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19 UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA

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

24 Plaintiff,
25 v.
26 ALTUS FINANCE S.A., et al.,
27 Defendants.
28

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RESTITUTION AWARD**

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

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1 **I. INTRODUCTION**

2 Pursuant to the Court’s instructions on October 29, 2012, Plaintiff California
3 Insurance Commissioner, as Conservator, Rehabilitator and Liquidator of Executive
4 Life Insurance Company (the “Commissioner”), and Intervenors National
5 Organization of Life and Health Insurance Guaranty Associations and California
6 Life and Health Insurance Guarantee Association (collectively, “NOLHGA”)
7 submit this memorandum in support of the Court ordering Artemis to pay
8 restitution to the Commissioner.

9 After the jury at the 2005 trial found that Artemis had knowingly joined the
10 conspiracy to defraud the Commissioner but concluded that the Commissioner had
11 not proved that he was entitled to compensatory damages, Judge Matz resolved the
12 Commissioner’s equitable claim for restitution. *See Garamendi v. Altus Fin. S.A.*,
13 2005 U.S. Dist. LEXIS 39273 (C.D. Cal. Nov. 21, 2005). He entered judgment
14 against Artemis for the net amount of \$131,092,020, after offsetting \$110 million
15 that the Commissioner had previously received from Artemis pursuant to Artemis’s
16 settlement with the U.S. Attorney. *See Dkt. No. 3573: Judgment, para. 6.* The
17 Ninth Circuit remanded for a new damages phase trial based on the NOLHGA
18 Premise and vacated the restitution award with leave to reinstate, if warranted, after
19 the resolution of the Commissioner’s legal claims for damages. *California v. Altus*
20 *Fin. S.A.*, 540 F.3d 992, 1009 (9th Cir. 2008).

21 This Court is now in a position that is similar to the position of Judge Matz
22 after the first jury trial, so it must resolve the Commissioner’s equitable claim for
23 restitution. Like Judge Matz, the Court is bound by the jury findings that Artemis
24 knowingly engaged in a fraudulent conspiracy but that the Commissioner has not
25 proven his claim for damages. Accordingly, the Commissioner and NOLHGA
26 request that this Court require Artemis to pay restitution for its fraudulent conduct,
27 as Judge Matz did.

28 The Commissioner and NOLHGA submit, however, that this Court, unlike

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1 Judge Matz, should order Artemis to disgorge **all** of its illegal profits. Under
2 California law, “[n]o one can take advantage of his own wrong.” *See* Cal. Civil
3 Code § 3517. Simply reinstating Judge Matz’s restitution award would allow
4 Artemis to keep almost all of the benefits that it received from joining the
5 fraudulent conspiracy. The present value of Artemis’s net illegal profits, using 7%
6 simple interest,¹ is approximately \$1.58 billion after deducting the \$110 million that
7 the Commissioner previously received from Artemis. *See Section III.A. below.*
8 The prior net restitution award of approximately \$130 million is less than 10% of
9 these ill-gotten gains.

10 In the alternative, if the Court concludes that it must accept Judge Matz’s
11 decision to allow Artemis to keep most of its profits from the conspiracy and his
12 formula for calculating restitution, the Commissioner and NOLHGA request that
13 that formula be adjusted to reflect undisputed valuation developments since the
14 prior restitution award. In August 2012, Artemis completed its sale of its share of
15 the new insurance company, which it acquired as a result of participating in the
16 conspiracy. The actual net realized value of that interest therefore should be
17 substituted for the estimated net value that was used by Judge Matz in 2006 when
18 he calculated his restitution award. If this adjustment is made and prejudgment
19 interest to date is added, the total net restitution award would be approximately
20 \$230 million.

21 At the very least, if the Court does not adopt either of the options described
22 above, it should add 7% simple interest to the prior restitution award from the date
23 of that award. This would increase the net restitution award to approximately
24 \$194 million.

25
26 ¹ California law mandates 7% simple interest as the rate of prejudgment interest for
27 the Commissioner’s fraud claim against Artemis. *See* Cal. Const., Art. XV, §1;
28 *Wolkowitz v. Beverly (in re Beverly)*, 2010 Bankr. LEXIS 230 at *9 (Bankr. C.D.
Cal. Jan. 29, 2010). *See also Garamendi*, 2005 U.S. Dist. LEXIS 39273 at *50
(awarding 7% prejudgment interest on benefits to be disgorged by Artemis).

