Docket Nos. 13-55567, 13-56684, 13-55699

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVE JONES,
as Insurance Commissioner of the State of California and as Conservator, Liquidator and Rehabilitator of the ESTATE OF EXECUTIVE LIFE INSURANCE COMPANY,

Plaintiff/Appellant/Cross-Appellee, and

NATIONAL ORGANIZATION OF LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATIONS and CALIFORNIA LIFE AND HEALTH INSURANCE GUARANTEE ASSOCIATION,

Intervenors/Appellants/Cross-Appellees,

v.

ALTUS FINANCE S.A., a corporation organized under French law,

Defendant, and

ARTEMIS S.A., a corporation under French law,

Defendant/Appellee/Cross-Appellant.

PRINCIPAL AND RESPONSE BRIEF OF APPELLEE/CROSS-APPELLANT ARTEMIS S.A.

Appeal and Cross-Appeal from the United States District Court,
Central District of California, Case No. CV-99-02829 RGK (CWx)
The Honorable R. Gary Klausner, Judge Presiding

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the parent of Defendant/Appellee/Cross-Appellant Artemis S.A. is Financiere Pinault. No publicly held company owns 10% or more of the stock of Artemis S.A.

Dated: January 10, 2014

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I.
INTRODUCTION

In two jury trials, Plaintiff/Appellant California Insurance Commissioner (the "Commissioner") and Intervenors/Appellants National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA") and California Life and Health Insurance Guarantee Association (collectively, "Appellants") failed to prove that Defendant/Appellee Artemis S.A. ("Artemis") caused damages to the estate of Executive Life Insurance Company ("ELIC"). The 2005 jury was presented with Appellants' requested articulation of their theory of the case and Appellants could not prevail. The 2012 trial was conducted in exact accordance with this Court's mandate and Appellants lost. There is no reason for this Court to order a third trial.

The undisputed facts make plain why two juries have refused to award damages. Throughout the late 1980s, ELIC amassed billions of dollars of risky junk bonds and, as a result, collapsed in what was at the time the largest insurance company failure in history. When asked why ELIC failed, then Insurance Commissioner John Garamendi responded, "Two words: Junk Bonds." (3-SER-513.) Commissioner Garamendi repeatedly disparaged ELIC's bond holdings as "really rotten junk" and "toxic waste." (2-SER-165.)

In order to rehabilitate ELIC, Commissioner Garamendi sold most of its junk bonds for fair value—$3.25 billion in cash—in a well-publicized judicially sanctioned auction. (3-SER-582.) That money was used to create a well-

capitalized insurance company—purged of risky junk bonds—that fulfilled its obligations to ELIC's policyholders. (1-ER-77.) The result was "an outcome most people never dreamed possible." (3-SER-583.)

In this litigation, a clear case of seller's remorse, Appellants attempted to rewrite history by asserting that if Commissioner Garamendi had known of contracts among the winning bidders, he would instead have selected an untested bidder (NOLHGA) that wanted to *keep* the toxic junk bonds in the insurance company. But two separate juries refused to accept the so-called "NOLHGA Premise." Appellants were unable to overcome the extensive contemporaneous evidence that, in Commissioner Garamendi's own words, "it would have been irresponsible for me, as Conservator of an estate with over 60% of its assets in junk, to in effect 'double-down' and allow policyholders to become even more entangled in the junk market." (3-SER-586-587; 2-SER-166-167.) The result is exactly as Judge Matz, the 2005 trial judge, predicted:

> The testimony given by Commissioner Garamendi and his lieutenants as to why and how NOLHGA would have gotten the nod if Altus had not was so flatly at odds with what Mr. Garamendi said (and his aides did) in 1991 and thereafter as to be devoid of credibility. For that reason, I am convinced that no fair-minded jury would ever unanimously adopt the Commissioner's 2005 version of history.

(2-ER-226.)

Despite their repeated losses, Appellants stubbornly refuse to admit that the "NOLHGA Premise" is unwinnable. Rather, they remarkably contend—

notwithstanding two separate trials—that they "have yet to have their day in court on the central issue of damages causation." (Appellants' Opening Br. ("AOB") 1.) The assertion is plainly false.

The district court conducted precisely the retrial on the NOLHGA Premise that this Court ordered. It presented the jury with the exact question mandated by this Court. The jury was not confused. It simply did not believe Appellants' revisionist history.

On appeal, Appellants offer a thinly disguised reprise of the arguments that this Court rejected in the last appeal. Appellants argue that the district court should have constrained the 2012 jury to accept certain "facts" that they contend the 2005 jury "must" have found. But such supposed "facts" are wholly inconsistent with the principal damages theory that Appellants advanced during the damages phase of the 2005 trial. Moreover, this Court previously rejected Appellants' attempts to read the 2005 jury verdicts as somehow resolving the question of what Commissioner Garamendi would have done in 1991, because the "indeterminate verdict" could not "be reconciled in favor of either side." *California v. Altus Fin. S.A.*, 540 F.3d 992, 1008 (9th Cir. 2008). This Court decided that the inability to answer the NOLHGA Premise in 2005 "suggest[ed] that the jury had something else in mind, even if it was only confusion." *Id.* at 1007. It therefore "remand[ed] for a new damages phase trial limited to proffer of the NOLHGA Premise," which is exactly what took place in 2012. *Id.* at 1009.

"At some point, litigation must come to an end." *Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1042 (9th Cir. 2011). After nearly 15 years of litigation, "[t]hat point has now been reached." *Id.*

II.
JURISDICTIONAL STATEMENT

Artemis adopts Appellants' jurisdictional statement. (AOB 2.) In addition, Artemis filed a timely cross-appeal on April 24, 2013 (3-ER-657), over which this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

III.
ISSUES PRESENTED

1. Did the district court properly carry out this Court's remand order and instruct the jury on the NOLHGA Premise as defined by this Court? (*Infra* pp. 20-48.)

2. Did the district court err in awarding restitution in light of: (a) precedent refusing to recognize any independent "claim" to unjust enrichment under California law; (b) jury verdicts rejecting the claims upon which Appellants based their claim to restitution; (c) an enforceable contract that foreclosed any "quasi-contractual" remedy; (d) Appellants' pursuit of an adequate remedy at law; and (e) Appellants' failure to establish the required elements for an award of restitution? (*Infra* pp. 48-59.)

3. Did the district court err in failing to offset the judgment by the amounts paid in good faith settlements by Artemis' co-defendants, who were

alleged to be jointly and severally liable for the same profits? (*Infra* pp. 59-64.)

4. Did the district court properly deny Appellants' requests for interest on, or increases to, the restitution award? (*Infra* pp. 64-69.)

IV.
STATEMENT OF THE CASE AND RELEVANT FACTS

A. The Underlying Events

1. *The Failure and Rehabilitation of ELIC.* "This litigation arises from the 1991 insolvency and subsequent rehabilitation of the Executive Life Insurance Company (ELIC), following the largest insurance failure in California history." *Altus*, 540 F.3d at 995. ELIC's insolvency was in large part due "to losses on the company's large junk bond portfolio." *Id*. at 996. Then Insurance Commissioner John Garamendi described ELIC's junk bonds as "toxic waste," "really rotten junk," the "junk of the junk," and "the worst of the worst." (2-SER-159, 165.)

As the junk bond market collapsed, ELIC policyholders created a "run on the bank" by trying to cash out their policies. (2-SER-158.) In response, Commissioner Garamendi "developed a plan to rehabilitate ELIC, which contemplated a public auction of the assets and liabilities of the ELIC Estate to a new California insurance company that would reinsure ELIC's existing life insurance policies and annuity contracts at a guaranteed minimum percentage of their former value." *Altus*, 540 F.3d at 996.

Commissioner Garamendi sold ELIC's troubled junk bonds for $3.25 billion. (3-SER-582.) That money, along with another $300 million in capital

contributions, funded the rehabilitated insurance company, Aurora National Life Assurance Company ("Aurora"). (3-SER-565.) The Rehabilitation Plan "was a resounding success" that was "'by any objective standards a home run'" and "result[ed] in a full recovery for 92 percent of the insolvent insurer's former policy holders." *Altus*, 540 F.3d at 995. "[ELIC] got cash from the junk bond portfolio that was transferred; and the restructured insurance company … fulfilled its obligation to policyholders as it had promised as part of its bid." (2-SER-109.) Reflecting on the success years later, Commissioner Garamendi explained that this was "an outcome most people never dreamed possible." (3-SER-583.)

2. *Bidding For ELIC's Assets*. This successful rehabilitation resulted from a competitive auction for ELIC's assets. "[I]n October 1991, the Commissioner received eight bids, three of which merited full consideration: [1] a joint bid by Altus Finance S.A. (Altus), a subsidiary of Credit Lyonnais S.A. that was controlled by the French government, and the MAAF Group, a consortium of French and Swiss insurance companies; [2] a bid from [NOLHGA]; and [3] a bid by Sierra National Insurance Holdings, Inc. (Sierra)." *Altus*, 540 F.3d at 996.

The NOLHGA and Sierra bids were "bonds-in bids," in which the risky junk bonds that had caused ELIC's failure "would remain in the rehabilitated insurance company." *Id*. at 996-97. By contrast, the Altus/MAAF bid was a "bonds-out" bid, which meant that "Altus would purchase the junk bond portfolio for cash, and the MAAF Group would manage the rehabilitated insurance company without the

risk associated with continued ownership of the junk bond portfolio." *Id*. at 997.

At the time, Commissioner Garamendi personally told the court supervising ELIC's rehabilitation that he had "met with literally hundreds of policyholders" and that "[t]heir overwhelming desire is to avoid being forced to gamble on the junk-bond market." (3-SER-570.) He "believed the policyholders deserved the certainty and maximum value that the bond sale gave them." (2-SER-166-167.) Looking back on his decision, Commissioner Garamendi wrote that ridding the ELIC Estate of the junk bonds was the "only reasonable choice a prudent fiduciary could make, and, given the same circumstances, is one we would make again." (3-SER-588.)

3. *Rejection of the NOLHGA Bid.* NOLHGA's proposal had risks beyond retaining the junk bonds. NOLHGA is an association of state guarantee associations that had no experience operating an insurance company. (2-SER-176.) As a competing bidder observed, "[t]he eight-man staff at NOLHGA dreams about running an insurance company, but they've never run a gas station." (2-SER-195.) Commissioner Garamendi initially proposed accepting the NOLHGA bid, but that proposal was conditional, as he "identified several 'serious legal issues' and 'potentially grave problems' that NOLHGA would have to cure before its bid could be approved." *Altus*, 540 F.3d at 997. These problems "directly impact[ed] the safety and certainty of the NOLHGA bid." (3-SER-545.)

NOLHGA never met the Commissioner's conditions. (3-SER-548-563.)

Instead, NOLHGA proposed a structure that placed the "immediate direct risk upon policyholders, both with respect to the financial strength of [the new insurance company], which is essentially dependent upon the performance of the junk bond portfolio, and with respect to several issues as to the ability of the guarantee associations to perform the obligations in the proposed transaction." (3-SER-552.)

After receiving NOLHGA's inadequate response, "the Commissioner formally rejected the NOLHGA bid" and "identif[ied] numerous specific defects in the bid," *Altus*, 540 F.3d at 997, including significant structural, legal, contractual, and economic defects. (3-SER-550-563.) Commissioner Garamendi "determined that it [was] in the best interests of the policyholders … to proceed to select either" the Altus/MAAF bid or the Sierra bid. (3-SER-549.)

4. *Selection of the Altus/MAAF Bid and the Rehabilitation Plan*. "On November 14, 1991, the Commissioner determined that a revised $3.25 billion cash bid from the Altus/MAAF Group was superior to the Sierra bid and recommended selection of the Altus/MAAF Group bid to the Rehabilitation Court." *Altus*, 540 F.3d at 997. "[T]he Altus bid provided significantly better return and less risk to the policyholders than the Sierra and NOLHGA bids." (3-SER-590-591.) In addition to the $3.25 billion for the junk bonds, the Altus/MAAF plan provided: (a) an additional $300 million as capital for Aurora; (b) a guaranty from Altus for the remaining bond holdings; and (c) potential

"additional recoveries from future profit participations." (3-SER-565, 536, 564.) Even NOLHGA agreed at the time that the Altus/MAAF bid "provides policyholders with the maximum possible value and financial security." (3-SER-566.)

