SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ALLEN GOLDMEIER, STEVEN GOLDMEIR, and CENTURY SPORTS, INC. f/k/a RAND INTERNATIONAL LEISURE PRODUCTS, LTD.,

Plaintiffs,

- against -

MARK WORKSMAN, RAND INTERNATIONAL LEISURE PRODUCTS, LLC f/k/a RAND INTERNATIONAL ACQUISITION I, LLC, and MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP,

Defendants.

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TRIAL/IAS PART: 12
NASSAU COUNTY

Index No: 001315-10
Motion Seq. Nos: 9 and 10
Submission Date: 6/23/17

The following papers have been read on these motions:

Notice of Motion and Worksman Affidavit in Support.............................x
Summary Judgment Motion and Affidavit of Mark A. Worksman,
Table of Contents and Exhibits...x
Goldmeier Affidavit in Opposition to Worksman Motion and Exhibits....x
Memorandum of Law in Opposition to Worksman Motion.......................x
Worksman Reply to Opposition and Exhibits...x
Plaintiffs' Notice of Motion..x
Goldmeier Affidavit in Support and Exhibits..x
Kushner Affirmation in Support and Exhibits...x
Plaintiffs' Rule 19-a Statement and Exhibits...x
Plaintiffs' Memorandum of Law in Support...x
Worksman Affidavit in Opposition..x
Worksman Opposition to Summary Judgment Motion..............................x
Kushner Affirmation in Reply..x
Disc with Affidavit in Support, Affirmation in Support,
Plaintiffs' Memorandum of Law in Support and Rule 19-a Statement......x

This matter is before the Court for decision on 1) the motion filed by Defendant Mark Worksman ("Worksman") on May 5, 2017, and 2) the motion filed by Plaintiffs Allen Goldmeier ("Allen"), Steven Goldmeier ("Steven") (collectively "Goldmeiers") and Century Sports, Inc., f/k/a Rand International Leisure Products, Ltd. ("Century") ("Plaintiffs") on May 8, 2017, both of which were submitted on June 23, 2017. For the reasons set forth below, the Court 1) denies Defendant Worksman's motion; and 2) grants Plaintiffs' motion and a) awards Plaintiffs judgment on the third cause of action in the Complaint in the sum of $3,331,702.41, together with interest at the Default Rate of 14% from April 2010 to be determined by Special Referee Thomas V. Dana at the inquest directed herein;[1] b) awards Plaintiffs judgment on the fourth cause of action in the Complaint, and directs that the appropriate attorney's fees award will be determined at an inquest before Special Referee Thomas V. Dana on September 19, 2017 at 10:00 a.m.; and c) dismisses Worksman's remaining counterclaim. To the extent that Plaintiffs wish to pursue any remaining causes of action, such proceeding shall be held before Special Referee Thomas V. Dana on a hear-and-report basis.

BACKGROUND

A. Relief Sought

Worksman moves for an Order, pursuant to CPLR § 3211(a)(1), dismissing the Complaint, finding the guarantee null and void, finding Plaintiffs liable for fraud in the inducement and awarding damages including punitive damages. Plaintiffs oppose the motion.

Plaintiffs move for an Order, pursuant to CPLR § 3212, granting summary judgment on Plaintiffs' third and fourth causes of action and dismissing the first counterclaim asserted by Defendant Worksman. Worksman opposes the motion.

B. The Parties' History

The parties' history is set forth in detail in prior decisions of the Court and the Court incorporates its prior decisions ("Prior Decisions") by reference as if set forth in full herein. As noted in the Court's prior decisions, Century and other entities owned by the Goldmeiers entered into an Asset Purchase Agreement ("APA"), which Worksman signed in his capacity as Manager

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[1] The Court is awarding Default Interest from April 2010 rather than March 2010 as suggested by Plaintiffs (*see* Kushner Aff. in Supp. at ¶ 74).

of Rand, for the sale of substantially all of their assets to Rand. Rand paid a portion of the Purchase Price at the Closing, and the balance of the Purchase Price was evidenced by a Promissory Note payable by Rand to Century. The parties executed numerous Loan Documents, including the Subordinated Note in the amount of $3,000,000 in favor of Old Rand and the Worksman Guaranty in which Worksman delivered his personal guaranty to Century in connection with the Subordinated Note. The company has been referred to as "Old Rand" prior to the transaction, and to "Rand" or "New Rand" subsequent to the transaction. New Rand defaulted on its obligation to Century under the Subordinated Note. Century accelerated the due date of the Subordinated Note on October 23, 2009.

