No. 13-55567 (Consolidated with Nos. 13-55684 and 13-55699)
DC No. 2:99-cv-02829-RGK-CW

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,

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

Intervenors-Appellants/Cross-Appellees,

v.

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

Defendant-Appellee/Cross-Appellant.

Appeal From Judgment Of The United States District Court
For The Central District Of California
(Hon. R. Gary Klausner, Presiding)

APPELLANTS' RESPONSE AND REPLY BRIEF

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APPELLANTS' REPLY BRIEF

ARGUMENT

I.

THE DISTRICT COURT ERRED IN PERMITTING ARTEMIS TO RETRY THE ISSUE OF WHETHER THE COMMISSIONER WOULD HAVE CHOSEN THE ALTUS/MAAF BID HAD THERE BEEN NO FRAUDULENT CONCEALMENT.

In the prior appeal, this Court held that the first jury's harm finding was based on a determination that the Commissioner would have selected a "bonds-in bid" had he known about the portage agreements. Appellants' Opening Brief ("AOB") 40-42. After construing Instructions Nos. 25 and 30, the Court found "the jury could have found 'losses, costs or expenses' causing 'harm' in [Verdict] Form 5 if it concluded that, but for the Altus/MAAF Group's conspiracy, *the Commissioner would have selected either the Sierra or the NOLHGA bid*." *California v. Altus Fin. S.A.*, 540 F.3d 992, 1008 (9th Cir. 2008) ("*Altus*") (emphasis added). The Court ordered a retrial of the NOLHGA Premise because "we cannot determine *which* of these conditions the jury found." *Id.* (emphasis added).

Instead of limiting the retrial to determining whether the Commissioner would have selected the NOLHGA or Sierra bid had he learned about the portage agreements, the District Court denied Appellants' motion *in limine* and erroneously allowed Artemis to

relitigate the issue of harm by contending at the second trial that the Commissioner would still have picked the Altus/MAAF bid had he known about the concealed contracts. This ruling contravened the law of the case and the Seventh Amendment. AOB 43-45.

Artemis contends in its Principal and Response Brief ("PRB") that the *Altus* opinion does not really mean what it says, relying on a few snippets wrenched out of context. Artemis' argument ignores the principle that "words of our opinions are to be read in the light of the facts of the case under discussion." *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944). Those facts demonstrate that the Court meant what it said in *Altus*. *See* Part I(A), *infra*.

Artemis also contends—for the first time since 2005—that the first jury's harm finding did not necessarily determine that the Commissioner would have rejected the Altus/MAAF bid because (Artemis argues) that verdict could have been based on a "lost rescission" theory. PRB 26-27. But even if this Court had not already decided what that finding meant, Artemis' newly minted interpretation is unavailing. That interpretation is procedurally barred because it was not raised in the first appeal or in opposition to Appellants' motion *in limine*. It is also wrong because it is contradicted by both

the jury instructions in the first trial defining harm and by what Artemis told the jury on the issue of liability. *See* Part I(B), *infra*.

A. Appellants Have Correctly Interpreted This Court's Prior Decision And Mandate.

1. This Court Interpreted The First Jury's Harm Findings As Incorporating A Determination That The Commissioner Would Have Chosen A Bonds-In Bid.

In the prior appeal, this Court was presented with two diametrically opposed interpretations of the first trial's verdicts. Appellants contended that the verdicts showed that the jury had accepted the NOLHGA Premise—*i.e.*, that the Commissioner would have selected the NOLHGA bid had he known about the portage agreements. PRB 21. Artemis contended that the verdicts showed that the jury had rejected the NOLHGA Premise. *See* Brief of Appellee/Cross-Appellant Artemis S.A., No. 06-55297, 2006 U.S. 9th Cir. Briefs LEXIS 827, at *112-27.

The Court rejected both of those positions. Accordingly, when the Court stated that it disagreed "with the Commissioner and NOLHGA that the verdicts must be reconciled in their favor" (*Altus*, 540 F.3d at 1007)—language on which Artemis relies (PRB 14, 29)—it was doing nothing more than rejecting Appellants' contention that the jury's verdict established the NOLHGA Premise. Similarly, when the Court said that the verdicts "cannot be reconciled in favor of either side"

(*Altus*, 540 F.3d at 1008)—language repeatedly cited by Artemis (PRB 3, 14, 21, 25, 26, 29, 30)—it was merely rejecting both parties' opposing arguments that the jury had decided the NOLHGA Premise in their favor, notwithstanding its inability to answer Verdict Form 7. As the Court stated in the very next sentences of its Opinion:

> The jury might have answered Form 7 in favor of either party. Since we cannot infer anything from the jury's silence [on Verdict Form 7], we are left with an indeterminate verdict. (*Altus*, 540 F.3d at 1008)

Unlike all parties in the last appeal, Appellants are not now asking the Court to "infer anything from the jury's silence." Nor do Appellants dispute the Court's conclusion that the first jury's verdict was "indeterminate" insofar as it failed to decide the NOLHGA Premise. Instead, Appellants' position rests squarely on the *reasons* given by this Court for *rejecting* Appellants' claim in the prior appeal that the first jury's verdict established the NOLHGA Premise.[1]

In so holding, the Court interpreted Instruction No. 25 as "allow[ing] the jury to find the Commissioner was harmed if it determined *either* that the Commissioner would have accepted the NOLHGA bid or that the Commissioner would have incurred losses,

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[1] Artemis therefore errs in calling Appellants' argument a "thinly disguised reprise of their rejected argument from the last appeal." PRB 21.

costs or expenses that the ELIC Estate would not otherwise have incurred *if the Commissioner had picked a 'bonds in' bid*." 540 F.3d at 1008 (emphases added). Similarly, the Court held that, under Instruction No. 30, "the jury could have found harm if it concluded that the Commissioner would have entered a transaction *with either of the 'bonds-in' bidders, NOLHGA or Sierra*, but for the Altus/MAAF Group conspiracy." *Id.* (emphasis added). The Court therefore construed *both* of the harm instructions as permitting the jury to find harm only if it determined that the fraud had prevented the Commissioner from selecting *either* the NOLHGA bid or the Sierra bid. Accordingly, under the Court's analysis, the "harm" finding must have been based on an implied jury determination that, in the "but-for" world, the Commissioner would *not* have chosen the same bid that he had actually accepted in the real world. That holding was binding on the District Court, even though Judge Matz believed (*see* 1-ER-51-52) that this Court had erred. *See, e.g.*, *Vizcaino v. U.S. District Court*, 173 F.3d 713, 720 (9th Cir.) (District Court could not change definition of class on remand where "class certification [was] a central premise" of both prior appellate opinions), *amended*, 184 F.3d 1070 (9th Cir. 1999); *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1037 (10th Cir. 2000) (determination that contract provision

applied to plaintiffs was "integral to" decision by first appellate panel that plaintiffs had shown a triable issue of fact on their breach of contract claim and was therefore entitled to law of the case effect).

Artemis' brief ignores the foregoing statements in the *Altus* opinion while claiming that the Court said something quite different. Artemis contends that in rejecting Appellants' contention "that Verdict Form 7 was 'superfluous' and that the jury had already determined that the Commissioner would have chosen NOLHGA," this Court "identified several possibilities, *other than* the NOLHGA Premise, of what the jury 'could have' believed in finding 'harm' in [Verdict Form] 5." PRB 29 (emphasis in original). This statement is false. It is not supported by either a citation to or quotation from the Court's opinion. Nor does Artemis describe what those "several possibilities" supposedly were. In fact, the Court's opinion identified only *one* alternative to acceptance of the NOLHGA bid that was consistent with the "harm" finding in Verdict Form 5: selection of the Sierra bid. No other "possibilities" were mentioned in the Court's opinion.

Nor can the "harm" finding in Verdict Form 5 be dismissed as the result of jury "confusion," as Artemis argues. PRB 30. To be sure, the Court's opinion did suggest the possibility of jury confusion in a passage that Artemis quotes seven times. *See* PRB 3, 14, 17, 26, 28,

30, 30-31. But the Court was not referring to Verdict Form 5 or the harm finding it contained. Instead, the Court was addressing an entirely different issue. The District Court had ruled that the jury's verdict conclusively rejected the NOLHGA Premise because the jury had found in Verdict Forms 1 and 3 that Artemis' own misrepresentations and concealments had not harmed the ELIC Estate. *See Altus*, 540 F.3d at 1007. In reversing this ruling, the Court stated:

> [I]t is difficult to accept the district court's reasoning in light of Form 7. If the jury had found no harm in Forms 1 and 3 because it found that the Commissioner would not necessarily have awarded NOLHGA the bid, then the jury should have easily answered 'no' on Form 7. That the jury could not do so suggests that the jury had something else in mind, even if it was only confusion. (*Id.*)

Accordingly, the jury "confusion" that the Court hypothesized related only to Verdict Forms 1, 3 and 7, not to Verdict Form 5 or the harm finding contained therein. Indeed, that finding is not inconsistent with the jury's inability to answer Verdict Form 7. Suppose some jurors had believed that the Commissioner would have chosen the NOLHGA bid; others believed that the Commissioner would have chosen Sierra; and all jurors believed that the ELIC Estate was harmed because the Commissioner did not select one of these two bids. In that event, the jury would have rejected Artemis' contention that there was no harm because the Commissioner would have

chosen the French bid even if he had known of the portage agreements. But it would have been unable to reach a unanimous verdict on whether the Commissioner would have chosen NOLHGA, instead. Accordingly, the jury's inability to answer Verdict Form 7 does not show that the "harm" finding in Verdict Form 5 was the result of jury confusion.[2] Indeed, far from dismissing Verdict Form 5 on that ground, the Court recognized that "the jury's answer to [Verdict] Form 5 constituted a complete finding of liability." *Altus*, 540 F.3d at 1005.

2. This Court's Mandate Did Not Require The District Court To Deny Appellants' Motion *In Limine*.

Artemis contends that this Court's mandate in *Altus* ordered the District Court to retry the question of whether, absent the fraudulent conspiracy, the Commissioner would have selected Sierra, NOLHGA *or Altus/MAAF.* PRB 22-24. Nothing in the Court's prior opinion supports this illogical proposition. Having just decided that the first jury verdict was based on a finding that the Commissioner would *not* have picked Altus/MAAF had he known about the portage

[2]Artemis also cites the Court's statement that "the jury might have answered Form 7 in favor of either party." PRB 30 (emphasis omitted). However, as shown above, the jury could have found that the ELIC Estate had been harmed by the fraudulent conspiracy and answered either "yes" or "no" on the NOLHGA Premise.

agreements, the Court would not have done a 180-degree turn and ordered a new jury to reconsider whether the Commissioner would have done so.

