SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LIQUID HOLDINGS GROUP, INC., Petitioner, -against- GIBSON, DUNN & CRUTCHER LLP, Respondent.	Motion Sequence No. 1 Index No. 652385/2015 Part 53 (Ramos, J.) **Oral Argument Requested**

RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION OF PETITIONER LIQUID HOLDINGS GROUP, INC. TO STAY AND IN SUPPORT OF RESPONDENT'S CROSS-MOTION TO COMPEL ARBITRATION

[CONTAINS CORRECTED PAGE NUMBERS IN TABLE OF AUTHORITIES]

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Respondent Gibson, Dunn & Crutcher LLP ("Gibson Dunn") opposes the Petition of Petitioner Liquid Holdings Group, Inc. ("Liquid") to stay all proceedings in a JAMS arbitration instituted by Gibson Dunn against Liquid. In addition, Gibson Dunn respectfully requests that this Court grant Respondent's cross-motion to dismiss the Petition, pursuant to CPLR 404(a), and to compel arbitration, pursuant to CPLR 7503(a).

I. INTRODUCTION

Respondent Gibson Dunn is owed over $970,000 in unpaid legal fees and ever-increasing costs and interest by Petitioner Liquid, for work performed in connection with an internal investigation of certain allegations of wrongful conduct (the "Investigation") as well as for additional work performed for Liquid during and after the Investigation. Publicly available information indicates that Liquid is a company in extremis—the company missed the deadline for filing its 10-K and has not filed any audited financial statement for months, its common stock is currently trading at approximately $0.18, and it recently publicly announced that it is laying off employees and consultants to reduce costs. As a result, upon learning that Liquid intended to indefinitely delay even the decision of whether Liquid would pay Gibson Dunn's fees for work completed, Gibson Dunn promptly commenced arbitration proceedings against Liquid seeking judgment against and payment from Liquid as expeditiously as possible.

There can be no dispute that Gibson Dunn and Liquid entered into an engagement agreement dated July 13, 2012 (the "Engagement Agreement"). The Engagement Agreement contains a broad arbitration clause, pursuant to which Gibson Dunn and Liquid agreed that all disputes relating to "our relationship" and "any other matter or thing … shall be determined exclusively by confidential, final and binding arbitration." Ex. A at 2, § 7.1.[1] This broad

[1] Citations in the form "Ex. _" are exhibits to the Affirmation of Adam Wolf, dated August 3, 2015.

arbitration provision squarely covers the work at issue here, both work Gibson Dunn performed for Liquid in connection with the Investigation as well as the other work Gibson Dunn performed during and after the Investigation at the request of and for Liquid.

Liquid does not claim that either the arbitration provision or the Engagement Agreement was procured by fraud. Liquid does not claim the arbitration provision, on its face, is invalid or unfair. Liquid does not argue against the arbitrability of, let alone even address, the claims for payment of work performed by Gibson Dunn apart from the Investigation. Liquid raises as its sole basis for avoiding arbitration (and delaying proceedings before JAMS) the novel, though baseless, argument that Liquid's Audit Committee is somehow the only proper party and also is not bound to arbitrate. However novel, this defense is baseless—the Audit Committee's members worked alongside other board members and senior management of Liquid in their interactions with Gibson Dunn throughout the Investigation. All of the invoices at issue were addressed to Liquid (not the Audit Committee), and Liquid accepted each of the invoices without complaint (at least initially), *and indeed Liquid paid one of the invoices*, before deciding to freeze the payment process. As noted, Liquid's senior management and a number of board members worked with Gibson Dunn throughout. Liquid's desire to avoid arbitration is undercut by the law, the facts, common sense, and New York's strong policy in favor of arbitration. Accordingly, Liquid's Petition for Stay should be denied and Gibson Dunn's Cross-Motion to dismiss the Petition and to Compel Arbitration should be granted.

II. FACTS AND PROCEDURAL HISTORY

A. Liquid and Gibson Dunn Executed an Engagement Agreement Expressly Calling for Arbitration in New York Under JAMS Rules

On July 13, 2012, Liquid and Gibson Dunn executed the Engagement Agreement. The agreement states that "[u]nless otherwise agreed to in writing, the terms of this letter and the

attached Terms of Retention will also apply *to any additional matters that [Gibson Dunn] handle[s] on behalf of Liquid Holdings, and any affiliate of Liquid Holdings for whom [Gibson Dunn] also provide[s] legal services*, as to which [Liquid] represent[s] that [Liquid has] the authority to bind such affiliates to the terms of this letter." Ex. A at 1 (emphasis added).

