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20 CENTRAL DISTRICT OF CALIFORNIA

21 JOHN GARAMENDI, as Insurance
Commissioner of the State of
22 California and as Conservator,
Rehabilitator and Liquidator of
23 Executive Life Insurance Company,

24 Plaintiff,

25 v.

26 ALTUS FINANCE S.A., et al.,

27 Defendants.
28

Case No. CV-99-02829 RGK (CWx)
consolidated for trial purposes with
Case No.: CV-01-01339 RGK (CWx)

**RESPONSE TO ARTEMIS’S POST-
TRIAL BRIEF REGARDING
RESTITUTION**

Trial Date: October 17, 2012
Judge: Hon. R. Gary Klausner
Courtroom: 850

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FEDERAL CASES

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1 **I. INTRODUCTION**

2 As the jury found in the first trial, Artemis knowingly participated in a
3 fraudulent conspiracy that harmed the ELIC Estate, repeatedly concealed and
4 misrepresented its knowledge of this conspiracy in sworn regulatory filings with the
5 Commissioner and did so with malice, fraud or oppression. As a direct result of its
6 participation in the conspiracy, Artemis has received profits that are now worth
7 more than \$1.5 billion from former assets of ELIC that Artemis obtained from its
8 co-conspirators. Under these circumstances, equity requires that Artemis disgorge
9 its profits from the conspiracy.

10 Artemis’s Post-Trial Brief Regarding Restitution (“Artemis Brief”) argues
11 that Artemis should keep all of its ill-gotten gains. Artemis’s arguments lack any
12 merit, and most of them were expressly rejected by Judge Matz when he ordered
13 restitution after the first trial. *See Garamendi v. Altus Fin. S.A.*, 2005 U.S. Dist.
14 LEXIS 39273 (C.D. Cal. Nov. 21, 2005). In particular, Judge Matz held that:

- 15 • Artemis received a benefit from its participation in the fraudulent
16 conspiracy, and it would be unjust to allow Artemis to retain all of that
17 benefit, *id.* at *43-44;
- 18 • Restitution is required by California Civil Code section 3517, which
19 provides that “no one can take ‘advantage of his own wrong,’” *id.* at
20 *47;
- 21 • The public interest in vindicating California’s statutory framework for
22 insurance regulation is served by awarding restitution, *id.* at *47-48;
- 23 • The Commissioner is entitled to restitution even though he did not
24 recover compensatory damages, *id.* at *45-46;
- 25 • The Commissioner’s receipt of fair market value for the junk bonds
26 does not prevent him from recovering restitution, *id.* at *45-46;
- 27 • The fact that the Commissioner did not transfer any assets directly to
28 Artemis does not preclude restitution, *id.* at *44; and

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- 1 • The Commissioner’s restitution claim is not barred by the
2 Rehabilitation Plan for the ELIC Estate or any other contract, *id.* at
3 *47.

4 These conclusions are supported by ample legal authority, as shown below, and
5 they require an award of restitution here.

6 Artemis now argues incorrectly that the second jury’s rejection of the
7 NOLHGA Premise bars any award of restitution. Here again, Judge Matz’s
8 conclusions are instructive: he awarded restitution even though he concluded that
9 the first jury had rejected the NOLHGA Premise.

10 Artemis contends that the recent verdict supposedly shows that the jury must
11 have found that, even if there had been no conspiracy, the Commissioner still
12 would have picked the Altus/MAAF bid, so the conspiracy allegedly was not the
13 “but for” cause of any harm. In fact, the second jury’s verdict does not even
14 mention the Altus/MAAF bid. Instead, that jury found only that the Commissioner
15 had not proven that, but for the conspiracy, he probably would have entered in a
16 transaction with NOLHGA. Moreover, the second jury’s verdict on the NOLHGA
17 Premise did not – and legally could not – nullify the first jury’s findings of
18 Artemis’s wrongdoing and the conspiracy’s harm to the ELIC Estate. These
19 findings by the first jury, which remain binding, require restitution by Artemis.

20 In addition, unlike this Court’s instruction to the jury for its determination of
21 damages, “but for” causation is not required for an award of restitution. Among
22 other reasons, requiring such causation would undermine the equitable policy that
23 wrongdoers should not be allowed to profit from proven wrongdoing and that future
24 wrongdoing should be discouraged.

25 The second jury’s verdict is also irrelevant to the issue of restitution because
26 that jury was asked to decide the NOLHGA Premise, for purposes of damages only,
27 by determining what the Commissioner would have done if the conspiracy had
28 never happened. By contrast, in deciding restitution, this Court should not assume

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1 there was no conspiracy but instead should determine whether the conspiracy found
2 by the first jury requires restitution by Artemis. In other words, the Court's
3 decision on restitution should be based on the real world, where the first jury found
4 that the conspiracy actually occurred and caused harm, and not a hypothetical world
5 where there was no conspiracy, as the second jury was asked to assume when
6 deciding the NOLHGA Premise.

