SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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EURO PACIFIC CAPITAL, INC.,ADAM KINZER

Plaintiff,

- v -

FAT BRANDS, INC.,

Defendant.

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INDEX NO. 656148/2020

MOTION DATE 11/12/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for STAY.

Upon the foregoing documents, for the reasons set forth on the record (12-15-2020) and as otherwise set forth, the petitioners' motion and the instant petition, both brought pursuant to CPLR § 7503(b), to stay the arbitration commenced by respondent against the petitioners before FINRA (the **FINRA Arbitration**) is granted as the AGP Agreement (hereinafter defined) requires that all disputes between the parties be heard "only in the state or federal courts located in the City of New York, State of New York" (NYSCEF Doc. No. 2) and AGP (hereinafter defined) never agreed to arbitrate any claims arising under the AGP Agreement.

Pursuant to a debt private placement agreement (the **AGP Agreement**) dated April 24, 2018 between FAT Brands Inc. (**FAT Brands**), its affiliates, and Alliance Global Partners (**AGP**; AGP and Fat Brands, hereinafter, collectively, the **AGP Agreement Parties**) for AGP to serve as "the co-placement agent and investment banker working with Dalmore Group, LLC ('Dalmore') in regards to an Investment Banking/Advisory Agreement executed on April 1, 2018

(the 'Services') for [FAT Brands], on a best effort basis, in connection with the offer and placement (the 'Offering') by [FAT Brands] of up $100 million of debt securities, private notes, loans or working capital financing of [FAT Brands] (collectively, the 'Securities')" (NYSCEF Doc. No. 2 at 1).

The AGP Agreement contains the following jurisdiction and governing law provision:

> L. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New York applicable to agreements made and to be fully performed therein. ***Any disputes that arise under this Agreement, even after the termination of this Agreement, will be heard only in the state or federal courts located in the City of New York, State of New York***. The parties hereto expressly agree to submit themselves to the jurisdiction of the foregoing courts in the City of New York, State of New York. The parties hereto expressly waive any rights they may have to contest the jurisdiction, venue or authority of any court sitting in the City and State of New York. In the event of the bringing of any action, or suit by a party hereto against the other party hereto, arising out of or relating to this Agreement; the party in whose favor the final judgment or award shall be entered shall be entitled to have and recover from the other party the costs and expenses incurred in connection therewith, including its reasonable attorneys' fees. Any rights to trial by jury with respect to any such action, proceeding or suit are hereby waived by A.G.P. and the Company.

(*id.* at 5 [emphasis added]).

Pursuant to an Investment Banking/Advisory Agreement dated April 1, 2018 (the **Dalmore Agreement**) between FAT Brands and Dalmore, a FINRA registered broker dealer (FAT Brands and Dalmore, hereinafter, collectively, the **Dalmore Agreement Parties**), for Dalmore to provide certain investment banking services to FAT Brands (NYSCEF Doc. No. 13). The Dalmore Agreement, which predates the AGP Agreement, contains an arbitration provision as follows:

> The parties agree that any dispute, claim or controversy directly or indirectly relating to or arising out of this Agreement, the termination or validity hereof, any alleged breach of this Agreement or the engagement contemplated hereby (any of the foregoing, a "Claim") shall be submitted to JAMS, or its successor, in New York, for final and binding arbitration in front of a panel of three arbitrators with JAMS in New York, New York

> under the JAMS Comprehensive Arbitration Rules and Procedures (with each of Dalmore and the Company choosing one arbitrator, and the chosen arbitrators choosing the third arbitrator). The arbitrators shall, in their award, allocate all of the costs of the arbitration, including the fees of the arbitrators and the reasonable attorneys' fees of the prevailing party, against the party who did not prevail. The award in the arbitration shall be final and binding. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. Sec.1-16, and the judgment upon the award rendered by the arbitrators may be entered by any court having jurisdiction thereof. The Company and Dalmore agree and consent to personal jurisdiction, service of process and venue in any federal or state court within the State and County of New York in connection with any action brought to enforce an award in arbitration.

