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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

COUENTRY REAL ESTATE

- v -

DEVELOPERS DIVERSIFIED REALTY

INDEX NO. 115559/09
MOTION DATE 3/4/10
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for DISMISS (&11) or SEVER

E-FILED

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	2 - 10
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/23/10

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

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COVENTRY REAL ESTATE ADVISORS, LLC, et al.,

Index No. 115559/2009

Plaintiffs,

DECISION & ORDER

-against-

DEVELOPERS DIVIERSIFED REALTY CORPORATION et al.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.

Defendants move to dismiss the complaint on the grounds of forum non conveniens, CPLR 327, and to dismiss the tort claims for failure to state a cause of action, CPLR 3211(a)(7). The motion to dismiss is directed to the following causes of action: breach of fiduciary duty (5th); fraud in the inducement (6th); negligent misrepresentation (7th); and rescission of a release due to economic duress (8th).[1] Alternatively, defendants move to sever plaintiffs' claims, pursuant to CPLR 603 and 1002. Plaintiffs oppose.

Background

This action involves claims that defendants mismanaged the leasing and development of real properties. Essentially, plaintiffs claim that they invested money in real property upon defendants' advice with the expectation that defendants would develop, and/or lease and manage it in exchange for fees, but that defendants, instead, maximized their fees, causing the investments to fail. Plaintiffs allege that some of the subject properties were acquired by

[1] The 1st through 4th causes of action are for breaches of various contracts.

defendants at distress prices after they extracted fees and wiped out plaintiffs' equity.

In 2003, plaintiffs Coventry Fund II, LLC (Main Fund), Coventry Fund II Parallel Fund, LLC (Parallel Fund) (collectively, Funds) and defendant Developers Diversified Realty Corporation (DDR) entered into a co-investment agreement. The original co-investment agreement was superceded by a contract dated April 30, 2004 (Investment Agreement) and again on July 19, 2009 (Amended Investment Agreement), both of which are governed by New York law. It is undisputed that the Investment Agreement closing took place in New York.

The Investment Agreement provided for the sale of subscriptions to investors in the Funds. The Funds were to provide 80% and DDR 20% of the equity for acquisition of the real properties, but the complaint alleges that in some instances DDR transferred properties it already owned, which lowered its total cash contribution below 20%. Coventry Fund II Partners, LLC (Coventry Partners) was designated the Managing Member of the Funds and plaintiff Coventry Real Estate Advisors, LLC (CREA, collectively with the Funds, Coventry) was designated as the Investment Manager. The Investment Agreement provided that:

> Each of the parties hereby expressly agrees that this Agreement shall not be construed as creating a partnership or joint venture and, except for the relationship between the members of each Property Owner, as and when formed, the relationship of the parties hereunder is solely contractual as possible co-investors as discussed herein and not as partners.

Investment Agreement, §16.

The Investment Agreement provided for the formation of an Investment Committee composed of three individuals selected by CREA and three individuals selected by DDR. The Investment Committee was to make most decisions by majority vote. However, if all of the Coventry representatives on the Investment Committee voted to sell an asset and DDR's

representatives voted no, Coventry's vote controlled and the asset would be sold. Investment Agreement §4(b). For each potential investment, DDR was required to perform "property due diligence," including but not limited to "review of leases and operating agreements, title and survey examination, and environmental, engineering and structural review." CREA was required to perform "financial due diligence" prior to an acquisition, including but not limited to "market analysis, review of historical and projected cash flows, historical and projected operating expenses and scheduled rent increases and term expirations."

The real properties to be acquired (Properties) were each to be held in the name of a separate Delaware limited liability company (Property Owner REITs) that would qualify as a real estate investment trust under the Internal Revenue Code.[2] Each Property Owner REIT was governed by a Delaware limited liability company agreement (LLC Agreements). The plaintiffs, other than Coventry, are the twelve Property Owner REITs acquired pursuant to the Investment Agreement, for whom Coventry brings this action derivatively. One of the Properties is located in Ohio and one in New York (part of a portfolio of Service Merchandise Properties). The remainder are located in other states.

