Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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DONALD J. TRUMP, 401 MEZZ VENTURE LLC, 401 NORTH WABASH VENTURE LLC and TRUMP INTERNATIONAL HOTELS MANAGEMENT LLC,

Plaintiffs,

-against-

DEUTSCHE BANK TRUST COMPANY AMERICAS, DEUTSCHE BANK SECURITIES INC., FORTRESS CREDIT CORP., UNION LABOR LIFE, ISTAR, MERRILL LYNCH CAPITAL CORP., NORDDEUTSCHE LANDESBANK, HAHN, LANDESBANK SACHSEN AKTIENGESEL, HIGHLAND FUNDS, MORGAN STANLEY MORTGAGE CAPITAL, OAK HILL FUNDS, DEUTSCHE HYPOTHEKENBANK, AIB DEBT MANAGEMENT, BANK OF EAST ASIA LTD, FOOTHILL, SATELLITE SENIOR INC. 11, EATON VANCE/GRAYSON & CO., MJX VENTURE, E. SUN COMMERCIAL BANK, GREENWICH CAPITAL FINANCIAL, BANK OF COMMUNICATIONS, GERMAN AMERICAN CAPITAL CORPORATION, BLACKACRE INSTITUTIONAL CAPITAL MANAGEMENT, LLC, NEWCASTLE INVESTMENT CORP., PCRL INVESTMENTS L.P., DUNE CAPITAL LP and DRAWBRIDGE SPECIAL OPPORTUNITIES FUND L.P.,

Defendants.

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Index No. 26841/08
Motion Date: 1/7/09
Motion No.: 57 & 58

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

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DEUTSCHE BANK TRUST COMPANY AMERICAS,
(Action No. 2)

Plaintiff, **Index No.: 603483/08**

-against-

DONALD J. TRUMP,

Defendant.

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The following papers numbered 1 to 16 read on this application by plaintiffs in Action 1 for orders pursuant to CPLR § 602(b) to remove and consolidate Action No. 2 into Action No. 1, which is currently pending in the Supreme Court, County of Queens for all purposes and upon consolidation dismissing Action No. 2 pursuant to CPLR § 3211(a)(4), based upon a prior action pending and/or CPLR § 3211(a)(8) or, in the alternative, for an order pursuant to Article 63 of the New York Civil Practice Law and Rules staying Action No. 2 pending the resolution of Action No. 1; and motion by defendants Fortress Credit Corp. ("Fortress"), Newcastle Investment Corp., Drawbridge Special Opportunities Fund L.P. ("Drawbridge"), Blackacre Institutional Capital Management, LLC, PCRL Investments L.P. and Dune Capital LP (collectively and hereinafter, "Fortress") for transfer of venue, pursuant to CPLR 501 and 511, transferring this action to the Supreme Court of the State of New York, New York County. The motions under calendar number 57 & 58 are consolidated for purposes of disposition.

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Upon the foregoing papers, the application by plaintiffs in Action 1 for orders pursuant to CPLR § 602(b) to remove and consolidate Action No. 2 into Action No. 1, which is currently pending in the Supreme Court, County of Queens for all purposes and upon consolidation dismissing Action No. 2 pursuant to CPLR § 3211(a)(4), based upon a prior action pending and/or CPLR § 3211(a)(8) or, in the alternative, for an order pursuant to Article 63 of the New York Civil Practice Law and Rules staying Action No. 2 pending the resolution of Action No. 1; and motion by defendants Fortress pursuant to CPLR 501 and 511, transferring this action to the Supreme Court of

the State of New York, New York County, are decided as follows:

According to the Complaint and various uncontested submissions, this action stems from the development of certain property in Chicago, Illinois, owned by plaintiff 401 North Wabash Venture LLC (hereinafter, "401 NWV"), which is a single purpose entity owned and controlled by plaintiff Donald J. Trump. In pursuit of developing this land into a high-rise, mixed-use tower, on February 7, 2005, 401 NWV and Deutsche Bank executed a Construction Loan Agreement (hereinafter, "CLA"), under which Deutsche Bank agreed to lend 401 NWV a maximum of $640 million in principal (hereinafter, the "Construction Loan") to construct the Trump International Hotel & Tower Chicago (hereinafter, the "Project"). As partial consideration to Deutsche Bank for providing the Construction Loan, plaintiff Donald Trump executed a Payment Guaranty in which plaintiff Trump personally guarantees the timely payment of the Construction Loan when due under the CLA with his maximum liability under the Payment Guaranty limited to $40 million. Concurrently with the execution of the Construction Loan Agreement, Plaintiff 401 Mezz Venture LLC (hereinafter, "Mezz Venture"), also controlled by plaintiff Donald Trump, and the parent entity of 401 North Wabash, entered into a Mezzanine Loan Agreement with defendant Fortress whereby Fortress and the other Mezz Lenders loaned 401 Mezz $130 million that would be contributed to 401 North Wabash to pay closing costs and satisfy certain equity requirements of the Construction Loan.

On November 3, 2008, plaintiffs commenced Action No. 1, which seeks, *inter alia*, damages arising out of defendants alleged attempt to thwart the successful completion of the Project. The complaint alleges that Deutsche Bank Trust Company Americas ("Deutsche Bank") engaged in bad faith, breach of fiduciary duty, fraudulent inducement and self-dealing, through its undisclosed stake in a subordinate mezzanine loan, which operated effectively as a preferred equity position in the Project, at the cost and expense of plaintiffs. Plaintiffs in Action No. 1 also seek a declaratory judgment recognizing plaintiffs' right to extend the interim November 7, 2008 loan maturity date to complete the Project and to invoke the Force Majeure Provision in accordance with the Construction Loan Agreement. Plaintiffs claim that despite their good faith measures to perform under the CLA, defendants have improperly refused to extend the loan Maturity Date and recognize the force majeure event arising from the current economic crisis. According to the complaint, the CLA contains a clause that recognizes that events beyond the parties' control may occur and may warrant an extension of the maturity date due to force majeure event. The CLA provides that plaintiffs shall provide Deutsche Bank with notice as to the above referenced force majeure event, which will thereby extend the maturity date until after the end of said event.

On November 4, 2008, plaintiffs gave notice to Deutsche Bank as to the force majeure event and stated that the Project's completion was jeopardized since there was no replacement financing available due to the current worldwide credit crisis. Deutsche Bank has failed to acknowledge plaintiffs' right to exercise its contractual rights to extend the interim maturity date and purportedly declared plaintiffs in default of the Construction Loan Agreement. On or about November 25, 2008, Deutsche Bank commenced Action No. 2 pursuant to CPLR § 3213 by filing a summons and motion for summary judgment in lieu of complaint in the Supreme Court, County of New York, Index No. 603483/08. This action is based upon the guaranty of payment by Donald Trump on the CLA.

Thereafter the instant application and motion were made.

The Court shall first address the application by plaintiffs for an order pursuant to CPLR § 602(b) to remove and consolidate Action No. 2 into Action No. 1, for all purposes. Plaintiffs claim that both actions involve common questions of law and fact relating to Deutsche Bank's obligations to fund under the Construction Loan Agreement to complete the Project. Simply put, plaintiffs claim that if there is no default under the Construction Loan Agreement, then there can be no indemnity under the guaranty. Plaintiffs also claim that their allegations of Deutsche Bank's improper syndication of the loan is an issue in both actions. Consequently, plaintiffs claim that the issues in both actions are inextricably intertwined with common questions of law and fact relating to the Construction Loan Agreement and the parties' rights and obligations thereunder. Plaintiffs also point out that consolidation is appropriate since Action No. 2 involves enforcing the guaranty on the Construction Loan Agreement which is the contract in issue in Action No. 1. Plaintiffs also claim that consolidation is appropriate as it serves the interests of justice and judicial economy. Plaintiffs also claim that consolidation of Action No. 2 with Action No. 1 would eliminate any possibility that the parties would be subject to inconsistent verdicts, which might otherwise result if the actions proceeded independently of each other. Finally, plaintiffs claim that Queens County must serve as the county for the consolidated action since the first action was commenced in Queens County.