In fact, the opinion refutes Artemis' interpretation of the mandate. At the end of its discussion of the jury verdicts, the Court said the following (in language Artemis ignores):

> [T]the jury could have found "losses, costs or expenses causing "harm" in Form 5 if it concluded that, but for the Altus/MAAF Group's conspiracy, the Commissioner would have selected either the Sierra or the NOLHGA bid. Because *we cannot determine which of these conditions the jury found*, the answered verdict forms do not establish the NOLHGA Premise conclusively. (*Altus*, 540 F.3d at 1008 (emphasis added))

A retrial to determine "which of these conditions" should be found—*i.e.*, would the Commissioner have selected NOLHGA or Sierra had there been no fraudulent conspiracy—is the only logical meaning of the mandate, which must be interpreted in light of the Court's opinion. *See Vizcaino*, 173 F.3d at 719 ("District courts must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces") (citations and internal quotation marks omitted).[3]

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[3]Contrary to Artemis' contention (PRB 24), a retrial on the narrow issue of whether the Commissioner would have chosen NOLHGA or Sierra would not violate *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), and its progeny. As the Court stated in *Lies v. Farrell Lines, Inc.*, 641 F.2d 765 (9th Cir. 1981), "we . . .
(continued . . .)

B. The Jury's Harm Finding Rests On An Implied Determination That The Commissioner Would Not Have Chosen The Altus/MAAF Bid.

Even if *Altus* had not interpreted the jury's verdict, a fresh examination unaffected by the law of the case yields the same conclusion: the jury's harm finding should have precluded Artemis from relitigating whether the Commissioner would have chosen the Altus/MAAF bid had there been no fraudulent concealment.

Artemis does not deny that its counsel told the jury in the 2005 liability trial that the ELIC Estate could not have been harmed if the Commissioner would have chosen the conspirators' bid "anyway." *See* AOB 12-13. Nor does it deny that Judge Matz endorsed this

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(. . . continued)
should not be slow to adopt [a] rule that looks to the preventing of further contest on phases of litigation or issues already well settled, the saving to litigants the costs incident to relitigation of such matters, and to the courts the time unnecessarily consumed therein." *Id.* at 774-75 (citation and internal quotation marks omitted). Accordingly, this Court has repeatedly rejected claims that issues already decided by juries should be retried even though those claims were similar to claims being remanded. *See, e.g.*, *Galdamez v. Potter*, 415 F.3d 1015, 1025 n.8 (9th Cir. 2012) (new trial ordered on plaintiff's claims that employer maintained a hostile work environment and breached duty to investigate and remedy customer harassment; no new trial required for plaintiff's claim that employer had imposed discipline for discriminatory reasons); *Lies*, 641 F.2d at 774-75 (remanding for negligence claim under Jones Act while holding that remand was not required for strict liability claim arising out of same accident); *see Mazer v. Lipschutz*, 327 F.2d 42, 52 (3d Cir. 1963) (cited with approval in *Lies*) (new trial in malpractice action limited to claim of vicarious liability, no retrial of whether defendant was individually negligent).

interpretation of the harm finding in three separate orders after the first trial. AOB 39-40.

Instead, Artemis contends—for the very first time since the first jury verdicts were rendered in 2005—that the jury could have found that the ELIC Estate was harmed even if the Commissioner would have accepted the Altus/MAAF bid in the "but-for" world because the fraud caused him to lose the opportunity to rescind the bond sale in 1993. PRB 26-27. Its sole support for this "lost rescission" theory is a snippet of attorney argument at the conclusion of the 2005 damages phase, which stated that the lost rescission theory had been presented to the jury during the liability phase of that trial. *Id.*

Artemis' eleventh-hour attempt to evade the harm finding is freshly minted for this appeal. It therefore is procedurally barred for two separate and independent reasons. First, it is barred because it was not raised in the prior appeal. *See United States v. Arreguin*, 735 F.3d 1168, 1178 (9th Cir. 2013) (contention by appellee that it had not raised when it was appellant in prior appeal was waived); *Jimenez v. Franklin*, 680 F.3d 1096, 1100 (9th Cir. 2012) (same). It also is barred because it was not raised in the District Court in opposition to Appellants' motion *in limine*. *See Henry A. v. Willden*, 678 F.3d 991, 999 n.5 (9th Cir. 2012) ("Although ordinarily we may

consider affirming dismissal on any ground supported by the record, that discretion extends to issues raised in a manner providing the district court an opportunity to rule on it") (citations and internal quotation marks omitted); *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 974 (9th Cir. 2010) ("As the district court has had no opportunity to rule on the individual defendants' qualified immunity defense, we will not affirm on that basis").

Even if not procedurally barred, Artemis' belated attempt to explain away the jury's "harm" finding is meritless. The two instructions defining "harm" given at the end of the liability phase (Instructions Nos. 25, 30) did not authorize the jury to find harm based on a "lost rescission" theory. Indeed, they did not even mention rescission. *See Altus*, 540 F.3d at 1006 nn.13-14. Instead, as the Court concluded in the prior appeal, both of these instructions required the jury to find harm if—and only if—the Commissioner would have chosen one of the two bonds-in bids but for the fraud. *See* AOB 40-42; pp.4-5, *supra*.

These instructions therefore did not permit the jury to find harm if it concluded that the Commissioner would have made the same choice in the "but-for" world that he had actually made in the real world. Because juries are presumed to follow the court's instructions (*Jules*

Jordan Video, Inc. v. 144942 Canada Inc., 617 F.3d 1146, 1159-60 (9th Cir. 2010)), these instructions foreclose Artemis' claim that the "harm" finding could have been based on a "lost rescission" theory.[4]

This claim is also contradicted by what Artemis told the jury in its closing argument at the end of the liability phase. There, Artemis argued that "the Commissioner bases *his entire claim that he suffered injury on the myth that he would have accepted the NOLHGA bid* if only he'd known of the Altus/MAAF portage agreements." Further Excerpts of Record ("FER") 5:11-13 (emphasis added). Artemis also told the jury that "if you believe he would have picked the Altus/MAAF bid anyway . . . he hasn't suffered any harm from anyone, and the case against Artemis . . . just goes away." 4-ER-674:11-14. These arguments are incompatible with a jury finding that the Estate suffered harm from the fraud because, having selected the co-conspirators' bid, it did not rescind the bond sale in 1993.

In short, both the jury instructions and Artemis' closing argument recognized that the first jury could find harm only if it determined

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[4]Artemis also argues that "Appellants could not have presented this [rescission] theory [in the damages phase of the trial] . . . if there was already a jury finding that the Commissioner would have rejected Altus/MAAF . . . ." PRB 27. But no one ever contended at the time that the harm finding barred this claim for damages. Accordingly, the trial court did not decide the issue that Artemis now belatedly raises.

that the Commissioner would not have chosen the Altus/MAAF bid in the "but-for" world. Artemis' eleventh-hour attempt to reinterpret the harm finding must therefore be rejected.[5]

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[5]Artemis suggests that the harm finding did not foreclose a jury determination that the Commissioner could have selected "a revised Altus/MAAF bid." PRB 30 n.3. However, Artemis does not explain how this contention is consistent with the jury instructions or its own closing argument in the first trial. *See* AOB 12-13; p.13, *supra*. Nor does it cite any evidence that the Estate would have been harmed had the Commissioner chosen a revised Altus/MAAF bid instead of the original one.

Artemis also cites the District Court's statement that the jury "in a sense" had found that the Commissioner would have worked out a deal with the conspirators or reopened the bidding once he learned about the portage agreements. PRB 30 n.3 (citing 1-ER-55). However, this comment referred to the jury's award of zero damages in Phase II of the first trial, when the jury was erroneously precluded from awarding damages based on the NOLHGA Premise. *See* 1-ER-55.

Finally, Artemis contends that the first jury could not have found that the Commissioner would have chosen Sierra because Appellants "never claimed that the Commissioner would have chosen Sierra." PRB 28. However, the District Court found that the Commissioner had presented evidence during the liability phase that the ELIC Estate suffered a $75 million loss because the Commissioner accepted the Altus/MAAF bid instead of *one of the two bonds-in bids*. *See* 2-ER-225. The court therefore found that a reasonable jury could have relied on this evidence to support a finding that, had there been no fraudulent concealment, the Commissioner would have picked *either NOLHGA or Sierra*. Artemis does not mention this finding.

II.

APPELLANTS ARE ENTITLED TO A NEW TRIAL BECAUSE OF INSTRUCTIONAL ERROR ON DAMAGE CAUSATION.[6]

Artemis concedes that the jury needed to be instructed that, in the "but-for" world, "the concealment of the Altus/MAAF relationship and the portage agreements did not occur." PRB 34-35 (citation and emphasis omitted). The revised instruction proposed by the Commissioner ("Revised Instruction") did just that: it defined the NOLHGA Premise as whether, "had the Commissioner learned of the portage agreements, he probably would have entered into a transaction with NOLHGA." 3-ER-660. Artemis asserts that the instruction was legally incorrect but *points to no flaw in its wording*. It was error not to give it.

Artemis' primary response is that the error was harmless because the instruction the District Court *did* give was sufficient. But that instruction did not tell the jury that in the "but-for" world, the Commissioner actually learned of the portage agreements. This omission was not cured—indeed, it was exacerbated—by the various off-the-cuff comments made by the court before and after instructing the jury and by the court's express refusal to answer a direct jury

[6]If the Court agrees with the argument in Part I, it will not need to reach the alternative ground for reversal discussed in this section.

question about disclosure of the portage agreements. The judgment must therefore be reversed.

At the retrial, the jury would be correctly instructed if the Revised Instruction were given to the jury. However, given the jury confusion at the last trial, greater clarity would be achieved by telling the jury not only *what* the Commissioner would have learned in the "but-for" world but *when* he would have learned it. Accordingly, the jury should be told that in the "but-for" world, the Commissioner learned of both the August and November 1991 portage agreements in November 1991—after the second set of those agreements was signed and before the Conservation Court approved the selection of Altus/MAAF in December 1991. *See* AOB 62-63; pp.36-39, *infra*.

A. The Court Prejudicially Erred By Refusing To Instruct The Jury That In The "But-For" World, The Portage Agreements Were Not Concealed.

1. The Commissioner's Proposed Instruction Was Legally Correct And It Was Error To Refuse It.

Artemis asserts that the court correctly rejected the Revised Instruction because it "misstated the law." PRB 36. Artemis cites no case or legal principle to support this conclusory assertion. Moreover, *it has no quarrel with the actual words of the Revised Instruction.* This is unsurprising, for that instruction and Artemis' description of

what a correct instruction should have said are substantively identical. *See* p.15, *supra*.

