SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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DANIEL DE MACEDO MONTEIRO,

Plaintiff,

- v -

ALPARGATAS, S.A.,

Defendant.

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INDEX NO. 657276/2020

MOTION DATE 10/10/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers 7-58 (Motion 001), were read on this motion by plaintiff for DEFAULT JUDGMENT & defendant's cross-motion to DISMISS.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, it is ORDERED that plaintiff's motion seeking entry of a default judgment is denied, and defendant's cross-motion to dismiss is granted, per the following memorandum.

This action was commenced by summons and complaint filed December 24, 2020 (the "Initial Complaint") (NYSCEF Doc. No. 1). The Initial Complaint essentially claims that the defendant footwear manufacturer "engaged in a course of wrongful conduct to force [plaintiff] out of the business" (*id.*, ¶ 5), and seeks $10 million in damages.

Subsequent to the commencement of this action, on March 12, 2021, defendant removed this action to United States District Court, S.D.N.Y. (*see*, NYSCEF Doc. No. 3), resulting in litigation before that federal court (*Monteiro v Alpargatas, S.A.*, No. 1:21-cv-2192 [US Dist Ct, SD NY] [LAP]). While pending before said court, plaintiff amended the Initial Complaint by adding additional allegations; but asserting the same causes of action as in the Initial Complaint, albeit in different sequential order (*see*, NYSCEF Doc. No. 31) (the "Amended Federal

Complaint"). By order of said federal court, per Hon. Loretta A. Preska, U.S.D.J., dated January 5, 2022 (NYSCEF Doc. No. 4), the Amended Federal Complaint was dismissed and the case was remanded back to this court (*see, id.*).

In connection with the foregoing dismissal and remand, the federal district court expressly held that the plaintiff's claims in this action are, in fact, arbitrable (*see*, NYSCEF Doc. No. 34 at 16).

Plaintiff undertook no action in this case in the aftermath of said January 2022 remand until October 10, 2023, when it moved this court for a default judgment against defendant on the basis of the Initial Complaint filed in 2020 and which preceded the Amended Federal Complaint that was dismissed by the federal district court in 2022 (*see*, NYSCEF Doc. Nos. 11, 12).

In addressing the reason why it did not answer the Initial Complaint, defendant raises two important points: *one* – the undeniable fact that the federal district court had already held that all of plaintiff's claims were subject to arbitration (*see*, NYSCEF Doc. No. 25 [Affirmation of Defendant's Counsel] ¶ 19; NYSCEF Doc. No. 40 [Memorandum of Defendant's Counsel] at 13); and *two* – that the Initial Complaint upon which plaintiff's motion is based is, procedurally, an "inoperative complaint" by virtue of the Federal Amended Complaint which assertedly had superseding effect in this state action vis-à-vis the Initial Complaint (*see*, NYSCEF Doc. No. 40 [Memorandum of Defendant's Counsel] at 7).

There is no real necessity for this court to address defendant's latter assertion of *inoperability* of the complaint filed in this court (the Initial Complaint) on account of the filing of an amended complaint in the federal district court during the erstwhile removal period (the Federal Amended Complaint), because there can be no doubt whatsoever as to the dispositive truth of defendant's principal assertion that the federal district court held that plaintiff's claims

are subject to arbitration. Accordingly, no logic could possibly sustain a grant of default judgment on the force of claims which the federal district court has already dismissed on arbitrability grounds. To the extent, if any, that this obvious conclusion requires, or benefits from, any support from usage derived from the ordinary standards for denial of a motion for a default judgment (*e.g.*, *US Bank N.A. v Richards*, 155 AD3d 522, 522 [1st Dept 2017] ["excusable default and meritorious defenses"]), suffice it to say that defendant's non-answering of the Initial Complaint is completely excusable due to its correct understanding that the claims have already been effectively dismissed by the federal district court, which also constitutes its meritorious defense. Accordingly, the plaintiff's motion for a default judgment is denied.

Moreover, defendant's cross-motion to dismiss this action in favor of arbitration (CPLR 3211 [a] [5]), is granted. On a motion to compel arbitration pursuant to CPLR 7503, if the court finds no substantial question that "a valid agreement was made," that it was "complied with," and there is no statute of limitations bar, the court must direct the parties to arbitrate and stay a pending or subsequent action (CPLR 7503[a]). When a contract contains "a broad arbitration clause, a court merely determines whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract" (*White Rock Ins. Co. PCC Ltd. v Lloyd's Syndicate 4242*, 202 AD3d 563, 565 [1st Dept 2022] [internal quotation marks and citations omitted]). Here, the federal district court conducted a detailed analysis of the broad arbitration clauses contained within the relevant agreements between plaintiff's entities and defendant and held that the dispute herein is subject to arbitration (NYSCEF Doc. No. 34 at 13-15). As indicated from the preceding discussion involving plaintiff's now-denied motion for a default judgment, this court finds the federal district court's analysis persuasive and sees no need to disturb it.

Plaintiff argues that defendant cannot enforce the arbitration clauses because defendant previously refused to pay its share of the arbitration advance fees, resulting in plaintiff's obligation to absorb that expense pursuant to the rules of the arbitral forum (the American Arbitration Association), but which plaintiff declined to pay. Plaintiff does not dispute that the rules of the American Arbitration Association provide for just such a fee-absorption structure. Indeed, the Appellate Division, First Department, has previously held that a defendant's refusal to pay the arbitration advance fee is not a breach of an agreement to arbitrate, in the sense that a court may not compel a defendant to forgo a right provided by the rules of the arbitral forum (*Asesd, LLC v Vanguard Constr. & Dev. Co., Inc.*, 79 AD3d 418, 418 [1st Dept 2010] ["As the AAA's rules provide that the remedy for a party's refusal to pay its share of arbitration fees is for the paying party to advance the nonpaying party's share of the fees, that is petitioner's recourse here. This Court cannot fashion another remedy"]). Thus, plaintiff's argument that defendant has forfeited the right to compel arbitration is unavailing.

As the entirety of the dispute is subject to arbitration and there is nothing further for the court to adjudicate, the court will dismiss the action in its entirety (*Republic Mortg. Ins. Co. v Countrywide Fin. Corp.*, 28 Misc 3d 1214 [A], 2010 WL 2927286 [Sup Ct, NY County, 2010], *affd* 87 AD3d 457 [1st Dept 2011]).

This constitutes the decision and order of the court.

ENTER:

12/2/2024
DATE

LOUIS L. NOCK, J.S.C.

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