Defendants Deutsche Bank and Fortress oppose the motion for consolidation. Deutsche Bank argues that plaintiff Trump expressly and unequivocally waived his right to seek consolidation of the Guaranty Action. He agreed in the Payment Guaranty that "a separate action may be brought to enforce the provisions of this Guaranty". Deutsche Bank also argues that consolidation would substantially prejudice Deutsche Bank by taking its bargained-for right to have the guaranty enforcement action proceed independently and expeditiously, since plaintiffs are bound by the terms of the Payment Guaranty and the CLA, which expressly prevents them from seeking consolidation of the Guaranty Action. Granting their motion would deprive Deutsche Bank of the rights that it bargained for in these agreements, and it threatens to impair Deutsche Bank's right to expedited relief under the CPLR and under the Payment Guaranty. Deutsche Bank's claim that its right to expedited adjudication under CPLR § 3213 will be impaired is based upon this consolidation motion being an effort by Trump to stall; as indicated by plaintiffs' alternative relief request for a stay of the Guaranty Action. As such, consolidation poses a substantial risk to it that its summary proceeding for enforcement of Trump's unconditional obligations under the Payment Guaranty will be delayed. Finally, Deutsche Bank argues plaintiffs have not demonstrated a sufficient basis for consolidation. However, if consolidation is ordered, Deutsche Bank claims that the actions should be consolidated in New York County. It argues that since none of the parties reside in Queens County, the vast majority of parties reside in New York County, the majority of the witnesses and the evidence is located in New York County, and all but one of the six law firms involved in this case have offices in New York County, New York County should serve as the venue for any consolidated action.

Defendants Fortress initially request that their Venue Motion should be decided before Plaintiffs′ Motion for Consolidation is considered. The Venue Motion was filed on November 26,

2008, while Plaintiffs' Consolidation Motion was not brought until December 17, 2008. In the event the Venue Motion is granted and the case is transferred to New York County, then consolidation is a matter solely for the court in New York County to consider. Fortress claims that plaintiffs are specifically seeking relief from the terms of the Mezzanine Loan Agreement, and as such, the Mezzanine Loan Agreement's exclusive venue selection clause is controlling. That clause mandates that all actions relating to the Mezzanine Loan Agreement may only be brought in New York County at Mezz Loan Defendants' election. The Mezz Loan Defendants also point out that New York County is a proper venue under the Construction Loan Agreement and there is an utter lack of any connection between Queens County and any of the claims or parties in Action No. 1, and that, with the exception of the construction of the project in Chicago, all of the events at issue in Action No. 1 took place in New York County.

Fortress also argues that in the event that this Court does not first decide the Venue Motion and defer consideration of any consolidation question to the court in New York County, but does determine that consolidation is proper, then this Court still must determine the proper venue for the consolidated action is New York County. Fortress claims that although Action No. 1 was filed first in Queens County, this Court may nevertheless transfer the consolidated action to New York County if special circumstances are present. Here, plaintiffs contend in their consolidation motion that they brought their Complaint under the Construction Loan Agreement, and do not raise claims about the Mezzanine Loan Agreement. The CLA loan agreement permits venue for any action to lie in New York, New York, while the Mezzanine Loan Agreement permits venue to lie only in New York County. Fortress claims that plaintiffs do not, and cannot, allege that the Mezz Loan Defendants are parties to the Construction Loan Agreement, and the Mezzanine Loan Agreement provides the only basis upon which Plaintiffs have any rights and obligations with respect to the Mezz Loan Defendants. As such, it is inappropriate for Plaintiffs to ignore the venue provisions of the Mezzanine Loan Agreement and if this Court were to consolidate the actions, then it must consolidate Action No. 1 with Action No. 2 in the Supreme Court, New York County since it is the only county in which the venue of this action is proper as to all parties.