7 Artemis also argues that California law does not authorize a claim for unjust
8 enrichment, but Artemis's own authorities show that California law does authorize
9 claims for restitution that are based on unjust enrichment. Judge Matz awarded
10 such restitution here, and the Ninth Circuit expressly granted leave to reinstate that
11 award, if warranted, so Artemis's argument has no merit.

12 Accordingly, the Commissioner and NOLHGA request this Court to award
13 restitution, as Judge Matz did, but they request that the amount of that award be
14 increased, as explained in their prior brief. *See Dkt. No. 4323*. Simply reinstating
15 the prior award would allow Artemis to keep more than 90% of its profits from the
16 conspiracy. *Id. at 7-11*. Instead, Artemis should be required to disgorge all, or at
17 least most, of these profits. At a minimum, even if the Court adopts Judge Matz's
18 reasoning and formula for limited restitution, the Commissioner and NOLHGA
19 request that the Court increase the award to reflect the actual sales price of
20 Artemis's interest in NCLH/Aurora and the accrual of prejudgment interest since
21 the date of the last award.¹ *See id. at 11-14*.

22 _____
23 ¹ Artemis has submitted Proposed Findings of Fact and Conclusions of Law
24 even though the Court did not request this submission or set a briefing schedule that
25 allowed time to respond to such a lengthy and detailed pleading. *See Dkt. No.*
4324-1. The Commissioner and NOLHGA believe that it is premature and wasteful
to submit or respond to such Findings of Fact and Conclusions of Law before the
Court decides whether and how much restitution will be awarded.

26 The Commissioner and NOLHGA reserve all objections to Artemis's
27 Proposed Findings of Fact and Conclusions of Law, which presents an incomplete
28 and highly misleading version of the facts and prior rulings in this case. Among
other defects, this pleading includes citations to evidence that was never presented
to this Court. *See, e.g., Dkt. No. 4324-1, paras. 91-96*. Even worse, this pleading
(footnote continued on next page)

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1 **II. THE JURY VERDICTS DO NOT PRECLUDE AN AWARD OF**
2 **RESTITUTION**

3 Artemis correctly states that, in deciding the issue of restitution, this Court
4 must follow the prior juries' findings. *See Artemis Brief at 5-6.* Artemis is wrong,
5 however, when it argues that these findings preclude any award of restitution.

6 In fact, the first jury found that Artemis knowingly joined a conspiracy to
7 obtain the assets of the ELIC Estate and that this conspiracy "cause[d] harm to the
8 ELIC Estate." *See Dkt. No. 3173: Phase I Verdict Form 5.* Artemis's argument
9 that the conspiracy had no impact whatsoever on the ELIC Estate is inconsistent
10 with these verdicts.

11 The first jury's findings of wrongdoing and harm distinguish this case from
12 the cases cited by Artemis where there was no wrongdoing or no harm. *See Cleary*
13 *v. Phillip Morris Inc.*, 656 F.3d 511, 518 (7th Cir. 2011) (affirming dismissal of
14 restitution claim because "plaintiffs do not allege that they suffered any harm"); *Ag*
15 *Servs. of Am., Inc. v. Nielsen*, 231 F.3d 726, 733 (10th Cir. 2000) (reversing
16 restitution award because jury "completely exonerated" appellant on all legal
17 claims and therefore must have found that he "did not participate in or ratify the
18 conversion" by other defendant); *Chase Manhattan Bank, N.A. v. T&N PLC*, 1996
19 U.S. Dist. LEXIS 15577 at *10-11 (S.D.N.Y. Oct. 22, 1996) (jury finding that
20 product was not defective precluded award of restitution); *Dinosaur Dev., Inc. v.*
21 *White*, 216 Cal. App. 3d 1310, 1313 (1989) (affirming dismissal of restitution case
22

23 cites evidence that was specifically excluded by this Court. *See, e.g., id., para. 83*
24 (quoting David Walsh, former Alaska Director of Insurance); *10/24/12 Trial*
Transcript at 77 (Court's ruling excluding Walsh's testimony).

25 Moreover, Artemis proposes findings and conclusions that are directly
26 contrary to the prior jury verdicts. For example, the prior jury explicitly found that
27 the Commissioner did not have reason to know about the conspiracy to defraud him
28 prior to 1996. *See Dkt. No. 3173: Phase I Verdict Form 8(3).* Nevertheless,
Artemis proposes an entire section of "findings" that the Commissioner knew or
had reason to know about the fraudulent conspiracy in 1991. *See Dkt. No. 4324-1,*
Section II(C)(2)(a).

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1 where defendant was not guilty of any wrongdoing but emphasizing that holding “is
2 limited to the peculiar situation presented”).

