PREPARED BY THE COURT

YA GLOBAL INVESTMENTS, L.P.

Plaintiff,

-vs-

RAINER GONZALEZ, PACER HEALTH CORPORATION, PACER ECI, LLC, Ei3 ENERGY, LLC, PACER HEALTH STAFFING, INC., BRICK MOUNTAIN BILLING, INC., BRICK MOUNTAIN MEDIA, 5G WIRELESS COMMUNICATIONS, INC., CONNECTED MEDIA TECHNOLOGIES, INC., EYI INDUSTRIEIS, INC., and ICOA, INC.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY

DOCKET NO.: UNN-L-2090-15

CIVIL ACTION

COURT ORDER

FILED

APR 04 2017

ROBERT J. MEGA, J.S.C.

THIS MATTER having been opened to the Court by Sills Cummis & Gross P.C., attorneys for Plaintiff YA Global Investments, L.P. ("Plaintiff" or "YAGI"), for an Order, pursuant to R. 4:46, (1) granting summary judgment on Counts One, Two, Three, Four, Five, Six, Fifteen, Sixteen and Seventeen of Plaintiff's Second Amended Complaint; (2) dismissing all of the counterclaims of Defendants Rainier Gonzalez, Pacer Health Corporation, Pacer ECI, LLC, Ei3 Energy, LLC, Pacer Staffing, Inc., Pacer Health Staffing, Inc., Brick Mountain Billing, Inc., and Brick Mountain Media, LLC (together "Defendants") with prejudice; and (3) striking all of the Defendants' affirmative defenses; and the Court having consider the papers submitted in connection with this motion, and having heard the arguments of counsel, if any; and the Court having determined that, based the Statement of Reasons attached herewith and dated April 4, 2017, YAGI is entitled to the relief it seeks and for good cause shown,

IT IS on this 4th day of April 2017,

ORDERED Plaintiff's motion for summary judgment pursuant to R. 4:46 is hereby granted as to Counts One, Two, Three. Four, Five, Six, Fifteen, Sixteen and Seventeen of Plaintiff's Second Amended Complaint; it is further,

ORDERED that Defendants Rainier Gonzalez ("Ray Gonzalez") personally, jointly and severally liable for the reasons set forth in the attached Statement of Reasons; it is further,

ORDERED Defendant's counterclaims are hereby dismissed in their entirety and with prejudice; it is further

ORDERED Defendant's affirmative defenses are hereby stricken in their entirety and dismissed with prejudice; it is further

ORDERED Plaintiff's counsel shall serve a copy of this Order on all counsel of record within seven (7) days of receipt.

ROBERT J. MEGA, J.S.C.
New Jersey Superior Court Judge

_X_ Opposed
___ Unopposed

Copies furnished to: *Counsel of record*

PREPARED BY THE COURT
NOT FOR PUBLICATION WITHOUT APPROVAL
FROM THE APPELLATE DIVISION

YA GLOBAL INVESTMENTS, L.P.

Plaintiff,

-vs-

RAINER GONZALEZ, PACER HEALTH CORPORATION, PACER ECI, LLC, Ei3 ENERGY, LLC, PACER HEALTH STAFFING, INC., BRICK MOUNTAIN BILLING, INC., BRICK MOUNTAIN MEDIA, 5G WIRELESS COMMUNICATIONS, INC., CONNECTED MEDIA TECHNOLOGIES, INC., EYI INDUSTRIEIS, INC., and ICOA, INC.,

Defendants.

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LAW DIVISION: UNION COUNTY

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CIVIL ACTION

STATEMENT OF REASONS

Introduction

This matter comes before the court on a summary judgment motion brought by Plaintiff, YA Global Investments ("YAGI"), pursuant to Rule 4:46-2. Plaintiff is an investment firm based in Mountainside, New Jersey that provides debt, equity, and financing products for businesses across sectors. See Cert. of David Gonzalez, ¶ 4. Rainer Gonzalez, one of the named Defendants, is the principal of Defendants: Pacer Health Corporation, Pacer ECI, LLC., and Ei3 Energy, LLC. ("Pacer Entity Defendants"). See Cert. of Rainer Gonzalez, ¶ 1. Defendant has filed a cross-motion in opposition, also seeking summary judgment.

Plaintiff's complaint allege the following. Between 2007 and 2013 YAGI entered into a series of loan agreements with the Pacer Entity Defendants. Subsequently, the complaint alleges Defendants paid neither the principal nor the accrued interest pursuant to these agreements and are therefore in default. Accordingly, YAGI has charged the various Defendants with breach of

contract, breach of implied covenants of good faith and fair dealing and fraud. Plaintiff also requests piercing the corporate veil for any judgment entered in YAGI's favorPacer Entity Defendants, including Ray Gonzalez can be held individually, personally, jointly and severally liable.