The Engagement Agreement is unequivocal with respect to arbitration: "[A]ny and all disputes, claims or controversies arising out of or relating to this agreement, *our relationship*, or the services performed *or any other matter or thing*, shall be determined exclusively by confidential, final and binding arbitration." *Id.* (emphasis added). The Engagement Agreement further stipulates that "[t]he matters submitted to arbitration shall be heard and determined by a single arbitrator in New York City . . . in accordance with the then existing Comprehensive Arbitration Rules . . . of the Judicial Arbitration and Mediation Services ('JAMS')." *Id.* § 7.1(a). Finally, the Engagement Agreement expressly states:

> Disputes, claims and controversies subject to final and binding arbitration under this agreement include, without limitation, all those that otherwise could be tried in court to a judge or jury in the absence of this agreement. Such disputes, claims and controversies include, without limitation, claims for professional malpractice, *disputes over our fees and expenses*, any disputes over the quality of services which we render, any claims relating to or arising out of your or our performance under this agreement, and any other claims arising out of any alleged act or omission by you or us."

Id. § 7(c) (emphasis added).

B. Gibson Dunn Conducts the Investigation, and Gibson Dunn Reports to Liquid's Audit Committee, Other Board Members and Senior Management Throughout the Course of the Investigation

In February 2015, Gibson Dunn was retained to conduct the Investigation. The parties did not execute a separate engagement agreement for this work, as the July 13, 2012 Engagement Agreement remained in force. Wolf Aff. ¶ 4.

During the course of the Investigation, Gibson Dunn formally reported to and took direction from Liquid's Audit Committee. However, Gibson Dunn attorneys were in far more regular contact with Liquid's senior management than with the members of the Audit Committee. Wolf Aff. ¶ 5. Throughout the pendency of the Investigation, Gibson Dunn attorneys had standing weekly (and sometimes twice-weekly) telephone conferences with Liquid's Chief Executive Officer ("CEO") and General Counsel ("GC") regarding the Investigation. In addition to these regularly scheduled calls, Gibson Dunn attorneys spoke or emailed almost daily (and, at times, on multiple occasions per day) with either or both of these Liquid senior executives regarding the Investigation. Wolf Aff. ¶ 6. Gibson Dunn attorneys updated Liquid's Audit Committee periodically throughout the Investigation, and the CEO and GC attended almost every such meeting or telephone conference. Indeed, the CEO and/or GC would work with the Gibson Dunn attorneys to discuss and receive updates in advance of such meetings or telephone conferences with the Audit Committee. *Id.* Different board members, in addition to the Audit Committee members, attended various meetings and telephone conferences regarding the Investigation. Wolf Aff. ¶ 7. When Gibson Dunn prepared its written reports summarizing its findings, conclusions, and recommendations with respect to the Investigation, it distributed these reports to Liquid's Audit Committee and the CEO and GC (among others). *Id.*

C. Liquid Used Gibson Dunn for Additional Work During and After the Investigation

[redacted]

[redacted]

Additionally, throughout the relevant time period, Gibson Dunn provided to Liquid general legal advice. This work included teleconferences with Liquid's GC to discuss Gibson Dunn's advice. Wolf Aff. ¶ 11. Again, there was no separate engagement agreement executed or discussed for this work; it too was conducted pursuant to the existing and operative Engagement Agreement. *Id.*

D. Since the Beginning of The Investigation, Gibson Dunn Has Submitted Four Invoices to Liquid, All of Which Liquid Accepted and Only One of Which Liquid Has Paid