In order to finance the acquisition of the Purchased Assets and to provide for Rand's working capital needs, Rand obtained two (2) asset based loans from Wells Fargo Bank, N.A. ("Wells Fargo"). Plaintiffs have alleged that, following the Closing, Rand was constantly delinquent in making payments to suppliers, resulting in the loss of valuable business relationships and a restriction of Rand's credit lines, and Rand failed to make required payments to the Goldmeiers. Plaintiffs also allege, *inter alia*, that Worksman caused Rand to default on the Wells Fargo obligations, which prompted Wells Fargo to declare a default and accelerate the balance due. Plaintiffs allege that this default resulted from Rand's improper and fraudulent characterization of returned goods as inventory.

The Complaint contains thirteen (13) causes of action:

First - against Rand for breach of the Promissory Note,

Second - against Rand for recovery of counsel fees pursuant to the Promissory Note,

Third - against Workman for breach of the Guaranty,

Fourth - against Worksman for recovery of counsel fees pursuant to the Guaranty,

Fifth - against Rand for breach of the August Agreement,

Sixth - against Worksman for breach of the August Agreement,

Seventh - by Allen against Worksman for vacation pay due under the August Agreement,

Eighth - for an Order directing the Escrow Agent to release the Certificates to Century,

Ninth - for replevin of the Membership Interests by directing seizure of the Certificates,

Tenth - for replevin of the Collateral by issuance of an order of seizure,

Eleventh - for injunctive relief against the Defendants with respect to the Collateral,

Twelfth - against Worksman for fraud, and

Thirteenth - against Rand for breach of the Employment Agreements

As also noted in a prior decision of the Court, In March of 2010, an involuntary chapter 7 case was commenced against Rand in the United States Bankruptcy Court for the Eastern District of New York ("Bankruptcy Action"). The Goldmeiers and Century were two of the petitioning creditors in the Bankruptcy Action. The Bankruptcy Court permitted the parties to file amended pleadings, and an amended petition ("Amended Petition") against Rand was filed in May of 2010. By Decision and Order dated June 18, 2010, the Bankruptcy Court denied Rand's Motion for Summary Judgment, and deferred ruling on Rand's Motion for Abstention Dismissing Voluntary Petition. A trial on the Amended Petition was conducted and by decision after trial dated August 31, 2010 ("Bankruptcy Decision"), the Bankruptcy Court (Trust, J.) rendered an opinion that addressed the issue "whether to enter an order for relief against the debtor" and "a subsidiary issue...whether the Court should abstain from entering an order for relief if an order for relief were otherwise proper" (Bkcy. Dec. at p. 4). The Bankruptcy Court concluded that an order for relief should be entered, and that it should not abstain from entering such an order (*id.*). The Bankruptcy Court determined that Century is a petitioning creditor that holds a claim in the amount of $3,331,702.41 that is not subject to a bona fide dispute as to either liability or amount (*id.* at p. 14). By Order dated September 28, 2010, the Bankruptcy Court granted Rand's motion to convert the Bankruptcy Action from Chapter 7 to Chapter 11.

In its decision dated October 22, 2012 ("October 2012 Decision") (Ex. 7 to Ps' Rule 19-a Statement), the Court *inter alia* granted Plaintiffs' prior motion for partial summary judgment dismissing Worksman's Second Counterclaim and denied Plaintiff's prior motion for partial summary judgment dismissing Worksman's First Counterclaim. In the first Counterclaim, alleging fraud in the inducement, Worksman alleges that the instruments on which Plaintiffs rely were induced by the fraudulent and materially misleading promises by the Goldmeiers that they would work cooperatively with Worksman, post-closing, to pay off the bank debt incurred to finance the purchase of Century. Worksman further alleges that he relied on those

misrepresentations in agreeing personally to guarantee the obligation.