Facts

YAGI's breach of contract claims involve numerous debt and security instruments Plaintiff entered into with the Pacer Entity Defendants over the six (6) year period between 2007 and 2013. These contracts organized into three groups based chronologically, on their respective dates of execution, and their subject matter are as follows:

(i) YAGI's contracts with Pacer Health in 2007 and 2008 ("Pacer Health Debentures");

(ii) YAGI's contracts with Pacer ECI and Pacer Health in 2009 ("Pacer ECI Contracts"); and

(iii) YAGI's contracts with Pacer ECI, Pacer Health, and Ei3 Energy ("Limited Waiver Agreement").

i. *Pacer Health Debentures*

Between 2007 and 2008, YAGI and Pacer Health Corporation entered into three (3) separate debenture agreements ("Pacer Health Debentures").

On July 6, 2007 YAGI's predecessor firm, Cornell Capital Partners, L.P. and Pacer Health executed a debenture agreement ("July 2007 Debenture"). See D. Gonzalez Cert., ¶ 6-7, Exs. A-E; see also Howley Cert., Ex. N at No. 30; see also Howley Cert., Ex. C, Ray Gonzalez Dep. at 26-27. D. Gonzalez Cert., Ex. A. The July 2007 Debenture financed $3.5 million to Pacer Health Corporation, at a fixed rate of interest. Id. Rainier Gonzalez signed the agreement document in

his capacity as CEO of the Pacer Health Corporation. Id. Payment of all outstanding principal under the July 2007 Debenture, including accrued and unpaid interest, was due to YAGI by its "Maturity Date" of March 31, 2009. Id. Plaintiff alleges Pacer Health failed to repay the amount due under the July 2007 Debenture by March 31, 2009. Id. As of January 4, 2017, YAGI claims to be owed $7,276,279.45 in unpaid principal and interest under the July 2007 Debenture. Id.

On September 18, 2017 YAGI and Pacer Health executed a second debenture agreement. ("September 2007 Debenture"). See D. Gonzalez Cert., Ex. D. The September 2007 Debenture financed $500,000 to Pacer Health at a fixed interest rate. Id. Rainer Gonzalez signed the September 2007 Debenture as Pacer Health's CEO. Id. Payment of outstanding principal under the September 2007 Debenture, including accrued and unpaid interest, was to be paid to YAGI by the maturity date: March 31, 2009.[1]

On April 1, 2008 YAGI and Pacer Health Corporation executed their third debenture agreement. ("April 2008 Debenture"). Under this agreement, YAGI loaned $5,786,017 to Pacer Health Corporation at fixed interest rate. See D. Gonzalez Cert., ¶ 8, Exs. F-H; see also Howley Cert., Ex. N at No. 35. Mr. Gonzalez executed the April 2008 Debenture in his capacity as Pacer Health CEO. See id. Payment of all outstanding principal due under the April 2008 Debenture agreement, including accrued and unpaid interest, was paid to YAGI on April 1, 2012, the maturity date. Id. Plaintiff contends Pacer Health failed to repay the amount due under the April 2008 Debenture by its respective maturity date. As of January 4, 2017, YAGI was owed $12,082,427.37 in unpaid principal and interest under the April 2008 Debenture. See id., ¶ 11, Ex. I.

[1] The Debenture entered into on September 2007 amended and restated the July 2007 Debenture. Plaintiff refers to the two Debentures, collectively, as the "July 2007 Debenture." See Plaintiff's Supplemental Letter Brief, p. 2 of 11.

ii. *Pacer ECI Contracts*

On April 1, 2009, Pacer ECI was assigned investments YAGI held in five (5) financially distressed companies in order to turnaround the firms. The arrangement was memorialized in two contracts: an Assignment Agreement and the Pacer ECI Debenture. See D. Gonzalez Cert., Ex. J and K. YAGI secured the transaction by executing the following agreements: the Partial Guaranty Agreement, the Security Agreement, and the Collateral Assignment Agreement.

YAGI conveyed to Pacer ECI the following investments under the Assignment Agreement:

a. A 2005, investment valued of $359,000 in Ei3 Corporation ("Ei3");
b. A 2006 and 2007 investment of $1,240,000 in 5G Wireless Communications, Inc. ("5G");
c. A 2006 and 2007, investment of $1,553,000 in Connected Media Technologies, Inc. ("CMT");
d. A 2006 investment of $2,250,000 in EYI Industries, Inc. ("EYI"); and
e. A series of investments made in 2005, 2006 and 2008 totaling of $2,540,320.24 in ICOA, Inc. See D. Gonzalez Cert., ¶ 12 (collectively, the "Five Investments").

Among other things, the Assignment Agreement transferred to Pacer ECI all of YAGI's right, title, and interest in the above five (5) companies. The interests transferred were valued at over $11 million. See Howley Cert., Ex. J, Ray Gonzalez Dep. at 200.[2] Pacer ECI in-turn assumed all obligations associated with the investments in Ei3, 5G, CMT, and ICOA, Inc. See Id. Gonzalez's role as manager and CEO of Pacer ECI, was to actively manage and realize a return on the Five Investments. See Ray Gonzalez Deposition at p. 48-49.