Annual operating budgets of the Property Owner REITs were subject to the approval of the Investment Committee. Under the LLC Agreements, DDR and the Parallel Fund were to be non-managing members of the Property Owner REITs, while the Main Fund was designated the Managing Member.

The Investment Agreement provided that upon approval of an investment, the Investment

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[2] Certain exceptions were permitted by the Investment Agreement. A few properties are owned by what are defined in the motion papers as "Intermediary Parties." For simplicity, all of the Property owners will be referred to in this opinion as Property Owner REITs.

Committee would decide whether DDR (or a DDR affiliate, at DDR's option) would be the development manager (if the asset needed development) and/or the property manager/leasing agent of the asset. Form development agreements (Development Agreements), management and leasing agreements (Management Agreements) and leases were appended to the Investment Agreement. The fees that DDR or its affiliates would receive for managing and leasing and for supervising development of the Properties were listed on annexed schedules to the Investment Agreement. The parties agree that the LLC Agreements, the Management Agreements and the Development Agreements contain essentially the same terms for each Property Owner REIT. Defendants' Moving Brief, p. 5 and Complaint ¶39. Annexed to the complaint as exhibits are the Totem Lake Property Owner REIT LLC, Management and Development Agreements.

Coventry Partners, the Managing Member pursuant to the Investment Agreement, was to form an Advisory Committee composed of representatives of the Funds' investors. The Investment Agreement provided that the Advisory Committee would meet on a regular basis with the Investment Committee and Coventry Partners. Among the powers of the Advisory Committee was the power to remove DDR or its affiliate as Property Manager and to approve the sale of property owned by a Property Owner REIT to DDR or its affiliates. The Advisory Committee was eliminated in the Amended Investment Agreement.[3]

Section 5 of the LLC Agreements appoint the Main Fund as the Managing Member and impose upon it fiduciary duties. Other LLC Agreement provisions negate fiduciary relationships between members. Section 3 provides that the members and their controlled affiliates may engage in other business ventures, including competing ones and can transact business with the

[3] The full Amended Investment Agreement is not part of the record of this motion.

Property Owner REIT. The LLC Agreements further provide that the Managing Member, a Coventry entity, should not permit conflicted transactions with DDR or its affiliates, excluding the Management and Development Agreements, unless the transactions are at least as favorable as an arms-length transaction and there is full disclosure. However, the LLC Agreements also provide that where a Development or Management Agreement with DDR is entered into, the Managing Member has no right to exercise the functions delegated to DDR in those Agreements.

The Management Agreements provide that DDR is an independent contractor, who was "free to dispose of such portion of [its] time, energy and skills in the accomplishment of [its duties hereunder] in such manner as [it] sees fit." The Development Agreements contain identical language.

Pursuant to the Management Agreement, DDR was empowered, *inter alia*, to lease and maintain the Properties. DDR also was required to maintain accounting records for each Property Owner REIT and give it access to all such books and records. In addition, DDR was obligated to prepare and deliver to the Property Owner REIT proposed annual operating budgets for each fiscal year, monthly reports of receipts and disbursements and annual profit and loss statements. DDR needed permission of the Property Owner to execute leases in excess of 10% of the aggregate base rent of all tenants or more than 10,000 square feet of leasable area in a lease containing terms that materially deviated from the operating budget (Major Leases).

Moreover, under the Development Agreement, DDR was obligated to supervise the development work at the Properties that needed development. Further, DDR was required to maintain books and records and to give notice to the Property Owner REIT of any budget deviation of more than 5% and any material deviation from the construction schedule. The

Property Owner REIT was entitled to examine the books and records each quarter. In addition, DDR could enter into initial leases for the developed Property, except for Major Leases, which required approval of the Property Owner REIT. However, DDR could not enter into a contract for more than $50,000 that was not in the budget without the Property Owner REIT's consent. DDR was entitled to a development manager fee of 5% of hard costs (not including the land), which were defined in the Development Agreement.