Since the beginning of the Investigation, Gibson Dunn submitted four invoices to Liquid, dated March 9, 2015; April 10, 2015; May 11, 2015; and June 8, 2015. The client referenced on all four of these invoices is Liquid Holdings Group, Inc. *Id.* Gibson Dunn has never submitted an invoice to Liquid's Audit Committee. Wolf Aff. ¶ 12. This is consistent with the Engagement Agreement, which states that Gibson Dunn "will generally bill Liquid Holdings for our services and reimbursable expenses on a monthly basis unless we mutually agree otherwise." Ex. A at 2. It also is consistent with Liquid's publicly available Audit Committee Charter, which expressly states that "[t]he Audit Committee will have the authority to retain such outside

counsel, accountants, experts and other advisors as it determines appropriate to assist it in the performance of its functions *and will receive appropriate funding*, as determined by the Audit Committee, *from the Company for payment of compensation to any such advisors . . . .*" Ex. B (emphasis added). Finally, it is consistent with work Gibson Dunn performed for Liquid in the fall and winter of 2014 (prior to the Investigation), when Gibson Dunn was retained by another committee of Liquid's board—the Strategic Committee—pursuant to the Engagement Agreement (i.e., again, without a separate engagement agreement), worked closely with Liquid's senior management, and sent its invoices to Liquid Holdings, Inc. (the company itself, not the Strategic Committee)—which Liquid paid. *See* Wolf Aff. ¶ 13.

In connection with the Investigation and the additional work performed, Gibson Dunn addressed all four of the above-referenced invoices to Liquid's GC. Wolf Aff. ¶ 12. Gibson Dunn also emailed all four of the invoices to the GC. *Id*. Liquid accepted all four of the invoices, and never suggested to Gibson Dunn (until it filed this Petition) that the invoices should have been sent to Liquid's Audit Committee, rather than the company itself. Wolf Aff. ¶ 14. Indeed, Liquid paid in full the invoice dated March 9, 2015. Wolf Aff. ¶ 14. The remaining three invoices, which total $970,977.43, are outstanding and the subject of the New York arbitration. Wolf Aff. ¶ 15.

E. Liquid Advised Gibson Dunn It Would Not Make any Decision of Whether or Not to Pay the Outstanding Invoices Until Some Indeterminate Point in the Future

On or about April 28, 2015, Liquid engaged a different law firm to conduct further work related to the Investigation. Wolf Aff. ¶ 17. Liquid continued to make use of Gibson Dunn's services after the other law firm was engaged, including in connection with [redacted] and other work as well, as noted above. On or about June 15, 2015, Liquid's CEO

advised Gibson Dunn that Liquid intended to wait until some undetermined point in the future before determining whether or not to pay Gibson Dunn's outstanding invoices. Wolf Aff. ¶ 18.

F. Pursuant to the Governing Engagement Agreement, Gibson Dunn Initiated Arbitration Proceedings Seeking Payment from Liquid on the Outstanding Invoices

It is apparent, from publicly available sources, that Liquid is a company in extremis. The company has not filed its 10-K, or any other audited financial statement, for months. *See* Ex. H. Its common stock is currently trading at approximately $0.18. *See* Ex. G. Its market capitalization is approximately $7.2 million, down from approximately $94.2 million on August 1, 2014. *See* Ex. J. Similarly, its cash balance has gone down from approximately $35.9 million on June 30, 2014, to $12.1 million on June 30, 2015. *See* Ex. K. It recently publicly announced that it is laying off employees and consultants to reduce costs. *See* Ex. I. As a result of Liquid's deteriorating financial situation, upon learning that Liquid intended to indefinitely delay payment of the outstanding invoices, Gibson Dunn commenced arbitration proceedings before JAMS in New York City on June 24, 2015, as contemplated by the governing Engagement Agreement. Wolf Aff. ¶ 19. On July 6, 2015, Gibson Dunn and Liquid both submitted letters to JAMS purporting to strike arbitrator candidates. Ex. E; Wolf Aff. ¶ 20. On July 20, 2015, Liquid submitted an additional strike list to JAMS. Wolf Aff. ¶ 21. On July 21, 2015, JAMS selected the Honorable Theodore H. Katz (Ret.) as the arbitrator. The initial telephone conference before Judge Katz is scheduled for August 4, 2015. Wolf Aff. ¶ 22; Ex. E.

III. ARGUMENT

A. Liquid's Petition to Stay the Arbitration Should Be Denied and Gibson Dunn's Petition to Compel Arbitration Should Be Granted

There is a longstanding and strong policy in New York favoring arbitration. The First Department has observed that the Court of Appeals considers "New York's policy in favor of arbitration to be so strong that it overrides all but a very few other public policies of the State

itself." *Curtis, Mallet-Prevost, Colt & Mosle, LLP v. Garza-Morales*, 308 A.D.2d 261, 269 (1st Dep't 2003) (citing *In re N.Y. City Transit Auth. v. Transp. Workers Union of Am.*, 99 N.Y.2d 1 (2002)). Indeed, "[b]road and unrestricted arbitration clauses, as a matter of law, are entitled to be given their full effect." *Matter of City of Newburgh v. McGrane*, No. 3144/2009, 2009 N.Y. Misc. LEXIS 1783, at *9, 11 (Sup. Ct. Orange Cnty. 2009) (citing cases).

