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Superior Court of California
County of Los Angeles
OCT 21 2020
Sherri R. Carter, Executive Officer/Clerk of Court
By: Berta Guerrero, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

HIMELSEIN MANDEL FUND MANAGEMENT, LLC, et al., Plaintiffs, v. FORTRESS INVESTMENT GROUP LLC, et al., Defendants.	LASC Case No: BC495595 COURT'S RULING AND ORDER RE: FORTRESS DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION Hearing Date: September 22, 2020

I.

BACKGROUND

This litigation arises out of a business relationship gone awry between Plaintiffs and Defendants. The operative Fourth Amended Complaint ("4AC") alleges that in February 2010, Plaintiff Himelsein Mandel and Defendant Fortress formed a joint venture both to assist Himelsein Mandel in weathering the global financial crisis and also in expanding its successful life settlement practices through the infusion of additional capital by Fortress.[1] The parties'

[1] 4AC, ¶2.

relationship allegedly included an initial $65 million investment through a credit facility Fortress provided, but also included the parties' sharing in the profits and losses of the venture; the parties' sharing of legal advice and, at times, legal counsel regarding complicated taxation and regulatory issues affecting the venture; Fortress' exercising operational control over Himelsein Mandel's day-to-day business activities; Himelsein Mandel's bringing to Fortress an additional investment opportunity in another life settlement portfolio; Himelsein Mandel's freely sharing with Fortress details about its operations, investment strategies and deep industry knowledge of the life settlement market; and Fortress' general disregard of the terms of a credit agreement – when doing so suited Fortress – through the Parties' relationship.[2]

The operative Complaint alleges that when it became clear to both Fortress and Himelsein Mandel in the summer of 2010 that additional capital beyond Fortress' initial $65 investment would be needed to sustain and grow the venture, Fortress repeatedly and unequivocally promised Himelsein Mandel to increase its investment in the venture by at least $20 million (money which Himelsein Mandel alleges it needed for its very survival).[3] Throughout the fall of 2010, Himelsein Mandel allegedly reasonably relied on Fortress' express promise of additional capital to its detriment by, among other things, forgoing the pursuit of alternative viable sources of the vitally needed cash.[4]

However, at 4 p.m. on the Wednesday before Thanksgiving 2010, Fortress (knowing that Himelsein Mandel essentially was out of cash to sustain the venture) reneged on its promise and informed Himelsein Mandel that, contrary to its prior and repeated assurances to Himelsein

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[2] *Id.*

[3] 4AC, ¶3.

[4] *Id.*

Mandel and others, it would not provide the promised additional capital.[5] As a result, Himelsein Mandel failed over the holiday weekend to lock-down millions of dollars in alternative vital capital, and the following week, Fortress sent Himelsein Mandel a pretextual "notice of default" under the credit agreement as a precursor to foreclosing on and seizing approximately half of Himelsein Mandel's over $2.6 billion life settlement portfolio.[6] The 4AC alleges that Himelsein Mandel, without capital to sustain its business, ultimately was forced to sell the remaining half in a distressed sale.[7] Himelsein Mandel and the other plaintiffs (HM Ruby Fund, L.P.; Quantlife LLC; and Brentwood Holdings, LLC) allege that Defendant Fortress's conduct was in bad faith.

Based on these allegations and the other allegations set forth in the 4AC, Plaintiffs allege claims against Defendants for breach of fiduciary duty; unfair competition in violation of Business & Professions Code §§17200, et seq.; promissory estoppel; negligent misrepresentation; intentional misrepresentation; and unjust enrichment.

The Fortress Defendants now move for an order summarily adjudicating the third cause of action for promissory estoppel, fourth cause of action for negligent misrepresentation, and fifth cause of action for intentional misrepresentation. The motion is based on Defendant's argument that these claims "fail as a matter of law because the Plaintiffs' own sworn trial testimony conclusively disproves the elements of actual and justifiable reliance on any alleged misrepresentation by Fortress."[8]

For the reasons discussed *infra,* the motion for summary adjudication is denied.

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Notice of Motion at 2:10-12.

II.

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S EVIDENCE IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

1. Exhibit N to Smolowe Declaration (TREX 1516: October 21, 2010 email from Himelsein to Hutter): Overruled. The objection goes to the weight, rather than to the admissibility, of this evidence.

2. Exhibit H to Smolowe Declaration (excerpts of 10/26/16 trial transcript) at 736:4-21: Overruled. The objection goes to the weight, rather than to the admissibility, of this evidence.

3. Exhibit GG to Smolowe Declaration (Contribution and Sale Agreement): Overruled. The objection goes to the weight, rather than to the admissibility, of this evidence. The evidence of the Contribution and Sale Agreement is not irrelevant, unduly prejudicial, confusing, or misleading within the meaning of Evidence Code §§350-352.

4. Exhibit HH to Smolowe Declaration (10/28/16 Trial Tr.) at 1160:21- 1161:2: Overruled. The objection goes to the weight, rather than to the admissibility, of this evidence.

5. Exhibit K to Smolowe Declaration at TREX0397-0002-03 (email sent by Ron Marks): Overruled.

6. Exhibit T to Smolowe Declaration at TREX0450-0001 (email sent by Christopher Zafiriou): Overruled.

7. Exhibit U to Smolowe Declaration at TREX0410-0001 (email sent by Ron Marks): Overruled.

8. Exhibit V to Smolowe Declaration at TREX-3587- 0001-02 (emails sent by Jason Papastavrou): Overruled.

9. Exhibit AA to Smolowe Declaration at TREX0940-0001 (emails sent by Christopher Zafiriou): Overruled.

III.

FORTRESS DEFENDANTS' OBJECTIONS TO EVIDENCE

1. Cave Decl. Ex. 1 (10/24/16 Himelsein Trial Tr.), at 554:8-9 [cited re UMF 11, 12]: "Q. did you rely on Mr. Hutter's representation? A. Very much so.": Overruled.

2. Cave Decl. Ex. 2 (Himelsein Trial Tr.), at 736:4–737:4 [cited re UMF 7, 28, 169]: Overruled.

3. Cave Decl. Ex. 2 at 738:17–739:3: (Himelsein Trial Tr.) [cited re UMF 171, 17]: Sustained.

4. Cave Decl. Ex. 2 at 757:9-25 (10/26/16 Himelsein Trial. Tr.) [cited re UMF 196]: Overruled.

5. Cave Decl. Ex. 2 at 757:26–760:18 (10/26/16 Himelsein Trial Tr.) [cited re: UMF 185, 186, 188, 189]: Overruled.

6. Cave Decl. Ex. 2 at 760:6-14 (10/26/16 Himelsein Trial. Tr.) [cited re UMF 190]: Overruled.

7. Cave Decl. Ex. 2 at 767:6-769:2 (10/26/16 Himelsein Trial. Tr.) [cited re UMF 197]: Overruled.

8. Cave Decl. Ex. 2 at 780:14–781:17 (10/26/16 Himelsein Trial Tr.) [cited re UMF 23]: Overruled.

9. Cave Decl. Ex. 2 at 767:6-767:24 (10/26/16 Himelsein Trial. Tr.): Overruled.

10. Cave Decl. Ex. 2 at 767:25–769:2 (Himelsein Trial Tr.) [cited re: UMF 196]: Overruled.

11. Cave Decl. Ex. 2 at 775:26–776:23 (10/26/16 Himelsein Trial. Tr.) [cited re: UMF 196]: Overruled.

12. [Deliberately left blank]

13. Cave Decl. Ex. 2 at 779:18–780:2 (10/26/16 Himelsein Trial Tr.) [cited re: UMF 198]: Overruled.

14. Cave Decl. Ex. 2 at 780:14 – 781:17 (10/26/16 Himelsein Trial Tr.) [cited re UMF 23]: Overruled.

15. Cave Decl. Ex. 2 at 784:21 – 785:1 (10/26/16 Himelsein Trial Tr.) [cited re: UMF 202]: Sustained.

16. Cave Decl. Ex. 2 at 787:8 – 21 (10/26/16 Himelsein Trial Tr.) [cited re: UMF 205]: Sustained as to the statement "And they wanted to get comfortable with that position" as speculative; otherwise, overruled.

17. Cave Decl. Ex. 2 at 798:27 – 801:17 (10/26/16 Himelsein Trial Tr.) [cited re: UMF 227]: Overruled.

18. Cave Decl. Ex. 2 at 802:13 – 803:12 (10/26/16 Himelsein Trial Tr.) [cited re UMF 234]: Overruled.

19. Cave Decl. Ex. 2 at 803:13-27 (10/26/16 Himelsein Trial Tr.). [cited re UMF 235]: Overruled.

20. Cave Decl. Ex. 2 at 803:23-27 (10/26/16 Himelsein Trial Tr.). [cited re UMF 235]: Overruled.

21. Cave Decl. Ex. 2 at 843:23–26 (Himelsein Trial Tr.) [cited re Opp. at 27:4-9]: Overruled.

22. Cave Decl. Ex. 2 at 844:1-845:20 (Himelsein Trial Tr.) [cited re UMF 14, 15, 294]: Overruled.

23. Cave Decl. Ex. 2 at 847:18-24 (Himelsein Trial Tr.) [cited re UMF 15]: Sustained.

24. Cave Decl. Ex. 2 at 848:15–18 (10/26/16 Himelsein Trial Tr.) [cited re UMF 250, 251]: Overruled.

25. Cave Decl. Ex. 2 at 848:19–849:5 (10/26/16 Himelsein Trial Tr.) [cited re UMF 237, 238]: Overruled.

26. Cave Decl. Ex. 2 at 850:7–27 (10/26/16 Himelsein Trial Tr.) [cited re: UMF 242]: Overruled.

27. Cave Decl. Ex. 2 at 852:4-25 (Himelsein Trial Tr.) [cited re UMF 15]: Sustained.

28. Cave Decl. Ex. 2 (Himelsein Trial Tr.), at 853:18–855:5 [cited re UMF 11, 12]: Overruled.

29. Cave Decl. Ex. 2 (Himelsein Trial Tr.), at 853:18–855:5 [cited re UMF 11, 12, 245-246]: Overruled.

30. Cave Decl. Ex. 2 (Himelsein Trial Tr.), at 855:23–856:17 [cited re UMF 11, 12]: Overruled.

31. Cave Decl. Ex. 2 (Himelsein Trial Tr.), at 856:18–857:10 [cited re UMF 11, 12]: Overruled.

32. Cave Decl. Ex. 2 at 863:14-15 (10/26/16 Himelsein Trial Tr.) [cited re UMF 304]: Sustained.

33. Cave Decl. Ex. 2 at 864:4-7. (10/26/16 Himelsein Trial Tr.) [cited re UMF 306]: Sustained.

34. Cave Decl. Ex. 2 at 864:8-11 (10/26/16 Himelsein Trial Tr.) [cited re UMF 308]: Sustained.

35. Cave Decl. Ex. 2 at 864:8-11 (10/26/16 Himelsein Trial Tr.) [cited re UMF 308]: Moot (objection appears to be identical to objection 34 above).

36. Cave Decl. Ex. 2 at 878:1–879:13 (10/26/16) [cited re UMF 325]: Overruled.

37. Cave Decl. Ex. 3 (Himelsein Trial Tr.) at 1041:27-1042:22 [cited re UMF 11, 12]: Overruled.

37.a. Cave Decl. Ex. 3 (Himelsein Trial Tr.) at 1042:24-1043:18 [cited re UMF 11, 12]: Overruled.

38. Cave Decl. Ex. 4 [cited re: UMF 11, 12]: Overruled.

39. Cave Decl. Ex. 6 at 614:26–617:6 (Himelsein Trial Tr.) [cited re UMF 82]: Sustained.

40. Cave Decl. Ex. 6 at 657:8-21 (Himelsein Trial Tr.) [cited re UMF 134, 135, 138]: Overruled.

41. Cave Decl. Ex. 6 at 658:2-22 (10/25/16 Himelsein Trial Tr.) [cited re UMF]: Overruled. The excerpt does not call for a legal conclusion, and there is an adequate foundation for Himselsein's statements about "almost never" obtaining deviations in writing from the CSA.

42. Cave Decl. Ex. 6 at 659:20–660:1 (Himelsein Trial Tr.) [cited re UMF]: Overruled. Himselsein is competent to testify as to whether or not Fortress told him that it was strictly enforcing the premium reserve requirement. This objection goes to the weight of this evidence, rather than its admissibility.

43. Cave Decl. Ex. 6 at 667:4 – 6 (10/25/16 Himelsein Trial Tr.): Sustained.

44. Cave Decl. Ex. 6 at 670:11-19 (10/25/16 Himelsein Trial Tr.).: Overruled.

45. Cave Decl. Ex. 6 at 705:1–705:24 (10/25/16 Himelsein Trial Tr.) [cited re UMF]: Overruled.

46. Cave Decl. Ex. 7 [cited re UMF 23]: Overruled.

47. Cave Decl. Ex. 8 [cited re UMF 23]: Overruled.

48. Cave Decl. Ex. 10 [cited re UMF 127, 131]: Overruled.

49. Cave Decl. Ex. 11 [cited re UMF 127, 130]: Overruled.

50. Cave Decl. Ex. 12 [cited re UMF]: Overruled.

51. Cave Decl. Ex. 13 [cited re UMF]: Overruled.

52. Cave Decl. Ex. 14 [cited re UMF]: Overruled.

53. Cave Decl. Ex. 15 [cited re UMF]: Overruled.

54. Cave Decl. Ex. 16 [cited re UMF 23, 129, 130]: Sustained, as being duplicative of Exhibit 7.

55. Cave Decl. Ex. 17 [cited re UMF 127, 128]: Sustained.

56. Cave Decl. Ex. 18 at 122:12–123:16 (Himelsein Dep. Tr.) [cited re: UMF 98.]: Sustained, as Himelsein's testimony about the creation or "formalization" of a joint venture through the term sheet calls for a legal conclusion. However, Himelsein's testimony about the parties' relationship and course of dealing is admissible and will be considered in assessing whether a triable issue exists as to actual and/or justifiable reliance.