"On December 26, 1991, the Rehabilitation Court approved the Altus/MAAF Group bid, and the sale … was formalized in a written contract entered between the Commissioner and the Altus/MAAF Group (the Rehabilitation Plan)." *Altus*, 540 F.3d at 997-98. Numerous court challenges to the approved Rehabilitation Plan followed. Concerned about the delay these legal challenges might cause, and that "the ELIC Estate's continued ownership of the junk bond portfolio would jeopardize the security of existing ELIC policies," the Commissioner "requested that the Rehabilitation Court sever the sale of the junk bond portfolio from the sale of the ELIC Estate's insurance assets." *Id*. at 998. Because "[t]he Altus bid was … the highest and best bid received and reflected the fair value of the Transferred Bonds at the time of the sale" (3-SER-582), the Rehabilitation Court approved the sale of ELIC's junk bonds to Altus for $3.25 billion in February 1992. *Altus*, 540 F.3d at 998. The insurance company transaction was delayed while appeals were resolved, and ultimately closed in September 1993. *Id.*

5. *Artemis' Entry Into the Scene.* "Artemis did not exist at the time Altus/MAAF Group bid for the assets of the ELIC Estate" in 1991. *Id*. It was

formed in December 1992, more than a year after the selection of the Altus/MAAF bid. *Id*. "On December 24, 1992 … Altus sold Artemis approximately 21 percent of the ELIC junk bond portfolio, which Altus had acquired nine months earlier." *Id*. Later, Artemis "obtained approval … to acquire a controlling interest in NCLH [New California Life Holdings, Inc.] and its subsidiary Aurora from the MAAF Group." *Id*. Artemis never purchased anything from the Commissioner or the ELIC Estate. (3-SER-346, 452.)[1]

B. Procedural History

1. *The Commissioner's Lawsuit.* The Commissioner commenced this action in February 1999, alleging that Altus and MAAF failed to disclose their true relationship, as memorialized in a series of agreements known as *contrats de portage* (or "portage agreements"). (3-SER-475, 477.) Although the import of the portage agreements was disputed, the Commissioner alleged that the agreements resulted in the MAAF Group holding an ownership interest in Aurora as a "front" for Altus, a subsidiary of Credit Lyonnais, which was at the time owned by the French Government, allegedly in violation of California Insurance Code § 699.5—a statute that prohibited a foreign government-controlled entity from owning a California insurance company, but also expressly allowed such ownership if certain findings were made. (3-SER-476-477, 512.) NOLHGA was permitted to

[1] As the district court would later note, this timeline "is one reason why [Artemis] is less culpable than the other French defendants." (1-ER-66.)

intervene "for the limited purpose … [of] presenting evidence on damages." (2-ER-192.)

Artemis and its founder, François Pinault, were added in an amended complaint and denied the claims. (2-ER-148.) Mr. Pinault and Artemis were not parties to the portage agreements. (3-SER-465, 458-460.) Rather, the Commissioner argued that Artemis failed to disclose those agreements when it sought to purchase shares in Aurora's parent, NCLH. Nevertheless Judge Matz found that, as majority owner, "Artemis consistently operated Aurora in a lawful and businesslike manner." (1-ER-81.) "Under Artemis's ownership and control, Aurora … fulfilled its obligations under the Rehabilitation Plan and policyholders have not been injured by the conduct of Artemis and NCLH in managing Aurora." (1-ER-77.)

2. *The 2005 Trial.* On the eve of trial, Altus and Credit Lyonnais—"[t]he most culpable defendants" (1-ER-60)—along with Aurora and NCLH settled for a combined $595,250,000, and MAAF and others defaulted. (2-SER-308, 320; 1-ER-60.) Appellants then proceeded to trial against Artemis and Mr. Pinault. Artemis argued that: (1) the Altus/MAAF bid offered the best deal for ELIC policyholders; (2) Commissioner Garamendi never would have subjected policyholders to the further risks of the junk bonds that caused ELIC's failure; and (3) any regulatory issues caused by the portage agreements could have been addressed in a manner that permitted the Altus/MAAF bid to proceed. (3-SER-

434-436, 429-433, 441.) In fact, "the [2005] jury learned that [i] the very language of Section 699.5 actually permits the [Department of Insurance ('DOI')] to license such an insurer under certain specified conditions"; "[ii] that the DOI previously *had* permitted a foreign government-owned company to operate an insurance company" when a voting trust agreement was in place to protect against foreign government control; and "[iii] that Artemis itself eventually entered into such [a voting trust] agreement" to address Altus' minority ownership interest in order to acquire interests in Aurora. (1-ER-61-62.) "[A]fter nine weeks of evidence … [t]he jury exonerated Pinault on all claims." *Altus*, 540 F.3d at 999. The jury likewise rendered defense verdicts for Artemis on the intentional misrepresentation and fraudulent concealment claims. *Id.* at 1005.

As to the remaining claim of civil conspiracy, the jury found that Artemis joined a common scheme with others to obtain assets from the ELIC Estate by fraud, and that the scheme caused harm to the ELIC Estate. (2-ER-206-207.) At Appellants' request, the jury was not asked to, and did not, identify the particular "harm" that it found; in fact, Appellants successfully argued that it would be "fraught with peril" to require the jury to agree on a single harm. (2-SER-236.)

The jury was unable to unanimously agree to the "NOLHGA Premise," "the Commissioner's principal damages theory and a vital issue in the trial." *Altus*, 540 F.3d at 1006, 1008. That theory was embodied in a specific verdict form proposed by the Commissioner:

> Did the Commissioner prove that, but for the misrepresentation, concealment or conspiracy that led to your answers to previous questions, he probably would have entered into a transaction with NOLHGA for the benefit of the ELIC Estate?

Id. at 1006 (quoting Verdict Form 7). Because the jury could not answer this question, the district court prohibited the Commissioner from pursuing lost profits based on this theory in the damages phase. (2-ER-226.) Appellants did not seek a mistrial, but instead pursued two alternative damages theories:

> (1) if the Commissioner had chosen any bid other than the Altus/MAAF bid, the ELIC Estate would not have had to pay $75,000,000 in settlement of certain indemnification claims under the court-approved Rehabilitation Plan; and
>
> (2) if the Commissioner had learned of the relationship between the bidders after selecting the Altus/MAAF bid, he would have attempted to rescind the completed junk bond sale to Altus.

(1-ER-63.) Following a one-week damages phase, the jury awarded "$0" on each of these theories. (2-ER-246.)[2]

The district court later awarded restitution of a percentage of the profits of the insurance company in the amount of $189,806,288, plus 7% interest, for a total of $241,092,020. (1-ER-81.) The court refused Artemis' request to offset this award with the $595,250,000 in settlements paid by Artemis' co-defendants (and

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[2] Despite not awarding any compensatory damages, the jury attempted to award $700 million in punitive damages. (2-ER-247.) The district court invalidated that award under California law and the Due Process Clause (2-ER-252-254), and this Court affirmed that ruling, *see Altus*, 540 F.3d at 1000-04.

alleged co-conspirators), despite the "good faith" settlement orders that barred Artemis from seeking contribution or equitable indemnification from the settling defendants pursuant to California Civil Procedure Code § 877. (1-SER-33.)

3. *The Appeals from the First Trial.* In the appeals that followed, the Commissioner and NOLHGA argued "that, properly reconciled, the verdict forms answered by the jury conclusively establish the NOLHGA Premise," and that they should have been entitled to present that theory again in the damages phase. *Altus*, 540 F.3d at 1004.

After analyzing the parties' contentions, this Court held that the district court had erred in treating the jury's inability to answer the NOLHGA Premise as a failure of proof. *Id.* at 1007. However, this Court also "disagree[d] with the Commissioner and NOLHGA that the verdicts must be reconciled in their favor." *Id.* Ultimately, it concluded that "the verdicts cannot be reconciled in favor of either side," and the inability to answer the NOLHGA Premise "suggests that the jury had something else in mind, even if it was only confusion." *Id.* at 1007, 1008. Because it could not "infer anything" and was "left with an indeterminate verdict," this Court "remand[ed] for a new damages phase trial limited to proffer of the NOLHGA Premise and a determination of damages (including punitive damages), if any, on that theory." *Id.* at 1008, 1009.

This Court vacated the restitution award and granted the district court "leave to reinstate that award, if warranted, at the close of trial." *Id.* at 1009. It

"decline[d] to address the merits of Artemis' objections to the restitution award or to consider whether the offset provisions of Section 877 would apply to any restitution award made by the district court upon remand." *Id.*

4. *The 2012 Retrial.* After remand and reassignment to Judge R. Gary Klausner, the retrial took place in October 2012. Judge Klausner presented the jury with an instruction and verdict form asking the same question that this Court had instructed be retried: "Did the Commissioner prove that, but for the conspiracy to defraud, he probably would have entered into a transaction with NOLHGA for the benefit of the ELIC Estate?" (3-ER-553.) Artemis explained that the NOLHGA Premise required the jury to decide "what would have happened if there was no conspiracy … if Altus had told the department about the Portage agreements in 1991?" (2-SER-203.) Appellants' position—characterized by the district court as "misleading" (2-SER-133)—was that the question for the jury was what Commissioner Garamendi would have done if the conspiracy occurred and he later learned "the depth of the lying and the depth of the deceit, had known that people were looking him in the eye and promising him one thing and behind his back in writing doing the exact opposite." (2-SER-114.)

After a seven-day trial, the jury unanimously rejected the NOLHGA Premise. (3-ER-553.) As a result of this verdict, the district court denied as moot Artemis' motion for judgment as a matter of law, which attacked not only the Commissioner's failure to prove the NOLHGA Premise, but also his failure to

offer evidence of legally cognizable damages. (6-ER-1322; 1-SER-1.)

5. *The Post-Trial Restitution Award.* After the jury trial, Appellants argued that, despite their inability to convince a second jury to award any damages, the district court should award $1.58 billion in restitution. (3-ER-569.) Artemis raised numerous legal and factual objections to *any* award of restitution (3-ER-588-612), and challenged Appellants' new calculations as flawed (2-SER-62-65, 71-77).

The district court found that "restitution in the amount awarded by Judge Matz [was] appropriate," and, "for the same reasons stated by Judge Matz," it reinstated that award. (1-ER-4.) The court provided no analysis of Artemis' objections to any restitution award.

On April 2, 2013, the district court entered judgment in the amount of $241,092,020. (1-ER-2.) The court denied Appellants' request that the judgment reflect that it "is the several and individual obligation of Artemis S.A." (2-SER-42), but it nonetheless rejected (without explanation) Artemis' request for an offset for the $595,250,000 paid by its settling co-defendants (1-ER-3).

Appellants filed notices of appeal (3-ER-635, 642), and Artemis filed a cross-appeal (3-ER-657). The appeals were consolidated by this Court. (Dkt. No. 19.)

V.
SUMMARY OF ARGUMENT

A. Summary Of Arguments In Response To Appellants' Challenges To The Jury Verdict

1. *The District Court Faithfully Applied This Court's Mandate.* The district court followed this Court's mandate and retried the NOLHGA Premise precisely as ordered. Appellants had a full and fair opportunity to present the NOLHGA Premise to the 2012 jury and there is no basis for a *third* trial of this theory. In an attempt to find error, Appellants repackage the same arguments that this Court rejected in the last appeal concerning the 2005 verdict forms. But this Court concluded that it was unable to "infer *anything* from the [2005] jury's silence" on the NOLHGA Premise, that it was "left with an indeterminate verdict," and that jury "***confusion***" was a possibility. *Altus*, 540 F.3d at 1008, 1007 (emphases added). The 2005 jury simply was not asked to and did not make the "findings" that Appellants now claim were binding on the 2012 jury. (*Infra* pp. 21-31.)

2. *The District Court Correctly Instructed The Jury.* The jury instructions followed California law: they informed jurors that they had to decide what Commissioner Garamendi would have done if the portage agreements had not been concealed. Unable to win on that question, Appellants now attempt to redefine "but for" causation in a way that would overturn decades of settled tort law. Appellants were not constrained in presenting their case, and the hurdles they faced

were based not on any instructional error, but rather the inability to reconcile the Commissioner's litigation position with the real-world position that he took in 1991. And even if there were any error, it was invited by Appellants by proposing the response that the district court provided to the jury's questions. (*Infra* pp. 32-48.)

B. Summary Of Arguments Regarding The Restitution Award

1. *Appellants Are Not Entitled To Restitution*. In the last appeal, this Court did not address Artemis' objections to any restitution award, which apply with equal (if not greater) force now, because: (a) there is no independent "claim" to unjust enrichment under California law; (b) Appellants based their request for restitution on the fraud claims that they lost in 2005, and the 2012 verdict removes any possible basis for an award; (c) the existence of a binding contract (the Rehabilitation Plan) forecloses the "quasi-contractual" remedy of "unjust enrichment"; (d) Appellants had and pursued an adequate remedy at law; and (e) they also failed to establish the legal elements to justify a restitution award. (*Infra* pp. 48-59.)

2. *Artemis Was Entitled To An Offset.* At a minimum, the district court should have offset the restitution award pursuant to California Civil Procedure Code § 877 with the $595,250,000 paid by Artemis' co-defendants (and alleged co-conspirators) to settle claims seeking the same insurance company profits that form the basis of the restitution award. (*Infra* pp. 59-64.)