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1 **II. BACKGROUND**

2 **A. The Conspiracy**

3 The Commissioner oversaw competitive bidding for the assets of Executive
4 Life Insurance Company (“ELIC”) in 1991. *Altus*, 540 F.3d at 995. Altus Finance,
5 a subsidiary of the French bank, Credit Lyonnais S.A., and the MAAF Group, a
6 consortium of French and Swiss insurers, submitted the winning bid. *Id.* Altus
7 purchased the junk bond portfolio, and the MAAF Group agreed to create a new
8 insurance company called Aurora to reinsure ELIC’s outstanding insurance
9 policies. *Id.* Artemis subsequently purchased a portion of that junk bond portfolio
10 and two-thirds of Aurora’s parent, NCLH. *Id.*

11 Several years later, the Commissioner discovered that Altus, MAAF, Artemis
12 and others had conspired to obtain the assets of the ELIC Estate by fraud. As the
13 Ninth Circuit explained:

14 Altus ... entered into a conspiracy with the members of the MAAF
15 Group to circumvent the prohibition on foreign control of California
16 insurers in [California Insurance Code] Section 699.5. ... The MAAF
17 Group ... would operate NCLH for the benefit of Altus, not its
members. The terms of the secret agreements were memorialized in
French-language *contrats de portage*.

18 *Id.* at 997. During the bidding process, Altus and the MAAF Group falsely
19 represented to the Commissioner that Credit Lyonnais and Altus, which were
20 owned and controlled by the French government, would not control the new
21 insurance company. *Id.*

22 “Artemis was formed in December 1992 as a joint venture between Altus and
23 Financiere Pinault, a French corporation controlled by Francois Pinault.” *Altus*,
24 540 F.3d at 998. “On December 24, 1992, ... Altus sold Artemis approximately 21
25 percent of the ELIC junk bond portfolio, ... [and] Artemis also acquired an option
26 to purchase Altus’ interest in Aurora.” *Id.*

27 Artemis knew about the Altus/MAAF Group’s conspiracy to evade
28 California law but did not disclose this conspiracy to the Commissioner. *Id.*

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1 Instead, “[o]n multiple occasions, Artemis submitted Form A applications” to the
2 California Department of Insurance that “contained false or misleading information
3 regarding both Artemis’ own interest in Aurora through its option contract and
4 Altus’s secret control of Aurora through the *contrats de portage* with the MAAF
5 Group.” *Id.*

6 **B. The First Trial**

7 At the end of the liability phase of the first trial in 2005, the jury found that
8 Altus, Credit Lyonnais and others “participate[d] in a common scheme to obtain
9 assets from the ELIC Estate by fraud,” that Artemis “agree[d] to participate ... in
10 furtherance of that scheme, knowing its wrongful objective and before the scheme
11 was accomplished,” and that this “scheme cause[d] harm to the ELIC Estate.” *See*
12 *Dkt. No. 3173: Phase I Verdict Form 5*. In addition, the “jury found that Artemis
13 made false representations to and concealed important facts from the
14 Commissioner.” *Altus*, 540 F.3d at 999. The jury also found that “an officer,
15 director or managing agent of Artemis S.A. acted with malice, oppression or fraud”
16 and “knowingly authorized or ratified the fraudulent conduct of other employees of
17 Artemis S.A.” *See Dkt. No. 3338: Phase II Verdict Form B.1 and 2*.

18 The jury at the 2005 trial deadlocked on Verdict Form 7 regarding the
19 “NOLHGA Premise,” and Judge Matz, who presided over that trial, “construed the
20 jury’s inability to return a verdict on Form 7 as a failure of proof and prohibited the
21 Commissioner from proffering evidence in support of the NOLHGA Premise in the
22 damages phase of trial.” *Altus*, 540 F.3d at 999. As a result, the Commissioner was
23 limited to seeking compensatory damages based on two alternative theories, and the
24 jury awarded \$0 in compensatory damages and \$700 million in punitive damages.
25 *See Dkt. No. 3338: Phase II Verdict Forms*. The district court vacated the punitive
26 damages award because the jury had not awarded any compensatory damages. *See*
27 *Garamendi v. Altus Fin. S.A.*, 2005 U.S. Dist. LEXIS 39214 at *22 (C.D. Cal.
28 Oct. 3, 2005).