57. Cave Decl. Ex. 18 at 152:13-18 (Himelsein 6/30/15 Dep. Tr.) [cited re UMF 24]: Sustained, to the extent that this testimony is being used to show the existence of a joint venture between Fortress and HM; overruled as to Himelsein's testimony about how specific employees of Fortress, such as Mr. Hutter, were allegedly presenting the relationship between Fortress and HM at the conference in question (as this goes to the credibility of Himelsein's testimony).

58. Cave Decl. Ex. 18 at 300:14 – 24 (Himelsein 6/30/15 Dep. Tr.) [cited re UMF 128]: Overruled.

59. Cave Decl. Ex. 18 at 329:3 – 330:10 (Himelsein 6/30/15 Dep. Tr.) [cited re UMF 128]: Overruled.

60. Cave Decl. Ex. 19 at 199:28–201:8 (10/19/16 Tapiero Trial Tr.): Overruled.

61. Cave Decl. Ex. 19 at 251:13– 255:25 (10/19/16 Tapiero Trial Tr.): Overruled.

62. Cave Decl. Ex. 19 at 276:5 – 276:7 (10/19/16 Tapiero Trial Tr.): Overruled.

63. Cave Decl. Ex. 19 at 288:16 –24 (10/19/16 Tapiero Trial Tr.) [cited re UMF 300]: Overruled.

64. Cave Decl. Ex. 21 at 91:4 – 13 (Tapiero Dep. Tr.) [cited re UMF]: Overruled.

65. Cave Decl. Ex. 21 at 151:6-20 (Tapiero Dep. Tr.) [cited re UMF]: Sustained as to the sentence commencing with "So my testimony is that" and ending with "and created delays"; otherwise, overruled.

66. Cave Decl. Ex. 22 at 499:27– 500:21 (10/21/16 Tapiero Trial Tr.): Sustained.

67. Cave Decl. Ex. 26 at 6274-76 [cited re UMF 51]: Overruled.

68. Cave Decl. Ex. 27 [cited re: UMF 52, 53]: Overruled.

69. Cave Decl. Ex. 28. [cited re: UMF 52, 54]: Overruled.

70. Cave Decl. Ex. 29 [cited re: UMF 55, 69, 102]: Overruled.

71. Cave Decl. Ex. 31 at 1300:15–1301:4 (11/01/16 Chin Trial Tr.) [cited re: UMF 143]: Sustained as to Chin's testimony of what constituted an incurable breach as lacking foundation.

72. Cave Decl. Ex. 31 at 1300:20-1301:4 (11/1/16 Chin Trial Tr.) [Cited re Opp 21; UMF 312]: Sustained.

73. Cave Decl. Ex. 32 [cited re: UMF 60 – 62] Email chain containing emails from Wayne Himelsein to third parties Aaron Weingarten, Sammy Spiegel, Rod Hutter, and others, dated November 3, 2009: Overruled.

74. Cave Decl. Ex. 33 [cited re: UMF 63, 64, 65, 66, and 67] Emails from Brian Waters to Alex Popescu, dated November 12, 2009: Overruled.

75. Cave Decl. Ex. 37 at 433:14–436:17 (Hutter 4/29/15 Dep. Tr.) [cited re UMF 95, 96]: Overruled.

76. Cave Decl. Ex. 38 [cited re: UMF 69, 73]: Overruled.

77. Cave Decl. Ex. 39 at 405:10-22 (Himelsein 7/1/15 Dep. Tr.) (if policy went into grace, there would be 30 to 60 days to cure) [cited re UMF 312]: Sustained.

78. Cave Decl. Ex. 39 at 425:9–429:1 (7/1/15 Himelsein Dep. Tr.) [cited re: UMF 109]: Sustained, but only to the extent this excerpt can be read as Mr. Himelsein interpreting Fortress's understanding or evaluation of the profit participation clause in the loan agreement with HM; otherwise, overruled.

79. Cave Decl. Ex. 39 at 558:9-17 (Himelsein 7/1/15 Dep. Tr.) [cited re UMF 229]: Overruled.

80. Cave Decl. Ex. 39 at 570:13–571:9 (Himelsein 7/1/15 Dep. Tr.) [cited re UMF 170]: Overruled.

81. Cave Decl. Ex. 39 at 578:12–579:23 (Himelsein 7/1/15 Dep. Tr.) [cited re UMF 170, 288]: Overruled.

82. Cave Decl. Ex. 39 at 604:9–605:20 (Himelsein 7/1/15 Dep. Tr.) (daily conversations about the business) [cited re UMF 133]: Overruled.

83. Cave Decl. Ex. 39 at 768:5–17 (Himelsein 7/1/15 Dep. Tr.) [cited re UMF 69]: Sustained.

84. Cave Decl. Ex. 41 at [271:12–272:1] (Dakolias Dep Tr.) [cited re Opp 12; SSUF 161]: Sustained.

85. Cave Decl. Ex. 41 at [200:6–202:12] (Dakolias Dep Tr.) [cited re Opp 22; SSUF 335]: Sustained in part, as to the excerpt, "And then would the Duff & Phelps valuations be provided to anyone? A. I think that they're provided externally. They're used -- maybe the auditors use them as part of the audit process" as lacking in foundation; otherwise, overruled.

86. Cave Decl. Ex. 43 [cited re UMF 76]: Overruled.

87. Cave Decl. Ex. 46 at 151:8–159:3 ([10/15/2015 Rose Dep. Tr.) [cited re UMF 86, 87; Opp 30]: Overruled.

88. Cave Decl. Ex. 46 at 151:23–152:10 ([10/15/2015 Rose Dep. Tr.) [cited re UMF 83]: Overruled.

89. Cave Decl. Ex. 46 at 152:11–19 ([10/15/2015 Rose Dep. Tr.) [cited re UMF 84]: Overruled.

90. Cave Decl. Ex. 46 at 152:20–153:6 ([10/15/2015 Rose Dep. Tr.) [cited re UMF 85]: Overruled.

91. Cave Decl. Ex. 46 at 242:3–243:3 ([10/15/2015 Rose Dep. Tr.) [cited re UMF 197]: Overruled.

92. Cave Decl. Ex. 46 at 242:11–243:3 ([10/15/2015 Rose Dep. Tr.) [cited re Opp 14]: Moot (this objection appears to be duplicative of objection 91 above, as a portion of the identical excerpt and objection is raised).

93. Cave Decl. Ex. 46 at 242:21–243:3 ([10/15/2015 Rose Dep. Tr.) [cited re UMF 196; Opp 14]: Moot (this objection appears to be duplicative of objection 91 above, as a portion of the identical excerpt and objection is raised).

94. Cave Decl. Ex. 46 at 250:4–20 ([10/15/2015 Rose Dep. Tr.) [cited re UMF 199; Opp 12]: Overruled.

95. Cave Decl. Ex. 46 at 261:9–263:4 (Rose 10/15/15 Dep. Tr.) [cited re UMF 24, 25, 160]: Sustained.

96. Cave Decl. Ex. 46 at 265:2–267:19 ([10/15/2015 Rose Dep. Tr.) [cited re UMF 220]: Overruled.

97. Cave Decl. Ex. 52 [cited re: UMF 110]: Overruled.

98. Cave Decl. Ex. 53 at 9388 [cited re: UMF 111]: Overruled.

99. Cave Decl. Ex. 55 at 88:12 – 15 (Bonacci Dep. Tr.) [cited re UMF 133]: Overruled.

100. Cave Decl. Ex. 57 [cited re: UMF 124]: Overruled.

101. Cave Decl. Ex. 58 [cited re: UMF 144, 145, 146]: Overruled.

102. Cave Decl. Ex. 62 [cited re: UMF 152, 153, 154, 155, and 165]: Overruled.

103. Cave Decl. Ex. 63 [cited re: UMF 24-25, 159, 219-221]: Sustained.

104. Cave Decl. Ex. 64 at [226:4-227:6] [1/7/2016] Tormondsen Depo. Tr. [cited re UMF 343; Opp 23, 32]: Overruled.

105. Cave Decl. Ex. 67 [cited re UMF 173]: Overruled.

106. Cave Decl. Ex. 68 [cited re 174, 176]: Overruled.

107. Cave Decl. Ex. 69 [cited re UMF 174 – 175]: Overruled.

108. Cave Decl. Ex. 70 [cited re UMF 174]: Overruled.

109. Cave Decl. Ex. 71 [cited re UMF 177 – 182]: Overruled.

110. Cave Decl. Ex. 72 at 102:5-10 [3/12/2015] Hutter Depo. Tr. [cited re UMF 205]: Sustained, without prejudice to counsel submitting said testimony in compliance with CCP §437c(d) and CRC 3.1350(f) and (g).

111. Cave Decl. Ex. 72 at 108:24–110:3 [3/12/2015] Hutter Depo. Tr. [cited re UMF 213]: Sustained.

112. Cave Decl. Ex. 72 at 488:14–490:13 [3/12/2015] Hutter Depo. Tr. [cited re UMF 185, 186]: Sustained, without prejudice to counsel submitting said testimony in compliance with CCP §437c(d) and CRC 3.1350(f) and (g); otherwise, overruled.

113. Cave Decl. Ex. 72 at 490:4-21 [3/12/2015] Hutter Depo. Tr. [cited re UMF 187]: Sustained, without prejudice to counsel submitting said testimony in compliance with CCP

§437c(d) and CRC 3.1350(f) and (g); otherwise, overruled.

114. Cave Decl. Ex. 75 [cited re: UMF 197]: Overruled.

115. Cave Decl. Ex. 77 at 183:1-184:22 [12/1/2015] Zafiriou Depo. Tr. [cited re Opp 14; UMF 202]: Overruled.

116. Cave Decl. Ex. 77 at 186:15-190:10 [12/1/2015] Zafiriou Depo. Tr. [cited re Opp 14; UMF 207]: Sustained, to the extent Mr. Zafiriou purports to interpret the content of notes which he did not prepare and for which Plaintiffs did not lay a foundation; otherwise, overruled.

117. Cave Decl. Ex. 77 at 186:15-195:7 [12/1/2015] Zafiriou Depo. Tr. [cited re Opp 30; UMF 212]: Sustained, to the extent Mr. Zafiriou purports to interpret the content of notes which he did not prepare and for which Plaintiffs did not lay a foundation; otherwise, overruled.

118. Cave Decl. Ex. 77 at 191:11-192:16 [12/1/2015] Zafiriou Depo. Tr. [cited re UMF 208, 209, 210]: Overruled. Mr. Zafiriou's "sense" of whether Hutter was in favor of the extension goes to the credibility of the witness's statements, and not to their admissibility.

119. Cave Decl. Ex. 77 at 193:14-194:16 [12/1/2015] Zafiriou Depo. Tr. [cited re UMF 211]: Sustained, to the extent Mr. Zafiriou purports to interpret the content of notes which he did not prepare and for which Plaintiffs did not lay a foundation; otherwise, overruled.

120. Cave Decl. Ex. 77 at 197:2-200:10 [12/1/2015] Zafiriou Depo. Tr. [cited re Opp 15; UMF 214]: Sustained, to the extent Mr. Zafiriou purports to interpret the content of notes which he did not prepare and for which Plaintiffs did not lay a foundation (in the excerpt, this would be through Defendant's Statement "I'm not sure actually what it refers to"); otherwise, overruled.

121. Cave Decl. Ex. 77 at 205:13-208:8 [12/1/2015] Zafiriou Depo. Tr. [cited re UMF 215]: Sustained, to the extent Mr. Zafiriou purports to interpret the content of notes which he did not prepare and for which Plaintiffs did not lay a foundation; otherwise, overruled.

122. Cave Decl. Ex. 77 at 208:18-209:16 [12/1/2015] Zafiriou Depo. Tr. [cited re UMF 216]: Sustained, to the extent Mr. Zafiriou purports to interpret the content of notes which he did not prepare and for which Plaintiffs did not lay a foundation; otherwise, overruled.

123. Cave Decl. Ex. 77 at 215:12-217:1 [12/1/2015] Zafiriou Depo. Tr. [cited re Opp 11]: Sustained, to the extent Mr. Zafiriou purports to interpret the content of notes which he did not prepare and for which Plaintiffs did not lay a foundation; otherwise, overruled.

124. Cave Decl. Ex. 77 at 215:18-218:2 [12/1/2015] Zafiriou Depo. Tr. [cited re UMF 159, 218, 219]: Sustained, to the extent Mr. Zafiriou purports to interpret the content of notes which he did not prepare and for which Plaintiffs did not lay a foundation; otherwise, overruled.

125. Cave Decl. Ex. 77 at 219:16-224:17 [12/1/2015] Zafiriou Depo. Tr. [cited re Opp 15; UMF 220, 221]: Sustained, to the extent Mr. Zafiriou purports to interpret the content of notes which he did not prepare and for which Plaintiffs did not lay a foundation; otherwise, overruled.

