CHRISTOPHER CHORBA, SBN 216692
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
cchorba@gibsondunn.com

ROBERT L. WEIGEL (Pro Hac Vice)
MARSHALL R. KING (Pro Hac Vice)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue, 48th Floor
New York, New York 10166
Telephone: (212) 351-4000
Facsimile: (212) 351-4035
rweigel@gibsondunn.com
mking@gibsondunn.com

Attorneys for Defendant ARTEMIS S.A.

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 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Trial Date: October 17, 2012

TABLE OF CONTENTS

Page

Table of Contents
(continued**)**

Table of Contents
(continued**)**

Defendant Artemis S.A. ("Artemis") respectfully submits the following Proposed Findings of Fact and Conclusions of Law in connection with the equitable claim and defenses that are before the Court for decision and judgment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for trial by jury, commencing on October 17, 2012, in accordance with the Ninth Circuit mandate for a limited retrial on plaintiff's damage theory referred to as the "NOLHGA Premise." The jury returned a unanimous defense verdict on October 29, 2012. This retrial followed the initial trial that commenced on February 15, 2005, and resulted in verdicts in Phase I (liability) on May 10, 2005, and in Phase II (damages) on July 21, 2005. Judge Matz took additional evidence concerning the equitable issues outside of the presence of the jury on July 19 and 20, 2005.

Having fully considered all of the evidence introduced in both trials, along with all of the arguments and written filings of counsel, and based upon the entire record in this matter, the Court makes the following findings and conclusions. Any finding of fact that may properly be construed as a conclusion of law shall be so construed, and vice versa.

FINDINGS OF FACT

I. Background

A. The Parties And Other Relevant Entities

1. Plaintiff is the Commissioner of the Department of Insurance of the State of California and the Conservator, Liquidator, and Rehabilitator of the Estate of Executive Life Insurance Company (hereinafter, the "Commissioner" or the "DOI"). The current Commissioner of Insurance is Dave Jones.

2. Plaintiff-Intervenor National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA") is a national association of state life and health insurance guaranty associations. Plaintiff-Intervenor California Life and Health Insurance Guarantee Association ("CLHIGA") is the life and health insurance

guaranty association for the State of California. NOLHGA and CLHIGA are hereinafter referred to collectively as "NOLHGA."

3. Defendant Artemis S.A. ("Artemis") is a corporation organized under the laws of France. Francois Pinault is an individual, who, along with his family, is the owner of Artemis S.A. Artemis America is a general partnership organized under the laws of the State of Delaware. Artemis Finance S.N.C. is an entity organized under French law.

4. CDR Entreprises ("CDR") is a corporation organized under French law and is a successor in interest to Altus Finance S.A. ("Altus"). Credit Lyonnais S.A. ("Credit Lyonnais") is a corporation organized under French law, and is the former parent company of Altus. Consortium de Realisation S.A. is a corporation organized under French law and is now the sole owner of Altus. These entities are referred to collectively as the "CDR Defendants."

5. Jean-Francois Henin is an individual, and formerly was the Managing Director of Altus.

6. MAAF Assurances ("MAAF") is a mutual company organized under French law. MAAF Vie is a stock life insurance company organized under French law, and is a subsidiary of MAAF Assurances. Jean-Claude Seys is an individual, and formerly was the Managing Director of MAAF. Jean Irigoin is an individual, and formerly was the President of MAAF Vie. These entities and individuals are referred to collectively as the "MAAF Defendants."

7. Aurora National Life Assurance Company ("Aurora") is a stock life insurance company organized under the laws of the State of California. New California Life Holdings, Inc. ("NCLH") is a corporation organized under the laws of the State of Delaware and is the sole shareholder of Aurora. Aurora and NCLH are referred to collectively as the "Aurora Defendants."

B. The Commissioner's Claims

8. This case arises from events in 1991 and thereafter surrounding the conservation and rehabilitation of a failed California life insurance company, Executive Life Insurance Company ("ELIC"). The heart of the Commissioner's claims is that, in 1991, Altus, Credit Lyonnais, and a group of European investors led by MAAF (collectively, the "MAAF Group") misrepresented their various relationships with each other in order to induce the Commissioner to select their bid to rehabilitate ELIC pursuant to a plan of rehabilitation (the "Rehabilitation Plan") under which ELIC's junk bond portfolio would be sold to Altus, and ELIC's insurance business and assets would be transferred to the MAAF Group.

9. More specifically, the Commissioner alleged that these parties fraudulently concealed and intentionally misrepresented the fact that Altus and Credit Lyonnais controlled the insurance business of the MAAF Group through undisclosed agreements known as *contrats de portage* ("*portage* agreements"), in violation of California Insurance Code Section 699.5 ("Section 699.5"). With respect to the Artemis defendants and Mr. Pinault, the Commissioner alleged fraudulent misrepresentation, fraudulent concealment, and conspiracy claims in connection with their later acquisitions of: (a) certain junk bonds (which had once been owned by ELIC) from Altus; and (b) the MAAF Group's interest in ELIC's former insurance business. In addition, the Commissioner asserted a claim of unjust enrichment, as well as certain equitable remedies, against the Artemis defendants.