3. *The District Court Correctly Refused To Award Additional Interest.*

This Court's remand order authorized *reinstatement* of the restitution award, not the billion-dollar *increase* Appellants sought. The district court properly resolved the parties' factual disputes and rejected further interest because the amount of any judgment was not and could not have been "certain" until after the retrial. (*Infra* pp. 64-69.)

VI.
STANDARD OF REVIEW

This Court *presumes* district court decisions are correct, and Appellants have the burden of overcoming this presumption. *See*, *e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006); *Parke v. Raley*, 506 U.S. 20, 29 (1992).

Properly preserved objections to the formulation of civil jury instructions are subject to abuse of discretion review. *See*, *e.g.*, *Mueller v. Auker*, 700 F.3d 1180, 1193 (9th Cir. 2012); *Fikes v. Cleghorn*, 47 F.3d 1011, 1013 (9th Cir. 1995) ("We review for abuse of discretion a district court's formulation of civil jury instructions."). But where (as here) a party invites the very course that it then attacks on appeal, or where a party *opposes* a favorable instruction the trial court offered to give, "review is denied under the 'invited error' doctrine." *United States v. Guthrie*, 931 F.2d 564, 567 (9th Cir. 1991) (collecting cases).

Although a district court's order granting equitable relief generally is reviewed for abuse of discretion (*see eBay Inc. v. MercExchange, L.L.C.*,)) 547 U.S. 388, 391 (2006)), the court's *legal* conclusions in awarding restitution are

reviewed *de novo*, and its factual findings generally are reviewed for clear error (*see* Fed. R. Civ. P. 52(a); *Milicevic v. Fletcher Jones Imports, Ltd.*, 402 F.3d 912, 915 (9th Cir. 2004)). The denial of an offset under Section 877 also is reviewed *de novo*. *See*, *e.g.*, *Fed. S&L Ins. Corp. v. Butler*, 904 F.2d 505, 510 (9th Cir. 1990).

VII.
APPELLANTS' CHALLENGES TO THE JURY'S UNANIMOUS VERDICT DO NOT PROVIDE ANY BASIS FOR A THIRD TRIAL

In its 2008 opinion, this Court ordered a retrial of the NOLHGA Premise, which it defined as the question presented in Verdict Form 7:

> Did the Commissioner prove that, but for the misrepresentation, concealment or conspiracy that led to your answers to previous questions, he probably would have entered into a transaction with NOLHGA for the benefit of the ELIC Estate?

Altus, 540 F.3d at 999, 1006, 1011.

The district court conducted the retrial that this Court ordered, presented the very question (updated slightly to reference only the conspiracy claim (1-ER-35)) to the jury that this Court directed, and permitted Appellants to pursue $4.3 billion in damages. Appellants were not limited in presenting their evidence to try to convince the 2012 jury that Commissioner Garamendi would have selected the junk-bond-laden NOLHGA bid if the portage agreements had been disclosed. In the end, Appellants simply could not overcome the contemporaneous evidence that (1) Commissioner Garamendi "disdained" bonds-in bids like NOLHGA's (3-SER-578), (2) notwithstanding the portage agreements, the Altus/MAAF bid was the

highest bid, with the largest guaranteed payments to policyholders (3-SER-582), (3) the real-life Altus/MAAF deal produced "an outcome most people never dreamed possible" (3-SER-583), and (4) there were regulatory solutions that could have allowed the Altus/MAAF bid to proceed if the portage agreements had been disclosed (1-SER-13-15). The jury unanimously rejected the NOLHGA Premise based on the facts, not because of any instructional error.

A. The District Court Faithfully Applied This Court's Mandate And Properly Rejected Appellants' Attempt To Stack The Deck In Their Favor

Appellants argued in their prior appeal that the "harm" finding in the conspiracy verdict, when coupled with Jury Instruction No. 25, meant that the jury found in their favor on the NOLHGA Premise and that Verdict Form 7 was "superfluous." *Altus*, 540 F.3d at 1007-08. This Court rejected that argument and found that the verdicts could not "be reconciled in favor of either side." *Id.* at 1008. Accordingly, this Court ordered a retrial of the NOLHGA Premise and that is exactly the case that the district court tried.

Appellants now rely on the 2005 verdicts and instructions to contend that the jury in the first trial "impliedly found that, but for the fraud, Commissioner Garamendi would have chosen a bid other than the Altus/MAAF bid—*i.e.*, either the NOLHGA or Sierra bid." (AOB 39.) As explained below, Appellants' position is a thinly disguised reprise of their rejected argument from the last appeal that rests on a basic misreading of the 2005 verdicts and jury instructions, the

district court's rulings, and this Court's opinion and mandate.

1. *The District Court Properly And Precisely Followed The Mandate.*

In the last appeal, this Court held that "[t]he jury's failure to answer Form 7 'left a gaping hole in the special verdict. To do other than send the case back for a new trial when decision on a vital issue by the jury is missing would deprive the parties of the jury trial to which they are entitled constitutionally.'" *Altus*, 540 F.3d at 1008-09 (citation omitted). Accordingly, it "remand[ed] for a new damages phase trial limited to proffer of the NOLHGA Premise and a determination of damages (including punitive damages), if any, on that theory." *Id.* at 1009.

The district court carefully followed that mandate, presenting the jury with the question directed by this Court: "Did the Commissioner prove that, but for the conspiracy to defraud, he probably would have entered into a transaction with NOLHGA for the benefit of the ELIC Estate?" (3-SER-553.) There was no error in following this Court's mandate to the letter.

Appellants suggest that the district court should have deviated from the mandate, limited Artemis' ability to introduce evidence of alternatives to the NOLHGA bid, and forced the jury into an artificial and hypothetical choice between NOLHGA and Sierra. But the district court properly refused to dictate facts that were never found and properly refused to ignore this Court's mandate by conducting a partial trial on an artificial premise. *See*, *e.g.*, *In re Beverly Hills*

Bancorp, 752 F.2d 1334, 1337 (9th Cir. 1984) ("On remand, a trial court may not deviate from the mandate of an appellate court."). In fact, a retrial that imposed upon the 2012 jury findings that were never made—by excluding the possibility of alternatives other than NOLHGA or Sierra—would have violated *Artemis'* Seventh Amendment rights. *Altus*, 540 F.3d at 1005 ("To do other than send the case back for a new trial when decision on a vital issue by the jury is missing would deprive the parties of the jury trial to which they are entitled constitutionally.") (internal quotation marks omitted).

This Court ordered a retrial of the entire NOLHGA Premise, not the "narrower" question of whether "the Commissioner would have chosen the NOLHGA bid rather than the Sierra bid." (AOB 45.) The NOLHGA Premise asks which of the real world bidders—*e.g.*, Altus/MAAF, NOLHGA, or Sierra—the Commissioner would have selected had he known of the portage agreements. But the bids cannot be evaluated in a vacuum, especially here, where there was an open, public auction in which Altus/MAAF provided the stalking horse bid. (3-SER-542, 585.) The jury could not have answered the question of which bidder the Commissioner would have chosen without hearing evidence on the whole bidding procedure and considering the details of *all* of the bids—the issue of whether the Commissioner would have chosen NOLHGA is inextricably intertwined with the question of whether he would have rejected Altus/MAAF. For that reason, this Court never ordered the district court to conduct a piecemeal

trial of parts of the NOLHGA Premise—Sierra vs. NOLHGA—and such a piecemeal trial would not have been permissible in any event. "[A]lthough partial new trials are permitted, the device 'may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.'" *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 774 (9th Cir. 1981) (quoting *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931)). This Court concluded that the NOLHGA Premise as a whole was distinct and separable from the liability findings and could be tried separately. *Altus*, 540 F.3d at 1006. Appellants' attempt to contort this Court's simple and straightforward mandate is without basis.

2. *The First Jury Was Not Asked To Make (And Did Not Make) The Finding That Appellants "Infer" From The 2005 Verdicts.*

Appellants' argument also rests on a faulty premise. They contend that in the 2005 trial, the jury "found" that Commissioner Garamendi would not have chosen Altus/MAAF and, instead, would have chosen NOLHGA or Sierra and no other option. (AOB 39.) But the jury was never presented with the question that Appellants now argue it must have answered. Only the unanswered Verdict Form 7—which posed the NOLHGA Premise—asked the jury to decide which of the various bids Commissioner Garamendi would have selected.

As this Court noted in its previous opinion, "[t]he Commissioner proposed Verdict Form 7 to satisfy his burden of proving that he would have obtained a profit but for the defendants' conduct." *Altus*, 540 F.3d at 1006 n.12. Appellants

did not meet their burden in the first trial, as the jury deadlocked on this form. This Court concluded that "the verdicts cannot be reconciled in favor of either side[,]" and "[s]ince we cannot infer anything from the jury's silence, we are left with an indeterminate verdict." *Id.* at 1008.

To overcome the obvious problem that *nothing* can be inferred from the jury's failure to answer the NOLHGA Premise, Appellants engage in a strained reading of the jury instructions to try to "infer" the finding they desire. Although the first jury concluded that the Altus/MAAF Group's "scheme caused harm to the ELIC Estate" (*id.* at 1001-02), the jury did not specify what the "harm" was. In fact, when the district court proposed to ask the jury to identify the "harm" in the verdict forms, *the Commissioner* objected that it would be "fraught with peril to ask [the jury] to fill in with pen their identification of the harm" (2-SER-236) and that this proposal would "impermissibly require[] the jury to agree on the precise nature of the harm rather than on just the fact of harm" (3-SER-423). Having achieved the very ambiguity they sought, Appellants now purport to divine what the jurors *must have all agreed upon* as the "harm." Setting aside the patent hypocrisy of Appellants' position, the record simply does not support their attempt to extract definitiveness from this "indeterminate verdict."

First, the jury instruction that applied to the conspiracy claim (Instruction No. 30) did not define "harm" in the context of any particular bidder. Instead, that Instruction stated:

> The Commissioner claims that he was harmed by the following companies that allegedly conspired to, and did obtain, ELIC's junk bonds and insurance business through fraud: Altus/Credit Lyonnais, MAAF, Omnium Geneve, SDI Vendome, and Financiere de Pacifique …. The Commissioner contends that Artemis and Pinault are responsible for the harm because they joined those companies' alleged conspiracy to commit this fraud.

Altus, 540 F.3d at 1006 n.14. Appellants' attempt to use Instruction No. 25—the harm instruction related to the misrepresentation and omission claims that they *lost*—to determine what the 2005 jury meant when it found that the conspiracy caused "harm" is simply a rehash of an argument Appellants presented and lost in the prior appeal. *Id.* at 1008. But this Court confirmed that it was Instruction No. 30 that "was the instruction on proving harm resulting from the conspiracy" and that this instruction "did not depend on the NOLHGA Premise." *Id.* It also determined that the conspiracy instruction could be construed to encompass a notion of harm that "was broader" than the instruction the jury was given "on harm for intentional misrepresentation and concealment." *Id.* Ultimately, the verdicts could not "be reconciled in favor of either side" and reflected possible jury "confusion," thus requiring a retrial of the NOLHGA Premise. *Id.* at 1007.

Second, Appellants' current position is directly contrary to the position that they took during the damages phase of the 2005 trial. As the Commissioner's counsel told the 2005 jury:

> During Phase I of this case, we presented evidence showing three types of harm that, in our opinion, were the result of the conspiracy. They were [1] the rejection of the NOLHGA Bid, [2] the loss of the opportunity to rescind the bond sale transaction,

> and [3] the $75 million that was paid in 1998 to settle this tax indemnity claim.

(3-SER-339.)

Appellants' current theory—that the 2005 jury ***must*** have concluded that Commissioner Garamendi would have picked either NOLHGA or Sierra in 1991—is completely at odds with Appellants' "lost rescission opportunity" theory, which *presupposed* that Commissioner Garamendi selected the Altus/MAAF bid in 1991 and sold the junk bonds to Altus in 1992. Otherwise, there would have been no junk bond sale to "rescind." Appellants' "lost rescission opportunity" theory actually depended on the Commissioner ***rejecting*** NOLHGA, ***rejecting*** Sierra, and ***selecting*** Altus/MAAF in 1991. (*See also* 3-SER-340 (arguing "three different California insurance companies … offer[ed] their assistance in case that 1993 rescission motion was, in fact, successful[:] … SunAmerica, Transamerica, and Pacific Mutual").) Appellants could not have presented this theory—postulating that these other insurance companies could have become involved—if there was already a jury finding that the Commissioner would have rejected Altus/MAAF and chosen NOLHGA or Sierra. Ultimately, the jury found no damage from the lost opportunity to rescind, making the most likely inference that the 2005 jury thought that the Commissioner would not have rescinded the junk bond sale. But whatever the 2005 jury might have thought, it is clear that the 2005 jury did ***not*** find that Altus/MAAF would have been rejected in 1991.