3 Artemis argues that the second jury conclusively determined that the
4 conspiracy did not cause the transfer of ELIC’s assets to Altus/MAAF, but that
5 jury’s verdict did not even mention Altus/MAAF. In fact, the jury in the recent trial
6 found only that the Commissioner had not met his burden of proving that “but for
7 the conspiracy to defraud he probably would have entered into a transaction with
8 NOLHGA for the benefit of the ELIC Estate.” *See Dkt. No. 4301: Verdict Form,*
9 *Question 1.*

10 Moreover, the Commissioner does not need to prove “but for” causation to
11 recover restitution here. As the Restatement explains:

12 “[N]either the presence nor the absence of a causal link between the
13 defendant’s wrongdoing and the defendant’s profit will be conclusive
14 in all cases on the ultimate issue of unjust enrichment. **Absence of
15 but-for causation does not necessarily exonerate the wrongdoer,**
because a finding that the defendant would have realized the profit in
any event does not compel the conclusion that the defendant, under the
circumstances, has not been unjustly enriched.

16 Restatement (Third) of Restitution § 51, cmt. f (emphasis added). *See also id.,*
17 § 13, cmt. h (restitution is permitted even if defendant’s misrepresentation is not
18 “the legal cause of plaintiff’s injury”). Requiring “but for” causation for restitution
19 would undermine the equitable policies that no one should profit from his own
20 wrong and that allowing wrongdoers to keep their profits would encourage future
21 wrongdoing.

22 Here, the second jury was asked to determine (for purposes of damages only)
23 if the Commissioner would have accepted the NOLHGA bid if there had been no
24 conspiracy. When deciding restitution, however, this Court cannot assume there
25 was no conspiracy. Instead, it must decide whether the proven conspiracy justifies
26 restitution. In the real world, as opposed to the hypothetical world that the second
27 jury was asked to assume, Artemis received tremendous profits as a result of – and
28 as compensation for – participating in the actual conspiracy and hiding the other

1 conspirators’ wrongdoing. Accordingly, Artemis has been unjustly enriched and
2 should be ordered to make restitution.

3 **III. THE COMMISSIONER’S FAILURE TO RECOVER DAMAGES**
4 **DOES NOT PRECLUDE AN AWARD OF RESTITUTION**

5 Artemis argues that restitution is barred because neither jury awarded any
6 damages, but proof of damages or loss is not required to recover restitution under
7 California law.² For example, *County of San Bernardino v. Walsh*, 158 Cal. App.
8 4th 533 (2007), affirmed an award of restitution to the County of all bribes and
9 kickbacks that had been paid to the defendant County officials by private third
10 parties, even though the County had not proven that the bribes and kickbacks had
11 caused the County any loss or damages. The court explained:

12 The principle of unjust enrichment ... is broader than mere
13 “restoration” of what the plaintiff lost.... **[T]he public policy of this**
14 **state does not permit one to take advantage of his own wrong**
15 **regardless of whether the other party suffers actual damage....**
16 Where a benefit has been received by the defendant but the plaintiff
17 has not suffered a corresponding loss or, in some cases, any loss, but
18 nevertheless the enrichment of the defendant would be unjust ... the
19 defendant may be under a duty to give to the plaintiff the amount by
20 which [the defendant] has been enriched....

21 ... **The emphasis is on the wrongdoer’s enrichment, not the**
22 **victim’s loss.** In particular, a person acting in conscious disregard of
23 the rights of another should be required to disgorge all profit because
24 disgorgement both benefits the injured parties and deters the
25 perpetrator from committing the same unlawful actions again....
26 Without this result, there would be an insufficient deterrent to
27 improper conduct that is more profitable than lawful conduct.

28 *Id.* at 542-43.

San Bernardino’s conclusion follows well-established principles governing
restitution. *See* Restatement (Third) of Restitution, § 13, cmt. h (restitution is
permitted even if defendant’s misrepresentation “would not support a claim for
damages in tort”); *1 Palmer, The Law of Restitution § 2.10 at 134* (“[T]he decisions

² The Commissioner and NOLHGA reserve all objections to the second jury’s
verdict regarding the NOLHGA Premise, and nothing stated herein should be
construed as a concession that that verdict was correct.

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1 amply demonstrate that economic loss is not a requisite” for restitution.); *Cleary*,
2 656 F.3d at 518 (7th Cir. 2011) (holding that plaintiff “need not show loss or
3 damages” to recover restitution); *Engel v. Engel*, 902 P.2d 442, 445 (Colo. 1995)
4 (“In some [restitution] situations, ... a benefit has been received by one, but the
5 other has not suffered a corresponding loss. In such cases, the benefit recipient is
6 under a duty to give to the other the amount by which he or she has been
7 enriched.”).