Here, the written Engagement Agreement governing the relationship between Liquid and Gibson Dunn contains such a broad and unrestricted arbitration clause: "[A]ny and all disputes, claims or controversies arising out of or relating to this agreement, our relationship, or the services performed or any other matter or thing, shall be determined exclusively by confidential, final and binding arbitration." Ex. A § 7.1. The Engagement Agreement stipulates that "[t]he matters submitted to arbitration shall be heard and determined by a single arbitrator in New York City . . . in accordance with the then existing Comprehensive Arbitration Rules . . . of the Judicial Arbitration and Mediation Services ('JAMS')." *Id.* § 7.1(a). The instant dispute—Gibson Dunn seeking to be paid for work performed on Liquid's behalf—clearly arises out of and/or relates to the relationship between Gibson Dunn and Liquid, and therefore is squarely covered by the Engagement Agreement. *Id.* As such, the plain and unequivocal arbitration clause contained within the Engagement Agreement governs, Liquid's petition to stay the arbitration should be denied, and Gibson Dunn's cross-motion to compel the arbitration should be granted.

B. Liquid Is a Proper Party to the Arbitration

Liquid argues that it is not a proper party to the arbitration because some of the work at issue was performed at the instruction of Liquid's own Audit Committee. Liquid does not contest that it signed the Engagement Letter; nor does it contest that the arbitration provision in the Engagement Letter that both Liquid and Gibson Dunn executed is a binding arbitration

provision. Liquid merely raises a defense that (some) of the work at issue was performed at the direction of its own Audit Committee, and therefore the Audit Committee, rather than Liquid itself, is an appropriate party to this dispute. However, this argument, even if we were to disregard its absurdity, does not affect Gibson Dunn's right to arbitration.[2]

Liquid's contention that it is not an appropriate party to the arbitration is baseless. Liquid's argument that its Audit Committee is an entity wholly distinct from Liquid is both misplaced and irrelevant for arbitrability purposes (and also as a defense to Liquid's payment obligations).[3] *See Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, No. Civ.A.15754, 2000 WL 1476663, at *9 (Del. Ch. Sept. 27, 2000) (Strine, V.C.) (explaining that, where a general partner forms an audit committee, "the Audit Committee, after all, is not a separate entity from the General Partner. The Audit Committee is created by and is a constituent part of the General Partner itself."). The Audit Committee is a creature of Liquid's board, and is composed of three of the six members of Liquid's board. It often holds meetings at Liquid's offices.

[2] Even assuming *arguendo* that such a defense has any merit—and it does not—it is a defense that Liquid should raise in the arbitration, and does not go to the issue of the appropriateness of an arbitration involving Liquid. *See Matter of Cox*, 188 A.D.2d 915, 916–18 (3d Dep't 1992) (affirming arbitrators' award where the arbitrators "implicitly concluded that [a related entity] was not a necessary party . . . ."); *Matter of Condell*, 151 A.D.2d 798, 799–800 (3d Dep't 1989) (upholding an arbitrator's award despite the alleged absence of a necessary party because "[a]bsent a finding that the award is the product of fraud, partiality, or is 'so divorced from rationality that it can be accounted for only by misbehavior' . . . it must be affirmed.") (quoting *S & W Fine Foods, Inc. v. Office Emps. Int'l Union*, 8 A.D.2d 130 (1st Dep't 1959)); *see also Matter of Antique Rug Dealers Ass'n*, 210 A.D.2d 111, 111–12 (1st Dep't 1994) (rejecting argument that an award should be overturned because necessary parties were not joined, in part because "arbitrators 'have broad power to do justice and fashion appropriate remedies . . . .'") (quoting *Cook v. Mishkin*, 95 A.D.2d 760 (1st Dep't 1983)).)). Liquid's effort to avoid arbitration by focusing on the Audit Committee does not reach the issue of whether Gibson Dunn has the right to arbitrate its disputes with Liquid—which it indisputably has.