Third, Appellants' argument ignores another obvious problem: at trial, they

never claimed that Commissioner Garamendi would have chosen the Sierra bid. As the Commissioner's counsel argued in his closing argument in 2005:

> There is very little evidence on Sierra, and so I'm not going to spend much time on that. I just want to point out that in the bidding rounds, NOLHGA won the first round. Altus/MAAF won the second round. Sierra is the only of the three finalists who never won a round. They lost every one. They were dead last.

(3-SER-428.) Throughout the litigation, Appellants contended that Commissioner Garamendi would have chosen NOLHGA. When Judge Matz expressed concern that the Commissioner was "changing horses" mid-trial, the Commissioner's counsel reassured him, "I do not want to dispute for a second, your Honor, that we are riding the NOLHGA horse in this case," and "we are not going to argue that [maybe Commissioner Garamendi would have picked the Sierra bid] at all." (2-SER-232, 233.) The Commissioner is bound by his decision to disclaim any "Sierra Premise." (1-ER-48-51; 3-SER-496 (Commissioner sought summary judgment against Sierra).) As a practical matter, we know that the 2005 jury could not agree on whether Commissioner Garamendi would have chosen NOLHGA, and Appellants never argued that Commissioner Garamendi would have chosen Sierra, so all we can surmise is that the first "jury had something else in mind, even if it was only confusion." *Altus*, 540 F.3d at 1007.

3. *Appellants Misstate The Previous Rulings In This Case.*

Unable to find any support from the actual 2005 jury findings, Appellants resort to mischaracterizing this Court's prior opinion. Based on selective

quotations, Appellants contend that this Court conclusively determined that the "harm" finding in Verdict Form 5 "necessarily meant that the Commissioner would have picked *either* the NOLHGA bid or the Sierra bid." (AOB 42.) In reality, this Court held that "the verdicts cannot be reconciled in favor of either side." *Altus*, 540 F.3d at 1008. A central issue in the last appeal was Appellants' contention that Verdict Form 7 was "superfluous" and that the jury had already determined that the Commissioner would have chosen NOLHGA. *Id.* at 1004. In rejecting their contention, this Court identified several possibilities, *other than* the NOLHGA Premise, of what the jury "could have" believed in finding "harm" in Verdict Form 5. Although omitted from Appellants' brief, this Court held that "[a]lthough we disagree with the district court that the verdicts compel judgment for Artemis, *we also disagree* with the Commissioner and NOLHGA that the verdicts must be reconciled in their favor." *Id.* at 1007 (emphasis added).

Appellants attempt to turn this Court's identification of what the jury "***could have***" found into a decree of what the jury "***must have***" determined. Appellants even go so far as to substitute the word "must" for the Court's word "could" in their recitation of this Court's holding: they misread this Court's statement that the "jury ***could have*** found harm if it concluded that the Commissioner would have entered a transaction with either of the 'bonds-in' bidders" (*id.* at 1008), to mean that "the Court ***held*** that … the first jury ***must have concluded***" that the Commissioner would have selected NOLHGA or Sierra (AOB 29-30 (emphases

added)). But what the Court actually concluded was that "the verdicts cannot be reconciled in favor of either side" because "the jury *might have answered Form 7 in favor of either party*. *Since we cannot infer anything from the jury's silence, we are left with an indeterminate verdict*." *Altus*, 540 F.3d at 1008 (emphasis added). That the jury could not answer Verdict Form 7 suggested "that the jury had something else in mind, ***even if it was only confusion.***" *Id.* at 1007 (emphasis added).

The Court's discussion of possible interpretations of the verdicts—ranging from juror confusion to a hypothetical conclusion that either NOLHGA or Sierra would have purchased the assets of the ELIC Estate—were not the only possible constructions, as evidenced by the "lost rescission opportunity" claim (which was predicated on the acceptance of the Altus/MAAF bid, *see supra* pp. 26-27) that Appellants presented in the 2005 damages phase.[3] It was not necessary for this Court to identify and explore all conceivable interpretations. Rather, the inability to definitively decipher the jury's "indeterminate" verdict, coupled with the

[3] Selecting a revised Altus/MAAF bid was one obvious option that was not foreclosed by those verdicts. As Judge Matz explained *after* remand, "because he was so intent on ridding ELIC's Estate of the junk bonds, [Commissioner Garamendi could] have worked out a 'deal' with the Altus/MAAF bidders, such as a voting trust, or he would have re-opened the bidding to elicit a different 'bonds-out' bid." (1-ER-55.) "That the jury could rationally arrive at this conclusion is demonstrated by the fact that in a sense it already did." (1-ER-55.)

likelihood of "confusion," led this Court to place the question in the hands of a new jury for a complete retrial of the NOLHGA Premise. *Altus*, 540 F.3d at 1009.

Appellants' reliance on the "law of the case" doctrine (AOB 43) is misplaced because this Court neither expressly nor implicitly limited the retrial to NOLHGA and Sierra. For the law of the case doctrine to apply, "[t]he issue in question must have been decided explicitly or by necessary implication in the previous disposition." *Hall v. City of L.A.*, 697 F.3d 1059, 1067 (9th Cir. 2012); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186-87 (9th Cir. 2001) (law of the case doctrine is limited to the Court's "explicit decisions as well as those issues decided by necessary implication"). Contrary to Appellants' assertions, the district court followed the mandate to the letter and retried the NOLHGA Premise.[4]

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[4] Far from "refus[ing] to apply this Court's" opinion (AOB 42), the district court adhered to it by retrying the NOLHGA Premise and refusing to restrict the retrial to a contrived, binary choice between NOLHGA and Sierra. Judge Matz also did not "change" his position after remand (*id*. at 42-43); rather, as he explained, in "a remarkable display of zealous advocacy" (1-ER-49), *Appellants* had misstated his rulings and ignored that Commissioner Garamendi could have reworked the Altus/MAAF "deal" or "re-opened the bidding." (1-ER-55.)

Moreover, because this Court reversed and/or vacated Judge Matz's rulings on the verdict forms (*Altus*, 540 F.3d at 1009), it is unclear why Appellants believe that those 2005 decisions are relevant here (particularly given Judge Matz's decision that the Commissioner and his witnesses were "devoid of credibility" (*id.* at 1007 n.16)).

B. The District Court Correctly Instructed The Jury On Causation

In accordance with this Court's mandate, the district court properly instructed the jury to "determine whether the Commissioner has proved that, but for the conspiracy to defraud, he probably would have entered into a transaction with NOLHGA for the benefit of the ELIC Estate." (1-ER-35.) The question presented to the 2012 jury was thus the proper question of what would the Commissioner have done had he known of the concealed facts, not, as Appellants urge, what the Commissioner would have done had he known of the act of concealment. The district court consistently explained the meaning of "but for" as the *absence* of the wrongful conspiracy—that is, if the portage agreements had been disclosed. The record belies Appellants' contention that the jury assumed that "in the 'but-for' world none of the portage agreements had ever existed." (AOB 59.)

1. *The District Court's Jury Instructions Properly Followed This Court's Formulation Of The NOLHGA Premise.*

Because Appellants cannot credibly claim that the district court's formulation of the NOLHGA Premise—which was originally proposed by the Commissioner in 2005 and later endorsed by this Court—misstated the law, they must show that the district court abused its discretion by choosing its formulation of the question over the alternative instruction that they proposed in 2012.

Mueller, 700 F.3d at 1193.[5] In deciding challenges to jury instructions, reviewing courts do not "engage in a 'technical parsing' of the language"; instead, they "think of the instructions as the jury would—'with a commonsense understanding of the instructions in the light of all that has taken place at trial.'" *Rhoades v. Henry*, 638 F.3d 1027, 1042-43 (9th Cir. 2010) (citation omitted).

Far from abusing its discretion, the district court carefully adhered to this Court's formulation of the NOLHGA Premise, which was based on the 2005 verdict form ***drafted by the Commissioner***. (3-SER-360-361.) This formulation is entirely consistent with hornbook tort law on causation. As the Supreme Court recently reaffirmed, the "but for" test of causation "requires the plaintiff to show 'that the [alleged] harm would not have occurred' in the absence of—that is, but for—the defendant's conduct." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524-25 (2013) (explaining that "[c]ausation in fact—i.e., proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of *any tort claim*" (emphasis added)). The Supreme Court went so far

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[5] Appellants attempt to invoke *de novo* review by asserting that the instruction was "'incomplete, and therefore incorrect.'" (AOB 57, n.19 (quoting *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1232 (9th Cir. 2011))). This attempt fails because, as discussed *infra* pp. 39-44, the court did not omit a "theory of the case" that "cannot be readily deduced from simply reading" the instruction given. *Hunter*, 652 F.3d at 1232, 1235. Moreover, unlike in *Hunter*, where the plaintiffs did not object to the disputed instruction, but rather requested additional instructions, *id.* at 1228, Appellants simply asked the district court to deliver an alternative, redundant formulation of the instruction ultimately given.

as to describe it as "***textbook tort law*** that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" *Id*. (emphasis added; citations omitted).

California law is in accord. *See*, *e.g.*, *Boschma v. Home Loan Center, Inc*., 198 Cal. App. 4th 230, 248 (2011) (under California law, a plaintiff must show that "'he would not have acted as he did if he had known of the concealed or suppressed fact'") (citation omitted). As this Court observed in the last appeal, "[t]he Commissioner proposed [Verdict] Form 7 to satisfy his burden of proving that he would have obtained a profit but for the defendant's conduct, which is a predicate to receipt of lost profits as compensatory damages under California law." *Altus*, 540 F.3d at 1006 n.12 (citing *Kids' Universe v. In2Labs*, 95 Cal. App. 4th 870, 883-84 (2002)).[6]

Consistent with these established legal principles, the NOLHGA Premise required the jury to assume that the "alleged wrongful action or actions"—the concealment of the Altus/MAAF relationship and the portage agreements (AOB

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[6] Appellants acknowledge the "more general rule, applicable in all tort cases, that the 'causal inquiry asks ***whether the harm would have occurred if the actor had not acted tortiously***'" (AOB 48 (quoting REST. (THIRD) OF TORTS §26, cmt. f (2010))), and they cite *Cabral v. Ralphs Grocery Co.*, 51 Cal. 4th 764, 785 (2011) (AOB 48), which explained that "[t]he counterfactual question relevant to but-for causation, therefore, ***is what would have happened if [defendant] had not stopped his tractor-trailer rig there*** [that being the tortious act] ...." (emphases added).

35)—***did not occur***. It was entirely proper for the district court to instruct the jury to determine whether Commissioner Garamendi would have negotiated a transaction with NOLHGA "but for the conspiracy to defraud." (1-ER-35.)

As the instruction "sufficiently conveyed [their] theory," Appellants are "not 'entitled to dictate the turn of phrase the judge should use to acquaint lay jurors with the applicable law.'" *Sheek v. Asia Badger, Inc*., 235 F.3d 687, 698 (1st Cir. 2000) (citation omitted); *see also Dream Games of Ariz., Inc. v. PC Onsite,* 561 F.3d 983, 989 (9th Cir. 2009) (rejecting claim of error because "the jury instructions fairly and sufficiently explained the theory of the case and did not misstate the law"); *Brooks v. Cook*, 938 F.2d 1048, 1053 (9th Cir. 1991) ("A party is not entitled to have the jury instructed in the particular language of his choice.").[7]

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[7] The cases cited by Appellants (AOB 46) do not change this result. Unlike here, where the district court closely adhered to this Court's formulation of the NOLHGA Premise, the instructions in *Clem v. Lomeli*, 566 F.3d 1177, 1181, 1182 (9th Cir. 2009), "misstated the law" and "added [an] extra element to [plaintiff's] burden." Next, *Dang v. Cross*, 422 F.3d 800, 811-12 (9th Cir. 2005), concluded that the failure to give instructions concerning separate and distinct legal bases for punitive damages required reversal. And *Galdamez v. Potter,* 415 F.3d 1015, 1021 (9th Cir. 2005) (AOB 46-47 n.13), held that the refusal to give the plaintiff's requested formulation of a "mixed motive" instruction "was neither an abuse of discretion, nor misstatement of the law." *Id.* Here, the court acted within its discretion and gave a correct instruction on the NOLHGA Premise, even though it was not the one proposed by Appellants.

