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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 POST-TRIAL BRIEF REGARDING RESTITUTION

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED CONCURRENTLY HEREWITH

Filed pursuant to Court's Minute Order dated Oct. 29, 2012 [ECF No. 4298]

Trial Date: October 17, 2012

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

After more than a decade of contentious litigation and two separate jury trials, the Plaintiff Insurance Commissioner has failed to prove a single dollar in compensatory damages against Artemis S.A. He had the opportunity to present *all* of his theories at least once, and two tries to convince a jury to adopt his principal theory of harm and damages—the "NOLHGA Premise." These theories sought breathtaking amounts, and the Commissioner benefited from an expansive application of conspiracy law that would have held Artemis liable for conduct that occurred before it existed. But the juries unanimously rejected *all* of the Commissioner's theories.

Plaintiff's claim for "unjust enrichment" is nothing more than a thinly-disguised repackaging of theories that were rejected by the juries. Any possible basis that plaintiff had for recovering from Artemis the proceeds of either ELIC's junk bonds or its insurance operations has already been sought from, and been denied by, the juries.

In particular, the first jury found that Artemis was not liable for fraud. That jury also found that the conspiracy did not cause any damage to the ELIC Estate because of the lost opportunity to rescind the junk bond sale in 1993. When combined with the recent jury's rejection of the Commissioner's claim that, but for the conspiracy, he would have chosen the NOLHGA bid, the verdicts compel the conclusion that if the *portage* agreements had been revealed, Commissioner Garamendi would have stuck with the Altus bid that had both the highest restructuring percentage and greatest financial security of any of the bids.

Judge Matz's restitution award was based on a record "which excluded proffer of the NOLHGA Premise." *California v. Altus Fin. S.A.*, 540 F.3d 992, 1009 (9th Cir. 2008). The Ninth Circuit vacated the restitution award, but held that it could be reinstated "if warranted" after a trial on the NOLHGA Premise. This Court is bound by the jury's unanimous rejection of the Commissioner's argument that he would have awarded Executive Life's assets to a bidder other than Altus and the MAAF group, if the *portage* agreements had been disclosed. In light of the jury's verdict, reinstatement

of the award is not warranted. Indeed, any conclusion that Artemis was "unjustly" enriched by the acceptance of the Altus/MAAF bid would contravene the juries' findings and therefore violate the Seventh Amendment.

Moreover, well-settled California law precludes a restitution award here for several reasons—each of which is independently sufficient to reject plaintiff's demand for equitable relief, and when taken together overwhelmingly compel this conclusion:

First, California law does not recognize a stand-alone "claim" for unjust enrichment. Several courts—including this Court and the Ninth Circuit since the remand order—have rejected similar attempts to pursue such a purported "claim."

Second, the Commissioner has failed to establish *any* predicate act of wrongdoing to support a restitutionary remedy. He tethered his restitution theory to his negligent misrepresentation and fraudulent concealment claims, but those claims resulted in defense verdicts in the 2005 trial and he just lost his conspiracy claim because California law requires actual damages as an element of civil conspiracy.

Third, plaintiff cannot establish any of the required elements for a restitution award, because: (a) the Estate received the best possible deal for the junk bonds and the insurance business; (b) Artemis never acquired any assets from the ELIC Estate, the Commissioner, or the Department of Insurance ("DOI"); and (c) there is no basis to find that Artemis' retention of the profits it earned as a result of its ownership and management of Aurora for nearly two decades was "unjust."

Fourth, because plaintiff's counsel made an explicit request for restitution from the jury, the Commissioner cannot seek that same relief in equity. The Commissioner *had* and *pursued* an adequate remedy at law; his failure to prove his claims does not render the legal remedy that he sought "inadequate," nor does it permit him to seek the same relief under the guise of unjust enrichment.

Fifth, other binding Ninth Circuit precedent holds that where (as here) a valid contract covers the subject matter in dispute, it precludes the quasi-contractual remedy of "unjust enrichment." Here, the Rehabilitation Plan governs the transaction and

precludes this equitable relief as a matter of law.

Finally, even if this Court disagrees with all the foregoing arguments and elects to reinstate the restitution award, then at a minimum there is no basis for *increasing* that award. The Commissioner had every opportunity to pursue his claims and to recover damages against Artemis, but even after two tries, he could not prove the "NOLHGA Premise." Despite having failed to prove that the ELIC Estate suffered *any* damage because of the *portage* agreements, the Commissioner is still not going home empty-handed—he has already recovered more than $730 million as the result of settlements in this litigation. There is no legal, factual, or equitable basis to award restitution against Artemis.[1]

II. RELEVANT PROCEDURAL HISTORY

Following a several-month trial in 2005, the jury rendered defense verdicts on two of the three claims against Defendant Artemis S.A. and "exonerated" its founder, Francois Pinault, on all claims. *Altus*, 540 F.3d at 996. Although the jury did find that Artemis joined a conspiracy, the Commissioner ultimately "met with defeat" on this claim as well, because "the jury awarded him no compensatory damages from Artemis, not even nominal damages." *Garamendi v. Altus Fin. S.A.*, No. 99-2829, 2005 U.S. Dist. LEXIS 39273, at *20 (C.D. Cal. Nov. 21, 2005). Nonetheless, having already heard (over Artemis' objections) evidence of Artemis' net worth and profits, the jury attempted to award $700 million in punitive damages. The District Court vacated that attempted award, and the Ninth Circuit later affirmed that ruling. *See Garamendi v. Altus Fin. S.A.*, No. 99-2829, 2005 U.S. Dist. LEXIS 39214, at *22 (C.D. Cal. Oct. 4, 2005), *aff'd*, 540 F.3d at 1004.