In the October 2012 Decision, the Court granted Plaintiffs' motion for summary judgment dismissing Worksman's Second Counterclaim on the grounds that: 1) the Second Counterclaim contains language pertaining primarily to Plaintiffs' alleged breaches of their obligations to Rand and, therefore, the claims belong to the company, not to Worksman personally; and 2) the Second Counterclaim is foreclosed by the doctrines of *res judicata* and collateral estoppel because the issues raised in the Second Counterclaim were litigated against Rand and decided in the Bankruptcy Action. As noted in the October 2012 Decision, the Bankruptcy Court determined that Century is a petitioning creditor that holds a claim in the amount of $3,331,702.41 that is not subject to a bona fide dispute as to either liability or amount.

In support of his motion now before the Court, Worksman provides extensive documentation including pleadings filed in this action, Prior Decisions of the Court, and submissions in the Bankruptcy Action. Worksman contends *inter alia* that 1) the ownership of the cash collateral is Worksman's; 2) the Goldmeier Brothers/Century do not have a perfected second security position or interest in the seized collateral, as reflected in the Bankruptcy Court records; 3) the Goldmeier Brothers/Century acknowledge in the Bankruptcy Action that there are no claims against Worksman on the $3 million guarantee; 4) Plaintiffs fraudulently induced Worksman into entering into the subject transaction, 5) the Goldmeier Brothers/Century breached non-compete and non-solicitation provisions in the parties' agreement; 6) the Goldmeier Brothers/Century violated the APA, as demonstrated *inter alia* by the June 8, 2010 affidavit of Leslie Turbowitz in the Bankruptcy Action (Ex. 38); and 7) the Goldmeier brothers' conduct demonstrates that they never intended to give up control of their company as evidenced, *e.g.*, by the fact that they continued "to control customer, supplier and Licensor relationships" and "Delayed credit memos for defective products sold to Wal-Mart from long term supplier friend Sales Chief to qualify them as a Bankruptcy Petitioner" (Worksman Aff. at p. 49).

In opposition to Worksman's motion, Allen affirms that Century has repeatedly attempted, without success, to procure from Worksman the exact nature of the misrepresentations that allegedly induced him into entering into the transaction with Century. Goldmeier submits that Worksman's affidavits "contain conclusory statements lacking any factual or documentary

evidence of the wrongs allegedly committed by the Goldmeiers, and/or how Worksman was fraudulently induced into the sale" (Allen Aff. in Opp. at ¶ 8).

Allen disputes Worksman's assertion that it has never been determined who owns the cash collateral, and submits that this assertion is refuted by the affirmation in support of Plaintiffs' counsel as well as numerous Court rulings annexed as exhibits thereto. Allen contends, further, that Worksman provides no connection between his assertions that he was defrauded, and the exhibits on which he relies in support of that assertion.

Allen also disputes Worksman's contention that the Goldmeiers continued to control the business following the acquisition. Allen affirms that the relationship between New Rand and Sales Chief, one of New Rand's largest trade vendors, was not as described by Worksman. Allen notes that Worksman, in defending the merits of the involuntary petition, never raised these claims against Sales Chief that he now offers in support of his motion. Allen affirms that the Bankruptcy Court determined that Sales Chief held a claim of $972,679.16 that was not subject to a bona fide dispute as to amount or liability, citing Exhibit 17 to the Kushner Affirmation in Support of Plaintiffs' Motion, which is an August 31, 2010 transcript in the Bankruptcy Proceeding. That transcript includes the following directive by the Bankruptcy Court, at page 14:

> The Court has determined then that the following six petitioning creditors hold claims which are not subject to a bona fide dispute as to either liability or amount, none of which six creditors are asserted as holding contingent claims nor did the Court find them to hold contingent claims. Number one, Sales Chief in the amended petition amount of $972,679.16; number two Joseph Sanbrook in the amount of $18,500, number three Executive Importers in the amount of 1,000 – $1,016,032.69, number four, Century Sports, $3,331,702.41, number five G Squared Promotion, $38,331.21, and KKG in the amount of $51,023.78.