Under the Development and Management Agreements, DDR's services could be terminated with or without cause. If Coventry terminated DDR's services without cause, there was a formula for the amount of additional, unearned fees that DDR would receive upon termination and buy/sell provisions were triggered, which gave DDR the right either to buy or sell to Coventry the Property in question. If DDR's services under the Property Management Agreements were terminated with cause, defined as willful misconduct, fraud or gross negligence by a DDR Executive Officer, it was not entitled to additional money or the buy/sell arrangement. On November 5, 2009, Coventry sent a letter terminating for cause DDR's services under the Property Management Agreements on all of the Properties.

The Two Ohio Actions

This action was filed on November 4, 2009. Subsequently, DDR filed two actions in Ohio on November 18, 2009 (First Ohio Case) and December 1, 2009 (Second Ohio Case). DDR's Complaint in the First Ohio Case seeks a declaratory judgment that Coventry was not entitled to terminate DDR for cause, a temporary restraining order and a preliminary injunction. According to conversations between my staff and the staff in the Ohio court, the First Action is scheduled for a final pre-trial conference in late August and for trial in late September of 2010.

The Second Ohio Action involves DDR's claim for management fees under the Management Agreement for the Tri-County Mall in Cincinnati, Ohio. The Second Ohio Action has been stayed in favor of this action.

Forum Selection Clauses and Governing Law in the Parties' Agreements

The Investment Agreement and Amended Investment Agreement contain New York choice of law provisions, but no forum selection clauses. The LLC Agreements for each of the Property Owner REITs are governed by Delaware law and are silent on choice of forum. Of the eight Development Agreements, three specify that their contracts are governed by Ohio law; the other five choose the law of Michigan, Kansas, Texas or Arizona. Of the eleven Management Agreements, all but two choose Ohio law, with the remainder selecting Michigan and Texas.

However, there are no forum selection clauses in the Management and Development Agreements. The clauses that defendants claim are forum selection clauses, merely contain agreements not to challenge personal jurisdiction.[4] Five of the Development Agreements consent to personal jurisdiction in Ohio; in the other three, the parties agree not to contest jurisdiction in Michigan, Kansas and Arizona. Ten of the Management Agreements consent to personal jurisdiction in Ohio, and one to jurisdiction in Michigan.

Forum Non Conveniens

New York courts "need not entertain causes of action lacking a substantial nexus with New York." *Martin v Mieth*, 35 NY2d 414, 418 (1974). The doctrine of forum non conveniens, codified in CPLR 327 (a), "permits a court to stay or dismiss such actions where it is determined

[4] As the parties agree that the terms of the Development and Management Agreements for all of the Properties are essentially the same, the court assumes that like the Totem Lake agreements, they do not contain forum selection clauses.

that the action, although jurisdictionally sound, would be better adjudicated elsewhere." *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 (1984), *cert den.*, 469 US 1108 (1985). New York courts consider the availability of an adequate alternative forum and certain other private and public interest factors when evaluating New York's nexus to a particular action, and deciding whether to dismiss an action on the grounds of forum non conveniens. *Id.* The burden is on the defendant challenging the forum to demonstrate the relevant private or public interest factors which militate against accepting the litigation. *Id; Highgate Pictures, Inc. v De Paul*, 153 AD2d 126 (1st Dept 1990).

Although not every factor is articulated in every case, collectively, the courts consider and balance the following factors in determining an application for dismissal based on forum non conveniens: the existence of an adequate alternative forum; situs of the underlying transaction; residency of the parties; potential hardship to the defendant; location of documents; location of a majority of the witnesses; and the burden on New York courts. *Islamic Republic of Iran v Pahlavi, supra*; *World Point Trading PTE v Credito Italiano*, 225 AD2d 153 (1st Dept 1996); *Evdokias v Oppenheimer*, 123 AD2d 598 (2d Dept 1986). A motion to dismiss on the ground of forum non conveniens is subject to the discretion of the trial court, and no one factor is controlling. *Islamic Republic of Iran v Pahlavi, supra*; *Matter of New York City Asbestos Litig. v Rapid American Corp.*, 239 AD2d 303 (1st Dept 1997).