Instead, Artemis quarrels with a few words at the end of Part II(B) of Appellants' Opening Brief. PRB 36 (citing AOB 63). Artemis' argument is an exercise in misdirection: neither that portion of our brief nor Artemis' discussion of it has anything to do with the legal correctness of the Revised Instruction. Instead, the sentence Artemis quotes concerned what the District Court should have told the jury once it became clear from the jury's questions that the *instruction given by the court* had left the jury hopelessly confused. Indeed, the sentence Artemis quotes appears in a section of the brief (Part II(B)) that assumed, *arguendo*, that the Revised Instruction had been properly *rejected*. *See* AOB 55. Accordingly, the language Artemis quotes from AOB 63—while legally sound (*see* pp.37-38, *infra*)—has nothing to do with whether the District Court erred in refusing to give the Revised Instruction to the jury.

Artemis nevertheless claims that the Revised Instruction would have directed the jury to assume that the Commissioner did not learn of the portage agreements until "months after the purported misstatements and omissions that form the conspiracy are alleged to have begun." PRB 36. However, the Revised Instruction was not

explicit as to *when* disclosure of the portage agreements occurred in the "but-for" world.[7]

Artemis' purported discussion of the Revised Instruction also cites comments made by the Commissioner's counsel during closing argument. PRB 36-38. Those comments have nothing to do with the Revised Instruction either. By the time the closing arguments were made, the court had told counsel what instructions it would give, so the parties knew the court would not give the Revised Instruction. *See* FER 8:11-9:13. Counsel's comments were addressed to the instruction counsel knew the court *would* give.

In short, the Revised Instruction told the jury just what Artemis concedes the jury *should* have been told: that in the "but-for" world, "the concealment of the Altus/MAAF relationship and the portage agreements did not occur." PRB 34-35 (citation and emphasis omitted). Artemis cannot justify the District Court's refusal to give that instruction.

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[7]The Commissioner's *original* proposed instruction submitted before the trial began *did* address when the portage agreements would have been disclosed in the "but-for" world. *See* 3-ER-469. However, because the District Court made comments objecting to that formulation (*see, e.g.*, 4-ER-696:19-97:1), the Revised Instruction deleted any reference to the timing of disclosure in an effort to submit an instruction that would be both legally correct and acceptable to the court. *See* AOB 22.

2. The Failure To Give The Revised Instruction Was Prejudicial Because The Court's Damage Causation Instruction Failed To Instruct The Jury That, In The "But-For" World, The Portage Agreements Were Not Concealed.

Artemis contends that the instruction on damage causation that the court did give was good enough because it "sufficiently conveyed [Appellants'] theory." PRB 35. It did not. It failed to instruct the jury that in the "but-for" world, the portage agreements existed and were disclosed.

This case differs from most because the damages jury was not the same jury which had found that Artemis had joined a conspiracy to defraud. As a result, the court had to define the facts that the jury was to assume were revealed in the "but-for" world.

Artemis concedes that a correct instruction would have asked the jury to determine what the Commissioner would have done if the portage agreements had not been concealed. *See* p.15, *supra*. The court's instruction did not do that. It asked the jury to decide "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 (emphasis added). This instruction did not tell the jury—either expressly or by

implication—that in the "but-for" world, the portage agreements existed and the Commissioner knew about them.[8]

Instead, the court's instruction told the jury to assume precisely the opposite. A lay jury was highly likely to interpret the court's "no conspiracy to defraud" instruction as a command to assume that the portage agreements had never existed. AOB 59-60. To begin with, the jury was required to accept the parties' stipulation that "[t]he conspirators' secret agreements were memorialized in [the portage agreements]." 3-ER-550. Moreover, the November Portage Agreements contained confidentiality provisions that barred disclosure to the Commissioner. 4-ER-787, 795. Accordingly, without an express instruction to assume otherwise, a jury directed to assume the absence of a conspiracy to defraud was highly likely to assume

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[8]Artemis says that the District Court "presented the jury with the exact question *mandated by this Court*." PRB 3 (emphasis added); *see also* PRB 22, 32. That is untrue. *Altus* did not prescribe the damage causation instruction or verdict form to be given on remand. Indeed, the verdict form used by Judge Klausner differed from, and was inferior to, the verdict form used in the first trial. There, Verdict Form 7 asked: "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." AOB 13 (emphasis added). The District Court's deletion of the italicized words when it reformulated the NOLHGA Premise over the Commissioner's objection (*see* 4-ER-730:4-7, 732:2-5) materially changed its meaning.

that *the means by which the Commissioner was defrauded*—the secret portage agreements—did not exist.

The court's comments and responses to jury questions pushed the jury further in that direction. The court repeatedly told the jury—four times during deliberations alone—that it should simply assume that "no conspiracy" had ever existed. 4-ER-757:7-11, 16-21, 758:1-5, 766:10-23. Even more disastrously, *the court expressly declined to answer a pointed question from the jury as to whether "the portage agreements were disclosed"*—a critical fact that Artemis' brief fails to mention. 4-ER-757:14-18.

3. This Prejudice Was Not Cured By The District Court's Other Statements.

In attempting to show that the jury must have understood that the portage agreements existed in the "but-for" world, Artemis relies on trial testimony, one statement made by the trial court during trial, and a single colloquy between the judge and jury during deliberations. PRB 40-43. None of these snippets from the record fills the gap created by the trial court's initial failure, and later unqualified refusal, to tell the jury that it had to assume the existence and disclosure of the portage agreements.

Trial Testimony. Artemis argues that the jury must have assumed existence of the portage agreements because the court "*allowed*

Appellants to ask multiple witnesses what would have occurred if the portage agreements had been disclosed." PRB 39 (emphasis in original). That's no answer. Jury instructions are supposed to guide the jury in evaluating the evidence. Accordingly, the prejudice caused by an erroneous jury instruction cannot be cured by the prior introduction of evidence. *See Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1235-36 (9th Cir. 2011). Artemis cites no case to the contrary.

There was ample evidence that the Commissioner would have rejected the Altus/MAAF bid had he learned about the portage agreements. *See* AOB 51-53. But the District Court instructed the jury to ignore much of this testimony. For example, Deputy Commissioner Baum testified that, had the portage agreements been disclosed to the Commissioner, the Commissioner would have drawn the inference that Altus/MAAF had been lying to him and therefore rejected their bid. 4-ER-696:14-17. Although Artemis did not object to this testimony, the District Court—on its own initiative—told the jury that Mr. Baum was not addressing "the correct question for the jury." 4-ER-696:19-20. Similarly, the court later told the jury that "You're not to assume what [the Commissioner] would have done if he had known of a conspiracy because . . . he might have been offended or whatever and done different things." 4-ER-746:16-19.

These statements profoundly damaged Appellants' case. It was—and remains—Appellants' contention that the Commissioner's regulatory responsibilities required that any applicant seeking to acquire and operate an insurance company in California be both candid and willing to comply with legal and regulatory requirements. *See* AOB 52-53. The court's statements effectively directed the jury to disregard these concerns even though there was ample testimony that the selection of the winning bid involved far more than determining who would pay the highest price. *See, e.g.*, 4-ER-690:6-18.[9]

Comments By The Trial Court During Trial. Artemis attempts to extract from the transcript what it calls "instructions" (PRB 43) that it says told the jury to assume that, in the "but-for" world, the portage agreements were disclosed to the Commissioner. It refers to a passage in the transcript in which the court told the jury "that the

[9]Artemis purports to quote the Commissioner's counsel as having conceded 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.'" PRB 41 (quoting 2-SER-138). Artemis has distorted the significance of that comment beyond recognition. First, the comment was made outside the jury's presence. *See* 2-SER-137. Moreover, counsel was contending that, although even Artemis agreed that the portage agreements would have been disclosed in the "but-for" world, the jury instruction defining the NOLHGA Premise was likely to lead the jury to conclude incorrectly that the portage agreements had never existed. *See* 2-SER-138:2-15; AOB 23-24.

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.'" *Id.* (quoting 2-SER-170).

This comment will not bear the weight Artemis places on it. To begin with, the statements made by the court defining the NOLHGA Premise were inconsistent. AOB 20 n.5. Moreover, the comment was made *during the trial*, before the court instructed the jury. It did not purport to be an instruction. And since the jury had not yet been instructed on the issue of damage causation, the comment did not explain how that subsequently conveyed "no conspiracy" formulation should be interpreted. It is unrealistic to think that the jury would have relied on a single statement made early in the trial as a guide to interpreting the numerous, sometimes contradictory jury directions given the jury immediately before and during its deliberations.

The Colloquy During Jury Deliberations. Artemis claims that, after the court instructed the jury, "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." PRB 42. Notably, Artemis once again characterizes the transcript rather than quote it in full or disclose its

context. Accordingly, although the Court will want to read the relevant portion of the transcript for itself, we offer this brief summary.

The court began by announcing to counsel that "there has been a note from the jury." 2-SER-89:5. The note contained two questions. The first asked: "Are we deciding the Commissioner, upon seeing the portage agreements, would have disqualified or eliminated Altus or MAAF?" 4-ER-755:12-14. The second was substantively identical except that it added the words "up front" after "seeing the portage agreements." 4-ER-755:15-17.

After discussing these questions with counsel, the court decided it needed to clarify whether the "up front" language was part of both questions. It orally posed that question to the jury. 4-ER-755:19-23. The foreperson responded: "What we meant, Your Honor, no, there's no difference if the portage agreements were shown up front. . . . Would the Commissioner automatically reject it or would he have entered or explored some other solutions?" 4-ER-755:24-56:5. The court responded: "All I can tell you is that's the basic premise of the question. . . . All I can tell you is that's exactly what you have to decide." 4-ER-756:6-9.

The court then reverted to a paraphrased version of the language of the damage causation instruction itself: "If there was—excuse

me—but for this conspiracy to defraud, would he probably have gone with NOLHGA, you know? That's the question you have to decide; what would they have done. Okay?" 4-ER-756:15-18. And a few lines later: "[Y]ou're to assume what would have happened if there had been no conspiracy. What would the Commissioner have done if there were no conspiracy . . . to defraud." 4-ER-757:8-13.

With all respect, the court's comments to the jury during this colloquy were exceedingly confusing, at times bordering on incoherence. The jury could not possibly have understood the few words of this colloquy cited by Artemis to constitute a modification of the court's damage causation instruction and the court's repeated directions—in this colloquy and elsewhere—to assume "no conspiracy" in the "but-for" world.