Plaintiff also sought "restitution" from the District Court, claiming that Artemis had been "unjustly enriched" by the transactions at issue. Plaintiff "centered" his

[1] Because Federal Rule of Civil Procedure 52(a) requires the Court to "find the facts specially and state its conclusions of law separately," Artemis concurrently submits proposed Findings of Fact and Conclusions of Law.

request for restitution "on an allegation of fraud," despite his failure to prove his fraud claims to the jury, *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *20, and despite the focus in the jury trial on the conduct of others, *see id.* at *15, 24, 34, 35 (Artemis "did not participate in the bidding process for the assets of ELIC," "did not even exist at the time the *contrats de portage* were entered into," "had nothing to do with those *portage* agreements and false statements," and was "less culpable" than other parties).

After the jury's verdicts in 2005, Judge Matz issued Findings of Fact and Conclusions of Law pursuant to Rule 52. The court found that any Insurance Code violations that Artemis had committed were "hyper-technical," and that Artemis had run the insurance company well, fairly, and professionally, such that "policyholders [were] not . . . injured by the conduct of Artemis." *Id.* at *18, 42, 49. Judge Matz also determined that plaintiff was "not entitled to recover the profits Artemis earned on the junk bonds" for several reasons:

> (1) the transfer of the junk bonds occurred before Artemis came into existence; (2) the transfer was a separate transaction from the sale of the insurance assets; (3) the Commissioner was intent on selling the ELIC Estate's junk bonds anyway; (4) the Commissioner received fair market value for the bonds and earned some $ 455 million upon investing the $ 3.2 billion that Altus had paid.

Id. at *46.

Nonetheless, Judge Matz was motivated by the vacated attempt to impose punitive damages to award *some* amount of restitution: "that the hardworking jury awarded $700 million in punitive damages to the Commissioner indicates that the jurors believed that Artemis deserved to be punished for *something*." *Id.* at *21. Primarily on this basis, he ordered Artemis to provide $241 million in "restitution." *Id.* at *49. This amount represented one-half of the profits that Artemis earned from its ownership of Aurora, plus interest. *Id.*; *Altus*, 540 F.3d at 999.

Plaintiff then appealed the post-verdict orders, and Artemis challenged the restitution award on a cross-appeal. *See Altus*, 540 F.3d at 1009. Notably, the Commissioner did *not* appeal Judge Matz's determination regarding the amount of the restitution award, including his refusal to award junk bond profits and his limitation of

restitution to one-half of Artemis's insurance company profits.

The Ninth Circuit affirmed Judge Matz's order vacating the punitive damages award and ordered a retrial limited to proffer of the NOLHGA Premise. *Id.* at 1004. It also vacated the restitution award and specifically declined to address the merits of any of Artemis' appellate arguments on that issue. The Ninth Circuit explained that any reinstatement of the restitution award must await the outcome of the retrial:

> The district court calculated restitution in light of the jury's verdicts in the damages phase of the trial, which excluded proffer of the NOLHGA Premise. Because we remand for a new damages phase trial, we vacate the award of restitution. We grant the district court leave to reinstate that award, ***if warranted***, at the close of trial. ***We decline to address the merits of Artemis' objections to the restitution award or to consider whether the offset provisions of Section 877 would apply to any restitution award made by the district court upon remand***.

Id. at 1009 (emphases added).

In the retrial that concluded last month, the Commissioner proffered the NOLHGA Premise and the jury unanimously rejected it. In doing so, the jury refused to accept plaintiff's only remaining theory of harm and damages by finding that the Commissioner failed to prove that "but for the conspiracy to defraud, he probably would have entered into a transaction with NOLHGA for the benefit of the ELIC Estate." (Verdict Form/Question No. 1, Oct. 29, 2012 [ECF No. 4301].)

III. THE COMMISSIONER IS NOT ENTITLED TO RESTITUTION

Having failed in his final attempt to demonstrate that the ELIC Estate suffered damages as a result of the non-disclosure of the *portage* agreements, the Commissioner now asks this Court to do in equity what two juries refused to do at law. There are several compelling reasons for rejecting this request.

A. The Juries' Binding Verdicts Foreclose Any Award of Restitution

After repeatedly citing the Seventh Amendment and the inviolability of the jury's 2005 verdicts since the Ninth Circuit's remand, the Commissioner now wants to disregard the findings of two separate juries. But the Seventh Amendment prevents courts sitting in equity from disregarding implicit or explicit jury findings:

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

Acosta v. City of Costa Mesa, 694 F.3d 960, 985 (9th Cir. 2012) (citations omitted); *see also L.A. Police Prot. League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993) (same). Thus, when a jury rejects a plaintiff's theory, a court may not award restitution based on the same alleged facts that the jury considered and rejected.