126. Cave Decl. Ex. 77 at 229:19-230:22 [12/1/2015] Zafiriou Depo. Tr. [cited re UMF 218]: Overruled.

127. Cave Decl. Ex. 77 at 234:4-20 [12/1/2015] Zafiriou Depo. Tr. [cited re Opp 15; UMF 217]: Overruled.

128. Cave Decl. Ex. 78 [cited re: UMF 212 – 214] Handwritten notes dated October 8, 2010 and produced by third party Glenmede: Overruled.

129. Cave Decl. Ex. 87 [cited re: UMF 259]: Overruled.

130. Cave Decl. Ex. 90 at 166:13–167:14 (7/10/2015 Marks Dep. Tr.) [cited re UMF 263]: Overruled.

131. Cave Decl. Ex. 90 at 166:13–167:14 (7/10/2015 Marks Dep. Tr.) [cited re UMF 266]: Moot (the objection appears to be duplicative of objection 130, albeit with reference to a

different fact in the separate statement).

132. Cave Decl. Ex. 90 at 244:17–247:14 (7/10/2015 Marks Dep. Tr.) [cited re UMF 341]: Overruled.

133. Cave Decl. Ex. 90 at 244:23–245:7 (7/10/2015 Marks Dep. Tr.) [cited re UMF 338]: Overruled.

134. Cave Decl. Ex. 90 at 245:4–18 (7/10/2015 Marks Dep. Tr.) [cited re UMF 339]: Overruled.

135. Cave Decl. Ex. 90 at 249:4–251:4 (7/10/2015 Marks Dep. Tr.) [cited re UMF 264]: Overruled.

136. Cave Decl. Ex. 90 at 249:4–251:4 (7/10/2015 Marks Dep. Tr.) [cited re UMF 265]: Moot (the objection appears to be duplicative of objection 135, albeit with reference to a different fact in the separate statement).

137. Cave Decl. Ex. 90 at 251:10–252 (7/10/2015 Marks Dep. Tr.) [cited re UMF 268]: Overruled.

138. Cave Decl. Ex. 91 [cited re: UMF 264]: Overruled.

139. Cave Decl. Ex. 92 [cited re: UMF 267]: Overruled.

140. Cave Decl. Ex. 94 at [297:12-298:6] [10/16/2015] Rose Depo. Tr. [cited re UMF 291; Opp 20]: Overruled. Mr. Rose can testify as to his general recollection of the conversation. The objection goes to the weight of this testimony as opposed to its admissibility.

141. Cave Decl. Ex. 94 at [299:12-300;25] [10/16/2015] Rose Depo. Tr. [cited re UMF 14, 15, 293; Opp 20, 31]: Overruled. The objection goes to the witness's credibility, as opposed to the admissibility of his statements on his recollection of the alleged $20 million upsize.

142. Cave Decl. Ex. 94 at [303:14-23] [10/16/2015] Rose Depo. Tr. [cited re UMF 14,

295; Opp 20]: Sustained.

143. Cave Decl. Ex. 94 at [328:17-24] [10/16/2015] Rose Depo. Tr. [cited re UMF 14]: Sustained, without prejudice to counsel submitting said testimony in compliance with CCP §437c(d) and CRC 3.1350(f) and (g); otherwise, overruled.

144. Cave Decl. Ex. 94 at [330:10-332:21] [10/16/2015] Rose Depo. Tr. [cited re UMF 18]: Sustained, to the extent that Mr. Rose is testifying as to Mr. Byall's comments and his reasons for making them.

145. Cave Decl. Ex. 99 [cited re: UMF 282 – 283]: Overruled.

146. Cave Decl. Ex. 102 [cited re: UMF 296]: Overruled.

147. Cave Decl. Ex. 104 [cited re: UMF 311]: Sustained.

148. Cave Decl. Ex. 105 [cited re: UMF 313, 314, 215, 316]: Sustained.

149. Cave Decl. Ex. 106 [cited re: UMF 318 – 319]: Sustained.

150. Cave Decl. Ex. 107 [cited re: UMF 320 – 321]: Sustained.

151. Cave Decl. Ex. 109 [cited re: UMF 324 – 325]: Overruled.

152. Cave Decl. Ex. 110 [cited re: UMF 325]: Overruled.

153. Cave Decl. Ex. 113 [cited re: UMF 335]: Overruled.

154. Cave Decl. Ex. 115 [cited re: UMF 158]: Sustained.

155. Cave Decl. Ex. 117 [cited re: UMF 157]: Overruled.

156. Cave Decl. Ex. 118 Trial Testimony of Lionel Tapiero at 381:14-18 (10/20/16 Trial Tr.) [testifying that HM did not provide its accounting documents to Fortress] [cited re: UMF 276]: Overruled.

157. Cave Decl. Ex. 126 [cited re: UMF 332]: Sustained.

158. Cave Decl. Ex. 127 [cited re: UMF 333]: Sustained.

159. Cave Decl. Ex. 128 [cited re: UMF 334]: Sustained.

IV.

LODGING OF DOCUMENTS UNDER SEAL

Consistent with the parties' protective order, Plaintiffs have lodged conditionally under seal unredacted copies of Exhibits 25, 55, 56, 84, 89, 93 and 116 to the Declaration of Matthew J. Cave in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment on Plaintiffs' Fraud Claims. However, in order for these documents to remain sealed, Plaintiffs or Defendants will be required to file a motion to seal said documents with the Court, and to demonstrate that the considerations under CRC 2.550 are satisfied.

V.

MOTION FOR SUMMARY ADJUDICATION

1. Standards governing motions for summary adjudication

A party may move for summary adjudication as to one or more causes of action, affirmative defenses, claims of damages, or issues of duty under CCP § 437c(f)(1). Summary adjudication must completely dispose of the cause of action, defense, damages claim or duty issue to which it is directed. CCP §437c(f)(1); California Practice Guide, Civil Procedure Before Trial., ¶10:33 (The Rutter Group 2020). Under CCP § 437c(p)(2), a defendant or cross-defendant has the initial burden on summary judgment or adjudication of showing that one or more elements of the cause of action, even if separately pleaded, cannot be established, or that there is a complete defense to that cause of action. In other words, defendants moving for summary judgment/adjudication bear the burden of *persuasion* that one or more elements of the cause of action in question "cannot be established," or that "there is a complete defense" thereto. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.

In addition to the burden of persuasion, there is a burden of *production* on the moving party to make a *prima facie* showing that there are no triable issues of material fact. *Aguilar, supra,* at 850. To show a complete defense, defendant must present admissible evidence of each essential element of the defense upon which it bears the burden of proof at trial. *Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289.

Another way for a defendant to obtain summary judgment is to "show" that an essential element of plaintiff's claim cannot be established. Defendant does so by presenting evidence that plaintiff "does not possess and cannot reasonably obtain, needed evidence." *Aguilar, supra,* at 854. Such evidence usually consists of admissions by plaintiff following extensive discovery to the effect that he or she has discovered nothing to support an essential element of the cause of action. *Id.* at 855; *Union Bank v. Superior Court (Demetry)* (1995) 31 Cal.App.4th 573, 590. It is not enough for defendant to show merely that plaintiff "has no evidence" on a key element of plaintiff's claim. Defendant must also produce evidence showing plaintiff *cannot reasonably obtain* evidence to support that claim. *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 891. Importantly, where plaintiffs have had an adequate opportunity for discovery, their factually-devoid responses to discovery requests may "show" that one or more elements of their claim "cannot be established." *Demetry, supra,* 31 Cal.App.4th at 590.

Once that burden is met, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. CCP § 437c(p)(2); *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 72.

The Court must consider the offered evidence and the reasonable inferences that may be drawn from the evidence. *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840; *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, 1059, 1060. Declarations and evidence offered in opposition to the motion must be liberally construed, while the moving party's

evidence must be construed strictly in determining whether there are triable issues of fact. *Binder, supra*, 75 Cal.App.4th at 839. Any doubts as to the propriety of granting a motion for summary judgment should be resolved in favor of the party opposing the motion. *Id.* at 839. In deciding whether there are any triable issues, courts consider reasonably deducible inferences from the evidence. *Sababin v. Sup. Ct.* (2006) 144 Cal. App. 4th 81, 90 (citing CCP §437c(c)). Further, courts cannot decide summary judgment or adjudication motions based upon credibility. *AARTS Prods., Inc. v. Crocker Nat'l Bank* (1986) 179 Cal.App.3d 1061, 1064; California Practice Guide, Civil Procedure Before Trial, ¶10:272.10 (The Rutter Group 2020).

As to the burden of parties opposing motions for summary judgment, "[t]he court seeks to find contradictions in the evidence or inferences reasonably deducible from the evidence that raise a triable issue of material fact." *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal. App. 4th 1133, 1143-1144. *Accord Sababin v. Sup. Ct.* (2006) 144 Cal. App. 4th 81, 90; *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal. App. 4th 1286, 1298.

2. Discussion

The Fortress Defendants' motion for summary adjudication is directed to Plaintiff HM's third cause of action for promissory estoppel, fourth cause of action for negligent misrepresentation, and fifth cause of action for intentional misrepresentation. Specifically, the motion is based on the Fortress Defendants' argument that Plaintiff HM cannot establish the element of actual or justifiable reliance common to these claims.

a. The claims for fraud, negligent misrepresentation, and promissory estoppel

To prove a claim for fraud (active deceit), a plaintiff must demonstrate the following:

1. misrepresentation;
2. knowledge of falsity (or "scienter");
3. intent to defraud (induce reliance);
4. justifiable reliance; and,
5. resulting damage.

Conroy v. Regents of Univ. of Cal. (2009) 45 Cal. 4th 1244, 1255 ("The elements of fraud, which give rise to the tort action for deceit, are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage."); *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184;

Similarly, to prove a claim for negligent misrepresentation, a plaintiff must demonstrate the following:

1. Assertion of an untrue fact;
2. believed by defendant to be true;
3. lack of reasonable ground for the belief;
4. defendant's intent to induce plaintiff's reliance upon the representation;
5. plaintiff's justifiable reliance upon the representation; and
6. resulting damage.

Melican v. Regents of Univ. of Cal. (2007) 151 Cal. App. 4th 168, 182; *County of Kern v. Sparks* (2007) 149 Cal.App.4th 11, 20; *Small v. Fritz Companies, Inc.* (2003) 30 Cal. 4th 167, 173-74; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal. App. 3d 388, 402; *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal. App. 4th 226, 243.

For a promissory estoppel claim, a plaintiff must show:

1. Promise;
2. which the promisor should reasonably expect to induce action or forbearance;
3. of a definite and substantial character;
4. on the part of the promisee;
5. induces such action or forbearance; and
6. injustice can be avoided only by enforcement of the promise.

C & K Eng'g Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 6; *Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1566; *Lange v. TIG Ins. Co.* (1998) 68 Cal. App. 4th 1179, 1185.

b. Reliance

As stated, the instant motion is directed to the element of reliance common to each of the three claims at issue. With regard to reliance specifically, "'whether reliance was reasonable is a question of fact for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion.'" *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal. 4th 623, 637. "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction." *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.

"'[A] plaintiff will be denied recovery *only if* his conduct is manifestly unreasonable in the light of his own intelligence or information. It must appear that he put faith in representations that were 'preposterous' or 'shown by facts within his observation to be *so patently and obviously false* that he must have closed his eyes to avoid discovery of the truth.' Even in case of a mere negligent misrepresentation, a plaintiff is not barred unless his conduct, in the light of his own information and intelligence, is preposterous and irrational.'" *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal. App. 4th 835, 864 (emphasis added).

"In evaluating the reasonableness of a plaintiff's reliance on alleged misrepresentations, the courts will consider what is apparent from the pleadings about the plaintiff's knowledge and experience" and generally plaintiffs will be denied recovery only if their conduct is manifestly unreasonable in the light of their intelligence or information. *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 175.

Further,

> [Forbearance]...is...sufficient to fulfill the element of reliance necessary to sustain a cause of action for fraud or negligent misrepresentation. Section 525 of the Restatement Second of Torts states: "One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act *or to refrain from action* in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation." *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 174 (citing Rest.2d Torts, §531) (emphasis added by *Small* court).

c. The evidence before the Court and application

Turning to the evidence, and keeping in mind the procedural elements for summary adjudication and the substantive standards governing reliance, the Fortress Defendants reference the following.

In addressing actual reliance, the Fortress Defendants state that Wayne Himelsein is a fund manager with over 20 years of fund management experience.[9] Himelsein founded Plaintiffs Himelsein Mandel Fund Management LLC and HM Ruby Fund L.P., a life settlement investment fund.[10]

As Fortress explains, in order to keep policies in force after acquiring them, life settlement investment funds such as HM Ruby require large amounts of capital to pay policy premiums for the remainder of the lifetimes insured by the policies.[11]

Mr. Himelsein testified at his deposition: "I don't think I ever stopped in my five-year

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[9] Fortress Defendants' Separate Statement ("SS"), Fact 1; (Smolowe Decl. Ex. B [Himelsein Dep.] at 21:14–22:2 ["Q ... You worked in finance pretty much since you graduated from college in 1995, haven't you? A Finance is a very broad term, but in different areas of it, yes. [¶] . . . [¶] Q. What are the names of all the companies you have founded in your professional career? A. That's a long list."]; id. Ex C [10/24/16 Trial Tr.] at 557:27–28 ["Q How many years have you been a fund manager? A. Almost 21 years now."]).