Any doubt on this point is dispelled by what the jurors and the court said immediately *after* the garbled passage on which Artemis relies. At that point, a juror directly asked the court whether, in the "but-for" world, the portage agreements were disclosed—a question that would not have been asked if Artemis' interpretation of the prior colloquy were correct. Here, in context, is the critical question and the court's response:

> JUROR NO. 4: But you're also asking us to assume what someone might have done.

THE COURT: That's correct. That's correct. And I will explain that to you again.

For purposes of this first question, only for the purpose of the first question, you're to assume what would have happened if there had been no conspiracy. What would the Commissioner have done if there were no conspiracy—

JUROR NO. 3: When you say the portage—

THE COURT: —no conspiracy to defraud.

JUROR NO. 3: *So the portage agreements were disclosed?*

THE COURT: *Well, I mean, all that evidence was presented to you and I can't comment on the evidence. It was already presented to you.*

But the question is: If there had been no conspiracy to defraud, what the Commissioner would have done[?]

Now, obviously, there was a conspiracy so that evidence you consider for everything else in the trial. I don't know if that answers your question. It's probably as far as I can go.

The first question and only for the first question you are asked if there was no conspiracy, but for the conspiracy, would the Commissioner probably have entered into a transaction with NOLHGA for the benefit of—you know, the jury instruction really spells it out. (4-ER-757:3-58:5 (emphases added))

The instructional error problem is vividly revealed in this passage, which Artemis fails to mention. The fact that a juror had to ask whether the portage agreements were disclosed in the "but-for" world refutes Artemis' contention that the court's prior instructions and its answer to the jury's first note had successfully clarified this critical point. And the court's statement that it couldn't answer this unambiguous question because "all that evidence was presented to

you and I can't comment on the evidence" left the jury more at sea than ever.

But that's not all. Even if—contrary to the colloquy just quoted—the jury had understood the court's response to the questions Artemis cites as a definitive statement of what happened in the "but-for" world, that response was legally erroneous. Indeed, the trial court would have erred even if it had told the jury directly—instead of by implication, which is the most that Artemis claims—that it had to decide what the Commissioner would have done if the portage agreements had been disclosed "up front."

The "up front" formulation asked the wrong question. So did the trial court's prior statement to the jury, in the middle of trial, that it was to decide what the Commissioner would have done "if they had divulged this *in the very beginning*." 4-ER-696:23-97:1 (emphasis added). The Altus-Commissioner negotiations began in April 1991. 4-ER-681:8-84:15. But the first set of portage agreements was not signed until August 1991. 4-ER-772, 776. And the second set of portage agreements was not signed until November, the day after the Commissioner recommended approval of the Altus/MAAF bid. 4-ER-788, 797. Neither the August nor the November portage agreements could have been disclosed "up front" or "in the very beginning"

because they were not yet in existence when the negotiations began. The "up front" formulation on which Artemis relies therefore wrote out of the "but-for" world both the existence and disclosure of the August and November portage agreements. Indeed, the latter set of portage agreements came at the *end* of the process—not the "beginning"—more than seven months after the Altus-Commissioner negotiations began. Remarkably, Artemis' brief fails even to *mention*—much less grapple with—the secret contracts signed in November.

The "up front" formulation therefore violates the modesty principle, discussed in our Opening Brief (and unchallenged by Artemis), that requires the alterations made to eliminate the actionable tort in the "but-for" world to "be careful, conservative, and modest." David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770 (1997); *see* AOB 48 (collecting supporting authorities). And the error would have been prejudicial. Even if the *August* Portage Agreements had been disclosed, and even if—as Artemis contended at trial—the Commissioner had thereafter agreed to some kind of voting trust to solve the foreign ownership problem (4-ER-719:18-20:15), what about the November Portage Agreements? They existed; they were not themselves fraudulent; and therefore, like the

August Portage Agreements, they cannot be assumed away in the "but-for" world. A correctly instructed jury would likely have concluded that even if the Commissioner would have agreed to a voting trust arrangement after disclosure of the August Portage Agreements, discovery of the *November* agreements would have led him to conclude that the Altus/MAAF bid was incompatible with California Insurance Code Section 699.5, and that any efforts to arrange a voting trust had been undermined by the latest agreements. Consequently, any instruction that implicitly or explicitly told the jury to ignore the November Portage Agreements—such as the colloquy Artemis relies on—would have been prejudicial error.

B. Alternatively, The Court Prejudicially Erred By Giving The Jury An Ambiguous "But-For" Instruction And Then Failing To Clarify The Ambiguity.

1. The Court's Damage Causation Instruction Was Inadequate And Prejudicially Erroneous.

In discussing why the court's failure to give the Revised Instruction was not cured by the "no conspiracy to defraud" instruction the court gave or by its off-the-cuff comments during jury deliberations, we have already responded to most of Artemis' attempts to justify what the court told the jury. That instruction and those comments did not come close to telling the jury that it had to determine

what the Commissioner would have done had he learned about both sets of portage agreements. Because even Artemis admits that the jury needed to answer that question, the error was prejudicial.

2. Appellants Objected To The Erroneous Instruction And Did Not Invite The Court's Erroneous Comments During Jury Deliberations.

Artemis' sole remaining argument on this issue attempts to fasten responsibility for this instructional debacle on Appellants' supposed "invitation" to misinstruct the jury. PRB 45-46. But Appellants did not encourage or otherwise "invite" the District Court to give the "no conspiracy to defraud" instruction; to the contrary, they objected to it. AOB 23-24, 56 n.18. Moreover, the Commissioner proposed the legally correct Revised Instruction that the court refused. Indeed, counsel for Appellants repeatedly set forth their view of the NOLHGA Premise on multiple occasions during trial. 3-ER-469, 660; 4-ER-690:6-18, 695:7-13, 696:3-18, 712:15-24, 723:14-20, 733:14-25, 741:25-42:11, 743:8-45:18, 750:2-25; 2-SER-113:22-14:21. Accordingly, there was no waiver of instructional error; as the District Court said: "everybody's objections to everything are reserved." 4-ER-734:3-4.

Unable to show any waiver with respect to instructions that the court either gave or refused, Artemis focuses on the comments made by the court during jury deliberations, contending that Appellants

"not only *failed to object* to the court's responses to the jury's questions, but they also *specifically requested* the actions that they now challenge." PRB 45 (footnote omitted; emphases in original). Artemis is wrong in both respects.

Appellants have not claimed, and need not show, that the District Court's responses to the jury's questions constituted stand-alone error requiring reversal. Instead, Appellants contend that the court gave a substantively erroneous and insufficient instruction (to which Appellants objected), and did not remedy (in fact, exacerbated) the error when it repeated the instruction in response to a confused jury's many questions (and, in addition, declined to answer a juror's direct question about disclosure of the portage agreements). For this reason, whether Appellants adequately preserved their objections to each of the court's various responses to the jury's questions is immaterial.

Moreover, it was not necessary for counsel to repeat objections during the jury deliberations that had already been made and rejected. Appellants had (1) proposed a legally correct instruction (AOB 47-51); (2) objected to the court's "no conspiracy" instruction (AOB 57 n.18); and (3) articulated Appellants' position on how to define the NOLHGA Premise on numerous occasions. *See* p.31,

supra. Each time, however, they were met by an insistent District Judge who courteously but firmly reiterated the court's disagreement. AOB 19-20. Once the court's position had been made clear, and reduced to delivered jury instructions, it was unnecessary—and it would have been disrespectful—for Appellants' counsel to protest every time the court restated its framing of the damage causation issue for the jury, especially when the court had already ruled that all such objections were reserved. *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1289 (9th Cir. 2014); *Loya v. Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 282 (9th Cir. 1983) ("[W]hen the trial court has rejected plaintiff's posted objection [to an instruction] and is aware of the plaintiff's position, further objection by the plaintiff is unnecessary").

Nor did Appellants *invite* the court's confusing responses to questions from the jury, as Artemis mistakenly contends. PRB 45-46. Artemis claims that the trial judge said that he planned to tell jurors "'to decide what would have happened if they had seen the portage agreements'" and that the Commissioner's counsel persuaded the court "*not* [to] give even that very limited additional instruction." PRB 45-46 (emphasis in original). That distorts the record. The statement by the Commissioner's counsel quoted by Artemis was not

a response to Judge Klausner's suggestion that the jury be told to assume disclosure of the portage agreements. Instead, it was a response to a proposal *by Artemis's counsel* that the jury be told to decide what the Commissioner would have done "if there had been no conspiracy, if the portages had been disclosed *up front from the beginning*." *See* 2-SER-90-91 (emphasis added). The flaw in this formulation has already been discussed. *See* pp.28-30, *supra*.

Moreover, the jury's first set of written questions asked the court what issues it should decide, not what facts it should assume. See 2-SER-97:12-17 ("Are we deciding the Commissioner, upon seeing the portage agreements, would have disqualified or eliminated Altus or MAAF?" and "[O]r are we deciding [the] Commissioner seeing the portage agreements up front would have negotiated . . . alternate solutions with Altus?") Given these questions, the Commissioner's counsel told the court "that the jury is grappling with factual issues here, evidentiary issues; and we believe the 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 . . . ." 2-SER 90:23-91:4. That was a sound recommendation, not an invitation to commit error.

The Commissioner's counsel *never* objected to telling the jury that the damage causation issue was what the Commissioner would have done had he seen the portage agreements before selecting the winning bid. To the contrary, that is *precisely* what counsel had repeatedly urged the court to tell the jury. *See* AOB 21-24; 4-ER-744:22-45:15, 749:23-50:25. The Commissioner's counsel also reminded the court at this point that there were two sets of portage agreements, "in August and November and those are in front of [the jury] as evidence." 2-SER-93:3-4. He expressed concern that the court not say anything that would "prejudic[e] any consideration they have about the fact that they have seen two sets of portages at two different dates . . . [a]nd that's why I felt that the most minimal [response that] this is evidence you've got to decide is the appropriate way to do this." 2-ER-93:6-12.

Appellants' position on this issue was perfectly clear to all; they never invited the District Court to do anything to the contrary; and the court consistently rejected Appellants' position. There was no invited error and no waiver.

C. On Remand, The District Court Should Give Either The Revised Instruction Or A Modified Instruction That Specifies When The Portage Agreements Were Disclosed.