Prior Pending Litigation, Alternative Available Forum and Application of Foreign Law

The balance of these elements would lead to retention of jurisdiction in this court. New York courts routinely dismiss cases on forum non conveniens grounds where there is a prior related litigation pending in a foreign jurisdiction because of the burden this would place on New

York courts and the risk of conflicting results. *Hart v General Motors Corp.*, 129 AD2d 179 (1st Dept 1987)(courts should not be burdened with duplicative action governed by Delaware law with possible inconsistent verdict); *World Point Trading PTE, Ltd. v Credito Italiano*, 225 AD2d 153, 161 (1st Dept 1996) (dismissal due to risk of conflicting results and burden of applying foreign law).

In this action, there is no danger of inconsistent verdicts. The only issue pending in the First Ohio Case is whether Coventry properly terminated DDR's Management Agreements for cause. Termination for cause relates to the fourth cause of action for breach of the Management Agreements and the sixth cause of action for fraud, as fraud is a ground for termination for cause. The court has contacted the Staff Attorney for the Ohio Court of Common Pleas for Cuyahoga County and has been advised that the pre-trial conference is scheduled for August 31, 2009 and the trial is scheduled for September 27, 2009. As discovery has hardly begun in this action, this court can refrain from making decisions on those two causes of action until after the Ohio trial is concluded. The Second Ohio Action has been stayed in favor of this one, which eliminates the possibility of inconsistent verdicts.

Moreover, where the issue is the application of a sister state's law, it is not determinative when other factors militate in favor of retention of jurisdiction. *Temple v Temple*, 97 AD2d 757 (2d Dept 1983). Here, the Investment Agreement is governed by New York law. Delaware law governs the LLC Agreements, a state convenient for neither Coventry nor DDR. Ohio law governs only some of the Management and Development Agreements. Furthermore, New York courts are capable of applying the law of another state. *Continental Ins. Co. v Garlock Sealing Tech., LLC*, 23 AD3d 287 (1st Dept 2005).

CPLR 3211 (a) (4) provides that a party may move to dismiss an action when "there is another action pending between the parties for the same cause of action in a court of any state or the United States." In determining whether to dismiss an action based on another action pending, New York courts are often guided by the "first to file" rule. However, that rule is not followed mechanically, particularly when the actions are filed close in time. *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1 (1st Dept 2007). In this case, the filings were so close in time that the timing of filing is irrelevant and the Second Ohio Action has been stayed in favor of this one.

In terms of personal jurisdiction, New York is an available forum. Defendants have not moved to dismiss the breach of contract claims and there is no dispute that defendants are subject to jurisdiction here. They contracted in New York. CPLR 302. Ohio is also an available forum, but not the exclusive one. Thus, prior pending actions, availability of an alternate forum, applicability of foreign law and danger of inconsistent results are factors tending to make New York a convenient forum.

Residency of the Parties and Burden on Defendants

A defendant does not meet its burden of proof on this element of a forum non conveniens analysis where the parties are equally inconvenienced by trial in the other party's home state. *Temple v Temple*, 97 AD2d 757 (2d Dept 1983). Here, the plaintiffs all maintain a principal place of business in New York, while the defendants are incorporated and maintain their principal places of business in Ohio. In such a situation, the plaintiff's choice of forum should not be disturbed. *Id.* The balance, therefore, weighs in favor of the plaintiff's choice of forum.

Situs of the Underlying Transaction, Location of Documents and Witnesses

The Investment Agreement was entered into in New York. While the Management,

Development and LLC Agreements may not have been, their form was dictated by the Investment Agreement. Moreover, to the extent that contracts were signed in states where the Properties are located, the majority would not have been signed in either New York or Ohio. The same is true of witnesses and documents. To the extent that they are located where the Properties are, they are all over the United States. The record with respect to witnesses and documents is that neither New York nor Ohio is substantially more convenient.