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1 **C. The Restitution Award**

2 After the conclusion of the jury trial in 2005, Judge Matz resolved the
3 Commissioner’s equitable claim for restitution by deciding that the Commissioner
4 should be awarded some but not all of Artemis’s profits from ELIC’s assets.
5 *Garamendi*, 2005 U.S. Dist. LEXIS 39273 at *47-48. He held that “Artemis was
6 not some innocent enterprise” and had “behaved much more deviously” than it had
7 claimed at trial. *Id.* at *21. In particular, stressing the “intertwined financial
8 relationship ... between Credit Lyonnais and Artemis” and the evidence that Credit
9 Lyonnais had offered a favorable deal to Artemis, Judge Matz concluded that
10 “Artemis had played a shady game.” *Id.* at *21-22. Accordingly, he held that:

11 The public interest will be served if the statutory framework for
12 insurance regulation in California is vindicated by a ruling requiring
13 Artemis to make at least some restitution. Owners and executives of
14 insurance companies, including powerful and sophisticated companies
15 like Artemis, are subject to disclosure and compliance requirements
 imposed by the California Insurance Code and by the regulations of
 the DOI [*i.e.*, California Department of Insurance]; they must tell the
 truth and comply with the law. In certain respects, Artemis failed to
 comply with these duties.

16 After joining the other defendants’ conspiracy to defraud the
17 Commissioner, Artemis obtained a benefit (its ownership interest in
18 NCLH and control over Aurora.) It did so after making
19 misrepresentations to the DOI and concealing material information
 from the DOI. As between the Commissioner and Artemis, it would
 be unjust for Artemis to retain *all* (as opposed to *any*) of the profits it
 derived from that ownership interest.

20 *Id.* at *47-48 (emphasis in original).

21 Judge Matz rejected Artemis’s arguments that the Commissioner was not
22 entitled to any restitution and expressly concluded that:

- 23 • “it is not essential that money be paid directly to the recipient by
24 the party seeking restitution,” *id.* at 44;
- 25 • “[t]he fact that the Commissioner received fair market value for the
26 benefit he conferred in transferring the junk bonds does not
27 necessarily preclude him from obtaining restitution,” *id.* at 45-46;

28

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- 1 • “[t]he jury’s finding that the Commissioner was entitled to no
2 compensatory damages does not flatly bar the Commissioner’s
3 restitution claim,” *id.* at 47; and
- 4 • “partial restitution here is consistent with the principle embodied in
5 Cal. Civ. Code §3517 that no one can ‘take advantage of his own
6 wrong.’” *Id.*

7 In addition, Judge Matz subsequently held that the restitution award against
8 Artemis should not be offset by the Commissioner’s settlements with other
9 defendants because, among other reasons, “there is no risk of double recovery if
10 Artemis disgorges the benefit it derived unjustly.” *See Dkt. No. 3966-3: 2/1/06
11 Order Denying Motion of the Artemis at 2.*²

12 Judge Matz’s findings regarding Artemis’s profits essentially adopted the
13 conclusions of the Commissioner’s accounting expert, D. Paul Regan, and rejected
14 the conclusions of Artemis’s expert, Colin Blaydon. Judge Matz found that
15 “Artemis obtained at least \$459,008,378 in profit attributable to the [ELIC junk]
16 bonds that it acquired from Altus” and that Artemis received dividends of
17 \$227,727,280 from NCLH, the parent of Aurora. *Id.* at *42-43. He also found that
18 “Artemis will be entitled to receive \$151,885,297 upon the closing of an agreement
19 to sell NCLH to REALIC, a subsidiary of Swiss Reinsurance.” *Id.* at *43.³

20 Judge Matz concluded, however, that “the Commissioner is not entitled to
21 recover the profits Artemis earned on the junk bonds.” *Id.* at 46. Instead, he

22 ² To prevent double recovery, Judge Matz did not include approximately \$13
23 million that Artemis received as the result of a “dividend swap” agreement with
24 MAAF in the restitution award against Artemis because that amount was included
25 in his restitution award against MAAF. *See Garamendi*, 2005 U.S. Dist. LEXIS
26 39273 at *42-43 &49; *Dkt. No. 3966-2: Rulings on Commissioner’s Request for
27 Order re Default Judgment Against MAAF Defendants, para. 3(b) and n.1.*
28 Accordingly, that amount is not included in any of the calculations of the economic
benefits received by Artemis that are set forth above.