[3] Additionally, the logical extension of Liquid's argument is that Gibson Dunn should be suing Liquid's own Audit Committee for payment. This does not make sense. While Liquid states in its Petition that its Audit Committee "is an independent entity with its own charter,"(¶ 5), the reality is that the Audit Committee is not a legally recognized entity—it is not a corporation, a limited liability company, a partnership, or any other type of entity that registers itself with the State of Delaware or any other state. One suspects that Liquid's directors would vehemently oppose being pursued directly, whether in arbitration or in Court, for payment of Liquid's obligations.

Liquid's senior executives, including its CEO and General Counsel, regularly attend these meetings. *See* Wolf Aff. ¶ 3.

Further, it was never contemplated that Liquid's Audit Committee, as opposed to Liquid, would pay Gibson Dunn's bills. Indeed, the Audit Committee's own Charter explicitly states that although the Audit Committee can retain its own outside counsel, it is Liquid that will pay for such counsel. Ex. B. Petitioner, in its submission to this Court, misleadingly quotes only half of the relevant clause from the Audit Committee Charter, apparently to make it seem as if the Charter contemplates an Audit Committee distinct and separate from the company itself: "Moreover, the Audit Committee has, 'the authority to retain such outside counsel … as it determines appropriate to assist it in the performance of its functions.'" Ex. F (Petr.'s. Memo at 2). Petitioner chose not to include the second half of that sentence, presumably because it is fatal to Petitioner's argument that Liquid's Audit Committee is somehow distinct from Liquid itself. The full and complete sentence from the Charter is as follows:

> The Audit Committee will have the authority to retain such outside counsel, accountants, experts and other advisors as it determines appropriate to assist it in the performance of its functions *and will receive appropriate funding*, as determined by the Audit Committee, *from the Company for payment of compensation to any such advisors*. Ex. B at 4 (emphasis added).

It is clear that the Audit Committee's own Charter contemplates that Liquid would pay for any outside advisor that the Audit Committee retained. And this is how it has worked historically. When Liquid selected a new outside auditor in September 2014, Liquid's public filing noted that the "Audit Committee invited several firms to participate in this process. As a result of this process and following careful deliberation, *the Company* has entered into an engagement letter with [the selected auditor]." Ex. L (emphasis added). That is the scenario

here: Liquid's Audit Committee selected Gibson Dunn to conduct the Investigation, and the governing engagement letter is between Liquid and Gibson Dunn.[4]

The only case Petitioner cites for its bold claim that "the Audit Committee is a separate, independent entity from Liquid Holdings" is inapposite and of no persuasive value. First of all, this case does not even address or mention arbitrability – the very issue before the Court. Nonetheless, Petitioner relies upon the court's statement in *In re BCE W., L.P.*, No. M-8-85, 2000 WL 1239117, at *2 (S.D.N.Y. Aug. 31, 2000), that "[b]ecause [corporation Boston Chicken's] Special Committee is a separate and distinct group from the Board of Directors, with separate legal representation, the privilege afforded it is not the privilege of the corporation, but rather, is the privilege of the Special Committee." Petitioner attempts to extrapolate from this a broad proposition that Liquid's Audit Committee is somehow distinct and independent from Liquid for arbitrability purposes. Ex. F (Petr.'s. Memo at 5–6). However, once again Petitioner tells only half the story. The *In re BCE* court went on to note that, in that case, the Special Committee was deemed to enjoy a privilege independent of the company because the Special Committee's counsel "*at no time provided counsel to the general Board of Directors or the management*." *Id.* (emphasis added). Here, the very opposite is true. Throughout the course of the Investigation, Gibson Dunn provided legal advice and counsel to Liquid's management, in addition to reporting to the Audit Committee. Wolf Aff. ¶¶ 5-6. Gibson Dunn attorneys spoke or emailed with Liquid's CEO and GC almost daily regarding the Investigation. *Id.* Gibson

[4] Petitioner notes in its submission that "Gibson Dunn submitted three invoices for services performed on behalf of the Audit Committee totaling nearly $1 million." Ex. F (Petr.'s. Memo at 2). Indeed, these three invoices are for work performed in connection with the Investigation, and they were sent to Liquid Holdings, Inc. (not the Audit Committee), care of Liquid's GC—exactly the same as the March 9, 2015 invoice, *which Liquid paid in full*. At no time did anyone from Liquid (or from Liquid's Audit Committee) ever raise the notion that any of the invoices should have been sent to Liquid's Audit Committee, rather than Liquid itself (until the Petition was filed). This argument is but a baseless effort at delay raised by Liquid in what should be a futile effort to avoid the arbitration before JAMS to which it agreed, which it has ratified and which it is bound.