[2] At the time, the investment's combined value was approximately $11,781,125. Id.

Pacer ECI also issued a convertible debenture to YAGI for $11,781,125. See D. Gonzalez Cert., Ex. K. The Debenture had a maturity date of March 31, 2011, by which time Pacer ECI was obligated to pay YAGI "all outstanding Principal, accrued and unpaid Interest." Id., Ex. K at YAGI 0000684, ¶ 1(a). Rainer Gonzalez signed the Assignment Agreement and Pacer ECI Debenture Agreement as Pacer ECI LLC's CEO and "Manager." Id., Ex. K at YAGI 00000791.

In addition to the Pacer ECI Debenture, YAGI entered three (3) security agreements with the following parties: (i) the "Partial Guaranty Agreement" between YAGI and Pacer Health Corporation; (ii) the "Security Agreement" and; (iii) the "Collateral Assignment Agreement" both of which were executed by YAGI and Pacer ECI. See D. Gonzalez Cert., Exs., D., M and N.

Pursuant to the Partial Guaranty Agreement, Pacer Health Corporation "unconditionally and irrevocably" guaranteed payment of up to 80% of Pacer ECI's obligations, in the event Pacer ECI defaulted on the Pacer ECI Debenture. See D. Gonzalez Cert., Ex. L. The Partial Guaranty Agreement also required Pacer Health reimburse YAGI for costs, including attorney's fees incurred as a result of enforcing the payment under the Pacer ECI Debenture. See id.

The Security Agreement granted a continuing first priority security interest in all of Pacer ECI's personal property assets. See D. Gonzalez Cert., Ex. N. YAGI perfected the security interests, filing the appropriate UCC Financing Statement in the applicable jurisdictions where Pacer ECI was located. See Howley Cert., Ex. F.

The Collateral Assignment Agreement granted YAGI a security interest in all of Pacer ECI's right, title and interest in the documents evidencing the Five Investments. See D. Gonzalez Cert., Ex. M. The Collateral Assignment required Pacer ECI provide YAGI (i) monthly written reports on Pacer ECI's effort to collect on the five investments, and (ii) copies of all material

correspondence, documents, agreements and other written materials relating to Pacer ECI's collection efforts. Id. at Section 9(a). Gonzalez admitted in his deposition he never provided these written reports or issued to YAGI copies of material correspondence. See Howley Cert., Ex. C., Ray Gonzalez Dep. at 51, 212.

On March 31, 2011 Pacer ECI failed to meet its obligations under the Pacer ECI Debenture. D. Gonzales Cert., ¶ 19. As a result, YAGI alleges it is owed $23,676,833.54 in unpaid principal and interest pursuant to the Pacer ECI Debenture.[3] See Id. and Ex., I.

YAGI claims Pacer ECI concealed the fact that some of the assigned investments realized a profit. Plaintiff claims from 2009 to 2013 the Five Investments netted approximately $5.1 million in returns. See D. Gonzalez Cert., ¶ 19; see also Howley Cert., Exhibit C; Ray Gonzalez Dep. at 51, 212; Ex. K. The failure to report these returns, YAGI claims, is a clear breach of a provision within the Debenture requiring monthly disclosure of material correspondence, documents, agreements and other written materials relating to the revenue of the assigned stock. Id.

On September 14, 2011, YAGI alleges profits derived from the Five Investments had been concealed from YAGI when Pacer ECI and Ei3 Energy entered a Contribution and Settlement Agreement ("Ei3 Settlement Agreement").[4] See Howley Cert., Ex. B. The agreement was purported to resolve outstanding or "legacy" debts Ei3 owed to Pacer ECI. See id. Pursuant to the Ei3 Settlement agreement, Brick Mountain Media LLC, another Gonzalez operated firm, rather than Pacer ECI would be the entity receiving a $2 million cash infusion from the Ei3

[3] As of January 4, 2017

[4] Ei3 Energy is an entity Ray Gonzalez formed, operated, and controlled. See Howley Cert., Ex. B

investment profits. See id.[5] Plaintiff argues it is a: "[a] fair inference from these facts . . . [to assume] that Ray Gonzalez directed . . . the $2 million payment . . . to Brick Mount Media – and not to Pacer ECI, which Ray Gonzalez formed to take the Assignment – so that YAGI would not discover it." Plaintiff's Letter Brief, p. 8 of 47. The Ei3 Settlement Agreement was made without YAGI's knowledge or consent. See Howley Cert., Ex. K.

iii. *Limited Waiver Agreement*

On January 31, 2013, YAGI, Ei3 Energy, Gonzalez and the Pacer Entity Defendants executed the Limited Waiver agreement, consenting that the Ei3 Settlement Agreement constituted an "Event of Default," pursuant to the definition under the Pacer ECI Debenture. See D. Gonzalez Cert., Ex. O at YA 00000783, ¶ 1-2. In exchange, YAGI agreed to waive the default, so long as the Pacer Entities agreed to binding conditions of repayment. Id.

