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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

ALTUS FINANCE S.A., et al.,

Defendants.

Case No. CV-99-02829 RGK (CWx)

DEFENDANT ARTEMIS S.A.'S OBJECTIONS TO PROPOSED JUDGMENT SUBMITTED BY COMMISSIONER

[Local Rules 52-7 and 58-4]

Trial Date: October 17, 2012
Time: 9:00 a.m.
Place: Courtroom 850
Judge: The Hon. R. Gary Klausner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Showing a remarkable disregard for this Court's February 26, 2013 Order re: Restitution (the "Order"), the Commissioner has submitted a Proposed Judgment that is not only inconsistent with the ruling of this Court, but also ignores the last seven years of litigation, including the trial conducted before this Court.

Plaintiff asks this Court to backdate the new judgment *nunc pro tunc* to February 13, 2006 – the date Judge Matz's judgment on restitution was entered – in order to inflate his restitution award by including almost $50 million in post-judgment interest. [Proposed] Judgment, Mar. 5, 2013 (ECF No. 4331-1) ("Pl.'s Proposed Judgment"), ¶ 1. Having sought – and lost – an award of prejudgment interest, the Commissioner now seeks to convert the prejudgment interest that this Court refused to allow into post-judgment interest using a procedural trick. However, the jury trial that the Commissioner forced this Court, the jury, and Artemis to go through would have eliminated any restitution award if it had come out differently and the Commissioner received the jury verdict he wanted, and it cannot be dismissed as some simple clerical error that can be fixed "*nunc pro tunc*." The judgment in this matter is going to be entered in 2013 – not in 2006 – and 28 U.S.C. § 1961 is clear that interest "shall be calculated from the date of the entry of the judgment." The Commissioner's $50 million procedural gimmick is improper.

The Commissioner rejected Judge Matz's initial award when he took an appeal following the 2005 trial. In the new trial that followed, the Commissioner asked the jury to award him billions of dollars – an amount that the Commissioner would surely have elected to receive instead of any amount of restitution. He lost. The Commissioner then sought a new and different restitution award that included tens of millions of dollars in prejudgment interest up to 2012. Artemis, on the other hand, argued that no restitution award should be given because the Commissioner tried all of his damages claims to the jury – including his claims for all of the profits actually earned by the recapitalized insurance company known as Aurora National Life

Assurance Company ("Aurora") – and it also lost. Until the jury delivered its verdict, and this Court decided the restitution award based on its review of the relevant law and facts, there was no way for either party to know whether there would be any restitution award or, if so, how much it would be. This Court's decision to reinstate Judge Matz's $241 million restitution award was not the result of this Court fixing some clerical mistake, but rather reflected this Court's decision on a renewed claim for restitution made after the jury decided the Commissioner's (lack of) damages. Accordingly, the Court's Order will lead to the entry of a *new* judgment. The Commissioner's request for pre-2013 interest (once again) should be denied.

The Commissioner also asks this Court to find that the restitution award against Artemis is "several and individual" and therefore "not subject to any offset." Pl's. Proposed Judgment ¶ 5. However, as the jury trial made clear, the Commissioner sought as damages the very same insurance company profits for Artemis' purported co-conspirators' conduct that he has been awarded as restitution. These alleged co-conspirators settled the Commissioner's claims against them for the insurance company profits, and the Commissioner's judgment against Artemis for those same insurance company profits must accordingly be reduced in an amount equal to the settlements. The Commissioner tried to slip the "not subject to any offset" provision into his Proposed Judgment to avoid briefing on the issue because – having failed to prove to the jury that he is entitled to any damages – he wants to avoid the effect of the $595,250,000 in settlements that he has received from Artemis' alleged co-conspirators – $516,500,000 in settlement with Credit Lyonnais and Altus Finance, and $78,750,000 in settlement with Aurora and New California Life Holdings, Inc. (collectively, the "Settling Defendants"). But black letter law provides that when two or more defendants are "claimed to be liable for the same tort" and the plaintiff then settles with some, but not all, defendants, the settlement "shall reduce the claims against the others in the amount . . . of the consideration paid." Cal. Civ. Proc. Code §§ 877, 877(a). The Commissioner's entire case is based on his claims that Artemis