Allen affirms that what, in fact, caused New Rand's relationship with Sales Chief to erode was Worksman's company's inability to timely pay its bills. Allen affirms that Old Rand had a 14-year history of paying Sales Chief in a timely manner and, for this reason, Sales Chief agreed to forego any requirement that Old Rand pre-pay its purchases or otherwise post a letter of credit or collateral. Allen affirms that the Goldmeiers made no representation to Worksman that

any vendor with whom Old Rand transaction would continue to do business with New Rand once Worksman assumed ownership. Moreover, any promise, representation or warranty made by the Goldmeiers to Worksman is fully contained in the APA, and the APA makes no representation about continued vendor relationships. Allen affirms that Worksman "quickly destroyed" the goodwill with Sales Chief (Allen Aff. in Opp. at ¶ 47) by failing to arrange for the capital needed to remain current with Sales Chief.

Allen also disputes Worksman's assertion that Worksman advised the Goldmeiers to discontinue use of Sales Chief as a supplier. Allen affirms that Worksman has never produced a single document which demonstrates, or even suggests, that Worksman told the Goldmeiers to discontinue ordering from Sales Chief, and Allen affirms that no such document exists. Allen affirms that "it was not only Worksman who controlled the supply chain, it was Worksman who expressly directed the Goldmeiers to continue placing orders with Sales Chief - even after his discovery of the alleged "kickback scheme""" (Allen Aff. in Opp. at ¶ 81). Allen provides emails (Ex. 61 to Allen Aff. in Opp.) demonstrating that the Goldmeiers followed Worksman's direction, as they were required to do, regarding sourcing the supply of New Rand's product line. Those emails include 1) a June 8, 2009 email from Worksman to Allen which includes the statement "By all means keep the mold at Sales Chief's Supplier VKS," and 2) a January 23, 2009 email from Worksman to the Goldmeiers reading "Question: We have in the file a PO to Sales Chief for 450,000 units at $19.55 signed by a member of Rand's team. Do you know how many units Sales Chief sold to Rand at that $19.55 price?

As further evidence that, contrary to Worksman's claims, the Goldmeiers never acted as if they were in control of New Rand, Allen affirms *inter alia* that 1) Worksman was responsible for, and made all final decisions, as to compliance related issues, as evidenced by the representative emails provided (Ex. 62) which demonstrate that the compliance aspects of New Rand's business was under Worksman's supervision and that he made the final decision as to those issues; and 2) the Goldmeiers did not have access to all of the company's books and records, and it was Worksman who controlled the nature of the financial information that was provided to the Allens (*see* emails at Ex. 63). Those emails include an April 21, 2009 email from gbarbera@grandinternational.com to Allen advising Allen that "Unless directed otherwise I am

only authorized to provide financial information pertaining to the daily collateral report to Mark Worksman, John Cohen and Joanna Arena."

Allen also describes as "false" (Allen Aff. in Opp. at ¶ 88) Worksman's claim that he was defrauded due to Century unwillingness to follow through with an alleged promise to subordinate its lien position once Wells Fargo was repaid, or in connection with a refinancing of New Rand's debts. Allen affirms that this claim is refuted by the deposition testimony of Ira Halperin ("Halperin"), Worksman's own transactional attorney (Ex.32 to Kushner Aff. in Supp.). That testimony includes the following, at page 78 of that testimony:

> Q. Looking at the subordination agreement, Exhibit F, is there anywhere, to your knowledge as a lawyer, where old Rand, the Goldmeiers company, agreed to further subordinate to a new lender, that may be obtained in the future by her [sic] client?
>
> A. Not that I see.
>
> Q. So you would agree that the purpose of the subordination agreement, was to allow Wells Fargo a first position and to allow my client a second position on the assets and that once Wells Fargo would be repaid, my client would occupy the first priority position, security interest and lien against the assets of new Rand?
>
> A. Yes.
>
> Q. Are you aware of any agreement, that would have changed the scenario that I just described?
>
> A. Not that I'm aware of.