The Commissioner's original proposed damage causation instruction defined the NOLHGA Premise, as Judge Matz had done (*see* AOB 17), by asking "what the Commissioner would have done if he had learned of the fraud before the Commissioner's selection of the Altus/MAAF bid was approved by the Conservation Court on December 26, 1991." 3-ER-469:9-11. In contrast, the Revised Instruction did not explicitly define when the Commissioner learned about the portage agreements in the "but-for" world. *See* note 7, *supra*.[10]

Although the Revised Instruction did not *expressly* address the issue of timing, the instruction—and common sense—fairly implied that the Commissioner learned of the portage agreements *after* they were signed and *before* the Commissioner relied by making his selection of the successful bid. Obviously, the Commissioner could not

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[10]In full, the Revised Instruction provided:

> The NOLHGA Premise is the Commissioner's claim that, but for the conspiracy to conceal the portage agreements, he probably would have entered into a transaction with NOLHGA. In other words, had the Commissioner learned of the portage agreements, he probably would have entered into a transaction with NOLHGA. (3-ER-660)

have learned that there were *two* sets of portage agreements until the second set was signed in November.

This Court's review and a remand will afford an opportunity to formulate a clearer direction for the jury—one that specifies precisely *when* the Commissioner learned of the portage agreements in the "but-for" world. The unfortunate jury confusion that occurred at the last trial (*see* pp.26-27, *supra*) is a vivid demonstration of the need for clarity. The next jury should be told both *what* was disclosed (both sets of portage agreements) and *when* the Commissioner learned of them (before he became irretrievably committed to a sale to Altus/MAAF). In other words, as our opening brief stated, the jury should be told "to assume execution and disclosure of *both* the August and November Portage Agreements prior to the Commissioner's reliance on the deceit" (AOB 62)—*i.e.*, "after the November Portage Agreements were signed and before the Conservation Court approved the Altus/MAAF sale" on December 26, 1991. AOB 62 n.21. This instruction would define the NOLHGA Premise as follows:

> The NOLHGA Premise is the Commissioner's claim that, but for the concealment of the portage agreements, he probably would have entered into a transaction with NOLHGA. In other words, had the Commissioner learned of both the August and November portage agreements after the November Portage Agreements were signed and before the Commissioner's selection of the Altus/MAAF bid was approved by the Conservation

> Court on December 26, 1991, he probably would have entered into a transaction with NOLHGA.

The same language should be used in the verdict form:

> Did the Commissioner prove that if he had learned of both the August and November portage agreements after the November Portage Agreements were signed and before his selection of the Altus/MAAF bid was approved by the Conservation Court on December 26, 1991, he probably would have entered into a transaction with NOLHGA?

This definition of the "but-for" world would eliminate any actionable fraud by Altus/MAAF—*i.e.*, the Commissioner would have learned "the truth" that had been concealed in the real world before he made a final bid selection. *See* AOB 48. In particular, the Commissioner would have learned of both sets of the portage agreements before detrimentally relying on representations as to the independence of the proposed insurer from French governmental control or ownership. *See* AOB 9, 50. This would have corrected Altus/MAAF's prior assurances that the proposed insurer was independent from French governmental ownership or control. *See* AOB 9. Moreover, this instruction would define the "but-for" world in a way that would be the most consistent with actual historical events while eliminating the actions and reliance that made Altus/MAAF's conduct actionably tortious. *See* AOB 50. As a result, this instruction would meet the requirement that the alterations made to eliminate the tort in the "but-for" world be "careful, conservative and modest." *See* AOB 48

and authority cited. And it would do so with the least possible speculation by the jury as to what transpired in the "but-for" world. *See* AOB 48-49 and authority cited.

In the interest of avoiding any further debate in the trial court over the formulation of this much-disputed damage causation instruction, we respectfully request that the Court's opinion specify the instruction that should be given on that issue on remand. For the reasons just discussed, the Court should direct that the instruction and verdict form set forth above be given. Alternatively, the Court should direct the District Court to give the Revised Instruction (quoted at AOB 22) at the retrial. While we prefer the instruction and verdict form set forth above because they describe the "but-for" world more precisely, either of these formulations would correct the error and jury confusion that tainted the trial.

III.

THE DISTRICT COURT ERRED IN NOT ADJUSTING THE RESTITUTION AWARD FOR SUBSEQUENT DEVELOPMENTS AND IN NOT AWARDING PREJUDGMENT OR POST-JUDGMENT INTEREST.

A. The Court Erred In Failing To Adjust The Award To Reflect The Passage Of Time And Subsequent Developments.

Judge Klausner reinstated the prior restitution award for the same amount and "for the same reasons stated by Judge Matz."

1-ER-4. The court did not adjust the award to reflect the actual price received by Artemis from its 2012 sale of Aurora (which was materially more than the amount estimated by Judge Matz in 2005). Nor did it include prejudgment or post-judgment interest for the period between the original and the reinstated restitution award. The order does not explain why.

Artemis defends the District Court's failure to bring the award up to date on four grounds. None has merit.

Artemis first contends that the *Altus* mandate prohibited the District Court from adjusting the award. PRB 64-65. However, that mandate could not preclude the court from resolving issues that had not yet arisen. "[T]he appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events." *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 18 (1976).

Next, Artemis contends that the District Court "properly declined to resolve" the factual disputes supposedly raised by Appellants' request to increase the restitution award "in Appellants' favor." PRB 65. However, the disputes that *did* exist below related to the Commissioner's unsuccessful effort to convince the District Court to make a much larger restitution award, using a different methodology

than that adopted by Judge Matz. *See* 3-ER-578-80 (¶¶10-19). Those disputes are irrelevant to this appeal, which does not challenge Judge Matz's methodology. The adjustments that this appeal argues should have been made by Judge Klausner are based on undisputed facts, such as the prejudgment interest rate, the lapse of time between the original restitution judgment and its reinstatement, and the amount that Artemis actually received when it sold Aurora.

Artemis also contends that Appellants' calculation of the properly adjusted restitution award incorrectly includes compound interest. PRB 65. Artemis is wrong. The net restitution award in 2006 included $51,285,732 in prejudgment interest prior to 2006. 2-ER-257 (¶1). This is less than the $110 million offset that Artemis received for a prior payment. 2-ER-258 (¶6). That offset must be credited against interest before principal. *See Devex Corp. v. Gen. Motors Corp.*, 749 F.2d 1020, 1024-25 & n.6 (3d Cir. 1984).[11] Consequently, no prejudgment interest was left in the principal amount that Appellants used to calculate the prejudgment interest due through the date of the reinstated judgment. *See* 3-ER-587.

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[11]The same rule applies under California law. *See* CAL. CODE CIV. PROC. §695.220(c), (d); *Big Bear Props., Inc. v. Gherman*, 95 Cal. App. 3d 908, 915 (1979).

Finally, Artemis claims that prejudgment interest is discretionary, not mandatory, because California Civil Code Section 3287(a) applies only when damages are certain or capable of being made certain. PRB 66-67. This argument is wrong for several reasons. First, the amounts for which Appellant requests prejudgment interest—*i.e.*, the dividends and sales proceeds that Artemis received—are certain and undisputed. Second, Judge Klausner's failure to revise the award to reflect the sale of Aurora in 2012 has nothing to do with the availability of prejudgment interest. *See* AOB 65. Third, the District Court did not purport to exercise discretion in refusing without explanation to grant prejudgment interest through 2012 on the prior restitution award. Instead, it merely reinstated the award "for the same reasons stated by Judge Matz." 1-ER-4. However, Judge Matz could not have decided in 2006 whether his award should bear interest when it was reinstated in 2012. Artemis cannot find refuge in discretion that the District Court failed to exercise. Moreover, given the District Court's unchallenged determination in 2006 that prejudgment interest should be awarded, the unexplained (and inexplicable) failure to do likewise once the court reinstated the award was an abuse of discretion. Accordingly, the net restitution award should be increased to $233,302,866. AOB 66.

B. Alternatively, The Court Erred In Not Awarding Post-Judgment Interest From The Date Of The First Restitution Award.

Three Ninth Circuit cases hold that when a District Court reinstates a prior judgment or order, as the court did here, post-judgment interest runs from the date of the first order. *See* AOB 66-69 (citing *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 518 F.3d 1013, 1018 (9th Cir. 2008); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 703 (9th Cir. 1996); *Handgards, Inc. v. Ethicon*, 743 F.2d 1282, 1298-1300 (9th Cir. 1984)). Two other decisions by this Court stand for the same proposition. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1311 (9th Cir. 1982); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394, 407 (9th Cir. 1980). The District Court therefore erred in failing (again without explanation) to require that post-judgment interest on the reinstated restitution judgment run from the date it was originally entered.[12]

Artemis says these cases are distinguishable because "the Commissioner sought different relief on remand than was awarded in the 2006 judgment," thereby causing "uncertainty as to what judgment, if any, could be entered" on remand. PRB 68; *see also* PRB 68

[12]Artemis does not dispute that the applicable standard of review on this issue is *de novo*. *See* AOB 69.

n.25. That argument is foreclosed by Ninth Circuit precedent. In *Handguards*, this Court, relying on two earlier decisions (*Twin City Sportservice* and *Mt. Hood*), held that "a district court *must* award interest for the original vacated judgment *even when the issue of antitrust liability was not firmly settled until the post-remand judgments*." 743 F.2d at 1299 (emphasis added; citation and internal quotation marks omitted). Similarly, in *Twin City Sportservice*, this Court held that, under *Mt. Hood*, post-judgment interest had to run from the date of the original judgment even though the defendant's "liability . . . was not established until the second judgment was entered." 676 F.2d at 1311. And in *Guam Society*, this Court held that post-judgment interest ran from the date of the previously vacated judgment when the District Court reinstated that judgment after considering and rejecting the defendants' argument that intervening case law made part of the award improper. *See* 100 F.3d at 697, 703. In short, the rule that post-judgment interest on a reinstated judgment begins to run from the date that the first judgment was entered applies regardless of whether reinstatement was certain or contested.

The cases Artemis cites do not conflict with this rule. Artemis cites *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827

(1990), for the proposition that "[p]ost-judgment interest accrues from the date the monetary award is 'ascertain[ed].'" PRB 68. As this Court has explained, however, an award is "ascertained" for this purpose when "the legal and evidentiary basis" of the award is determined. *See Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 518 F.3d 1013, 1018 (9th Cir. 2008). Judge Klausner reinstated the prior restitution award "for the same reasons stated by Judge Matz." 1-ER-4. Accordingly, the "legal and evidentiary basis" for Judge Klausner's restitution award was determined by the prior restitution judgment. Post-judgment interest therefore runs from the date of that judgment.[13]

Finally, Artemis quotes *Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1984), for the proposition that "'[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 [28 U.S.C. §] 1961 [*i.e.*, the date from which post-judgment interest should run] is the date of the entry of the judgment *after the new trial on remand*." PRB 68 (quoting *Turner*, 702 F.2d at

[13]Artemis also quotes *Mt. Hood* out of context (*see* PRB 68) but ignores its holding that the plaintiff was entitled to recover interest from the date of the original judgment. 616 F.2d at 407.