Interest Analysis for Tort Claims

Where, as here, the parties are not both New York domiciliaries, New York law applies an "interest analysis" to tort claims, applying the law of the jurisdiction with the greatest interest in the resolution of the dispute. *Schulz v Boy Scouts of Am., Inc.*, 65 NY2d 189 (1985). As previously noted, the court will not rule on the motion to dismiss the fraud claims to avoid conflict with the outcome of the First Ohio Case. As noted below, the interest analysis for negligent misrepresentation and economic duress presents factual issues not ripe for resolution and the breach of fiduciary duty claim is being dismissed. *See, infra.* For this reason, the court will not consider whether New York or Ohio has a greater interest in the tort claims. However, there is a sufficient nexus with New York to retain jurisdiction without considering the situs of the tort claims.

Conclusion of Forum Non-Conveniens Analysis

The factors on balance show that there is a nexus with New York sufficient to deny the forum non conveniens motion. *Continental Ins. Co. v Garlock Sealing Tech., LLC*, 23 AD3d 287 (1st Dept 2005). The factors either militate in favor of New York as a convenient forum or demonstrate Ohio to be inconvenient for plaintiffs. Thus, the motion to dismiss based upon

forum non conveniens is denied.

Motion to Dismiss Claims for Breach of Fiduciary Duty, Negligent Misrepresentation and Duress

The parties and the court agree that Delaware law applies to the claims for breach of fiduciary duty, as they allegedly arise from delegation of authority to DDR in the LLC Agreements, which are governed by Delaware Law. In the complaint, Coventry claims that DDR breached its fiduciary duties to the Property Owner REITs. DDR urges that under Delaware law, the parties to an LLC agreement are free to contract to eliminate fiduciary duties; that the LLC Agreements designate Coventry as the Managing Member, which made it the fiduciary, while not making DDR a fiduciary; that Coventry retained substantial decision-making authority under the Management and Development Agreements, while DDR was labeled an independent contractor; that Coventry had access to records and information which negates the element of reliance on DDR; and that the breach of fiduciary claims are duplicative of the breach of contract claims. Coventry alleges that a claim for breach of fiduciary duty arises from its delegation of significant authority over the Properties to DDR in the LLC Agreements. Both parties contend that their view of the evidence is supported by the case of *Bay Center Apts. Owner, LLC v Emery Bay PKI, LLC* (Del. Ch. 2009), 2009 WL 1124451 (nor).

> The Delaware Limited Liability Company Act provides the following:
>
> (b) It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.
>
> (c) To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other

person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

(d) Unless otherwise provided in a limited liability company agreement, a member or manager or other person shall not be liable to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement for breach of fiduciary duty for the member's or manager's or other person's good faith reliance on the provisions of the limited liability company agreement.

(e) A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement; provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

6 Del. C. § 18-1101. Under Delaware Law, where the provisions of an LLC agreement do not explicitly disclaim the default principles of fiduciary duty, LLC members owe each other duties that directors owe a corporation and the courts look to the law of limited partnerships in Delaware, where the general partner owes fiduciary duties to the partnership and its partners. *Bay Center*, *supra.*

Bay Center held that the plaintiff had stated a claim for breach of fiduciary duty where there were contradictory clauses in the LLC agreement, because on a motion to dismiss the court cannot choose between ambiguous provisions. One clause in the *Bay Center* LLC agreement stated that the parties would have the same duties and obligations to each other that members of a limited liability company formed under the Delaware Act have to each other. The contrary clause stated that the parties owed no duty of any kind toward one another.

In this case, unlike in *Bay Center*, the LLC Agreements are not ambiguous. Specifically they provide that the Managing Member, the Main Fund, has a fiduciary duty, but that the members and their affiliates can compete and transact business with the Property Owner REITs to the same extent as any person who is not a member or affiliate of a member. Further, the Management and Development Agreements make DDR an independent contractor and free it to engage in competing businesses.