2. *Appellants' Proposed Formulation Misstated The Law.*

Appellants advocated the following language as part of the NOLHGA Premise instruction that they proposed as an alternative to the one given by the district court: "In other words, had the Commissioner learned of the portage agreements, he probably would have entered into a transaction with NOLHGA." (AOB 22.) The impropriety of this formulation is exposed by Appellants' assertion that the question means that the Commissioner learned of the portage agreements "after the November Portage Agreements were signed" (AOB 63), months after the purported misstatements and omissions that form the conspiracy are alleged to have begun. (AOB 10; 2-SER-201 (Commissioner's opening statement: "fraud started" in "March and April of 1991").) Put another way, Appellants' "but for" world assumes that a fraud did occur, and then asks what Commissioner Garamendi would have done **if he had exposed the fraud midway and learned *that he had been lied to***. *See* AOB at 14 ("The 'NOLHGA Premise': That The Commissioner Would Have Selected The NOLHGA Bid **Had He Learned Of … The Fraud** Prior To The Final Selection Of The Altus/MAAF Bid.") (emphasis added).

Despite the district court's specific admonitions, Appellants repeatedly mischaracterized the question presented by the NOLHGA Premise and attempted to confuse the jury. As the Commissioner's counsel argued in his closing:

> [I]f the Commissioner had known, *had known the depth of the lying and the depth of the deceit, had known that people were*

> *looking him in the eye and promising him one thing and behind his back in writing doing the exact opposite*, can anyone doubt that the Commissioner or anybody would never want to do business with those people again in any possible way? …. There can be no question that the Commissioner could never deal with them *once the conspiracy to defraud became known*.

(2-SER-114-115 (emphasis added).) Artemis sought to refocus the jury in its closing: "I want to leave you with this: When you retire to the jury room, the question for you is what would Mr. Garamendi have done in 1991 if Altus/MAAF had told him about the portage agreements from the beginning?" (2-SER-123-124.) In other words, "if there was no conspiracy, would the Commissioner have entered into a deal with NOLHGA?" (2-SER-122.) In rebuttal, the Commissioner's counsel accused Artemis of misleading the jury:

> [T]he but for language. I want you to listen very closely when you hear that and I want you to listen for any statement that says you should assume there was no conspiracy. Remember those words: There was no conspiracy … just listen and see if you hear the words: They would have divulged the portages in the beginning. Because we know that lawyers are privy. We get to see the judge's instructions before you do. And you're not going to hear those words anywhere. That's the way [Artemis' counsel] defines this but that is not it.

(2-SER-125-126.) Artemis objected, and the court attempted to correct the confusion created by the Commissioner's counsel, which the court later characterized as "misleading" (2-SER-133):

> "But for the conspiracy" means if there had been no conspiracy …. You're not to assume what he would have done if he had known of a conspiracy because if he had known of a conspiracy, he might have been offended or whatever and done different things …. [T]he question is: If there had never been a conspiracy, what

would he have done?

(2-SER-135.) This curative instruction was entirely proper because, as described above, the properly-formulated "but for" world assumes "the absence of … the defendant's [wrongful] conduct." *Nassar*, 133 S. Ct. at 2525.

Appellants now contend that the district court should have ignored the settled meaning of "but for" and instructed the jury to determine what Commissioner Garamendi would have done if *there was a conspiracy and it was revealed later*. However, a plaintiff is required "to establish that he 'would not have acted as he did if he *had known of the concealed or suppressed fact*.'" (AOB 47 (quoting *Boschma*, 198 Cal App. 4th at 248) (emphasis added).) Here, the concealed fact was the relationship between Altus and MAAF (AOB 35), and the jury was properly asked to determine what would have happened had that relationship—as embodied in the portage agreements—been disclosed from the outset.

The law does not ask whether the plaintiff would have acted differently if he had known that the concealed or suppressed fact *had been concealed or suppressed*. Because Appellants' position conflicts with well-settled law—including the authority upon which they rely—the district court correctly rejected their proposed instruction. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1063 (9th Cir. 2008); *Bird v. Lewis & Clark College*, 303 F.3d 1015,

1022 (9th Cir. 2002).[8]

3. *Appellants Were Not Constrained In Presenting Their Theory, And The Jury Was Not Confused About Whether It Should Assume The Existence Of The Portage Agreements.*

Appellants falsely assert that "the District Court told the jury to ignore the Commissioner's evidence that the Commissioner would not have selected the Altus/MAAF bid had the portage agreements been disclosed." (AOB 19.) To the contrary, the district court *allowed* Appellants to ask multiple witnesses what would have occurred if the portage agreements had been disclosed.[9] It only

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[8] Appellants also make the disingenuous claim that "as the second trial approached, Artemis saw an opportunity arising from the transfer of the case to a new judge and seized it" by articulating the NOLHGA Premise as what Commissioner Garamendi would have done "had the Altus/MAAF conspiracy never occurred." (AOB 17-18 (quoting 2-ER-341).) But that has always been the proper articulation of the NOLHGA Premise. *Altus*, 540 F.3d at 1006 n.13 ("[Y]ou must determine whether the Commissioner would have agreed to the NOLHGA bid *had the alleged fraud not occurred*.") (quoting instructions to 2005 jury) (emphasis added). Judge Matz's February 2010 order, quoted by Appellants out of context, was not addressing the *nature* of the "but for" world, but rather the appropriate *time frame*. (2-ER-298 (citing Appellants' failure to prove the lost rescission opportunity theory and barring them from arguing that Commissioner Garamendi would have "picked NOLHGA in 1992, 1993 or any time after he first accepted the Altus/MAAF bid").) The court's clarification was necessary as a result of *Appellants'* post-remand attempt to seize language out of context and redefine their theory.

[9] (*See infra* p. 40; 2-SER-181; 2-SER-183-184 ("Q. If you had learned about the existence of these portages before the court approved the Altus/MAAF bid in December of 1991, what would you have done?"); 2-SER-187-188 ("Q. If, in the beginning of the process of the Commissioner meeting with Altus and setting up the bidding, if Altus had told you that Altus wanted to own and control the insurance company, what would you have done?").)

interjected when Appellants' counsel attempted to reframe the question as what would have happened had Commissioner Garamendi learned that Altus/MAAF had lied to him, explaining:

> Counsel, that's not the correct question for the jury. The question is: If there had never been a conspiracy to conceal, not if they had had a conspiracy and then told you later. The question is: If there never had been a conspiracy to conceal, if they had divulged this in the very beginning, that's the question. What would have happened then?

(2-SER-185-186.)

Moreover, virtually the entire trial of the NOLHGA Premise focused on what Commissioner Garamendi would have done *had he been aware of the portage agreements*. Witness after witness was asked what would have occurred if they had "seen the portage agreements." (2-SER-181 (Rick Baum, Commissioner Garamendi's chief deputy).)[10] As the district court explained, "there's no question that the letters are there. There's no question there's an agreement there. *Everybody has made that crystal clear to the jury*." (2-SER-140 (emphasis added).)

There is simply no support in the record for Appellants' newfound objection

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[10] (*See also*, *e.g.*, 2-SER-162 (John Garamendi); 2-SER-193 (Art Dummer, NOLHGA's lead negotiator); 2-SER-146-147 (H. Rodgin Cohen, former lawyer for Altus/Credit Lyonnais); 1-SER-9-11 (Terence Lennon, Artemis' expert on insurance regulation); 1-SER-19 (Michael Parks, advisor to Altus/MAAF and later President of Aurora).)

that "the jury almost certainly interpreted the court's directives to assume 'no conspiracy' as a command to assume that none of the portage agreements had ever existed." (AOB 34.) In fact, the jury was repeatedly told that "but for the conspiracy to defraud" meant that the jury should assume that the Commissioner knew of the portage agreements. For example, the district court specifically informed the jury that "the only thing we're interested in is anything that pertained to what he would have done in 1991 *if he had known of the portage agreements at that time*." (2-SER-170 (emphasis added).) Artemis likewise accurately explained the NOLHGA Premise in both its opening statement and closing argument, telling the jury that "[t]he question that you are going to be asked to answer is what would have happened if there was no conspiracy? What would Commissioner Garamendi have done if Altus had told the department about the Portage agreements in 1991?" (2-SER-203; *see also* 2-SER-123-124, 121 ("There were alternatives, and you heard Mr. Lennon [New York's former chief life insurance regulator] talk about some of them. Even walked you through some of the factors that a reasonable regulator would consider *if presented with those portage agreements at the very beginning of the process*.").) Even the Commissioner's counsel remarked that "Artemis has argued consistently through this proceeding [that] what [the NOLHGA Premise] means is what would have happened if the portages had been disclosed." (2-SER-138.)

The jury notes during deliberations also confirm that the jury correctly

understood the NOLHGA Premise. In its first note, the jury asked two questions that, far from indicating that it had to "assume that none of the portage agreements had ever existed" (AOB 34), actually were premised upon the Commissioner seeing the portage agreements. (2-SER-97 ("Are we deciding the Commissioner, *upon seeing the portage agreements*, would have disqualified or eliminated Altus/MAAF? Second, or are we deciding [if the] *Commissioner seeing the portage agreements* up front would have negotiated … about alternate solutions with Altus[?]") (emphases added).) In response to the court's request for clarification of the questions, the foreperson replied, "[w]hat we meant, Your Honor, no, there's no difference if the portage agreements were shown up front … [w]ould the Commissioner automatically reject it or would he have entered or explored some other solutions." (2-SER-97-98.) The court informed the jury that this was the "basic premise of the question …. All I can tell you is that's exactly what you have to decide." (2-SER-98.) In other words, the court specifically told the jury that the "basic premise of the question" it had to answer was what Commissioner Garamendi would have done if the portage agreements had been disclosed.

Further undermining Appellants' position is that the *only* testimony the jury requested during the deliberations was from Mr. Lennon (2-SER-101), an insurance regulator who had identified regulatory solutions to the issues presented by the portage agreements (1-SER-7-15). Specifically, it asked to re-hear his

testimony about the use of a voting trust, one such possible solution. (2-SER-101 ("There is a note from the jury that you'd like to hear the testimony of Terrance Lennon; direct and cross in relation to Exhibit 4392"); 3-SER-594.) This testimony would have been entirely irrelevant if, as Appellants claim, the jury thought that they had to assume that the portage agreements never existed.

Finally, on the morning of the last day of deliberations, the jury again asked a question that was explicitly premised upon the existence of the agreements: "*If [the] Commissioner is presented with portage agreements* before the stalking bid was signed, would he move forward with the Altus bid?" (2-SER-82) (emphasis added).) Consistent with his other responses, Judge Klausner properly declined to answer this question. (2-SER-82 ("You've got to make those decisions. I can't comment on the evidence. I'm sorry.").)

Even if these exchanges were not enough, Appellants' position still fails because their argument runs afoul of the longstanding rule that "[j]uries are presumed to follow the court's instructions." *Aguilar v. Alexander*, 125 F.3d 815, 820 (9th Cir. 1997). The record establishes that the jury did not "assume away" the portage agreements. Moreover, because the court informed the jury that the question it was to answer was what Commissioner Garamendi "would have done in 1991 if he had known of the portage agreements at that time" (2-SER-170), the absence of specific references to the portage agreements in the NOLHGA Premise instruction, even if it were error (which it is not), was harmless. *Lambert v.*

Ackerley, 180 F.3d 997, 1008 (9th Cir. 1999) (error "harmless because 'the evidence would have supported a verdict for the plaintiff even with th[e requested] instruction'" (quoting *Benigni v. City of Hemet*, 879 F.2d 473, 480 (9th Cir. 1989)).

In an effort to support their arguments, Appellants again cite incomplete snippets of the record. For example, on four occasions, Appellants assert that a "frustrated juror went so far as to blame the court for the jury's confusion, bluntly telling the judge that 'this [confusion] is your fault.'" (AOB 59 (alteration in original); *see also id.* at 1, 27, 34.) In each of their citations, however, Appellants fail to include the word "(*laughter*)," which appears in the official transcript both *before* and *after* the juror's comment:

> Juror No. 4: We knew were you [sic] going to answer it that way. (*Laughter*)
>
> The Court: It's nice to be predictable.
>
> Juror No. 4: So this is your fault.
>
> The Court: Okay; good. (*Laughter*)

(2-SER-85.) The *unaltered* sequence demonstrates that, contrary to Appellants' argument, the jurors believed that the court was consistent in its instructions and responses to questions, and any "frustration" on the part of the jurors was not the result of confusion—a word inserted by Appellants but appearing nowhere in the transcript—but merely the difficulty of answering hypothetical questions about a "but for" world.

4. *The District Court Properly Responded To The Jury's Questions, And Even If There Were Any Error, It Was Invited By Appellants.*

Appellants claim, for the first time on appeal, that the district court committed prejudicial error by "refusing to answer the jury's requests for clarification except by repeatedly and unhelpfully telling the jury to assume that there was 'no conspiracy' in the 'but for' world" and by "failing to respond to a juror's question asking whether the jury should assume that the portage agreements had been disclosed." (AOB 55-56.)