754) (emphasis added by Artemis). But that proposition is irrelevant because *Altus* did not order, and the District Court did not conduct, a new trial on restitution.[14]

In short, the law in this Circuit is exactly what Appellants said it was. At the very least, then, the District Court erred in not making post-judgment interest retroactive to February 13, 2006, the date of the first restitution judgment.

APPELLANTS' RESPONSE BRIEF

SUMMARY OF ARGUMENT

Artemis' cross-appeal contends that California does not recognize a claim for unjust enrichment. PRB 49. But numerous cases hold that such claims *are* recognized under the label of "restitution" or "disgorgement." *See* Part IV(A)(1), *infra.*

Artemis next argues that Appellants failed to prove a predicate act of wrongdoing. PRB 50-51. But the first jury found that Artemis joined a conspiracy to fraudulently obtain ELIC Estate assets. That finding of wrongful conduct supports restitution/disgorgement of part

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[14]Moreover, the language Artemis quotes from *Turner* was characterized as *dicta* in *Handgards* (*see* 743 F.2d at 1299 n.26), which held that post-judgment interest runs from the date of the original judgment even though an appeal from that judgment resulted in a remand *and a new trial*. *See id.* at 1300.

of the profit Artemis obtained from joining the conspiracy. *See* Part IV(A)(2)(a), *infra*.

Artemis also argues that restitution is unavailable where no damages are awarded. PRB 50-51. However, *Ward v. Taggert*, 51 Cal. 2d 736 (1959), holds that a plaintiff's inability to prove that the fraud caused actionable damages does not preclude disgorgement of profits attributable to the fraud. *See* Part II(A)(2)(b).

Artemis next contends that the jury rejected a claim for restitution, and this finding precludes the trial court from ordering restitution. PRB 51-53. However, the jury was not asked by the verdict forms to decide a restitution claim, was not instructed on the law of restitution, and did not decide a claim that was not before it. *See* Part IV(A)(3), *infra.*

Artemis contends that the Rehabilitation Plan forecloses the District Court's restitution award. PRB 53-55. But this Court held otherwise in the prior appeal. *Altus*, 540 F.3d at 1010. Artemis was not a party to the Rehabilitation Plan. And even if it were, and even if the Plan were otherwise applicable, the Plan would not preclude restitution where the Plan itself resulted from a fraud. *See* Part IV(A)(4), *infra*.

Artemis next contends that equitable relief is unavailable because Appellants supposedly had an adequate remedy at law. PRB 55-56. Under *Ward*, however, disgorgement is an available remedy for fraud even if a plaintiff cannot prove that it sustained compensatory damages. *See* Part IV(A)(5), *infra*.

Artemis also argues that Appellants failed to prove that Artemis benefited from the fraudulent scheme or that any benefit was at their expense. PRB 56. Appellants amply proved that Artemis received a substantial benefit—millions of dollars in profits. Moreover, Artemis' claim that a finding of benefit is precluded where a fraudulently induced purchase of property was for fair market value conflicts with *Ward*. *See* Part IV(A)(6)(a), *infra.* In addition, the *Restatement* makes clear that the requirement that the benefit be at the plaintiff's expense is satisfied if the claimant has suffered a loss because the defendant's violated its legal rights. *See* Part IV(A)(6)(b), *infra*. Finally, the District Court's award of *partial* restitution was well within its discretion. *See* Part IV(A)(6)(c), *infra*.

Finally, Artemis argues that the restitution award should be reduced to zero by offsetting other defendants' settlement payments. PRB 59-64. The same contention was recently rejected in an appeal by one of Artemis' co-defendants. *Garamendi v. Hénin*, 683 F.3d

1069, 1081-82 (9th Cir. 2012). The District Court required Artemis to disgorge only profits *it* received, not profits received by Artemis' co-defendants. Accordingly, there was no risk of any double recovery that would require an offset. *See* Part IV(B), *infra.*

ARGUMENT

I.

RESTITUTION IS APPROPRIATE.

Artemis' cross-appeal challenges the District Court's order requiring Artemis to disgorge a portion of its wrongfully obtained profits. This Court reviews that order for abuse of discretion. *See SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113 (9th Cir. 2006). The factual findings that support the restitution order are reviewed for "clear error." *See* FED. R. CIV. P. 52(a)(6); *Chase Inv. Servs. Corp. v. Law Offices of Jon Divens & Assocs., LLC*, 491 Fed. App'x 793, 795 (9th Cir. 2012). The restitution/disgorgement order should be affirmed under these deferential standards.

A. The District Court Properly Awarded Restitution.

1. California Recognizes Claims For Restitution/Disgorgement Based On Unjust Enrichment.

Artemis argues that California does not recognize a claim for unjust enrichment. *See* PRB 49. But numerous cases, including

those on which Artemis relies, make clear that such claims *are* recognized under the label of "restitution" or "disgorgement." *See id.* (citing *Myers-Armstrong v. Actavis Totowa, LLC*, 382 Fed. App'x 545, 548 (9th Cir. 2010) ("[U]njust enrichment is a basis for obtaining restitution . . .") (citation and internal quotation marks omitted); *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1490 (2006) (same); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010) ("Unjust enrichment is synonymous with restitution")). The argument that California does not recognize a cause of action for "unjust enrichment" is, as one court recently put it, "largely a dispute in semantics" because the "courts concluding that unjust enrichment is not a stand-alone cause of action have typically recharacterized the claim as one for restitution . . . [which] consists of essentially the same elements: the unjust retention of a benefit at the expense of another." *Gerawan Farming, Inc. v. Rehrig Pac. Co.*, No. 1:11-CV-01273 LJO, 2012 WL 691758, at *11 (E.D. Cal. Mar. 2, 2012) (citation omitted). Accordingly, "for all relevant purposes, unjust enrichment appears to be 'synonymous' with restitution, which is a viable cause of action under California law." *Id.*; *accord*, *Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1100 (N.D. Cal. 2006); *Kosta v. Del*

Monte Corp., No. 12-CV-01722-YGR, 2013 WL 2147413, at *14 n.8 (N.D. Cal. May 15, 2013).

2. Artemis' Wrongful Acts Justify The Restitution Award.

a. The Restitution Award Is Properly Based On Artemis' Wrongful Acts.

Artemis argues that Appellants failed to prove a predicate act of wrongdoing on which to base their restitution claim. *See* PRB 50-51. But at the 2005 trial, the jury found that Altus, Credit Lyonnais and others "participate[d] in a common scheme to obtain assets from the ELIC Estate by fraud," that Artemis "agree[d] to participate . . . in furtherance of that scheme, knowing its wrongful objective and before the scheme was accomplished," and that this "scheme cause[d] harm to the ELIC Estate." *See* 2-ER-205-07. This Court held that this verdict constituted a "complete finding of liability." *Altus*, 540 F.3d at 1005.

These jury findings distinguish this case from those Artemis relies upon, in which there was no credible evidence of wrongdoing as a predicate for a restitution claim. *See* PRB 50 (citing *Bosinger v. Belden CDT, Inc.*, 358 Fed. App'x 812, 815 (9th Cir. 2009) (no credible evidence of any wrongdoing); *Ag Servs. of Am., Inc. v. Nielsen*, 231 F.3d 726, 734 (10th Cir. 2000) (jury verdict demonstrated there was

not "anything inequitable" in defendants' receipt of the relevant proceeds)).

b. Restitution Does Not Require Proof Of Damages.

Artemis contends that disgorgement of wrongfully earned profits is precluded if the conspiracy to defraud claim fails for lack of proof of damages. PRB 50-51. Artemis is wrong. In *Ward v. Taggert*, 51 Cal. 2d 736 (1959), which Judge Matz relied on in awarding restitution (1-ER-79), the California Supreme Court held that disgorgement of profits earned from a transaction tainted by fraud was appropriate even though the plaintiff had been unable to prove that it had sustained any legally compensable damages: "Although the facts pleaded and proved by plaintiffs do not sustain the judgment on the theory of tort [because of lack of recoverable damages], they are sufficient to uphold recovery under the quasi-contractual theory of unjust enrichment . . . ." 51 Cal. 2d at 742.

As Justice Traynor's opinion for the Court explained, *Ward* rested on the bedrock principle, codified in California Civil Code Section 3517, that "no one can take advantage of his own wrong." As explained in the *Restatement*:

> When the defendant has acted in conscious disregard of the claimant's rights, the whole of the resulting gain is treated as unjust enrichment, even though the defendant's gain may exceed both (i) the measurable injury to the claimant, and (ii)

> the reasonable value of a license authorizing the defendant's conduct. . . . [¶] Restitution requires full disgorgement of profit by a conscious wrongdoer, not just because of the moral judgment implicit in the rule of this section, but because any lesser liability would provide an inadequate incentive to lawful behavior. (RESTATEMENT (THIRD) OF RESTITUTION §3, cmt. c at 23-24 (2011))

See also 1 GEORGE E. PALMER, THE LAW OF RESTITUTION §2.10, at 134 (1978) ("1 PALMER") ("[T]he decisions amply demonstrate that economic loss is not a requisite" for restitution).

Artemis cites no decision or authority questioning the continuing authority of *Ward*. It remains good law. *See, e.g.*, *Cnty. of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 542 (2007) ("The emphasis is on the wrongdoer's enrichment, not the victim's loss"); 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §1040, at 1031-32 (10th ed. 2005). Yet Artemis does not even acknowledge *Ward* in the section of its brief that argues that restitution is foreclosed because the jury awarded no damages. Instead, it relegates discussion of this dispositive Supreme Court precedent to a footnote in a different section of the brief. PRB 57 n.16. And its attempt to distinguish *Ward* there is unavailing. *Ward*, Artemis says, is distinguishable because, under the applicable measure of damages for fraud in connection with the sale of property, plaintiffs had been unable to prove any recoverable damages. But that is also true here: the jury rejected Appellants' damage claim under the legal standard

given it by the District Court.[15] Accordingly, this case is governed by *Ward*'s holding that the plaintiff's failure to prove compensatory damages is no bar to disgorgement of the wrongdoer's profits.

3. The Jury Was Not Asked To Decide, And Therefore Did Not Reject, A Claim For Restitution/Disgorgement.

Artemis contends that the jury rejected a claim for restitution, and that this determination is preclusive. PRB 51-53. However, the jury was not asked to, and did not, decide a claim for restitution.