The Commissioner has now presented all of his theories to two separate juries, and he has failed to prove that any alleged wrongdoing on the part of Artemis, Altus, or the MAAF group would have changed the course of the ELIC rehabilitation. In 2005, plaintiff presented three theories of harm: (1) the NOLHGA Premise; (2) the "lost rescission opportunity," which argued that, had the Commissioner known of the *portages* in 1993, he would have rescinded the sale of junk bonds to Altus; and (3) the $75 million tax indemnity payment, which plaintiff alleged the Estate would not have had to pay had the Commissioner chosen a bonds-in bid. (Jt. Stmt. for Trial Setting Conf., May 22, 2012 [ECF No. 4067] at 2-3; *Altus*, 540 F.3d at 1000.) In the 2005 trial, the jury hung on the first theory, but it unanimously rejected the second and third theories by refusing to award any damages (not even nominal damages). *Altus*, 540 F.3d at 1000.

While the Ninth Circuit held that plaintiff should be allowed to present the NOLHGA Premise in a limited retrial, *id.* at 1009, a second jury has now unanimously rejected that theory. In so doing, the jury found that if the *portage* agreements had been disclosed, the Commissioner would not have disqualified the Altus/MAAF bid and picked NOLHGA. This conclusion is both mandated by the jury findings and is consistent with the overwhelming evidence that the Commissioner was determined to rid the ELIC Estate of the junk bonds and consummate a deal with Altus and the MAAF group, the only bonds-out bid. (*See, e.g.*, Trial Ex. 2722A at 7 (Mr. Garamendi

in 1994 defended his decision to sell the bonds as "the only responsible choice a prudent fiduciary could make, and, given the circumstances, is one we would make again").)

Other courts have rejected similar attempts to use equitable relief to contravene explicit or implicit jury findings. For example, in *Ag Services of America, Inc. v. Nielsen*, 231 F.3d 726, 733 (10th Cir. 2000), the jury rendered defense verdicts on plaintiff's fraud claims. The appellate court reversed a restitution award because it contravened the jury's implicit findings in rejecting the fraud claims. *Id*. Likewise, *Chase Manhattan Bank, N.A. v. T&N PLC*, 87 Civ. 4436, 1996 U.S. Dist. LEXIS 15577, at *5, 13 (S.D.N.Y. Oct. 21, 1996), held that "[t]he injuries that [plaintiff] sought to recover on its negligence claim included the same damages that it seeks to recover on its [equitable claim]," and therefore "the jury's factual findings collaterally estop the Court from making contrary findings and thereby defeat [plaintiff's] equitable claims."

Here, the Commissioner failed to prove all of his theories, and he never presented a theory of restitution that was distinct from his legal claims. In fact, as discussed below (*infra* p. 10), his equitable claims always have been narrower in scope than his legal claims. Thus, the verdicts preclude any equitable award.

Further, in the Pretrial Conference Order, which supersedes the pleadings (*see Patterson v. Hughes Aircraft Co.*, 11 F.3d 948, 950 (9th Cir. 1993)), plaintiff acknowledged that he was required to prove as an element of his restitution claim that he was unjustly enriched "because of a mistake induced by fraud or negligent misrepresentation." (Pretrial Conf. Order, Feb. 11, 2005 [ECF No. 2815] at 33.) As a result of the jury verdicts, we now know that the Commissioner's selection of the Altus/MAAF bid was neither a "mistake," nor was it "induced" by any wrongdoing, because the Commissioner would have done the same thing if the *portage* agreements had been disclosed. The *Restatement* makes clear that "[a] transfer made under the influence of a mistake gives rise to a claim in restitution *only if the mistake induces the*

transfer." *Rest. (Third) of Restitution* § 5 cmt. e (2011) (emphasis added). Thus, a plaintiff who enters into a transaction with another, "acting under a mistake about the . . . relationship between them, is not entitled to restitution if the court determines that the [plaintiff] would have made the same [transaction] had the true relationship been known." *Id*.; *see also id*. § 13 cmt. c (under the "test of causation," a court will not rescind a transfer and award restitution unless defendant's wrongdoing "induced the transfer"). In *Cleary v. Philip Morris Inc*., 656 F.3d 511, 518 (7th Cir. 2011), plaintiffs sued several tobacco companies for a "failure to disclose" the dangerous side effects of cigarettes. The Seventh Circuit rejected plaintiffs' theory of unjust enrichment because they could not establish "that they would have acted differently had the defendants been truthful about the cigarettes they were selling." *Id*.; *see also Dinosaur Dev., Inc. v. White*, 216 Cal. App. 3d 1310, 1316, 265 Cal. Rptr. 525 (1989) ("It must ordinarily appear that the benefits were conferred *by mistake, fraud, coercion or request*; otherwise, though there is enrichment, it is not unjust.") (quoting 1 Witkin, *Summary of Cal. Law, Contracts*, § 97, p. 126 (9th ed. 1987)); *see also id*. at 1316-18 (collecting cases refusing restitution because plaintiff was not induced by defendant but instead acted voluntarily for his own benefit).