Allen affirms that the only time that the subordination issue arose was well after the closing, years subsequent to the execution and delivery of the Worksman Guaranty. In August 2009, New Rand was about to default on a $500,000 payment that it needed to ensure that it maintained its most valuable license with Marvel Entertainment. Allen affirms that the Goldmeiers agreed to provide New Rand with a short term $500,000 loan, and to clear up other issues. To that end, the Goldmeiers and Worksman entered into an agreement dated August 25, 2009 (Ex. 64), pursuant to which the Goldmeiers first agreed to a limited subordination of its, at the time, second priority security interest in New Rand's assets. Thus, this agreement, which

occurred in August 2009, could not have been something on which Worksman relied when he pledged his personal guaranty years earlier. Allen affirms that when Worksman solicited the Goldmeiers for the $500,000 loan, Worksman never disclosed that Wells Fargo had issued a number of default letters to New Rand. Allen also affirms that this $500,000 loan that the Goldmeiers provided to New Rand were funds that were earmarked for his daughter's medical care, and these funds, in addition to the Century loan of $3 million, were lost " as a result of Workman's deception" (Allen Aff. in Opp. at ¶ 96).

In support of Plaintiffs' motion, Plaintiffs provide a copy of the Worksman Guaranty (Ex. 12 to Ps' Rule 19-a Statement). Allen affirms that Worksman, to complete his leveraged buyout of Old Rand's assets, formed New Rand and agreed to pledge the acquired assets as collateral for the repayment of the $3 million Note. Worksman executed the Worksman Guaranty which was delivered to Century. Allen affirms that New Rand failed under Worksman's ownership and became financially strapped, and that Worksman engaged in deceitful conduct, including but not limited to 1) manipulating the value of New Rand's borrowing base by falsely reporting assets, to induce Wells Fargo to lend against the same collateral more than once; 2) inducing the Goldmeiers to loan $500,000 to New Rand, in August 2009; and 3) permitting Dollar Tree, a customer of New Rand, to divert the payment of an $864,000 receivable that was pledged as collateral to Wells Fargo.

In further support of Plaintiffs' contention that it was Worksman's improper conduct, and not any misfeasance by Plaintiffs, that led to New Rand's demise, Plaintiffs provide deposition testimony of Robert Ostrowe ("Ostrowe"), a vice president of Wells Fargo. That deposition on December 2, 2016 (transcript at Ex. 31 to Kushner Aff. in Supp.) included the following testimony, at page 255:

> Q. In this particular case, when I use the word fraud and I asked you the question was new Rand liquidated as a result of a fraud?
>
> A. Yes. The bank liquidated its collateral to repay its loan because it lost faith in the integrity of the information being provided by the company.
>
> Q. Because there was a fraud, correct?
>
> MR. WORKSMAN: Objection.

A. Because there was a fraud.

In addition, Ostrove testified that it was Worksman, not Plaintiffs, who engaged in the fraud, as reflected by his testimony, at page 222:

> Q. You determined by this point in time 9/22/09 that the company had made an intentional diversion of collateral that belonged to the bank?
>
> A. Correct.
>
> Q. Do you know who is responsible for that diversion?
>
> A. I do not.
>
> Q: Do you believe it was my client?
>
> A. No.
>
> Q: Who do you believe at the company made that decision?
>
> A. Mr. Worksman or Mr. Cohen.

Allen also provides emails between Ostrowe and Worksman in 2007 (Ex. 37 to Allen Aff. in Supp.) which confirm the strained relationship between Ostrowe and Worksman, including an email in which Ostrowe advises Worksman that "Blaming the bank for Rand's accounting deficiencies is not a viable excuse, nor a satisfactory way to address a covenant default." Allen submits this refutes Worksman's assertion at paragraph 17 of his February 1, 2010 affidavit (Ex. 3 to Ps' Rule 19-A Statement) that "Rand LLC had a perfect track record for the prior 24 months, with monthly payments that were automatically withdrawn from the Rand account, and had met all its profit projections and all the bank covenants in all prior periods." Allen provides other affirmations and supporting documentation in support of Plaintiffs' contention that Worksman has misrepresented his interactions with Wells Fargo.