The motion for consolidation is granted and the venue for the consolidated actions shall be in Queens County. Section 602(b) of the CPLR provides, "[w]here an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court." A motion to consolidate pursuant to CPLR 602 (a) rests in the sound discretion of the court. Absent a showing of prejudice to a substantial right by a party opposing the motion, consolidation should be granted where common questions of law or fact exist. Gadelov v. Shure, 274 A.D.2d 375 (2d Dept 2000.) This is favored in the interest of judicial economy and ease of decision-making. Raboy v McCrory Corporation, 210 AD2d 145 (1st Dept 1994.) In addition, where actions commenced in different counties are consolidated pursuant to CPLR 602, the venue should be placed in the county where the first action was commenced, unless special circumstances exist, which in the sound discretion of the court, warrant placement of venue elsewhere. Gadelov v. Shure, *supra*.

Here, Actions No. 1 and No. 2 have common questions of law and fact. Plaintiffs in Action 1 seek an extension of the loan Maturity Date based upon, among other things, the force majeure event arising from the current unprecedented credit and economic crisis. The Construction Loan Agreement does contain a clause recognizing that events beyond the parties′ control may occur and warrant an extension of the Maturity Date due to the force majeure event. Plaintiffs claim that Deutsche Bank has refused to acknowledge plaintiffs′ right to a second extension of the Maturity Date of the Deutsche Bank Loan. In Action 2, Deutsche Bank seeks to enforce Trump's Payment Guaranty in the event of a default on the Construction Loan Agreement. Moreover, the CLA and the Payment Guaranty involve the same Project. Clearly, both actions have common questions of law and fact. As such, judicial economy therefore dictates that both actions should not simultaneously proceed in separate forums. Contrary to Deutsche Bank's claims, this Court does not find the existence of any prejudice if the two actions are consolidated. Merely consolidating these actions does not create a situation where Deutsche Banks' rights to CPLR 3213 relief is unavailable.

Generally, the county in which the first action was commenced will serve as the county for the purposes of the consolidated action. Id. See also, Nationwide Assocs., Inc. v. Targee St. Internal Med. Group, P.C., 286 A.D.2d 717 (2d Dep't 2001) Action No. 1 was commenced on November 3, 2008, in Queens County Supreme Court. Subsequently, on November 25, 2008, nearly three weeks after the commencement of Action No. 1, Deutsche Bank filed Action No. 2, in New York County Supreme Court. Both actions make consistent references to the controlling Construction Loan Agreement which governs the parties' rights and obligations in both actions. This document places venue in New York, New York. As Queens County is a part of New York City, at least since about 1898, the filing of Action No. 1 in Queens County Supreme Court was appropriate. Contrary to the arguments of defendants, there is no inconvenience of witnesses, parties, or their attorneys to try this matter is in Queens. The Courthouse is conveniently located by public and private transportation, and if the Court may be permitted to judicially note, for those who cannot walk to the Manhattan Supreme Court, it is often an easier trip to the Queens Supreme Court. Furthermore, the Court finds that there is an issue as to whether or not the instant claims by plaintiffs against Fortress are subordinated to plaintiffs' claims against Deutsche Bank. Additionally, certain terms in the Mezzanine Loan Agreement suggest that relevant terms of this Agreement are also subordinated to the CLA, including the venue provisions. As such, Fortress's rights are not impaired by having venue of the consolidated action in Queens. Accordingly, there are no special circumstances which warrant this court placing venue other than in Queens County, where the first action was commenced.

Based on the above, the application by plaintiff seeking consolidation is granted and the motion by Fortress seeking venue in New York County is denied.

It is further :

ORDERED, that the application by plaintiffs is granted to the extent that Actions 1 and 2 shall be tried jointly in Supreme Court, Queens County, and separate Index Numbers, Requests for Judicial Intervention (RJI) and Notes of Issue shall be filed for each action; and it is further

ORDERED, that the Clerk of New York County, upon being served with a copy of this Order with Notice of Entry and payment of any required fees, is directed to transfer all papers filed in his or her office in Action No. 2 to the Clerk of Supreme Court, Queens County, to be tried jointly with Action No. 1: and it is further