Pacer ECI, Pacer Health Corporation, and Ei3 Energy, as parties to the Limited Waiver, agreed to be jointly and severally liable to YAGI, under the Pacer ECI Debenture for $17,659,744.99. Id. Previously, only Pacer ECI was responsible to YAGI for any payment under the Pacer ECI Debenture. This changed with the Limited Waiver. Under the Waiver, all the Pacer entities had bound themselves to the terms of the Pacer ECI Debenture by "ratif[ying], confirm[ing] and reaffirm[ing] all the terms and conditions of the Pacer ECI Debenture." See id. at YAGI 00000783-84, ¶ 3(a)-(b). Pacer ECI, Pacer Health Corporation, and Ei3 Energy also agreed to make monthly payments to YAGI of no less than $20,000.00, in addition to the regularly scheduled payments under the Pacer ECI Debenture, July 2007 Debenture, and April 2008 Debenture. Id.

[5] Brick Mountain Media, a named defendant in this lawsuit was another firm founded, operated and controlled by Gonzalez. See Howley Cert., Exhibit J.

investment profits. See id.[5] Plaintiff argues it is a: "[a] fair inference from these facts . . . [to assume] that Ray Gonzalez directed . . . the $2 million payment . . . to Brick Mount Media – and not to Pacer ECI, which Ray Gonzalez formed to take the Assignment – so that YAGI would not discover it." Plaintiff's Letter Brief, p. 8 of 47. The Ei3 Settlement Agreement was made without YAGI's knowledge or consent. See Howley Cert., Ex. K.

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[5] Brick Mountain Media, a named defendant in this lawsuit was another firm founded, operated and controlled by Gonzalez. See Howley Cert., Exhibit J.

Nevertheless, during negotiations over the Limited Waiver, YAGI alleges Gonzalez concealed that Pacer ECI, Pacer Health Corporation, and Ei3 Energy were insolvent at the time and likely judgment-proof. See D. Gonzalez Cert., ¶ 27. As result, YAGI claims those entities "never made a single payment" according to the conditions of the Limited Waiver documents. See id., Ex. I.

Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46–2(c); See also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529–30 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46–2(c). If the evidence submitted on the motion "'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

For purposes of summary judgment by defendant, a court must "assume the truth of plaintiff's version of the facts, giving plaintiff the benefit of all favorable inferences that version supports." Brooks v. Odom, 150 N.J. 395, 398 (1995); See also Gerber v. Springfield Board of Ed., 328 N.J. Super. 24, 30 (App. Div. 2000). When the matter arises out of a defendant's motion for summary judgment, the plaintiff's version of the facts is assumed to be true, giving plaintiff

the benefit of all favorable inferences that that version supports. Gerber v. Springfield Board of Ed., 328 N.J. Super. 24, 80 (App. Div. 2000) (citing Brooks v. Odom, 150 N.J. 395 (1995)).

Analysis

A. Breach of Contract

To establish a breach of contract claim, a plaintiff must show that the parties entered into a valid contract, that the defendant failed to perform its obligations under the contract, and that the moving party sustained damages because of the breach. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). Where the terms of the contract are unambiguous, they should be enforced as written. Impink ex rel. Baldi v. Reyenes, 396 N.J. Super. 553, 560 (App. Div. 2007). Summary judgment is appropriate where the clear and unambiguous terms of a written contract entitle the moving party to judgment as a matter of law. See CSFB 2001-CP-4-Princeton Park Corp., LLC v. SB Rental I, LLC, 410 N.J. Super. 114, 119-20 (App. Div. 2009).

Evidence that tends to alter an integrated written document is prohibited under the parol evidence rule. Restatement (Second) of Contracts § 213 (1981). "In general, the parol evidence rule prohibits the introduction of evidence that tends to alter an integrated written document." Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 268 (2006); accord Filmlife, supra, 251 N.J. Super. at 573; Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 378 (App. Div. 1960).

The record supports the following, undisputed facts. Pursuant to the July 2007 and April 2008 Debenture Agreements, Pacer Health has acknowledged that they failed to repay YAGI. See D. Gonzalez Cert., ¶ 10 and 18. Pacer ECI has also not contested that under the Pacer ECI Debenture "YAGI was owed $23,676,833.54 in unpaid and principal and interest as of January 4, 2017." Id. at ¶ 20; see also Statement, ¶ 5, and Response, ¶ 1. Lastly, pursuant to the Limited

Waiver agreement, Pacer ECI, Pacer Health and Ei3 Energy have agreed, and do not presently dispute, that they agreed to be jointly and severally liable to YAGI for $17,659,744.99. See Gonzalez Cert., Ex. O at YAGI 00000783. The record supports no countervailing evidence that suggests Pacer Entity Defendants ever paid any monies to YAGI as required by the Limited Waiver. See Howley Cert., Ex. C, Ray Gonzalez Dep. at 229.