Allen submits that Worksman's counterclaim has no merit. He contends, first, that it is imprecise, and that Worksman's response to Century's Demand for a Verified Bill of Particulars

(Ex. 33 to Kushner Aff. in Supp.) is "convoluted, imprecise and, in many respects, simply unintelligible" (Allen Aff. in Supp. at ¶ 95). Allen contends, further, that the allegations on which the counterclaim is based are untrue, as evidenced by the fact, *inter alia*, that 1) the APA provides no representation from the Goldmeiers that any Licenses would transfer from Old Rand to New Rand, and the APA (Ex. 9 to Ps' Rule 19-a Statement) provides only that licenses would be transferred from Old Rand to New Rand "to the extent transferrable;" 2) nothing in the APA required Century or the Goldmeiers to ensure the transfer of any license from Old Rand to Rand; 3) the Goldmeiers fulfilled their obligation, as set forth in the APA, to assist Worksman in obtaining licensor consents, as evidenced by the fact that the APA closed on Apil 23, 2007 with nine (9) licenses transferred from Old Rand to New Rand; 4) the Goldmeiers were not prohibited from owing or operating another business, and made no such representation to Worksman but, rather, agreed not to own a business that competed with New Rand; 5) the Goldmeiers complied with that obligation, as Millennium Products Group, LLC ("Millennium") was formed almost three (3) years after the Worksman Guaranty was executed and delivered and was engaged in a business that did not compete with Rand; 6) Worksman's claim that the Goldmeiers breached the Employment Agreements, or induced Worksman to execute the Guaranty on the false promise that they would cooperate with him, is belied by documentary proof, including emails that include a December 17, 2007 email from Worksman (Ex. 48) in which he states "I was hoping that after all the hard work and long hours you put in that something would come of it - And it did. You did a great Job this year and lived up to all your words & goals" and a December 31, 2008 email from Worksman to Allen (Ex. 49) returning his wishes for a happy new year and stating "Nobody could have done it without you;" and 7) Century never advised Worksman that it would further subordinate its already junior lien portion in the event that New Rand required additional capital, and Worksman's own attorney recognized that Century had no duty to subordinate.

In further support of Plaintiffs' motion, counsel for Plaintiffs ("Plaintiffs' Counsel") provides a detailed history of the bankruptcy proceedings in this action (Kushner Aff. in Supp. at ¶¶ 5-64). Those proceedings include 1) the August 31, 2010 proceedings in the Bankruptcy Court during which the Bankruptcy Court determined that Century is a petitioning creditor that

holds a claim in the amount of $3,331,702.41 that is not subject to a bona fide dispute as to either liability or amount (Ex. 17 to Kushner Aff. in Supp.), and 2) an April 28, 2016 decision in which the Bankruptcy Court held Worksman in civil contempt "based on his having knowingly and willfully violated multiple Orders of this Court that are clear and unambiguous, based upon proof of non-compliance that is clear and convincing, and where Mr. Worksman failed to diligently attempt in a reasonable manner to comply with any of the Orders" (Ex. 18 to Kushner Aff. in Supp. at p. 1). Plaintiffs' Counsel affirms that, as the Bankruptcy Court has already determined that Century has an allowed claim against Rand in the amount of $3,331,702.41 as of March 2010, Worksman is liable under the Worksman Guaranty for the sum of $3,331,702.41 as of March 2010, as no sums have been paid to satisfy this obligation, together with interest that has accrued since March 2010.

In support of Plaintiffs' application for interest on the Subordinated Note, Plaintiffs' Counsel sets forth the provision in the Note titled "Interest" (Ex. 10 to Ps' Rule 19-a Statement at p. 2), which reads as follows:

> (b) Interest. Except as otherwise provided herein, interest shall accrue from the date hereof on any unpaid principal balance of this Note at the rate of eight percent (8%) per annum. In the event that the Company fails to pay any amount hereunder when and as the same shall become due and payable and such failure has not been cured within fifteen (15) days of such failure, interest shall accrue on the amount of such payment at the rate of ten percent (10%) per annum (the "Default Rate"), provided that if such failure occurs after the Term Note has been repaid, the Default Rate shall equal fourteen percent (14%) per annum.

Plaintiffs' Counsel affirms that Century is entitled to additional interest on the principal balance of the Subordinated Note, which is $3,000,000.00, that has accrued since March 2010. Thus, he affirms, pursuant to the Subordinated Note, Century's additional interest accrues at the Default Rate of 14% from March 2010 to April 2017, a total of 3,616 days, for a total of $6,026,678.72. Plaintiffs' Counsel affirms that, all totaled, Century is owed the sum of $9,358,381.13 as of April 2017, with additional interest accruing at the rate of $1,166.67 per diem on and after May 1, 2017.