and the Settling Defendants were co-conspirators "liable for the same tort." Indeed, the recent trial before this Court – which focused on 1991, before Artemis even existed, and during which the parties were not permitted to refer to Artemis' actions – was dedicated to the question of Artemis' liability for damages, including the lost insurance company profits, allegedly caused by the Settling Defendants. The Commissioner also claimed that – because they each shared in the profits of the insurance company – the Settling Defendants were jointly and severally liable for restitution of those profits. The Commissioner attempts to avoid the clear impact of the settlement of these overlapping claims for the insurance company profits by noting that Judge Matz denied Artemis' prior request for an offset. But Judge Matz's decision not to allow an offset was based on the fact that, in the 2005 trial, "the Commissioner was not permitted to seek recovery of the dividends that Artemis earned from its two-thirds ownership of Aurora" or "the capital value of [Artemis'] ownership of Aurora." Order Denying Motion for Offset, Feb. 1, 2013 (ECF No. 3554) ("Offset Order"), ¶ 3. In the 2012 trial, the Commissioner *was allowed* to pursue those exact profits as damages. Thus, there is no reason why the Commissioner's inability to press the NOLHGA Premise in the 2005 damages trial should limit Artemis' right to an offset now. Under Section 877, the judgment against Artemis for the insurance company profits earned as part of the conspiracy must take into account the amounts that the Commissioner has received from Artemis' alleged co-conspirators in settlement of the Commissioner's claims seeking those same profits from others.

For these reasons and the reasons set forth below, Artemis respectfully requests that this Court reject the Commissioner's Proposed Judgment and enter a judgment in the form submitted by Artemis herewith.[1]

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[1] By submitting this Objection to Proposed Judgment Submitted by Commissioner and concurrently-filed [Proposed] Judgment, Artemis does not waive its rights under Rules 52, 59, and 60 of the Federal Rules of Civil Procedure or its right to appeal from any judgment entered by the Court. Further, Artemis preserves all rights to appeal and challenge this Court's Order re: Restitution, February 26, 2013

[Footnote continued on next page]

II. ARGUMENT

A. The Judgment Should Limit Post-Judgment Interest To The Period After The Entry Of Judgment On This Court's Restitution Order.

The Commissioner seeks to circumvent this Court's Order by inserting into the judgment $50 million in post-judgment interest (if the clock stopped now) accruing from February 13, 2006. Pl.'s Proposed Judgment ¶¶ 1, 3. In so doing, the Commissioner asks this Court to act as though the last seven years of litigation never happened. Under governing Ninth Circuit precedent, the Commissioner's recovery in this action was not "ascertained" in 2006, but rather in 2013 after he elected to pursue a retrial in which he sought entirely new and uncertain damages and new and increased restitution. Moreover, this Court already considered the Commissioner's arguments that interest should be added to the restitution award to take into account the passage of time between 2006 and 2013 and rejected them when it entered the Order, which awarded no additional interest. The Commissioner should not be permitted to sidestep the effects of this Court's Order and his own actions. Accordingly, post-judgment interest should not run until after the entry of judgment on this Court's – not Judge Matz's – restitution order.