8 After the first trial, Judge Matz rejected the argument that the
9 Commissioner’s failure to recover damages, including damages under the
10 NOLHGA Premise, precluded restitution. He “construed the [first] jury’s inability
11 to return a verdict form on Verdict 7 [regarding the NOLHGA Premise] as a failure
12 of proof.” *California v. Altus Fin., S.A.*, 540 F.3d 992, 999 (9th Cir. 2008).
13 Nevertheless, he concluded that the Commissioner was entitled to restitution from
14 Artemis despite this perceived failure of proof. *See Garamendi*, 2005 U.S. Dist.
15 LEXIS 39273 at *47. In particular, Judge Matz held that “[t]he jury’s finding that
16 the Commissioner was entitled to no compensatory damages does not flatly bar the
17 Commissioner’s restitution claim.” *Id.*, citing Restatement of Restitution § 1,
18 cmt. e (1937); *Ward v. Taggart*, 51 Cal. 2d 736, 741 (1959) and *Coleman v. Ladd*
19 *Ford Co.*, 215 Cal. App. 2d 90, 93-94 (1963). He stressed that, even though no
20 damages were proven, awarding restitution here “is consistent with the principle
21 embodied in Cal. Civil Code § 3517 that no one ‘can take advantage of his own
22 wrong.’” *Garamendi*, 2005 U.S. Dist. LEXIS 39273 at *47.

23 In short, the second jury’s finding that the Commissioner has not proven the
24 NOLHGA Premise in the hypothetical world, assuming no conspiracy, does not
25 entitle Artemis to retain the fruits of its fraud in the real world. The Commissioner
26 can recover restitution even though he did not recover damages.

27
28

1 **IV. CALIFORNIA LAW RECOGNIZES CLAIMS FOR RESTITUTION**
2 **BASED ON UNJUST ENRICHMENT**

3 Artemis argues that there is no claim for **unjust enrichment** under California
4 law, but neither Artemis nor any of the authorities it cites say that there is no claim
5 for **restitution** based on unjust enrichment under California law. *See Artemis Brief*
6 *at 8.*³ In fact, many of the cases cited by Artemis explicitly state that a plaintiff can
7 bring a claim for restitution under California law when a defendant has been
8 unjustly enriched. *See Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370
9 (2010) (holding that “restitution may be awarded where the defendant obtained a
10 benefit from the plaintiff by fraud”); *McKell v. Washington Mutual, Inc.*, 142 Cal.
11 App. 4th 1457, 1463 (2006) (holding that “unjust enrichment is a basis for
12 obtaining restitution”); *Myers-Armstrong v. Actavis Totowa, LLC*, 2010 U.S. App.
13 LEXIS 11322 at *6 (9th Cir. June 3, 2010) (holding that “unjust enrichment is a
14 basis for obtaining restitution”).

15 Courts applying California law have repeatedly held that a claim for “unjust
16 enrichment” should be construed as a claim for restitution. *See, e.g., Nordberg v.*
17 *Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1100-1101 (N.D. Cal. 2006) (Although
18 plaintiffs labeled their claim as one for unjust enrichment, “plaintiffs may assert a
19 claim for restitution based on a theory of unjust enrichment.”); *McBride v.*
20 *Boughton*, 123 Cal. App. 4th 379, 388 (2004) (construing claim for unjust
21 enrichment as a claim for restitution, which “may be awarded where the defendant
22 obtained a benefit from the plaintiff by fraud”).

23 In a case decided earlier this year, the court reconciled the cases that have

24 _____
25 ³ Artemis did not make this argument when it appealed the prior restitution
26 award. To the contrary, its appellate brief set forth the elements required for a
27 claim for unjust enrichment and stated that “[t]here is no distinction between unjust
28 enrichment and restitution under California law.” *See Declaration of Charles Rice*
in Support of Response to Artemis’s Post-Trial Brief Regarding Restitution, Ex. A:
Principal and Response Brief of Appellee/Cross-Appellant Artemis S.A. at 29 and
n.7.

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1 recognized a “stand-alone claim for unjust enrichment” and the cases that have held
2 that there is no such cause of action in California. *Gerawan Farming, Inc. v.*
3 *Rehrig Pac. Co.*, 2012 U.S. Dist. LEXIS 28017 at *29-30 (E.D. Cal. Mar. 2, 2012).
4 The *Gerawan* court found that “the split is largely a dispute in semantics” and that
5 the “courts concluding that unjust enrichment is not a stand-alone cause of action
6 have typically recharacterized the claim as one for restitution ... [which] consists of
7 essentially the same elements: the unjust retention of a benefit at the expense of
8 another.” *Id.* at 30. Accordingly, *Gerawan* held that, “for all relevant purposes,
9 unjust enrichment appears to be ‘synonymous’ with restitution, which is a viable
10 cause of action under California law.” *Id.* at *31. *Accord, Nordberg*, 445 F. Supp.
11 2d at 1100 (“[C]ourts finding that California law does not allow an ‘unjust
12 enrichment’ cause of action have made essentially semantic arguments...”).

13 In short, California law recognizes claims for restitution, and Judge Matz
14 awarded restitution. Artemis’s “semantic” arguments about the validity of claims
15 for “unjust enrichment” are irrelevant.