C. Procedural History

10. The Commissioner filed his original Complaint for fraud, deceit, misrepresentation, and unfair competition in the Superior Court of the State of California on February 17, 1999, against defendants Altus Finance S.A., CDR Entreprises, MAAF, MAAF Vie, Omnium Geneve S.A., Credit Lyonnais S.A., Jean-Claude Seys, Jean-Francois Henin, and Jean Irigoin. After the case was removed to Federal Court, pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1130,

1602 *et seq*., the Commissioner amended his complaint three times. It was not until his fourth attempt to plead his claims – in his Third Amended Complaint, filed on February 16, 2000 (almost exactly one year after he filed his initial pleading) – that he named Artemis, Mr. Pinault, Artemis America, and Artemis Finance S.N.C. (and Aurora and NCLH) as defendants.

1. The Commissioner Resolved His Claims Against All Defendants Other Than Artemis S.A. And Francois Pinault

11. Shortly before the first trial in February 2005, the Commissioner and NOLHGA settled their claims with the Aurora Defendants. Accordingly, on February 14, 2005, the Court dismissed the claims and counter-claims among the Commissioner, NOLHGA, and the Aurora Defendants. *See* Order, Feb. 14, 2005 [ECF No. 2756].

12. On February 16, 2005, the Commissioner and NOLHGA settled their claims against the CDR Defendants, and ultimately dismissed these claims. *See* Joint Notice of Motion and Motion of CDR Defendants, Plaintiff Commissioner, and Intervenors NOLHGA for Determination of Good Faith Settlement [ECF No. 3391] at 5.

13. On February 17, 2005, the attorneys-of-record for the MAAF Defendants informed the Court that those defendants would no longer defend against the Commissioner's claims or otherwise participate in this action. Thereafter, the MAAF Defendants did not appear at trial. On April 19, 2005, the Commissioner filed an application for the entry of default against the MAAF Defendants on all liability issues as to the Commissioner, and, on April 21, 2005, the Court granted an Order of Default against the MAAF Defendants. In accordance with that Order, on April 25, 2005, the Clerk of Court entered a default against the MAAF Defendants, pursuant to Fed. R. Civ. P. 55(a). Judgment was entered on December 2, 2005. Thereafter, the Commissioner and the MAAF Defendants entered into a settlement agreement, as of March 30, 2006.

14. On April 12, 2005, the Commissioner voluntarily dismissed all of his claims against defendants Artemis America and Artemis Finance S.N.C., with prejudice, in response to the Artemis Defendants' Motion for Judgment as a Matter of Law. *See* Apr. 12, 2005 Tr. at 4:19-5:2; Pl.'s Opp. to Mot. for JMOL, dated Apr. 8, 2005 [ECF No. 3043] at 21. The Court granted the Commissioner's motion for judgment as a matter of law as to the Artemis defendants' sole remaining counterclaim (breach of contract based on a release) on April 15, 2005. *See* Apr. 15, 2005 Tr. at 9:9-9:14; Order dated May 3, 2005 [ECF No. 3144].

15. Mr. Henin did not appear at trial. On April 25, 2005, the Clerk of Court entered a default against Mr. Henin, pursuant to Fed. R. Civ. P. 55(a). Judgment was entered on December 2, 2005.

2. The 2005 Trial

16. The first trial in this matter commenced on February 15, 2005. The trial of the Commissioner's claims for fraudulent misrepresentation, concealment, and conspiracy was bifurcated into a liability phase and a damages phase. At the conclusion of the first phase of the trial on May 10, 2005, the jury returned special verdicts on the Commissioner's fraud and conspiracy claims. Following the conclusion of the second phase of the trial on July 21, 2005, the jury returned verdicts on two of the Commissioner's theories of damages.

a. The Liability Phase

17. The Commissioner asserted claims for fraudulent misrepresentation, fraudulent concealment, and conspiracy against Mr. Pinault, all of which were tried to the jury. At the conclusion of Phase I of the trial, the jury found that Mr. Pinault was not liable on any of the three claims that were brought against him. *See* Verdict Forms 2, 4, 6. Specifically, with regard to those claims, the jury found that Mr. Pinault did not make any misrepresentations to the Commissioner (Verdict Form 2), did not conceal anything from the Commissioner (Verdict Form 4), and did not join a conspiracy to defraud the Commissioner or the ELIC Estate (Verdict Form 6).