First, pursuant to 28 U.S.C. § 1961, post-judgment interest accrues from the date the monetary award is "ascertain[ed]." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835-36, 110 S. Ct. 1570, 1576, 108 L. Ed. 2d 842, 852 (1990) (internal citation omitted). Where, as here, there are multiple judgments in a single matter, in order to determine when the award is ascertained, the Ninth Circuit "requires an inquiry into the nature of the initial judgment, the action of the appellate court, the

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(ECF No. 4330); Judge Matz's Fed. R. Civ. P. 52 Findings of Fact and Conclusions of Law Re Restitution, November 21, 2005 (ECF No. 3494); Minute Order Denying the Motion of the Artemis Defendants to Amend the Findings of Fact and Conclusions of Law, January 10, 2006 (ECF No. 3536); and Order Denying Motion of the Artemis Defendants for an Offset, February 1, 2006 (ECF No. 3554). The failure to challenge any aspect of these decisions shall not be construed as a waiver of any such rights.

subsequent events upon remand, and the relationship between the first judgment and the modified judgment." *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coalition of Life Activities*, 518 F.3d 1013, 1021 (9th Cir. 2008) (internal citation omitted). In making this determination, a court "must carefully examine the damages ***sought*** in the second trial." *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1300 (9th Cir. 1984) (emphasis added). "[W]here a district court judgment in favor of defendant is reversed on appeal or a judgment in favor of plaintiff is vacated on appeal and, upon remand, a new trial is held resulting in a verdict and judgment for plaintiff, the date referred to in section 1961 is the date of the entry of the judgment ***after the new trial on remand***." *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 754 (9th Cir. 1983) (emphasis added); *see also Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394, 407 (9th Cir. 1980) (interest accrues from second judgment when there is no "basis for recovery of the amount on which interest was sought until the appellate court reversed and remanded"); *United States v. Hougham*, 301 F.2d 133, 135 (9th Cir. 1962) (holding that "post-judgment interest should be calculated from the date of the entry of the judgment in which the money damages, upon which interest is to be computed, were in fact awarded" and awarding interest from date of second judgment); *James B. Lansing Sound, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 801 F.2d 1560, 1570-71 (9th Cir. 1986) (same).

The Commissioner opted to seek a very different recovery post-remand ($4.3 billion in compensatory damages from the jury and then $1.58 billion in restitution and interest from the Court) than the $241 million restitution judgment he received in 2006. As a result, the Commissioner's actual award was not ascertainable, much less ascertained, until this Court issued its Order. Unlike the cases the Commissioner cites, where interest ran from the first judgment because the courts were evaluating whether an already ascertained award was legally sufficient, here the amount and type of award was unknown and unknowable until after the retrial. Pl.'s Mem. re [Proposed] Judgment, Mar. 5, 2013 (ECF No. 4331), at 2 (citing cases). The amount could have

been anywhere between zero and $4.3 billion, and the type (if the jury award was greater than zero) could have been compensatory damages or restitution. In fact, had the Commissioner succeeded in obtaining the compensatory damages he sought in the 2012 retrial, he would not have elected to receive any restitution at all.[2] Therefore, there was no basis here "for recovery of the amount on which interest was sought until [after] the appellate court reversed and remanded," *Mt. Hood Stages*, 616 F.2d at 407, after the second trial was held, and "[a]fter review and consideration of the relevant law and facts and the parties' arguments" by this Court led to entry of the Order, Order at 1. There are no equities that favor giving the Commissioner the gift of seven years of interest where he elected to appeal from the initial judgment and seek different and undetermined damages in a retrial. The delay and uncertainty were entirely due to the choices made by the Commissioner.

Second, the Commissioner's request should be denied because this Court already considered the parties' arguments concerning whether interest should be added or the restitution award should otherwise be altered to account for the passage of time (*see, e.g.*, Pl.'s Mem. in Supp. of Restitution Award, Nov. 30, 2012 (ECF No. 4323), at 11-14; Artemis' Opp. to Pl.'s Post-Trial Br. Re Restitution, Dec. 7, 2012 (ECF No. 4324), at 11-16), and it declined to award interest. In ascertaining the restitution award, this Court considered whether it was appropriate to award interest from 2006 and determined that it was not.

