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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

HIMELSEIN MANDEL FUND MANAGEMENT, LLC, et al.,

Plaintiff,

v.

FORTRESS INVESTMENT GROUP, LLC, et al.,

Defendant.

[PUBLIC VERSION]

CASE NO. BC495595

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION ON PLAINTIFFS' FRAUD CLAIMS

[Filed Concurrently with Response to Separate Statement; Evidentiary Objections; Appendix of Evidence; Notice of Lodging; Proof of Service]

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TABLE OF CONTENTS

Page

Kibler Fowler & Cave LLP
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TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

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I. PRELIMINARY STATEMENT

The parties are back before this Court for a retrial before a jury because the Court of Appeal concluded that HM was wrongfully denied—at Fortress's urging—its inviolable right to a trial by jury. Fortress's *second* motion for summary adjudication on HM's fraud claims is yet another attempt to deprive HM of this fundamental right and, if granted, would inject even further error into this years-long litigation, risking yet another round-trip to the Court of Appeal and wasting still more time, judicial resources and millions of dollars. Fortress's motion seeks, in effect, to reinstate Judge Jones's factual finding that HM could not have relied on Fortress's promise to extend an additional $20 million in financing because HM continued some capital-raising activities after the promise was made. But the Court of Appeal reversed Judge Jones's decision, precisely so quintessentially disputed issues of fact like reliance could now be resolved by the correct fact finder: a duly empaneled jury.

In all events, the motion is without merit because it cherry-picks evidence consistent with Fortress's theory of the case, and just wishes away voluminous contradictory evidence. The record contains substantial evidence that HM reasonably relied on Fortress's October 28, 2010 promise to extend an additional $20 million in financing, promises to provide the requisite documents to fulfill that promise, similar promises that Fortress would not let HM "run out of money," and Fortress's assurances that the parties were long-term partners, separate and apart from their initial credit agreement. If anything, the substantial evidence becomes overwhelming when viewed against the backdrop of the parties' close partnership relationship. Fortress tries to narrowly frame the question of reliance as turning on whether HM altered its course of conduct following the October 28, 2010 promise. But that's not the law. Reliance is shown by conduct *or forbearance* and must be viewed in the context of the parties' relationship. Here, Fortress's promises gave HM a false sense of security that an additional $20 million in financing was available and that there was no urgent need for additional capital to avoid losing assets. Indeed, settled law holds that a statement that lulls a listener into a false sense of security is a paradigmatic example of statements that warrant estoppel. HM's reliance is demonstrated precisely by the fact that it stayed on its steady course while awaiting the promised documents to finalize the additional

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capital, rather than taking emergency steps to address a looming cash crisis that would have arisen if the promises never had been made. HM's principal, Wayne Himelsein, testified that if he had not believed that Fortress would provide an additional $20 million in financing, he would have acted differently, specifically by taking steps to accelerate other financing opportunities. Himelsein identified specific opportunities that he would have accelerated, such as by accepting less favorable terms from an investor rather than holding out for better terms through further time-consuming negotiations. He testified to this repeatedly over the course of six days of testimony. And this testimony is entirely *consistent* with the single question-and-answer that Fortress's entire motion is built on.

Fortress's argument that HM's reliance was not "justifiable" fares no better. Fortress has made this exact argument in a prior (failed) demurrer and prior (failed) motion for summary adjudication—and the Court rejected it both times. Fortress offers no reason why the outcome should be different this time—indeed, Fortress does not even bring its prior (failed) motions to the Court's attention. As the Court previously held, the reasonableness of reliance is a classic jury question, and there's (still) substantial record evidence that would permit a jury to find that HM's reliance was justifiable.

And, HM had every reason to rely on Fortress's promise. From the start of their relationship, Fortress billed itself to HM as a partner that was looking to enter the life settlement industry for the long term through its alignment with HM. While Fortress tries to characterize the relationship as simply a lender and borrower, the evidence shows that the parties acted very differently than that. The parties communicated regularly, not merely about the loan facility, but also other business opportunities in the life settlement market. HM shared with Fortress its considerable expertise and operational know-how in the life settlement field—information Fortress later used to launch its own life settlement funds. Fortress, for its part, used its broader expertise in financial transaction structuring to assist HM in ways that were not part of the $65 million loan that Fortress implausibly now contends is the sum total of the parties' relationship.

HM had every reason to believe that Fortress would provide the additional $20 million in capital it promised. This money was needed to pay premiums on the life insurance policies that

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formed the collateral for Fortress's loan; without it, the policies would lapse and hundreds of millions of dollars in value would evaporate. Fortress representatives repeatedly assured HM that Fortress would not let it run out of money. The parties' discussions in the weeks leading up to the October 28 promise were not focused on *whether* Fortress would extend more capital, but how much, and in what form. And then, in November 2010, even after the initial $65 million in financing had been fully drawn, Fortress asked HM to pledge *additional* insurance policies to the collateral portfolio, to HM's mind a clear signal that additional financing would soon be available; otherwise there would be no reason for Fortress to request additional collateral.

Based on the parties' course of dealing and close partnership relationship, Fortress's repeated assurances, and Fortress's October 28 promise, HM did not believe that the money urgently needed for looming premium payments would run out in November or December. While HM's trust in Fortress was justifiable, it was misplaced. Fortress betrayed HM on the day before Thanksgiving. On that Wednesday afternoon, Fortress advised HM that it was reneging on the promise of additional financing, and told HM that it would declare an incurable default on the Monday after the holiday weekend unless HM could raise millions of dollars from other sources by then. Fortress Managing Director Rodney Hutter, who had conveyed Fortress's October 28 promise to Himelsein, was too embarrassed to speak on that call, and remained silent in the face of Himelsein's protestations to Hutter's superiors that Hutter had promised the money. At this point, after being lulled into a false sense of security by Fortress's promise, HM was not left with enough time to find capital elsewhere. HM's business was destroyed. Fortress completed its betrayal by running Plaintiffs' loan collateral through a so-called (and corrupt) foreclosure "auction" that the Court conclusively determined at trial was rigged by Fortress and its representatives. This allowed Fortress to steal a portfolio worth—by Fortress's own valuation—$173 million for a fraction of its value.

Fortress's latest (its third) baseless attempt to deprive HM of its right to a jury trial should be rejected, the motion should be denied and the case should proceed to the jury trial that the Court of Appeal mandated.

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II. BACKGROUND

A. HM and Fortress form a close partnership in early 2010.

HM successfully launches the HM Ruby Fund and develops expertise in the life settlement industry.

Wayne Himelsein, principal and co-founder of Plaintiffs Himelsein Mandel Fund Management and HM Ruby Fund, is a Los Angeles-based entrepreneur, who has used his background in quantitative analysis to create successful businesses based on proprietary statistical modeling. Ex. 1 at 556:25–557:24.[1] 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. *Id*. 564:22–23, 565:14–567:11. In a premium finance loan, HM lent money to older, high-net-worth people who owned life insurance and did not want to go out-of-pocket to pay premiums. 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. *Id*. at 566:6–567:11.

Himelsein and his team built HM Ruby from the ground up, learning the intricacies of the life settlement industry through research, analysis, and, sometimes, the entrepreneurial grind of trial-and-error. *Id*. at 568:1–18. Employing conservative, rigorous analysis and underwriting guidelines allowed HM Ruby to grow rapidly into a successful enterprise with approximately 18 employees, 70 investors and $300 million in assets under management by late 2009. *Id*. at 568:19–569:22; Ex. 19 at 195:13–198:8, 199:28–201:16, 211:6–28; Ex. 24 at 1223:1–1225:14.

The global financial crisis requires HM to adjust its business plan.

In the aftermath of the 2008–2009 global financial crisis, premium finance borrowers increasingly started selling policies to HM in lieu of cash repayment. Ex. 1 at 570:26–572:16. This created a long-term opportunity for HM and a medium-term challenge. 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 of premium payments plus interest). *Id*. HM was building a life settlements portfolio that would pay out nearly $3 billion in

[1] References to Exhibits in this motion refer to the Exhibits to the Declaration of Matthew J. Cave in the concurrently filed Appendix of Evidence.

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death benefits in the years to come. On the other hand, HM needed additional capital in the medium-term 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. *Id*.

HM engages with several potential sources of financing, including Fortress.

In fall 2009, HM sought a liquidity solution. After talking with a wide range of suitors, HM entered into serious negotiations with several financial institutions that offered different transaction structures. A large European private bank offered a traditional loan of up to $75 million. *See* Ex. 27; Ex. 21 at 282:15–283:3. 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. *See* Ex. 28. As detailed below, Fortress offered something different: cash now and the opportunity to enter into a long-term partnership.

As negotiations between HM and Fortress evolve, Fortress repeatedly represents itself as a potential partner to HM.

Fortress was contacted about a potential transaction with HM in fall 2009. Fortress Managing Director Rod Hutter, a senior executive within Fortress's Credit Funds division, assumed responsibility for the transaction. Ex. 31 at 1284:20–22. Fortress understood that HM was "open to financing, jv [joint venture] or other structures." Ex. 26. HM and Fortress clarified the contemplated nature of their relationship as they negotiated a Mutual Non-Disclosure Agreement ("NDA"), which after some discussion, confirmed that HM and Fortress were "evaluating [a] potential transaction involving a credit facility, joint venture, and/or equity acquisition." Ex. 9 at 3335; *see also* Ex. 33. Even after HM signed a term sheet with Farallon, Fortress hotly pursued a transaction with HM, offering "longer term partnership [opportunities]" and "the whole solution [for HM] with no additional liquidity risk to his business." Ex. 29; *see also* Ex. 37 at 409:20–410:18; Ex. 38; Ex. 39 at 768:5–17. Ultimately, HM withdrew from its term sheet with Farallon and signed a term sheet with Fortress on January 22, 2010. Exs. 42, 43.

After signing, Fortress conducts extensive, joint-venture-level due diligence on its potential partner, HM.

After signing the term sheet, Fortress conducted extensive on-site due diligence on HM. Ex. 48 at 8493–95, 8499–8502; Ex. 44; Ex. 31 at 1285:3–1293:27. New York-based Fortress sent

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a large team to HM's Los Angeles office for a full week, including Scott Rose of life settlement consulting firm Barrett Advisors, a lawyer and an experienced professional in this asset class, who Fortress hired to study HM's business. Ex. 46 at 67:25–68:23, 74:18–79:11; Ex. 48 at 8499; Ex. 31 at 1285:11–1286:19. 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. Ex. 46 at 151:8–160:15; Ex. 47.

At a celebratory dinner between the HM and Fortress teams, Hutter and Himelsein shared how enthusiastic they were to enter into a promising, long-term business relationship. Hutter told Himelsein "how excited he was to be getting into the life settlement space with us, that there was so much we could do together." Ex. 18 at 146:14–17. Hutter said that Fortress and HM was "such a good synergy" because "[HM] had all the specialized industry knowledge" and Fortress "had the capital." *Id.* at 147:1–5; *see also* Ex. 6 at 620:17–621:6. Hutter "loved" the idea that the organizations could "sweep up the portfolios that were available." Ex. 6 at 621:9–622:2. Hutter announced to the group that "this is going to be great for me as a new revenue line" and that "he had been waiting to bring something good to Fortress. And this was it." *Id*. at 621:12–622:2.

Fortress and HM execute a credit facility giving Fortress substantial control over HM's business.

The first transaction in the Fortress-HM partnership was a credit facility to finance HM's growing portfolio of life settlements. Ex. 18 at 122:12–123:16. This involved a series of interrelated agreements. The principal agreement was the Credit and Security Agreement ("Credit Agreement"). At Fortress's direction, the parties formed a special purpose vehicle, Brentwood Holdings, LLC, to receive $65 million in financing from Fortress. *See* Exs. 48, 49.

Plaintiff Quantlife (an HM Ruby subsidiary) and Plaintiff Brentwood, another HM subsidiary, also entered into a Contribution and Sale Agreement at Fortress's direction. *See* Ex. 5. The agreement obligated Quantlife to convey all "eligible" life settlement policies it owned to Brentwood. *Id.* §§ 2.01, 4.01(x). Among other requirements, an insurance policy became an "Eligible Life Policy" only after Quantlife produced information about the policy and Fortress had an opportunity to perform due diligence on it. *Id.* Schedule I, § A(xxxi), A(xxxiv). Quantlife also had the right to unilaterally terminate its obligation to pledge policies under the Contribution and

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Sale Agreement. *Id.* §§ 2.01, 1.01.

By the terms of the Credit Agreement, the partners also agreed that Fortress and HM would share 50/50 in Brentwood's profits up to the first $130 million, a mechanism referred to as Fortress's "profit participation." Fortress requested, and HM agreed, that Brentwood would treat Fortress's profit participation as a "partnership interest" in HM Ruby. Ex. 52.

With the credit facility in place, Fortress and HM operate as partners, with HM providing its extensive industry expertise and Fortress providing capital.

After the credit facility was finalized, HM and Fortress operated as partners. HM employees routinely shared their insights into the life settlement industry with their counterparts at Fortress. Ex. 19 at 247:10–249:15; Ex. 21 at 308:10–25; Ex. 20 at 259:22–260:14, 260:19–261:8; Ex. 23 at 58:16–19. Himelsein alerted Hutter to various portfolios of life settlements that came up for public sale as opportunities that HM and Fortress might pursue together, including a portfolio being auctioned by KBC Bank. *See, e.g.*, Exs. 12, 13, 14, 15. In a variety of similar ways, HM and Fortress collaborated as partners, not a traditional lender and borrower. *See* Exs. 7, 10, 11, 17; Ex. 18 at 330:2–10; Ex. 6 at 714:20–716:6.

B. The parties operated flexibly and collaboratively, without strict adherence to terms of the credit facility.

HM and Fortress partnered in a collaborative, flexible manner and were in almost constant contact throughout 2010. Ex. 6 at 692:4–8. 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. The "day-to-day dynamics" of the business "rarely" involved referring to particular provisions of the Credit Agreement. Ex. 18 at 79:7–24; *see also* Ex. 6 at 657:8–21.

This flexibility extended to the parties' treatment of the Premium Reserve Account covenant. 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. Ex. 120 at § 5.03. If the Premium Reserve Account was underfunded, the Credit Agreement technically gave Fortress the right to declare Brentwood in default. *Id*. at § 6.01(d)). In fact, a violation of the Premium Reserve Account covenant was (unlike other default provisions) deemed an "incurable"

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default. Ex. 31 at 1300:15–1301:4.

Right from the outset of their relationship, the parties deviated from the strict terms of the Premium Reserve Account covenant. On February 23, less than two weeks after signing, Fortress asked to delay an initial tranche of funding. 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." Ex. 58. 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). Later that day, Hutter obtained agreement from his superiors to grant the waiver. Ex. 59. More than two weeks later, Himelsein asked Hutter to confirm the previously agreed upon waivers in an email. Ex. 60. On March 10, Hutter emailed Himelsein (copying only his subordinates, not his superiors) to "confirm" waivers to the advance rate and premium reserve account covenants through the end of March. Ex. 61.

As the parties continued working together, Hutter continued to inform HM that Fortress was waiving covenants to the Credit Agreement—and did so in an increasingly, casual, informal manner. For example, on March 26, 2010, even though Brentwood had yet to obtain 100 unique lives, Hutter emailed Himelsein simply saying, "We are good keeping the advance rate at 35% through April. Thanks. Rod." Ex. 62. Hutter also routinely orally assured Himelsein that Fortress was continuing to waive both the advance rate and the Premium Reserve Account covenants. Ex. 18 at 370:8–21, 373:22–375:2. In fact, the Premium Reserve Account more often than not contained insufficient funds, a fact well known to Fortress because Fortress received Brentwood's account statements. *See* Ex. 117; Ex. 19 at 251:13–255:25; Ex. 118 at 381:14–18. Similarly, Brentwood did not achieve the milestone 100 "lives" until July 2010, months past the purported deadline. Indeed, Fortress's waivers to the Credit Agreement were so frequent and ubiquitous that Scott Rose, Fortress's ongoing valuation expert on the Brentwood facility, told potential HM investor Glenmede in October 2010 that Fortress's prerogative had been to "waive & waive & waive" various technical defaults. Ex. 63 at 34; Ex. 77 at 215:12–217:1. Rose, a trained lawyer,

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confirmed that Fortress had not enforced various "technical" defaults. Ex. 46 at 261:9–263:4.[2]

C. Fortress promises to provide additional capital to Brentwood.

As the initial funding approaches exhaustion,
HM approaches Fortress about its need for additional capital.

By summer 2010, HM and Fortress recognized that Brentwood was approaching the $65 million cap in the Credit Agreement faster than the parties previously anticipated. 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. Ex. 66; Ex. 2 at 736:4–18.

To address this, Himelsein proactively approached Hutter about HM's need for additional capital. Ex. 2 at 736:4–21. From the outset, Hutter was reassuring. On the very first phone call about the issue, Hutter said, "[w]e won't let you run out of cash." *Id*. at 736:10–27. 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.'" Ex. 39 at 570:13–571:9, 578:12–579:23. At some point over the summer, on one of their frequent phone calls, Hutter told Himelsein he had woken up in the middle of the night in a sweat because he had "dreamt Wayne ran out of cash." Ex. 2 at 738:17–739:3. Once again, Hutter reassured Himelsein, saying "Don't worry, we won't let you run out of cash." *Id*. 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." Ex. 67.

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

[2] Years later, Fortress witnesses claimed 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." Ex. 30 at 49:9–54:14; Ex. 41 at 119:21–25, 263:22–264:3, 271:12–272:1; Ex. 65 at 117:15–119:12. HM, of course, was not privy to whatever internal policies Fortress had in place, and operated on the reasonable understanding that as a Managing Director, Rod Hutter had authority to grant waivers under the Credit Agreement. Ex. 6 at 670:11–18.

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on the amount of additional capital required. Exs. 69, 68, 70; Ex. 72 at 59:5–12. Discussions grew more specific in a critical email exchange between September 22 and September 27. Ex. 71. First, Fortress asked HM to "re-run your cashflow projections and let us know your projected maximum draw." *Id*. Himelsein provided a detailed analysis and Hutter thanked Himelsein for the "helpful" information. Hutter then posed two questions: "Do you have a specific $ ask? Also, what can we tell people it is based on?" *Id*. Himelsein responded 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. Instead, he asked Hutter to "please tell me the max you'd be comfortable committing as a top." *Id*. Hutter responded: "Is $85mm the right number?" Hutter's proposal amounted to $20 million in additional capital. *Id*.

Himelsein travels to New York to meet with Fortress regarding $20 million in additional capital.

The day after Himelsein and Hutter's "the right number" email exchange, Himelsein traveled to New York City, where he attended a life settlement industry conference with Hutter, and they continued their discussions regarding the additional cash needs of the life settlements portfolio. Ex. 72 at 488:14–490:13; Ex. 2 at 757:26–760:18. Both Himelsein and Hutter testified that they discussed whether it made sense to make available an additional $60-65 million in capital, as Himelsein had previously suggested, or the additional $20 million, as Hutter had previously suggested would be the "right number." Ex. 72 at 490:4–21; Ex. 2 at 758:19–760:5.

Hutter confided to Himelsein that if Hutter were to tell others at Fortress that the portfolio needed an additional $65 million, he would have "egg on his face" for having underwritten the original size of the credit facility so badly. Ex. 2 at 757:9–760:5. Instead, Hutter told Himelsein that "[t]o not have egg on my face, I [Hutter] want to do this in stages," and for Fortress to provide additional capital in smaller increments of, for example, $20 million at a time. *Id*. Hutter explained that another reason for doing it in stages was that "he [Hutter] could definitely get 20 done." *Id*. at 760:6–14.

HM and Fortress continued discussing additional capital at a meeting at Fortress's New York office on October 1. HM and Fortress discussed "various potential ways of getting more cash to HM." An increase in Brentwood's borrowing limit under the Credit Agreement's credit

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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. Ex. 46 at 242:11–243:3; Ex. 2 at 765:17–776:23. 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. Ex. 121; Ex. 46 at 242:3–243:3; Ex. 2 at 767:25–769:2.

HM viewed the meeting positively and believed that the discussions regarding Fortress's provision of additional capital were progressing well. Ex. 2 at 779:18–780:2. 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. Ex. 46 at 250:4–20. 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" (Ex. 76), a term of art at Fortress that, Chin testified, indicates the investment is "performing" and that Fortress does not see "any issues with respect to the deal." Ex. 45 at 101:5–21, 165:23–170:18.

In October 2010, Fortress and Scott Rose give assurances to another HM investor, Glenmede.

After the October 1 meeting, Himelsein requested that Fortress discuss its intentions with an entity called Glenmede Trust Company. Glenmede was considering making an additional investment in HM and sought to speak to Fortress about its views on HM and the status of HM's request for additional capital. Ex. 77 at 183:1–184:22; Ex. 2 at 784:21–785:1; Ex. 78. In an October 6 email, Himelsein reminded Hutter that "where we left off yesterday was that you were going to canvas internally on the increase, then you and I would chat with my new investor [Glenmede] (scheduled for thu or fri)." Ex. 79. An entry in Hutter's Outlook calendar indicates that on October 8, Hutter held a "Mtg to discuss HM upsize" with Cardoni, Ruggiero, Chin, Bonacci, and Lo. Ex. 80.

The call between Fortress and Glenmede took place that same day, shortly after Fortress's internal meeting concerning the HM "upsize." Ex. 72 at 104:6–106:19. Chris Zafiriou, a Glenmede employee on the call, testified that Hutter told Glenmede that Fortress was in the process of analyzing HM's request for additional capital. Ex. 77 at 186:15–190:10. Zafiriou

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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." *Id*. at 191:11–192:16. Hutter told Glenmede that Fortress "liked" the deal and that "it would make sense" to increase the borrowing limit because it was a "good loan-to-value" and a good "risk adjuste[d] return for Fortress." *Id*. at 191:11–192:16. 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." *Id*. at 193:14–194:16. In fact, Hutter told Glenmede in early October that Fortress might commit to the increase in credit "by the end of next week" or even sooner. *Id*. at 186:15–195:7; Ex. 78. Hutter also assured Glenmede that declaring HM in default would be "messy" and that Fortress "would rather not have a default." Ex. 77 at 197:2–200:10; Ex. 78.

Glenmede also held a call with Fortress's life settlement expert Scott Rose on October 7. Zafiriou testified that Rose told Glenmede that he expected Fortress would "resize" the credit facility "in a way to give Wayne runway"—*i.e.* "sufficient breathing room to successfully execute [its] strategy." Rose also told Glenmede that if Fortress provided additional capital to HM, Fortress itself stood to make more money. Ex. 77 at 234:4–20. Regarding the possibility of Fortress defaulting HM, Rose told Glenmede that Fortress had routinely waived "technical" defaults under the Credit Agreement, and that if Fortress "wanted" to declare HM in default, it could have done so "now or any time in the last nine months." *Id*. at 215:18–216:9. Indeed, Glenmede contemporaneously recorded Rose as saying that Fortress's past practice was to "waive & waive & waive" technical Credit Agreement requirements. *Id*. at 216:18–218:2; Ex. 63. Rose told Glenmede he "felt strongly that nobody at Fortress planned to push HM into default and foreclose." Ex. 77 at 219:16–224:17; Ex. 63. After receiving these assurances from both Fortress and Rose, Glenmede invested over $7 million in HM just weeks later. Ex. 77 at 17:8–20:3.

On October 28, 2010, Hutter tells Himelsein that Fortress will loan an additional $20 million.

The discussions between HM and Fortress continued through October. On October 27, Himelsein emailed Hutter that "I know you've been pretty swamped, but I'd like to continue our conversation on the cap"—*i.e.*, the provision of additional capital. Ex. 81. The next day, on October 28, Hutter sent Himelsein an early morning email asking Himelsein to "[g]ive me a call

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when you get in." Ex. 82. Himelsein testified that he called Hutter and Hutter said he had "Great news." Hutter told Himelsein, "I got you the 20 million." Ex. 2 at 798:27–799:8. Hutter then said he was "circling" around to get some documents and that he would need some materials from HM. *Id.* at 799:12–22. Himelsein 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." Ex. 39 at 558:9–17. Himelsein had a "high expectation" that the additional capital would come in using the Irish structure given its tax advantages and the nature of the parties' discussions at the October 1, 2010 meeting and after. Ex. 2 at 800:20–801:13.

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." *Id.* at 801:14–17. Lionel Tapiero recalled Himelsein excitedly saying "We got it, we got it." Ex. 21 at 236:20–237:14.

D. In reliance on Fortress's October 28 promise to provide additional capital, HM forgoes the opportunity to accelerate other transactions to secure short-term capital.

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." Ex. 2 at 802:13–803:12. In Himelsein's experience up to that point, when Hutter committed to something, it would get done, and paperwork would follow. *Id*. Himelsein testified at trial: "The NewOak thing was a good example. Said, We'll take care of it. Came to me some weeks later with a document, This is how we're going to do it. So I just got to know that when Rod [Hutter] committed to me, things played out that way." *Id.* at 803:8–12. After their October 28, 2010 phone call, Himelsein did not have "any doubt that Fortress was going to provide [HM] $20 million." *Id.* at 803:13–16.

"Because of Rod [Hutter]'s commitment," Himelsein did not "feel a pressing need after October 28th to line up back up capital." *Id.* at 803:23–27. 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. *Id*. at 848:10–849:5. Himelsein explained at trial that he "was always looking at capital. That was part

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of my - - what I do. I was always trying to grow the business." *Id*. at 848:12–14.

Himelsein's testimony was crystal-clear that he relied on Fortress's promise, and that he would have acted differently had Fortress never made the promise. Ex. 1 at 554:8–9 ("Q. Did you rely on Mr. Hutter's representation? A. Very much so."). 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." Ex. 3 at 1041:8–1042:13. This would have included offering better deals to potential counterparties. *Id*. at 1042:5–10.

For example, HM was in advanced discussions with Eric Schwartz, an investor who was previously a partner and senior executive at Goldman Sachs. Schwartz was considering making a major equity investment in HM—which would have, among other things, greatly increased HM's long-term capital availability for premium payments. Ex. 2 at 850:7–27, 852:4–25. HM sent Schwartz a term sheet on October 31, 2010. Ex. 4. The term sheet contemplated that Schwartz would invest $15 million in HM in exchange for 20% of the company. Ex. 2 at 852:9–25; 853:18–855:5. The term sheet also compensated Schwartz if he brought in additional capital, up to $500 million. *Id.* HM's potential deal with Schwartz ultimately did not close due to Fortress's declaration of default. Himelsein testified that had Fortress not presented itself as HM's long-term partner, he would have offered Schwartz substantially better deal terms in exchange for a quick closing (i.e. a quick infusion of capital). Ex. 3 at 1041:2–1043:18. He testified: "if my survival depended on it—I would have made sure something got done just like I did after the default." *Id.* at 1042:20–22.

Instead, 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." Ex. 2 at 848:15–17. He continued to act in the normal course: "looking out for my interests and being a little bit more of a negotiator. And taking time and being patient. And waiting for them to come back to me, and all the things you do in negotiations." Ex. 3 at 1041:2–1043:18.

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E. Fortress reneges on its promise on the day before Thanksgiving, then declares a pre-textual default in order to foreclose on HM's assets.

Fortress's fall 2010 decision to launch its own life settlements funds alters the landscape.

On October 21, 2010, Fortress contracted to purchase, for $332.5 million, the KBC portfolio that Himelsein had identified for Hutter. Ex. 83. [redacted] Ex. 84. Fortress set out to raise hundreds of millions of dollars from investors to support the new funds. Ex. 85. In the lead up to the launch, Fortress cribbed from HM Ruby's fund materials to help generate Fortress's own fund structure and sales pitch. Exs. 86, 87. While evaluating the KBC portfolio, one of Fortress's chief investment officers asked to review HM Ruby's materials in order to "improve our judgment on the life settlement business." Ex. 88.

[redacted] Ex. 25 at 316:19–317: 5. Third-party witnesses familiar with the HM Ruby fund who listened to Fortress's presentation were stunned as Briger and Dakolias pitched to investors what appeared to be a carbon copy of HM Ruby. Ron Marks, who is an investor in both HM and Fortress funds, testified that the "structure of the investment" seemed "virtually identical to that of HM Ruby's," as did Fortress's description of how its fund would operate. Ex. 90 at 249:4–251:4. In a November 28 email to Himelsein, Marks wrote that the presentation used by Fortress on the call "reads almost as if they [Fortress] have taken everything that HM Ruby has ever done and now called it their own. It is scary." Ex. 92.

In the days following Hutter's October 28 promise, and with the launch of Fortress's separate life settlement funds underway, Hutter's superiors come to the realization that they can acquire a large, valuable life settlements portfolio if they engineer HM's default.

Either Hutter's October 28 promise was false when made, or else Fortress soon changed its mind about providing HM additional capital and failed to tell HM; either way, that's fraud. [redacted]

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[redacted] Ex. 93. Days later, Chin reported to Co-Chief Investment Officers Briger and Dakolias that Hutter's deal team was analyzing whether it should provide the additional capital "to enhance our economics and *gain control* of the remaining policies in the HM Ruby portfolio." Ex. 66 (emphasis added).

Fortress secretly schemes to force a default, while Hutter goes dark.

On November 15, HM reached the $65 million borrowing limit. Ex. 118 at 379:13–16. Unbeknownst to HM, however, Fortress had already internally begun to plot to default HM based on the previously "waived & waived & waived" Premium Reserve Account shortfall.

On November 11, Fortress's Gary Lo emailed Hutter and Bonacci with the subject line "Brentwood EOD [Event of Default] relating to Premium Reserve" and sent the text of the Premium Reserve Account covenant. Ex. 95. The next day, Lo confirmed Fortress's methodology for "determin[ing] what premiums are due on the Brentwood (SPV) life settlements in the next 30 days" because that's something "we'll want to start checking daily going forward." Ex. 96. On November 17, just two days after HM hit the credit facility cap, Lo reported to Hutter that the Premium Reserve Account had a $1.6 million shortfall; Hutter told Lo to "discuss with DeWayne [Chin] and see what he wants to do." *Id*.

During the same week, even though HM had drawn the full $65 million under the existing credit facility and therefore had no reason whatsoever to pledge additional collateral to Brentwood *other than* to collateralize the additional funds Hutter had promised, Lo emailed HM asking it to pledge all of its remaining life settlement policies to the Brentwood special purpose vehicle that Fortress controlled. Ex. 99.

On the morning of November 18, Himelsein emailed, "Rod, Can we speak soon?" *Id*. Having received no response, Himelsein sent a follow up email later that day, acknowledging that Hutter had been "incredibly busy with the KBC deal" but asking Hutter to nonetheless confirm the form in which Fortress was going to proceed with providing the additional capital. Ex. 98. He noted that HM had a number of "great potential deals" in the pipeline but, given their "size and complexity," it would be difficult to close immediately. *Id*. Therefore, Himelsein asked Hutter to provide some "color" on how Fortress was going to provide the additional capital, so that HM

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could plan accordingly. *Id.*; Ex. 2 at 844:1–845:20. Again, Himelsein received no response. On November 22, Himelsein implored Hutter to reach out to him, as "[o]ur cash position is running thin." Ex. 100. Hutter remained silent, as Fortress secretly set-up an incurable default.

Scott Rose, Fortress's life settlements consultant, testified that in this time period, he spoke with Himelsein who "was concerned that he couldn't reach Rod [Hutter] and was hoping that [Rose] would be able to." Ex. 94 at 297:12–298:6. Rose eventually was able to contact Hutter and told him that Himelsein was trying to reach him. *Id.* at 299:12–23. While Rose—whose lawyer defending his deposition was being paid by Fortress—testified that he could not recall much of his conversation with Hutter he "[did] recall that I believed that Fortress was going to upsize the facility" and continued to believe this "into the mid to late November 2010 time period"—weeks *after* his call to Hutter. *Id.* at 299:12–300:25. This is consistent with Himelsein's testimony that after Rose spoke with Hutter, Rose called Himelsein to relay that Hutter had said "don't worry. Tell Wayne he's fine." Ex. 2 at 847:18–24. Indeed, Rose confirmed that he would have no basis to dispute Himelsein's testimony on this point. Ex. 94 at 303:14–23.

While Hutter ignored Himelsein's repeated emails, Hutter's subordinate, Gary Lo, continued to press HM to pledge the additional eight life settlement policies, which had a combined face value of over $40 million. Exs. 101, 102. Lo insisted that this happen even though Barrett Advisors had not yet reviewed the policies prior to the pledge, which was a key part of the standard "process." Ex. 101. Relying on the word of its trusted partner that additional funding was on its way, HM transferred the $40 million in policies to Brentwood on November 24 so there would be security for the additional capital Fortress promised. Ex. 21 at 85:25–87:3, 91:4–13, 241:7–246:1; Ex. 19 at 288:16–24.

Mere *hours* after Fortress received confirmation that these additional $40 million in policies had been pledged, on the day before Thanksgiving, Fortress informed HM over the phone (Fortress wanted noting in writing) that it would not be providing the additional capital and instead intended to declare HM in default the next week due to a shortfall in the Premium Reserve Account. Ex. 2 at 862:19–863:13; Ex. 21 at 246:2–247:25. DeWayne Chin spoke on behalf of Fortress. Ex. 2 at 863:5–9. Hutter (after spending weeks ignoring Himelsein) was on the line, and

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silent. *Id.* at 863:23–26. Himelsein responded: "that's not what Rod told me." Ex. 2 at 863:14–15. Hutter said nothing. *Id.* at 863:16–20. Instead, Chin spoke for Hutter and denied that Hutter had made any commitments to HM. Himelsein responded by pointing out that Chin was not on the call when Hutter made the commitment, so he would have no way to know. *Id.* at 864:4–7. Hutter still said nothing. *Id.* at 863:25–26. Then, Himelsein "suddenly kind of realized what position I was in, in totality" and he asked Chin and Hutter, "how can you do this to me? I'm going to go bankrupt." *Id.* at 864:8–11. Chin told Himelsein he was being "emotional" and they would call him back. *Id.* at 864:12–15. Hutter remained silent and the call ended.

Fortress declares HM to be in incurable default, and then tries to strongarm HM into waiving its claim against Fortress based on the promise as a price for any further discussions.

The following Monday, Fortress told HM it was in default. Ex. 103 at 40:25–41:5. Fortress followed up on Wednesday, December 1 with a letter declaring a default based on a previously "waived & waived & waived" violation of the Premium Reserve Account covenant. Ex. 104. The default was incurable, Ex. 31 at 1300:20–1301:4, even though no Brentwood policies were in danger of lapsing for at least 30 to 60 days. Ex. 48 at p.16 ("policies do not lapse until they have been in grace for 60 days"); Ex. 45 at 209:15–18; Ex. 30 at 130:12–131:17.

Fortress then sought to exploit HM's vulnerability in order to clean up the loose end of Hutter's unfulfilled promise of additional capital and cover its deceitful tracks. Fortress sent HM a "Discussions Agreement" that it asserted was a "standard" agreement that would allow the parties to discuss a resolution of the default without anything said in those future discussions to be used later in litigation. Exs. 105, 106. In reality, the agreement contained highly non-standard terms, including that HM would "covenant not to sue and irrevocably waive and release any and all claims" HM had against Fortress "by reason of any statement or utterance (whether *oral* or in writing) whatsoever which . . . has been made *at any time before* or during" the parties' discussions." Ex. 105 (emphasis added). HM wisely refused to sign a release of its claim against Fortress or falsely deny reliance on the promises (in the guise of a purportedly standard "Discussions Agreement") as the price of merely getting a seat at the negotiating table. [redacted] Ex. 116.

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Meanwhile, in December, HM worked feverishly to close a transaction to save the balance of its portfolio (*i.e.* the policies that had not been pledged to Brentwood). HM was able to arrange financing in less than three weeks—less time than the span between Hutter's October 28 promise and Fortress's November 24 reneging. Ex. 109. A company called Gerova Financial agreed to purchase HM's remaining life settlement assets for $105 million in cash and stock, with $3 million payable on the closing date and an additional $2 million loan made available on the same date as well. Ex. 18 at 300:14–301:2; Ex. 110.

For its part, as 2010 came to a close, Fortress was very pleased with the performance of its HM deal team, and awarded them a bonus of $10 million for their 10 months of work on the HM transaction. Ex. 111; Ex. 41 at 278:19–285:14. Dakolias testified that deal-related performance bonuses are only given to employees when Fortress considers the deal to be successful. Ex. 41 at 277:17–278:18.

Fortress "sells" the Brentwood portfolio to itself in an auction that the Court has conclusively determined, following trial, was "not commercially reasonable" and designed to allow Fortress "to acquire the portfolio at a rock bottom price" that "shocks the conscience."

Following Fortress's foreclosure of the Brentwood assets, it completed its scheme to obtain HM's assets on the cheap by running those assets through a rigged auction process. The Court's post-trial findings of fact were affirmed and are conclusive. The Court detailed several key limitations that Fortress imposed on the auction process, including (1) not providing adequate information to potential bidders, (2) insisting on a very short timetable, and (3) imposing a reserve price on the portfolio, resulting in a "sausage factory" of an auction. Ex. 112 at 22:5–23:22 (1/6/17 Statement of Decision). The Court concluded that Fortress's insistence on these limitations "supports a reasonable inference that Fortress's intentions—at least initially—were to acquire the portfolio at a rock bottom price." *Id.* at 24:1–3. The Court disregarded Fortress's DeWayne Chin's testimony to the contrary, finding it "not credible." *Id.* at 23:25–26.

At the June 2 "auction," Fortress submitted the "winning bid" of $72.5 million, taking full ownership of the assets that, only six months earlier, it had valued on its own audited financial statements at $173 million. Ex. 113 at 6002–03; Ex. 41 at 200:6–202:12; Ex. 129. The Court later held that "a sales price (from Fortress itself) of $100 Million less than its own valuation of the

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loan portfolio months earlier '*shocks the conscience*.'" Ex. 112 at 28:6–8 (emphasis added).

Sophisticated investors testify about the reasonableness of relying on oral promises.

Several witnesses testified regarding reliance on oral promises in business dealings between sophisticated parties. Ron Marks, an HM and Fortress investor and Peter Briger's former partner at Goldman Sachs, and someone Fortress's counsel established to be an "experienced investment professional," (Ex. 90 at 17:11–13), testified that based on his years of experience working on Wall Street, people "very much rely on oral promises made between counterparties." *Id*. at 244:17–247:14. On Wall Street, "[w]e traded day in, day out, all day long with oral representations as opposed to written" and that " your word is your bond on Wall Street, period, end of story . . . [Y]our handshake or your word was your bond. And we lived and died by it." Marks testified that this "culture" of relying on oral promises at Goldman Sachs extended to his "dealings with our counterparties, interdealer brokers, clients, other investment banks, so on and so forth. [I]t is and certainly was always part of the culture." *Id*.

John Tormondsen, another HM investor and former Goldman Sachs partner, also testified that oral contracts are a routine part of the financial industry. "Most of my career in Goldman Sachs was conducted on oral contract alone and nothing else." For example, Tormondsen testified that he would "agree to purchase a billion five-year notes" from an institution "and there's nothing other than my word that says yes and a price. And I did that for 16 years." Ex. 64 at 226:4–227:6.

III. LEGAL STANDARD

On a summary adjudication motion, courts simply determine from the evidence submitted whether there is a "triable issue as to any material fact." Civ. Proc. Code § 437c(c). "[T]he court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the opposing party." *Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 844–45 (citations omitted).

IV. ARGUMENT

Fortress challenges Plaintiffs' Third, Fourth, and Fifth causes of action, all on the same two grounds: that HM cannot show actual reliance or justifiable reliance on Fortress's promises. Both of these issues present quintessential disputes of material fact that require resolution at a jury

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trial—as the Court of Appeal contemplated when remanding this case.

A. A Jury Could Conclude that HM Actually Relied on Fortress's Representations.

Fortress's argument on actual reliance rests on an error of law and a mischaracterization of the facts. Fortress argues that Wayne Himelsein "repudiated" any actual reliance by testifying that he did not change the manner he went about looking for additional capital after Fortress's October 28, 2010 promise. This testimony does not "repudiate" anything. The single question-and-answer that Fortress's motion rests on is entirely consistent with the rest of Himelsein's *six days* of trial testimony in which he explained that, in reliance on Fortress's promise, he held steady course and did not accelerate other opportunities for additional capital, though he could have and would have done so had Fortress never made its false promise. Contrary to Fortress's argument, the law recognizes that reliance can take the form of action *or forbearance*. Himelsein's testimony is material evidence showing that HM forbore from accelerating other capital-raising opportunities in reliance on Fortress's promise. Fortress's citation of various documents for the proposition that HM continued to seek capital in the normal course after Fortress's October 28 promise are not inconsistent with Himelsein's testimony or Plaintiffs' theory of reliance—and in any event, factual disputes in this case, according to the Court of Appeal, are for a jury to resolve. Fortress also offers no substantive challenge to HM's other theories of reliance.

1. Contrary to Fortress's argument, either action or forbearance can demonstrate reliance.

Fortress argues that HM could demonstrate reliance only by showing that it changed course following Fortress's false October 28 promise. Motion at 18:20–19:8. That is not the law. The law recognizes either action *or forbearance* constitutes reliance. The Supreme Court of California has held that forbearance is "sufficient to fulfill the element of reliance necessary to sustain a cause of action for fraud or negligent misrepresentation." *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 174.[3] Thus, in *Small* the Supreme Court held that a stockholder's decision

[3] *See also* Rest. 2d Contracts § 90, subd. (1) ("A promise which the promisor should reasonably expect to induce action *or forbearance* on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by

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to *continue to hold* stock was cognizable reliance. *Id.* at 176. Similarly, in *Moncada v. West Coast Quartz Corp.*, the Court of Appeal upheld clams that plaintiffs had relied on a promise by remaining employed at their current employer "and forgoing other employment and residential opportunities." (2013) 221 Cal.App.4th 768, 780. In *Aceves v. U.S. Bank, N.A.*, a mortgage lender promised a mortgage borrower that it would "work with [her] on a mortgage reinstatement and loan modification" if she no longer pursued relief in bankruptcy court. The Court of Appeal held that the borrower relied on the bank's promise to negotiate "by declining to convert her chapter 7 bankruptcy proceeding to a chapter 13 proceeding, by not relying on her husband's financial assistance in developing a chapter 13 plan, and by not opposing U.S. Bank's motion to lift the bankruptcy stay." (2011) 192 Cal.App.4th 218, 227, *as modified* (Feb. 9, 2011).

There is no support in the law for Fortress's argument that a party's reliance is tested by comparing its pre-promise conduct to its post-promise conduct, or that reliance requires a party to "change his position." *See* Motion at 21:16–18. Indeed, the Supreme Court has clearly held to the contrary, adopting the following explanation: "Lies which deceive and injure do not become innocent merely because the deceived continue to do something rather than begin to do something else. Inducement is the substance of reliance; the form of reliance—action or inaction—is not critical to the actionability of fraud." *Small*, 30 Cal.4th at 175 (citation omitted).[4] Fortress's argument that its false promises escape liability because Himelsein "continued to" raise capital in

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enforcement of the promise.") (emphasis added); *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6 (Section 90 "has been judicially adopted in California").

[4] While Fortress selectively cites case language about a party "alter[ing] his position," the cases are clear that the relevant comparison is a party's actual conduct against how the party *would have acted* absent the promise or misrepresentation, not whether a party alters course once a promise is made. *Wilkins v. Nat'l Broadcasting Co., Inc.* (1999) 71 Cal.App.4th 1066, 1081–1082 (plaintiff admitted "he would not have done anything differently" if he had known the truth). *Alliance Mortgage Co. v. Rothwell* offers no support for Fortress's argument—the court did not address forbearance because the allegations were that the defendant's fraud induced plaintiff to enter into loans (i.e. take an affirmative action). (1995) 10 Cal.4th 1226, 1239. Similarly, *Smith v. Brown* involved claims that misrepresentations induced the plaintiff to enter into a real estate transaction. (1943) 59 Cal.App.2d 836, 837. None of these cases states—or even suggests—that forbearance induced by a promise or misrepresentation is insufficient to constitute reliance.

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his usual manner rather than "begin to do something else" runs squarely contrary to the law.

2. Himelsein testified that HM forewent opportunities to raise capital, such as by accelerating discussions or offering more favorable economic terms to counterparties.

Contrary to Fortress's mischaracterization of the evidence, Himelsein did not disclaim reliance on Fortress's promise to extend $20 million in additional financing. In fact, he repeatedly testified that he *did* rely on that promise. *E.g.* Ex. 1 at 554:8–9. There is no contradiction between the single question-and-answer Fortress relies on—in which Himelsein explained that Hutter's representation on October 28 regarding the additional $20 million in financing did not change the manner in which Himelsein went about looking for additional capital—and the rest of Himelsein's six days of testimony. Himelsein explained, in his immediately preceding answer, that "I was always looking at capital. That was part of my - - what I do. I was always trying to grow the business." Ex. 2 at 848:12–14. Moments earlier, Himelsein had explained that by November 18 he was pressing Hutter for more details about the timing of Fortress's $20 million extension because, "I'd have to pick up the pace significantly. I'd have to do things differently unless I heard from him and knew when the timing of something was going to happen." *Id.* at 843:23–26.

As discussed above, the law recognizes that reliance can take the form of a party *continuing* to do something, and does not require that a party begin to do something else upon receiving a promise. And, as a factual matter, there is no contradiction between testimony that (1) after the October 28 promise, Himelsein continued to raise capital as usual "to grow the business" and (2) if Fortress had never promised additional capital, Himelsein, perceiving an emergency, would have "h[ad] to do things differently"—he would have acted with greater urgency by accelerating other capital raising efforts. Ex. 3 at 1041:27–1042:4 ("[A]s 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 manner of months I could have got a lot done."). This included offering better deals to potential counterparties. *Id.* at 1042:5–10.

Fortress's argument seeks to reinstate Judge Jones's incorrect interpretation of Himelsein's testimony that he continued as usual after the promise to mean that "the representation didn't affect [his] behavior." Ex. 119 at 899:21–26. Fortress misleadingly references Judge Jones's

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evidentiary ruling during Himelsein's direct examination, sustaining objections to questioning about how Himelsein would have changed his behavior had Fortress never made its October 28 promise. Motion 12, n.2.[5] But Fortress fails to advise the Court that Judge Jones later *changed* that ruling in part and permitted limited questioning. Ex. 119 at 1033:14–18. While Judge Jones still did not permit the question "If you had thought that there was a risk after October 28th that Fortress was not going to provide any additional capital to HM, would you have done either of those things any differently?" the remainder of Himelsein's testimony already amply answers that question—as Himelsein explained that he would have acted with more urgency and accelerated other funding sources. Ex. 2 at 843:23–26, 848:19–849:5; Ex. 3 at 1041:27–1042:22. In all events, Judge Jones's incorrect factual findings and interpretation of the evidence—other than her affirmed findings related to Fortress's counterclaims—are a nullity. The Court of Appeal reversed and vacated the Court's decision because Fortress had improperly deprived HM of its inviolable right to a jury trial. In other words, the wrong fact finder drew the conclusions on which Fortress's latest summary adjudication gambit is based. Fortress is doing the same thing again by asking the Court to reinstate Judge Jones's findings, piecemeal. This only risks injecting further error into these proceedings. Arguments about what Himelsein's testimony meant (especially in the face of express testimony contradicting Fortress's interpretation) should be presented to a jury, because they present classic questions of fact that cannot be resolved on summary adjudication.

3. HM would have managed the life settlements portfolio differently had it not relied on Fortress's promises.

Moreover, had Fortress not represented itself as a long-term partner that would not let HM run out of funding, HM would have managed the portfolio differently to reduce HM's cash expenditures. Himelsein testified that "[i]f 65 [million dollars] 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 lapsed many more policies." Ex. 3 at 1042:24–1043:18. HM retained

[5] While, as Judge Jones later acknowledged, this evidentiary ruling was wrong, Judge Jones also noted that the answer that Fortress's motion now relies on "*doesn't negate or vitiate his reliance on this statement*." Ex. 119 at 901:26–27 (emphasis added).

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ownership (and premium-payment obligations) of policies with low value or even negative value because Fortress—HM's purported long-term partner—wanted as many "lives" in the collateral as possible. Ex. 6 at 667:4–6, 709:12–710:10. HM did this to be a "good partner" to Fortress even though it was detrimental to HM. *Id.*

4. HM pledged tens of millions of dollars after the credit line had been exhausted in additional policies in reliance on, and in anticipation of, Fortress's promise of additional capital.

HM also relied on Fortress's promise of additional capital when it pledged additional policies with face values totaling $40 million on November 24, even though it had already drawn the full initial commitment of $65 million on the credit facility. Ex. 3 at 1043:19–21; Ex. 19 at 288:16–20. The only reason for HM to pledge additional collateral was to permit a draw on the increased amount that Fortress had promised. Fortress incorrectly asserts that this is not in Plaintiffs' complaint. Motion at 22:27–28. It is. Ex. 122 at 191 (HM "continued to operate the venture as though an additional capital draw from Fortress was forthcoming.").

Fortress also incorrectly asserts that HM was contractually obliged to pledge the additional policies on November 24 even if the credit facility was exhausted. Motion at 22:2–3. This too is incorrect and is another hotly disputed fact. Quantlife was obligated only to convey "eligible" life settlement policies it owned to Brentwood—indeed, Quantlife was required to warrant that "each Conveyed Policy was an Eligible Life Policy." Ex. 5 at § 2.01; 4.01(x) (Contribution and Sale Agreement). Among other requirements, an insurance policy became an "Eligible Life Policy" only after Quantlife produced information about the policy and Fortress had an opportunity to perform due diligence on it. *Id.* Schedule I, § A(xxxi), A(xxxiv). A policy that was not submitted to Fortress was not an "eligible policy" and could sit on Quantlife's books forever. But, in reliance on Fortress's promise that additional capital would be available, HM submitted additional policies to Fortress, had them approved, and then pledged the newly "eligible" policies to Brentwood on November 24. In all events, but for HM's reliance on Fortress's promise, it could have simply exercised Quantlife's unilateral right to terminate—with immediate effect—its obligation to pledge policies under the Contribution and Sale Agreement. *Id.* § 2.01; 1.01 (defining "Conveyance Termination Date" as "the earliest of . . . (ii) the effective date of the

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delivery of an Election Notice by the Parent to the Company and the Program Agent . . .”). Thus, had HM not relied on Fortress’s promise, it could have—and the evidence shows *would have*—refrained from pledging additional policies on November 24, either by terminating the obligations or never making the policies “eligible.”

B. A jury could conclude that HM’s reliance on Fortress’s promise was justifiable.

The second ground for Fortress’s motion is that HM’s reliance on Fortress’s October 28 promise of additional capital was not justifiable because it was not in writing. Fortress has already moved on this ground and the motion has been rejected. Ex. 123 (7/1/16 Ruling on Submitted Matter). Fortress offers no “newly discovered facts” as required to support a renewed motion and it should be denied on that ground alone. *See* Cal. Code Civ. Proc. § 437c(f)(2). While Fortress cites some snippets of trial testimony, this is a pretext. Fortress cites trial testimony in which Himelsein explains why he did not tell his investors about the October 28 promise. Motion at 23:19–22. But this testimony “is entirely consistent” with a document that Fortress had when it made its prior motion. Motion at 24:1–4 (citing TREX 397). Nor is Himelsein’s trial testimony that he was “aware” of a provision of the Credit Agreement purporting to require written amendments or modifications a fact that Fortress has “newly discovered.” That contractual provision was the cornerstone of Fortress’s prior motion. Ex. 123 at 8:7–10 (“Defendants contend that Plaintiffs’ reliance on the alleged oral promise is unreasonable in the face of two ‘no oral modifications’ clauses . . . .”). While, as discussed below, Fortress mischaracterizes the testimony and documents it relies on, the fact that none of the evidence is “newly discovered” but simply regurgitates the prior denied motion is a threshold ground for denial of Fortress’s motion.

In any event, the justifiability of a party’s reliance is a classic jury question. “Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff’s reliance is reasonable is a question of fact.” *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239. This is, in part, because the standard of reliance includes consideration of the “context of the relationship” between the parties. *Id.* at 1247.

This is not the “rare” case, and whether HM’s reliance was reasonable is a question of fact.

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Substantial evidence demonstrates the reasonability of HM's reliance. The parties' dealings gave HM every reason to believe (as it did), that Fortress and HM were long term partners, and that Fortress would not let HM run out of premium-payment money. When pursuing HM for the deal, Fortress expressly offered HM "longer term partnership [opportunities]." Ex. 29; Ex. 37 at 409:20–410:18. Hutter pitched Fortress to Himelsein as a joint venture partner. Ex. 18 at 152:13–153:12. Then, Fortress conducted extensive, joint venture-level due diligence on HM. Ex. 46 at 151:8–159:3. During that due diligence trip, Hutter enthused that the HM-Fortress relationship presented a whole "new business" for Fortress. Ex. 18 at 146:8–148:28; Ex. 6 at 619:23–622:2. Hutter and Himelsein shared a desire to pursue a *series* of life settlement transactions together, with HM offering the technical and industry expertise and Fortress providing the capital. Ex. 6 at 620:19–621:6.

The parties proceeded that way for months. HM identified industry opportunities for Fortress. Exs. 12;13, 14, 15. HM offered industry know-how. Ex. 19 at 239:9–24, 247:10–249:15; Ex. 21 at 308:10–25, 309:15–25; Ex. 20 at 259:22–260:14, 260:19–261:8; Ex. 23 at 58:16–19. Fortress routinely—and increasingly informally—waived technical requirements of the Credit Agreement so that the parties could smoothly operate the business.

Given the way the parties worked together for months, HM expected—reasonably—that if the time came that more capital was needed, Fortress would provide it, and HM thus did not begin acting as it would have had it perceived an emergency. HM was repeatedly reassured, both by Fortress and its representatives Barrett Partners, that Fortress "won't let [HM] run out of cash" or HM "had nothing to worry about." Ex. 2 at 738:27–28, 847:18–24; Ex. 19 at 276:5–7. The parties were discussing not *whether* the increase would happen, but structuring issues as to *how* it would happen. In early October, a third-party who had spoken with Fortress thought that the $20 million increase "seemed like it was close to being a done deal" and Hutter said Fortress might commit within a week or two. Ex. 77 at 186:15–195:7; Ex. 78. Fortress had the right to 50% of the profits of the venture through what the parties variously called its "partnership" or "equity" interest in HM Ruby—which HM expected would be sufficient incentive for Fortress not to let the venture fail. Exs. 54, 52; Ex. 53 at 9388. Fortress's own consultant, Scott Rose, who was

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intimately involved in the deal starting with due diligence and continuing through every draw on the credit facility, also expected Fortress to increase the credit available to HM. Ex. 94 at 299:12–300:25. While Fortress *disputes* the weight of some of this evidence or questions its credibility, those are issues for a jury to decide upon remand. In light of the parties' dealings leading up to and continuing past the October 28 promise, there was nothing unreasonable about HM relying on its purported partner to honor its word and loan an additional $20 million.

Fortress flatly misstates the evidence when it argues that Himelsein "admitted under oath . . . that he understood that relying on a purported oral promise to upsize the credit facility by $20 million would have been unreasonable—'sloppy and irresponsible,' as Himelsein himself put it." Motion at 7:12–16. Indeed, past this headline-grabbing fabrication, Fortress itself admits the actual testimony was something else entirely. When Fortress is forced to actually cite the testimony, it concedes that what Himelsein *really* testified is that one of the reasons he did not immediately tell his investors about Fortress's October 28 promise is that *the investors*—who were not involved in the day-to-day running of the business and did not know all of the history between HM and Fortress—would tell Himelsein that *they thought* it was "sloppy and irresponsible" not to get it in writing. Motion at 23:19–23 (quoting Ex. 24 at 1243:23–1244:9). Himelsein's testimony was referencing a document he had been shown earlier during cross-examination where, in a bit of Monday-morning quarterbacking after Fortress's betrayal had cost HM and its investors virtually HM's whole business, one of HM's investors leveled criticism at Himelsein's naive (in hindsight) reliance on Fortress's promise. *See* Ex. 124. Himelsein's testimony shows that he *disagreed* that his reliance on Fortress's promise was unreasonable: "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." Ex. 24 at 1244:8–15 (emphasis added). While ultimately Fortress can argue reasonableness *to the jury* in closing upon retrial, the current motion rests on a fabrication. Himelsein never testified that he thought reliance on Fortress's promise was unreasonable.

What Fortress is really doing is repackaging its shop-worn argument that reliance on an

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oral promise for a $20 million loan is never justifiable. The evidence and law are to the contrary. Fortress simply ignores the record evidence that transactions at many multiples of that amount are routinely committed via oral communication (sometimes with documentation to follow, as here), and that sophisticated investors and finance professionals routinely rely on such oral commitments. Ex. 90 at 244:17–247:14; Ex. 64 at 226:4–227:6. The Court has rejected Fortress's reliance on the "no oral modifications" clause in the Credit Agreement multiple times over the past eight years (though Fortress fails to bring that to the Court's attention) at the pleading stage and after Fortress's first try to get summary adjudication on these very claims. Ex. 125 at AA743–45; Ex. 123 at 7:25–10:5. The Court previously concluded that there was a triable issue that the capital increase was independent of the Credit Agreement, as the new capital could have loaned through HM's Irish entity. Ex. 123 at 9:13–17 (quoting Ex. 71). And the Court held that "[i]n addition, the reasonableness of Plaintiffs' reliance is more appropriate for resolution by the trier of fact." *Id.* at 9:19–21. The fact that Himelsein was "aware" of a "no oral modifications" clause in the Credit Agreement is similarly of no help to Fortress. If the additional $20 million in capital had been funded through the Irish entity, that would have been independent of the Credit Agreement. In any event, even if a written amendment to the Credit Agreement would have been required to document the additional $20 million in funding, HM still could have reasonably relied on Fortress's promise, because nothing prevented Fortress from executing an amendment. *See Aceves v. U.S. Bank,* 192 Cal.App.4th at 222 (holding borrower "could have reasonably relied on the bank's promise to work on a [mortgage] loan reinstatement and modification").

The reassurances and promises that Fortress is now claiming were not reasonably relied upon were in fact the key to Fortress's scheme, and Fortress *intended* for HM to rely on them.

When the parties began discussing additional funding in summer 2010, Fortress may well have expected to extend additional financing. If the venture succeeded, Fortress would be repaid its loan principal, a high interest rate, and earned half of the profits on an ever-growing Brentwood portfolio. If HM had found another capital partner, Fortress would have still received its contractual entitlement, but would no longer have shared in any future growth. The landscape changed when Fortress realized it could raise its own fund using HM's business strategy and

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industry contacts. Fortress felt it no longer needed HM and could capture 100% of future growth without sharing with HM by acquiring available portfolios through its own fund. Fortress also realized it could take HM's half of the existing collateral pool by foreclosing.

But to engineer a foreclosure, Fortress needed to induce HM to wait until it was too late to find another capital partner. So Fortress led HM along with reassurances and promises until the time was right to spring the trap—waiting until the evening before Thanksgiving to tell HM it would declare a default on Monday morning. Indeed, Fortress waited until just hours after HM pledged an extra $40 million in policies, so Fortress could wring every possible policy out of HM.

If Fortress had simply decided that it would not extend more capital than the $65 million initial credit facility, but had not induced HM to rely on its promises of additional funding, this would have given HM time to strike a deal with a substitute capital partner. Fortress would have been left with only half of Brentwood's profits. As it was, HM *did* find additional capital in less than three weeks of Fortress reneging on its promises, and managed to do so even *after* Fortress declared a default. Fortress offered its reassurances and promises to HM precisely because it *wanted* HM to rely upon them. Fortress, which touted its credit funds as "opportunistic," was not satisfied with half of Brentwood's profits, it wanted all of them.

V. CONCLUSION

Because a jury could find that Plaintiffs actually and justifiably relied on Fortress's promises, Fortress's motion for summary adjudication should be denied (again) and the case should proceed expeditiously to the jury trial the Court of Appeal ordered.

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