18. With respect to the Commissioner's fraudulent misrepresentation claim against Artemis, the jury found that Artemis knowingly made a false representation to the Commissioner and that the Commissioner relied on that false representation. Similarly, as to the claim of fraudulent concealment, the jury found that Artemis intentionally failed to disclose an important fact to the Commissioner and that the Commissioner relied on that non-disclosure. However, the jury found that nothing Artemis said or failed to say was a substantial factor in causing harm to the Commissioner or the ELIC Estate. *See* Verdict Forms 1, 3. As a result, the jury rendered a verdict in favor of Artemis on both the Commissioner's claims for fraudulent misrepresentation and his claim for fraudulent concealment. *Id.*

19. With respect to the Commissioner's conspiracy claim, at the conclusion of the first phase of the trial, the jury found that Artemis became aware of, and agreed to participate in, a common scheme with Altus, Credit Lyonnais, MAAF, and other entities to obtain assets from the ELIC Estate by fraud. *See* Verdict Form 5. In response to the question on that same verdict form of whether the scheme "caused" harm to the ELIC Estate, the jury answered "yes." *See id.*

20. Unlike the causation/harm question on Verdict Forms 1 and 3 (related to misrepresentation and concealment), which spoke in terms of "substantial factor," the causation/harm question on Verdict Form 5 (related to conspiracy) did not contain the "substantial factor" element. *See* Verdict Forms 1, 3, 5. Instead, Verdict Form 5 asked only whether "the scheme cause[d] harm to the ELIC Estate." Verdict Form 5. Therefore, the jury did not find, and was not asked to find, whether the conspiracy was a "substantial factor" in causing harm to the ELIC Estate.

21. In the liability phase verdict forms in the 2005 trial, the jury had to answer a question contained in a specific verdict form regarding a theory of injury that the Commissioner presented as an "integral," "required part" of his liability case during the first phase of trial: whether, but for any misrepresentation, concealment, or conspiracy that the jury found, the Commissioner probably would have entered into a

transaction with NOLHGA for ELIC's assets (the "NOLHGA Premise"). Apr. 18, 2005 Pl.'s Closing Arg. Tr. at 56:23-57:7; *see also* Verdict Form 7.

22. Following its deliberations in Phase I of the trial, the jury could not reach unanimity on the verdict form concerning the NOLHGA Premise. *See* Verdict Form 7. Because the jury deadlocked on Verdict Form 7, the Commissioner was not permitted to pursue a theory of "lost profits" based on the NOLHGA Premise in the second phase of the trial. *See Garamendi v. Altus Fin., S.A.*, No. CV-99-2829, 2005 U.S. Dist. LEXIS 40047, at *32 (C. D. Cal. June 10, 2005) [ECF No. 3200]. The Commissioner did not seek a mistrial with respect to the jury's deadlock on the NOLHGA Premise theory of damages, but instead made an "offer of proof" concerning that theory, and then proceeded to try the second (damages) phase of the trial on alternative theories of damages.

b. The Damages Phase

23. The Commissioner pursued two theories of compensatory damages during the second phase of the trial: (a) a "lost rescission opportunity" theory – that is, a theory based upon a hypothetical rescission in 1993 of the bond sale to Altus; and (b) a theory based upon his claims of "out of pocket losses," based in turn upon a payment of $75 million that the ELIC Estate made to Aurora to settle certain indemnity claims under the Rehabilitation Plan.[1]

24. As part of the "lost rescission opportunity" theory of damages, the jury was given an instruction setting forth the effects of rescission, and the analysis that a court sitting in equity would have undertaken in considering a claim for that relief. *See* Supp. Jury Instr. Re Damages No. 9 ("In such a lawsuit or motion, the plaintiff asks

---

[1] The Commissioner was allowed to present the so-called "lost rescission opportunity" theory to the jury, even though the Commissioner had not included this theory in the Final Pretrial Conference Order, and first requested leave to present evidence on it just four days before the commencement of the second phase of the trial. *See* July 8, 2005 Hearing Tr. at 9; Revised Final Pretrial Conference Order, dated Feb. 11, 2005 [ECF No. 2815] at 123.

the court to order the defendant to return everything of value he received, in return for plaintiff doing the same"; "In deciding the motion, Judge Lewin would have been entitled to exercise considerable discretion and to take into account a number of factors . . . .").

25. The jury was instructed about the restitutionary nature of the damages that the Commissioner was seeking, and was asked to evaluate the equitable factors that would go into awarding such a recovery.