Here, the jury verdicts foreclose any contention that the Commissioner "would have acted differently" with knowledge of the *portage* agreements, and this forecloses any award of restitution on the basis of unjust enrichment.

B. There Is No Stand-Alone Unjust Enrichment "Claim" Under California Law

The Commissioner purports to assert an independent "claim" for "unjust enrichment" through a single paragraph in the operative complaint. (Third Am. Compl., Feb. 16, 2000 [ECF No. 70] ¶ 131.) But as state and federal courts—including the Ninth Circuit and this Court in decisions that post-date Judge Matz's original restitution award—have held, California law does not recognize this theory as an independent "claim." For example, in *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370, 108 Cal. Rptr. 3d 682 (2010), the Court of Appeal explained that "there is

no cause of action in California for unjust enrichment." *Id.* (quoting *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793, 131 Cal. Rptr. 2d 347 (2003)); *see also Levine v. Blue Shield of Cal.*, 189 Cal. App. 4th 1117, 1138, 117 Cal. Rptr. 3d 262 (2010) (same). This Court likewise has held that "[u]nder California law, 'there is no cause of action for unjust enrichment.'" *Gearing v. China Agritech, Inc.*, No. 12-5039-RGK, 2012 U.S. Dist. LEXIS 98417, at *7 (C.D. Cal. July 16, 2012) (quoting *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1490, 49 Cal. Rptr. 3d 227 (2006)).

The Ninth Circuit also has confirmed on three separate occasions in the last three years that unjust enrichment "is not an independent cause of action in California." *See Smith v. Ford Motor Co.*, 462 F. App'x 660, 665 (9th Cir. 2011); *Myers-Armstrong v. Actavis Totowa, LLC*, 382 F. App'x 545, 548 (9th Cir. 2010) ("In California, '[t]here is no cause of action for unjust enrichment.'"); *Bosinger v. Belden CDT, Inc.*, 358 F. App'x 812, 815 (9th Cir. 2009) (same). These decisions compel a rejection of the Commissioner's purported "claim" for unjust enrichment.

C. Plaintiff Failed To Prove Any Predicate Act To Support Restitution

Even if this Court were to entertain this "claim" (notwithstanding the binding Ninth Circuit authority discussed above), this claim would still fail because federal courts consistently hold that there must be a predicate act to support restitution. *See, e.g., Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1248 (9th Cir. 2000) (courts sitting in equity cannot award restitution without a "showing of fraud or wrong-doing") (citation omitted); *Cleary*, 656 F.3d at 517 ("[I]f an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim.").[2]

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[2] *See also Berenblat v. Apple, Inc.*, No. 08-4969, 2009 WL 2591366, at *6 (N.D. Cal. Aug. 21, 2009) ("[A] claim for unjust enrichment cannot stand alone without a cognizable claim under a quasi-contractual theory or some other form of misconduct."); *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 989 (N.D. Cal. 2009) ("[Unjust enrichment] will depend upon the viability of the [p]laintiffs' other

[Footnote continued on next page]

The operative complaint includes only one paragraph explaining plaintiff's theory of unjust enrichment, and in that paragraph he expressly links this purported claim to his other legal claims and "wrongful acts alleged above." (ECF No. 70 ¶ 131.) Then, in the superseding Pretrial Conference Order, plaintiff identified his negligent misrepresentation and fraudulent concealment claims as the predicate "wrongful acts" for unjust enrichment. (ECF No. 2815 at 33 n.20 ["[T]he Commissioner claims unjust enrichment based on grounds of defendants' fraud and negligent misrepresentations."].) But he abandoned his negligent misrepresentation claim during the 2005 trial (Minute Order, Apr. 12, 2005 [ECF No. 3047] at 2; 4/12/05 Tr. at 5:13-6:1), and the 2005 jury rendered defense verdicts on the fraudulent misrepresentation and concealment claims, *see Altus*, 540 F.3d at 1005.

Plaintiff never linked his theory of unjust enrichment to conspiracy, but even if he had, the jury's refusal to award any damages on that claim would preclude unjust enrichment. "A conspiracy which does not result in actual damages is not actionable." *Shiba v. Chikuda*, 214 Cal. 786, 789, 7 P.2d 1011 (1932). That is because under California law, actual damages are a *necessary element* of a civil conspiracy claim. *See, e.g., Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 208 (9th Cir. 1991) ("Under California law, it is well settled that there is no separate tort of civil conspiracy, and there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results therefrom.") (citations omitted); *Sullivan v. Mass. Mut. Life Ins. Co.*, 611 F.2d 261, 266 (9th Cir. 1979) ("A conspiracy, in and of itself, does not give rise to a cause of action unless a civil wrong has been committed resulting in damages."); *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 511, 28 Cal. Rptr. 2d 475 (1994) ("'A civil conspiracy, however atrocious, does

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claims."); *In re Actimmune Mktg. Litig.*, No. 08-02376, 2009 U.S. Dist. LEXIS 103408, at *50-51 (N.D. Cal. Nov. 6, 2009) ("[C]ourts routinely dismiss unjust enrichment claims where a plaintiff cannot assert any substantive claims against a defendant.").

not per se give rise to a cause of action unless a civil wrong has been committed resulting in damage.'") (citations omitted); *Okun v. Super. Ct.*, 29 Cal. 3d 442, 454, 175 Cal. Rptr. 157 (1981) ("A complaint for civil conspiracy states a cause of action only when it alleges the commission of a civil wrong that causes damage.").