C. The Parties' Positions

Worksman submits that the Court should dismiss the Complaint, and award him damages on his remaining counterclaim, on the grounds that 1) the ownership of the cash collateral is Worksman's; 2) the Goldmeier Brothers/Century do not have a perfected second security position or interest in the seized collateral; 3) the Goldmeier Brothers/Century acknowledge in the Bankruptcy Action that there are no claims against Worksman on the $3 million guarantee; 4) Plaintiffs fraudulently induced Worksman into entering into the subject transaction, 5) the Goldmeier Brothers/Century breached non-compete and non-solicitation provisions in the parties' agreement; 6) the Goldmeier Brothers/Century violated the APA; and 7) the Goldmeier brothers' conduct demonstrates that they never intended to give up control of their company.

Plaintiffs submit that they have established their right to summary judgment on the third and fourth causes of action in the Complaint, and to dismissal of Worksman's remaining counterclaim, in light of 1) the Bankruptcy Court's determination that New Rand breached the Subordinated Note, and that Century has a sum certain claim in the amount of $3,331,702.41 as of March 10, 2010, which is not subject to a bona fide dispute as to either liability or amount, 2) Allen's sworn assertion that Worksman has not made payments under the Guaranty that he executed, and 3) the provision in the Guaranty that entitles Century to attorney's fees. Plaintiffs submit, further, that Worksman has not created a material question of fact on his counterclaim in light of the fact that 1) as Worksman was in privity with New Rand in the Bankruptcy Action, as evidenced *e.g.* by his sworn assertion that he is "united-in-interest with" New Rand (Ex. 3 to Ps' Rule 19-a Statement at p. 1), his counterclaim is barred by the doctrine of *res judicata* because the fraudulent inducement claim was not raised in the Bankruptcy Proceeding; 2) Workman's fraudulent inducement counterclaim is barred by the loan documents' integration clause (*see, e.g.,* APA, Ex. 9 to Ps' Rule 19-a Statement, at ¶ 9.3, stating that the APA "constitutes the entire agreement among the parties and supersedes any prior understandings, agreements, or representations by or among the parties, written or oral, to the extent they related in any way to the subject matter hereof:"); 3) the APA and Worksman Guaranty contained a provision stating that they could not be modified except by a writing signed by all parties sought to be bound (*see* Worksman Guaranty at ¶ 13); and 4) even if the Court disregards the integration clause,

Worksman cannot, as a matter of law, establish reasonable reliance because his allegations of fraud are disproved by the evidentiary submissions as evidenced by the fact, *e.g.*, that a) by its express language, the APA provides no representation from the Goldmeiers that any licenses would transfer from Old Rand to New Rand; b) the Goldmeiers assisted Worksman in obtaining licensor consents, as evidenced by the fact that the APA closed on April 23, 2007 with nine (9) licenses transferred from Old Rand to Rand; c) the Goldmeiers were not prohibited from owning or operating another business but, rather were prohibited from owning a business that competed with New Rand, and the Goldmeiers' involvement with Millennium, which was formed almost three years after the closing, did not violate any agreement between the parties; and d) Worksman's claim that the Goldmeiers breached the Employment Agreement is belied by the evidence, including Worksman's own emails.

RULING OF THE COURT

A. Dismissal Standards

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

B. Summary Judgment

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68

N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

C. Fraudulent Inducement

The elements of a cause of action sounding in fraudulent inducement are representation of a material existing fact, falsity, scienter, deception and injury. *Dalessio v. Kressler*, 6 A.D.3d 57, 61 (2d Dept. 2004), quoting *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 N.Y.2d 403, 407 (1958).

In *Chappo & Co., Inc.*, 83 A.D.3d 499 (1st Dept. 2011), the First Department held that the cause of action alleging fraud in the inducement was barred by the merger clause contained in the engagement letter. *Id.* at 500.

D. Guaranty

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept., 1999).