26. The Commissioner presented evidence in the second phase of the trial that went beyond the profits on the junk bonds as of 1993, that is, the time that the hypothetical motion to rescind would have been made and decided. Instead, the Commissioner presented to the jury evidence and argument as to all of the proceeds earned on the junk bonds, including those that remained unsold as of the time of the rescission motion. *See* July 13, 2005 Roberson Tr. at 186:15-187:23 and 197:9-197:19 ("Q: And do you know what amount of proceeds were received on the sale of those . . . those unsold bonds? A: Approximately $1.8 billion."); Trial Exhibit ("TX") 4042; TX 4059 at 2; July 19, 2005 Pl.'s Closing Arg. Tr. at 147:10-147:23.[2]

27. At the conclusion of the second phase, the jury was instructed that, in determining the amount of compensatory damages to award, if any, it should include an award for the harm that the conspiracy was a "*substantial factor*" in causing. *See* New Jury Instr. Re Damages No. 2. Following its deliberations with respect to the second phase of the trial, the jury returned verdicts finding compensatory damages of "$0" on each of the Commissioner's damages theories; that is, on both the "lost rescission opportunity" theory and the theory of "out of pocket losses," based on the

---

2 "TX" refers to trial exhibits received into evidence during either the 2005 trial or the 2012 trial. Because much of the evidence that relates to the Commissioner's unjust enrichment claim was not the subject of the 2012 trial, the evidence cited herein necessarily includes trial exhibits and testimony from the 2005 trial. "Court Ex." refers to the additional joint exhibits requested by, and marked and received separately by, the Court during the 2005 trial.

$75 million settlement payment. *See* Verdict Form A. "Despite having been permitted to pursue an arguably 'expanded' theory of damages, the Commissioner met with defeat; the jury awarded him no compensatory damages from Artemis, not even nominal damages." *Garamendi v. Altus Fin.*, No. CV-99-2829, 2005 U.S. Dist. LEXIS 39273, at *20 (C.D. Cal. Nov. 21, 2005). Thus, each time the jury was asked to consider whether *any of the alleged wrongdoing* was a "substantial factor" in causing harm to the Commissioner or the ELIC Estate, it found no such causation. *See* Verdict Forms 1, 3. Therefore, the jury determined that whatever scheme Artemis had joined had resulted in *no* damage to the Commissioner or to the ELIC Estate. *See* Verdict Form A.

28. 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 under California law and the Due Process Clause. *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 992, 1004 (9th Cir. 2008).

c. The 2005 Restitution Award

29. Several months after the jury's verdicts in 2005, Judge Matz issued Findings of Fact and Conclusions of Law pursuant to Rule 52. In that ruling, the Court concluded 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." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *18, 42, 49. Judge Matz also determined that the Commissioner 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.

30. 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 *49-50. This amount represented one-half of the profits that Artemis earned from its ownership of Aurora, plus interest. *Id.*

3. The Ninth Circuit Appeal And Remand For A New Trial On The NOLHGA Premise

31. Both sides appealed various rulings from the 2005 trial. The Commissioner appealed the post-verdict orders, and Artemis challenged the restitution award on a cross-appeal. *See California v. Altus Fin.*, 540 F.3d 992, 1009 (9th Cir. 2008). 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' insurance company profits.

32. On August 25, 2008, the Ninth Circuit issued its decision. It affirmed Judge Matz's order vacating the punitive damages award, reversed his decision precluding the Commissioner from seeking "lost profits" based on the NOLHGA Premise in the second phase of the trial, and remanded "for a new damages phase trial limited to proffer of the NOLHGA Premise and a determination of damages (including punitive damages), if any, on that theory." *Altus*, 540 F.3d at 1011. It also vacated the restitution award and specifically declined to address the merits of any of Artemis' appellate arguments concerning that award. The Ninth Circuit explained that any future 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.

4. The 2012 Retrial Of The NOLHGA Premise

33. The retrial of the NOLHGA Premise commenced on October 17, 2012. The trial was bifurcated with the NOLHGA Premise and compensatory damages being tried first, and punitive damages, if necessary, to be tried in a second phase.

34. The Commissioner argued to the jury that based on the actual profits made by Altus and Artemis on Executive Life's former junk bonds and based on the actual results of the rehabilitated insurance company Aurora, the policyholders, the Guaranty Associations, and the ELIC Estate would be $2.174 billion better off if the Commissioner had selected NOLHGA's bonds-in bid rather than the Altus/MAAF bid. Oct. 25, 2012 Pl.'s Closing Arg. Tr. at 111:18-112:17; *see also* Oct. 19, 2012 Hart (P.M.) Tr. at 13:25-14:9; Oct. 23, 2012 Tr. at 9:22-9:25 (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.").

35. In his closing argument, the Commissioner made an explicit request for restitution:

> 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 Pl.'s Closing Arg. Tr. at 180:7-180:22 (emphasis added).