In short, without damages, there is no completed finding of conspiracy—and hence no predicate "wrongful act" to which plaintiff can tether his claim to restitution.

D. Plaintiff Cannot Establish The Required Elements For A Restitution Award

Even if plaintiff overcame all of the foregoing legal hurdles (which he cannot), he has not established (and cannot establish) any of the necessary elements for obtaining the equitable remedy of restitution—(1) the receipt of a benefit, (2) at the expense of another, and (3) that retention of the property at issue is "unjust." *Ghirardo v. Antonioli*, 14 Cal. 4th 39, 51, 57 Cal. Rptr. 2d 687 (1996).

1. Plaintiff failed to *allege*, much less *prove*, that any "benefit" was conferred upon *Artemis*. As a matter of law, no "benefit" is conferred when a plaintiff obtains fair market value for an asset. *See Rheem Mfg. Co. v. U.S.*, 57 Cal. 2d 621, 626, 21 Cal. Rptr. 802 (1962) (proof of payment of fair market value "tends to show that there was no unjust enrichment"); *Beanstalk Group, Inc. v. AM Gen. Corp.*, 283 F.3d 856, 863-64 (7th Cir. 2002) (finding that unjust enrichment was inappropriate where plaintiff had "received the full consideration for which it had negotiated"). Nor can the Commissioner seek a "vicarious" award of restitution from Artemis based on an assertion that Altus and/or MAAF obtained a benefit, because it is undisputed that the ELIC Estate received fair value for ELIC's junk bonds and its insurance operations. (Order re Mot. to Preclude Ev., Feb. 1, 2005 [ECF No. 2674] at 3 (Commissioner estopped from denying that he received fair market value for the bonds); *see also* Trial Ex. 2353 at 32 n.24 (Rehabilitation Court: "The Altus bid was thus the highest and best bid received and reflected the fair value of the Transferred Bonds at the time of the sale."); *id.* at 6 ("[T]he Modified Plan is fair and equitable . . . ."); Trial Ex. 2977 at 19-20 (Court of Appeal: "[T]he Altus bid provided significantly better return and less

risk to the policyholders than the Sierra and NOLHGA bids."); Trial Ex. 1145 (DOI Press Release: the Altus/MAAF bid "is superior since it delivers more money to policyholders" and is an "outstanding outcome for policyholders"); Trial Ex. 1344 (NOLHGA: the Altus bid "provides policyholders with the maximum possible value and financial security."); 10/22/12 Tr. at 184:2-6; 10/23/12 Tr. at 232:4-8.)

2. Plaintiff also cannot establish that Artemis received any benefit "at the expense of" plaintiff. It is undisputed that Artemis did not purchase *anything* from the Commissioner or the ELIC Estate. Instead, Artemis purchased the bonds from Altus and an interest in the insurance company from the various members of the MAAF group. If Artemis did not receive the "benefit" of these assets, then that benefit would have been retained by Altus and MAAF, not plaintiff. *See Walker v. GEICO Gen. Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir. 2009) ("Because the defendants have no money or property that belongs to [plaintiff], he has no stronger claim for the equitable remedy of restitution than he has for unfair competition under California law."). The only possible way for plaintiff to claim that Artemis' retention of its profit is "unjust" is to rely on the same theories that he asserted during both jury trials. As two unanimous juries have now found, however, plaintiff "lost" nothing and suffered no damages or compensable harm. These verdicts thus reflect the conclusive determination that nothing is (or was) being held by anyone "at the expense of" plaintiff. The Court is bound by those determinations. *See Acosta*, 694 F.3d at 985.[3]

3. There is no basis to conclude that Artemis' retention of the profits it earned

[3] The Commissioner previously relied on *Ward v. Taggart*, 51 Cal. 2d 736, 336 P.2d 534 (1959), for the proposition that a plaintiff need not suffer any compensable loss to recover on a theory of unjust enrichment. (*See, e.g.*, Pl.'s Appellate Reply Br. at 27-29.) However, as the Ninth Circuit explained, *Ward* had to fashion an "ingenious innovation" in the form of a restitution award, because at that time the California Civil Code only allowed recovery of "out of pocket" losses for fraud. *Altus*, 540 F.3d at 1003 & n.8. Here, of course, plaintiff pursued—but did not recover—"lost profits" under Civil Code § 3343. Further, in stark contrast to this case, *Ward* concluded that "[t]hrough fraudulent misrepresentations [defendant] received money that plaintiffs would otherwise have had." 51 Cal. 2d at 741.

as a result of its ownership and management of Aurora was "unjust." *Ghirardo*, 14 Cal. 4th at 51. There was no inequity in Mr. Garamendi's decision to accept the Altus/MAAF bid, because he received everything he bargained for under the Rehabilitation Plan. *See, e.g.*, *Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1596, 80 Cal. Rptr. 3d 316 (2008) ("[Plaintiffs] are not entitled to restitution because they received the benefit of the bargain."). Not only did the ELIC Estate receive fair market value from "the highest and best bid" for the junk bond portfolio ($3.25 billion), but it also obtained a $300 million capital infusion into the insurance company. Indeed, Judge Lewin expressly found that the Rehabilitation Plan, including both the price paid for the junk bonds and the treatment of the insurance policies, was "fair and equitable." (Trial Ex. 2353 at 6; *see also* Trial Ex. 2977 at 19-20.)

