable or the cash equivalent. These offers would be worth far more to Citibank than used fiber cable. Citibank comes to this Court purportedly seeking equity. It seeks only revenge on an entity that has scrupulously adhered to the terms of the Citibank's own Master Lease Agreement and related documents.

Citibank cannot establish that it is likely to succeed on the merits of the case. Filed prior to receipt of Burlington's Answer and Co-Defendant McNeil Leddy & Sheahan's Motion to Dismiss, Citibank's motion ignores countless facts which Burlington detailed in its responsive pleading and which will be further explored at the evidentiary hearing. These facts call Citibank's position, that this is a simple case of Burlington's breach of contract, into serious doubt. There are substantial issues of fact that challenge Citibank's notion that it owns the equipment and has a right to rent and immediate de-installation. Furthermore, they establish that Citibank acted in bad faith when it induced Burlington to enter the Master Lease Agreement with fraudulent promises of future financing, and then refused to extend such financing and precipitated BT's financial free-fall. Because Citibank seeks a mandatory injunction, it must "demonstrate a 'clear' or 'substantial' likelihood of success on the merits." *Jones v. National Conference on Bar Examiners*, -- F. Supp. ---, 2011 WL 3321507 *1 (D.Vt.

³ Citibank has also refused to negotiate a fair rental rate for the Equipment.

2011). Citibank cannot carry this heavy, heightened burden when the behavior described in Burlington's Answer is considered by the Court.

b. Immediate and Irreparable harm.

Citibank has made it expressly clear that the remedy it seeks is monetary in nature. In its Memorandum in Support of its Motion for a Mandatory Injunction/Preliminary Injunction, Citibank proclaims that it should be granted injunctive relief because "the outlook for Burlington's ability to repay...the sum of money it owes to Citibank appears bleak...."⁴ Were Citibank actually seeking the equitable remedy of return of equipment, speculation regarding Burlington's financial status would be inconsequential. Citibank further tips its hand that it seeks monetary compensation when it pleads that Burlington is not protected by the doctrine of Sovereign Immunity. If Citibank is correct that Sovereign Immunity does not protect Burlington, then Burlington may be sued for money damages by Citibank. Were Burlington protected by the doctrine, Citibank's only relief would be equitable.

In its course of dealing prior to filing suit, Citibank repeatedly rejected numerous proposals that would have provided Citibank the tangible equipment and/or the rental payments it now seeks. Citibank rejected each proposal summarily, and stated that it preferred monetary compensation to return of used equipment. Since monetary relief will compensate Citibank for any alleged loss, equitable relief is not appropriate.

Assuming, *arguendo*, that this Court believes Citibank's claims are facially suitable for equitable relief, Citibank cannot carry its burden because it cannot establish

⁴ Citibank goes on to cite the Blue Ribbon Committee's recommendation that Burlington reduce debt with creditors in order to recapture the investment in BT. Citibank fails to mention that it is one of the main creditors and that when presented with an opportunity to refinance BT and reduce BT debt, Citibank failed to do so.

that it is in danger of suffering immediate harm. BT equipment is not a wasting asset. BT's equipment is not in any danger of being depleted in quantity, or moved to a location where Citibank could not make a claim on it. A decrease in value, which Citibank hinges much of its motion on, may be redressed with a legal remedy - money damages - and does not constitute irreparable harm.

Citibank's own post-termination actions demonstrate that Citibank is not in any danger of immediate or irreparable harm. Since the Master Lease Agreement terminated on June 30, 2010, Burlington presented Citibank with numerous proposals to return the equipment in an orderly fashion. Plaintiff refused Burlington's offers and failed to arrange for the collection of equipment Citibank now claims it owns. Furthermore, Plaintiff has acted in bad faith and ceased any discussions regarding the return of equipment. Citibank's does not now, nor has ever before, faced an immediate, irreparable harm from Burlington's delay in immediately de-installing and returning the equipment.

c. Balance of the Equities.

When balancing the equities, no injunctive relief in favor of Citibank should be issued. Citibank argues that the equities favor Citibank because it is being deprived of its assets – the equipment- and its ability to collect revenue from those assets. To see how one of the world's largest financial companies is being greatly harmed by its inability to use fiber-optic cable is frankly difficult. Compared to the harm an injunction would cause Burlington and its residents, these assertions fail to support Citibank's motion.

BT currently serves approximately 3900 customers. BT also provides telecommunications services to the government of the City of Burlington and the

Burlington School District. Most importantly, BT's equipment is used to provide telecommunications services to Burlington's public safety and emergency service departments. If Citibank is allowed to force the immediate de-installation of the equipment, service will be interrupted to the people and government of Burlington. Compared to the disruption of Burlington's government, schools system and public safety systems, Citibank's alleged harm is miniscule.

d. Is the Injunction in the Public Interest

Citibank makes several incomprehensible claims that the grant of injunctive relief is in the public interest. At page 31 of the Memorandum in Support of its Motion, Citibank finally comes clean on the harm it fears. It states: "[t]his case presents important and previously unaddressed questions of municipal finance law with potential reverberations well beyond Burlington, reaching established principles of national public finance and credit markets." Burlington has no knowledge – yet – of the number of similar lease transactions Plaintiff engaged in prior to 2008. But to claim that the precedential effect of this litigation somehow places Citibank as a representative of the general public is disingenuous in the extreme.

Moreover, Citibank hints that the public interest is served because if Burlington is allowed to "breach the Agreement" Citibank will see to it that Burlington will not be able to obtain municipal financing in the future for other public projects.⁵ Threatening that Burlington's ability to obtain financing for other city projects will be thwarted unless Citibank is granted an injunction over Burlington's objection does not suddenly place Citibank as a protector of the public or its alter ego.

⁵ "If Burlington is permitted to breach its Agreement without any recourse in the manner it seeks, the ability of Burlington to obtain municipal financing for other city projects in the future will be seriously compromised if not functionally eliminated." Memorandum at pp. 38-39.

Conversely, denying the motion for injunctive relief allows Burlington's government, schools, public safety and emergency service departments, including 9-1-1 services, to continue uninterrupted service to the residents of Burlington. A denial of Plaintiff's motion, also allows BT's 3994 customers to use and enjoy the telecommunications services they have contracted for. Lastly, Vermont law and BT's CPG establish that BT's continued operations serve the public interest and that any termination of services must be approved by the PSB after a hearing.

IV. Conclusion

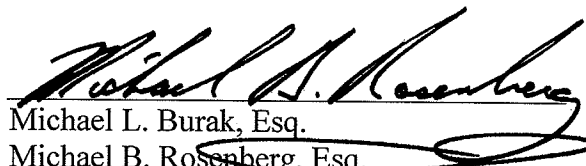
For the reasons set forth above, Plaintiff's Motion for a Mandatory Injunction/Preliminary Injunction should be denied, and Burlington awarded such other and further relief as may be just and proper.

Respectfully Submitted,

Dated: December 30, 2011
Burlington, Vermont

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