³ This figure was based on an estimate of what Artemis would receive at that time
under this agreement, which had been executed but had not yet closed. Artemis’s
sale of its interest in Aurora pursuant to this agreement closed in August 2012, and
Artemis received total sales proceeds of \$367,209,519.55. *See Section III.B.1
below.*

1 ordered that Artemis pay restitution of only half of the benefits received from only
2 its ownership of NCLH/Aurora, plus prejudgment interest of 7% from the dates that
3 such benefits were received, for a total of \$241,092,020. *Id.* at 50; *Dkt. No. 3573:*
4 *Judgment, para. 1.* This amount was reduced by the \$110 million that the
5 Commissioner had received from Artemis pursuant to the latter’s settlement with
6 the United States Attorney, leaving a “Net Artemis Judgment Obligation” of
7 \$131,092,020. *Id., para. 6.*

8 **D. The Ninth Circuit Decision**

9 Both sides appealed. *See Altus*, 540 F.3d at 996. The Ninth Circuit reversed
10 the district court’s ruling that the jury’s inability to answer Verdict Form No. 7
11 should be deemed to be a finding against the Commissioner on the NOLHGA
12 Premise. *Id.* at 1007. Accordingly, the case was remanded for a “new damages
13 phase trial limited to proffer of the NOLHGA Premise and a determination of
14 damages (including punitive damages), if any, on that theory.” *Id.* at 1009.

15 In light of this decision to retry the Commissioner’s legal claims for
16 damages, the Ninth Circuit vacated Judge Matz’s restitution award without
17 addressing Artemis’s objections to that award. *Id.* It stated, however, that, “We
18 grant the district court leave to reinstate that award, if warranted, at the close of
19 trial.” *Id.*

20 **III. ARGUMENT**

21 **A. The Court Should Require Restitution Of All Of Artemis’s Profits**
22 **From The Conspiracy**

23 In determining restitution, this Court must follow the jury’s implicit or
24 explicit factual determinations. *Los Angeles Police Protective League v. Gates*, 995
25 F.2d 1469, 1473 (9th Cir. 1993) (“[I]n a case where legal claims are tried by a jury
26 and equitable claims are tried by a judge, and the claims are ‘based on the same
27 facts,’ in deciding the equitable claims ‘the Seventh Amendment requires the trial
28 judge to follow the jury’s implicit or explicit factual determinations.’”). *Accord*,

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1 *Miller v. Fairchild Indus.*, 885 F.2d 498, 507 (9th Cir. 1989). This Court is
2 therefore bound by the prior jury findings that Artemis knowingly joined the
3 fraudulent conspiracy to acquire the ELIC Estate’s assets (including both the junk
4 bonds and insurance business), that that conspiracy harmed the Estate, that Artemis
5 misrepresented and concealed material facts in communications with the
6 Commissioner and that Artemis acted with malice, fraud or oppression. *See Section*
7 *II.B. above*. If Artemis had not joined the conspiracy and purchased ELIC assets
8 from its co-conspirators, it never would have been in the position to make any
9 profits from ELIC’s junk bonds or insurance business.

10 Judge Matz did not cite any legal authority to support his decision to require
11 restitution of only a small portion of Artemis’s profits from the fraudulent
12 conspiracy. *See Garamendi*, 2005 U.S. Dist. LEXIS 39273 at *49. In fact,
13 “ordinarily, the measure of restitution is the amount of enrichment received.” *FTC*
14 *v. Figgie Int’l*, 994 F.2d 595, 606 (9th Cir. 1993). For example, in *County of San*
15 *Bernardino v. Walsh*, 158 Cal. App. 4th 533 (2007), the appellate court affirmed an
16 award of restitution to the County of **all** of the bribes and kickbacks that were paid
17 to the defendant County officials by private third parties (and not by the County
18 itself). The court explained:

19 The principle of unjust enrichment is broader than mere “restoration”
20 of what the plaintiff lost... “[T]he public policy of this state does not
21 permit one to ‘take advantage of his own wrong’” regardless of
whether the other party suffers actual damage....