36. The Commissioner also argued to the jury in his closing that Artemis "made hundreds of millions of dollars in this transaction" (Oct. 25, 2012 Pl.'s Closing Arg. Tr. at 100:6-100:7), that Artemis and Mr. Pinault "benefited" from the fraud (*id.* at 103:15-103:16), and that the jury's "decision is going to determine whether the conspirators get to keep money that they were never entitled to have in the beginning" (*id*. at 179:15-179:17). The Commissioner repeated these restitutionary points to the jury throughout his closing, arguing that:

a. ". . . people came into the State of California and availed themselves of all of the opportunities and benefits to make millions of dollars in California . . ." (*id*. at 98:4-98:8);

b. "The conspirators are entitled, according to the conspirators, to keep everything they got by way of the fraudulent conspiracy. We're entitled to keep amounts of money that they never could have or should have ever obtained; and that's what the defense is telling you in the case." (*id*. at 103:15-104:4);

c. "But as it is, net in their pocket, $1,925,000,000 less the selling expenses; and Mr. Hart took all that into account." (*id*. at 111:18-111:20); and

d. "The conspirators in this case have had the use of the money from the bonds starting all the way back to 1992. They have been able to use it. What a marvelous deal. You get to use $2,174,000,000. For 14 years you get to benefit from it, you get to invest it, you get to put it into interest-bearing treasury notes or other securities. And 14 years later, your responsibility is just to give back the same amount of money that you were never entitled to have in the beginning. Never entitled to have this money, and you got to use it for 14 years." (*id*. at 113:15-113:25).

37. On October 29, 2012, the jury returned a defense verdict on the NOLHGA Premise, thus rejecting the Commissioner's last remaining theory of damage on his conspiracy claim against Artemis. The jury unanimously answered "no" in response to the question asked on the verdict form: "Did the Commissioner prove that, but for the conspiracy to defraud, he probably would have entered into a transaction with NOLHGA for the benefit of the ELIC Estate?" 2012 Verdict Form [ECF No. 4301].

II. The Failure, Conservation, And Rehabilitation Of Executive Life Insurance Company

A. The Failure Of Executive Life And Its Conservation

38. On April 11, 1991, Insurance Commissioner John Garamendi seized the assets of ELIC, the sixteenth largest life insurance company in the United States at the time, and placed the company in conservatorship because of its hazardous financial condition. *See* Court Ex. B at 2; TX 3144 at 2, 9.

39. At the time of the conservation, approximately 55% to 60% of ELIC's assets were invested in high-risk junk bonds. *See* TX 3144 at 6; TX 355 at 1; TX 291 at 1; Mar. 31, 2005 Baum Tr. at 27:7-28:13; Oct. 18, 2012 (A.M.) Baum Tr. at 79:17-79:19; Oct. 22, 2012 Garamendi Tr. at 49:20-50:1. The concentration of junk bonds in ELIC's investment portfolio was far in excess of insurance industry averages, which were in the range of 5% to 6%. *See* Mar. 1, 2005 Sutton Tr. at 173:8-173:14; Mar. 29, 2005 Dummer Tr. at 89:7-89:10; Oct. 18, 2012 (A.M.) Baum Tr. at 80:18-81:4. ELIC's assets at the time were described by the DOI as more like the "bloated docket of a federal bankruptcy court rather than the portfolio for an insurance company." TX 1765 at 83.

40. Even by junk bond standards, ELIC's junk bond portfolio was of extremely poor quality, and was one of the riskiest in the country because of its minimal market value and questionable liquidity. *See* TX 1765 at 83. Indeed, Commissioner Garamendi at the time of the conservation and rehabilitation of ELIC publicly characterized the portfolio as "toxic waste," the "junk of the junk," "trash,"

and "really rotten junk." Mar. 2, 2005 Garamendi Tr. at 152:23-153:19, 116:22-117:2, 172:16-173:15; Oct. 22, 2012 Garamendi Tr. at 53:1-53:22. As a result of ELIC's substantial investment in junk bonds, when the junk bond market plummeted in 1990, so did the value of ELIC's assets. *See* TX 2722 at 2.

41. This severe decline in ELIC's asset base in turn caused a "run on the bank," during which ELIC policyholders with combined policies representing well over $1 billion in assets surrendered and redeemed their ELIC policies for cash. *See* TX 3144 at 6-7; Mar. 2, 2005 Garamendi Tr. at 72:3-72:21; Mar. 31, 2005 Baum Tr. at 28:14-28:17; Mar. 29, 2005 Dummer Tr. at 91:24-92:9; Oct. 18, 2012 (A.M.) Baum Tr. at 81:22-82:4; Oct. 22, 2012 Garamendi Tr. at 20:19-21:1. This phenomenon exacerbated ELIC's hazardous financial condition, because ELIC was forced to liquidate its highest quality assets in order to meet these full-value policy surrenders. *See* Mar. 2, 2005 Garamendi Tr. at 72:3-72:21; Mar. 31, 2005 Baum Tr. at 41:22-41:25; Oct. 18, 2012 (A.M.) Baum Tr. at 82:1-82:10.

42. "The failure of ELIC was the result, in part, of the collapse of the junk bond market, the resulting torrent of policyholder redemptions, and the overall mismanagement of the company under the leadership of its Chief Executive Officer, Fred Carr." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *25 (¶ 2); Trial Stip. No. 1, ¶ 2.[3] *See also* TX 3144 at 6-7; TX 355 at 1; TX 291 at 1; Mar. 31, 2005 Baum Tr. at 28:18 -29:9; Oct. 22, 2012 Garamendi Tr. at 51:8-51:13. "In February 1992, Commissioner Garamendi sued Mr. Carr and other ELIC representatives, and eventually recovered approximately $350 million." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *25 (¶ 2). *See* TX 1516; Mar. 31, 2005 Baum Tr. at 126:13-126:22; Oct. 18, 2012 (A.M.) Baum Tr. at 84:8-84:10.