Dunn attorneys updated Liquid's Audit Committee periodically throughout the Investigation, and Liquid's CEO and GC attended almost every such meeting or telephone conference. When Gibson Dunn prepared its written reports summarizing its findings, conclusions, and recommendations with respect to the Investigation, it distributed these reports to Liquid's Audit Committee and the GC and CEO (among others). It certainly cannot be said that Gibson Dunn "at no time provided counsel" to Liquid's management. As a result, Petitioner's sole purported authority for its groundless theory that Liquid's Audit Committee is a distinct, independent entity from Liquid itself is readily distinguished.[5] Moreover, as noted above, the court in *In re BCE* did not even address, let alone mention, arbitrability.

Liquid is the entity that executed the Engagement Agreement, the entity whose Chief Executive Officer and General Counsel were intimately involved in the management and execution of the Investigation (and who attended meetings with Gibson Dunn and the Audit Committee regarding the Investigation), the entity that benefited from Gibson Dunn's services, and also the entity that received with no complaints—and, on one occasion, even paid—invoices submitted by Gibson Dunn for work performed in connection with the Investigation.[6] *See* Ex.'s A-B. For all of these reasons, Liquid is an appropriate party to the arbitration.[7]

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[5] Petitioner states in its Petition that "[i]n connection with the investigation, Gibson Dunn reported exclusively to members of the Audit Committee and the Audit Committee's representatives." Ex. F (Petr.'s. Memo at 5). This, simply put, is not true as even a cursory review of Gibson Dunn's Notice of Claim makes clear. As discussed above, Gibson Dunn's primary contact with respect to the Investigation was with Liquid's CEO and GC. Petitioner also states that "Gibson Dunn repeatedly acknowledged in its arbitration filing that it reported to, and took its instructions from, the Audit Committee, not Liquid Holdings." Ex. F (Petr.'s. Memo at 6). Petitioner ignores a number of paragraphs from that filing, including Paragraphs 3 ("Throughout this process, GDC provided regular updates to the Audit Committee *and senior management of Liquid* regarding the work it was performing"), 4 ("GDC also provided *senior management of Liquid* with regular updates regarding legal fees incurred and likely to be incurred"), and 15 ("In addition to providing *regular updates to Liquid* on the status of the Investigation, GDC provided an interim oral update to Liquid's Audit Committee"). Ex. C (Notice of Claims of Claimant Gibson, Dunn & Crutcher LLP, (hereafter "Notice of Claims")).

[6] Liquid engaged in an extensive course of conduct unequivocally manifesting its acceptance and ratification of the Engagement Agreement and all legal services provided by Gibson Dunn. *See God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 6 N.Y.3d 371, 373 (2006) (noting the " long-standing rule that an arbitration clause in a written agreement is enforceable, even if the agreement is not signed, when it is

IV. CONCLUSION

For all of the foregoing reasons, the Court should deny Liquid Holdings, Inc.'s Petition for Stay, grant Respondent's cross-motion to dismiss the Petition and to compel Petitioner to