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[2] As the Commissioner explained on the eve of the first trial in this action:

> The Commissioner will make his election as to whether to accept an award of damages, under his fraud and negligent misrepresentation causes of action, or an award of restitution or constructive trust under his unjust enrichment cause of action, after the verdicts are entered, but prior to judgment being entered. *See Jahn v. Brickey*, 168 Cal. App. 3d 399, 406 (1985) (a plaintiff is not required to make an election of remedies before the case is submitted to a jury. After a decision is made on the merits, by either the jury or from the bench, a plaintiff must ultimately make an election to avoid duplicate damages or recoveries).

Revised Final Pretrial Conference Order, Feb. 11, 2005 (ECF No. 2815) ("PTCO"), at 125.

Ignoring this Court's decision against an award of interest, the Commissioner inappropriately requests that the Court use its inherent and extremely limited *nunc pro tunc* power to award post-judgment interest from 2006. But the Court's power to act *nunc pro tunc* is an error correction mechanism that can only be used "where necessary to correct a clear mistake and prevent injustice" in order to "mak[e] the record reflect what the district court actually intended to do at an earlier date, but which it did not sufficiently express or did not accomplish due to some error or inadvertence." *United States v. Sumner*, 226 F.3d 1005, 1010 (9th Cir. 2000) (citations omitted). This power does not allow the Court "to alter the substance of that which actually transpired or to backdate events to serve some other purpose." *Id*. The Commissioner should not now be allowed to avoid this Court's interest determination by styling a $50 million interest award as the "correction" of a clerical error. *See Handgards*, 743 F.2d at 1299-1300 (interest should run from second judgment where judgment is vacated on appeal and new verdict is rendered because new verdict takes into account value of loss of use of money judgment).[3]

Accordingly, post-judgment interest should accrue from the date when the Commissioner's damage was finally ascertained and enforceable – the date of entry of the judgment as ordered by this Court. This Court's Judgment should reflect that. Artemis' [Proposed] Judgment paragraphs 1and 4, present corrected versions of the Commissioner's Proposed Judgment paragraphs 1 and 3, respectively.[4]

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[3] Artemis further objects to the Commissioner's Proposed Judgment to the extent that it would reinstate Judge Matz's Fed. R. Civ. P. 52 Findings of Fact and Conclusions of Law Re Restitution, November 21, 2005 (ECF No. 3494). Those findings make no mention of events of the last seven years, including the 2012 jury findings, rendering Judge Matz's findings, at a minimum, significantly incomplete.

[4] Artemis also objects to the sentence in paragraph 3 of the Commissioner's Proposed Judgment which erroneously states that the "Net Artemis Judgment Obligation is for restitution and does not include any punitive damages component." Pl.'s Proposed Judgment ¶ 3. This language was not included in the 2006 judgment, and it should not be included in this judgment either for the simple reason that Judge Matz based his restitution award primarily on the 2005 jury's invalidated attempt to award $700 million in punitive damages. *See Garamendi v.*

[Footnote continued on next page]

B. The Judgment In This Action Should Offset The Amounts Paid By The Settling Defendants.

Black letter California law provides that a plaintiff is not entitled to more than one recovery for the same injury. Even a criminal defendant who is convicted and forced to pay restitution to his victim is entitled to an offset for the amounts paid by his co-defendants. *See People v. Blackburn*, 72 Cal. App. 4th 1520, 1535, 86 Cal. Rptr. 2d 134, 146 (1999) (holding in case of two defendants ordered to pay restitution that "[o]f course, each defendant is entitled to a credit for any actual payments by the other"); *In re S.S.*, 37 Cal. App. 4th 543, 550, 43 Cal. Rptr. 2d 768, 773 (1995) (holding that convicted car thief is entitled to credit against restitutionary award for any sums paid by his co-defendant). The rule is no different in civil cases. *Reed v. Wilson*, 73 Cal. App. 4th 439, 444, 86 Cal. Rptr. 510, 513 (1999) ("[T]he [settlement] offset provided for in section 877 assures that a plaintiff will not be enriched unjustly by a double recovery, collecting part of his total claim from one joint tortfeasor and all of his claim from another.").