ORDERED, the Title of Actions combined for Joint Trial shall be:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
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DONALD J. TRUMP, 401 MEZZ VENTURE LLC, 401 NORTH WABASH VENTURE LLC and TRUMP INTERNATIONAL HOTELS MANAGEMENT LLC,	**ACTION # 1** **Index No. 26841/08**
Plaintiffs,	
-against-	
DEUTSCHE BANK TRUST COMPANY AMERICAS, DEUTSCHE BANK SECURITIES INC., FORTRESS CREDIT CORP., UNION LABOR LIFE, ISTAR, MERRILL LYNCH CAPITAL CORP., NORDDEUTSCHE LANDESBANK, HAHN, LANDESBANK SACHSEN AKTIENGESEL, HIGHLAND FUNDS, MORGAN STANLEY MORTGAGE CAPITAL, OAK HILL FUNDS, DEUTSCHE HYPOTHEKENBANK, AIB DEBT MANAGEMENT, BANK OF EAST ASIA LTD, FOOTHILL, SATELLITE SENIOR INC. 11, EATON VANCE/GRAYSON & CO., MJX VENTURE, E. SUN COMMERCIAL BANK, GREENWICH CAPITAL FINANCIAL, BANK OF COMMUNICATIONS, GERMAN AMERICAN CAPITAL CORPORATION, BLACKACRE INSTITUTIONAL CAPITAL MANAGEMENT, LLC, NEWCASTLE INVESTMENT CORP., PCRL INVESTMENTS L.P., DUNE CAPITAL LP and DRAWBRIDGE SPECIAL OPPORTUNITIES FUND L.P.,	
Defendants.	

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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DEUTSCHE BANK TRUST COMPANY AMERICAS,	**ACTION # 2** **"Index Number to be Assigned"**
Plaintiff,	
-against-	
DONALD J. TRUMP,	
Defendant.	

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;and it is further

ORDERED, that a copy of this Order with Notice of Entry be served on all parties to the actions combined, the Clerk of Queens County, and at the time of filing Notes of Issue, and on the Clerk of the Trial Term Office, Queens County.

The branch of plaintiffs' motion seeking dismissal pursuant to CPLR 3211(a)(4), based upon a prior pending action is denied. CPLR § 3211(a)(4) provides that a party may move for a judgment dismissing one or more causes of action asserted against it on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state." CPLR § 3211(a)(4). Plaintiffs claim, *inter alia*, that they have a valid claim in Action No. 1 and a review of Action No. 2 clearly demonstrates that both actions require the interpretation of the parties' rights under the Construction Loan Agreement, an issue currently pending in Action No. 1. Action No. 2 must therefore be dismissed based upon the prior pending Action No. 1.

Defendant Deutsche Bank has submitted evidence that shows it could bring a separate action for enforcement of the Payment Guaranty and that plaintiffs recognized that the Guaranty was separate from, independent of and in addition to each of plaintiff Trump's undertakings under the other Loan Documents. Moreover, Plaintiffs agreed to certain terms in securing a $640 million loan from Deutsche Bank and other lenders. In the Guaranty Action, Deutsche Bank seeks enforcement of Trump's unconditional promise to pay Deutsche Bank under the Payment Guaranty pursuant to CPLR § 3213. The Guaranty Action and the Queens Action involve different parties, different remedies, different issues, and perhaps most importantly, different causes of action. Any overlap between the two proceedings is minimal and certainly does not provide a basis for § 3211(a)(4) dismissal. *See* Zirmak Invs., L.P. v. Miller, 290 A.D.2d 552, 552 (2d Dep't. 2002)