[3] Trial Stipulation No. One ("Trial Stip. No. 1") refers to the stipulation, entered into by the parties and filed with the Court on June 4, 2010 (ECF No. 3878-1), which was read and provided to the jury in the 2012 trial.

43. In addition to blaming Mr. Carr and ELIC's senior management for the failure of Executive Life, Commissioner Garamendi insisted that the lax regulatory practices of his predecessor were at fault for ELIC's failure. *See* TX 219 at 1-2; TX 449 at 4; Oct. 22, 2012 Garamendi Tr. at 51:8-52:25. Commissioner Garamendi contended that, had the DOI not ignored "warning signs" of ELIC's "abusive and risky practices" throughout the 1980's, it could have minimized the massive losses ELIC suffered. TX 1764 at RB 00461. As Commissioner Garamendi informed Congress: "As 1990 drew to a close, ELIC was more vulnerable than ever to its junk bonds, the risk of which was poorly understood by the California Department which had no real investment expertise on its staff." *Id.* at RB 00473.

44. These losses to ELIC's policyholders occurred before ELIC was placed into conservation. *See* Oct. 23, 2012 Blaydon Tr. at 231:6-231:21. To the extent that certain ELIC policyholders suffered a reduction in the value of their insurance policies, that was the result of the unsound business practices of ELIC's management, as well as the crash of the junk bond market, which destroyed the value of ELIC's substantial junk bond portfolio, not the result of anything that the defendants in this action did or failed to do.

B. The Rehabilitation Of ELIC

45. Prior to putting Executive Life into conservation, the Commissioner told Altus that he wanted a proposal for rehabilitating Executive Life that complied with California Insurance Code Section 699.5. *See* Oct. 22, 2012 Garamendi Tr. at 111:3-112:12. In 1991, Section 699.5 allowed a foreign government to own an interest in a California insurance company if certain conditions were met. TX 1.[4]

---

[4] The text of Section 699.5 provided at the time:

(a) Except as provided by subdivision (b), a certificate of authority shall not issue to any insurer owned, operated, or controlled, directly or indirectly, by any other state, province, district, territory, or nation or any governmental subdivision or agency thereof.

[Footnote continued on next page]

46. Section 699.5 is not an absolute prohibition on foreign government ownership or control of a California insurance company. *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *16 ("the jury learned that the very language of Section 699.5 actually permits the DOI to license such an insurer [*i.e.*, one in which a foreign government had an ownership interest] under certain specified conditions"); Oct. 18, 2012 (A.M.) Baum Tr. at 99:18-99:25; Oct. 24, 2012 Holmes Tr. at 103:16-103:20; TX 1; TX 1407.

47. When Commissioner Garamendi was told on February 20, 1991 that Credit Lyonnais wanted to invest directly in ELIC, Commissioner Garamendi did not tell Credit Lyonnais to "get lost." Oct. 22, 2012 Garamendi Tr. at 112:8-112:12. Instead, discussions were held about the limitations of Section 699.5 with regards to the proposed structuring of a transaction for the rehabilitation of ELIC. TX 187.

[Footnote continued from previous page]

> (b) The ownership or financial control, in part, of any domestic, foreign, or alien insurer by any state of the United States or by a foreign government or by any political subdivision of either, or by an agency of any other state, government, or subdivision thereof, shall not restrict the commissioner from issuing, renewing, or continuing in effect the license of that insurer to transact in this state the kinds of insurance business for which that insurer is otherwise qualified under the provisions of this chapter and under its charter provided the insurer has satisfied the commissioner that (1) it is not subject to any form of subsidy that would enable it to compete unfairly with domestic insurers, (2) it is not subject to governmental practices that discriminate on the basis of race, color, creed, or national origin, (3) the ownership or financial control will not create the presence of any sovereign immunity in the insurer, (4) appropriate measures and controls exist to avoid security problems resulting from an insurer's access to confidential information and data of its insured, and (5) the ownership or financial control will not result in substantial or undue influence being asserted over the insurer.
>
> Cal. Ins. Code § 699.5 (1991); TX 1.
>
> In 1995, Section 699.5 was amended to provide that governmental "ownership or financial control" of an insurer would not preclude the DOI from issuing, renewing, or continuing a certificate of authority *unless* the Commissioner should find that one or more of five conditions enumerated in the statute existed. Cal. Ins. Code § 699.5(a) (2005). As a result of the amendment, the 1995 version of 699.5 relaxed the prohibition on governmental ownership or control of California insurers.