Here the Commissioner has already received more than $595,250,000 from Artemis' alleged joint tortfeasors.[5] Despite having recovered this truly monumental sum – a sum that is especially remarkable in light of the fact that the Commissioner has *twice* failed to convince a jury to award him *any* damages – the Commissioner asks this Court to disregard Artemis' offset rights. Pl.'s Proposed Judgment ¶ 5. The Court should reject the Commissioner's request.

[Footnote continued from previous page]
Altus Fin. S.A., 2005 U.S. Dist. LEXIS 39273, at *21-22 (C.D. Cal. Nov. 21, 2005). To say that the restitution award does not include a punitive damages component is inaccurate, disingenuous, and unnecessary.

[5] Decl. of Robert A. Holland, Aug. 5, 2005 (ECF No. 3325), Ex. 1 (Commissioner Settlement Agreement [with Aurora and NCLH], July 25, 2005); Decl. of C. Randolph Fishburn (ECF No. 3389), Aug. 29, 2005, Ex. A (Settlement Agreement [between Commissioner, NOLHGA, the CDR Parties, and Credit Lyonnais], Aug. 25, 2005).

1. California Civil Procedure Code § 877 Requires That The Judgment Against Artemis Be Reduced By The Amount The Commissioner Has Received In Settlement.

Under California law, if a plaintiff brings an action against several defendants who are "claimed to be liable for the same tort" or "co-obligors mutually subject to contribution rights" and then settles its claims against some but not all the defendants, the settlement "shall reduce the claims against the others in the amount . . . of the consideration paid." Cal. Civ. Proc. Code §§ 877, 877(a). In exchange for this offset, the non-settling defendant is barred from seeking contribution or indemnification for any judgment from the settling defendants. *Id*. § 877(b) (a settlement given in "good faith" "shall discharge the party to whom it is given from all liability for any contribution to any other parties"). Here, the settling parties sought and were granted just such a "good faith settlement" bar order.[6] As a result Artemis is precluded from seeking indemnification or contribution from the Settling Defendants, including defendants that Judge Matz found to be more culpable than Artemis, such as Altus and Credit Lyonnais. Accordingly, pursuant to Section 877, the judgment in this action should reflect an offset for the settlement amounts paid by those defendants.[7]

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[6] Indeed, in seeking the bar order, the Commissioner expressly acknowledged that the non-settling defendants (such as Artemis) would obtain an offset for the settlement amounts: "[A] good faith settlement with one or more defendants reduces the liability of non-settling defendant(s) to the plaintiff 'in the amount . . . of the consideration paid for it.'" Mot. of Pl. Insurance Commissioner and Defs. Aurora Nat'l Life Assurance Co. and New California Life Holdings, Inc. for an Order Determining Good Faith Settlement, Aug. 5, 2005 (ECF No. 3317), at 3 (quoting Cal. Civ. Proc. Code § 877 (a)). The settlement motion was filed after the jury had returned its "$0" damages verdict, such that the only "liability" that "non-settling defendant(s)" faced was in restitution.

[7] A non-settling defendant is entitled to an offset even where Section 877 does not apply. *See Leung v. Verdungo Hills Hosp.*, 55 Cal. 4th 291, 303-04, 145 Cal. Rptr. 3d 553, 561 (2012) (requiring *pro tanto* offset for monies paid in settlement where settling parties failed to comply with Section 877 requirements); *see also Laurenzi v. Vranizan*, 25 Cal. 2d 806, 813, 155 P.2d 633, 637 (1945) ("Since the plaintiff can have but one satisfaction, evidence of [settlement] payments is admissible for the purpose of reducing *pro tanto* the amount of the damages he may be entitled to recover.").