E. *Res Judicata*

The general doctrine of *res judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein. *Serio v. Town of Islip*, 87 A.D.3d 533 (2d Dept. 2011), citing *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 13 (2008), quoting *Matter of Grainger* [*Shea Enters.*], 309 N.Y. 605, 616 (1956). The doctrine applies with full force to Bankruptcy Court determinations. *Evergreen Bank, N.A. v. Dashnaw*, 246 A.D.2d 814, 815 (3d Dept. 1998), citing *McNeary v. Senecal*, 197 A.D>2d 835 (3d Dept. 1993).

F. Attorney's Fees

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d

Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. *See Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

G. Application of these Principles to the Instant Action

The Court denies Defendant Worksman's motion based on its conclusion that the submissions do not support Worksman's contentions in support of his motion to dismiss, and for damages on his remaining counterclaim. While Worksman has made lengthy, and often rambling assertions, in support of his contention that he should not be liable on the Guaranty that he executed, the documentation he supplies does not support those assertions. Moreover, the submissions of Plaintiffs, including affidavits, Bankruptcy determinations, correspondence and deposition testimony, establish that Worksman's assertions, which he has made in furtherance of his effort to avoid his obligations under the Guaranty that he signed, are unfounded.

The Court grants Plaintiffs' motion, and awards Plaintiffs judgment a) on the third cause of action in the Complaint in the sum of $3,331,702.41, together with interest at the Default Rate of 14% from April 2010,[2] and b) on the fourth cause of action in the Complaint, with the appropriate attorney's fees award to be determined at an inquest. Plaintiffs have established their right to judgment on the third cause of action by producing the Guaranty, and demonstrating Worksman's failure to make required payments under that Guaranty, as he was required to do in light of Rand's failure to make required payments under the Subordinated Note. Moreover, as the Bankruptcy Court has already determined that Century has an allowed claim against Rand in the amount of $3,331,702.41 as of March 2010, Worksman is liable for that sum, together with Default Interest from April 2010. With respect to the fourth cause of action, Plaintiffs are entitled to attorney's fees pursuant to paragraph 6 of the Guaranty which provides that the Guarantor "will pay or reimburse the Lender for all costs, expenses and reasonable attorneys'

[2] The Court is awarding Default Interest from April 2010 rather than March 2010 as suggested by Plaintiffs (*see* Kushner Aff. in Supp. at ¶ 74).

fees paid or incurred by the Lender in endeavoring to collect and enforce the Obligations and in enforcing this Guaranty." As the Court has an insufficient factual basis on which to determine the appropriate attorney's fees award, the Court refers that determination to an inquest.

In light of the foregoing, it is hereby:

ORDERED, that Plaintiffs are awarded judgment against Defendant Mark Worksman on the third cause of action in the Complaint in the sum of $3,331,702.41, together with interest at the Default Rate of 14% from April 2010 to be determined by Special Referee Thomas V. Dana (516-493-3080) at an inquest on September 19, 2017 at 10:00 a.m.; and it is further

ORDERED, that Plaintiffs are awarded judgment against Defendant Mark Worksman on the fourth cause of action in the Complaint, and the determination of the appropriate attorney's fees award is referred to an inquest before Special Referee Thomas V. Dana on September 19, 2017 at 10:00 a.m.; and it is further

ORDERED, that the remaining counterclaim asserted by Defendant Mark Worksman is dismissed; and it is further

ORDERED, that Plaintiffs' counsel shall serve upon Defendant Mark Worksman a copy of this Order with Notice of Entry, a Note of Issue or Notice of Inquest and shall pay the appropriate filing fees on or before September 8, 2017; and it is further

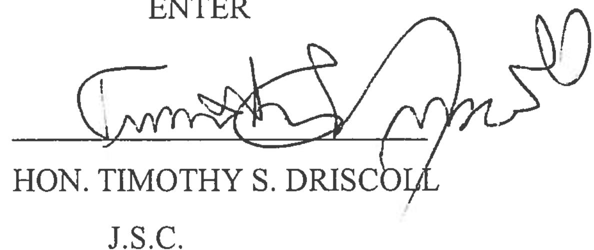
ORDERED, that the County Clerk is directed to enter a judgment in favor of Plaintiffs and against Defendant Mark Worksman in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
August 2, 2017



HON. TIMOTHY S. DRISCOLL
J.S.C.