The court tendered only the issue of damages—not restitution—to the jury. The court's instructions explained that the jury

> must decide how much money will reasonably *compensate* the Commissioner for selecting the Altus/MAAF Bid instead of NOLHGA's bid. This compensation is called '*damages*.' . . . The following are the specific items of *damages* claimed by the Commissioner: Profits or other gains that might reasonably *have been earned by the ELIC Estate* had the Commissioner selected the NOLHGA bid. (1-ER-37 (emphases added))

Likewise, the verdict form asked, "[w]hat is the amount of damages, if any, suffered by the ELIC Estate?" 3-ER-554. It asked no questions, and sought no verdict, on restitution or disgorgement.

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[15]The cases Artemis cites (PRB 51) concern only the elements required to recover *damages* for conspiracy and say nothing about whether a co-conspirator is liable for restitution/disgorgement of the profits *it* received from the conspiracy.

Artemis nevertheless says that the Commissioner's counsel made an "explicit[] request[]" for "a restitutionary remedy" (PRB 52) during closing argument. That is untrue. Counsel's argument sought only to assure the jury that awarding compensatory damages would not unfairly harm Artemis because such damages would represent profits that "they never should have gotten." 2-SER-129:11-22. Moreover, counsel's rhetoric could not give the jury power to confer a remedy that was neither authorized nor defined by the court's instructions or the verdict form.

4. The Rehabilitation Plan Does Not Preclude Restitution.

Artemis argues that the Rehabilitation Plan governs the subject matter of this dispute and forecloses any award for restitution. PRB 53-55. Artemis is incorrect.

First, this Court has already ruled that the Rehabilitation Plan does not preclude the Commissioner's claims against Artemis:

> We are not persuaded that the Commissioner's legal and equitable claims seeking disgorgement of Artemis's profit obtained through participation in the Altus/MAAF Group conspiracy to defraud the Commissioner are equivalent to revision of contractual profit participation terms embodied in the Rehabilitation Plan. The Commissioner does not seek rescission or modification of the Rehabilitation Plan; he seeks only to hold Artemis personally liable in law and equity for Artemis's intentional misrepresentation, concealment and participation in the Altus/MAAF Group conspiracy to defraud the Commissioner. (*Altus*, 540 F.3d at 1010)

Second, there is no contract between the parties governing this dispute. Artemis was not a party to the Rehabilitation Plan; it did not even exist at the time the Rehabilitation Plan was formalized. *See id.* at 997-98.

Third, even an express contract between the parties that governs the subject matter of the dispute does not preclude restitution when, as here, the contract was the result of fraud. Again, the California Supreme Court's decision in *Ward* is directly on point: there, the plaintiff was allowed to seek disgorgement of profit from a contract procured by fraud. As in *Ward*, Artemis' obligation to disgorge its illegal profits "does not arise from any agreement between [it] and [Appellants]. It arises from [its] fraud and violation of statutory duties. [Its] fraud is not waived, for it is the very foundation of the implied-in-law promise to disgorge." 51 Cal. 2d at 743.

Accordingly, the cases on which Artemis relies are inapposite. Those are cases in which there was no finding of fraud or misrepresentation and there was an agreement between the parties governing the subject matter of the dispute. *See* PRB 54 (citing *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1166-67 (9th Cir. 1996) (no claim for unjust enrichment where plaintiffs "failed to demonstrate an issue of material fact as to whether [defendant] made

actionable misrepresentations"); *Wal-Noon Corp. v. Hill*, 45 Cal. App. 3d 605, 612-15 (1975) (overturning restitution award in a breach of contract action where there were no allegations of fraud, and no one sought to invoke trial court's equitable powers); *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal. App. 4th 194, 203 (1996) (dismissing claim for unjust enrichment in breach of contract action where plaintiff re-alleged existence of contract)).

5. Inadequacy Of The Legal Remedy Is Not Required.

Artemis argues that equitable relief should not be available because Appellants had an adequate remedy at law. *See* PRB 55-56. But no showing that the remedy at law is inadequate is required for restitution to disgorge wrongful gains. RESTATEMENT (THIRD) OF RESTITUTION §3, cmt. c.; *see also* 1 PALMER, §1.6, at 33 ("Restitution is frequently sought where the plaintiff has another remedy, for example an action to recover damages for tort or breach of contract. The availability of restitution is not dependent upon inadequacy of the alternative remedy"); DAN B. DOBBS, LAW OF REMEDIES §4.1(1), at 556 (1993) ("If the facts justify a substantive claim of restitution to prevent unjust enrichment, the existence of other remedies like damages is no impediment to restitutionary relief"). Here, as in *Ward v. Taggart*, Appellants unsuccessfully sought compensatory damages; if

that part of the judgment is affirmed, they are likewise entitled to disgorgement.

The cases Artemis cites do not concern a claim for restitution and are therefore inapposite. *See Thompson v. Allen Cnty.*, 115 U.S. 550 (1885) (court of chancery may not appoint receiver to collect taxes levied against municipal corporations by judgment issued at common law); *Philpott v. Superior Court*, 1 Cal. 2d 512 (1934) (fraud and money had and received are actions at law; plaintiff did not include allegations for equitable relief); *Wilkison v. Wiederkehr*, 101 Cal. App. 4th 822, 835 (2002) ("where the breach of an agreement to make a will results in the loss of a monetary bequest, the affected legatee must file a creditor's claim in the probate proceeding and, if unsuccessful there, may file a civil action for damages").

6. Appellants Established The Elements For Restitution.

Artemis argues that Appellants have not proven the elements for restitution—*i.e.*, that it unjustly received a benefit at their expense. *See* PRB 56. Artemis is mistaken. As Judge Matz and Judge Klausner both held, the Commissioner proved the elements required for restitution at the first trial. *See* 1-ER-4, 77-81.

a. Artemis Received A Benefit.

Artemis benefited significantly from its participation in the conspiracy to defraud. Judge Matz found that Artemis received profits of more than $459 million from the ELIC junk bonds it purchased from Altus and more than $379 million in profits from the new insurance company (NCLH/Aurora) created by the conspirators. 1-ER-77, 81.

Since Judge Matz's decision, Artemis' profits have more than trebled. *See* 3-ER-579. Even after offsetting the $110 million previously paid to the Commissioner, the net present value of its profits from the ELIC Estate assets it acquired is more than $1.58 billion. 3-ER-580. Artemis never would have acquired these assets, and received these profits, had it not participated in the fraudulent conspiracy.

Artemis argues that because it "never purchased anything 'directly' from the Commissioner or the ELIC Estate," no benefit was ever "*directly* conferred" upon it. *See* PRB 56-57 (emphasis added).[16] But, as Judge Matz explained, "'[f]or a benefit to be conferred it is not

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[16]Artemis also cites *City & County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1144 (N.D. Cal. 1997). The plaintiff counties in that case alleged that defendant cigarette manufacturers benefited from fraudulent representations regarding the risks of smoking by avoiding responsibility for individual smokers' medical costs paid by the plaintiff counties. *Id.* at 1144-45. The court noted that plaintiffs had an independent statutory duty to bear those costs and that any benefit was conferred upon the individual smokers, not the manufacturers. *Id.* Here, only Artemis benefited from the assets *it* acquired due to the fraud.

essential that money be paid directly to the recipient by the party seeking restitution.'" 1-ER-78 (quoting *Cnty. of Solano v. Vallejo Redev. Agency*, 75 Cal. App. 4th 1262, 1278 (1999)). This principle is well established. *See, e.g.*, *CSI Elec. Contractors, Inc. v. Zimmer Am. Corp.*, No. CV 12-10876-CAS AJWX, 2013 WL 1249021, at *5 (C.D. Cal. Mar. 25, 2013); *Cnty. of San Bernardino*, 158 Cal. App. 4th at 542; *Shersher v. Superior Court*, 154 Cal. App. 4th 1491, 1500 (2007).

Artemis received ELIC assets from its co-conspirators and knowingly concealed its co-conspirators' use of fraud to obtain those assets from the ELIC Estate. Accordingly, the fact that Artemis did not receive benefits directly from the ELIC Estate does not defeat the Commissioner's entitlement to restitution of benefits that Artemis *indirectly* received. *See First Nationwide Sav. v. Perry*, 11 Cal. App. 4th 1657, 1663 (1992) ("[A] transferee with knowledge of the circumstances giving rise to an unjust enrichment claim may be obligated to make restitution").

Artemis also contends that there is a black-letter rule that no "benefit" is imparted where "a plaintiff obtains fair market value for an asset." PRB 56. However, as Judge Matz held, this proposition is contrary to *Ward v. Taggart*. 1-ER-79 (citing *Ward*, 51 Cal. 2d at 741-42). There, compensatory damages could not be awarded because

"there was no evidence that the property was worth less than plaintiffs paid for it." 51 Cal. 2d at 740. Nevertheless, the Supreme Court held that the wrongdoer's profits from its wrongful acquisition of the property should be disgorged. *Id.* at 741-42.[17]

Artemis has conflated the requirements for compensatory damages with those for restitution. Unjust enrichment is measured by the defendant's gain, not by the plaintiff's loss. *See Cnty. of San Bernardino*, 158 Cal. App. 4th at 542 ("The principle of unjust enrichment, however, is broader than mere 'restoration' of what the plaintiff lost. Many instances of liability based on unjust enrichment . . . do not involve the restoration of anything the claimant pre-

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[17]The two cases cited by Artemis (*Rheem Mfg. Co. v. United States*, 57 Cal. 2d 621 (1962), and *Beanstalk Group, Inc. v. AM Gen. Corp.*, 283 F.3d 856 (7th Cir. 2002)), do not support a black-letter rule precluding disgorgement when the plaintiff has received fair market value. In *Rheem*, the holder of a purchase money deed of trust foreclosed on the property, which it subsequently purchased for fair market value at the resulting auction. Dismissing a mechanic lienholder's claims for unjust enrichment, the California Supreme Court held only that "[t]he judgment cannot be sustained on the theory of unjust enrichment. The *only finding* that relates to the matter, namely, that Rheem paid the fair market value of the property at the trustee's sale, *tends to show* that there was no unjust enrichment." 57 Cal. 2d at 626 (emphases added).

Beanstalk is also inapposite. There, the court held that "[w]hen a contract defines the relationship of two parties, termination *without fault* is a defense to a claim of unjust enrichment." 283 F.3d at 863 (emphasis added). That principle is irrelevant here because the jury found Artemis liable for conspiracy. *See* pp.50-51, *supra*.

viously possessed . . . includ[ing] cases involving the disgorgement of profits . . . wrongfully obtained . . . ") (citation and internal quotation marks omitted); *Haskel Eng'g & Supply Co. v. Hartford Accident & Indem. Co.*, 78 Cal. App. 3d 371, 376 (1978) (the right to restitutionary recovery pursuant to a constructive trust includes appreciation on property purchased with embezzled funds); *CTC Real Estate Servs. v. Lepe*, 140 Cal. App. 4th 856, 860 (2006) (permitting identity theft victim to recover profits derived from stolen assets).

b. Artemis Benefited At Appellants' Expense.