22 In particular, a person acting in conscious disregard of the rights of
another should be required to disgorge **all** profit because disgorgement
23 both benefits the injured parties and deters the perpetrator from
committing the same unlawful actions again.... Without this result,
24 there would be an insufficient deterrent to improper conduct that is
more profitable than lawful conduct.

25 *Id.* at 542-43 (emphasis added). *See also Nelson v. Serwold*, 687 F.2d 278, 281 (9th
26 Cir. 1982) (One of the purposes of restitution is “to deny the fraudulent party **any**
27 benefits, whether or not foreseeable, which derive from his wrongful act.”)
28 (emphasis added); Restatement (Third) Of Restitution § 49(4) (“When restitution is

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1 intended to strip the defendant of a wrongful gain, the standard of liability is ... the
2 amount of the profit wrongfully obtained.”) and §51(4) (“[T]he unjust enrichment
3 of a conscious wrongdoer ... is the net profit attributable to the underlying
4 wrong.”).

5 The Ninth Circuit vacated the prior reinstatement award, *see Altus*, 540 F.3d
6 at 1009, so this Court must decide the Commissioner’s equitable claim for
7 restitution now that his legal claims have been resolved in the damages retrial. The
8 appellate court granted leave to reinstate the prior restitution award, “if warranted,
9 at the close of trial,” but it did not expressly mandate that this Court award the same
10 amount of restitution as Judge Matz did. *Id.* The Ninth Circuit did not decide – or
11 even discuss – the proper measure of restitution, so this Court is free to determine
12 for itself how much restitution to award. *See United States v. Kellington*, 217 F.3d
13 1084, 1092 (9th Cir. 2000) (rule of mandate “require[s] respect for what the higher
14 court decided, not for what it did not decide” and “leaves to the district court any
15 issue not expressly or impliedly disposed on appeal”); *Herrington v. County of*
16 *Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) (“[L]ower courts are ... free as to
17 ‘anything not foreclosed by the mandate.’”); *Waggoner v. Dallaire*, 767 F.2d 589,
18 593 (9th Cir. 1985) (On remand, the trial court can consider “matters left open by
19 the mandate of this court.”).

20 Accordingly, the Commissioner and NOLHGA request the Court to hold an
21 evidentiary hearing to determine the proper amount of restitution. If given the
22 opportunity, the Commissioner and NOLHGA will prove that:

- 23
- 24 • The Commissioner required all bidders for the assets of the ELIC
25 estate to offer a “package deal” that included **both** ELIC’s junk
26 bonds and insurance business;
 - 27 • The Commissioner accepted the original conspirators’ bid to buy
28 **both** ELIC’s junk bonds and insurance business, and Artemis
purchased a portion of **both** the junk bonds and the insurance
business from the original conspirators;

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- Artemis was created by Altus, one of the original conspirators, and Financiere Pinault in December 1992 as an exit strategy for the conspirators to evade liability for their violations of both California and federal law;
- Artemis was aware that Credit Lyonnais’s purchase of ELIC junk bonds violated the federal Bank Holding Company Act;
- Artemis was aware of the secret portage agreements between Altus and the MAAF Group that violated the California Insurance Code, and Artemis had copies of these portage agreements in its files in France;
- Artemis purchased a portion of the junk bonds that Altus had purchased from ELIC in order to cover up Altus’s violations of the federal Bank Holding Company Act;
- Artemis purchased Altus’s illegal, secret interest in NCLH/Aurora in order to cover up Altus’s violations of both the California Insurance Code and the federal Bank Holding Company Act;
- Credit Lyonnais and its affiliates loaned Artemis more than \$2 billion that provided 100% financing on very favorable terms for Artemis’s purchase of both the junk bonds and NCLH/Aurora, and Artemis could not have purchased these assets without this financing;
- Artemis repeatedly lied to the Commissioner in sworn regulatory filings required by California law about the secret portage agreements and its option to purchase Altus’s secret interest in Aurora; and
- Artemis obtained financial benefits as a direct result of its knowing participation in the conspiracy that have a present value of more than \$1.58 billion after offsetting \$110 million that the Commissioner previously received as a result of Artemis’s settlement with the U.S. Attorney.