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evident that the parties intended to be bound by the contract."). The acceptance of services following receipt of an agreement constitutes ratification of the agreement. *See Just In-Materials Designs, Ltd. v. I.T.A.D. Assocs., Inc.*, 61 N.Y.2d 882, 883 (1984) (holding that party's receipt of an agreement followed by "acceptance of delivery of and payment for" services pursuant to that agreement "constituted ratification of the agreement between the parties … including the provision therein for arbitration, even though the latter provision had never been expressly discussed with either party."); *Weil, Gotshal & Manges LLP v. Fashion Boutique of Short Hills*, 56 A.D.3d 334, 335 (1st Dep't 2008) (holding a party is bound to an agreement after it has "accepted and made use of the substantial benefits accruing to them under [an] agreement, thereby implicitly ratifying the terms of the agreement."). Moreover, New York courts consider making payments on invoices received to be powerful evidence of affirmative conduct demonstrating ratification includes making payments on invoices received. *See Markstone Capital Partners, L.P. v. Gibson, Dunn & Crutcher LLP*, No. 101085/2010, Dkt. No. 25, slip. op. at 6 (Sup. Ct. N.Y. Cnty. May 25, 2010) (compelling non-signatory-Markstone to arbitrate after finding "correspondence between the parties throughout this period, and the payments Markstone remitted to Gibson Dunn for its services, demonstrate that Markstone not only took advantage of Gibson Dunn's representation but openly acknowledged the fact that it was doing so."); *see also Mulitex USA, Inc. v. Marvin Knitting Mills, Inc.*, 12 A.D.3d 169, 170 (1st Dep't 2004) (holding that "[t]he partial payment of those invoices constitutes ratification of the agreements."); *Liberty Mgmt. & Const. Ltd. v. Fifth Ave. & Sixty-Sixth St. Corp.*, 208 A.D.2d 73, 79 (1st Dep't 1995) (compelling arbitration on party opposing arbitration because the submission of invoices "demonstrated its acceptance of the . . . contract by its conduct throughout the course of the work.").

[7] Even accepting, *arguendo*, Liquid's extraordinary contention that its own Audit Committee is an entity unrelated to the company itself for the purpose of the Engagement Agreement, Liquid nevertheless would be an appropriate party to the New York arbitration. *See Jefferies & Co. v. Infinity Equities I, LLC*, 66 A.D.3d 540, 541 (1st Dep't 2009) (affirming Justice Ramos's decision to compel arbitration because "[a] nonsignatory may be bound to an arbitration agreement"). New York law is clear that "[a] non-signatory may be estopped from denying an obligation to arbitrate if the non-signatory knowingly receives a direct benefit of an agreement containing an arbitration clause." *Markstone Capital Partners, L.P.*, slip. op. at 5 (citing *In re SSL Int'l, PLC,* 44 A.D.3d 429 (1st Dep't 2007)); *HRH Const., LLC v. Metro. Transp. Auth.*, 33 A.D.3d 568 (1st Dep't 2006); *Robinson Brog Leinwand Greene Genovese & Gluck P.C. v. John M. O'Quinn & Assocs., L.L.P.*, 523 F. App'x 761 (2d Cir. 2013) (summary order); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349 (2d Cir. 1999). Here, Liquid's Audit Committee knowingly and willingly accepted Gibson Dunn's services—in addition to convening regular status meetings in which Gibson Dunn apprised the Audit Committee of its progress—and Gibson Dunn rendered those services pursuant to its Engagement Agreement with Liquid. Ex. C (Notice of Claims at 5). As Liquid's Audit Committee knowingly received legal services pursuant to Gibson Dunn's retainer agreement with Liquid, and derived direct benefits therefrom, it is estopped from now avoiding arbitration under that agreement. *See Markstone*, slip op. at 5–6; *accord Merrill Lynch Int'l Fin., Inc. v. Donaldson*, 895 N.Y.S.2d 698, 704 (Sup. Ct. N.Y. Cnty. 2010) ("[A] non-signatory who exploits a contract containing an arbitration clause is estopped from repudiating that clause."). This logic also demonstrates the futility of Liquid's argument that because the Audit Committee was established after the Engagement Agreement was signed, it could not be bound by that agreement. Ex. F (Petr.'s. Memo at 8). *See Jefferies*, 66 A.D.3d at 541 (binding a non-signatory principal to an arbitration agreement signed by an agent and a third-party even though the agreement "preceded the agency relationship."); *see also* Transcript at 13:21, *Jefferies & Co. v. Infinity Equities I, LLC*, No. 103612-2009, Dkt. No. 8 (Sup. Ct. N.Y. Cnty. Apr. 7, 2009) (Ramos, J.) (It "[m]akes no difference" that arbitration clause was entered into before an entity existed). Further, even assuming *arguendo* that Liquid ever had a right to stay arbitration, it waived that right when it participated in the arbitrator-selection process by twice submitting strike lists to JAMS. *In re Bos. Old Colony Ins. Co. v. Martin*, 34 A.D.2d 776 (1st Dep't 1970) ("By active participation in the selection of the arbitrator, the respondent waived its right to stay arbitration . . . .").

proceed with arbitration before JAMS in New York, and award such further relief as the Court deems appropriate.

Dated: New York, New York
August 3, 2015

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