16 **V. ARTEMIS’S KNOWING PARTICIPATION IN A FRAUDULENT**
17 **CONSPIRACY IS SUFFICIENT PREDICATE WRONGDOING FOR**
18 **RESTITUTION**

19 Artemis argues that the Commissioner failed to prove any predicate act to
20 support restitution. *See Artemis Brief at 9, citing Reynolds Metals Co. v. Ellis*, 203
21 F.3d 1246, 1248 (9th Cir. 2000) (“restitution requires the showing of fraud or
22 wrong-doing”). In fact, the jury at the 2005 trial found that Altus, Credit Lyonnais
23 and others “participate[d] in a common scheme to obtain assets from the ELIC
24 Estate by fraud,” that Artemis “agree[d] to participate ... in furtherance of that
25 scheme, knowing its wrongful objective and before the scheme was accomplished,”
26 and that this “scheme cause[d] harm to the ELIC Estate.” *See Dkt. No. 3173:*
27 *Verdict Form 5*. That jury also found that Artemis made false representations to
28 and concealed important facts from the Commissioner. *Id.*, *Verdict Forms 1 and 3*.
Moreover, that jury found that “an officer, director, or managing agent of Artemis

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1 S.A. acted with malice, oppression or fraud” and “knowingly authorized or ratified
2 the fraudulent conduct of other employees of Artemis S.A.” *See Dkt. No. 3338:*
3 *Phase II Verdict Form B.1 and 2.*

4 The Ninth Circuit held that the first jury’s conspiracy verdict was a
5 “complete finding of liability.” *Altus*, 540 F.3d at 1005 (9th Cir. 2008).
6 Accordingly, the Commissioner has proved the predicate wrongdoing that is
7 necessary to support an award of restitution. *See Cal. Civ. Code § 3517* (“No one
8 can take advantage of his own wrong.”); Restatement (Third) of Restitution § 3 (“A
9 person is not permitted to profit by his own wrong.”). The prior jury’s findings of
10 Artemis’s wrongdoing distinguish this case from the cases cited by Artemis, which
11 held only that a restitution claim must fail if the plaintiff fails to prove **any**
12 wrongdoing. *See Artemis Brief at 9 and n. 2.*

13 Artemis argues that the conspiracy verdict is not a sufficient basis for an
14 award of restitution because the Commissioner did not prove damages. *See Artemis*
15 *Brief at 10.* The cases cited by Artemis, however, did not involve claims for
16 restitution based on a “complete finding of liability,” as was found by the Ninth
17 Circuit here. *See Altus*, 540 F.3d at 1005. Instead, these cases involved only claims
18 for damages for conspiracy, so it is neither surprising nor relevant that they required
19 proof of damages. None of these cases contradict the well-established general
20 principle that proof of damages or loss is **not** required for a restitution claim. *See*
21 *Section III above.*

22 **VI. THE COMMISSIONER HAS ESTABLISHED THE REQUIRED**
23 **ELEMENTS FOR RESTITUTION**

24 Artemis argues that the Commissioner has not established the elements
25 required for restitution because he allegedly has not proved that Artemis obtained a
26 benefit at the expense of the Commissioner that would be unjust for Artemis to
27 retain. In fact, as Judge Matz held, the Commissioner already proved the elements
28 required for restitution at the first trial. *Garamendi*, 2005 U.S. Dist. LEXIS at

1 *43-49.

2 Artemis unquestionably received significant benefits as a result of its
3 participation in the conspiracy to obtain the assets of the ELIC Estate by fraud. As
4 Judge Matz found, Artemis received profits of more than \$459 million from the
5 ELIC junk bonds that it purchased from Altus and more than \$379 million in profits
6 from the new insurance company (*i.e.*, NCLH/Aurora) created by the conspirators.
7 *Id.* at *42-43.

8 In fact, Artemis’s profits from NCLH/Aurora have grown since Judge Matz
9 made his findings because Artemis’s sale of its interest in NCLH/Aurora closed
10 earlier this year, and the actual sales price exceeded the estimated value of that
11 interest, which was used by Judge Matz when calculating restitution in 2006, by
12 approximately \$140 million. *See Dkt. No. 4323-1: Declaration of D. Paul Regan in*
13 *Support of Restitution Award, para. 14.* Moreover, the present value of the net
14 profits received by Artemis as the result of acquiring ELIC assets – even after
15 offsetting the \$110 million paid to the Commissioner as a result of Artemis’s
16 settlement with the U.S. Attorney – is now more than \$1.58 billion. *Id., para. 19.*
17 Artemis should not be allowed to keep these profits, because it never would have
18 received the ELIC assets that generated these profits if Artemis had not agreed to
19 participate in the fraudulent conspiracy.

20 Artemis argues that, “[a]s a matter of law, no ‘benefit’ is conferred when a
21 plaintiff obtains fair market value for an asset.” *Artemis Brief at 11.* Judge Matz
22 expressly rejected this argument, however, and held that the “fact that the
23 Commissioner received fair market value for the benefit he conferred in transferring
24 the junk bonds does not necessarily preclude him from obtaining restitution.”
25 *Garamendi*, 2005 U.S. Dist. LEXIS 39273 at *45-46, *citing Ward*, 51 Cal. 2d at
26 741-42 (1959). This ruling is consistent with the general principle that a plaintiff
27 does not have to prove damages or loss in order to recover restitution. *See*
28 *Section III above.*