The Commissioner and NOLHGA estimate that this evidentiary hearing could be completed in two days or less.

Given this evidence that the Commissioner and NOLHGA will present if

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1 given the opportunity and the evidence already presented at the recently completed
2 trial,⁴ as well as the binding jury findings of Artemis's wrongdoing, Artemis should
3 be required to disgorge the present value of all of its net profits from both the junk
4 bonds and the insurance business. The Commissioner's expert, D. Paul Regan, has
5 calculated that that amount is \$1,582,318,416 as of December 13, 2012, plus
6 interest of \$166,357 for each day thereafter until judgment is entered. *See*
7 *Declaration of D. Paul Regan in Support of Restitution Award ("Regan Dec.")*,
8 *paras. 10-19.*

9 Even if the Court concludes that Artemis should be allowed to keep half of
10 its illegal profits, as Judge Matz did, the Commissioner and NOLHGA respectfully
11 request the Court to order restitution of half of Artemis's net profits from **both** the
12 junk bonds and the insurance company. The junk bonds were always an integral
13 part of the conspiracy that Artemis joined, and Artemis made more than \$459
14 million from these junk bonds. Accordingly, at a minimum, the Court should order
15 Artemis to disgorge at least \$790 million, which is half of the present value of
16 Artemis's total net profits from the conspiracy.

17 **B. In The Alternative, The Restitution Award Should Be Reinstated**
18 **With Appropriate Adjustments**

19 If the Court rejects the foregoing arguments and decides that it should adopt
20 the reasoning and formula of Judge Matz's prior restitution award, the
21 Commissioner and NOLHGA request the Court to adjust the prior award to reflect
22 two undisputed subsequent developments: the closing of Artemis's sale of its
23 interest in NCLH/Aurora to a third party and the passage of time since the prior
24

25 ⁴ For example, Francois Pinault, the Chairman of Artemis, admitted in his recent
26 trial testimony that Artemis received profits of approximately \$450 million from
27 the ELIC junk bonds. *See 10/23/12 Trial Transcript at 94.* In addition, Arthur
28 Dummer, the head of NOLHGA's ELIC Task Force, testified that the ELIC Estate
has been unable to pay approximately \$5 billion owed to former ELIC
policyholders and the State Guaranty Associations. *10/18/12 (afternoon) Trial
Transcript at 49.*

1 award. Accordingly, the award should be increased by (1) substituting the actual
2 realized value of Artemis’s interest in NCLH/Aurora for the estimated value used
3 by Judge Matz; and (2) adding interest since February 2006.

4 **1. The Restitution Award Should Be Adjusted To Reflect**
5 **Artemis’s Proceeds From Closing The Sale of NCLH to**
6 **REALIC**

7 As explained above, Judge Matz required Artemis to disgorge half of the
8 “Capital Value of its Ownership Interest in NCLH,” based on what he estimated
9 that “Artemis will be entitled to receive ... upon the closing of an agreement to sell
10 NCLH to REALIC, a subsidiary of Swiss Reinsurance.” *See Garamendi, 2005*
11 *U.S. Dist. LEXIS 39273 at *43 and 49-50.* That agreement closed earlier this year,
12 and Artemis received net proceeds (after deducting the amount paid by Artemis to
13 purchase this interest) of \$291,288,942 from this sale – not the much smaller
14 estimate of the net value of this interest that Judge Matz used when calculating the
15 prior restitution award. *See Regan Dec., para. 13.* (The sales price changed over
16 time because the sales contract provided that this price increased with compound
17 interest from the date the contract was signed to the date the sale closed. *Id., para.*
18 *22.*)

19 Accordingly, if this Court decides to adopt Judge Matz’s reasoning and
20 formula for the prior restitution award, it should adjust that formula to reflect the
21 actual net “Capital Value” of Artemis’s interest in NCLH. In other words, this
22 Court should substitute the actual net sales proceeds to Artemis in place of the
23 estimated “Capital Value of its Ownership Interest in NCLH” in Judge Matz’s
24 formula for restitution.