(NYSCEF Doc. No. 13, ¶ 11[a]).

Thus, the Dalmore Agreement Parties agreed to arbitrate their disputes, whereas the AGP Agreement Parties agreed to have their disputes "heard only in the state or federal courts located in the City of New York, State of New York" (NYSCED Doc. Nos. 2, 13).

On or about October 16, 2020, FAT Brands filed a Statement of Claim before FINRA against the petitioners Adam Kinzer and AGP (NYSCEF Doc. No. 3). In pursuing arbitration against AGP and Mr. Kinzer, FAT Brands claims that the AGP Agreement was modified by two emails: (i) dated August 8, 2018 and (ii) dated December 8, 2018 (NYSCEF Doc. Nos. 12, 14). The August 8, 2018 email (the **August Email**; NYSCEF Doc. No. 12) is between Andy Wiederhorn of FAT Brands, Mr. Kinzer and Carlos Conde of Dalmore. Mr. Wiederhorn writes:

> Please reply to this email with your approval. FAT will pay 4% at closing on the PPMT $60m deal to Dalmore and AGP. FAT will pay an additional .20% for each year that the facility is outstanding up to 5 years, in arrears with a 2 year minimum term (i.e. minimum total of .40%). If the facility is up-sized, for example from $60m to $100m, FAT will pay the same 4% + .20%/year on any incremental increase in the proceeds from the Lender (i.e. on the $40m increase).

(*id.*).

Mr. Kinzer replies, "AGP confirms that we approve this." (*id.*).

The December 8, 2018 email (the **December Email**; together with the April Email, the **April and December Emails**) is from Mr. Conde of Dalmore to Andy Wiederhorn of FAT Brands, with a CC to Mr. Kinzer, and states as follows:

> Andy,
>
> Pursuant to our latest discussions, this email will memorialize the agreement and understanding between Fat Brands, Inc (FAT) and Dalmore and AGP ("The Broker Dealers").
>
> Pursuant to a validly executed engagement letter between Dalmore and FAT Brands, executed April 11, 2018 and further amended via email August 8th, 2018. The following were the current contractual obligations due to The Broker Dealers upon closing of the $60,000,000 PPMT Fund I Credit Facility ("The Transaction"):
>
> A) 4.0% fee on full loan amount funded by PPMT Fund I ($60,000,000) or $1,200,000 due to each of the Broker Dealers at closing or $2,400,000 in total; **There is NO CHANGE to this agreement.**
>
> B) A yearly 20 basis point residual fee was to be paid to both Broker Dealers upon the first anniversary of the loan for the next five years or $120,000 in total or $60,000 to each broker dealer every year; **That agreement is hereby CANCELLED AND NULL AND VOID.**
>
> C) Concurrently with the closing of the $60,000,000 debt facility, under the August 8th Amended Agreement there was a 4% tail fee due for any subsequent increments and/or additions to the original $60,000,000 Credit Facility. **THAT OBLIGATION IS HEREBY AMENDED AND REDUCED TO 1% INSTEAD OF 4% going forward till the Facility is fully repaid.**
>
> D) Concurrent with the closing of the Transaction or shortly thereafter, PPMT Fund I intends to purchase $40,000,000 worth of FAT unregistered stock in a under a separate Securities and Purchase Agreement (SPA) or hereinafter referred to as "The Equity Transaction". **The Broker Dealers agree to be compensated by FAT at closing an advisory fee of 1% or $400,000 in total for the Equity Transaction**. No other Equity Transaction fees are due upon closing of this transaction.

E) **FAT agrees to provide the Broker Dealers going forward a right of first refusal (ROFR) for investment banking services to be performed such as a fairness opinions and buy side advisory services at market rates to be determined at the time of the request.** The ROFR should remain in place till the repayment of the Transaction's Credit Facility.