The branch of plaintiffs' application seeking dismissal pursuant to CPLR 3211(a)(8), based upon for failure to obtain personal jurisdiction over the defendant in that action is denied. Personal jurisdiction exists when (1) service of process is properly effected and (2) the court has power to enforce a judgment upon the defendant. Keane v. Kamin, 94 N.Y.2d 263, 265-66 (1999). Plaintiff Trump is subject to personal jurisdiction in the State of New York and Deutsche Bank properly effected service of process in the Guaranty Action on Trump. It is well-settled that service of process "in accordance with the terms of [a prior written agreement]" is "sufficient and effectively confer[s] jurisdiction over the defendants." Nat'l Equip. Rental, Ltd. v. Dec-Wood Corp., 274 N.Y.S.2d 280, 280 (2d Dep't 1966.) Deutsche Bank fully complied with the terms of this provision of the Guaranty when it served process upon plaintiff Trump via overnight courier. Contrary to Plaintiffs' contention, the terms specifying the method of service of process under Payment Guaranty are not "ambiguous." The operative provision of the Payment Guaranty clearly provides that service be "directed to Guarantor in accordance with Section 13," which states that all notices are deemed to have been given when given in accordance with Section 13.5 of the CLA. That provision states that notices shall be effective when they are sent. Deutsche Bank sent its § 3213 papers on November 29, 2008. Thus, service was effective on November 29, 2008. Finally, plaintiff Trump's claim that the

overnight delivery envelopes were not marked "personal and confidential" is irrelevant to the question of personal jurisdiction. *See* Keane, *supra,* at 265. The question of whether envelopes are marked "personal and confidential" would be relevant only if the question at hand was whether "leave and mail" or "nail and mail" service was properly effectuated. See CPLR 308(2) and (4). However, as stated above, service of process in the case was completed pursuant to the parties' written agreement.

The branch of plaintiffs' application seeking a stay of Action 2 pending the resolution of Action 1 is denied. Section 6301 of the C.P.L.R. provides, *inter alia*, "that a preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action ... or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." Section 6301 of the C.P.L.R. further provides, inter alia, that "a temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

In order to prevail on a motion for preliminary injunction, the movant must demonstrate (1) a likelihood of success on the merits; (2) irreparable injury absent the granting of the injunction; and (3) a balance of the equities in its favor. *See* Rentar Dev. Corp. v. New York, 160 A.D.2d 860 (2d Dep't 1990.) As noted above, the terms of the Payment Guaranty specifically recognized that Deutsche Bank could maintain a separate action to enforce the Payment Guaranty, and that "time is of the essence" in connection with plaintiff Trump's obligations under the Payment Guaranty. Plaintiffs cannot now avoid living up to the bargain they struck in the Payment Guaranty by seeking a stay of the Guaranty Action. To the extent the claims presented in Action 1 serve as a defense to the claim in Action 2, this Court will make timely rulings to ensure that the proceedings are conducted in a reasonable and logical manner that prevents inconsistent verdicts and or judgments.

Additionally, Deutsche Bank only seeks money damages in the Guaranty Action, and it is well settled that a risk of money damages does not constitute irreparable harm. Moreover, contrary to Plaintiffs' claims a declaration that Plaintiffs failed to repay the Construction Loan in a timely fashion would not be completely at odds with Plaintiffs' business history. As such, any purported reputational harm cannot be deemed irreparable and will not support this stay application. As such plaintiffs in Action 1 have not satisfied the elements for the granting of a preliminary injunction.

In sum, the application by plaintiffs in Action 1 for orders pursuant to CPLR § 602(b) to remove and consolidate Action No. 2 into Action No. 1, which is currently pending in the Supreme Court, County of Queens for all purposes is granted to the extent that the actions shall be consolidated in Queens County for a joint trial. The branch of the application seeking to dismissing Action No. 2 pursuant to CPLR § 3211(a)(4) is denied. The branch of the application seeking to dismiss Action No. 2 pursuant to CPLR § 3211(a)(8) is denied. The branch of the application seeking an order pursuant to Article 63 of the New York Civil Practice Law and Rules staying Action No. 2 pending the resolution of

Action No. 1 is denied. The motion by defendants Fortress for transfer of venue, pursuant to CPLR 501 and 511, transferring the Queens Action to the Supreme Court of the State of New York, New York County is denied. . the application by plaintiffs in Action number to consolidate is granted and upon consolidation the Guaranty Action in New York Supreme Court shall be transferred to Queens County, for a joint trial. The branch The defendants' venue motion is denied.

Dated: January 15, 2009

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ORIN R. KITZES, J.S.C.