In their Opposition, Defendants do not dispute that they failed to repay the amounts owed upon their respective maturity dates. See Plaintiff's Statement of Undisputed Material Facts ("Statement"), ¶ 4, and Defendant's Response to Plaintiff's Statement of Undisputed Material Facts. ("Response"), ¶ 1. Instead, Defendants assert that representatives acting on behalf of YAGI made oral assurances that payment of the Debentures at maturity were not required at the maturity date. Pursuant to these oral agreements, payment to YAGI was due upon "asset stabilization" or a "liquidating event." See Ray Gonzalez Cert., ¶ 5. "Documents confirm. . ." that Plaintiff's representatives made these arrangements. See Defendant Summation, p. 3 of 14.

Applied here, the Court begins its analysis with the relevant contract provisions to determine whether they evidence a clearly integrated agreement. As a threshold matter, Defendants do not dispute that they freely and voluntarily entered into the subject contracts with YAGI. See Defendant's Response, ¶ 1.

The July 2007, April 2008 and Pacer ECI Debentures all include "Section 7" entitled "NOTICES." That provision reads as follows:

> "Any notices, consents, waivers *or other communications required or permitted to be given under the terms hereof must be in writing.* . . " See Howley Cert., Ex. N; See D. Gonzalez Cert., ¶ 6-7; See id. Ex. K (emphasis added).

The Assignment Agreement that transferred YAGI's interest in the Five Investments contained the following provision, under "Section 7, Subpart B":

Waiver agreement, Pacer ECI, Pacer Health and Ei3 Energy have agreed, and do not presently dispute, that they agreed to be jointly and severally liable to YAGI for $17,659,744.99. See Gonzalez Cert., Ex. O at YAGI 00000783. The record supports no countervailing evidence that suggests Pacer Entity Defendants ever paid any monies to YAGI as required by the Limited Waiver. See Howley Cert., Ex. C, Ray Gonzalez Dep. at 229.

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The Assignment Agreement that transferred YAGI's interest in the Five Investments contained the following provision, under "Section 7, Subpart B":

> "The Assignee [Pacer ECI] has not relied, in entering into this Assignment, upon any oral or written information from the Assignor [YAGI] or any of the Assignor's employees, attorney's, affiliates, agents or representatives, other than the express representations and warranties of the Assignor contained in this Assignment. *The Assignor further acknowledges that no employee or representative of the Assignor has been authorized to make, and that the Assignee has not relied upon, any statements or representations other than those specifically contained in this Assignment.*" D. Gonzalez Cert., at YAGI 00000663-664. (emphasis added).

The Limited Waiver contract that contained Defendants' acknowledgment it was in default under the Pacer ECI Debenture contained the following provision, entitled "Entire Agreement" under "Section 15":

> "This Agreement shall be binding upon the Obligors and the Obligor's respective successors and assigns, and shall insure to the benefit of the Lender and the Lender's successors and assigns. This Agreement and the other Limited Waiver Documents incorporate all of the discussions and negotiations between the Obligors and the Lender, either express or implied, concerning the matters included herein and in such other documents, instruments, and agreements, any statute, custom, or usage to the contrary notwithstanding. *No such discussions or negotiations shall limit, modify, or otherwise affect the provisions hereof.*" Id. Ex., O at YAGI 00000790. (emphasis added.)

Based on the above provisions this court finds the contracts in question are fully integrated writings and the parol evidence rule bars Defendant's attempt to alter their material terms. Defendants argue that YAGI agreed orally that the payments on Debentures required at their maturity dates simply did not need to be made except when the Assigned assets stabilized or experienced a "liquidating event." See Ray Gonzalez Cert., ¶ 5. This is in direct conflict with express terms under the agreements Maturity Date provisions and above expressions of a fully integrated agreement. As the court noted in Winoka Village, Inc. v. Tate, 16 N.J. Super. 330, 333 (App. Div. 1951), "[t]he general rule is clear that a parol agreement which in its terms is

contradictory of the express words of a contemporaneous or subsequent written contract . . . is ineffectual and evidence of it inadmissible, whether the parol agreement be called collateral or not. [Parties] are usually bound by the import of documents signed by them and which they had the ability and opportunity to read."

The record before the court does not evince a single material dispute of fact as to its breach of contract claims. Instead, the evidence overwhelmingly supports a finding that the Pacer Entity Defendants breached several enforceable agreements. YAGI notes Defendants do not dispute the factual existence or legal enforceability of the various contracts at issue. Moreover, Mr. Gonzalez has not and does not presently dispute that he signed the various contracts with YAGI, knowingly and voluntarily. For this reason the court finds in favor of Plaintiff's breach of contract claims. YAGI has demonstrated Defendants Pacer Health Corporation, Pacer ECI, LLC., and Ei3 Energy, LLC. ("Pacer Entity Defendants") breached their contracts with Plaintiff.

B. Breach of Implied Covenant of Good Faith and Fair Dealing

New Jersey law imputes into every contract an implied covenant of good faith and fair dealing, which requires that neither party to a contract will do anything that will have the effect of "destroying or injuring the right of the other party to receive the fruits of the contract." Sons of Thunder Inc. v. Borden Inc. 148 N.J. 396, 420 (1997). Thus, the implied convent requires that a contracting party act in good faith when performing its obligations under a contract. Wilson v. Amerada Hess Corp., 168 N.J. 236, 244-45 (2001).