Both AGP and Dalmore are in agreement as per above.

Andy, please email back with your agreement and upon receipt will become our current valid understanding.

Thanks
Carlos & Adam

(NYSCEF Doc. No. 14 [all emphasis in original]).

FAT Brands does not provide a responsive email showing that it agreed to the December Email or that ADP agreed to the December Email, and in any event, the December Email does not contain a modification of the provision of the ADP Agreement with respect to the parties agreement to litigate, not arbitrate, disputes arising under the Agreement.

FAT Brands argues that because this "new agreement" outlined in the April and December Emails included Dalmore, it "likely falls under that earlier [Dalmore] agreement," which "earlier agreement requires arbitration" (NYSCEF Doc. No. 10 at 1-2). In other words, FAT Brands argues that because the Dalmore Agreement Parties agreed to arbitrate, the AGP Agreement Parties also agreed to arbitrate, even though the AGP Agreement expressly provides to the contrary. In addition, and as further discussed below, FAT Brands argues that FINRA Rule 12200 requires arbitration of the parties' dispute.

DISCUSSION

Pursuant to CPLR § 7503(b), a stay of arbitration may be granted "on the ground that a valid agreement [to arbitrate] was not made or has not been complied with…." (CPLR § 7503 [b]).

Here, the AGP Agreement plainly provides for New York state or federal courts as the exclusive forum for any disputes under that agreement, including "even after termination of [that] Agreement" (NYSCEF Doc. No. 2). Inasmuch as the respondent relies on the Dalmore Agreement as a basis for arbitration, AGP and Mr. Kinzer are indisputably not signatories to the Dalmore Agreement and, therefore, cannot be bound to its terms. To the extent that the August and December Emails modify any terms in either the AGP Agreement or the Dalmore Agreement, nothing in the emails addresses arbitration in any way.

Respondent's reliance on FINRA Rule 12200 is also unavailing. FINRA Rule 12200 requires arbitration of disputes between FINRA members and its customers, at the customer's request, "arising in connection with the members' business activities, unless, as provided in FINRA Rule 12100(I), the customer is a broker or dealer" (*Sinclair & Co. LLC v Pursuit Inc. Mgmt LLC*, 74 AD3d 650, 650 [1st Dept 2010]; FINRA Rule 12200). However, arbitration pursuant to FINRA Rule 12220 is not mandatory where there is a written agreement between the parties that provides to the contrary (*New York Bay Capital, LLC v Cobalt Holdings, Inc.*, 456 F Supp 3d 564 [SD NY 2020], citing *Golden, Sachs & Co. v Golden Empire Schools Financing Auth.*, 764 F3d 210 [2d Cir 2014]). Rather, where there is an unambiguous forum selection clause such as the one in the AGP Agreement here, the "forum-selection clause displaces the agreement to arbitrate in FINRA Rule 12200" (*id.* at 571).

Finally, to the extent that the respondent maintains that even if the AGP Agreement is still operable and applicable, the forum selection does not cover the instant dispute, the argument fails. If the December Email modified the ADP Agreement as respondent contends, the December Email would be a part of the ADP Agreement, not a separate "related" agreement, and any dispute arising under the ADP Agreement so amended (if it was amended by the December Email which in any event is not supported by the record) would be one agreement as amended such that the dispute would arise under the ADP Agreement, as amended, which does not contain an agreement to arbitrate by ADP. The forum selection clause in the AGP Agreement even if amended by the December Email applies to "[a]ny disputes that arise under this Agreement, even after the termination of this Agreement" (NYSCEF Doc. No. 2).

Accordingly, it is

ORDERED that the motion to stay the subject arbitration is granted; and it is further

ADJUDGED that the petition to stay the subject arbitration is granted in all respects and the FINRA arbitration against the petitioners is stayed; and it is further

ORDERED that the movant is directed to order the transcript of the argument on this motion and upload the transcript to the docket in this proceeding.

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12/16/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE