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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HIMELSEIN MANDEL FUND MANAGEMENT, LLC et al., Plaintiffs and Appellants, v. FORTRESS INVESTMENT GROUP LLC et al., Defendants and Appellants.	B281210 (Los Angeles County Super. Ct. No. BC495595)

APPEALS from a judgment of the Superior Court of Los Angeles County, Ann I. Jones, Judge. Affirmed in part and reversed in part with directions.

Simpson Thacher & Bartlett, Michael D. Kibler; Glaser Weil Fink Howard Avchen & Shapiro, Patricia L. Glaser, Sean Riley; Greines, Martin, Stein & Richland, Robin Meadow and Cynthia E. Tobisman for Plaintiffs and Appellants.

Munger, Tolles & Olson, Bradley S. Phillips, Lisa J. Demsky, Laura D. Smolowe and Jordan D. Segall for Defendants and Appellants.

Himelsein Mandel Fund Management, LLC and related entities (collectively HM) filed a complaint against Fortress Investment Group, LLC and related entities (collectively Fortress) alleging several causes of action, some legal and some equitable, relating to a $65 million credit and security agreement (CSA) and an alleged oral promise to extend further credit.[1] Fortress filed a cross-complaint.

The CSA included a choice-of-law provision stating that New York law governed the agreement and its construction, and also included a waiver of the right to jury trial. The trial court concluded that New York law governed the enforceability of the jury trial waiver, and that the waiver was enforceable under New York law and encompassed both contract and noncontract causes of action. The court therefore denied HM's demand for jury trial and conducted a nonjury trial, which resulted in a defense judgment on the complaint and no relief on the cross-complaint. Both sides appealed.

HM contends: (1) although the equitable causes of action were appropriately tried by the court, the trial court erred by denying a jury trial on the legal causes of action; (2) the court erred by applying New York law rather than California law to HM's noncontract causes of action both at trial and in ruling on Fortress's demurrers and motions for summary adjudication; and (3) HM's unjust enrichment cause of action should be reinstated regardless of which state's law applies.

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[1] The plaintiffs are Himelsein Mandel Fund Management, LLC (HMFM), HM Ruby Fund L.P. (HM Ruby), Quantlife LLC (Quantlife), and Brentwood Holdings LLC (Brentwood).

The defendants are Fortress Investment Group LLC (Fortress Investment), Fortress Credit Corporation (Fortress Credit), FCOF UL Investments LLC, and 28 other entities.

Fortress challenges the denial of its motions for summary adjudication of several causes of action in the complaint and the denial of relief on its cross-complaint. Fortress contends: (1) it was entitled to summary adjudication of HM's causes of action for intentional and negligent misrepresentation, promissory estoppel, and unfair competition; and (2) the trial court erred in denying relief on Fortress's causes of action for breach of the CSA and for a deficiency judgment.

We conclude that (1) the New York choice-of-law provision is unenforceable with respect to the jury trial waiver because the enforcement of a predispute jury trial waiver would be contrary to fundamental California public policy; (2) the denial of the right to jury trial is a structural error requiring a reversal on all of HM's causes of action adjudicated at trial; (3) the choice-of-law provision encompasses only contract causes of action, so the trial court on remand must apply the governmental interest analysis to decide which state's law applies to HM's causes of action adjudicated at trial and its unjust enrichment cause of action; (4) HM has not shown which state's law applied to several noncontract causes of action adjudicated before trial and has shown no error in those pretrial rulings; (5) the court erred by sustaining a demurrer to HM's unjust enrichment cause of action; (6) we need not review the denial of Fortress's motions for summary adjudication; and (7) the court properly denied relief on Fortress's deficiency and breach of contract causes of action. We therefore reverse the judgment on the complaint as to the causes of action adjudicated at trial and the unjust enrichment cause of action, with directions to the trial court to decide the governing law by applying the governmental interest analysis, and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Parties*

HMFM is a limited liability company organized under New York law and engaged in the business of investment management. HM Ruby is a limited partnership organized under Delaware law and engaged in the life settlement investment business. A life settlement involves the sale of an interest in a life insurance policy to a third party that pays the premiums and eventually collects the death benefits. Quantlife is a limited liability company organized under Delaware law and a wholly-owned subsidiary of HM Ruby. Brentwood is a limited liability company organized under Delaware law and a wholly-owned subsidiary of Quantlife.

Fortress Investment is a limited liability company organized under Delaware law, based in New York, and engaged in the business of investment management. Fortress Credit is a Delaware corporation with its principal place of business in New York. The other defendants are related to or affiliated with Fortress Investment and Fortress Credit in some manner.

2. *The Credit and Security Agreement*

HMFM sought an investor to provide funds needed to maintain its portfolio of life settlements. In November 2009, HMFM and Fortress Investment entered into a mutual nondisclosure agreement to maintain the confidentiality of information shared for the purpose of evaluating "the potential transaction involving a credit facility, joint venture, and/or equity acquisition." The agreement included a choice-of-law provision stating, "This Agreement and its validity, construction, effect, and performance shall be governed by the laws of the State of California," and a forum selection clause designating the City of Los Angeles as the forum for any litigation arising out

of the agreement. The agreement also included a waiver of any right to jury trial.

On February 12, 2010, Brentwood and Fortress Credit entered into the CSA, which provided for a $65 million credit facility secured by collateral consisting of life settlements held by Brentwood. Under the CSA, Brentwood agreed to repay the amounts borrowed, plus interest and fees.

The CSA provided that in the event of a default, Fortress Credit could notify Brentwood that all of Brentwood's obligations were due and payable and pursue its rights as a secured creditor under the Uniform Commercial Code. The CSA stated, "it shall be commercially reasonable for the Program Agent [Fortress Credit] to sell the Collateral on an 'as is' basis, without representation or warranty of any kind."

The CSA included a choice-of law provision stating:

> "THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK (INCLUDING SECTION 5-1401 OF THE GENERAL OBLIGATIONS LAW OF THE STATE OF NEW YORK BUT OTHERWISE WITHOUT REGARD TO CONFLICTS OF LAW PRINCIPLES)."

The CSA also included a waiver of the right to jury trial immediately following the choice-of-law provision:

> "EACH OF THE PARTIES HERETO WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION ARISING DIRECTLY OR INDIRECTLY OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED HEREUNDER."

The CSA included an indemnity provision stating that Brentwood would indemnify Fortress Credit and others for expenses relating to

Brentwood's failure to perform its obligations under the CSA, any misrepresentation made in connection with the CSA, any litigation arising from the CSA, and other matters.

The CSA provided that the agreement could be amended only by a signed writing. The CSA included a nonexclusive consent to jurisdiction in the State of New York, but did not limit the venue for any lawsuit to that state.

3. *The Default and Foreclosure*

In August 2010, Wayne Himelsein of HMFM asked Rodney Hutter of Fortress for more credit. According to Plaintiffs, after weeks of discussions, Hutter orally promised to provide an additional $20 million in credit. Defendants dispute this.

On December 1, 2010, Fortress Credit sent Brentwood a notice of default under the CSA. Fortress later sent additional notices of default and foreclosed on the collateral, which was sold at a public auction for $72.5 million on June 2, 2011. Fortress was the high bidder with a credit bid. Fortress claimed the amount owed under the CSA was approximately $185,675,943, leaving a deficiency after the sale of approximately $113,175,943.[2]

4. *The Complaint, Amended Complaints, and Demurrers*

On November 13, 2012, HM filed a complaint against Fortress alleging 10 causes of action for breach of contract, misappropriation of trade secrets, breach of fiduciary duty, violation of the unfair competition law (Bus. & Prof.

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[2] The parties stipulated to the amount of draws under the credit facility ($65 million), accrued interest, and other amounts totaling $185,675,943, but did not agree that all of those amounts should be included in calculating the secured debt and deficiency. HM disputed an $87 million early termination fee.

Code, § 17200 et seq.), violation of the California Commercial Code and New York Uniform Commercial Code (UCC), securities fraud (Corp. Code, §§ 25401, 25402), common law fraud, and unjust enrichment. HM demanded a jury trial.

Fortress demurred to several causes of action, arguing that they failed to state a valid cause of action under California law. Fortress noted that the CSA contained a choice-of-law provision designating New York law. Fortress argued: "Defendants cite to California law because the claims subject to this demurrer would fail regardless of whether New York or California law applies. Defendants reserve all rights to argue for the application of New York law." The trial court sustained a demurrer to the unjust enrichment cause of action without leave to amend on the grounds that there was no such cause of action under California law.

HM then filed a first amended complaint alleging 10 causes of action for breach of contract, breach of fiduciary duty, violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), violation of the California Commercial Code and New York UCC, promissory estoppel, constructive fraud, and intentional and negligent misrepresentation.

Fortress demurred to several noncontract causes of action alleged in the first amended complaint, this time arguing that the New York choice-of-law provision was enforceable and encompassed all causes of action arising from or related to the CSA. Fortress also moved to strike portions of the first amended complaint. HM argued in opposition that the choice-of-law provision must be interpreted under New York law, and that so interpreted the provision did not encompass the noncontract causes of action in the complaint, which therefore were governed by California law.

The trial court concluded that New York law applied to the challenged noncontract causes of action and requested supplemental briefing on the application of New York law. Following supplemental briefing, the court overruled the demurrers in part, sustained them in part with leave to amend, and denied the motion to strike.

HM then filed a second amended complaint alleging the same causes of action as the first amended complaint.

5. *The Cross-complaint*

Fortress answered the second amended complaint and filed a cross-complaint. Fortress's first amended cross-complaint filed on June 12, 2015, alleged causes of action against Brentwood for breach of contract and for a deficiency judgment under section 9-615, subdivision (d) of the New York UCC, among other causes of action. Fortress alleged that Brentwood breached the CSA by failing to pay its obligations under the CSA and failing to comply with its indemnity obligation under the CSA.

In its deficiency cause of action, Fortress alleged that it was entitled to a deficiency judgment under section 9-615, subdivision (d) of the New York UCC. Fortress alleged that the auction was commercially reasonable and the amount of the deficiency was $113,175.943.

6. *The Motions for Summary Adjudication*

On March 16, 2016, Fortress filed a series of four motions for summary adjudication collectively attacking all 10 causes of action alleged in the second amended complaint. On July 1, 2016, the trial court granted summary adjudication of the causes of action for breach of contract, breach of fiduciary duty, constructive fraud, and violation of the California Commercial Code and New York UCC, and denied summary adjudication of the causes of action for intentional and negligent misrepresentation and promissory

estoppel. The court treated the motion for summary adjudication of the unfair competition cause of action as a motion for judgment on the pleadings, and granted the motion with leave to amend to allege an unfair competition claim under New York common law.

7. *The Third Amended Complaint*

On July 8, 2016, HM filed the operative third amended complaint. The causes of action surviving after the summary adjudication ruling were: (1) unfair competition in violation of New York common law, (2) promissory estoppel, (3) negligent misrepresentation, and (4) intentional misrepresentation.

Fortress moved for summary adjudication of the unfair competition cause of action. The trial court denied the motion.

8. *The Jury Trial Waiver Ruling*

On July 26, 2016, HM moved to enforce its jury trial demand. HM argued that California law, rather than New York law, governed the enforceability of the CSA's jury trial waiver, and that under California law predispute contractual jury trial waivers are unenforceable. HM also argued that even if New York law applied, California's choice-of-law rules would preclude enforcement of the jury trial waiver because such enforcement would violate a fundamental policy of California.

On the same date, Fortress moved to enforce the CSA's jury trial waiver. Fortress argued that the trial court had already determined that the choice-of-law provision was enforceable. Fortress argued that New York law governed the enforceability of the jury trial waiver, pursuant to the choice-of-law provision, and that the remaining causes of action all arose directly or indirectly from the CSA. Fortress argued that California's choice-of-law rules did not preclude enforcement of the jury trial waiver because such

enforcement would not violate any fundamental policy of this state, and California did not have a materially greater interest than New York regarding such enforcement in this case.

The trial court concluded that New York law governed the enforceability of the jury trial waiver, pursuant to the CSA's choice-of-law provision, and that the waiver was enforceable under New York law. The court found that the enforcement of a predispute contractual jury trial waiver would violate a fundamental California policy, but California did not have a materially greater interest regarding such enforcement in this case. The court therefore concluded that California's choice-of-law rules did not preclude the enforcement of the jury trial waiver. The court granted Fortress's motion to enforce the jury trial waiver and denied HM's motion to enforce its jury trial demand.

9. *The Trial, Statement of Decision, and Judgment*

The trial court conducted a nonjury trial on HM's causes of action for intentional and negligent misrepresentation, promissory estoppel, and unfair competition, and Fortress's causes of action for breach of the CSA and deficiency.[3] At the conclusion of trial, Fortress moved for judgment (Code Civ. Proc., § 631.8) on all four of HM's causes of action. Applying New York law pursuant to the CSA's choice-of-law provision, the court granted the motion on all four causes of action. The court explained its ruling in a statement of decision.

The trial court found that HM's causes of action for intentional and negligent misrepresentation and promissory estoppel were all based on the same alleged representations that Fortress would lend an additional $20 million or, alternatively, would not allow HM to run out of money. The court

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[3] Fortress dismissed several of its causes of action before trial.

found that HM's sole witness to the alleged representations, Himelsein, was not a credible witness. Himelsein's trial testimony that HM's business was strong in 2009 and 2010 was contradicted by contemporaneous statements made to his business associates, and Himelsein did not adequately explain the contradictions at trial. The court also found that Himelsein's trial testimony on other business matters was not credible. The court specifically found that Himelsein's testimony regarding the purported assurances of new money was not credible and that Hutter's trial testimony via video deposition denying such statements was credible. The court concluded that HM had failed to prove a misrepresentation or promise, and therefore granted the motion for judgment on the three causes of action. The court also found that HM had failed to prove their unfair competition cause of action.

Applying New York law pursuant to the CSA's choice-of-law provision, the trial court found that Fortress was entitled to no relief on its cross-complaint because it failed to establish legally compensable damages. The court found that Fortress had established the essential elements of breach of contract with the exception of the element of damages. HM breached the CSA by failing to maintain sufficient funds in its premium reserve account. The court stated that under New York law the doctrine of avoidable consequences provided that "[d]amages awarded to the non-defaulting party to a contract will be determined and measured as though that party had made reasonable efforts to avoid the losses resulting from the default. *Papajoannou v. Sirocco Supper Club, Inc.* [*sic*] 75 Misc.2d 1001, 1002 (N.Y. App. Term 1973). If the court determines that the non-defaulting party has not acted reasonably to avoid damages, the actual award of damages for the breach will be reduced by the amount which could have reasonably been avoided. *Id.*"

The trial court found that the foreclosure auction was fraught with problems, including a lack of information available to potential bidders, a very short time frame for the auction, and Fortress's participation in the auction as a bidder. The $72.5 million sales price was a poor result. Months earlier, Fortress had reported to its investors that the collateral was worth $172 million. The court found that the auction was not a reasonable effort to avoid losses resulting from the default. Regarding the "as is" clause, the court stated that the clause did not relieve Fortress of its obligation to make reasonable efforts to avoid losses.

The trial court concluded:

> "The damages sought by Fortress—which rest on the assumption that the auction results were a reasonable effort to avoid the loss to plaintiffs and that damages can be fairly calculated as of the date of the failed auction—cannot be awarded. Fortress' damages are required to be determined and measured as though they had made reasonable efforts to avoid the losses resulting from the default.
>
> "[¶] . . . [¶]
>
> "While there are suggestions at what alternatives might have yielded in terms of auction results, defendants did not sponsor a witness nor admit a study that provided the needed evidentiary basis for such an assessment. This is not simply a question of picking a valuation of the portfolio (of which there were many). Rather, the factual questions to be answered are (1) what efforts would have been reasonable to avoid the loss to the parties due to the breach; (2) what proceeds would have resulted from such efforts (including, possibly, additional costs associated with having to pay premiums on the collateral), (3) what other expenses, including a proportional liquidated damages component for lost profit participation, could be claimed and (4) what damages could be awarded? While the defense invites the court to 'pick its own number,' such a selection would be entirely speculative.

> "Had Fortress sponsored a damage study that evaluated its damages in light of a reasonable strategy with regard to the Brentwood collateral, the complete absence of competent evidence with regard to damages might have been cured. Having chosen not to do so, there is no evidence of damages in light of the doctrine of avoidable consequences. As there is no competent evidence of legally compensable damages, defendants' the [*sic*] breach of contract cause of action is fatally deficient." (Fns. omitted.)

Regarding the deficiency cause of action, the trial court stated that under the New York UCC the disposition of collateral must be commercially reasonable. The court found that the auction was not commercially reasonable, and Fortress failed to present evidence of the likely proceeds of the auction had it been conducted in a commercially reasonable manner. The court stated that other evidence of the value of the collateral could not accurately measure "the deficiency that would have resulted had a commercially reasonable auction been conducted." The court concluded that Fortress had failed to prove the element of damages and therefore was entitled to no relief.

On January 6, 2017, the trial court entered a judgment awarding HM no relief on the complaint and awarding Fortress no relief on the cross-complaint.

DISCUSSION

1. *Predispute Contractual Jury Trial Waivers Are Unenforceable Under California Law*

The California Supreme Court in *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 961 (*Grafton*), held that predispute contractual jury trial waivers are unenforceable under California law. Article I, section 16 of the California Constitution states that the right to jury trial is "inviolate" and

that in a civil action any waiver of that right must be by consent of the parties "expressed as prescribed by statute." (See *Grafton*, *supra*, at p. 951, fn. 3, italics omitted.) Our Constitution treats the right to jury trial as "fundamental." (*Id.* at p. 951.)

Code of Civil Procedure section 631 implements this constitutional provision. Section 631 provides that the right to jury trial is "inviolate" and may be waived in a civil case only by prescribed methods: failure to appear at trial, written consent filed with the clerk or judge, oral consent in open court, failure to timely demand a jury trial, or failure to pay required jury fees. (Code Civ. Proc., § 631, subds. (a), (f); see *Grafton*, *supra*, 36 Cal.4th at pp. 951, 956-957.)

"[T]he framers of the Constitution intended to restrict to the Legislature the power and obligation to establish rules for jury waivers, because '[t]he right of trial by jury is too sacred in its character to be frittered away or committed to the uncontrolled caprice of every judge or magistrate in the State.' [Citation.] Later cases confirm that the right to trial by jury is considered so fundamental that ambiguity in the statute permitting such waivers must be 'resolved in favor of according to a litigant a jury trial.' [Citations.] Similarly, lower courts have observed that the right to trial by jury is so important that it must be 'zealously guarded' in the face of a claimed waiver [citation]. This has led to consistent interpretation of section 631 as providing strict and exclusive requirements for waiver of jury trial [citation] and requiring courts to resolve doubts in interpreting waiver provisions of section 631 in favor of a litigant's right to jury trial. [Citations.]" (*Grafton*, *supra*, 36 Cal.4th at p. 956.)

The specified methods for waiver under Code of Civil Procedure section 631 all presuppose a pending action. (*Grafton*, *supra*, 36 Cal.4th at pp. 957-

958.) A predispute agreement to waive a jury trial therefore is unenforceable. (*Id.* at pp. 958, 961.)

2. *The Trial Court Erred by Enforcing the Jury Trial Waiver Pursuant to the Choice-of-law Provision*

In deciding whether to enforce a contractual choice-of-law provision, California courts apply the principles set forth in section 187 of the Restatement Second of Conflict of Laws.[4] (*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 464-465 (*Nedlloyd*),)

The court first determines whether the chosen state has a substantial relationship to the parties or their transaction, or whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is satisfied, the inquiry ends and the court need not enforce the parties' choice of law. However, if either test is satisfied, the court must determine whether the chosen state's law is contrary to a fundamental California public policy. If there is no such conflict, the court must enforce the parties' choice of law. If the chosen state's law is contrary to a fundamental California policy, the court must determine whether California has a materially greater interest than the chosen state in the determination of the particular issue. If California has a materially greater interest, the court will not enforce the chosen law because to do so would be contrary to California's fundamental policy. (*Nedlloyd*, *supra*, 3 Cal.4th at p. 465.) This analysis presents a question of law that we review de novo if the material facts are undisputed.

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[4] HM argues that regardless of which state's substantive law applies California law governs all procedural matters, and the manner in which a party may waive the right to jury trial is a procedural matter. We need not decide this question because we conclude that even if we assume the enforceability of a predispute contractual jury trial waiver is a matter of substantive law, California's choice-of-law rules preclude the application of New York law permitting enforcement of the waiver.

(*Rincon EV Realty LLC v. CP III Rincon Towers, Inc.* (2017) 8 Cal.App.5th 1, 10 (*Rincon*).)

In *Rincon*, *supra*, 8 Cal.App.5th 1, the parties entered into loan and cash management agreements containing New York choice-of-law provisions and predispute jury trial waivers. (*Id*. at pp. 7-8.) After the defendants foreclosed on the collateral, the plaintiffs filed suit and demanded a jury trial. (*Id*. at pp. 7, 9.) The defendants argued that the jury trial waivers were enforceable under New York law pursuant to the choice-of-law provisions. The trial court agreed, granted the defendants' motion to strike the jury trial demand, and conducted a nonjury trial. (*Id*. at pp. 9-10.)

Applying the test from *Nedlloyd*, *supra*, 3 Cal.4th 459, the Court of Appeal concluded that New York had a substantial relationship to the parties and their transaction, and under New York law predispute contractual jury trial waivers are generally enforceable. (*Rincon*, *supra*, 8 Cal.App.5th at pp. 10-11.) However, in California the right to jury trial is fundamental, and the application of New York law to enforce the predispute jury trial waivers would be contrary to fundamental California policy. (*Id*. at pp. 12-14.)

Rincon stated, "the *Grafton* court interpreted and applied California constitutional and statutory provisions governing waiver of the right to jury trial. Although *Grafton* did not involve a choice-of-law question, the Supreme Court founded its analysis . . . on the premise that the right to jury trial in California is 'fundamental,' 'inviolate,' and '"sacred in its character."'" (*Rincon*, *supra*, 8 Cal.App.5th at p. 12.)

Rincon concluded that California had a materially greater interest in the determination of the enforceability of the contractual jury trial waivers. (*Rincon*, *supra*, 8 Cal.App.5th at pp. 10-11, 18.) Although New York had an interest in protecting the expectations of sophisticated commercial business

entities that negotiated and entered into contracts in New York, California's interest in protecting the fundamental right of all civil litigants in California courts to a jury trial was materially greater. (*Id.* at pp. 14-15.) This was true regardless of the fact that the plaintiffs were not California residents; California's policy prohibiting predispute contractual jury trial waivers protects the rights of all California litigants, regardless of their place of residence. (*Id.* at p. 16.) *Rincon* therefore concluded that the predispute jury trial waivers were unenforceable in California and the trial court erred in enforcing the parties' choice of law as to the waivers. (*Id.* at pp. 11, 18.) We agree with the reasoning and analysis in *Rincon*.[5]

The trial court here concluded that New York had a substantial relationship to the parties and their transaction. HMFM is a limited liability company organized under New York law. Fortress Investment and Fortress Credit have their principal place of business in New York and negotiated the CSA from their New York offices. Despite New York's substantial relationship to the parties and their transaction, for the same reasons articulated in *Rincon*, *supra*, 8 Cal.App.5th 1, we conclude that the application of New York law to enforce the predispute jury trial waivers here would be contrary to fundamental California public policy, and California has a materially greater interest in the determination of the enforceability of the waivers. We therefore conclude that the CSA's predispute jury trial waiver is unenforceable in California. The trial court erred by enforcing the parties' choice of law as to the waiver.

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[5] At the time of its ruling in September 2016, the trial court did not have the benefit of the later opinion in *Rincon*, *supra*, 8 Cal.App.5th 1.

3. *The Error Is Reversible Per Se*

Trial court error ordinarily does not justify a reversal unless the error is prejudicial. (Cal. Const., art VI, § 13; Code Civ. Proc., § 475; *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108.) However, errors that amount to a structural defect in the proceedings defy evaluation for harmlessness. (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 261 (*Sandquist*) [trial court erred by deciding whether arbitration agreement permitted class arbitration rather than allowing an arbitrator to decide that issue]; see *Monier*, at p. 1108.) Such errors are reversible per se without the need to demonstrate prejudice. (*Sandquist*, at p. 261.)

Denial of the right to jury trial is a structural error and is reversible per se. Harmless error analysis is inapplicable, and there is no need to demonstrate prejudice. (*People v. Collins* (2001) 26 Cal.4th 297, 313.) "[W]here a case improperly is tried to the court rather than to a jury, there is no opportunity meaningfully to assess the outcome that would have ensued in the absence of the error." (*Ibid.*) We cannot say whether a jury would have decided the case the same or differently, so the error "falls within that class requiring automatic reversal because its effects are '"immeasurable"' and '"def[y] analysis by 'harmless-error' standards."'" (*Sandquist*, *supra*, 1 Cal.5th at p. 261.)

Fortress argues that any reversal for denial of a jury trial should be limited to those causes of action for which there was a right to a jury trial: intentional and negligent misrepresentation. Fortress argues that there was no right to a jury trial on the promissory estoppel and unfair competition causes of action, so we should affirm the judgment on those causes of action. Fortress also argues that the trial court's finding that HM failed to prove any representation that Fortress would lend additional money would be binding

on remand and would defeat HM's misrepresentation causes of action, so a remand would be futile. We conclude that reversal is required on all causes of action tried by the court (intentional and negligent misrepresentation, promissory estoppel, and unfair competition), regardless of whether HM was entitled to a jury trial on all causes of action, as we shall explain.

The right to jury trial, if it exists, is the right to have the jury try and determine issues of fact. (*Shaw v. Superior Court* (2017) 2 Cal.5th 983, 993 (*Shaw*).) "'[T]he state constitutional right to jury trial "is the right as it existed . . . in 1850, when the [California] Constitution was first adopted."' [Citations.]" (*Id.* at p. 995.) "'As a general proposition, "[T]he jury trial is a matter of right in a civil action at law, but not in equity." [Citations.]'" (*Ibid.*)

"'"'If the action has to deal with ordinary common-law rights cognizable in courts of law, it is to that extent an action at law. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the *gist* of the action. A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law.'" [Citation.] On the other hand, if the action is essentially one in equity and the relief sought "depends upon the application of equitable doctrines," the parties are not entitled to a jury trial. [Citations.] Although we have said that "the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded" [citation], the prayer for relief in a particular case is not conclusive [citations].'" (*Shaw*, *supra*, 2 Cal.5th at p. 995.)

"'Complications arise when legal and equitable issues (causes of action, requested remedies, or defenses) are asserted in a single lawsuit. . . . In most

instances, separate equitable and legal issues are "kept distinct and separate," with legal issues triable by a jury and equitable issues triable by the court. [Citations.]' [Citation.] The order of trial in these mixed actions has 'great significance because the first fact finder may bind the second when determining factual issues common to the equitable and legal issues.' [Citation.] Generally, in mixed actions, the equitable issues should be tried first by the court, either with or without an advisory jury. [Citations.] Trial courts are encouraged to apply this 'equity first' rule because it promotes judicial economy by potentially obviating the need for a jury trial. [Citations.]" (*Darbun Enterprises, Inc. v. San Fernando Community Hospital* (2015) 239 Cal.App.4th 399, 408-409, fn. omitted (*Darbun*).) While courts are encouraged to try the equitable issues first, the order of trial is a matter within the trial court's discretion. (*Hoopes v. Doolan* (2008) 168 Cal.App.4th 146, 163; *DRG/Beverly Hills Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61-62.)

To avoid binding findings by the trial court and ensure a jury trial on common factual issues, a plaintiff may dismiss equitable claims and proceed to a jury trial on legal claims. (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671; *Darbun*, *supra*, 239 Cal.App.4th at pp. 411-412.)

HM's intentional and negligent misrepresentation, promissory estoppel, and unfair competition causes of action all are based in whole or in part on the same alleged representation that Fortress would lend Plaintiffs additional money. By denying a jury trial on the misrepresentation causes of action, the trial court denied HM the opportunity to have a jury decide whether Fortress made such a representation. If the court had ordered a jury trial on the misrepresentation causes of action first, the jury's factual findings would have been binding on the equitable claims. If the court had

stated its intention to try the equitable claims first, HM could have dismissed the equitable claims to ensure a jury trial on the legal claims.

Just as we cannot determine whether a jury would have decided the case the same or differently if the court had allowed a jury trial, we cannot determine whether the court would have tried the legal or equitable claims first and, if the latter, whether HM would have dismissed the equitable claims to ensure a jury trial on common factual issues. Because we cannot determine the impact of the denial of the right to jury trial without engaging in speculation, we conclude that the denial of a jury trial on the misrepresentation causes of action requires a reversal of the judgment on the promissory estoppel and unfair competition causes of action as well.[6]

Rincon, *supra*, 8 Cal.App.5th 1, does not persuade us to the contrary. *Rincon* held that the trial court erred by denying a jury trial on the plaintiffs' legal causes of action. The denial of a jury trial on the legal causes of action required reversal of the judgment on those causes of action, but did not justify reversing the judgment on equitable causes of action for which the plaintiffs were not entitled to a jury trial. (*Id.* at pp. 18, 21.) *Rincon* rejected as speculative the plaintiffs' argument that if the trial court had allowed a jury trial on the legal claims, it might have tried the legal issues first, and the jury might have made factual findings favorable to the plaintiffs that would have caused the trial court to find in the plaintiffs' favor on the equitable claims. (*Id.* at p. 20.) *Rincon* also rejected the argument that if the court had allowed a jury trial on the legal claims, the plaintiffs might have abandoned their equitable claims to ensure a jury trial on their legal claims. *Rincon* stated, "We fail to see how the possibility plaintiffs might have

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[6] For purposes of our analysis, we assume without deciding that the promissory estoppel and unfair competition causes of action are equitable.

dropped some of their equitable claims is a basis for reversing the judgment on those claims and allowing plaintiffs another chance to pursue them." (*Ibid*.)

We part company with the *Rincon* court on this issue. Although *Rincon* noted that the denial of a jury trial is structural error (*Rincon*, *supra*, 8 Cal.App.5th at p. 19), the published portion of the opinion did not discuss the disputed factual issues or the extent to which the legal and equitable issues were or were not interrelated. Furthermore it does not appear that the plaintiffs in *Rincon* argued that the trial court's findings on equitable issues should not be binding on their legal claims. Finally, the *Rincon* court relied solely on *Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468 (*Valley Crest*), for the proposition that "the erroneous denial of a jury trial on other claims provides no basis for reversing the judgment on the equitable claims." (*Rincon*, at p. 19.)

We believe the *Rincon* court read more into *Valley Crest* than is actually there. *Valley Crest* held that the trial court erroneously denied a jury trial on a legal cause of action and therefore reversed the judgment on that cause or action, while affirming the judgment on an equitable cause of action tried by the court. (*Valley Crest*, *supra*, 238 Cal.App.4th at p. 493.) The parties apparently did not dispute the scope of the reversal, and the opinion did not discuss the issue. An opinion is not authority for a proposition not considered. (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043.)

We agree with HM that the trial court's error deprived it of the opportunity to seek a jury trial on the legal causes of action first, or, in the alternative, dismiss its equitable claims. Whether the alleged false representation at the heart of all of HM's causes of action occurred is a

question of fact that is central to all of HM's causes of action adjudicated at trial. If the court had allowed a jury trial on the legal causes of action, we cannot presume the court would have tried the equitable issues first rather than allow a jury to resolve the central factual dispute.

A potential jury finding that Fortress made the alleged representation would be binding on the equitable claims and would support those claims. Moreover, the trial court's finding that there was no representation, if binding on the misrepresentation causes of action, would defeat those claims. We cannot presume HM would not have dismissed the equitable claims if the court had allowed a jury trial and decided to try the equitable claims first.

As we see it, Fortress's challenge to the speculative nature of these matters proves too much. Structural error affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminate* (1991) 499 U.S. 279, 310; *Aulisio v. Bancroft* (2014) 230 Cal.App.4th 1516, 1527.) Such errors are immeasurable and defy analysis by harmless error standards. (*Sandquist*, *supra*, 1 Cal.5th at p. 261.) Harmless error analysis does not apply when it would entail "a *speculative inquiry* into what might have occurred in an alternate universe." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150, italics added.) A defining feature of structural error is that its harmful effects "are 'necessarily unquantifiable and indeterminate,' [citation], such that 'any inquiry into its effects on the outcome of the case would be *purely speculative*.'" (*United States v. Gonzalez-Huerta* (10th Cir. 2005) 403 F.3d 727, 734, italics added.)

We therefore conclude that the denial of the right to jury trial in this case was a structural defect affecting more than only the legal causes of action and justifies a reversal of the judgment on any equitable causes of action as well.

4. *The Choice-of-law Provision Encompasses Only Contract Claims*

The CSA's choice-of-law provision stated, "THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK . . . ." The choice-of-law provision was part of the agreement, so the provision called for its own interpretation under New York law. The scope of the choice-of-law provision is a question of contract interpretation that should be decided under the parties' chosen law, the law of New York.[7] (*Nedlloyd*, *supra*, 3 Cal.4th at p. 469, fn. 7.)

In *Nedlloyd*, the choice-of-law provision stated, " 'This agreement shall be governed by and construed in accordance with Hong Kong law . . . ." (*Nedlloyd*, *supra*, 3 Cal.4th at p. 469, fn. 7, italics omitted.) The California Supreme Court explained: "The agreement, of course, includes the choice-of-law clause itself. Thus the question of whether that clause is ambiguous as to its scope (i.e., whether it includes the fiduciary duty claim) is a question of contract interpretation that in the normal course should be determined pursuant to Hong Kong law. [Citations.] The parties in this case, however, did not request judicial notice of Hong Kong law on this question of interpretation (Evid. Code, § 452, subd. (f)) or supply us with evidence of the relevant aspects of that law (Evid. Code, § 453, subd. (b).) The question therefore becomes one of California law. [Citations.]" (*Ibid*.)

The *Nedlloyd* court applied California law to the interpretation of the choice-of-law clause only because the parties failed to provide evidence of the law of a foreign state. (*Nedlloyd*, *supra*, 3 Cal.4th at p. 469, fn. 7; see *Olinick*

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[7] Unlike California courts, New York courts decide the scope of a choice-of-law provision under the law of the forum (i.e., New York) rather than under the law selected by the parties in the choice-of-law provision. (See *Finance One Pub. Co., v. Lehman Bros. Special Financing, Inc.* (2d Cir. 2005) 414 F.3d 325, 333; *Krock v. Lipsay* (2d Cir. 1996) 97 F.3d 640, 645.)

v. BMG Entertainment (2006) 138 Cal.App.4th 1286, 1299, fn. 9 [following *Nedlloyd* where the parties failed to provide information on New York law]; *Hambrecht & Quist Venture Partners v. American Medical Internat., Inc.* (1995) 38 Cal.App.4th 1532, 1540 [following *Nedlloyd* where the parties failed to provide information on Delaware law].)

Here, in contrast, HM argued in opposition to Fortress's demurrer to the first amended complaint that the choice-of-law provision should be interpreted under New York law. Both in the trial court and on appeal, HM cited state and federal cases applying New York law on the interpretation of choice-of-law provisions. We therefore will determine the scope of the choice-of-law clause under New York law. (See *JMP Sec. LLP v. Altair Nanotechnologies Inc.* (N.D.Cal. 2012) 880 F.Supp.2d 1029, 1036 (*JMP*) [applied New York law in determining the scope of a New York choice-of-law provision because the parties cited New York law, distinguishing *Nedlloyd* on this basis].)

Under New York law, the scope of a choice-of-law provision depends on the language in the provision. A provision stating that the *contract* is governed by the laws of a particular state does not encompass noncontractual causes of action.[8] (*Knieriemen v. Bache Halsey Stuart Shields, Inc.* (N.Y.Sup.Ct.App.Div. 1980) 74 A.D.2d 290, disapproved on other grounds in *Rescildo v. R.H. Macy's* (N.Y. Sup.Ct.App.Div. 1993) 187 A.D.2d 112.) In *Knieriemen*, a choice-of-law provision in a contract between a brokerage firm and its customer stated, "'[t]his contract shall be governed by the laws of the

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[8] Under California law, in contrast, a choice-of-law provision stating "that a specified body of law 'governs' the 'agreement' between the parties, encompasses all causes of action arising from or related to that agreement, regardless of how they are characterized, including tortious breaches of duties emanating from the agreement or the legal relationships it creates." (*Nedlloyd*, *supra*, 3 Cal.4th at p. 470.)

State of New York.'" (*Id.* at p. 293.) The court held that this provision did not encompass the customer's noncontract causes of action for negligence and churning. "That the parties agreed that their contract should be governed by an expressed procedure does not bind them as to causes of action sounding in tort . . . ." (*Ibid.*; see also *Krock v. Lipsay*, *supra*, 97 F.3d at p. 645 ["Under New York law, in order for a choice-of-law provision to apply to claims for tort arising incident to the contract, the express language of the provision must be 'sufficiently broad' as to encompass the entire relationship between the contracting parties]; *McBeth v. Porges* (S.D.N.Y. 2016) 171 F.Supp.3d 216, 223 [applying New York law, held a choice-of-law clause stating that Delaware law "'shall govern the validity of this Agreement, the construction of its terms and interpretation of the rights and duties of the Members'" did not encompass claims for fraudulent and negligent misrepresentation]; *JMP*, *supra*, 880 F.Supp.2d at p. 1033 [choice-of-law clause stating that the agreement "'shall be governed by and construed in accordance with'" New York law did not encompass claims for promissory estoppel, fraud, and negligent misrepresentation]; *Champlain Enterprises, Inc. v. U.S.* (N.D.N.Y. 1996) 945 F.Supp. 468, 471 ["Under New York law, a choice-of-law provision indicating that a contract will be governed by a certain body of law does not dictate the law that will govern non-contract based claims"].)

The choice-of-law provision in the CSA stated that "this agreement" would be "governed by, and construed in accordance with" New York law (capitalization omitted). Under New York law, this language did not encompass noncontract causes of action.

The choice-of-law provision did not refer more broadly to all disputes between the parties relating to their relationship under the agreement, or employ similar broad language. In contrast, the jury trial waiver provision

immediately following the choice-of-law provision referred to "litigation arising directly or indirectly out of, under or in connection with this agreement or any of the transactions contemplated hereunder." Comparing the narrowly worded choice-of-law provision with the broadly worded jury trial waiver provision compels the conclusion that the parties intended the scope of the choice-of-law provision to be narrow.[9] (See *Finance One*, *supra*, 414 F.3d at p. 335 [comparing a narrowly worded choice-of-law clause with a broadly worded forum selection clause, stated, "[t]he forum-selection and choice-of-law clauses use different language; there is no reason to think that they have the same scope"].)

5. *Upon Remand the Trial Court Must Decide Which State's Law Applies to HM's Causes of Action Adjudicated at Trial*

When there is no agreement that the law of another jurisdiction will govern the parties' dispute or a choice-of-law provision does not apply to a particular dispute, the governmental interest analysis determines which jurisdiction's law applies. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 915, 918-919.)

Under the governmental interest analysis, "[f]irst, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there

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[9] Defendants argue that regardless of the scope of the choice-of-law clause, the broadly worded jury waiver provision in the CSA encompasses both contract and noncontract causes of action. This argument is unavailing because we conclude that the jury waiver is unenforceable under California's choice-of-law rules, as stated.

is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law 'to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state' [citation], and then ultimately applies 'the law of the state whose interest would be the more impaired if its law were not applied.' [Citation.]" (*Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 107-108.)

Fortress did not argue in the trial court that New York law applied to HM's noncontract causes of action under the governmental interest analysis. Instead, Fortress relied on the choice-of-law provision, and the trial court agreed. We requested supplemental briefing on the governmental interest analysis after oral argument. In light of our partial reversal of the judgment and our conclusion that the CSA's choice-of-law provision encompasses only contract claims, the trial court in the first instance should decide whether the law of California, New York, or another jurisdiction governs HM's causes of action for intentional and negligent misrepresentation, promissory estoppel, unfair competition, and unjust enrichment (discussed *post*).

6. *HM Has Not Shown that California Law Applies to its Noncontract Causes of Action Adjudicated Before Trial*

HM contends the trial court erred by applying New York law rather than California law to its noncontract causes of action both at trial and in ruling on Fortress's demurrers and motions for summary adjudication. HM argues that California law governs because the CSA's choice-of-law provision encompasses only contract claims. But the absence of an applicable choice-of-law provision does not compel the conclusion that California law applies. The governmental interest analysis determines the choice of law. HM did not argue the governmental interest analysis in its opening brief on appeal, and

the cursory argument in its supplemental brief fails to show that California law applies to the causes of action adjudicated before trial. We therefore reject the contention that the trial court erred by applying New York law in ruling on the demurrers and motions for summary adjudication and express no opinion on the appropriate choice of law.

7. *HM Alleged a Valid Cause of Action for Unjust Enrichment*

HM contends the trial court erred by sustaining a demurrer to the unjust enrichment cause of action on the grounds that there is no such cause of action under California law. HM argues that unjust enrichment is a valid cause of action under either California or New York law.

Some courts state that there is no cause of action for unjust enrichment in California. (*Everett v. Mountains Recreation & Conservation Authority* (2015) 239 Cal.App.4th 541, 553; *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1138; *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793.) Other courts recognize such a cause of action. (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1132 (*Prakashpalan*) [stating the elements of an unjust enrichment claim]; *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593 (*Peterson*) [same]; *Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 722 (*Hirsch*) ["Appellants have stated a valid cause of action for unjust enrichment"].) Some courts state that unjust enrichment is synonymous with restitution and recognize a cause of action for restitution based on unjust enrichment. (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 231; *Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 233-234; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370.) Regardless of how the cause of action is labeled, California courts hold that a person who is unjustly enriched at the expense of another is liable for restitution. (*Ghirardo v.*

Antonioli (1996) 14 Cal.4th 39, 51 (*Ghirardo*); see Rest.3d Restitution and Unjust Enrichment, § 1.)

In *Ghirardo*, *supra*, 14 Cal.4th 39, a real property seller understated the amount due to payoff a loan. The seller realized his mistake after the deed of trust was reconveyed and demanded the remaining sum. He filed a cross-complaint against the purchaser alleging several causes of action, including a common count for payment of money. After a bench trial, the trial court denied relief on the cross-complaint. The Court of Appeal affirmed. (*Id*. at pp. 45-47.) The California Supreme Court held that the seller was entitled to relief "under traditional equitable principles of unjust enrichment." (*Id*. at p. 50.) The Supreme Court explained:

"Under the law of restitution, an individual may be required to make restitution if he is unjustly enriched at the expense of another. (Rest., Restitution, § 1, p. 12.) A person is enriched if he receives a benefit at another's expense. (*Id*., com. a, p. 12.) The term 'benefit' denotes any form of advantage. (*Id*., com. b., p. 12.) . . . Even when a person has received a benefit from another, he is required to make restitution 'only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.' (*Id*., com[.] c, p. 13.)" (*Ghirardo*, *supra*, 14 Cal.4th at p. 51.)

Ghirardo concluded, "The complaint set forth a common count 'for payment of money' that rests on a theory of unjust enrichment. The claim was adequately pleaded and proved." (*Ghirardo*, *supra*, 14 Cal.4th at p. 54.) *Ghirardo* therefore reversed the judgment with directions to enter judgment in the amount of the unpaid balance. (*Id*. at p. 55.)

We conclude that unjust enrichment is a valid cause of action under California law. (*Ghirardo*, *supra*, 14 Cal.4th at p. 54; *Prakashpalan*, *supra*,

223 Cal.App.4th at p. 1132; *Peterson*, *supra*, 164 Cal.App.4th at p. 1593; *Hirsch*, *supra*, 107 Cal.App.4th at p. 722.) The law of New York also recognizes a cause of action for unjust enrichment. (*E.J. Brooks Co. v. Cambridge Sec. Seals* (N.Y.Ct.App. 2018) 31 N.Y.3d 441 (*E.J. Brooks*).)

In its original complaint, HM alleged that Fortress was unjustly enriched by its misappropriation and misuse of HM's confidential and trade secret information, misrepresentations and omissions of material fact, and manipulative sale of the life settlements at a depressed price. HM alleged that in equity and good conscience, Fortress should not be permitted to retain the benefits obtained through this course of conduct. These allegations were sufficient to state a cause of action for unjust enrichment under California or New York law.[10] (*Prakashpalan*, *supra*, 223 Cal.App.4th at p. 1132; *E.J. Brooks*, *supra*, 31 N.Y.3d at p. 441.) Regardless of whether the law of California or New York applies, the sustaining of the demurrer to HM's unjust enrichment cause of action was error.

8. *We Need Not Review the Denial of Fortress's Motions for Summary Adjudication*

Fortress contends it was entitled to summary adjudication of HM's causes of action for intentional and negligent misrepresentation, promissory estoppel, and unfair competition. Fortress argues that we therefore should affirm the judgment regardless of whether the trial court erred by denying a jury trial.

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[10] The elements of unjust enrichment are essentially the same under California and New York law. (Compare *Prakashpalan*, *supra*, 223 Cal.App.4th at p. 1132, with *E.J. Brooks*, *supra*, 31 N.Y.3d at p. 441.) We reject Fortress's argument that HM waived its right to plead unjust enrichment by failing to allege a cause of action under New York law after the sustaining of the demurrer to HM's unjust enrichment cause of action.

Our reversal of the judgment on the intentional and negligent misrepresentation, promissory estoppel, and unfair competition causes of action places the parties in the same position as if those causes of action had never been tried. (*Weisenburg v. Cragholm* (1971) 5 Cal.3d 892, 896; *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 758.) Defendants did not seek writ relief after the denial of their motions for summary adjudication. (See Code Civ. Proc., § 437c, subd. (m)(1).) Such writ relief is extraordinary because a party ordinarily has an adequate remedy in an appeal from the judgment later entered. (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 7; Code Civ. Proc., § 1086.) Fortress does not argue and has not shown that a postjudgment appeal would be an inadequate remedy or that they would suffer any irreparable harm, and has shown no extraordinary circumstances justifying review of the pretrial rulings in this case. We therefore decline to review the denial of Fortress's motions for summary adjudication.

9. *The Trial Court Properly Denied Relief on Fortress's Deficiency Cause of Action*

a. *Contentions*

Fortress contends the trial court erred by denying relief on its deficiency cause of action. Fortress challenges the court's findings that the auction was not commercially reasonable and that Fortress failed to prove the amount of losses it would have suffered if the auction had been conducted in a commercially reasonable manner.[11]

Fortress argues that the parties may agree on a standard of commercial reasonableness in advance (see N.Y. UCC, § 1-302, subd. (b)) and, "the CSA

[11] The parties agree that New York law governs Fortress's causes of action for breach of contract and a deficiency. Fortress does not contend it was entitled to a jury trial on its cross-complaint.

prescribed that it would be commercially reasonable to sell the collateral 'as is,' with whatever diligence documentation it had in its possession." Fortress argues that the trial court erroneously ignored the "as is" clause in basing its finding that the auction was not commercially reasonable in part on the fact that the auction agent, Houlihan Lokey, failed to timely provide medical records and other due diligence information. Fortress also argues that the trial court erred by basing its finding that the auction was not commercially reasonable in part on the fact that Fortress participated in the auction as a credit bidder, which it was entitled to do as the secured party (see N.Y. UCC, § 9-610). Thus, Fortress argues that the court erred by basing its finding on improper considerations.

Regarding the amount of damages, Fortress argues that it presented evidence of the appraised fair market value of the collateral as of four weeks after the auction and other evidence that the fair market value was less than the amount of the secured debt, and HM presented no evidence to the contrary.

b. *Legal Framework*

Article 9 of the New York Uniform Commercial Code applies to any transaction that creates a security interest in personal property by contract. (N.Y. UCC, § 9-109, subd. (a)(1).) Thus, any contract that creates a security interest in personal property is governed by article 9. (*Ford Motor Credit Co., Inc. v. Racwell Constr., Inc.* (N.Y. Sup.Ct.App.Div. 2005) 24 A.D.3d 500 (*Ford Motor Credit*).) The CSA created a security interest in the life settlements and therefore was governed by article 9.

After a default, the secured party "may sell, lease, license, or otherwise dispose of any or all of the collateral. . . ." (N.Y. UCC, § 9-610, subd. (a).) The secured party must give timely notice before disposing of collateral, and the

disposition must be commercially reasonable. (*Id.*, §§ 9-610, subd. (b), 9-611, 9-612.) "Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." (*Id.*, § 9-610, subd. (b).)

"A disposition of collateral is made in a commercially reasonable manner if the disposition is made: [¶] (1) in the usual manner on any recognized market; [¶] (2) at the price current in any recognized market at the time of the disposition; or [¶] (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." (N.Y. UCC, § 9-627, subd. (b).) "The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner." (*Id.*, subd. (a).)

The parties may not waive the requirement that the disposition of collateral be commercially reasonable (N.Y. UCC, § 9-602), but they may agree on standards measuring the duties of a secured party provided "the standards are not manifestly unreasonable." (*Id.*, § 9-603; see *Federal Deposit Ins. Corp. v. Forte* (N.Y.Sup.Ct.App.Div. 1983) 94 A.D.2d 59, 66; *Federal Deposit Ins. Corp. v. Frank L. Marino Corp.* (N.Y.Sup.Ct.App.Div. 1980) 74 A.D.2d 620, 621; see also N.Y. UCC, § 1-302.)

Section 9-626, subdivision (a) of the New York Uniform Commercial Code provides that in any action arising from a secured transaction in which the amount of a deficiency is in issue, if the debtor claims the secured party disposed of collateral in a commercially unreasonable manner, the secured

party has the burden to prove that the disposition was commercially reasonable.[12] (*M & T Bank v. Sailor* (N.Y. Sup.Ct.App.Div. 2015) 131 A.D.3d 1017; *Ford Motor Credit*, *supra*, 24 A.D.3d at p. 501 [secured creditor "bore the burden of establishing that all aspects of the sale of the vehicle were commercially reasonable"].) If the secured party fails to prove that the disposition was commercially reasonable, the debtor's liability for a deficiency is limited to the lesser of (1) the difference between the amount of the secured obligation (plus expenses and attorney fees) and the sale proceeds, and (2) the difference between the amount of the secured obligation (plus expenses and attorney fees) and the proceeds that would have been realized had the disposition been commercially reasonable. (N.Y. UCC, § 9-626, subd. (a)(3).)[13]

There is a rebuttable presumption that the amount of proceeds that would have been realized had the disposition been commercially reasonable

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[12] Section 9-626, subdivision (a) of the New York UCC states, in relevant part: "(1) A secured party need not prove compliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue. [¶] (2) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this part."

[13] "Except as otherwise provided in Section 9-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of: [¶] (A) the proceeds of the collection, enforcement, disposition, or acceptance; or [¶] (B) the amount of proceeds that would have been realized had the non-complying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance." (N.Y. UCC, § 9-626, subd. (a)(3).) Section 9-628 sets forth certain limitations of liability that are not at issue here.

equals the amount of the secured obligation (plus expenses and attorney fees). (N.Y. UCC, § 9-626, subd. (a)(4).)[14] The secured party must present evidence to the contrary to overcome the presumption. (*Ibid.*) In other words, if the secured party fails to prove that the amount of proceeds that would have been realized in a commercially reasonable sale is less than the amount of the secured obligation (plus expenses and attorney fees), there is presumed to be no deficiency. (*Ford Motor Credit*, *supra*, 24 A.D.3d at p. 501.)

The official code comment on Uniform Commercial Code section 9-626 prepared by the American Law Institute and the National Conference of Commissioners of Uniform State Laws states: "Unless the secured party proves that compliance with the relevant provisions would have yielded a smaller amount, under paragraph (4) the amount that a complying collection, enforcement, or disposition would have yielded is deemed to be equal to the amount of the secured obligation, together with expenses and attorney's fees. Thus, the secured party may not recover any deficiency unless it meets this burden." (3 West's U. Laws Ann. (2010) U. Com. Code, rev. art. 9, § 9-626, p. 745.)

Ford Motor Credit, *supra*, 24 A.D.3d 500, involved an action to recover damages for breach of a lease. The defendants did not return the leased vehicle at the end of the lease term and did not exercise their option to purchase the vehicle. Several months after the end of the lease term, the plaintiff repossessed the vehicle and sold it at auction. The plaintiff filed suit to recover the difference between the price under the purchase option and the

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[14] "For purposes of paragraph (3)(B), the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than that sum." (N.Y. UCC, § 9-626, subd. (a)(4).)

sale proceeds (i.e. the deficiency), pursuant to a lease provision establishing that remedy in the event of default. The trial court granted summary judgment to the plaintiff on the issues of liability and damages. (*Id*. at pp. 500-501.) The appellate court concluded that the lease was a secured transaction governed by article 9 of the New York Uniform Commercial Code. Accordingly, the plaintiff had the burden to prove that all aspects of the sale were commercially reasonable (N.Y. UCC, § 9-626, subd. (a)(2)), but failed to do, so the plaintiff was not entitled to summary judgment on the issue of damages. (*Ford Motor Credit*, at p. 500.) The court stated that if the trier of fact ultimately determined that the sale was not commercially reasonable, the plaintiff could recover the deficiency only by proving "that the amount that would have been received at the sale of the vehicle, had the sale complied with the requirements of UCC article 9, would have been less than the amount of the obligation, attorney's fees, and expenses (see UCC 9-626[a][3] and [4].)" (*Id*. at p. 501.)

c. *Fortress Has Shown No Error in the Court's Finding That the Sale Was Not Commercially Reasonable*

The trial court concluded that the auction was not commercially reasonable because it was not made "(1) in the usual manner on any recognized market"; "(2) at the price current in any recognized market at the time of the disposition"; or "(3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." (N.Y. UCC, § 9-627, subd. (b)). The court stated that the $72.5 million sales price was much lower than the recent value estimates, including Fortress's own $172 million estimate reported to its investors months earlier, and "far below market value." The only bidder other than Fortress offered $20 million less than Fortress's $72.5 million

credit bid, and at the time Fortress acknowledged that the auction result was "lousy." Houlihan Lokey also stated that the sales price did not reflect the full market value.

The trial court stated that the auction was not conducted "in the usual manner" and was not "in conformity with reasonable commercial practices" because (1) medical records and other due diligence information was not made available until only two weeks before the extended date of the auction; (2) Fortress's participation in the auction as a credit bidder "caused a further diminution in market interest and suggests the possibility of self-dealing"; and (3) Fortress insisted on conducting the auction in a very short time frame.[15] The court emphasized that information essential to performing due diligence was not timely made available to potential bidders, reducing the pool of interested buyers. "[T]he auction failed to provide the market with a process that would allow it to participate intelligently in bidding on difficult-to-value assets."

The statement of decision stated in discussing the breach of contract cause of action that the "as is" clause "does not absolve defendants of their obligation to undertake reasonable efforts to avoid losses resulting from the default." The trial court did not mention the "as is" clause in discussing the deficiency cause of action. However, the court's emphasis on the importance to potential bidders of medical records and other due diligence information suggests a finding that it would be manifestly unreasonable for the parties to

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[15] The trial court addressed the breach of contract cause of action before addressing the deficiency cause of action. In discussing the failure to conduct a commercially reasonable auction in connection with the deficiency cause of action, the court referred to its prior discussion of the failure to make reasonable efforts to avoid losses in connection with the breach of contract cause of action.

agree to a standard of commercial reasonableness that would allow the sale of the collateral without providing such essential information.[16]

"[I]n the context of rights and duties after default, our legal system traditionally has looked with suspicion on agreements that limit the debtor's rights and free the secured party of its duties. . . . The context of default offers great opportunity for overreaching. The suspicious attitudes of the courts have been grounded in common sense." (3 West's U. Law Ann. (2010) U. Com. Code, rev. art. 9, com. 2 to § 9-602, p. 652.)

As explained by the trial court, potential bidders could not intelligently value the life settlements without medical records and other due diligence information on the insured individuals. To the extent the "as is" clause could be interpreted to allow Fortress to conduct a sale without providing such essential information, the clause was manifestly unreasonable and did not excuse the requirement of a commercially reasonable sale.

Regarding Fortress's participation in the auction as a credit bidder, the trial court did not suggest that it was improper for Fortress to make a credit bid, as allowed by section 9-610, subdivision (c) of the New York UCC, but only that its manner of doing so, while failing to provide important information to other bidders and compressing the time available to conduct due diligence, contributed to making the auction commercially unreasonable. Fortress has shown no error in this regard.

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[16] Fortress did not claim there was any omission or ambiguity in the statement of decision. Absent an objection to the statement of decision, we infer all findings in favor of the prevailing party. (Code Civ. Proc., § 634; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

d. *Fortress Has Shown No Error in the Court's Finding That it Failed to Prove the Amount of Losses*

The trial court concluded that Fortress failed to present evidence of the sales price that would have been achieved if the sale were commercially reasonable and "the factual bases for deductions to be taken from that result." The court stated, "While there are suggestions at what alternatives might have yielded in terms of auction results, defendants did not sponsor a witness nor admit a study that provided the needed evidentiary basis for such as assessment. This is not simply a question of picking a valuation of the portfolio (of which there were many). Rather, the factual questions to be answered are (1) what efforts would have been reasonable to avoid the loss to the parties due to the breach; (2) what proceeds would have resulted from such efforts (including, possibly, additional costs associated with having to pay premiums on the collateral), (3) what other expenses, including a proportional liquidated damages component for lost profit participation, could be claimed and (4) what damages could be awarded? While the defense invites the court to 'pick its own number,' such a selection would be entirely speculative." (Fn. omitted.)

The court stated, "At closing, defendants attempted to remedy the absence of competent testimony on this issue during trial. Fortress' counsel proffered a number of alternative valuations of the collateral and invited the court to speculate as to what might have been done to improve the results of the auction, and further to assign one of those numbers as the 'but for' result had those efforts been undertaken and then to compute a sum due and owing under the contract. As none of these facts were sponsored by any witness during the trial, the court declines to participate in such rank speculation." (Fns. omitted.)

"As with the breach of contract cause of action, defendants sponsored no testimony regarding what Fortress may have been entitled to if the auction had been conducted in a commercially reasonable way. While there was evidence adduced that the portfolio value increased significantly with the passage of a short period of time and with greater information being developed by Fortress, there was no effort to quantify the 'amount of proceeds that would have been realized' had the secured party 'proceeded in accordance with the provisions of the U.C.C.' *See* N.Y. U.C.C. §§ 9-626(a)(3)(B), 9-626(a)(4); *Coxall* [*v. Clover Commercial Corp.* (N.Y.Civ.Ct. 2004) 4 Misc.3d 654, 665.]. Moreover, a flurry of portfolio valuations taken from disparate documents—none of which were intended to measure the deficiency that would have resulted had a commercially reasonable auction been conducted—affords the court no competent basis upon which to compute an independent measure of damage. The court, therefore, declines to engage [in] such a speculative and baseless exercise."

We generally review the trial court's factual findings under the substantial evidence test. "Substantial evidence is evidence that a rational trier of fact could find to be reasonable, credible, and of solid value. We view the evidence in the light most favorable to the judgment and accept as true all evidence tending to support the judgment, including all facts that reasonably can be deduced from the evidence. The evidence is sufficient to support a factual finding only if an examination of the entire record viewed in this light discloses substantial evidence to support the finding." (*Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 99.)

The substantial evidence test can be misleading, however, in cases where the judgment is based on a party's failure to satisfy its burden of proof. In such cases, the question on appeal is not the sufficiency of the evidence

supporting the factual finding, but whether the evidence compels a finding in favor of the appellant as a matter of law. (*Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 302; *Eriksson v. Nunnick* (2015) 233 Cal.App.4th 708, 732-733; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 279.) "'Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." [Citations.]'" (*In re R.V.* (2015) 61 Cal.4th 181, 218.)

Fortress argues that it presented evidence of an appraisal of the "fair value" of the collateral as of June 30, 2011, only four weeks after the auction, conducted by an independent appraisal firm. According to Fortress, the appraiser, Empire Valuation Consultants (Empire), found that the fair value of the collateral was $71,914,483. Fortress argues that HM did not offer any evidence challenging the appraisal, yet the trial court disregarded the appraisal because it used a discount rate of 20.5 percent, which the court said was "more than six percent higher than the discount rate that Fortress had used in disclosing the loan's asset value to its investors months earlier" and the discount rate used by the parties to value the collateral for the credit facility.

The Empire appraisal report stated that Fortress had supplied the fair values ("It should be noted the fair values of the Investments were supplied to Empire by Fortress Investment Group, LLC") and asked Empire "to assess the reasonableness of the fair value of the life settlement pool." The report stated, "It is Empire's understanding that this assessment will be used by Fortress to serve as a valuation basis for internal management planning, management's determination of net asset value and profit and loss

calculations, and financial reporting with respect to Fortress' managed funds and accounts." The report stated further, "At your request, this report has been prepared as a Restricted Use Appraisal Report as defined in Standards Rule 10 of The Appraisal Foundation's Uniform Standards of Professional Appraisal Practice ('USPAP'), which specifically applies to the preparation of valuation reports of business interests. As such, this report is for the exclusive use of you and, at your request, those of your advisors who have the requisite knowledge to understand the risks, opportunities, and the valuation theories and analyses discussed and applied in this situation, since this report may not be understood properly by other readers without additional information contained in Empire's work files."

The report's valuation summary stated, "subject to the attached Statement of Limiting Conditions, it is Empire's assessment that the fair value of the [life settlement pool] is reasonably stated at $71,914,483 as of June 30, 2011, for use by Fortress to serve as a valuation basis for internal management planning, management's determination of net asset value and profit and loss calculations and financial reporting with respect to Fortress' managed funds and accounts. This appraisal is not intended for any other purpose nor for any other users and the sharing of the contents herein is not permitted without the express written consent of Empire."

Thus, the Empire appraisal was not a complete, independent appraisal, but a restricted use appraisal based on Fortress's own fair value estimates and intended for Fortress's own internal use and financial reporting. The report was not compelling evidence of fair market value.

Fortress also argues that other evidence showed overwhelmingly that the value of the collateral was less than the $185.7 million value of the secured debt. Fortress cites (1) its own preliminary valuation of the collateral

performed in December 2010 based on its purchase of another portfolio of life settlements, finding an estimated value of $94 million; (2) Fortress's analysis in February 2011 showing that if the auction were held in May 2011 it would yield $105 million; (3) emails from Himelsein to investors in February 2011 stating that his efforts to find new financing were unsuccessful, that there was "very limited appetite" for life settlements at the time, and, regarding the auction price, "I would hope for 10%, and can see as low as 5.5%"; (4) an email from Houlihan Lokey in February 2011 stating an expected auction sales price of $100 million; (5) an analysis by Fortress shortly before the auction estimating an auction sales price around $42 million; (6) evidence that the only other bid at the auction was $55 million, significantly less than Fortress's $72.5 million credit bid; and (7) evidence that Fortress eventually obtained $144.6 million in proceeds from the collateral, having paid $58.4 in premiums after the auction, so Fortress realized $86.2 million in value, which is only $13.7 million more than it paid for the collateral.

The evidence cited by Fortress consists mainly of trial testimony and emails briefly mentioning Fortress's or Houlihan Lokey's estimates of how much the auction would yield, and other disparate items of evidence. The cited evidence contains no rigorous value analysis or fair market value appraisal. To the extent the estimates were based on what was then known about the expected auction, including the limited information available to potential bidders, short time frame, and other shortcomings, they reflected those shortcomings and did not show what a commercially reasonable disposition would yield.

Contrary to Fortress's argument, the Empire appraisal and other evidence cited do not compel a finding as a matter of law that Fortress would have suffered a loss even if the auction had been conducted in a commercially

reasonable manner and do not compel a finding as to the amount of such loss. We therefore conclude that Fortress has shown no error in the finding that Fortress failed to prove the amount of losses it would have suffered if the auction had been conducted in a commercially reasonable manner.

10. *Fortress Is Not Entitled to Damages for Breach of Contract*

Fortress contends the trial court erred by denying relief on its breach of contract cause of action. Fortress argues that the court erred in applying the doctrine of avoidable consequences by placing the burden on Fortress to prove the amount of damages it would have suffered if it had made reasonable efforts to avoid losses, rather than placing the burden on HM to prove Fortress's failure to mitigate damages as an affirmative defense.

The common law doctrine of avoidable consequences provides that a person injured by another's wrongful conduct cannot recover damages that could have been avoided by reasonable effort or expenditure. The doctrine applies in both tort and contract actions. (Rest.2d Torts, § 918, subd. (1); Rest.2d Contracts, § 350, subd. (1); *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042-1043.) The doctrine of avoidable consequences is a rule regarding mitigation of damages. (*Jenkins v. Etlinger* (N.Y.Ct.App. 1982) 447 N.Y.S.2d 696, 698 (*Jenkins*).)

Under the doctrine of avoidable consequences as recognized in the State of New York, the burden is on the wrongdoer to show that the injured party unreasonably failed to minimize damages.[17] (*Jenkins*, *supra*, 447 N.Y.S.2d at p. 698; *Federal Ins. Co. v. Sabine Towing & Transp. Co., Inc.* (2d Cir. 1986) 783 F.2d 347, 350 [applying New York law].) Under article 9 of the

[17] The same is true under California law. (*State Dept. of Health Services v. Superior Court*, *supra*, 31 Cal.4th at p. 1044.)

New York UCC, however, the secured party has the burden of proof on issues involving the amount of a deficiency, as stated.

The New York UCC preempts the common law to the extent of any conflict. (N.Y. UCC, § 1-103.) Section 1-103 states that the common law supplements the New York UCC, "[u]nless displaced by the particular provisions of this act." The official code comment states, "the Uniform Commercial Code is the primary source of commercial law rules in areas that it governs, and its rules represent choices made by its drafters and the enacting legislatures about the appropriate policies to be furthered in the transactions it covers. Therefore, while principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to *supplant* its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such a provision, the Uniform Commercial Code preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies." (1 West's U. Laws Ann. (2012) U. Com. Code, rev. art. 1, com. 2 to § 1-103, pp. 15-16.)

Section 9-626, subdivision (a) of the New York UCC provides that in any action arising from a secured transaction in which the amount of a deficiency is in issue, if the debtor claims the secured party disposed of collateral in a commercially unreasonable manner, the secured party has the burden to prove that the disposition was commercially reasonable. There is a rebuttable presumption that the amount of proceeds that would have been realized had the disposition been commercially reasonable equals the amount of the secured obligation (plus expenses and attorney fees), and the secured party must present evidence to the contrary to overcome the presumption. (N.Y. UCC, § 9-626, subd. (a)(4).) We conclude that to the extent a dispute

involves the disposition of collateral and the amount of a deficiency, section 9-626 preempts the rule under the doctrine of avoidable consequences with respect to allocation of the burden of proof.

Fortress argues that its breach of contract cause of action does not seek to recover the deficiency, but instead seeks "restitution of the out-of-pocket losses it incurred" as a result of HM's failure to repay the loan. Fortress calculates those losses as the difference between (1) the loan principal ($65 million) plus payments for premiums, servicing, and operating expenses made by Fortress after the default and after acquiring the life settlements in the auction, and (2) HM's interest and fee payments plus death benefits that Fortress received after acquiring the life settlements, and proceeds from its sales of policies to third parties. Fortress acknowledges that a deficiency judgment would compensate for those losses, but argues that it did not receive a deficiency judgment so there is no duplication.

We conclude that the out-of-pocket losses Fortress seeks to recover in its breach of contract cause of action constitute a measure of the deficiency, so the amount of the deficiency is in issue. Fortress as the secured party had the burden to prove that the sale was commercially reasonable and, if it was not commercially reasonable, the amount of proceeds that would have been realized in a commercially reasonable sale. As stated above with respect to the deficiency cause of action, Fortress failed to carry its burden.

DISPOSITION

The judgment is reversed as to HM's causes of action for intentional and negligent misrepresentation, promissory estoppel, unfair competition, and unjust enrichment, with directions to the trial court to determine which

state's law governs those causes of action by applying the governmental interest analysis. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MICON, J.*

We concur:

MANELLA, P. J.

WILLHITE, J.

*Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.