Sabby Volatility Warrant Master Fund Ltd. v Aterian Inc.
2022 NY Slip Op 32095(U)
July 5, 2022
Supreme Court, New York County
Docket Number: Index No. 655558/2021
Judge: Andrew Borrok
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

----------X

SABBY VOLATILITY WARRANT MASTER FUND LTD.,

Plaintiff,

- v -

ATERIAN INC.,

Defendant.

INDEX NO. 655558/2021

MOTION DATE 12/15/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 30, 31, 32
were read on this motion to/for DISMISS.

Aterian Inc. (**Aterian**) is not entitled to dismissal of this lawsuit. This case involves the alleged fraud and breach of representations committed by Aterian, an e-commerce retailer, in inducing Sabby Volatility Warrant Master Fund Ltd (**Sabby**) to purchase $6,000,000 of Aterian stock pursuant to a certain Securities Purchase Agreement (the **SPA**; NYSCEF Doc. No. 15), dated June 10, 2021 by and between Sabby and Aterian (NYSCEF Doc. No. 13, ¶¶ 17-19; the **AC**).[1]

The well pled AC alleges that although Aterian made general disclaimers in the SPA that the Covid-19 pandemic ***could*** have an impact on its business, as alleged, Aterian ***already knew*** that this potential impact ***had in fact occurred*** and that a default under a certain Senior Secured Note (the **Note**; NYSCEF Doc. No. 14) in the amount of $110,000,000 was looming. This they failed

[1] For completeness, a class action has been filed alleging Aterian violated the federal securities laws in the United States District Court for the Southern District of New York captioned *Joseph P. Nolff, et. al. v Aterian, Inc. et. al.*, No 1:21-cv-04323-VM (SDNY, 2022) (NYSCEF Doc. No. 28).

to disclose and thus breached their representations set forth in Sections 3.1[i] and [l] of the SPA. Therefore, Aterian can not brush aside its potential liability based on general disclaimers.

Pursuant to Section 3.1 of the SPA Aterian represented that no event had occurred that would result in a default and that no event could reasonably be expected to result in a Material Adverse Effect:

> (i) Material Changes; Undisclosed Events, Liabilities or Developments. Since the date of the latest audited financial statements included within the SEC Reports, except as specifically disclosed in a subsequent SEC Report filed prior to the date hereof, (i) except as set forth on Schedule 3.1(i), there has been no event, occurrence or development that has had or that could reasonably be expected to result in a Material Adverse Effect, (ii) the Company has not incurred any material liabilities (contingent or otherwise) other than (A) trade payables and accrued expenses incurred in the ordinary course of business consistent with past practice, (B) liabilities not required to be reflected in the Company's financial statements pursuant to GAAP or disclosed in filings made with the Commission and (C) liabilities arising under the Transaction Documents, (iii) the Company has not altered its method of accounting, (iv) the Company has not declared or made any dividend or distribution of cash or other property to its stockholders or purchased, redeemed or made any agreements to purchase or redeem any shares of its capital stock and (v) the Company has not issued any equity securities to any officer, director or Affiliate, except pursuant to existing Company stock option or equity plans. The Company does not have pending before the Commission any request for confidential treatment of information. Except for the entry into the Transaction Documents and the issuance of the Shares contemplated by this Agreement or as set forth on Schedule 3.1(i), no event, liability, fact, circumstance, occurrence or development has occurred or exists or is reasonably expected to occur or exist with respect to the Company or its Subsidiaries or their respective businesses, properties, operations, assets or financial condition that would be required to be disclosed by the Company under applicable securities laws at the time this representation is made or deemed made that has not been publicly disclosed at least 1 Trading Day prior to the date that this representation is made
>
> . . .
>
> (l) Compliance. To the knowledge of the Company, neither the Company nor any Subsidiary: (i) is in default under or in violation of (and no event has occurred that has not been waived that, with notice or lapse of time or both, would result in a default by the Company or any Subsidiary under), nor has the Company or any Subsidiary received written notice of a claim that it is in default under or that it is in violation of, any indenture, loan or credit agreement or any other agreement or instrument to which it is a party or by which it or any of its properties is bound, which would reasonably be

> expected to result in a Material Adverse Effect (whether or not such default or violation has been waived), (ii) is in violation of any judgment, decree, or order of any court, arbitrator or other governmental authority or (iii) is or has been in violation of any statute,rule, ordinance or regulation of any governmental authority, including without limitation all foreign, federal, state and local laws relating to taxes, environmental protection, occupational health and safety, product quality and safety and employment and labor matters, except in each case as could not have or reasonably be expected to result in a Material Adverse Effect
>
> (NYSCEF Doc. No. 15, §§ 3.1[i] & [l])

Notwithstanding the foregoing, a mere two weeks later on June 30, 2021, a default occurred (NYSCEF Doc. No. 19; NYSCEF Doc. No. 13, ¶¶ 25-27). As set forth in the well pled AC, Aterian knew that this Material Adverse Effect was imminent.

In addition, pursuant to Section 4.7 of the SPA, Aterian covenanted that they would not use the proceeds of the financing to pay its obligations under the Note:

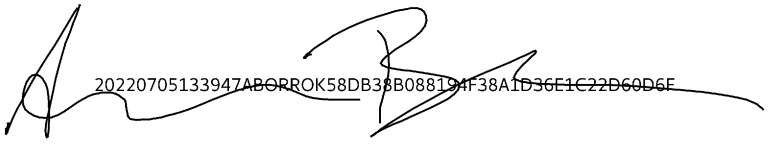
> 4.7 Use of Proceeds. Except as set forth on Schedule 4.7 attached hereto, the Company shall use the net proceeds from the sale of the Shares hereunder for working capital purposes, the conduct of its business and other general corporate purposes, which may include acquisitions, investments in or licenses of complementary products, technologies or businesses, and shall not use such proceeds: (a) for the satisfaction of any portion of the Company's debt (other than payment of trade payables in the ordinary course of the Company's business and prior practices or as required under the terms of those certain Senior Secured Notes due 2024 issued by the Company on April 8, 2021), (b) for the redemption of any Common Stock or Common Stock Equivalents, except for the repurchase of equity awards and underlying shares of Common Stock from employees and consultants whose service with the Company has terminated, (c) for the settlement of any outstanding litigation or (d) in violation of FCPA or OFAC regulations
>
> (*id.*, § 4.7).

The well pled AC alleges that this covenant was also breached because the proceeds were in fact used to pay for an agreement with the lender, High Trail Investments LLC to waive acceleration of the Note (NYSCEF Doc. No. 13, ¶ 33). It does not matter that Aterian otherwise had $60,000,000 in cash. Money is fungible. Dismissal simply is not appropriate based on this self-serving fiction. However, although the SPA provides for specific performance (NYSCEF Doc. No. 15, § 5.15), Sabby only seeks to have Aterian not breach their covenants under the SPA which they are not otherwise permitted to do anyway and an adequate remedy at law is available (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001]). Thus, the breach of contract cause of action (second cause of action) seeking specific performance must be dismissed without prejudice.

Accordingly, it is

ORDERED that the branch of the motion to dismiss seeking to dismiss the breach of contract (first cause of action) is denied; and it is further

ORDERED that the branch of the motion to dismiss seeking to dismiss the breach of contract – specific performance (second cause of action) is granted.



7/5/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

655558/2021 SABBY VOLATILITY WARRANT MASTER FUND LTD., vs. ATERIAN INC.,
Motion No. 001

APPLICATION:	☐	SETTLE ORDER	☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	FIDUCIARY APPOINTMENT	☐ REFERENCE