In addition to being without merit, Appellants' charges are remarkable in that they not only *failed to object* to the court's responses to the jury's questions,[11] but they also *specifically requested* the actions that they now challenge. After the jury's first note, Judge Klausner informed the parties that there was "not a whole lot I can tell [the jury] about this," and that he planned to tell jurors that they "will have to decide what would have happened if they had seen the portage agreements." (2-SER-89.) Apparently concerned that this would extinguish the confusion they had carefully nourished throughout the trial, Appellants argued that

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[11] *See* 2-SER-99-101 (no objection following court's response to first note from jury, even after court asked if there were "[a]ny comments from any of the attorneys?"); 2-SER-101-104 (no objection following jury's request to be read testimony of Terrance Lennon); 2-SER-80-81 (no objection to court delivering *Allen* charge); 2-SER-82-84 (no objection to court's response to final questions and direction that jury continue deliberations). In light of the foregoing, Appellants unsurprisingly could not comply with Ninth Cir. Rule 28-2.5, which required them to cite the specific part of the record where they objected to the court's actions.

Judge Klausner should *not* give even that very limited additional instruction. Instead, according to Appellants:

> [T]he appropriate thing to say to them is that these are factual issues that you have to decide, period. I think that avoids any commenting on evidence or suggesting to them any direction that they should go; and it should be limited merely to tell them these are facts they've got to resolve.

(2-SER-90-91; *see also* 2-SER-93 (Commissioner's counsel: "And that's why I felt that the most minimal, this is evidence you've got to decide is the appropriate way to do this.").)[12]

The invited error doctrine bars Appellants' challenge to the court's responses to the jury's questions. Because they asked Judge Klausner to do exactly what he did, and "[t]he court complied with [their] request," Appellants "cannot now complain of what [they] received." *Guthrie*, 931 F.2d at 567.

But Appellants' position fails for the more fundamental reason that there was no error. As "governor of the trial," the district court enjoys "wide discretion" in its "response to a question from the jury." *Arizona v. Johnson*, 351 F.3d 988, 994 (9th Cir. 2003). "'The necessity, extent and character of additional [jury] instructions are matters within the sound discretion of the trial court.'" *United*

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[12] Similarly, regarding another instruction they now attack (AOB 21), Appellants asserted that the "instruction was quite clear" and that the court should not provide further instructions because "it's always hard to do it exactly in the same fashion, repeated instructions." (2-SER-93-94.)

States v. Tatom, 273 F. App'x 600, 602-03 (9th Cir. 2008) (alteration in original) (holding that "the district court did not abuse its discretion by referring the jury to the jury instructions rather than providing an additional ... instruction"). Moreover, because Appellants never objected, the responses are subject only to the highly deferential "plain error" standard of review, which imposes a standard that Appellants do not even attempt to meet. Fed. R. Civ. P. 51(d)(2); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002) (noting that "'[p]lain error is a rare species in civil litigation'") (citation omitted).

After consulting with the parties, the district court responded to the jury's questions. While doing so, the court was very careful to be as "benign" as possible, to avoid "push[ing] them one way or the other." (2-SER-91.) *See Johnson*, 351 F.3d at 994 ("'Because the jury may not enlist the court as its partner in the factfinding process, the trial judge must proceed circumspectly in responding to inquiries from the jury.'") (citation omitted). When the jury asked questions that exceeded permissible boundaries, the district court carefully and correctly declined to answer because, as it explained, it could not "comment on the evidence." (2-SER-82.)

But the court also provided guidance where appropriate. For example, when asked to explain the meaning of the phrase "but for the conspiracy," Judge Klausner explained that "but for" "means in the absence of or if there had never been." (2-SER-83.) As discussed above (*supra* pp. 32-35), this interpretation is

consistent with hornbook tort law, and it was an appropriate response that reaffirmed the previous instruction. *See*, *e.g., United States v. Collom*, 614 F.2d 624, 631 (9th Cir. 1979) ("While the judge was free to do so, attempting to respond to the question directly would have risked further confusion. The judge therefore acted appropriately in merely rereading the previously given … instructions and inviting further questions should the confusion persist.").

Because they have not "called into serious question" "the integrity or fundamental fairness of the proceedings," *Rains v. Flinn*, 428 F.3d 893, 903 (9th Cir. 2005), Appellants have failed to show that the district court abused its "wide discretion" in responding to the jury's inquiries.[13]

VIII.
THE RESTITUTION AWARD AND THE RESULTING JUDGMENT WERE IMPROPER, AND IT WAS NOT ERROR TO REFUSE AN EVEN GREATER AWARD

A. Appellants Are Not Entitled To Any Restitution

During the last appeal, Artemis presented several legal challenges to the award of restitution. This Court declined to address these arguments, but it vacated the restitution award and granted "the district court leave to reinstate that award, ***if***

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[13] Citing *Medtronic, Inv. v. White*, 526 F.3d 487 (9th Cir. 2008), Appellants assert that if there is error, "the burden shifts to Artemis to show that these errors were not prejudicial." (AOB 59.) But this Court has questioned *Medtronic* in light of the Supreme Court's decision in *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009). *See Molina v. Astrue*, 674 F.3d 1104, 1120 n.11 (9th Cir. 2012). Under any standard, however, there was no prejudice, even assuming there was error.

warranted," after the retrial of the NOLHGA Premise. *Altus*, 540 F.3d at 1009 (emphasis added). The district court did not confront any of Artemis' legal arguments against an award of restitution on remand (1-ER-4; 3-ER-588-612), and the jury's verdict in Artemis' favor confirms that restitution here is not "warranted" for several reasons.

1. ***There Is No Independent Cause of Action for "Unjust Enrichment."*** Plaintiff purported to assert an independent "claim" for "unjust enrichment" through a single paragraph in the operative complaint. (2-ER-176.) But California law does not recognize a standalone "claim" to "unjust enrichment." *See*, *e.g.*, *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010) ("'[T]here is no cause of action in California for unjust enrichment.'") (quoting *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003)); *Levine v. Blue Shield of Cal.*, 189 Cal. App. 4th 1117, 1138 (2010) (same); *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1490 (2006) (same). This Court also has confirmed on several occasions that unjust enrichment "is not an independent cause of action in California." *Smith v. Ford Motor Co*., 462 F. App'x 660, 665 (9th Cir. 2011); *Myers-Armstrong v. Actavis Totowa, LLC*, 382 F. App'x 545, 548 (9th Cir. 2010) (same); *Bosinger v. Belden CDT, Inc*., 358 F. App'x 812, 815 (9th Cir. 2009) (same).

2. ***The Binding Verdicts Preclude an Award of Restitution*****.** It is well-settled that restitution cannot be awarded without a "showing of fraud or wrong-

doing." *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1248 (9th Cir. 2000); *see also Levine*, 189 Cal. App. 4th at 1138 (by failing to establish "claims for fraudulent concealment, negligent misrepresentation, and unfair competition …[,] [plaintiffs] have not demonstrated any basis on which they would be entitled to restitution pursuant to a theory of unjust enrichment."). Here, because Appellants did not prevail on any of their underlying tort claims to which they tethered their claim for "restitution," there was no basis for any award.

According to the Pretrial Conference Order, which supersedes the pleadings (*Patterson v. Hughes Aircraft Co.*, 11 F.3d 948, 950 (9th Cir. 1993)), "the Commissioner claims unjust enrichment based on grounds of defendants' fraud and negligent misrepresentations." (3-SER-479.) Appellants dropped the negligent misrepresentation claim during the 2005 trial (1-SER-35; 3-SER-446-447), and the jury found in Artemis' favor on the intentional misrepresentation and concealment claims. Because Appellants did not prevail on any of the claims upon which they sought restitution, there was no basis for any such award. *See*, *e.g.*, *Bosinger*, 358 F. App'x at 815; *GTE Sylvania Inc. v. Cont'l T.V., Inc.*, 537 F.2d 980, 986 n.7 (9th Cir. 1976), *aff'd*, 433 U.S. 36 (1977); *Ag Servs. of Am. v. Nielsen*, 231 F.3d 726, 734 (10th Cir. 2000).

That leaves only the conspiracy claim, but Appellants never linked their theory of unjust enrichment to any "conspiracy." Even if they had, the refusal of two juries to award any actual damages would preclude restitution for at least two

reasons. *First*, "[a] conspiracy which does not result in actual damages is not actionable." *Shiba v. Chikuda*, 214 Cal. 786, 789 (1932). Actual damages are a *necessary element* of a civil conspiracy claim. *See*, *e.g.*, *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 208 (9th Cir. 1991) ("Under California law, it is well settled that … there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results therefrom.") (internal quotation marks omitted); *Sullivan v. Mass. Mut. Life Ins. Co.*, 611 F.2d 261, 266 (9th Cir. 1979) (conspiracy "does not give rise to a cause of action unless a civil wrong has been committed resulting in damages."); *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 511 (1994) (same); *Okun v. Super. Ct.*, 29 Cal. 3d 442, 454 (1981) ("A complaint for civil conspiracy states a cause of action only when it alleges … [a] wrong that causes damage.").

Thus, although this Court determined that the conspiracy verdict was a "complete finding of liability" (*Altus*, 540 F.3d at 1005), that statement preceded the retrial of Appellants' lone remaining damages theory. Now that all of Appellants' damages theories have been rejected (*id.* at 1000; 3-ER-553), this *necessary* element is absent and Appellants have no claim upon which to base any restitution.

Second, Appellants sought restitution from the 2012 jury, and the jury rejected this request. Because "restitution is equally a legal and an equitable remedy, it can be sought from a jury in a fraud case." *Williams Elec. Games, Inc.*

v. Garrity, 366 F.3d 569, 576-78 (7th Cir. 2004); *Jogani v. Super. Ct.*, 165 Cal. App. 4th 901, 910 (2008) ("[R]estitution can be a legal, as opposed to equitable, remedy."). The Commissioner's counsel explicitly requested a restitutionary remedy from the jury in his closing argument:

> And with that, it's clear that the conspirators could have never ever gotten this money. And by reaching the decision that you're going to reach, it is clear that you're not harming them in some way.
>
> ***You are just going back in time and taking money that they never should have gotten and never should have been able to use for two decades and you're just putting it back where it should have been***.
>
> This isn't harm to them. ***This is restoring the situation to what it would have been*** because the Commissioner said explicitly: I will not agree to what you want to do; and all we're doing is going back in time and making things the way they would have been. Now, one way it would have been without a doubt, without a doubt, is that the conspirators would never have had this money.

(2-SER-129 (emphases added); *see also* 2-SER-112, 113, 116-117, 118, 119, 120, 128 (arguing that Artemis received unjust benefits).) Appellants never distinguished between the amounts sought in "damages" from the jury and the amounts sought as "restitution."

Despite the 2012 jury's unanimous rejection of the last of Appellants' damages theories, the district court erroneously found "restitution in the amount awarded by Judge Matz appropriate" and it reinstated the award of $241 million "for the same reasons stated by Judge Matz." (1-ER-4.) Ignoring the binding defense verdicts violated long-established precedent that forbids a court sitting in

equity from overruling jury determinations. *See*, *e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 507 (1959). Where, as here, a trial of equitable claims is preceded by jury findings, the Seventh Amendment prevents courts sitting in equity from disregarding explicit or implicit findings that were necessary to the jury's verdicts. As this Court recently explained:

> In our circuit, it would be a violation of the Seventh Amendment right to jury trial for the court to disregard a jury's finding of fact. Thus, in a case where legal claims are tried by a jury and equitable claims are tried by a judge, and the claims are based on the same facts, in deciding the equitable claims the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations.

Acosta v. City of Costa Mesa, 718 F.3d 800, 828-29 (9th Cir. 2013) (internal quotation marks and citation omitted); *L.A. Police Prot. League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993) (same); *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 507 (9th Cir. 1989) (same); *GTE Sylvania*, 537 F.2d at 986 n.7 (same); *see also Ag Servs.*, 231 F.3d at 733 (reversing restitution award that contravened the jury's implicit findings in rejecting plaintiff's fraud claims).

The district court was bound by the verdicts and it could not award restitution based on the same theory that the juries considered and rejected.

3. *The Rehabilitation Plan Prohibits The "Quasi-Contract" Theory Of Unjust Enrichment.* Where, as here, a valid and binding contract covers the subject matter of a dispute, a quasi-contractual theory of "unjust enrichment" is

precluded, and the parties may not avoid their obligations under that agreement by seeking alternate relief in equity. *See*, *e.g.*, *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996). In *Paracor*, this Court applied California and New York law and dismissed plaintiff's purported "claim" of unjust enrichment because the "subject matter" of the dispute was "covered by several valid and enforceable written contracts." *Id*.

This rule, which this Court and others have reiterated on many occasions,[14] derives from equitable principles: "where the parties have freely, fairly, and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability and to withdraw from one party benefits for which he has bargained and to which he is entitled." *Wal-Noon Corp. v. Hill*, 45 Cal. App. 3d 605, 613 (1975). Rather, to obtain quasi-contractual relief in equity, a party to an agreement first must rescind the contract and return all of the benefits received. *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal. App. 4th 194, 203 (1996).