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1 Moreover, the cases cited by Artemis do not hold that a plaintiff who
2 receives the benefit of the bargain can never bring a claim for restitution against a
3 defendant, like Artemis, who engaged in a fraudulent conspiracy. *Beanstalk Group,*
4 *Inc. v. AM Gen. Corp.*, 283 F.3d 856, 863-64 (7th Cir. 2002), held only that,
5 “[w]hen a contract defines the relationship of two parties, termination **without fault**
6 is a defense to a claim of unjust enrichment ... unless part or full performance by
7 one party has resulted in the conferral of uncompensated values on the other party.”
8 (Emphasis added.) Unlike this case, no fraud or other wrongdoing was established
9 in *Beanstalk*. Similarly, *Rheem Mfg. Co. v. United States*, 57 Cal. 2d 621, 626
10 (1962), did not involve any claim of fraud or other wrongdoing that would justify
11 an award of unjust enrichment. *Peterson v. Cellco Partnership*, 164 Cal. App. 4th
12 1583, 1595 (2008), also did not involve any claim of fraud, and it held only that
13 plaintiff could not base his claim for unjust enrichment on violations of statutes that
14 did not give plaintiff standing to sue for such violations. Accordingly, these cases
15 do not support Artemis’s argument.

16 Artemis also argues that Artemis did not receive any benefit “at the expense
17 of” the Commissioner because “Artemis did not purchase *anything* from the
18 Commissioner or the ELIC Estate.” *Artemis Brief at 12* (emphasis in original). In
19 fact, as Judge Matz found, it is well established that, “[f]or a benefit to be
20 conferred, it is not essential that money be paid directly to the recipient by the party
21 seeking restitution.” *See Garamendi*, 2005 U.S. Dist. LEXIS 39273 at *44, quoting
22 *County of Solano v. Vallejo Redevelopment Agency*, 75 Cal. App. 4th 1262, 1278
23 (1999). Many other California courts have reached exactly the same conclusion.
24 *See, e.g., County of San Bernardino*, 158 Cal. App. 4th at 542; *Shersher v. Superior*
25 *Court*, 154 Cal. App. 4th 1491, 1500 (2007); *Hirsch v. Bank of America*, 107 Cal.
26 App. 4th 708, 722 (2003); *California Federal Bank v. Matreyek*, 8 Cal. App. 4th
27 125, 132 (1992).

28 Here, Artemis received ELIC assets from its co-conspirators, and it

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1 knowingly concealed these co-conspirators’ use of fraud to obtain these assets from
2 the ELIC Estate. Accordingly, the fact that Artemis did not receive these benefits
3 directly from the ELIC Estate does not defeat the Commissioner’s entitlement to
4 restitution. *See First Nationwide Savings v. Perry*, 11 Cal. App. 4th 1657, 1663
5 (1992) (“[A] transferee with knowledge of the circumstances giving rise to an
6 unjust enrichment claim may be obligated to make restitution.”).

7 Artemis also argues that the Commissioner’s failure to prove damages shows
8 that Artemis did not receive any benefit “at the expense of” the Commissioner. *See*
9 *Artemis Brief at 12*. As shown above, however, a plaintiff need not prove damages
10 or loss to obtain restitution. *See Section III above*. The Restatement explains that
11 “the consecrated formula ‘at the expense of another’ can also mean ‘in violation of
12 the other’s legally protected rights,’ without the need to show that the claimant has
13 suffered a loss.” Restatement (Third) of Restitution, § 1, cmt. a. *See also I*
14 *Palmer, The Law of Restitution § 2.10 at 133* (“The general requirement [that
15 restitution be awarded only when the defendant’s benefit was obtained at the
16 plaintiff’s expense] does not mean that the gain to the defendant need be equated to
17 the loss of the plaintiff, **nor indeed that there need be any loss to the plaintiff**
18 **except in the sense that a legally protected interest has been invaded.**”)
19 (emphasis added). Here, the conspirators violated the Commissioner’s legally
20 protected interest in not being defrauded,⁴ and the first jury found that the ELIC
21 Estate had been harmed by this conspiracy. No more is required to show that
22 Artemis received its benefits “at the expense of” the Commissioner.

23 _____
24 ⁴ Of course, everyone has a legally protected right not to be defrauded, and
25 both former Commissioner John Garamendi and his Chief Deputy Rick Baum
26 testified at the recent trial that that right is particularly important, as a matter of
27 public policy, in the context of California insurance regulation in general and the
28 ELIC bidding process in particular. *See, e.g., 10/18/12 a.m. Trial Transcript at 24*
(Baum: “One of the issues with respect to ownership of an insurance company is
the responsibility that people have to the policyholders; and integrity and the
manner in which you represent yourself to the department is a critical piece” of
information for insurance regulators.).