2. The Commissioner Alleged Artemis And The Settling Defendants Were Jointly And Severally Liable For The Same Conduct.

The fact of settlement is undisputed here. Thus the only question is whether the Commissioner claimed that Artemis and the Settling Defendants were jointly and severally liable for the same conduct. The answer is undeniably yes. As the Ninth Circuit has explained:

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

In re JTS Corp., 617 F.3d 1102, 1116-18 (9th Cir. 2010) (citations omitted) (requiring offset where plaintiff "alleged [non-settling defendant] and the settling defendants combined to carry out the same injury, *i.e.*, the fraudulent transfer of the real property"); *Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 302, 216 Cal. Rptr. 443, 449 (1985) ("[T]he language of section 877 is significant – its drafters did not use the narrow term 'joint tortfeasors,' they used the broad term 'tortfeasors claimed to be liable for the same tort.' This language was meant . . . to permit broad application of the statute.") (citations omitted).

Whether described as damages or restitution, the Commissioner has alleged a singular wrong, the failure of the Commissioner to earn the profits that were ultimately derived from ELIC's assets. Throughout this litigation the Commissioner has sought to hold Artemis and the settling defendants *jointly and severally liable* as co-conspirators, claiming that, but for Artemis and the Settling Defendants' alleged misconduct, the Commissioner would have entered into a transaction with NOLHGA and earned the same insurance company and junk bond profits earned by the alleged co-conspirators. Indeed, the 2012 retrial was dedicated to determining Artemis' liability for the actions of settling defendants Altus and Credit Lyonnais before Artemis was even created. At the same time, the Commissioner has sought an award of *joint and several restitution*, asking the Court sitting in equity to award him the

same insurance company and junk bond profits he sought as damages.[8] The Commissioner's restitution claims arise out of the same operative facts and alleged conspiracy that are at the heart of his claims for damages.[9] But changing the name of the claim does not alter the nature of the alleged wrong, or the alleged remedy – an award of the profits earned by the defendants. There is no question that had the Settling Defendants remained in the case, the Commissioner could only recover the insurance company profits that are the basis for the restitution award once. The Commissioner cannot use the fact that he settled with some of the defendants to increase his recovery. *See Vesey v. United States*, 626 F.2d 627, 633 (9th Cir. 1980) ("Since there was but a single wrong . . . , the partial satisfaction obtained from [settling defendant] must be applied to reduce the total damages."). *Accord May v. Miller*, 228 Cal. App. 3d 404, 410, 278 Cal. Rptr. 341, 344 (1991) ("[W]hen the injury arises from a single act, [a plaintiff] cannot, by suing each wrongdoer alone, convert a joint into a several [injury], and thereby secure more than one compensation for the same injury."); 28A Corpus Juris Secundum, Election of Remedies § 13 (Reuters 2013) ("[W]here a party has suffered an actionable wrong he or she will not be permitted to pursue inconsistent remedies against different persons."); *Sussex Fin.*

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[8] *See, e.g.*, Pl.'s Damages Statement, Mar. 3, 2003 (ECF No. 1113), at 4 ("The above [restitution] recoveries are, to some extent, overlapping. For example, the profits earned by Aurora on assets received from the ELIC Estate appear in the above list as enrichment to Aurora and to its parent entity, NCLH, as well as enrichment to NCLH's shareholder, Artemis, and Artemis's minority shareholder, Altus. The Commissioner does not seek a double recovery, but seeks an award of joint and several liability against the relevant entities for any such overlapping amounts."); Pl.'s Pretrial Proposed Findings of Fact and Conclusions of Law, lodged Feb. 15, 2005, at 24 ("[S]uch amounts include enrichment which was transferred from one defendant/conspirator to another. In such cases, that amount of enrichment has been counted both with respect to the transferor and transferee.").

[9] *See, e.g.*, PTCO at 32 ("The Commissioner will rely upon the same facts . . . that establish fraud and negligent misrepresentation to establish unjust enrichment."); Pl.'s Mem. in Supp. of Restitution Award, Nov. 30, 2012 (ECF No. 4323), at 8 ("If Artemis had not joined the conspiracy and purchased ELIC assets from its co-conspirators, it never would have been in the position to make any profits from ELIC's junk bonds or insurance business.").