Our courts have found the implied covenant in three situations. First, to permit the inclusion of terms and conditions not expressly set forth in the contract to fulfill the parties expectations because the terms are necessary to give business efficacy to the contract; (2) when bad faith served as a pretext for a party's exercise of a contractual right to terminate even though

that party had not breached any express term; (3) to rectify a party's unfair exercise of discretion regarding its contract performance. See Seidenberg v. Summit Bank, 348 N.J. Super. 243, 257-58 (App. Div. 2002). As a general rule, "[s]ubtrefuges and evasions" in the performance of a contract violate the covenant "even though the actor believes his conduct to be justified." Brunswick Hills Racquet Club, Inc. 182 N.J. at 225.

In the present matter, Brick Mountain Media was not a party to any agreement with YAGI. Nevertheless, the undisputed deposition testimony supports this court's conclusion that the nature of the financing demonstrated by the evidence between the Pacer Entities and Brick Mountain Media was such that it permitted inter-company "comingling" sufficient for this court to look beyond Brick Media's absence of contractual privity with YAGI. See Statement, ¶ 15, and Response, ¶ 1. During Mr. Gonzalez' deposition, counsel for YAGI inquired as to the reason proceeds from YAGI-purchased investments, which under the Assignment, were supposed to be managed by Pacer ECI, were instead sent to Brick Mountain Media:

Q: Did you sign this document titled Proceeds Disbursement Instructions?

A: Yes

Q: And you see that two million dollars pursuant to this document went to Brick Mountain Media, LLC and not Pacer ECI, LLC?

A: Because *this* [Brick Mountain Media] *was a sister corporation* for it [Pacer ECI], and so – I believe it was because we were allocating a large amount for Legacy Cargo. Basically, we were closing out the Cargo Legacy obligations.

Q: Was Pacer ECI, LLC, formed to take the assignment of the Ei3 investment?

A: Yes, as a subsidiary of Pacer Co. In other words, if you did it to Pacer ECI and then up to a distribution to Pacer Co. and then bring it back down to Brick Mountain Media, *it's the same thing versus just doing it*

intercompany. See Ray Gonzalez Dep. At 171-74, 205-06. (emphasis added).

Gonzalez's subjective belief that Brick Mountain Media was a proper recipient of income from the Five Investments represents a clear breach of "Section 7, Subsection B" of the Collateral Assignment agreement. There, Pacer ECI had covenanted and warranted that: "it will not assign, pledge, convert or otherwise encumber the Assigned Documents other than as permitted in the Assignment Agreement or in this Collateral Agreement without the prior written consent of YA Global." D. Gonzalez Cert., Ex. M p. YAGI 00000679.

Gonzalez, operating through both Pacer ECI and Brick Mountain Media exercised improperly discretionary authority regarding its contract performance when it moved the investment profits to a firm other than Pacer ECI, in violation of the Pacer ECI Debenture. YAGI alleges it had no knowledge of Brick Mountain Media's existence until this litigation commenced. In the absence of contradictory evidence the Court is compelled to find an implied breach of the covenant of good faith and fair dealing with respect to the earnings from the Five Investments.

C. Veil Piercing

Veil piercing is an equitable remedy through which a court disregards the corporate existence and imposes liability on an individual or entity normally subject to the limited liability protections of the corporate form. A corporation is a separate entity from its shareholders and incorporation generally insulates shareholders from the liabilities of the corporate enterprise. See State, Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 500-01 (1983). However, under various circumstances, a court may pierce the corporate veil and attach liability to a corporate entity's members or shareholders or affiliated entities. See Id. Thus, an individual may be liable for corporate obligations if he uses the corporation as his alter ego and abuses the corporate form

to defeat the ends of justice, perpetrate a fraud, accomplish a crime or otherwise evade the law. See Id.

To pierce the corporate veil, a plaintiff must establish that (1) there was such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote an injustice. See Venron Corp., 94 N.J. at 500.

In the present matter, Ray Gonzalez confirmed in his own testimony a willful disregard for the corporate form, describing it was his business practice to treat all his firms as one group or enterprise. See e.g.,Ray Gonzalez Dep. At 171-74, 205-06. At the direction of Gonzalez the Pacer Entity Defendants ignored corporate formalities when they aggregated and commingled funds together for the purpose of paying the alleged operating expenses of the other entities. Statement, ¶ 36, and Response ¶ 1.

In furtherance of same, Gonzalez has offered this court no evidence demonstrating that these corporate entities held regular board meetings or were even subsidiary corporations. In the absence of such evidence, this court finds that Gonzalez created a web of multiple entities, not necessarily to further his personal wealth, but instead to fraudulently conceal monies required to be held and maintained in separate and apart from ventures YAGI had not been a part of or agreed to.