48. In addition, there were regulatory solutions available to address any concerns raised by Section 699.5. Oct. 24, 2012 Lennon Tr. at 22:18-24:24. One such regulatory solution is the use of a voting trust. Oct. 24, 2012 Lennon Tr. at 22:18-24:7; Oct. 24, 2012 Holmes Tr. at 108:2-108:7. A voting trust is a mechanism used to insulate an insurance company from the potential control of a foreign government. Oct. 18, 2012 (A.M.) Baum Tr. at 100:9-100:20; Oct. 24, 2012 Lennon Tr. at 23:4-24:7; TX 4392; Oct. 24, 2012 Holmes Tr. at 104:23-106:2. James Holmes, a DOI lawyer who was a member of the DOI's 699.5 Task Force, testified that a voting trust is "a well-established device." Oct. 24, 2012 Holmes Tr. at 102:17-102:21, 104:23-105:13.

49. Another regulatory solution is to conduct an analysis and make the findings set forth in Section 699.5 – findings that allow a company owned by a foreign government to own a California insurance company. Oct. 24, 2012 Lennon Tr. at 24:8-24:24; *see also* TX 1; TX 1407.

50. The *portage* agreements did not necessitate throwing out the Altus/MAAF bid and, as the jury found, Commissioner Garamendi would not have disqualified the Altus/MAAF bid and done a deal with NOLHGA if the *portage* agreements had been disclosed. *See* 2012 Verdict Form [ECF No. 4301].

1. The Bidding Process

51. Following the conservation of ELIC on April 11, 1991, Commissioner Garamendi, as ELIC's conservator, and Los Angeles County Superior Court Judge Kurt Lewin, sitting as the "Rehabilitation Court" for the Executive Life Estate, conducted a public auction for ELIC's junk bond portfolio and its insurance business. In particular, as part of the plan of rehabilitation for ELIC, the Commissioner issued a "Request for Proposal" in May 1991, and entered into a tentative transaction in August 1991 to sell the assets of Executive Life to Altus and a group of other European investors led by MAAF. *See* Court Ex. B at 2; TX 295; TX 449 at 2.

52. As the Commissioner put it, his paramount concerns in selecting a bid to rehabilitate ELIC were "the value to be delivered to policyholders and the certainty of the delivery." TX 1764 at RB 00559.

53. "In October 1991, the Commissioner began receiving bids for ELIC's assets from bidders other than Altus. Of the eight bids the Commissioner received, only three (including a revised bid from Altus) qualified for full consideration. The surviving bids were submitted by: NOLHGA; Sierra National Insurance Holdings, Inc. ('Sierra'); and the Altus/MAAF Group. The Commissioner rejected the other five bids as inadequate." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *28 (¶ 9); Trial Stip. No. 1, ¶ 9.

54. "The NOLHGA and Sierra bids were 'bonds-in' bids – that is, the junk bonds would remain in the rehabilitated insurance company. By contrast, the Altus/MAAF bid was a 'bonds-out' bid, under which: (a) the junk bonds would be sold to Altus in exchange for cash (and thus removed from the insurance company) and (b) the insurance policies of former ELIC policyholders would be restructured and transferred to a new insurance company to be established and owned by the MAAF Group." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *28 (¶ 10); Trial Stip. No. 1, ¶ 10.

2. The Conditional Acceptance And Subsequent Rejection Of The NOLHGA Bid

55. On October 24, 1991, the Commissioner conditionally accepted the NOLHGA bid, but identified nine "serious legal issues" (TX 843 at 3) and "potentially grave problems" (*id*. at 4) that "directly impact[ed] the safety and certainty" (*id*. at 3) of the bid, and which NOLHGA was required to cure before its proposal could be finally selected and recommended to the Rehabilitation Court. *See also* Feb. 22, 2005 Rubinstein Tr. at 82:23-83:3; Oct. 18, 2012 (A.M.) Baum Tr. at 116:14-118:10.

56. As early as September 1991, Commissioner Garamendi had questioned the credibility of the NOLHGA bid and raised questions about the adequacy of the

guaranty associations' assessment capacity, which provided the financial support for the NOLHGA bid. Oct. 19, 2012 (A.M.) Sutton Tr. at 35:11-36:25; *see also* Oct. 22, 2012 Garamendi Tr. at 78:25-79:7.

57. NOLHGA knew by the beginning of October, before it had even submitted its initial bid, that Commissioner Garamendi had questioned the guaranty associations' commitments and "wasn't comfortable merely with the promises from the guaranty associations." Oct. 18, 2012 (P.M.) Dummer Tr. at 74:2-74:7; Oct. 19, 2012 (A.M.) Sutton Tr. at 39:22-40:2; Oct. 22, 2012 Garamendi Tr. at 80:15-81:9; *see also* TX 683 at 2. NOLHGA knew that Commissioner Garamendi would be looking for "equivalence to [a] letter of credit." TX 683 at 2.