With respect to the claimed delegation of authority to DDR, significant control was retained by the Fund and the Investment Committee to an extent at odds with the *Bay Center* case. In *Bay Center*, the LLC agreement referred to a development management agreement that delegated control to a Development Manager, an entity affiliated with the LLC's managing member. By contrast, in this case, the delegation is to a non-managing member. Moreover, the delegation to DDR in this case is limited by the Major Lease provisions, operating budgets, and development contracts over $50,000. Finally, the Management and Development Agreements explicitly gave Coventry the right to inspect the books and records on a regular basis. Therefore, Coventry did not have to rely on DDR to obtain access to information. To the extent that Coventry claims that DDR failed to report as required by written agreements, that is a breach of contract, not a breach of fiduciary duty.

With respect to negligent misrepresentation, the complaint contains alleged representations made by individual defendant Scott Wolstein relating to the Merriam Village and Service Merchandise. Were New York law to apply, most of the alleged misrepresentations are not torts. They are contractual promises that defendants allegedly failed to perform or performed badly (*Nu-Life Constr. Corp. v Board of Educ.*, 204 AD2d 106, 107 [1st Dept 1994], *app.*

dismissed 84 NY2d 850 [2004] [alleging that breach of contractual duty arose from a lack of due care does not transform breach of contract into tort], or non-actionable puffery concerning DDR's skill and experience and predictions of future success (*Chase Invs. v Kent*, 256 AD2d 298, 299 [2d Dept 1998] [alleged representations that conditions of contract would be fulfilled are opinions and predictions, not misrepresentations]; *Sheth v New York Life Ins. Co.*, 273 AD2d 72 [1st Dept 2000], *app. den.* 1 NY3d 505 [2003] [mere puffery of value not negligent misrepresentation]). Nonetheless, the complaint does specifically allege that Wolstein represented that there was demand from retailers to lease space at Merriam Village and Service Merchandise Properties. Coventry alleges that it relied on those representations when it invested in Merriam Village and the Service Merchandise Portfolio.

However, there is a factual issue as to what law applies. In New York, when considering tort claims encompassing conduct, an interest analysis involving the place where the tort occurred is followed. *Padula v Lilarn Properties Corp.*, 84 NY2d 519 (1994) (if there are conflicting conduct-regulating laws, law of jurisdiction where tort occurred applies because that jurisdiction has greatest interest in regulating behavior within its borders). Here, the motion must be denied because the record is insufficient to discern where the alleged misrepresentations were made. Without that information a conflict of law analysis is impossible.

The motion to dismiss the economic duress claim suffers from the same infirmity. There is a factual issue as to where the events took place that cannot be resolved based upon the record of the motion.

Motion to Sever

Defendants move alternatively to sever the claims relating to the different Properties.

They assert that the claims involve mismanagement of twelve properties governed by different contractual agreements and different state laws, that disclosure will be unwieldy and that jury confusion may result, all to their prejudice. Plaintiffs counter that the action involves two parties and their affiliates, with identical form agreements.

The motion to sever is denied with leave to renew at the time of trial. The parties agree that the form of the agreements for the Properties are the same. Severance is inappropriate because common questions of fact and law predominate. CPLR 603. The court is accustomed to deciding cases based on the laws of differing states. Severing the claims pretrial will only complicate and delay discovery. The issue of severance to avoid jury confusion can be decided before trial. Accordingly, it is

ORDERED that the defendants' motion to dismiss the action on the ground of forum non conveniens or to sever claims is denied; and it is further

ORDERED that defendants' motion to dismiss for failure to state a cause of action for breach of fiduciary duty, fraud, negligent misrepresentation and economic duress is granted solely to the extent that the motion to dismiss the claim for breach of fiduciary duty is granted and the 5th cause of action is hereby dismissed with prejudice; the motion to dismiss the fraud claim is denied with leave to renew following a decision in the First Ohio Case, and the motion is denied in all other respects.

Dated: June 23, 2010

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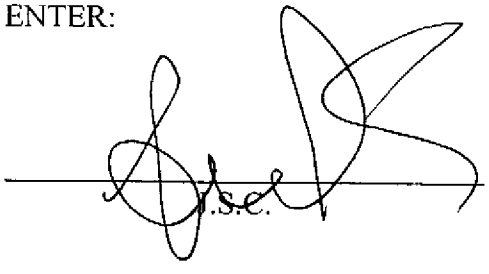

J.S.C.