Artemis also argues, incorrectly, that any benefits it received were not "at the expense of" the Commissioner. PRB 57. The *Restatement* explains that "the consecrated formula 'at the expense of another' can also mean 'in violation of the other's legally protected rights,' without the need to show that the claimant has suffered a loss." RESTATEMENT (THIRD) OF RESTITUTION §1, cmt. a; *see also* 1 PALMER, §2.10, at 133 ("The general requirement [that restitution be awarded only when the defendant's benefit was obtained at the plaintiff's expense] does not mean that the gain to the defendant need be equated to the loss to the plaintiff, *nor indeed that there need be any loss to the plaintiff except in the sense that a legally protected interest has been invaded*") (emphasis added). Here, the conspirators vio-

lated the Commissioner's legally protected interest in not being defrauded, and the first jury found that the ELIC Estate had been harmed by this conspiracy. Nothing more is required to show that Artemis received its benefits "at the expense of" the ELIC Estate.

c. Requiring Artemis To Disgorge Some Of The Profit It Obtained From Its Own Wrongful Conduct Was Not An Abuse Of Discretion.

Finally, Artemis argues that its retention of all of the profits from the transaction would not be "unjust" or "inequitable" because, it says, the Commissioner received the benefit of his bargain under the Rehabilitation Plan. PRB 57-58. This is a retread of Artemis' "no compensatory damages, no restitution" argument. As just discussed, such an argument misstates the law of unjust enrichment.

The 2005 jury found that Artemis engaged in a conspiracy to defraud that caused harm to the ELIC Estate. Given this finding, the court was entitled to conclude that it would be unjust for Artemis to retain the profits resulting from that wrongdoing. *See Cnty. of San Bernardino*, 158 Cal. App. 4th at 542 ("[T]he public policy of this state does not permit one to take advantage of his own wrong regardless of whether the other party suffers actual damage") (citation and internal quotation marks omitted). The court in *San Bernardino* explained that "[t]he emphasis is on the wrongdoer's enrichment, not

the victim's loss. In particular, a person acting in conscious disregard of the rights of another should be required to disgorge all profit because disgorgement both benefits the injured parties and deters the perpetrator from committing the same unlawful actions again." *Id.*

Artemis' reliance on *Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583 (2008), is misplaced. There the court found that permitting plaintiff's cause of action for unjust enrichment would frustrate public policy considerations by circumventing both an express statutory requirement that only an injured plaintiff may assert a private right of action for unfair competition and the Legislature's decision not to permit a private right of action for violations of the Insurance Code sections at issue. *Id.* at 1595. By contrast, Judge Matz found that awarding "*partial* restitution here is consistent with the principle . . . that no one can 'take advantage of his own wrong.'" 1-ER-80 (emphasis added). As Judge Matz explained, "powerful and sophisticated companies like Artemis[]. . . must tell the truth and comply with the law" and "[t]he public interest will be served if the statutory framework for insurance regulation in California is vindicated by a ruling requiring Artemis to make at least some restitution." *Id.* Despite this, the court declined to award restitution of *all* of Artemis' profits

and instead ordered partial restitution. The court's conclusions in this regard were an appropriate exercise of its equitable discretion.

B. Artemis Is Not Entitled To An Offset.

Artemis argues that the restitution award should be reduced to zero by offsetting other defendants' settlement payments. *See* PRB 59-64. Both Judge Matz and Judge Klausner rejected this contention, and this Court recently rejected a virtually identical request for an offset by one of Artemis' co-defendants. *See Garamendi v. Hénin*, 683 F.3d 1069, 1081-82 (9th Cir. 2012). Artemis is not entitled to offset an award disgorging profits it alone earned with sums paid by other defendants.

Where co-defendants are held to be jointly and severally liable, and one defendant is required to pay the judgment for the group's cumulative liability, that defendant is entitled to an offset for any amounts paid in settlement by other defendants to prevent a double recovery. *See* CAL. CODE CIV. PROC. §877. That statute does not require an offset here.

After the first trial, Judge Matz denied Artemis's motion to reduce its liability for restitution by the settlement amounts paid by other defendants. FER-1-3. He found that the requested offset "would result in an enormous injustice" (FER-1), and that "Section 877(a)

does not require an offset" because "there is no risk of double recovery if Artemis disgorges the benefit it derived unjustly." FER-2.[18] After the second trial, Judge Klausner also rejected Artemis's renewed argument that the restitution award should be reduced by settlement payments from other defendants. 1-ER-4.

These rulings were correct. In *Hénin*, this Court held that the Commissioner's restitution judgment against Artemis' co-defendant, Jean-François Hénin, should not be offset by settlements from other defendants because Hénin's "liability is individual, not joint." *See* 683 F.3d at 1082. The Court stressed that such individual liability was not subject to offset because the "'relevant language of section 877(a) . . . presupposes the existence of multiple defendants jointly liable for the same damages.'" *Id.* (citation and internal quotation marks omitted); *accord*, *Wilson v. John Crane, Inc.*, 81 Cal. App. 4th 847, 864 (2000) (holding that a non-settling tortfeasor's individual

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[18] *See also FTC v. Silueta Distribs., Inc.*, No. C 93-4141 SBA, 1995 WL 215313, at *8 (N.D. Cal. Feb. 24, 1995) ("When authorizing disgorgement the court is not awarding damages to which plaintiff is legally entitled but is exercising the chancellor's discretion to prevent unjust enrichment") (citation and internal quotation marks omitted); *SEC v. Rind*, No. CV 90-4361-HLH, 1991 WL 214267, at *2 (C.D. Cal. June 24, 1991) (disgorgement of profits and restitution are subject to court's equitable discretion to prevent defendant from profiting by violating the law and are not based on a showing of entitlement to damages).

liability should not be offset by settlements from other joint tortfeasors).

Hénin also rejected the argument, which Artemis now makes, that "the complaint, rather than the judgment, . . . controls" whether Section 877(a) requires an offset. 683 F.3d. at 1082 n.8. This argument failed because "the district court *apportioned damages individually* to Hénin rather than making him liable, jointly or otherwise, for the *total* claimed loss." *Id.* (emphases in original).

So it is here. Artemis tries to distinguish *Hénin* by arguing that the judgment against Hénin specifically imposed individual liability on Hénin alone. *See* PRB 63 n.21. But Artemis concedes that the restitution judgment "was entered against Artemis alone." PRB 63. Moreover, Artemis was required to disgorge only its own profits, not the profits of any other joint tortfeasors. *See* 1-ER-78-79, 81. In short, like the Commissioner's judgment against Hénin, the Commissioner's judgment here imposed only individual liability to disgorge Artemis' profits. No offset is needed to prevent a double recovery.

Artemis cites no case where a court has permitted offset of an order requiring the defendant to disgorge profits that *it* wrongfully earned. Instead, Artemis relies upon inapposite cases that involved

apportionment of compensatory damages among joint tortfeasors. *See* PRB 59-64 (citing, *inter alia*, *PacifiCare of Cal. v. Bright Med. Assocs., Inc.*, 198 Cal. App. 4th 1451, 1464 (2011)) (Section 877 applicable to claim for damages caused by delays in providing healthcare); *May v. Miller*, 228 Cal. App. 3d 404, 407 (1991) (applying Section 877 to compensatory damages claims for injuries resulting from negligent handling of insurance claims); *Vesey v. United States*, 626 F.2d 627, 633 (9th Cir. 1980) (applying Section 877 to compensatory damages claims in wrongful death action).

Artemis claims, without evidentiary support, that there is some overlap between the profits that Artemis has been ordered to disgorge and the profits of the settling defendants. PRB 62. In fact, however, the restitution award was actually reduced so that Artemis did not have to disgorge profits received by another defendant. *See* 1-ER-81. Moreover, even if Artemis were correct that some unspecified portion of the settlements with the other defendants was attributable to claims for restitution against those defendants (as distinguished from claims for compensatory damages), those claims were for disgorgement of profits earned by *those settling defendants*, not for profits earned by *Artemis*. Accordingly, no portion of the settlement payments made by co-defendants duplicated disgorgement of the profits

earned by *Artemis* that the present restitution award requires. This is exactly what Judge Matz found (FER-2-3 (¶3)), and the District Court's factual determination that there was no double-recovery should be affirmed in the absence of clear error (which Artemis doesn't even attempt to show). Artemis should not be allowed to keep all of its own ill-gotten gains just because the Commissioner has already recovered some of the ill-gotten gains earned by *other* defendants.

CONCLUSION

The Judgment should be reversed and the case remanded for a new trial on the NOLHGA Premise at which Artemis should be precluded from contending that, in the "but-for" world, the Commissioner would have chosen the Altus/MAAF bid. Alternatively, the jury at the retrial should be instructed to determine what the Commissioner would have done had he known about the August and November portage agreements before the Conservation Court approved that bid. Finally, if the Court affirms the judgment against the Commissioner on his damages claim, the award of restitution should be increased by

making the adjustments urged in Part III(A) or by adding post-judgment interest from the first judgment in February 13, 2006.

DATED: March 17, 2014.

Respectfully,

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ATTESTATION UNDER CIRCUIT RULE 25-5(f)

I, Jerome B. Falk, Jr., am the ECF User whose ID and password are being used to file **Appellants' Response And Reply Brief**. In compliance with Circuit Rule 25-5(f), I hereby attest that Franklin B. O'Loughlin concurs in the filing of this brief on behalf of National Organization of Life and Health Insurance Guaranty Associations and California Life and Health Insurance Guarantee Association.

DATED: March 17, 2014.

/s/ *Jerome B. Falk, Jr.*
JEROME B. FALK, JR.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 13-55567

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached **Appellants' Response And Reply Brief** is proportionally spaced, in a typeface of 14 points or more and contains 15,315 words, exclusive of those materials not required to be counted under Rule 32(a)(7)(B)(iii).

DATED: March 17, 2014.

By: /s/ *Steven L. Mayer*
STEVEN L. MAYER

CERTIFICATE OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on March 17, 2014, I electronically filed the foregoing **Appellants' Response And Reply Brief and Appellants' Further Excerpts of Record** with the Clerk of the 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.

/s/ *Jerome B. Falk, Jr.*
JEROME B. FALK, JR.

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