The Rehabilitation Plan is an exhaustive contract that covers every aspect of

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[14] *See*, *e.g.*, *McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1091 (9th Cir. 2003); *Berkla v. Corel Corp.*, 302 F.3d 909, 918 (9th Cir. 2002); *Durell*, 183 Cal. App. 4th at 1370 ("As a matter of law, an unjust enrichment claim does not lie where the parties have an enforceable express contract."); *Cal. Med. Ass'n, Inc. v. Aetna U.S. Healthcare of Cal., Inc.*, 94 Cal. App. 4th 151, 172 (2001).

the rehabilitation of ELIC, including how the profits of the new insurance company were to be shared with policyholders. (3-SER-526-527.) It has never been rescinded, and the Commissioner has not returned any of the benefits received, including approximately $3.25 billion in cash, and a healthy and viable new insurance company that assumed the liabilities of ELIC and paid more than $6.5 billion to ELIC's former policyholders. (2-SER-110-111.) Appellants cannot recover on a "quasi-contractual" theory.[15]

4. ***Appellants Failed To Prove Their Entitlement To Equitable Relief.*** It is a basic, long-standing principle that "[a]n equitable remedy is available in fraud cases if there is no adequate remedy at law, but an equitable remedy will not be available if there is a complete legal remedy." 37 Am. Jur. 2d, *Fraud & Deceit*, § 347 (2013); *see also Thompson v. Allen Cnty.*, 115 U.S. 550, 553-54 (1885); *Philpott v. Super. Ct.*, 1 Cal. 2d 512, 515 (1934). Here, Appellants had and pursued a complete and adequate remedy at law through the multi-billion-dollar

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[15] In connection with the 2005 award, Judge Matz relied on two distinguishable cases in ignoring *Paracor*. (1-ER-79.) First, he cited *McBride v. Boughton*, 123 Cal. App. 4th 379, 389-90 (2004), which did not involve a written contract, but rather quasi-contractual claims raised in a paternity dispute, and, in any event, declined to award restitution. The citation to *McBride* conflated separate bases for restitution and ignored that *McBride* relied on authority that makes clear that a contract must be *rescinded* to pursue restitution. *Id.* at 388 (citing 3 B.E. Witkin, *Cal. Proc., Actions* § 160 (4th ed. 1996)). Second, the district court cited *Stegeman v. Vandeventer*, 57 Cal. App. 2d 753, 762 (1943), in which the plaintiff (in contrast to the Commissioner here) offered to return the transferred property and rescind the parties' deal.

fraud and conspiracy claims they tried to the juries. The fact that they failed to prove their claims does not render the legal remedy they sought inadequate; "[t]he want of a remedy, and the inability to obtain the fruits of a remedy, are quite distinct." *Thompson*, 115 U.S. at 554; *Wilkison v. Wiederkehr*, 101 Cal. App. 4th 822, 832 (2002) ("Equity follows the law and, when the law determines the rights of the respective parties, a court of equity is without power to decree relief which the law denies ….").

Where restitution is—unlike here—available as an equitable remedy to a *proven* claim, plaintiffs must establish three additional elements in seeking such an award: (1) a receipt of a benefit, (2) at the expense of another, and (3) that retention of the property at issue is "unjust." *Ghirardo v. Antonioli*, 14 Cal. 4th 39, 51 (1996); *Lectrodryer v. Seoulbank*, 77 Cal. App. 4th 723, 726 (2000). Here there is no proven claim and Appellants cannot establish the elements in any event.

First, they failed to allege—much less *prove*—that any "benefit" was "directly conferred" upon Artemis. *City & Cnty. of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1144-45 (N.D. Cal. 1997). No "benefit" is imparted where—as judicially determined here—a plaintiff obtains fair market value for an asset. *See Rheem Mfg. Co. v. United States*, 57 Cal. 2d 621, 626 (1962); *Beanstalk Grp., Inc. v. AM Gen. Corp.*, 283 F.3d 856, 863-64 (7th Cir. 2002). It is undisputed that the ELIC Estate received fair value for the junk bonds and the insurance company assets; in fact, the Commissioner was estopped from

denying this fact. (3-SER-582; 3-SER-593.)[16] Further, Artemis never purchased anything "directly" from the Commissioner or the ELIC Estate.

Second, Appellants also failed to prove that Artemis received any benefit "at the expense of" the Commissioner. The profits of the newly formed insurance company that were the basis of the district court's restitution award were never the property of the Commissioner or the ELIC Estate. Artemis simply did not "receive[] a benefit at another's expense," *Ghirardo*, 14 Cal. 4th at 51, which forecloses an award of restitution, *see Walker v. GEICO Gen. Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir. 2009).

Third, Artemis' retention of a portion of the profits it earned as a result of its ownership and management of Aurora was neither "unjust" nor "inequitable." The Commissioner received everything he bargained for under the Rehabilitation Plan. *See*, *e.g.*, *Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1596 (2008)

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16 Judge Matz relied on *Ward v. Taggart*, 51 Cal. 2d 736 (1959), to support his conclusion that "[t]he fact that the Commissioner received fair market value for the benefit he conferred in transferring the junk bonds does not necessarily preclude him from obtaining restitution." (1-ER-79.) As this Court previously explained, *Ward* had to fashion an "ingenious innovation" in the form of restitution because at the time, lost profits were legally unavailable as damages under California Civil Code § 3343 *and* plaintiff had proven that the defendant was liable for fraud. *Altus*, 540 F.3d at 1003-04 & n.8. Neither circumstance is present here; Appellants: (1) failed to prove fraud (*id.* at 1005); and (2) sought *billions of dollars* in lost profits under the current version of Civil Code § 3343. The fact that the juries refused to award profits renders *Ward*'s "ingenious innovation" both unnecessary and legally unsustainable here.

("[Plaintiffs] are not entitled to restitution because they received the benefit of the bargain."). The ELIC Estate received fair market value from "the highest and best bid" for the junk bond portfolio ($3.25 billion), plus a $300 million capital infusion into the insurance company. (3-SER-582; 1-SER-36; 3-SER-542, 565.) The restitution order itself recognizes that Artemis honored its commitments under the Rehabilitation Plan, that "[u]nder Artemis's ownership and control, Aurora has fulfilled its obligations under the Rehabilitation Plan and policyholders have not been injured by the conduct of Artemis and NCLH in managing Aurora" (1-ER-77), and that "Artemis consistently operated Aurora in a lawful and businesslike manner" (1-ER-81).

To overcome these facts, the restitution order relied on legal irrelevancies. The court cited a legally invalid attempt to award punitive damages. (1-ER-64 ("[T]hat the hardworking jury awarded $700 million in punitive damages to the Commissioner indicates that the jurors believed that Artemis deserved to be punished for *something*. I agree."); 1-ER-65 ("I find that the punitive damage determination is entitled to important consideration.").) But a vacated verdict is "'null and void, and the parties are left in the same situation as if no trial had ever taken place.'" *United States v. Jimenez Recio*, 371 F.3d 1093, 1106 n.11 (9th Cir. 2004). And believing that "Artemis deserved to be punished for something" is no substitute for applying the legal standards governing restitution, which are not met here for the reasons discussed.

The district court also based its restitution award on its belief that "[o]ne or more entries on one or more" of the applications Artemis filed with the DOI was "false or misleading." (1-ER-74.) But, as the first jury found, those alleged misrepresentations did not cause any harm to the Estate (1-ER-62), and Artemis had "no legal liability" for any alleged misrepresentation or concealment. *Altus*, 540 F.3d at 1003.

In any event, the maximum penalty authorized by the Insurance Code for violations of disclosure requirements in connection with the acquisition of an insurance company is $50,000 per violation. *See* Cal. Ins. Code § 1215.11(b). It was improper for the court below to disregard the statutory limitations and fashion a ***$250,000,000*** penalty—instead of $50,000—under the guise of "equity." *See Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 127 (2007) (finding Insurance Code remedies are "exclusive"); *Wal-Noon Corp.*, 45 Cal. App. 3d at 613 ("While a court of equity may exercise broad powers in applying equitable remedies, it may not create new substantive rights under the guise of doing equity.").

B. The District Court Should Have Offset The Judgment By The Settlement Payments From Artemis' Alleged Joint Tortfeasors

Where a plaintiff brings an action against several defendants who are "claimed to be liable for the same tort," and one of those defendants settles the claims, the settlement "shall reduce the claims against the others in the amount … of the consideration paid." Cal. Civ. Proc. Code § 877. In exchange for this offset,

the non-settling defendant is barred from seeking contribution or indemnification from the settling defendants. *Id.* § 877(b) . This structure balances competing interests to encourage settlements by providing finality for settling defendants, while also "assur[ing] that a plaintiff will not be enriched unjustly by a double recovery, collecting part of his total claim from one joint tortfeasor and all of his claim from another." *Reed v. Wilson*, 73 Cal. App. 4th 439, 444 (1999).[17] The district court improperly failed to grant Artemis its requested offset of the judgment by the $595,250,000 paid by Artemis' alleged co-conspirators in settling claims seeking the same insurance company profits sought from Artemis as restitution. (1-ER-3.)

Section 877 applies to "all tortfeasors joined in a single action whose acts or omissions concurred to produce the sum total of the injuries to the plaintiff." *PacifiCare of Cal. v. Bright Med. Assocs., Inc.*, 198 Cal. App. 4th 1451, 1459-60 (2011) (internal quotation marks omitted). As this Court has explained:

> Whether individuals are joint tortfeasors under § 877 depends upon whether they caused "one indivisible injury" or "the same wrong." The "same wrong" may emanate from two successive independent torts and does not require unity of purpose, action, or intent by the two or more tortfeasors. Also, the plaintiff need not allege the same tort against the tortfeasors, but must only claim that the

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[17] Given the risks of a double recovery, a non-settling defendant is entitled to an offset even where Section 877 does not apply. *See*, *e.g.*, *Leung v. Verdugo Hills Hosp.*, 55 Cal. 4th 291, 303-04 (2012) (requiring *pro tanto* offset for settlement payments even where parties failed to comply with Section 877).

tortfeasors caused the same harm.

In re JTS Corp., 617 F.3d 1102, 1116-18 (9th Cir. 2010) (requiring offset where plaintiff "alleged [non-settling defendant] and the settling defendants combined to carry out the same injury, *i.e.*, the fraudulent transfer of the real property") (internal citation omitted); *Mesler v. Bragg Mgmt. Co.,* 39 Cal. 3d 290, 302 (1985) ("[T]he language of section 877 is significant—its drafters did not use the narrow term 'joint tortfeasors,' they used the broad term 'tortfeasors claimed to be liable for the same tort.' This language was meant … to permit broad application of the statute.") (internal citation omitted).

Here, Appellants alleged that Artemis and its former co-defendants were co-conspirators liable for the same tort. (3-SER-478.) Indeed, the retrial focused on Appellants' attempt to hold Artemis liable for the actions of its co-defendants that occurred before Artemis was even created. Throughout the litigation, Appellants sought profits made by the new insurance company Aurora from all the defendants, including Aurora and the other settling defendants. (3-SER-484, 501-503, 469-470.) In addition to seeking the insurance company profits from Artemis, Aurora, NCLH, Credit Lyonnais and Altus as damages, Appellants also claimed that Artemis and the other defendants were jointly and severally liable in restitution for insurance company profits because each shared in those profits. (3-SER-484, 469-470.)[18]

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[18] (*See also*, *e.g.*, 3-SER-503 ("The above recoveries are, to some extent,

[Footnote continued on next page]

Appellants specifically acknowledged that the restitution claim arose out of the same operative facts and alleged conspiracy that were at the heart of the damages claim.[19] Before the first trial, they acknowledged the overlap between their claims to damages and restitution, and argued that they were entitled to attempt to recover on both claims and then elect the preferred remedy (*i.e.*, the larger number). (3-SER-485.) Credit Lyonnais and Altus ($516,500,000) and NCLH and Aurora ($78,750,000) paid substantial sums in exchange for a release of all claims—including claims for Aurora's profits—and there was no attempt to allocate the settlement to any particular claim, or between damages and restitution, or between insurance company profits and junk bond profits. (2-SER-308, 320.)[20]

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overlapping. For example, the profits earned by Aurora on assets received from the ELIC Estate appear in the above list as enrichment to Aurora and to its parent entity, NCLH, as well as enrichment to NCLH's shareholder, Artemis, and Artemis's minority shareholder, Altus."); 3-SER-469-470 ("[S]uch amounts include enrichment which was transferred from one defendant/conspirator to another. In such cases, that amount of enrichment has been counted both with respect to the transferor and transferee …. Both the transferor and transferee defendant may be liable for restitution of such amount based on unjust enrichment, however the liability will be joint and several, and such amount may only be collected once.").)