Moreover, in 1993, the Commissioner himself trumpeted the equity and fairness of the deal in opposing rescission motions:

> [W]hen Altus closed the purchase of the bond portfolio, it assumed all of the risk of the changing value of the bonds, whether upward or downward. Getting this risk out of the ELIC assets, in fact, was a major reason for doing the bond sale in the first place. . . . [T]he Commissioner did not believe that Altus would return the bonds if the market declined. Having agreed to bear the downside risk, Altus cannot ***equitably or fairly*** be required to refund any upside gain it has realized.

(Trial Ex. 2224 at 18; *see also id*. at 23-24 ("***Nor would it be equitable*** to require Altus to return (or account for) the bonds it purchased, because . . . the sale was intended to be final and unconditional and Altus has borne the entire risk of holding these assets since the closing and should not now be deprived of whatever upside it may have gained."); *id*. at 17 ("[A]s a matter of basic ***fairness***, movants should not be permitted to seize the upside potential of the transferred bonds, without having to bear any of the downside risk") (all emphases added).) And the jury specifically rejected the Commissioner's theory that he could have profited from the recovery of the junk bond portfolio had he not lost the opportunity to rescind that sale—the only possible theory of recovery based on *Artemis'* failure to disclose the prior conduct of Altus and the MAAF group (as opposed to the conduct of the alleged co-conspirators). *Altus*, 540

F.3d at 1000.

E. Because The Commissioner Already Asked The Jury To Award Restitution, He May Not Seek The Same Remedy In Equity

Because "restitution is equally a legal and an equitable remedy, it can be sought from a jury in a fraud case," as plaintiff has done here. *Williams Elec. Games, Inc. v. Garrity*, 366 F.3d 569, 576-78 (7th Cir. 2004); *see also Jogani v. Super. Ct.*, 165 Cal. App. 4th 901, 910, 81 Cal. Rptr. 3d 503 (2008) ("[R]estitution can be a legal, as opposed to equitable, remedy."). In his closing argument last month, plaintiff's counsel made an explicit request for a restitutionary remedy from the jury:

> 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.

(10/25/12 Tr. at 180:7-22 (emphases added); *see also id.* at 98, 100, 103-04, 111, 113, 114, 179 (arguing that Artemis received unjust "benefits").)

The jury's rejection of this de facto request for restitution is binding and precludes the Commissioner from rearguing that same claim before this Court. *See, e.g.*, *Acosta*, 694 F.3d at 985 ("[I]n deciding the equitable claims 'the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations.'") (citation omitted); *Gates*, 995 F.2d at 1473 (same); *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 506-507 (9th Cir. 1989) (same); *GTE Sylvania Inc. v. Cont'l T.V., Inc.*, 537 F.2d 980, 986 n.7 (9th Cir. 1976) ("When issues common to both legal and equitable claims are to be tried together, the legal issues are to be tried first, and the findings of the jury are binding on the trier of the equitable claims."), *aff'd*, 433 U.S. 36 (1977); *Ag Servs.*, 231 F.3d at 734 (reversing district

court's finding of liability on equitable claim of unjust enrichment as clearly erroneous because the court disregarded jury findings in favor of defendant on claims of fraud, conversion, and negligent misrepresentation). Because the jury already rejected plaintiff's specific plea for restitution, this Court must reject his request for the same relief through equity.[4]

Stated another way, the Commissioner is seeking the same profits as restitution for the same underlying acts through his equitable cause of action that he sought through his legal claims for fraud and conspiracy. Plaintiff sought both junk bond profits and insurance company profits in this latest trial. (10/23/12 Tr. at 9:22-25 (Mr. Shartsis: "We take the exact same insurance operation as it ran, neither more or less profitable, and then we add the effect of the bonds to that. That's exactly what Mr. Hart did."); *see also* 10/19/12 p.m. Tr. at 14:2-6.) The Commissioner lost. Plaintiff cannot claim some part of the same rejected damages as restitution. Because he had (and pursued) adequate remedies at law for the purported wrongdoing here, he is precluded from pursuing the same relief again in equity. *See, e.g.*, *Philpott v. Super. Ct.*, 1 Cal. 2d 512, 515, 36 P.2d 635 (1934).

Plaintiff's failure to prove his legal claims does not render his legal remedy "inadequate," nor does it permit the same relief through back-door equitable relief. *See, e.g.*, *Wilkison v. Wiederkehr*, 101 Cal. App. 4th 822, 832, 124 Cal. Rptr. 2d 631 (2002) ("Equity follows the law and, when the law determines the rights of the respective parties, a court of equity is without power to decree relief which the law denies . . . .") (citations omitted); *Thompson v. Allen County*, 115 U.S. 550, 554, 6 S. Ct. 140, 29 L. Ed. 472 (1885). Simply put, an inability to prove any damages—particularly where damages are a *necessary element* of the legal claim (*supra* pp. 10-

[4] In contrast to the recent closing argument, in 2005 plaintiff's counsel did not expressly seek from the jury restitution of both junk bond and insurance company profits, and for this additional reason the present circumstances are materially different from those facing Judge Matz in 2005.