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1 Finally, Artemis argues that it was not **unjustly** enriched, but this argument
2 simply ignores the prior jury’s findings of Artemis’s wrongdoing and harm to the
3 ELIC Estate. *See Artemis Brief at 12-13*. Under these circumstances, it would be
4 unjust for Artemis to retain **any** of the profits it obtained as a result of joining the
5 conspiracy. *See* Restatement (Third) of Restitution § 3, cmt. c (“When the
6 defendant has acted in conscious disregard of the claimant’s rights, **the whole of**
7 **the resulting gain is treated as unjust enrichment**, even though the defendant’s
8 gain may exceed ... the measurable injury to the claimant.... Restitution requires
9 full disgorgement of profit by a conscious wrongdoer, not just because of the moral
10 judgment implicit in the rule of this section, but because any lesser liability would
11 provide an inadequate incentive to lawful behavior.”) (emphasis added).

12 Finally, Artemis quotes statements by the Commissioner in 1993 that Altus
13 should not be required to refund its profits. *See Artemis Brief at 13*. In 1993,
14 however, the Commissioner was not aware of Altus’s and the other conspirators’
15 fraud, so these statements do not absolve Artemis of its liability for that fraud or
16 make it just for Artemis to retain the benefits of that fraud.

17 **VII. THE COMMISSIONER DID NOT ASK THE JURY TO AWARD**
18 **RESTITUTION**

19 Artemis argues that the Commissioner asked the jury to award restitution
20 because his counsel argued that awarding **damages** would “restor[e] the situation to
21 what it would have been” if the conspiracy had been discovered. *See Artemis Brief*
22 *at 14*. In context, this argument was clearly an argument for damages – not
23 restitution.

24 In fact, neither the Commissioner nor Artemis ever asked for any jury
25 instructions or jury verdicts that would tender the issue of restitution to the jury,
26 and the final jury instructions and verdict forms did not ask the jury to decide the
27 issue of restitution. Instead, the Commissioner requested – and the Court provided
28 the jury with – instructions and verdict forms that tendered only the issue of

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1 damages to the jury. Moreover, the Commissioner’s primary damages expert
2 presented calculations of the total damages attributable to the conspiracy – not
3 calculations of Artemis’s total profits for purposes of restitution.

4 In short, the jury was not asked to decide the issue of restitution, and it never
5 did so. It simply decided the hypothetical NOLHGA Premise pursuant to the
6 Court’s instruction, and it did not even reach the issue of deciding what damages, if
7 any, to award. Under these circumstances, it would be unjust to hold, as Artemis
8 requests, that the Commissioner somehow waived his right to request the Court for
9 restitution because of the way that his counsel argued for an award of damages
10 from the jury.

11 Artemis also appears to argue that the Commissioner is not entitled to an
12 award of restitution by the Court because he allegedly had an adequate remedy at
13 law. *See Artemis Brief at 14-15*. The cases cited by Artemis, however, did not
14 involve claims for restitution. *See id. at 15, citing Thompson v. Allen County*, 115
15 U.S. 550, 554 (1885) (holding that court of equity could not enforce levy and
16 collection of municipal taxes); *Wilkison v. Wiederkehr*, 101 Cal. App. 4th 822, 832-
17 33 (2002) (declining to grant quasi-specific performance of contract). Accordingly,
18 these cases do not bar restitution here.

19 In fact, “‘inadequacy of a remedy at law’ is not a requirement of a claim in
20 restitution for disgorgement of wrongful gain.” Restatement (Third) of Restitution
21 § 3, cmt. c.

22 Restitution is frequently sought where the plaintiff has another
23 remedy, for example, an action to recover damages for tort or breach
24 of contract. **The availability of restitution is not dependent upon
inadequacy of the alternative remedy.**

25 *1 Palmer, The Law of Restitution, § 1.16 at p. 33* (emphasis added). *See also*
26 *Dobbs, Law of Remedies § 4.1(1)* (“If the facts justify a substantive claim of
27 restitution to prevent unjust enrichment, the existence of other remedies like
28 damages is no impediment to restitutionary relief.”).

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1 **VIII. NO CONTRACT PRECLUDES RESTITUTION HERE**

2 Artemis claims that restitution is barred where “a valid and binding contract
3 covers the subject matter of a dispute” and that the “Rehabilitation Plan sets forth
4 the specific responsibilities and duties of the Commissioner, Altus, and the new
5 insurance company (Aurora)” *Artemis Brief at 16*. Artemis was not even a
6 party to the Rehabilitation Plan, however, and it does not cite anything in that
7 document that immunizes Artemis from any liability for its proven participation in
8 the fraudulent conspiracy. This case is therefore not analogous to the cases cited by
9 Artemis. *See, e.g., Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151,
10 1166-67 (9th Cir. 1996) (finding that contract expressly precluded equitable
11 subrogation claim brought by plaintiff and that plaintiff had not shown any
12 actionable misrepresentations or omissions).