Enters., Inc. v. Bayerische Hypo-Und Vereinsbank AG, No. 08-4791, 2010 U.S. Dist. LEXIS 73884, at *43 (N.D. Cal. July 20, 2010) ("If a plaintiff contracts in reliance on the fraud of a defendant, the plaintiff may elect either the contract remedy . . . or the tort remedy . . . but not both.") (citing *Hjorth v. Bernstein*, 44 Cal. App. 2d 561, 112 P.2d 643 (1941)). Similarly there is no question that Artemis would be entitled to an offset were the Commissioner to recover the insurance company profits as damages rather than restitution. There is no reason why the Commissioner should be better off for having lost his claims in front of the jury.

3. Judge Matz's Decision On Artemis' 2005 Offset Motion Provides No Guidance Here.

The Commissioner makes no attempt to explain to this Court why he should be entitled to a double recovery. Instead the Commissioner attempts to sidestep the issue by asking this Court to enter a judgment rejecting Artemis' right to offset because Judge Matz issued an Order Denying Motion of Artemis Defendants for an Offset in 2006. Pl.'s Proposed Order ¶ 5. But Judge Matz's reasoning no longer applies. In denying Artemis' original offset motion, Judge Matz noted the difference between disgorgement and damages and held that a Section 877 offset was unnecessary because, in the 2005 trial, "the Commissioner was not permitted to seek recovery of the dividends that Artemis earned from its two-thirds ownership of Aurora" or "the capital value of [Artemis'] ownership of Aurora." Offset Order ¶ 3. The Commissioner was allowed to seek such damages during the 2012 retrial. Indeed, that was the very point of the 2012 trial, to permit the Commissioner to seek the alleged conspirators' profits as damages. As this Court and the jury learned, the Commissioner's damages model "take[s] the exact same insurance operation as it [Aurora] ran, neither more or less profitable" and treats those profits as damages to the Executive Life Estate. Oct. 23, 2012 Trial Tr. at 9:22-25; *see also* Oct. 19, 2012 P.M. Session Trial Tr. at 13:25-14:6. The overlap between the Commissioner's restitution

claim and the damages he was allowed to seek in the retrial is further evidenced by the Commissioner's counsel's plea to the jury during closing:

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

Oct. 25, 2012 Trial Tr. at 180:7-22 (emphases added); *see also id*. at 98, 100-01, 103-04, 113, 179 (arguing that alleged co-conspirators "profits" were damages). Whatever distinction between damages and restitution may have existed during the first trial has long since vanished. The Commissioner sought the insurance company profits from the jury; the restitution order awards profits of the insurance company. The overlap is obvious and an offset is required.

4. Artemis' Right To An Offset Is Based On The Commissioner's Claims, Not His Judgment.

The Commissioner also asks that this Court's judgment state that Artemis' "obligation" "is the several and individual obligation of Artemis S.A." and therefore "not subject to any offset." For the purposes of Section 877, the relevant question is not the form of the judgment but whether the claims existing at the time of settlement alleged joint liability. If so, the non-settling defendant has a right to an offset. *Vesey*, 626 F.2d at 633 (requiring offset pursuant to Section 877 where settling and non-settling defendants were both alleged to be liable for the same wrongdoing); *Lafayette v. County of Los Angeles*, 162 Cal. App. 3d 547, 555, 208 Cal. Rptr. 668, 669 (1984) (applying Section 877 where the settling and non-settling defendants were "claimed to

be liable for the same tort").[10] Here, prior to settlement, the Commissioner sought an award of *joint and several* damages. And, prior to settlement, he sought an award of *joint and several* restitution. The fact that the Commissioner settled with other defendants does not allow him to recover the same dollar twice. Indeed, courts apply the offset provisions of Section 877 even when the evidence at trial proves that the settling defendant had no liability to plaintiff. *See, e.g., McComber v. Wells*, 72 Cal. App. 4th 512, 517, 85 Cal. Rptr. 2d 376, 378 (1999) (finding it "irrelevant" for purposes of Section 877 that "the jury ultimately found the settling defendants were not negligent" "because [plaintiff] initially claimed all defendants were liable").