11)—does not justify the award of an equitable remedy instead.

F. The Existence Of An Enforceable Contract Prohibits Any Restitution Here

Plaintiff may not obtain restitution because a binding contract (the Rehabilitation Plan) governs the parties' relationship. Where, as here, a valid and binding contract covers the subject matter of a dispute, the quasi-contractual remedy of unjust enrichment is precluded and the parties cannot avoid their contractual obligations and secure alternate relief in equity. *See, e.g.*, *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996); *McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1091 (9th Cir. 2003); *Berkla v. Corel Corp.*, 302 F.3d 909, 918 (9th Cir. 2002); *Durell*, 183 Cal. App. 4th at 1370.

In *Paracor*, the Ninth Circuit applied California and New York law and dismissed plaintiff's purported "claim" of unjust enrichment against both signatories and non-signatories to an agreement because the "subject matter" of the dispute was "covered by several valid and enforceable written contracts," and, therefore, "the unjust enrichment claim [was] governed by contract." 96 F.3d at 1167. This long-standing rule derives from equitable principles: "where the parties have freely, fairly, and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability and to withdraw from one party benefits for which he has bargained and to which he is entitled." *Wal-Noon Corp. v. Hill*, 45 Cal. App. 3d 605, 613, 119 Cal. Rptr. 646 (1975).

The Plan is an exhaustive contract that covers every aspect of the rehabilitation of Executive Life. The Rehabilitation Plan sets forth the specific responsibilities and duties of the Commissioner, Altus, and the new insurance company (Aurora), and it remains in force today. The 2012 jury found that the disclosure of the *portage* agreements would not have caused the rejection of the actual Rehabilitation Plan in 1991—before Artemis was created. The 2005 jury found that the disclosure of the *portage* agreements in 1993—after Artemis was created—would not have caused the Commissioner to rescind the Rehabilitation Plan. In short, the Commissioner is bound

by the juries' findings that disclosure of the *portage* agreements would not have resulted in any change to the existing Rehabilitation Plan. As the entire subject matter of ELIC's rehabilitation is covered by a detailed contract that remains in place and would not have been disturbed by the disclosure of the *portage* agreements, there is no basis for restitution here. *Paracor*, 96 F.3d at 1167.

IV. THERE IS NO BASIS FOR "REINSTATING" THE 2005 AWARD

In deciding whether to award restitution, as with all forms of equitable relief, the Court must take into account and balance the equities between the parties, their respective culpability, and whether denial of any equitable relief would produce an injustice. *See, e.g.*, *Durell*, 183 Cal. App. 4th at 1370; *Cal. Fed. Bank v. Matreyek*, 8 Cal. App. 4th 125, 131, 10 Cal. Rptr. 2d 58 (1992) ("The recipient of the benefit is liable only if the circumstances are such that . . . it is *unjust* for the recipient to retain it.") (emphasis added); 2 *Dobbs Law of Remedies* § 4.1(2) (2d ed. 1993) ("Courts refuse to permit recovery of restitution even when unjust enrichment is fully established if a restitutionary award . . . would be unfair or inequitable on the particular facts of the case."); *Rest. (Third) of Restitution* § 3 cmt. e (2011) ("The extent of liability in restitution for benefits wrongfully obtained depends significantly on the culpability of the defendant.").

Here, there is no record from the retrial upon which this Court could make the determinations necessary to award any restitution against Artemis. Indeed, the Commissioner successfully precluded Artemis from introducing virtually *any* evidence of its own conduct in the retrial. (*See* Pl.'s Reply re Mot. in Limine No. 4, Aug. 12, 2012 [ECF No. 4146]; Order re Mots. in Limine, Oct. 12, 2012 [ECF No. 4214] (granting Pl.'s Mot. in Limine No. 4).) The Court also excluded nearly all evidence of post-1991 conduct (*see, e.g.*, 10/18/12 Tr. at 98:7-99:1 (instructing the jury that post-1991 evidence is not relevant)), and Artemis did not even exist until December 1992. As such, the trial record contains no evidence that Artemis was *unjustly* enriched or that the balance of the equities favors the Commissioner.

Moreover, as discussed above, Judge Matz based his restitution decision in large measure on the jury's invalidated attempt to award $700 million in punitive damages. But that award was vacated and the Ninth Circuit affirmed the vacatur. *See Garamendi*, 2005 U.S. Dist. LEXIS 39214, at *22, *aff'd*, 540 F.3d at 996, 1000-02. A vacated verdict is "'null and void, and the parties are left in the same situation as if no trial had ever taken place.'" *U.S. v. Jimenez Recio*, 371 F.3d 1093, 1106 n.11 (9th Cir. 2004) (citation omitted). Therefore, the vacated punitive damages verdict may not form the basis of, or in any way impact the amount of, any restitution award.