[10] Fortress Defendants' SS, Fact 2 (Smolowe Decl. Ex. C [10/24/16 Trial Tr.] at 553:21–22 ["Q Are you the founder of the HM Ruby Fund? A I am.], 556:12–14 ["Q When did you start Himelsein Mandel Fund Management? A In January of 1999."]; id. Ex. D [4AC] ¶¶ 6, 60).

[11] Fortress Defendants' SS, Fact 3; (Smolowe Decl. Ex. D [4AC] ¶ 63 ["In order to keep policies in force after acquiring them, life settlement investment funds such as HM Ruby must pay the policy premiums for the remainder of the lifetimes insured by the policies. Due to the timing of the front-end payments ... the life settlement investment business requires large amounts of capital."]).

career [at HM] of talking to different capital opportunities. [¶] . . . I was always talking to other capital and other potential deals."[12]

On February 12, 2010, Fortress Credit Corp. and Brentwood Holdings, LLC executed the "Credit and Security Agreement" ("Credit Agreement"), under which Fortress agreed to lend Brentwood Holdings, LLC up to $65 million.[13] By October 27, 2010, HM had drawn over $60 million of the $65 million credit facility.[14] In late summer of 2010, Himelsein asked Fortress for an increase on the loan amount.[15]

The Fourth Amended Complaint states that, "[a]fter Fortress' repeated promises that Fortress would expand the funding facility, Himelsein Mandel either stopped discussions with, or did not pursue, funding options from third parties that were readily available."[16]

At trial, Himelsein testified as follows on direct examination by his own counsel: "Q. Why were you looking for sources of capital on November 18th, mid-November 2010 time frame? A. Well, I was always looking at capital. That was part of my -- what I do. I was always trying to grow the business. Q. Did Mr. Hutter's representation to you about the $20 million on October 28th change in any way the manner you went about looking for additional capital? A.

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[12] Fortress Defendants' SS, Fact 4 (Smolowe Decl. Ex. B [Himelsein Dep.] at 281:23–282:24).

[13] Fortress Defendants' SS, Fact 5 (Smolowe Decl. Ex. M [TREX 3]; id. Ex. D [4AC] ¶ 85).

[14] Fortress Defendants' SS, Fact 6 (Smolowe Decl. Ex. N [TREX 1516] [October 21, 2010 email from Himelsein to Hutter: "I have been reviewing the numbers and am seeing that we will likely approach 65mm in EARLY Dec rather than LATE Dec. We are doing a draw this Mon for 4.3m, which will put us at 62.7M drawn."]; id. Ex. II [TREX 101] [November 19, 2010 email from HM employee attaching a spreadsheet showing the amounts drawn on the credit facility]).

[15] Fortress Defendants' SS, Fact 7 (Smolowe Decl. Ex. H [10/26/16 Trial Tr.] at 736:4–21 ["Q Now, Mr. Himelsein, once you realized that the $65 million loan facility was not going to be enough to get the portfolio to net cash-flow positive, what steps did you take in the summer of 2010 to address the liquidity issues? A I started talking to Rod about the issue. Q And what specifically did you discuss with Mr. Hutter and what did he . . . respond? A [¶] . . . [¶] I made him aware of why and what was happening and the fact that, therefore, we'd need more money."]).

[16] Fortress Defendants' SS, Fact 9; (Smolowe Decl. Ex. D [4AC] ¶ 147).

No."[17]

After October 28, 2010, Himelsein continued to work on deals to get capital from other sources besides Fortress.[18] On November 20, 2010, Himelsein wrote that he "certainly want[ed] to go down every open road" with potential investors.[19] Then, on November 18, 2010, Himelsein asked Hutter for "some color on Fortress' position with respect to the extension."[20] On November 22, 2010, Himelsein emailed Hutter "[r]egarding the most urgent issue, the CAP," asking Hutter, "[p]lease let me know when you are available to speak. Our cash position is running thin."[21]

The Fourth Amended Complaint alleges that Plaintiffs "followed Fortress' demands" to place additional policies in Brentwood on November 24, 2010, "because Himelsein Mandel believed that an additional draw from an expanded funding facility would be available the

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[17] Fortress Defendants' SS, Fact 11 (Smolowe Decl. Ex. H [10/26/16 Trial Tr.] at 848:10–18).

[18] Fortress Defendants' SS, Fact 12 (Smolowe Decl. Ex. O [TREX 221] [November 18, 2010 email from Himelsein to Hutter listing the "deals [Himelsein has] been working on to get capital from other sources," such as "a major Fund that knows Fortress well and has offered to take part in the 'upsize'" as well as "another major institution who is willing to lend a mezzanine piece behind your line."]; id. Ex. FF [Pls.' Supp'l Response to Defs.' First Special Rog. No. 23] [identifying the entities involved in the deals described in Himelsein's November 19, 2010 email]; id. Ex. P [FORTRESS0226023] [Ex. 1 described in Pls.' Supp'l Response to Defs.' First Special Rog. No. 23]; id. Ex. S [TREX 443] [November 19, 2010 Himelsein response to investor email with subject line "90 days from D-day" listing deals Himelsein is working on, and writing "since the Fortress deal, I HAVE been focused on exactly what you are saying, an ALTERNATIVE solution."]; id. Ex. R [TREX 950] [email from Himelsein to Zafiriou accepting Zafiriou's offer to set up a call with a potential investor and stating, "I have not heard of them and certainly want to go down every open road"]).

[19] Fortress Defendants' SS, Fact 13 (Smolowe Decl. Ex. R [TREX 950] [November 20, 2010 email from Himelsein to Zafiriou accepting Zafiriou's offer to set up a call with a potential investor and stating, "I have not heard of them and certainly want to go down every open road"]; id. Ex. S [TREX 443] [November 19, 2010 Himelsein email stating, "I am totally open to suggestions and would be happy to . . . go down whatever roads you think may be helpful."]).

[20] Fortress Defendants' SS, Fact14 (Smolowe Decl. Ex. O [TREX 221] [Himelsein writing to Hutter on November 18, 2010, that, "in early Dec we will be in desperate need of liquidity, and days away from starting to lapse policies in our PF book .....With this in mind, and given where we are today and the short timeline impacted by Thanksgiving, I really need some color on Fortress' position with respect to the extension."].).

[21] Fortress Defendants' SS, Fact 15 (Smolowe Decl. Ex. Q [TREX 444]).

following week on December 1, and Himelsein Mandel wanted to continue to act as a faithful partner to Fortress by adding collateral to the pool that secured the Fortress funding."[22] The Fourth Amended Complaint further alleges that, "Plaintiffs suffered damages because of their reliance on Fortress' promise. Plaintiffs could have acquired alternative funding. When Fortress failed to deliver on its promise, Plaintiffs defaulted on the CSA and lost the policies in the Brentwood portfolio, future profits resulting from the Brentwood portfolio, and additional business opportunities that would have been available if Plaintiffs had been extended the additional credit."[23]

As of November 24, 2010, Plaintiff Quantlife, LLC was contractually obligated to "sell, assign, transfer, contribute or otherwise convey . . . to [Brentwood Holdings, LLC] . . . all of [Quantlife, LLC's] right, title and interest in and to all Life Policies existing on the Effective Date and all Life Policies thereafter acquired or arising through and including the Conveyance Termination Date ..... "[24]

With respect to justifiable reliance, Defendant again points to Mr. Himelsein's background in fund management and his establishment of Mandel Fund Management LLC and HM Ruby Fund L.P.[25] Defendant states that life settlement funds require large amounts of capital to pay policy premiums for the remainder of the lifetimes insured by the policies.[26]

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[22] Fortress Defendants' SS, Fact 16 (Smolowe Decl. Ex. D [4AC] ¶ 148; see also id. ¶¶ 196, 202).

[23] Fortress Defendants' SS, Fact 17 (Smolowe Decl. Ex. D [4AC] ¶¶ 197, 204; see also id. ¶ 193).

[24] Fortress Defendants' SS, Fact 18 (Smolowe Decl. Ex. GG at TREX-0096- 0013 § 2.01; id. Ex. D [4AC] ¶ 108 ["Fortress required the execution of a Contribution and Sale Agreement between Quantlife and Brentwood that expressly required Quantlife to sell every policy to Brentwood. . . ."]; id. Ex. HH [10/28/16 Trial Tr.] at 1160:21–1161:2 ["Q Once -- if you make a decision to acquire it, then QuantLife, under the credit and security agreement, has an obligation to pledge it as collateral; correct? A If QuantLife made the decision to acquire it on its own volition, then it would enter QuantLife. . . . [I]f eligible, then it would be pledged to Brentwood."]).

[25] Fortress Defendants' SS, Facts 19-20.

[26] Fortress Defendants' SS, Fact 21 (Smolowe Decl. Ex. D [4AC] ¶ 63 ["In order to keep policies in force after

The Fortress Defendants reiterate the parties executed the Credit Agreement on February 12, 2010, under which Fortress agreed to lend Brentwood Holdings, LLC up to $65 million.[27] Fortress and HM were represented by separate legal counsel in the negotiation and signing of the Credit Agreement.[28]

The Credit Agreement contained a clause providing: "Except for actions expressly permitted to be taken by the Program Agent, no amendment, modification, termination or waiver of any provision of this Agreement, or any consent to any departure by Borrower therefrom, shall in any event be effective unless the same shall be in writing and signed by the Program Agent and Borrower, and by Requisite Lenders or all affected Lenders, as applicable."[29] The Credit Agreement also contained a clause providing that: "No amendment, modification, termination or waiver with respect to any provision of this Agreement shall, unless in writing and signed by the Program Agent and each Lender directly affected thereby: (i) increase the principal amount of any Lender's Commitment..... "[30]

Himelsein testified at trial as follows: "Q. You knew that the credit and security agreement had provisions requiring that any modifications to the loan amount be in writing. You knew that, didn't you, sir? A. At that point in time, I generally knew that idea -- I don't recall the specific language in the CSA, but yes, I knew about that."[31]

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acquiring them, life settlement investment funds such as HM Ruby must pay the policy premiums for the remainder of the lifetimes insured by the policies. Due to the timing of the front-end payments . . . the life settlement business requires large amounts of capital."].)

[27] Fortress Defendants' SS, Fact 22.

[28] Fortress Defendants' SS, Fact 23 (Smolowe Decl. Ex. B [Himelsein Dep.] at 54:20–55:3.)

[29] Fortress Defendants' SS, Fact 24 (Smolowe Decl. Ex. M at TREX-0003- 0073 § 9.01.)

[30] Fortress Defendants' SS, Fact 25 (Smolowe Decl. Ex. M at TREX-0003- 0074 § 9.01(b).)

[31] Fortress Defendants' SS, Fact 26 (Smolowe Decl. Ex. W [10/31/16 Trial Tr.] at 1248:28–1249:15]; id. Ex. J [10/27/16 Trial Tr.] at 1029:7–15 ["And, now, you're aware that the credit and security agreement with Fortress

By October 27, 2010, HM had drawn over $60 million of the $65 million credit facility.[32] In late summer of 2010, Himelsein asked Fortress for an increase on the loan amount.[33] Plaintiffs allege that, on October 28, 2010, Himelsein had a telephone call with Rod Hutter during which Hutter told Himelsein that Fortress would provide a $20 million loan extension.[34] The Fourth Amended Complaint alleges that, "[a]fter Fortress' repeated promises that Fortress would expand the funding facility, Himelsein Mandel either stopped discussions with, or did not pursue, funding options from third parties that were readily available."[35]

Prior to November 24, 2010, Himelsein did not inform any investors of the alleged October 28 promise to extend the loan.[36] On April 12, 2011, Himelsein wrote in response to an investor's email: "A written extension is only something that I can ask for, not something that I

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contained a provision saying that, (Reading:) No amendment, modification, termination, or waiver or waiver of any provision of this agreement shall in any event be effective unless the same shall be in writing and signed. You're aware of that, aren't you, sir? A Yes."]).

[32] Fortress Defendants' SS, Fact 27 (Smolowe Decl. Ex. N [TREX 1516] [October 21, 2010 email from Himelsein to Hutter: "I have been reviewing the numbers and am seeing that we will likely approach 65mm in EARLY Dec rather than LATE Dec. We are doing a draw this Mon for 4.3m, which will put us at 62.7M drawn."]; id. Ex. II [TREX 101] [November 19, 2010 email from HM employee attaching a spreadsheet showing the amounts drawn on the credit facility]).

[33] Fortress Defendants' SS, Fact 28 (Smolowe Decl. Ex. H [10/26/16 Trial Tr.] at 736:4–21 ["Q Now, Mr. Himelsein, once you realized that the $65 million loan facility was not going to be enough to get the portfolio to net cash-flow positive, what steps did you take in the summer of 2010 to address the liquidity issues? A I started talking to Rod about the issue. Q And what specifically did you discuss with Mr. Hutter and what did he . . . respond? A [¶] . . . [¶] I made him aware of why and what was happening and the fact that, therefore, we'd need more money."]).

[34] Fortress Defendants' SS, Fact 29 (Smolowe Decl. Ex. D [4AC] ¶ 143).

[35] Fortress Defendants' SS, Fact 30 (Smolowe Decl. Ex. D [4AC] ¶ 147).

[36] Fortress Defendants' SS, Fact 31 (Smolowe Decl. Ex. H [10/26/16 Trial Tr.] at 801:25–802:12 ["Q. Did you send an email to your limited partners to let you [sic] know that Rod Hutter had told you that Fortress had approved the additional $20 million? A. No. Q. Why not? A. I don't typically email my limited partners about things going on. ....."]; id. Ex. J [10/27/16 Trial Tr.] at 935:27–936:12 ["Q. You, in fact, you didn't send out a single email to your investors announcing this supposed deal, did you, sir? A. Don't recall all the emails I sent. I don't remember sending one. No."]; id. Ex. W [10/31/16 Trial Tr.] at 1243:17–1244:24 ["Q. As you testified on cross, even though leading up to the October 28th call with Rod Hutter some of your investors had been asking you about the state of the credit facility, you didn't write to any of them after October 28. Do you recall that testimony generally? A Yes. Q Why didn't you write to them after October 28? A. Again, . . . it just wasn't something I would do."]).

can execute on behalf of Fortress, and therefore not something I could 'allow' or not allow. If Fortress wouldn't provide it to me, then all I could do was 1) continue asking for it, and 2) seek out other options, both of which I did. How was this sloppy or irresponsible of me? I believe sloppy or irresponsible would've been the exact opposite, such as to stop pushing for it or to not seek out other options."[37]

Himelsein testified at the bench trial that he refrained from writing to his investors about receiving the alleged October 28 promise because:

> I can see it right now in my head, same thing I could have seen then is -- is that if I tell investors that hey, no, Rod promised me, it's coming, then, of course, I know what they're going to say. Well, get it in writing and where's the document and what day and how much. Of course, then it's going to be -- I remember there was an email later that it was -- one investor quoted that it was sloppy and irresponsible of me to not get it in writing. I know that they're going to say that. Why do I have to email them to hear that? All I -- I want to wait. Things are going to get finalized, then some months later I'm going to report to them, probably at that time it was November, so would have been a year-end letter where we would say, hey, we did this, we did this, we opened up an Irish company. Now your tax situation is going to be better.[38]

The Court finds these facts satisfy the Fortress Defendants' initial burden of showing on summary adjudication that Mr. Himelsein's reliance on the alleged $20 million extension – an essential element of the claims for promissory estoppel, intentional misrepresentation, and negligent misrepresentation – was neither actual nor justifiable. The burden shifts to Plaintiff HM to raise one or more triable issues of material fact with respect to whether its reliance on the alleged representation of the $20 million extension was actual or justifiable.

To that end, Plaintiffs reference the following. While Mr. Himelsein testified: 1) that he was "always looking at capital" in the mid-November 2018 time frame, and 2) that Mr. Hutter's

[37] Fortress Defendants' SS, Fact 32 (Smolowe Decl. Ex. K [TREX 397]).

[38] Fortress Defendants' SS, Fact 34 (Smolowe Decl. Ex. W [10/31/16 Trial Tr.] at 1243:17–1244:15).

representation about the $20 million on October 28th did not change in any way the manner he went about looking for additional capital, he went beyond those statements. At trial, when asked whether he relied on Mr. Hutter's representation about the $20 million, he responded "Very much so."[39] Further, Himelsein testified that "[c]ertainly, as the 65 cap got closer and closer, I would have dramatically picked up the pace. If – the same way I closed new capital two weeks after the default, in a matter of months I could have got a lot done…I would have made sure, if my survival depended on it – I would have made sure something got done just like I did after the default."[40]

Further, Mr. Himelsein testified that "[i]f 65 was the only cash I had, I would have not taken policies into QuantLife that I didn't want to. I would have sold them away to third parties. I would have been looking for buyers all the time. Opportunistically. [¶] I would have lapsed many more policies. I would have lapsed policies that had negative NPV, for sure. I would have lapse policies that had low value, where the premiums over the course of a year were more than the present value of the policy at that time."[41]

As an example of a further transaction he pursued, Mr. Himelsein pointed to a potential deal with one Eric Schwartz in October 2010, where Schwartz was going to make a "strategic investment" in HM (specifically, an LP investment in HM's Irish structure, Cresthaven, LP).[42]

Scott Rose, Fortress's life settlement expert, testified in the prior trial that he "believed that Fortress was going to upsize the facility" and continued to believe this "into the mid to late

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[39] See Plaintiff's Response to Defendant's SS, Fact 11 (Cave Decl. Ex. 1 at 554:8-9 (10/24/16 Trial Tr.) ("Q did you rely on Mr. Hutter's representation? A. Very much so.")

[40] Plaintiffs' Response to Defendant's SS, Fact 11 (Cave Decl. Ex. 3 at 1041:27–1042:22 (10/28/16 Trial Tr.).

[41] Exh. 3 to Cave Decl. at 1042:27-1043:8.

[42] See generally Cave Decl. Ex. 2 at 852:9-25; 853:18–855:5, 855:23–856:17 (10/26/16 Trial. Tr.)

November 2010 time period[.]"[43] Further, after Mr. Himelsein unsuccessfully attempted to reach Mr. Hutter in November 2010 about the $20 million additional funding, Rose testified that he contacted Hutter and then relayed to Himelsein that Hutter had said "don't worry. Tell Wayne he's fine" with respect to the additional credit.[44] Rose also testified that he advised Fortress on the initial terms of the HM Ruby deal, traveled to Los Angeles as part of Fortress's diligence team—even working without any formal agreement with Fortress—, and continued to advise on valuating the portfolio and individual policies before each was eligible to be pledged.[45] Rose further testified that at the time up to and including November 24, 2010, when Barrett Advisors was assisting Fortress and HM with the pledging of these eight insureds in connection with draw number 20, he still believed that additional capital was coming from Fortress.[46]

In support of their argument that the HM Plaintiffs neither justifiably nor actually relied on the $20 million extension, the Fortress Defendants point to the Credit Agreement's clause providing that "No amendment, modification, termination or waiver with respect to any provision of this Agreement shall, unless in writing and signed by the Program Agent and each Lender directly affected thereby: (i) increase the principal amount of any Lender's Commitment...."[47]

However, the HM Plaintiffs have introduced evidence tending to show that over the course of Plaintiffs' and the Fortress Defendants' relationship, Fortress "waived & waived & waived" provisions of the Credit Agreement, including the advance rate and Premium Reserve

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[43] See Plaintiffs' Response to Defendant's SS, Fact 14 (Cave Decl., Exh. 94 at 299:12-300:25.

[44] Plaintiffs' Response to Defendant's SS, Fact 14 (Cave Decl. Ex. 2 at 847:18-24 (10/26/16 Trial Tr.).

[45] Plaintiffs' Response to Defendant's SS, Fact 14 (Cave Decl. Ex. 46 at 60:18-20, 68:6-9, 85:6-16, 150:13-16).

[46] Plaintiffs' Response to Defendant's SS, Fact 15 (Cave Decl. Ex. 94 at 328:17-24 (Rose Dep. Tr)).

[47] Defendants' SS, Fact 25 (Smolowe Decl. Ex. M at TREX-0003- 0074 § 9.01(b)).

Account covenants, and did so in increasingly informal ways over the life of the parties' relationship.[48] In other words, the nature of the parties' relationship and their prior course of dealing may have reasonably led the HM Plaintiffs to believe that the $20 million was forthcoming, notwithstanding the existence of the "no oral modification" clause in the Credit Agreement itself.

As for the allegations in the operative Fourth Amended Complaint, Plaintiff specifically alleges in applicable part as follows:

> After Fortress' repeated promises that Fortress would expand the funding facility, Himelsein Mandel either stopped discussions with, or did not pursue, funding options from third parties that were readily available. Additionally, from August through November 2010, Fortress and Wayne Himelsein managed Himelsein Mandel's operations under the assumption that Fortress was going to expand the funding facility. Had Wayne Himelsein believed that Fortress was not going to expand the funding facility, not only would Wayne Himelsein have been negotiating with third parties for an immediate capital infusion, but Wayne Himelsein also would have pushed back on Fortress' directions to buy and service life settlements with lower expected returns. Instead, Wayne Himelsein would have stopped paying premiums on lower return investments, and most certainly on investments with negative net present value that Fortress wanted to be acquired, to retain funds for higher return investments. Moreover, Wayne Himelsein would not have borrowed from his own mother's retirement to patch a short term void in cash flows. Relying on Fortress' representations and with Fortress' supervision and approval, Wayne Himelsein continued to acquire all the investments he could and pay premiums for all investments, regardless of investment returns, as if a further capital draw would be available on December 1, as Fortress had promised.[49]

Defendants make much of the fact that Mr. Himelsein did not, prior to November 24,

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[48] Plaintiffs' Response to Defendant's SS, Fact 25 (Cave Decl. Exs. 9 at 3335, 10, 11, 12, 13, 14, 15, 16, 17; Cave Decl. Ex. 18 at 146:14-17, 147:1-18, 330:2-10 (Himelsein 6/30/15 Dep. Tr.); Cave Decl. Ex. 6 at 620:17–622:2, 714:20–716:6 (10/25/16 Trial Tr.); Cave Decl. Ex. 19 at 226:8-21, 239:9- 24 (10/19/16 Trial Tr.); Cave Decl. Ex. 20 at 259:22–260:14, 260:19–261:8, 267:15– 268:13, 272:14-18 (Sekeres Dep. Tr.); Cave Decl. Ex. 21 at 151:6-20, 308:10-25, 309:15- 25 (Tapiero Dep. Tr.); Cave Decl. Ex. 19 at 238:12–239:8, 247:10–249:15 (10/19/16 Trial Tr.); Cave Decl. Ex. 22 at 499:27– 500:21 (10/21/16 Trial Tr.); Cave Decl. Ex. 23 at 58:16-19 (Homich Dep. Tr.); Cave Decl. Ex. 58; Cave Decl. Ex. 59; Cave Decl. Ex. 60; Cave Decl. Ex. 77 at 215:18–218:2; 229:19–230:22 (Zafiriou Dep. Tr.) (testifying that Fortress told him it repeatedly waived the technical requirements of the Credit Agreement); Cave Decl. Ex. 63; Cave Decl. Ex. 117 (TREX 2188); Cave Decl. Ex. 19 at 251:13– 255:25 (10/19/16 Trial Tr.); Cave Decl. Ex. 118 at 381:14-18 (10/20/16 Trial Tr.); Cave Decl. Ex. 46 at 261:9–263:4 (Rose 10/15/15 Dep. Tr.); Cave Decl. Ex. 18 at 370:8-21, 373:22–375:2 (Himelsein 6/30/15 Dep. Tr.) (Hutter orally reassuring Himelsein that Fortress was continuing to waive the advance rate and Premium Reserve Account covenants).

[49] Plaintiffs' Response to Defendants' SS, Fact 30 (Fourth Amended Complaint, ¶147).

2010, inform any investors of the alleged October 28 promise to extend the loan. However, Mr. Himelsein generally testified that he did not update investors on operational matters outside of annual or other periodic reports.[50] Whether Himelsein's testimony about this being the ordinary course of his business with investors, and whether such evidence detracts from Plaintiffs' assertions of actual or justifiable reliance, is an issue of credibility inappropriate for summary resolution.

Plaintiffs have introduced additional evidence of reliance, as referenced in their separate statement of additional facts. By way of background[51], in 2005, Himelsein and his partner, Jason Mandel, launched the HM Ruby Fund, a hedge fund that extended what are known as "premium finance" loans.[52] In a premium finance loan, HM lent money to older, high-net-worth individuals who owned life insurance and did not want to go out-of-pocket to pay premiums.[53] At maturity, the borrower could either pay back the loan with interest, or sell the policy to an HM entity in satisfaction of the loan.[54]

In the aftermath of the 2008-2009 global financial crisis, premium finance borrowers increasingly started selling policies to HM in lieu of repaying the loans in cash.[55] A second

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[50] See generally Plaintiffs' Response to Defendants' SS, Fact 31 (Cave Decl. Ex. 24 at 1242:13– 1244:24 (10/31/16 Trial Tr.) and Fact 34.

[51] The Fortress Defendants have objected to many of Plaintiffs' additional facts in the Separate Statement relating to events leading up to the actual Credit Agreement. The Court recognizes that Judge Jones had previously rejected the Plaintiffs' contention that the parties formed a partnership or joint venture giving rise to fiduciary duties. Nevertheless, the Court views such evidence as providing an important background to the events leading up to the parties entering into the Credit Agreement and applies to Plaintiffs' argument that it actually and/or justifiably relied on the Fortress Defendants' alleged promise, through Mr. Hutter, for the $20 million extension.

[52] Plaintiffs' SS of Additional Facts, Fact 36 (Cave Decl. Ex. 1 at 564:22–567:11 (10/24/16 Trial Tr.).

[53] Plaintiffs' SS of Additional Facts, Fact 37 (Cave Decl. Ex. 1 at 564:22-23, 565:14– 567:11 (10/24/16 Trial Tr.).

[54] Plaintiffs' SS of Additional Facts, Fact 38 (Cave Decl. Ex. 1 at 566:6–567:11 (10/24/16 Trial Tr.).

[55] Plaintiffs' SS of Additional Facts, Fact 42 (Cave Decl. Ex. 1 at 570:26–572:16 (10/24/16 Trial Tr.).

effect of the global financial crisis was that investors became increasingly attracted to the life settlement industry because returns on life settlements are not correlated to financial markets.[56] Life settlements pay at their expected rates no matter what happened to real estate prices or the economy more broadly.[57] According to Plaintiffs, this circumstance created a long-term opportunity for HM and a medium-term challenge.[58]

Thus, Mr. Himelsein testified that the policies being sold to HM would eventually generate a significantly higher payout (multi-million dollar death benefits on each policy) than cash repayments of loans (a few years' worth of premium payments plus interest).[59] According to Himelsein, HM was building a life settlements portfolio that would pay out nearly $3 billion in death benefits in the years to come.[60] However, per Himelsein's trial testimony, HM also had a medium term need for additional capital to continue to fund premiums on the life settlements, until such time as the portfolio would begin paying out enough death benefits to cover ongoing premium requirements.[61]

Thus, Himelsein testified, in the fall of 2009, HM sought a liquidity solution.[62] HM was open to a variety of different transactions, including raising equity through direct investment, obtaining traditional debt financing from a bank, and finding a joint venture partner.[63] HM

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[56] Plaintiffs' SS of Additional Facts, Fact 43 (Cave Decl. Ex. 1 at 570:26–572:16 (10/24/16 Trial Tr.).

[57] Plaintiffs' SS of Additional Facts, Fact 44 (Cave Decl. Ex. 25 at 318:19–319:5 (10/30/15 Briger Dep. Tr.).

[58] Plaintiffs' SS of Additional Facts, Fact 45 (Cave Decl. Ex. 1 at 570:26–572:16 (10/24/16 Trial Tr.).

[59] Plaintiffs' SS of Additional Facts, Fact 46 (Cave Decl. Ex. 1 at 570:26–572:16 (10/24/16 Trial Tr.).

[60] Plaintiffs' SS of Additional Facts, Fact 47 (Cave Decl. Ex. 1 at 570:26–572:16 (10/24/16 Trial Tr.).

[61] Plaintiffs' SS of Additional Facts, Fact 49 (Cave Decl. Ex. 1 at 570:26–572:16 (10/24/16 Trial Tr.).

[62] Plaintiffs' SS of Additional Facts, Fact 50 (Cave Decl. Ex. 1 at 573:16–574:28 (10/24/16 Trial Tr.).

[63] Plaintiffs' SS of Additional Facts, Fact 51 (Cave Decl. Ex. 26 at 6274-76).

entered into serious negotiations with several financial institutions that offered different transaction structures.[64] EFG International offered a traditional loan of up to $75 million with an interest rate of 14%, while Farallon Capital Management (a private equity firm) offered a credit facility of $60 million in return for an interest rate of 18.5% and a share of the interest in HM Ruby's general partner.[65]

Ultimately, though, HM entered into a business relationship with Fortress. Fortress was contacted about a potential transaction with HM in the fall of 2009.[66] Fortress Managing Director Rod Hutter, a senior executive within the Rediscount Group within Fortress's Credit Funds division, assumed responsibility for the transaction.[67]

Fortress understood that HM was "open to financing, jv [joint venture] or other structures."[68] In a November 2 email, a broker for Fortress, Chris Wilson, requested that HM send along detailed information about its financial performance because "Fortress would like to be able to talk to the experience and success of their potential partners."[69] After Wilson's sentiments were relayed to HM, Himelsein responded that HM was interested in a "loan structure to bridge any funding gaps between premium liabilities and policy maturities."[70]

Himelsein requested, however, that Fortress send its "wish list for a joint venture and/or

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[64] Plaintiffs' SS of Additional Facts, Fact 52 (Cave Decl. Ex. 27; Cave Decl. Ex. 28. Exhibit 27 is a Draft Outline Term-sheet from EFT Bank; Exhibit 28 is a Confidential Indicative Term Sheet identifying potential lenders as Farallon Capital Management, L.L.C. and/or its affiliates.

[65] Plaintiffs' SS of Additional Facts, Facts 53, 54 (Cave Decl. Ex. 27; Cave Decl. Ex. 21 at 282:15–283:3 (Tapiero Dep. Tr.); Cave Decl. Ex. 28).

[66] Plaintiffs' SS of Additional Facts, Fact 56 (Cave Decl. Ex. 30 at 82:1–83:6 (Ruggiero Dep. Tr.).

[67] Plaintiffs' SS of Additional Facts, Fact 57 (Cave Decl. Ex. 31 at 1284:20-22 (11/01/16 Trial Tr.).

[68] Plaintiffs' SS of Additional Facts, Fact 59 (Cave Decl. Ex. 26).

[69] Plaintiffs' SS of Additional Facts, Fact 60 (Cave Decl. Ex. 32 at 8544).

[70] Plaintiffs' SS of Additional Facts, Fact 61 (Cave Decl. Ex. 32 at 8543).

structure" so that the parties would not be wasting time and energy in the event they did not have a meeting of the minds on the basic nature of their relationship.[71] On November 10, HM general counsel Brian Waters emailed an initial draft NDA to Hutter.[72] After Fortress's in-house counsel returned a marked-up draft that limited the description of the transaction solely to a "potential loan," Waters replied that the business principals had decided to intentionally keep the description of the potential transaction more "open ended" so that "Fortress had more flexibility in structuring a transaction."[73]

Waters relayed Himelsein's understanding that the "potential transaction may ultimately involve a loan/credit facility . . . joint venture, equity transaction, or some combination thereof."[74] Waters suggested that if Fortress's counsel believed that "limiting the potential transaction to a loan transaction is more accurate," he should modify the NDA accordingly.[75] The NDA was not so modified and the NDA confirmed that HM and Fortress were "evaluating a potential transaction involving a credit facility, joint venture, and/or equity acquisition" between HM and Fortress.[76]

Following a number of events in the interim, HM withdrew from its term sheet with Farallon and signed a term sheet with Fortress on January 22, 2010.[77] Fortress conducted due diligence on HM, including sending a team to HM's Los Angeles office (including Scott Rose of

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[71] Plaintiffs' SS of Additional Facts, Fact 62 (Cave Decl. Ex. 32 at 8543).

[72] Plaintiffs' SS of Additional Facts, Fact 64 (Cave Decl. Ex. 33 at 7341).

[73] Plaintiffs' SS of Additional Facts, Fact 65 (Cave Decl. Ex. 33 at 7338-40).

[74] Plaintiffs' SS of Additional Facts, Fact 66 (Cave Decl. Ex. 33 at 7338-40).

[75] Plaintiffs' SS of Additional Facts, Fact 67 (Cave Decl. Ex. 33 at 7338-40).

[76] Plaintiffs' SS of Additional Facts, Fact 68 (Cave Decl. Ex. 9 at 3335; Cave Decl. Ex. 35).

[77] Plaintiffs' SS of Additional Facts, Fact 76 (Cave Decl. Ex. 42; Cave Decl. Ex. 43).

Barrett Advisors, a lawyer and an experienced professional in this asset class, who Fortress hired to study HM's business).[78]

Rose testified that Fortress's diligence efforts during that week-long visit (a 71- point custom-tailored list) were tasks that a party would undertake for a joint venture, rather than a traditional loan.[79] The extent of further due diligence efforts undertaken by Fortress is set forth at Facts 80-82. When questioned at trial, Mr. Rose stated that the tasks on Fortress's due diligence checklist were those a party would undertake "in connection with a joint venture relationship."[80]

Following a celebratory dinner between the HM Plaintiffs and Fortress Defendants, Hutter testified generally that he and Mr. Himelsein both agreed about the existence of market opportunities in the life settlement space, and that both desired to enter into subsequent life settlement transactions together.[81]

Plaintiffs state that the first transaction in the Fortress-HM relationship was a credit facility to finance HM's growing portfolio of life settlements as well as additional life settlements from the maturing loans in its premium finance portfolio.[82] This involved a series of interrelated agreements, the principal of which was the Credit and Security Agreement ("Credit Agreement").[83] At Fortress's direction, the parties formed a special purpose vehicle, Brentwood

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[78] Plaintiffs' SS of Additional Facts, Fact 78 (Cave Decl. Ex. 46 at 67:25–68:23, 74:18– 79:11 (Rose 10/15/15 Dep. Tr.); Cave Decl. Ex. 48; Cave Decl. Ex. 31 at 1285:11–1286:19 (11/01/16 Trial Tr.)).

[79] Plaintiffs' SS of Additional Facts, Fact 79 (Cave Decl. Ex. 46 at 151:8-160:15 (Rose 10/15/15 Dep. Tr.); Cave Decl. Ex. 47.)

[80] Plaintiffs' SS of Additional Facts, Fact 87 (Cave Decl. Ex. 46 at 151:8–159:2 (10/15/15 Rose Dep. Tr.).

[81] Plaintiffs' SS of Additional Facts, Fact 96 (Cave Decl. Ex. 37 at 433:14–436:17 (Hutter Dep. Tr.)).

[82] Plaintiffs' SS of Additional Facts, Fact 98 (Cave Decl. Ex. 18 at 122:12–123:16 (06/30/15 Himelsein Dep. Tr.).

[83] Plaintiffs' SS of Additional Facts, Facts 99, 100 (Cave Decl. Exhs. 48-50.

Holdings, LLC, to receive $65 million in financing from Fortress.[84]

Plaintiffs reference additional evidence as to how the parties operated, as well as the Plaintiffs' sharing of information with the Fortress Defendants regarding the "nuts-and-bolts" of the life settlement industry.[85] According to Plaintiffs, none of this was required under the credit facility with Fortress.[86]

Plaintiffs have introduced evidence showing that following the parties' agreement in the Credit Agreement, Mr. Himelsein alerted Mr. Hutter about additional life settlement investment opportunities.[87] Again, these opportunities did not have anything to do with the credit facility.[88] Further, Plaintiffs have introduced evidence showing that HM and Fortress may have shared legal advice on discrete matters.[89]

According to Mr. Himelsein's trial testimony, HM and Fortress's relationship was collaborative and flexible, and the parties were in almost constant contact throughout 2010.[90]

Himelsein stated that the parties did not rigidly adhere to the strictures of the Credit Agreement, but treated the Agreement flexibly to meet the business needs of the venture. He testified the "day-to-day dynamics" of the business "rarely" involved referring to particular

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[84] Plaintiffs' SS of Additional Facts, Fact 101 (Cave Decl. Ex. 48; Cave Decl. Ex. 49).

[85] See, e.g., Plaintiffs' SS of Additional Facts, Facts 113, 115-118.

[86] Plaintiffs' SS of Additional Facts, Fact 19 (Cave Decl. Exh. 50).

[87] Plaintiffs' SS of Additional Facts, Facts 120-124.

[88] Plaintiffs' SS of Additional Facts, Fact 125.

[89] Plaintiffs' SS of Additional Facts, Facts 129-131.

[90] Plaintiffs' SS of Additional Facts, Fact 133 (Cave Decl. Ex. 39 at 604:9–605:20 (Himelsein 7/1/15 Dep. Tr.) (daily conversations about the business); Cave Decl. Ex. 6 at 692:4-8 (10/25/16 Trial Tr.); Cave Decl. Ex. 55 at 143:24–146:3 (Bonacci Dep. Tr.) (communicated with HM weekly if not daily through life of relationship); Cave Decl. Ex. 19 at 247:13–248:1 (10/19/16 Trial Tr.)).

provisions of the Credit Agreement.[91] Although the Credit Agreement in certain respects contains detailed provisions governing the minutiae of the parties' day-to-day operations of Brentwood, the evidence shows that the parties treated the terms of the Credit Agreement flexibly in order to meet the business needs of the venture.[92]

For example, Himelsein explained that under his working relationship with Hutter, the parties did not seek to "modify the agreement" every time a particular term presented a potential stumbling block.[93] Rather, Himelsein testified, he and Hutter would talk on the phone, brainstorm a workable solution, and then operate the business accordingly.[94] Per Himelsein's testimony at trial, the "day-to-day dynamics" of the business "rarely" involved referring to the particular provisions of the Credit Agreement.[95]

Plaintiffs note that the Credit Agreement required that HM keep in a "Premium Reserve Account" a minimum of one month of prospective premium payments on the Brentwood policies.[96] Per §6.01(d) of the Credit Agreement, if the Premium Reserve Account was underfunded, the Credit Agreement technically gave Fortress the right to declare Brentwood in

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[91] Plaintiffs' SS of Additional Facts, Fact 134 (Cave Decl. Ex. 18, at 79:7-24 (Himelsein 6/30/15 Dep. Tr.); Cave Decl. Ex. 6 at 657:8-21 (10/25/16 Trial Tr.) (Himelsein: "We weren't referencing the CSA [Credit Agreement] in our day-to-day operations.")

[92] Plaintiffs' SS of Additional Facts, Fact 135 (Cave Decl. Ex. 18, at 79:7–24 (Himelsein 6/30/15 Dep. Tr.); Cave Decl. Ex. 6 at 657:8–21 (10/25/16 Trial Tr.) (Himelsein: "We weren't referencing the CSA [Credit Agreement] in our day-to-day operations.").)

[93] Plaintiffs' SS of Additional Facts, Fact 136 (Cave Decl. Ex. 18, at 79:7-24 (Himelsein 6/30/15 Dep. Tr.)).

[94] Plaintiffs' SS of Additional Facts, Fact 137 (Cave Decl. Ex. 18 at 79:7-24 (Himelsein 6/30/15 Dep. Tr.)).

[95] Plaintiffs' SS of Additional Facts, Fact 138 (Cave Decl. Ex. 18 at 79:7-24 (Himelsein 6/30/15 Dep. Tr.); Cave Decl. Ex. 6 at 657:8-21 (10/25/16 Trial Tr.) (Himelsein: "We weren't referencing the CSA [Credit Agreement] in our day-to-day operations.")).