Thus, Gonzalez was entrusted with considerable responsibility to turnaround five (5) struggling firms. Nevertheless, the contractual responsibilities delineated in the numerous agreements first and foremost included a repayment obligation to YAGI. Instead providing this court with any evidence it was presently or had previously sought to honoring this commitment,

the evidence only shows that Gonzalez chose insulate his firm from liability under the corporate form rather execute on his obligations to YAGI. For these reasons, YAGI's request to pierce the corporate veil is granted.

D. Fraudulent Conveyance

To determine whether a "transfer constitutes a fraudulent conveyance, the court looks at two criteria. First, 'whether the debtor [or person making the conveyance] has put some asset beyond the reach of creditors which would have been available to them at some point in time 'but for the conveyance'" Barsotti v. Merced, 346 N.J. Super, 504 at 515 (2002) (quoting In re Wolensky's Ltd. P'ship, 163 B.R. 615, 626-27 (1993). Second, the court looks at whether the transfer was calculated to hinder, delay or defeat collection of a known debtor. Ibid.

In determining whether a debtor had the requisite intent to "deliberately cheat a creditor by removing his property from the jaws of execution," courts may consider a non-exhaustive list of eleven factors, referred to as "the badges of fraud." N.J.S.A. 25:2-26; Banco Popular North America v. Gandi, 184 N.J. 161 Barsotti v. Merced, 346 N.J. Super. 504, 515 (App. Div. 2002). "'Badges of fraud' represent circumstances that so frequently accompany fraudulent transfers that their presence gives rise to an inference of intent." Gilchinsky, 159 N.J. 463 at 476. Even the presence of a single factor "may cast suspicion on the transferor's intent. . . ." Ibid.

N.J.S.A. 25:2-26 enumerates the "badges of fraud" courts are to consider. The section provides:

a. The transfer or obligation was to an insider;

b. The debtor retained possession or control of the property transferred after the transfer;

c. The transfer or obligation was disclosed or concealed;

d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

e. The transfer was of substantially all the debtor's assets;

f. The debtor absconded;

g. The debtor removed or concealed assets;

h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

i. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

j. The transfer occurred shortly before or shortly after a substantial debt was incurred; and

k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

As in Gilchinsky, "the transfer[s] [at issue] [here are] laced. . .." with "badges of fraud" Id. at 478. The Court finds the following badges present with respect the Pacer Entity Defendants:

a. *Insider transfer:* The transfers between the Gonzalez Defendants were all transfers to insiders, i.e., to Ray Gonzalez personally or to entities that Ray Gonzalez owned, operated and controlled.
b. *Retain possession:* Since all of the Gonzalez Defendants were owned, operated and controlled by Ray Gonzalez –indeed they were treated as "one big operation" and "one enterprise" –Ray Gonzalez and the debtor entities retained control of the funds after the transfers were made.
c. *Concealed transfer*: The Gonzalez Defendants concealed transfers from YAGI (a creditor)
d. *Most of debtor's assets transferred*: The transfers were for substantially all the debtor-defendants' asserts, and rendered the debtor-defendant's insolvent. Indeed, the Pacer

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Entity Defendants are no longer operating and have no assets with which to satisfy their debts to YAGI.

e. *Sham consideration*: There is no evidence in the record that companies making the admitted intercompany transfers received any value for the transfers, let along reasonably equivalent value.

f. *Removal of assets*: The assets of the debtor-defendants were removed to put them beyond YAGI's reach, by transferring them to companies—Brick Mountain Billing, Pacer Health Staffing and Pacer Staffing—that had no reporting obligations to YAGI.

g. *Transfer immediately after debt incurred*: The transfers were made shortly after the Pacer Entity Defendants incurred substantial debts to YAGI.

It is evident attempts to defraud have been committed against YAGI. Notwithstanding the same, Defendants attempt to argue the first two badges of fraud are not present is without merit. "A finding of even one badge of fraud may cast suspicion on the transfers' intent" and a finding of several badges "generally provides conclusive evidence of an actual intent to defraud." Gilichinsky 159 N.J. at 477.

Plaintiff clearly has established that the transfer of monies belonging to YAGI by the Pacer Entity Defendants to the other Gonzalez Defendants was fraudulent under the New Jersey Uniform Fraudulent Transfer Act, N.J.S.A. 25:20-20. Defendants do not dispute that intercompany transfers of YAGI funds were made between the Obligors of those funds and other defendants.

Conclusion

For the aforesaid reasons, this court rules in favor of YAGI on their motion for summary judgment pursuant to the following counts: (i) Counts 1-5—Breach of contract claims; (ii) Count 6—Breach of the implied covenant of good faith and fair dealing; (iii) Count 16—Breach of the Collateral Assignment Agreement; (iv) Count 15—Fraudulent transfer claim (v) and Count 17—

Claim to pierce the corporate veil, holding Ray Gonzalez personally liable. Defendants' cross-motion for partial summary judgment is denied for the reasons stated below.