Finally, the circumstances facing this Court are dramatically different from those facing Judge Matz in 2005, and several of these differences make "reinstatement" of the restitution award inappropriate. *First*, unlike in 2005, during the most recent trial, the Commissioner specifically asked the jury to award restitution of junk bond and insurance company profits, and the Seventh Amendment prohibits him using equity to circumvent the jury's refusal to do so. *See*, *e.g.*, *Acosta*, 694 F.3d at 985. *Second*, when Judge Matz awarded a portion of Artemis' insurance company profits, he was not bound by a jury finding on the issue because the Commissioner had not (in 2005) asked the jury to award those profits as compensatory damages. The 2012 jury's refusal to award these profits precludes any reinstatement of those very same amounts as restitution. *Id*. *Third*, as explained above, the two juries now have definitively rejected all theories of damages and found that the Commissioner would not have acted differently if he had known of the *portage* agreements.

V. AT A MINIMUM, THERE IS NO BASIS FOR INCREASING THE AMOUNT OF RESTITUTION AWARDED BY JUDGE MATZ

Finally, if this Court elects to reinstate the restitution award despite all of the foregoing issues, then there is no basis for the Commissioner to request any increase to the $241 million that Judge Matz awarded. *First*, in its remand order, the Ninth Circuit authorized a "reinstatement' of Judge Matz's restitution award *after* the retrial and *only* "if warranted." *Altus*, 540 F.3d at 1009. As explained, reinstatement would not be

"warranted," but the $241 million previously awarded by Judge Matz is the maximum plaintiff could recover; the Ninth Circuit did not authorize *recalculating* or *increasing* the award, or adding additional interest.

Second, the Commissioner did not appeal Judge Matz's determination that the Commissioner was not entitled to the junk bond profits, nor did he challenge the determination that he was entitled to only one-half of the profits from the insurance company. As such, ***these issues have been waived.*** *See, e.g.*, *Walker v. California*, 200 F.3d 624, 626 (9th Cir. 1999) ("[A] failure to file a motion or to object within the allotted time results in forfeiture of the right provided by such rule."); *U.S. v. Wright*, 716 F.2d 549, 550 (9th Cir. 1983) ("When a party could have raised an issue, in a prior appeal but did not, a court later hearing the same case need not consider the matter.").

Third, Judge Matz correctly determined that there was no basis for awarding any restitution based on the profits Artemis earned on the junk bonds that it purchased from Altus. As discussed above (*supra* p. 4), there were several compelling (and undisputed) factual grounds for this determination. But there are many other reasons not to base any restitution award on junk bond profits:

- The jury's verdict confirms that had the *portage* agreements been disclosed, the Commissioner would still have sold the junk bonds to Altus.
- After the sale of the junk bonds was severed from the sale of the insurance company, the Rehabilitation Court reopened the bidding and no one came forward to submit *any* bid for the bond portfolio, let alone "to offer more than the $3.25 billion cash bid by Altus." (Trial Ex. 2353 at 32; *see also* Trial Stip. No. 1 ¶¶ 18, 21.)
- California Insurance Code § 699.5—the statute that formed the basis of plaintiff's claims—applies only to *insurance companies*, and has no impact on the *junk bond* sale. Indeed, the Commissioner could have sold the junk bonds directly to the Government of France if it had been the highest bidder.
- The junk bonds caused ELIC's collapse, and Commissioner Garamendi and Deputy Commissioner Baum did not believe the DOI should manage the bond portfolio. (10/22/12 Tr. at 61:2-11; 10/17/12 p.m. Tr. at 81:19-82:24.)

In any event, the jury's *rejection* of the NOLHGA Premise certainly does not weigh in favor of *increasing* any restitution award, and the Commissioner has offered no evidence of Artemis' conduct, or evidence regarding Artemis' purchase of NCLH

shares, that would support revisiting the previous ruling on these issues.

In sum, any request for a restitution award that represents the bond profits, additional insurance company profits, or additional interest would simply be yet another back-door attempt to obtain the same relief for the same alleged injuries that have now been rejected by two separate juries. For all of these reasons, if the Court decides to adopt and reinstate Judge Matz's restitution award, it should not increase the amount.[5]

VI. CONCLUSION

The Commissioner has had two opportunities to prove his legal claims against Artemis. Two juries have now rejected every theory of wrongdoing and injury that he presented, and there is no basis for an equitable award of restitution. For these reasons, and the several grounds discussed above, Artemis respectfully requests that this Court deny plaintiff's request for restitution and end this long-running litigation.

DATED: November 30, 2012

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By: /s/
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[5] In its cross-appeal after the 2005 trial, "Artemis argue[d] that any award of restitution should be offset by settlements made by Artemis' co-conspirators under California Code of Civil Procedure Section 877." *Altus*, 540 F.3d at 1009. Because it vacated the restitution award, the Ninth Circuit "decline[d]…to consider whether the offset provisions of Section 877 would apply." *Id*. Because this Court ordered briefing only on the entitlement to restitution, these issues are premature unless and until there is any award to offset. Artemis reserves its rights to seek an offset. (*See* Artemis' Mot. for Offset, Dec. 22, 2005 [ECF No. 3522]; Artemis' Mem. of Contentions of Fact & Law, Sept. 10, 2012 [ECF No. 4169] at 24.)