13 Judge Matz expressly acknowledged that “a claim for unjust enrichment
14 generally is precluded where there is a valid and binding contract covering the
15 subject matter of the dispute,” but he concluded that the Commissioner’s claim was
16 not barred by the “Rehabilitation Plan or any other contract.” *Garamendi*, 2005
17 U.S. Dist. LEXIS 39273 at *46-47. Moreover, the Ninth Circuit expressly rejected
18 Artemis’s argument that “the Commissioner’s legal and equitable claims seeking
19 disgorgement of Artemis’s profit ... are equivalent to revision of contractual profit
20 participation provisions embodied in the Rehabilitation Plan.” *Altus*, 540 F.3d at
21 1010. Thus, under the law of the case, the Rehabilitation Plan cannot preclude the
22 Commissioner’s restitution claim.

23 **IX. THIS COURT CAN REINSTATE THE PRIOR RESTITUTION**
24 **AWARD**

25 Artemis argues that this Court has “no basis” for reinstating the prior
26 restitution award. *Artemis Brief at 17*. To the contrary, the Ninth Circuit expressly
27 authorized the district court to “reinstate that award, if warranted, at the close of
28 trial.” *Altus*, 540 F.3d at 1009.

1 Artemis contends that “there is no record from the retrial upon which this
2 Court could make the determinations necessary to award any restitution against
3 Artemis.” *Artemis Brief at 17*. The prior restitution award, however, was based on
4 Judge Matz’s extensive findings of fact and conclusions of law, which were based
5 on the evidence presented at the first trial, and the first jury’s verdicts. *See*
6 *Garamendi*, 2005 U.S. Dist. LEXIS 39273 at *25-43. This Court can adopt those
7 findings of fact and reinstate the award, as the Ninth Circuit authorized it to do, or it
8 can hold its own evidentiary hearing to resolve any relevant factual issues,
9 including the proper amount of restitution.

10 Artemis also insists that the prior restitution award was based “in large
11 measure” on the first jury’s \$700 million award of punitive damages, which was
12 vacated. *Artemis Brief at 18*. There is no reason to believe, however, that Judge
13 Matz gave any undue consideration to that punitive damages award because Judge
14 Matz himself vacated that punitive damages award and his restitution award was
15 only a fraction of the vacated punitive damages award. *See Garamendi v. Altus*
16 *Fin. S.A.*, 2005 U.S. Dist. LEXIS 39214 at *22 (C.D. Cal. Oct. 3, 2005).

17 Finally, Artemis incorrectly claims that “the circumstances facing this Court
18 are dramatically different from those facing Judge Matz in 2005.” *See Artemis*
19 *Brief at 18*. In fact, the circumstances are very similar. As shown above, Judge
20 Matz’s restitution award assumed that the 2005 jury had rejected the NOLHGA
21 Premise, so the 2012 jury’s rejection of the NOLHGA Premise is not a material
22 change of circumstances that could undermine Judge Matz’s conclusions. *See*
23 *Section II above*. Moreover, contrary to Artemis’s assertion, the Commissioner did
24 not request the jury to award restitution in the recent trial. *See Section VII above*.
25 Accordingly, there are no changed circumstances here that preclude this Court from
26 reinstating the prior restitution award, just as the Ninth Circuit expressly permitted.

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1 **X. THIS COURT CAN INCREASE THE AMOUNT OF THE**
2 **RESTITUTION AWARD**

3 The previous filing by the Commissioner and NOLHGA explains why the
4 Court should increase the prior restitution award, which required Artemis to
5 disgorge only a small portion of its profits from the fraudulent conspiracy. *See Dkt.*
6 *4323: Memorandum of Points and Authorities in Support of Restitution Award. See*
7 *also* Restatement (Third) of Restitution § 3, cmt. c (“When the defendant has acted
8 in conscious disregard of the claimant’s rights, the **whole of the resulting gain is**
9 **treated as unjust enrichment**, ... not just because of the moral judgment implicit
10 in the rule of this section, but because any lesser liability would provide an
11 inadequate incentive to lawful behavior.”) (emphasis added). Moreover, as also
12 shown in this prior brief, the Court is not barred by the Ninth Circuit mandate from
13 increasing the prior restitution award because the appellate court did not expressly
14 or implicitly determine the proper amount of restitution. *See Dkt. No. 4323 at 9.*

15 Artemis contends that the Commissioner is barred from asking for an
16 increase in the restitution award because it did not do so on the appeal that followed
17 that award. *See Artemis Brief at 19.* Artemis also cites authority, however, that
18 holds that a vacated judgment is “null and void, and the parties are left in the same
19 situation as if no trial had ever taken place.” *See Artemis Brief at 18, quoting U.S.*
20 *v. Jimenez Recio*, 371 F.3d 1093, 1106 n.1 (9th Cir. 2004). Accordingly, because
21 the restitution award was vacated by the Ninth Circuit, the Commissioner’s
22 arguments about that award on appeal are irrelevant. Instead, the Commissioner is
23 free to seek – and this Court is free to grant – restitution of all of Artemis’s profits
24 “as if no trial [and thus no appeal] had ever taken place.” *Id.*

25 **XI. CONCLUSION**

26 Although the prior restitution award was vacated, Judge Matz’s reasoning in
27 rejecting Artemis’s arguments that no restitution should be awarded remains sound.
28 As Judge Matz found, Artemis obtained a substantial benefit from its participation

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