19 (*See*, *e.g.*, 3-SER-478 ("The Commissioner will rely upon the same facts … that establish fraud and negligent misrepresentation to establish unjust enrichment.").)

20 If (as here) the settlement agreement does not allocate the proceeds to particular claims, the ***entire amount*** is available to offset the claims for which the settling defendants were alleged to be jointly and severally liable. *Alcal Roofing &*
[Footnote continued on next page]

The restitution award against Artemis was based solely on Aurora profits that also were sought from the other defendants. Section 877 precludes Appellants from recovering insurance company profits once in settlement, and then a second time from Artemis as restitution—particularly when they could not convince a jury to award any damages at all.

It is irrelevant for Section 877 purposes that judgment was entered against Artemis alone. Section 877's application is determined by the claims existing *at the time of settlement*. As long as the plaintiff *alleged* that defendants were "liable for the same tort," the non-settling defendant has a right to an offset:

> To be a joint tortfeasor, a "party need not be found liable in tort." Because Code of Civil Procedure section 877.6's first sentence uses the word "alleged" to describe the tortfeasors entitled to seek a good faith settlement determination, allegations that two or more parties are joint tortfeasors satisfies that statutory requirement.

PacifiCare, 198 Cal. App. 4th at 1460 (citation omitted); *see also Vesey v. United States*, 626 F.2d 627, 633 (9th Cir. 1980). If this were not the case, an offset under Section 877 would never be available when only one alleged joint tortfeasor proceeds to trial. But that is precisely the scenario when an offset is mandated.[21]

[Footnote continued from previous page]
Insulation v. Super. Ct., 8 Cal. App. 4th 1121, 1127 (1992).

[21] In considering an appeal of a correction of the judgment against Jean-François Henin, an alleged co-conspirator who *defaulted* rather than defend the claims at trial, a panel of this Court noted that the complaint does not control "where the district court apportion[s] damages individually." *Garamendi v. Henin*, 683 F.3d 1069, 1082 n.8 (9th Cir. 2012). The Henin judgment "specifically call[ed]
[Footnote continued on next page]

Here, before settlement, Appellants contended that all defendants were *jointly and severally* liable for "profits" of the junk bonds and the insurance company, both as damages and as restitution. (3-SER-506-507, 483-484.) Appellants cannot recover the same dollar twice. *See*, *e.g.*, *Vesey*, 626 F.2d at 633 ("Since there was but a single wrong …, the partial satisfaction obtained from [settling defendant] must be applied to reduce the total damages."); *May v. Miller*, 228 Cal. App. 3d 404, 410 (1991) ("[W]hen the injury arises from a single act, [a plaintiff] cannot, by suing each wrongdoer alone, convert a joint into a several [injury], and thereby secure more than one compensation for the same injury.").

C. The District Court Correctly Rejected Appellants' Request For Additional Restitution And Interest

Even if this Court were to uphold the reinstated restitution award (and it should not for the reasons discussed above), the district court committed no error in rejecting Appellants' request to increase the award.

First, this Court's mandate allowed the district court to "*reinstate*" the previous award "*if warranted*" after the retrial. *Altus*, 540 F.3d at 1009 (emphases added). It did not authorize—let alone require—the district court to *recalculate* or *increase* the award. In light of Appellants' defeat in the retrial, the district court

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for individual liability." *Id.* at 1081. There is no such finding as to Artemis, and the district court *rejected* Appellants' request that the judgment recite that it "is the several and individual obligation of Artemis S.A." (2-SER-42; 1-ER-3.)

did not err in deciding that nearly a quarter billion dollars in *equity* was more than enough.

Second, the parties vigorously disputed the restitution and prejudgment interest calculations presented by Appellants (2-SER-62-65), and the district court properly declined to resolve these disputes in Appellants' favor. After the 2012 trial, Appellants offered a previously undisclosed expert calculation of restitution that was several hundred million dollars higher than what they had previously proposed. (3-ER-569.) These calculations were untimely. (1-SER-28; 3-ER-575.) *See*, *e.g.*, *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 969 n.5 (9th Cir. 2006).[22] They were also seriously flawed. To give just one example, Appellants' expert improperly attempted to include "interest on interest" (2-SER-64), but California law requires simple, rather than compound, interest. *See* Cal. Const. art. XV, § 1.[23] The district court properly rejected Appellants' new restitution calculations.

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[22] Because they successfully precluded Artemis from offering updated expert calculations (2-SER-149-153; 1-SER-21-22; 2-SER-206-211; 1-SER-25), Appellants also were judicially estopped from offering their own untimely updates. *See*, *e.g.*, *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993 (9th Cir. 2012).

[23] Appellants' expert also: (i) incorrectly assumed that Artemis' profits were at the expense of the ELIC Estate; (ii) overstated Artemis' actual profits by relying on the statutory prejudgment interest rate; (iii) failed to recognize costs when they occurred; and (iv) ignored the fact that Artemis lost the use of certain funds placed in escrow nearly a decade ago. (2-SER-70-77.) These errors overstated Artemis' profits by hundreds of millions of dollars. (2-SER-70-77).

Third, Appellants also ignore that *any* prejudgment interest was discretionary and not mandatory here. The provision upon which they rely—California Civil Code § 3287(a) —only applies where the amount was *certain* or *capable of being made certain*. "Damages are certain or capable of being made certain where there is essentially no dispute between the parties concerning the basis of computation of damages" and the "dispute centers on the issue of liability giving rise to the damages." *Nat'l Union Fire Ins. Co. v. Showa Shipping Co.*, 47 F.3d 316, 324 (9th Cir. 1995).

By contrast, "interest cannot be awarded prior to judgment when the amount of damages cannot be ascertained except on conflicting evidence." *Conderback, Inc. N.V. v. Standard Oil Co. of Cal.*, 239 Cal. App. 2d 664, 689 (1966); *see also Wisper Corp. v. Cal. Commerce Bank*, 49 Cal. App. 4th 948, 958, 960 (1996) ("[W]here the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate."). "The greater the disparity between the complaint and the damages …, the less likely prejudgment interest is appropriate." *Id.* at 961.

That is precisely the case here: (1) Appellants sought $4.3 billion in damages in the retrial but received nothing; and (2) they then sought $1.58 billion in restitution (3-ER-569), but were awarded only 15% of that amount. Because the amount of the restitution award—or even if any restitution would be sought after the retrial of the NOLHGA Premise—was unknown and incapable of calculation

prior to trial, the district court properly exercised its discretion to refuse additional interest. *See*, *e.g.*, *Wisper Corp.*, 49 Cal. App. 4th at 961-62 (affirming denial of prejudgment interest where plaintiff "emerged with a mere 25 percent of its claimed damages"); *Polster, Inc. v. Swing*, 164 Cal. App. 3d 427, 434-36 (1985) (overturning prejudgment interest award where plaintiff recovered approximately 15% of its demand). "[I]n view of the hot dispute" here, an award of prejudgment interest would be inappropriate because "the amount due appellant could not [have been] made certain by mere calculation." *United States ex rel. Carter-Schneider-Nelson, Inc. v. Campbell*, 293 F.2d 816, 819-20 (9th Cir. 1961).[24]

Fourth, consistent with this Court's long-standing precedent, the district court declined to enter judgment "retroactively," and instead it limited the accrual of post-judgment interest to the entry of judgment in 2013, rather than 2006, when the first, vacated judgment was entered.

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[24] The cases cited by Appellants provide no support for an award of prejudgment interest under Section 3287(a), and certainly do not support a finding that the district court abused its discretion in *declining to add* prejudgment interest. In one case, this Court applied Oregon law to *overturn* an award of prejudgment interest that ran from the date a contract was executed, finding that interest should instead run from the date the contract was *terminated* because any return on the plaintiff's contribution was *too uncertain* until then. *E.H. Boly & Son, Inc. v. Schneider*, 525 F.2d 20, 24-25 (9th Cir. 1975). (*See also* AOB 64-65, citing *William A. Graham Co. v. Haughey*, 646 F.3d 138, 145 (3d Cir. 2011) (affirming prejudgment interest award under federal common law on damages for copyright infringement); *Irwin v. Mascott*, 112 F. Supp. 2d 937, 956 (N.D. Cal. 2000) (allowing interest because, unlike here, amount was "certain or capable of being made certain by calculation" prior to verdict).)

Post-judgment interest accrues from the date the monetary award is "ascertain[ed]." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835-36 (1990). "[W]here a district court judgment in favor of defendant is reversed on appeal or a judgment in favor of plaintiff is vacated on appeal and, upon remand, *a new trial is held* resulting in a verdict and judgment for plaintiff, the date referred to in section 1961 is the date of the entry of the judgment *after the new trial on remand*." *Turner v. Japan Lines, Ltd.,* 702 F.2d 752, 754 (9th Cir. 1983) (emphases added). Here, the Commissioner sought different relief on remand than was awarded in the 2006 judgment. Because of the resulting uncertainty as to what judgment, if any, would be entered, there was no basis here "for recovery of the amount on which interest was sought until [after] the appellate court reversed and remanded," *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394, 407 (9th Cir. 1980), and after the second trial was held.[25]

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[25] In none of the cases cited by Appellants (AOB 66-67) did the plaintiff pursue on remand entirely different damages than those awarded in the prior judgment; rather, in those cases the interest ran from the first judgment because the courts evaluated whether an already ascertained award was legally sufficient. *See Planned Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 518 F.3d 1013, 1016 (9th Cir. 2008) (plaintiffs elected not to pursue a retrial); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 695 (9th Cir. 1996) (there was no retrial); *In re Exxon Valdez*, 568 F.3d 1077, 1080 (9th Cir. 2009) (interest awarded from date of original judgment where "evidentiary basis" and "legal basis" for award remained the same); *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1285 (9th Cir. 1984) (retrying same damages claims under different burden of proof).

Finally, any delay in entry of judgment here was entirely due to the choices of Appellants, not Artemis. Appellants had an exceedingly generous (and legally dubious) $241 million judgment in 2006 that they refused to accept, instead gambling for a different and greater award based on a completely different damages theory from the existing judgment. "[T]he purpose of postjudgment interest is to compensate the *successful plaintiff* for being deprived of compensation for the loss from the time between the ascertainment of the damages and the payment by the defendant." *Kaiser*, 494 U.S. at 835-36 (emphasis added). Here, Appellants *failed* to prove the NOLHGA Premise, *failed* to prove that they were entitled to any damages, and *failed* to convince the district court to award $1.58 billion in restitution. Under these circumstances, it would be improper to penalize Artemis by awarding additional interest.

IX.
CONCLUSION

At the conclusion of its appellate opinion in 2008, this Court "share[d] the frustration of the district court and the parties that *seventeen years* after the failure of ELIC, *fifteen years* after final approval of the successful Rehabilitation Plan, and *nearly ten years* after the exposure of the fraud by the Altus/MAAF Group and its investors, this litigation has not been brought to an end." *Altus*, 540 F.3d at 1011 (emphasis added). We are now more than ***five years*** after that expression of frustration, and in that time Appellants had a full and fair opportunity to present their lone remaining theory of harm and damages—the NOLHGA Premise—to a

new jury. Appellants demonstrate no basis for a third attempt, and it is time to end this long-running litigation.

Artemis respectfully requests that this Court:

1. AFFIRM the jury's verdict in favor of Artemis; and

2. REVERSE the district court's award of restitution to the Commissioner, and enter judgment in Artemis' favor on the claim for unjust enrichment; or, alternatively,

AFFIRM the district court's refusal to add additional amounts of restitution or pre- or post-judgment interest; and REVERSE the district court's refusal to offset any restitution award in favor of the Commissioner, and direct that the restitution award be offset by $595,250,000.

Dated: January 10, 2014

Respectfully submitted,

By: */s/ Robert L. Weigel*
Robert L. Weigel

Attorneys for Defendant/Appellee/Cross-Appellant ARTEMIS S.A.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Principal and Response Brief complies with the enlargement of brief size permitted by the Court's order dated January 6, 2014 (permitting Artemis S.A. to file a combined responsive brief to the appeal, and opening brief on its cross-appeal, of not more than 17,900 words). This Brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This Brief is 17,779 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count feature of Microsoft Word used to generate this Brief.

Dated: January 10, 2014

By: */s/ Robert L. Weigel*
Robert L. Weigel

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant/Appellee/Cross-Appellant Artemis S.A. states that it is not aware of any related cases pending in this Court.

By: */s/ Robert L. Weigel*
Robert L. Weigel

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2014, I electronically filed the foregoing **Principal and Response Brief of Appellee/Cross-Appellant Artemis S. A.** and **Appellee/Cross-Appellant's Supplemental Excerpts of Record** with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: */s/ Robert L. Weigel*
Robert L. Weigel

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