Artemis does not and cannot seek repayment of the $110,000,000 it has already paid to the Commissioner, but the Commissioner has recovered more than $700 million in a case where he failed to prove any damages. Artemis is entitled to an offset of the entire $595,250,000 paid by the Settling Defendants on the Commissioner's joint and several claims.[11] Accordingly, and as set forth in paragraph 5 of Artemis'

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[10] In considering an appeal of the default judgment assessed by Judge Matz against one of the other non-settling defendants, the Ninth Circuit noted, in dicta, that the complaint does not control "where the district court apportion[s] damages individually." *Garamendi v. Henin*, 683 F.3d 1069, 1082 n.8 (9th Cir. 2012). The judgment Judge Matz ordered against Henin "specifically calls for individual liability." *Id*. at 1081. No such finding was made by Judge Matz as to Artemis. Nor could there have been. Because of the overlapping profits as between the insurance company, Aurora, its parent company, New California, the shareholders of New California, such as Artemis, and direct and indirect shareholders of Artemis, such as Altus and Credit Lyonnais, the Commissioner told the Court that his "proof at trial . . . will make clear the extent to which defendants are jointly and severally liable for these amounts [of restitution], to insure against double recoveries." PTCO at 124 n.35. No such allocation evidence was ever offered however.

[11] Where the settlement agreement fails to allocate the proceeds to any particular claim, the entire amount is available to offset the claims for which the settling defendants were alleged to be jointly and severally liable. *Dillingham Constr., N.A., Inc. v. Nadel P'ship, Inc.*, 64 Cal. App. 4th 264, 287, 75 Cal. Rptr. 2d 207, 221 (1998) ("[W]here the settling parties have failed to allocate, the trial court must allocate in the manner which is most advantageous to the nonsettling party."); *Alcal Roofing & Insulation v. Superior Court*, 8 Cal. App. 4th 1121, 1127, 10 Cal. Rptr. 2d 844, 847 (1992) (absent allocation, non-settling defendant "may obtain an offset for the entire amount of that defendant's settlement").

[Proposed] Judgment, the net judgment against Artemis should award the Commissioner no additional monies.[12]

III. CONCLUSION

For all the above reasons, Artemis respectfully requests that this Court reject the Commissioner's Proposed Judgment and enter Judgment in the form submitted by Artemis.

Dated: March 12, 2013

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Robert L. Weigel*
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[12] Artemis' alternate [Proposed] Judgment also revises the language from paragraph 3 of the Commissioner's Proposed Judgment to specify that the Commissioner is "the sole Net Artemis Judgment Obligation Party." *See* Artemis' [Proposed] Judgment ¶ 4. This addition is necessary to fully satisfy the requirements of Artemis' Settlement Agreement with the United States Attorney's Office. The Settlement Agreement provides:

> Should there be a Judgment in the Civil Actions, Artemis shall request that the district court presiding over the Civil Actions specify in the Judgment all of the following: (i) the amount of the funds that each of the Artemis Parties is responsible to pay, net of any credit in favor of any of the Artemis Parties for funds disbursed from the USAO/Artemis Settlement Account pursuant to subparagraph 14(c) above (which will define the Net Artemis Judgment Obligation); (ii) the parties, selected only from among the named plaintiffs in the Civil Actions, to whom those funds are to be paid (the "Net Artemis Judgment Obligation Parties"); and (iii) the priority for payments to the Net Artemis Judgment Obligation Parties.

Final Settlement Agreement Between the United States Attorney's Office and Artemis S.A., et al., Dec. 15, 2003 (ECF No. 4327-3), ¶ 14(d). In accordance with this requirement, Artemis hereby requests that the Court include paragraph 4 from Artemis' [Proposed] Judgment instead of paragraphs 3 and 4 of the Commissioner's Proposed Judgment.