[96] Plaintiffs' SS of Additional Facts, Fact 141 (Cave Decl. Ex. 50 at § 5.03)).

default.[97] A violation of the Premium Reserve Account covenant was deemed an "incurable" default.[98]

Right from the outset of the HM/Fortress relationship, there is evidence that the parties deviated from the strict terms of the Premium Reserve Account covenant.[99] On February 23, less than two weeks after signing, Fortress asked to delay an initial tranche of funding.[100] In response, Himelsein asked Fortress to confirm that he would not need to ensure that the Premium Reserve Account held the funds required by the Credit Agreement, as he did not want HM to be "in Default risk."[101] Himelsein also asked Hutter to have Fortress agree to exceed the "advance rate" set forth in the Credit Agreement (which limited the amount Fortress would lend to Brentwood to a specified percentage of the value of the life settlement collateral).[102] Mr. Hutter obtained agreement from his superiors – Messrs. Cardoni, Ruggiero, and Chin – to grant the waiver.[103]

There is additional evidence which suggests that as the parties continued working together, Mr. Hutter informed Mr. Himelsein that Fortress was waiving certain covenants to the Credit Agreement.[104] Exhibit 62 is an email string, where at one point Hutter informs Himelsein

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[97] Plaintiffs' SS of Additional Facts, Fact 142 (Cave Decl. Ex. 50 § 6.01(d)).

[98] Plaintiffs' SS of Additional Facts, Fact 143 (Cave Decl. Ex. 31 at 1300:15–1301:4 (11/01/16 Trial Tr.)).

[99] Plaintiffs' SS of Additional Facts, Fact 144 (Cave Decl. Ex. 58 (email chain between Joshua Bonacci of Fortress, Wayne Himelsein, Gary Lo, and Rodney Hutter).)

[100] Plaintiffs' SS of Additional Facts, Fact 145 (Cave Decl. Ex. 58).

[101] Plaintiffs' SS of Additional Facts, Fact 146 (Cave Decl. Ex. 58).

[102] Plaintiffs' SS of Additional Facts, Fact 147 (Cave Decl. Ex. 59 (email chain from Rodney Hutter to Doug Cardoni, Dominick Ruggiero, and Gary Lo)).

[103] Plaintiffs' SS of Additional Facts, Fact 148 (Cave Decl. Ex. 59).

[104] Plaintiffs' SS of Additional Facts, Fact 152 (Cave Decl. Exh. 62).

that Fortress was "good keeping the advance rate at 35% through April."[105] This was despite the requirement that the advance rate (the advance rate limited the amount Fortress would lend to Brentwood to a specified percentage of the value of the life settlement collateral) would not be exceeded under the Credit Agreement.

According to Mr. Himelsein's deposition and trial testimony, Hutter also routinely orally assured Himelsein that Fortress was continuing to waive both the advance rate and the Premium Reserve Account covenants.[106] Himelsein also testified that the Premium Reserve Account more often than not contained insufficient funds, a fact well known to Fortress because Fortress received Brentwood's account statements.[107] Mr. Zafiriou testified at trial that his contemporaneous notes of an October 7, 2010 call with Mr. Rose reflected that Fortress was inclined to waive various technical defaults.[108] Fortress witnesses, including Ruggiero and Briger, testified that Hutter's informal communication of waivers to HM did not comply with internal Fortress policy, which purportedly required waivers to be approved by one of the two co-Chief Investment Officers (Briger and Dakolias) and signed by an "authorized signatory."[109]

By the summer of 2010, Himelsein testified, the HM Plaintiffs and Fortress recognized that Brentwood was approaching the $65 million cap in the Credit Agreement faster than the

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[105] See Exh. 62.

[106] Plaintiffs' SS of Additional Facts, Fact 156 (Cave Decl. Ex. 18 at 370:8-21, 372:4– 375:2 (Himelsein 6/30/15 Dep. Tr.); Cave Decl. Ex. 6 at 662:10-19 (10/25/16 Trial Tr.)).

[107] Plaintiffs' SS of Additional Facts, Fact 157 (Cave Decl. Ex. 6 at 665:10-21 (10/25/16 Trial Tr.); Cave Decl. Ex. 18 at 369:20- 25, 370:8-21, 371:9-18 (Himelsein 6/30/15 Dep. Tr.); Cave Decl. Ex. 19 at 252:11–255:25 (10/19/16 Trial Tr.); Cave Decl. Ex. 117).

[108] See Cave Decl. Ex. 77 at 229:19-230:22 [12/1/2015] Zafiriou Depo. Tr.

[109] [Plaintiffs' SS of Additional Facts, Fact 161 (Cave Decl. Ex. 30 at 49:9–54:14 (Ruggiero Dep. Tr.); Cave Decl. Ex. 65 at 117:15–119:12 (10/29/15 Briger Dep. Tr.)).

parties previously anticipated.[110] According to Himelsein's trial testimony, fewer policies matured than expected, and maturities that did occur were in the premium finance loan portfolio, where HM only recouped its premium finance loan and interest—a far smaller sum than the multi-million dollar death benefit.[111] To address this, Himelsein testified that he proactively approached Hutter about HM's need for additional capital.[112]

At the previous trial, Himelsein had testified that from the outset, Hutter was reassuring. On the very first phone call about the issue, Himelsein testified that Hutter said, "[w]e won't let you run out of cash."[113] Further, Himelsein testified that over the ensuing weeks, "there were many times Rod had said to me . . . 'You know, I won't let you run out of cash.' Or, 'Don't worry.'"[114] On August 26, Himelsein emailed his partner, Jason Mandel, saying, "wanted to let you know that I just got a commitment from Fortress on raising the line if we need more premiums before mortalities come. As of now, they are good to 80 million and would likely go more if needed."[115]

As the summer progressed, Himelsein and Hutter exchanged emails and analyses and held numerous discussions about the venture's need for additional capital, as they attempted to zero in on the amount of additional capital required.[116] Exhibit 68 is a confirmatory email from

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[110] Plaintiffs' SS of Additional Facts, Fact 166 (Cave Decl. Ex. 66; Cave Decl. Ex. 2 at 736:4-18 (10/26/16 Trial Tr.)).

[111] Plaintiffs' SS of Additional Facts, Fact 167 (Cave Decl. Ex. 66; Cave Decl. Ex. 2 at 736:4-18 (10/26/16 Trial Tr.)).

[112] Plaintiffs' SS of Additional Facts, Fact 168 (Cave Decl. Ex. 2 at 736:4-21 (10/26/16 Trial Tr.)).

[113] Plaintiffs' SS of Additional Facts, Fact 169 (Cave Decl. Ex. 2 at 736:10–737:1 (10/26/16 Trial Tr.)).

[114] Plaintiffs' SS of Additional Facts, Fact 170 (Cave Decl. Ex. 39 at 570:13–571:9, 578:12–579:19.)

[115] Plaintiffs' SS of Additional Facts, Fact 173 (Cave Decl. Ex. 67 (TREX 439)).

[116] Plaintiffs' SS of Additional Facts, Fact 174 (Cave Decl. Ex. 68; Cave Decl. Ex. 69; Cave Decl. Ex. 70; Ex. 72 at 59:5-12 (Hutter 3/12/15 Dep. Tr.)).

Himelsein to Hutter (cc'd to Messrs. Joshua Bonacci and Gary Lo), seeking to "confirm the scheduled discussion points" for the upcoming October 1, 2010 meeting (including "[c]ash flow scenarios with respect to the borrowing limit"). Exhibit 69 is an updated long-term cash flow model from Himelsein to Hutter (cc'd to Bonacci and Lo), highlighting the "key items to look at" as the annual cash flow, cumulative cash flow, and the amount needed to borrow.

Subsequently, Himelsein, Hutter, and Gary Lo's discussions about the projections and basis for "the specific number ask" are encapsulated in a September 22-September 27 e-mail chain.[117] Himelsein's response was that projecting the precise amount of funding required to support the portfolio is a "tough question" because of the uncertain timing, from a statistical perspective, of mortalities.[118] Himelsein also asked Hutter to inform him of "the max you'd be comfortable committing as a top."[119] Mr. Hutter then asked "Is $85mm the right number?"[120] Himelsein responded there was "no 'right' number," but provided his "guesstimate" and the logic behind it.[121]

Then, the day after Himelsein and Hutter's "the right number" email exchange concluded, Himelsein traveled to New York City to meet with Fortress and conduct other business. Himelsein and Hutter attended a life settlement industry conference together in New York City, where they presented themselves as partners.[122] At the conference, Hutter and

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[117] Plaintiffs' SS of Additional Facts, Fact 177 (Cave Decl., Exh. 71).

[118] Plaintiffs' SS of Additional Facts, Fact 181 (Cave Decl. Ex. 71).

[119] Plaintiffs' SS of Additional Facts, Fact 182 (Cave Decl. Ex. 71).

[120] Plaintiffs' SS of Additional Facts, Fact 183 (Cave Decl. Ex. 71).

[121] Cave Decl., Ex. 71.

[122] Plaintiffs' SS of Additional Facts, Fact 185 (Cave Decl. Ex. 18 at 152:13–153:12, 275:19–24 (Himelsein 6/30/15 Dep. Tr.); Cave Decl. Ex. 2 at 757:26–760:18 (10/26/16 Trial Tr.)).

Himelsein continued their discussions regarding the additional cash needs of the life settlements portfolio.[123]

According to Mr. Himelsein, Himelsein expressed his frustration about a "right number" of $85 million with respect to additional capital being requested. Hutter, according to Himelsein, explained his position by stating that "it would be bad for [Hutter] to go back to his seniors, the senior execs and say that he had been, for example, a hundred percent wrong on the line. That instead of needing 65, well, no they actually need 130, which is double that."[124] Himelsein says that Hutter told him that he could not "go back [to the senior managers at Fortress] and look so bad that [Hutter] got the thing wrong by 50 percent" and used the expression "I would have egg on my face."[125] Thus, Himelsein testified, Hutter told him that to not have egg on his face, Hutter wanted to do the extension in stages (such as $20 million extensions at a time) to "to protect the fact that he had been, quote, unquote, wrong on the onset."[126]

In advance of a subsequent October 1 meeting, Hutter prepared and circulated a meeting agenda to Himelsein and Fortress's consultant Scott Rose.[127] This agenda sought information on performance to date, mortality, top 10 assets, liquidity projections based on actual mortality experience, the Christiana Bank Structure, and the Irish structure.[128] According to Mr. Himelsein's deposition testimony, HM and Fortress discussed "various potential ways of getting

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[123] Plaintiffs' SS of Additional Facts, Fact 186 Cave Decl. Ex. 2 at 757:26–760:18 (10/26/16 Trial Tr.)).

[124] Cave Decl., Exh. 2 at 758:19-759:11.

[125] *Id.* at 759:12-15.

[126] *Id.* at 759:16-760:5.

[127] Plaintiffs' SS of Additional Facts, Fact 192 (Cave Decl. Ex. 74 (TREX 0079)).

[128] Cave Decl., Exh. 74 (TREX0079).

more cash to HM."[129] Himelsein testified at trial, and Rose in his deposition, that an increase in Brentwood's borrowing limit under the Credit Agreement's credit facility was considered, as were alternative forms of capital, such as an investment by Fortress in IRIS, HM's investment vehicle for its Irish tax structure.[130]

Himelsein delivered a lengthy PowerPoint presentation regarding the benefits to Fortress providing the additional capital through HM's Irish structure, focusing on the tax savings to Fortress.[131] HM viewed the meeting positively and believed that the discussions regarding Fortress's provision of additional capital, as well as the general relationship between HM and Fortress, were progressing well.[132] Similarly, Scott Rose testified he thought the meeting went well and, as a result, he felt good about the future of the HM-Fortress relationship even though the initial $65 million in funding was almost exhausted.[133]

As to Fortress, just days after the meeting, DeWayne Chin approved an internal "current status" report for the HM transaction that concluded that "we remain comfortable with this position," a term of art at Fortress that, Chin testified, indicates Fortress believes the investment is "performing" and that Fortress does not see "any issues with respect to the deal."[134]

Subsequently, as Mr. Hutter testified in deposition, one of HM's investors, Glenmede,

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[129] Plaintiffs' SS of Additional Facts, Fact 195 (Cave Decl. Ex. 39 at 550:6-20 (Himelsein 7/1/15 Dep. Tr.)).

[130] Plaintiffs' SS of Additional Facts, Fact 196 (Cave Decl. Ex. 2 at 757:9-25, 765:17-24, 767:25–769:2, 775:26–776:23 (10/26/16 Trial. Tr.); Cave Decl. Ex. 46 at 242:21–243:3 (Rose 10/15/15 Dep. Tr.).)

[131] Plaintiffs' SS of Additional Facts, Fact 197 (Cave Decl. Ex. 75 (TREX 0184); Cave Decl. Ex. 46 at 242:3–243:3 (Rose 10/15/15 Dep. Tr.) ; Cave Decl. Ex. 121; Cave Decl. Ex. 2 at 767–769:2.)

[132] Plaintiffs' SS of Additional Facts, Fact 198 (Cave Decl. Ex. 2 at 779:18–780:2 (10/26/16 Trial Tr.)).

[133] Plaintiffs' SS of Additional Facts, FactCave Decl. Ex. 46 at 250:4-20 (Rose 10/15/15 Dep. Tr.)).