25 **2. Interest Should Be Added To The Restitution Award**

26 As noted above, after determining the amount of benefits that Artemis should
27 be required to disgorge, Judge Matz added 7% simple interest to that amount in his
28 restitution award. *See Garamendi, 2005 U.S. Dist. LEXIS 39273 at *50.*
Moreover, in the very first hearing after the appellate remand, Judge Matz indicated

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1 that he would add interest to that award if it was reinstated. *See Dkt. No. 3722:*
2 *12/22/08 Hearing Transcript at 5* (Judge Matz: “Have you made a calculation as to
3 the post-judgment interests [on the prior restitution award] and what it amounts to
4 in the intervening period?”).

5 A party required to pay restitution should pay interest at the legal rate on the
6 unjust benefits received by that party. *See E. H. Boly & Son, Inc. v. Schneider*, 525
7 F.2d 20, 24-25 (1975); *Miletak v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 26913 at
8 *20-21 (N.D. Cal. Mar. 5, 2010); Restatement (Third) Of Restitution § 53. “If
9 prejudgment interest were not available when profits are disgorged, a tortfeasor
10 would be allowed to profit from the wrong inflicted on the victim.” *R. J. Reynolds*
11 *Tobacco Co. v. Premium Tobacco Stores, Inc.*, 2005 U.S. Dist. LEXIS 3069 at *5
12 (N.D. Ill. Feb. 8, 2005). *See also S.E.C. v. Merchant Capital, LLC*, 2012 U.S. App.
13 LEXIS 16359 at *9 (11th Cir. Aug. 7, 2012) (awarding prejudgment interest on
14 disgorgement award because, “[w]ithout prejudgment interest, the appellants would
15 have benefited from what in effect amount to interest-free loans of the ill-gotten
16 funds”); *William A. Graham Co. v. Haughey*, 646 F.3d 138, 145 (3d Cir. 2011)
17 (“Requiring only that a losing defendant pay back the principal amount of a
18 wrongfully obtained sum permits him to retain the money’s time value as a windfall
19 in the form of an interest-free loan.”).

20 Moreover, “prejudgment interest is also due on money paid as restitution”
21 under California Civil Code Section 3287(a) where, as here, the benefits to be
22 disgorged are “certain, or capable of being made certain by calculation.” *Allmerica*
23 *Fin. Life Ins. and Annuity Co. v. Dalessio*, 2006 U.S. Dist. LEXIS 8994 at *25
24 (N.D. Cal. Feb. 20, 2006); *Irwin v. Mascott*, 112 F. Supp. 2d 937, 956 (N.D. Cal.
25 2000). Accordingly, this Court should award the Commissioner 7% simple interest
26 on the benefits received by Artemis through the date of the new judgment.

27 3. Adjustments of Prior Restitution Award

28 If the Court adjusts Judge Matz’s formula for restitution for both the actual

1 net sales proceeds received by Artemis from selling its interest in NCLH/Aurora
2 and the passage of time since the prior award, the Court should enter a net
3 restitution award of **\$230,151,036** as of December 13, 2013, plus interest of
4 \$28,653 for each day thereafter until judgment is entered. *See Regan Dec., paras.*
5 *22-23.*

6 At the very least, if none of the foregoing requests are granted, the Court
7 should adjust Judge Matz’s restitution award by adding 7% simple interest to that
8 award from the date it was entered. That would result in a net restitution award of
9 **\$193,775,720**, plus interest of \$25,124 for each day thereafter until judgment is
10 entered. *Id., para. 24.*

11 **IV. CONCLUSION**

12 As shown above, Artemis should not be allowed to keep any – or even most
13 – of the \$1.58 billion of profits that it received as the result of participating in the
14 conspiracy to defraud the Commissioner. Accordingly, the Commissioner and
15 NOLHGA respectfully request the Court to hold an evidentiary hearing to
16 determine the proper amount of restitution here.

17 In the alternative, if the Court decides to adopt the reasoning and formula of
18 Judge Matz’s restitution award, the Commissioner and NOLHGA respectfully
19 request the Court to adjust that award to add interest from the date of the award and
20 substitute the actual net realized value of Artemis’s interest in NCLH/Aurora for
21 the estimated net value used by Judge Matz.

22 DATED: November 30, 2012

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