YAGI has put forward undisputed evidence demonstrating the parties entered valid and binding Financing Agreements, unambiguously requiring the Pacer Defendants repay the amounts outstanding under the Debentures. The uncontested evidence also demonstrates these agreements were breached and as a result plaintiff suffered significant damages. For these reasons and those already stated, the court holds YAGI entitled to summary judgment on its breach of contract claims. (Counts 1-5, 16).

This court makes the following findings based on undisputed evidence from the record with respect to plaintiff's breach of contract claims:

1. The July 2007 Debenture and April 2008 Debenture were breached by *Pacer Health* for failure to repay all principal and interest due to YAGI on maturity, resulting in $19,358,706.80 in damages;
2. The April 2009 Assignment was breached by *Pacer ECI*, *Ei3 Energy*, *Brick Mountain Media,* and *Pacer Health Staffing* (held out as "one enterprise") for failure to turn over to YAGI, $5.1 million in investment gains, resulting in $5.1 million in damages;
3. The Pacer ECI Debenture was breached by *Pacer ECI* for failure to repay all principal and interest due to YAGI on maturity, resulting in $23,676,833.54; and
4. The Limited Waiver was breached by *Pacer Health, Pacer ECI*, and *Ei3 Energy* for failing make single monthly payment above $20,000 to YAGI to repay outstanding amounts owed under the relevant Debentures, resulting in $17,659,744.99.

This Court holds Defendants are in breach of the implied covenant of good faith and fair dealing. Defendant clearly exercised unfair discretion regarding its contract performance when it moved the investment profits to a firm other than Pacer ECI, in violation of the Pacer ECI Debenture.

This Court further holds Defendants management of the defendant-entities as a single enterprise renders them not entitled to the protections of the corporate form. Here, the Pacer entities ignored corporate formalities regarding the transferring of funds and at the direction of Gonzalez, intermingled assets. Mr. Gonzalez's own testimony indicated he treated the firms as a "tight-knit" group of companies. In spite of Gonzalez' belief that commingling of funds was appropriate due to the nature of the intercompany relations, he is was not entitled to direct the use of said funds in a manner that would result in a breach of its contracts with YAGI.

Moreover, this court holds that transfers between and among the entities controlled by Gonzalez, each bear the hallmarks of an actual fraudulent transfer. Plaintiff's Seventh Count of Fraud, pleads for identical relief as Count Fifteen.[6] Therefore, Count Seven is mooted by this Court's favorable ruling for Plaintiff as to Count Fifteen. Judgment is therefore entered against Ray Gonzalez, Pacer ECI, Ei3 Energy, Pacer Health Staffing, Brick Mountain Billing, jointly and severally, for the value of any payments made by the Pacer Entity Defendants to Ray Gonzalez and/or the Brick Mountain Defendants.

The Court rejects defendant's defense of fraud in which they claim the existence of an oral agreement contradicting a matter expressly addressed in the parities' writing. See e.g., Chance v., McCann, 205 N.J. Super. 547, 563-64 (App. Div. 2009). Defendants cannot circumvent the parol evidence by pointing to oral arrangements outside the four corners of the

[6] Count Seven alleges "Defendants "fail[ed] to disclose that Brick Mountain Media had received a $2 million payment in connection with the Ei3 investment, attempt[ed] to hide certain payments from YAGI by directing that they be made to Pacer Health Staffing, Pacer Staffing, and/or Brick Mountain Media, misappropriating millions of dollars belonging to YAGI, and upon information and belief, fraudulently diverting YAGI's funds to Ray Gonzalez personally and to Brick Mountain Billing." Second Amended Complaint, p. 23 ¶ 135. Count Fifteen alleges: "Pacer Health, Pacer ECI, and Ei3 Energy, while debtors of YAGI, made fraudulent and/or preferential transfers of monies and other assets to Ray Gonzalez and/or the Pacer Entity Defendants. . . "[t]hese transfers were made with intent to hinder, delay or defraud the creditors of Pacer Health, Pacer ECI, and Ei3 Energy, including YAGI." Id. at p. 31 ¶ 181, 183. Plaintiff has not shown how the underlying facts and damages alleged in Count Seven and Fifteen are distinguishable. The two counts each requires a showing of an intent to defraud and both are predicated on the same improper transaction in an effort to bypass paying YAGI.

contract when the contract at issue is fully integrated. Further the parol evidence is not required to define the "terms of repayment," as the contracts' are clear in defining the phrase.

This Court rejects each of defendant's four affirmative counter-claims based on the theory they are entitled to rescind the agreements. Defendant have shown no evidence demonstrating even a plausible basis of fraud on the part of YAGI that would be sufficient to justify recession of the Debentures or Limited Waiver agreements.

ORDERED in chambers at Elizabeth, New Jersey, this 4th day of April 2017. This writing represents the Court's reasoning with respect to the Summary Judgment Order attached herewith and dated April 4, 2017.

ROBERT J. MEGA, J.S.C.
New Jersey Superior Court Judge

Copies furnished to:
Counsel of record