[134] Plaintiffs' SS of Additional Facts, Fact 200 (Cave Decl. Ex. 76; Cave Decl. Ex. 45 at 101:3-21, 165:23–170:18 (Chin 10/28/15 Dep. Tr.)).

wanted to get more information about "Fortress' view of the relationship with the HM entities" in order to help Glenmede determine whether it would make a multi-million dollar investment in HM.[135]

A call took place on October 10, 2010. Chris Zafiriou of Glenmede testified that Hutter told Glenmede that Fortress was in the process of analyzing HM's request for additional capital.[136] Zafiriou testified that based on what Hutter said during the call, he "very much" came away with the belief that Hutter was "in favor of expanding the credit facility."[137] Zafiriou testified that Hutter said HM was a "good business," that Fortress's credit facility was a "good loan," and that increasing the borrowing limit "made sense."[138]

Zafiriou testified it was "very clear" that Fortress and HM had discussed a $20 million increase in credit and that it "seemed like it was close to being a done deal."[139] According to Mr. Zafiriou's deposition testimony, Hutter even assured Glenmede that "Fortress is not better off" economically if it defaulted HM.[140]

After receiving assurances from both Fortress and Rose, Glenmede invested over $7 million in HM just weeks later.[141]

The discussions between HM and Fortress regarding Fortress's provision of additional

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[135] Plaintiffs' SS of Additional Facts, Fact 206 (Cave Decl. Ex. 72 at 104:6–106:19 (Hutter 3/12/15 Dep. Tr.)).

[136] Plaintiffs' SS of Additional Facts, Fact 207 (Cave Decl. Ex. 77 at 186:15–190:10 (Zafiriou Dep. Tr.)).

[137] Plaintiffs' SS of Additional Facts, Fact 208 (Cave Decl. Ex. 77 at 191:11–192:16 (Zafiriou Dep. Tr.)).

[138] Plaintiffs' SS of Additional Facts, Fact 209 (Cave Decl. Ex. 77 at 191:11–192:16 (Zafiriou Dep. Tr.)).

[139] Plaintiffs' SS of Additional Facts, Fact 211 (Cave Decl. Ex. 77 at 193:14–194:16 (Zafiriou Dep. Tr.)).

[140] Plaintiffs' SS of Additional Facts, Fact 214 (Cave Decl. Ex. 77 at 197:2–200:10 (Zafiriou Dep. Tr.); Cave Decl. Ex. 78.)

[141] Plaintiffs' SS of Additional Facts, Fact 222 (Cave Decl. Ex. 77 at 17:8–20:3 (Zafiriou Dep. Tr.)).

capital continued through October.[142] On October 28, 2010, in response to an email from Himelsein the day prior, Mr. Hutter sent Himelsein an email asking to "[g]ive me a call when you get in."[143] Himelsein testified that he called Hutter and the two men had the following exchange: Hutter: "Great news." Himelsein: "What?" Hutter: "I got you the 20 million." Himelsein: "Fantastic."[144] Himelsein also testified that Hutter then told Himelsein that he was "circling" around to get some documents and that he would need some materials from HM.[145]

Himelsein testified that he understood Hutter's reference to additional documents to mean that "Rod was working on some structure to come back to me with," but that he did not specifically know "what form the additional cash would come in."[146] Himelsein testified that he had a "high expectation" that the additional capital would come in using the Irish structure given its tax advantages, "Fortress' sensitivity to tax" issues "from the very beginning" of the parties' relationship, and the flow of the parties' discussion at the October 1, 2010 meeting in New York, along with follow-up requests for documents.[147]

After Himelsein ended his phone call with Hutter, he "jumped out of his chair" and "went out of [his] office to tell everybody at HM." Lionel Tapiero recalled Himelsein saying "We got it, we got it."[148]

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[142] Plaintiffs' SS of Additional Facts, Fact 224 (Cave Decl. Ex. 81, 82.)

[143] Plaintiffs' SS of Additional Facts, Fact 226 (Cave Decl. Exh. 82).

[144] Plaintiffs' SS of Additional Facts, Fact 227 (Cave Decl. Ex. 2 at 798:27–799:10 (10/26/16 Trial. Tr.)).

[145] Plaintiffs' SS of Additional Facts, Fact 228 (Cave Decl. Ex. 2 at 799:11-22 (10/26/16 Trial. Tr.)).

[146] Plaintiffs' SS of Additional Facts, Fact 229 (Cave Decl. Ex. 39 at 558:9-17 (Himelsein 7/1/15 Dep. Tr.)).

[147] Plaintiffs' SS of Additional Facts, Fact 230 (Cave Decl. Ex. 2 at 800:15–801:13 (10/26/16 Trial Tr.)).

[148] Plaintiffs' SS of Additional Facts, Fact 231 (Cave Decl. Ex. 2 at 801:14-17 (10/26/16 Trial Tr.); see also Cave Decl. Ex. 21 at 236:20–237:14 (Tapiero Dep. Tr.) (Lionel Tapiero testifying that after the phone call, Himelsein "jump[ed] out of his office" to say "We got it, we got it.").)

Himelsein testified that based on the parties' relationship and Hutter's conduct since HM and Fortress had first been introduced, Himelsein "fully believed that Rod [Hutter] had a hundred percent authority to convey to [Himelsein] the position of Fortress."[149] He further testified that in his experience up to that point, when Hutter committed to something, it would get done, and paperwork would follow.[150] Himelsein testified that "[b]ecause of Rod [Hutter]'s commitment," he did not "feel a pressing need after October 28th to line up back up capital."[151]

According to Mr. Himelsein, because it trusted Fortress's promise, HM did not perceive an emergency need for short-term funding, and HM continued raising capital in the same manner as it always did, both before and after the 2010 credit arrangement.[152] Himelsein specifically testified that he relied on Fortress's alleged promise, and that he would have acted differently had Fortress never made the promise.[153]

Himelsein explained that had he believed that his financing was limited to Fortress's initial $65 million commitment, that "as the 65 cap got closer and closer, I would have dramatically picked up the pace. If - - the same way I closed new capital two weeks after the [November 2010] default, in a manner of months I could have got a lot done."[154] This, Himelsein testified, would have included offering better deals to potential counterparties.[155] One

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[149] Plaintiffs' SS of Additional Facts, Fact 232 (Cave Decl. Ex. 2 at 802:13–803:12 (10/26/16 Trial Tr.)).

[150] Plaintiffs' SS of Additional Facts, Fact 233 (Cave Decl. Ex. 2 at 802:13–803:12 (10/26/16 Trial Tr.)).

[151] Plaintiffs' SS of Additional Facts, Fact 236 (Cave Decl. Ex. 2 at 803:23-27 (10/26/16 Trial Tr.)).

[152] Plaintiffs' SS of Additional Facts, Fact 237 (Cave Decl. Ex. 2 at 848:10–849:5 (10/26/16 Trial Tr.)).

[153] Plaintiffs' SS of Additional Facts, Fact 239 (Cave Decl. Ex. 1 at 554:8-9 (10/24/16 Trial Tr.) ("Q. Did you rely on Mr. Hutter's representation? A. Very much so.").)

[154] Plaintiffs' SS of Additional Facts, Fact 240 (Cave Decl. Ex. 3 at 1041:8–1042:13 (10/28/16 Trial Tr.)).

[155] Plaintiffs' SS of Additional Facts, Fact 241 (Cave Decl. Ex. 3 at 1041:8–1043:18 (10/28/16 Trial Tr.)).

such transaction, according to Himelsein, was with one Eric Schwarz.[156] Ultimately, the deal with Schwarz fell through, according to Himelsein, because of Fortress's declaration of default.[157] Himelsein testified at trial that because Fortress promised $20 million in additional financing on October 28, Himelsein did not perceive an emergency, and accordingly, he did not "change in any way the manner [he] went about looking for additional capital."[158]

All of this evidence provides further context to Himelsein's statement at trial that he did not actually rely on the alleged oral promise for the $20 million credit facility. To be sure, as Defendants note in their motion, Judge Jones found in her Statement of Decision following the first trial in this matter that Mr. Himelsein "invent[s] and prevaricat[es]," and is willing to "testify inconsistently" as necessary to "cure his previous testimony."[159] However, this Court's views and, for that matter, Judge Jones' prior views on Himelsein's credibility, are irrelevant at this time. The Court's only role on the instant motion is to determine whether Plaintiff has raised a triable issue of material fact through relevant, competent, admissible evidence.

Here, the HM Plaintiffs have presented substantial evidence chronicling the nature of the relationship and the course of dealing between HM and Fortress (including evidence that Fortress itself may not have been strictly enforcing certain components of the Credit Agreement regarding reserve requirements and other conditions). Given that evidence, it *may* have been reasonable for HM to rely on Fortress's alleged promise to provide the $20 million in emergency capital. In particular, the testimony from Mr. Rose that Fortress would "waive and waive and

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[156] Plaintiffs' SS of Additional Facts, Facts 242-246.]

[157] Plaintiffs' SS of Additional Facts, Fact 247 (Cave Decl. Ex. 2 at 856:18–857:10 (10/26/16 Trial. Tr.)).

[158] Plaintiffs' SS of Additional Facts, Fact 250 (Cave Decl. Ex. 2 at 848:15-17; Cave Decl. Ex. 3 at 1041:2–1043:18 (10/28/16 Trial Tr.)).

[159] Smolowe Decl. Ex. A1 [1/6/17 Stmt. of Decision] at pp. 8, 15.

waive" technical defaults to the agreement suggests that Fortress and HM may have had a unique relationship, leading to an inference of reasonable reliance by HM on Fortress's statements. This presents a triable issue which cannot be summarily adjudicated. Further, Mr. Hutter's alleged statements that Fortress would not "let [HM] run out of cash" in light of the pending expiration of the $65 million reserve, creates a reasonable inference that Himelsein's reliance on Hutter's alleged $20 million credit facility may have been reasonable.

Much of the evidence also goes to damages. If, for instance, Himelsein himself somehow diminished certain efforts to go "all out" for additional funding (while admittedly trying to seek *some* funding), this presents a further triable issue of material fact on whether HM reasonably forbore from pursuing alternative avenues of funding to make up for the shortfall.

The Court is not persuaded that the facts of *Park v. First Am. Title Co.* (2011) 201 Cal.App.4th 1418 or *Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411 mandate a different result here. This is so, in light of the evidentiary record before the Court, and particularly in light of the evidence of the deal Mr. Himelsein testified he was attempting to negotiate with Eric Schwartz.[160] The ultimate viability and prospects of this deal, and whether this constituted an action by the HM Plaintiffs resulting in forbearance, is an inherently factual issue.

At the very least, the Court is in no position to determinatively find that the HM Plaintiffs' conduct was manifestly unreasonable in light of its information. *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp., supra,* 157 Cal. App. 4th at 864. Nor can the Court make a finding that the facts within the HM Plaintiffs' observation were "so patently and obviously false that [they] must have closed [their] eyes to avoid discovery of the

[160] Cave Decl. Ex. 2 at 852:9-25; 853:18–855:5, 855:23–856:17 (10/26/16 Trial. Tr.)

truth." *Id.*

The Fortress Defendants note that Himelsein testified that prior to the October 28, 2010 promise, Fortress's alleged commitment to provide additional capital "wasn't final."[161] Further, Mr. Himelsein answered "No" when asked, "Did Mr. Hutter's representation to you about the $20 million on October 28th change in any way the manner you went looking for additional capital?" Accordingly, the Fortress Defendants argue that statements that Hutter allegedly made before the October 28, 2010 promise are not material to whether Himelsein actually or justifiably relied on Hutter's alleged promise on October 28 that an additional $20 million in credit had been approved.

In isolation, it certainly would appear that this negates any actual or justifiable reliance. Again, however, the communications between Mr. Himelsein, Mr. Hutter, and others at Fortress demonstrate that there was an ongoing relationship between the parties. The Court must view the parties' interactions broadly on summary adjudication. In light of that relationship, whether the Plaintiffs' alleged reliance on the supposed October 28 promise was reasonable cannot be summarily resolved at this time.

In light of the requirement in the Credit Agreement itself that any increases to the credit limit be performed in writing, Plaintiff's alleged reliance may very well have been *unreasonable,* in isolation. The jury may very well reach this conclusion. However, the Court is compelled to liberally construe the evidence before it, and to draw all reasonable inferences from that evidence. Under that standard, and without judging the credibility of Mr. Himelsein's statements, the credibility of the statements of Mr. Hutter, or the credibility of the other evidence before the Court, there are triable issues of material fact.

[161] Smolowe Decl. Ex. G [Himelsein Dep.] at 570:13– 571:9.

In sum, the issue of Mr. Himelsein's alleged reliance – whether it was actual or justifiable – is an issue which cannot be summarily adjudicated. As outlined by the evidence the Court has highlighted above, there are triable issues of material fact as to whether Mr. Himelsein actually relied on the purported $20 million credit facility and, if so, whether such reliance was justifiable. For these reasons, the motion for summary adjudication is denied.

V.

RULING AND ORDER

For the foregoing reasons, the motion for summary adjudication is denied. The Court finds triable issues of material fact exist with respect to whether the HM Plaintiffs actually or reasonably relied on the Fortress Defendants' alleged representations regarding the $20 million credit facility.

KENNETH R. FREEMAN

Dated: October 21, 2020

Kenneth Freeman
Judge of the Superior Court