58. As Tom Sutton, the head of Pacific Mutual and the point person for arranging NOLHGA's credit facility, acknowledged, NOLHGA chose not to "include any financial backup beyond the actual assessment capacity of the guaranty associations" in its initial bid submitted on October 11, 1991. Oct. 19, 2012 (A.M.) Sutton Tr. at 41:6-42:3.

59. By October 18, 1991, the insurance companies knew that Commissioner Garamendi "continued to question the adequacy of the financial commitment by NOLHGA" and that he "wanted a line of credit," but NOLHGA chose not to provide a line of credit as "a part of the original bid." Oct. 19, 2012 (A.M.) Sutton Tr. at 43:8-43:18, 44:5-44:11; TX 794 at 1, 3.

60. As Richard Baum – Commissioner Garamendi's chief deputy – testified during the 2012 trial, the Commissioner's team had been speaking to NOLHGA for nearly a month about the level of security and guarantees that NOLHGA was going to provide but what NOLHGA submitted in its opening bid did not satisfy what the Commissioner wanted – NOLHGA was "relying exclusively on the [guaranty associations'] assessment authority." Oct. 18, 2012 (A.M.) Baum Tr. at 119:8-119:15.

61. Even after Commissioner Garamendi gave NOLHGA the opportunity to fix its bid, NOLHGA still did not provide Commissioner Garamendi with an adequate

financial guarantee. Oct. 18, 2012 (A.M.) Baum Tr. at 123:6-123:17; Oct. 18, 2012 (P.M.) Baum Tr. at 7:6-8:4; Oct. 22, 2012 Garamendi Tr. at 109:15-109:17.

62. Mr. Baum testified that "there was sufficient time" for NOLHGA to address the Commissioner's requirement of a letter of credit or other security and that the Commissioner had made it clear to NOLHGA what he was looking for. Oct. 18, 2012 (A.M.) Baum Tr. at 118:22-119:7. NOLHGA agreed that it had "ample time" to respond to the Commissioner's conditions. Oct. 18, 2012 (P.M.) Dummer Tr. at 91:5-91:12. However, as Mr. Baum testified: "They gave us a form of other security that was not satisfactory to us, and we didn't think it was comparable to a letter of credit. . . . [NOLHGA] did not give us the guarantee we were looking for." Oct. 18, 2012 (P.M.) Baum Tr. at 7:6-8:4; *see also* Oct. 18, 2012 (A.M.) Baum Tr. at 131:10-131:21.

63. Although NOLHGA had a full opportunity to cure the "potentially grave problems" and "serious legal issues" the Commissioner had raised – most of which it had known about since at least the beginning of October – NOLHGA failed to do so. Oct. 18, 2012 (A.M.) Baum Tr. at 118:11-118:20; Oct. 18, 2012 (P.M.) Baum Tr. at 6:23-7:4; Oct. 18, 2012 (P.M.) Dummer Tr. at 77:2-77:4; Oct. 22, 2012 Garamendi Tr. at 97:25-98:6.

64. "NOLHGA responded to the Commissioner's demands on November 4, 1991. A mere two days later, on November 6, 1991, Commissioner Garamendi formally rejected the NOLHGA bid. In a pleading filed with the Rehabilitation Court that same day, the Commissioner identified numerous specific defects in NOLHGA's proposal that provided his 'rationale for rejecting the NOLHGA bid . . . .' The Commissioner informed the Rehabilitation Court that he had 'determined that it [was] in the best interests of the policyholders . . . to reject the NOLHGA bid and to proceed to select either' the Altus/MAAF bid or the Sierra bid." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *29 (¶ 12) (alterations in original). *See* TX 989 at 2.

65. In this filing, the Commissioner identified seven specific defects with NOLHGA's proposal, but noted that there were others, and that the seven that he had

identified provided "[a] general, but not exhaustive, discussion of the Conservator's rationale for rejecting the NOLHGA bid . . . ." TX 989 at 3. First, the Commissioner could not accept the structure of NOLHGA's bid, which did not impose the risk of loss in the value of the former ELIC assets on the insurance companies that were part of NOLHGA, but instead, imposed that risk on the former ELIC policyholders. As the Commissioner explained, "if there is too much risk for the insurers to be on the front line, then [I] will not place the policyholders there," and that he "cannot see any justification for asking policyholders to take risks that the insurance companies are unwilling to take." *Id.* at 5.

66. The second concern identified by the Commissioner involved the "Substantial Legal Issues" with NOLHGA's bid. TX 989 at 5. The Commissioner identified several specific legal problems with NOLHGA's bid, including: (a) the legal authority for NOLHGA and the guaranty associations to "assess funds to supply the sums necessary to support the agreement" (*id*. at 6); (b) "the liability of the individual members of the associations for such assessments" (*id*.); and (c) what the Commissioner described as a "clear" constitutional problem with NOLHGA's bid (*id.* at 9). Arthur Dummer – the Chairman of NOLHGA's ELIC Task Force and its chief negotiator – testified at the 2005 trial that many of these problems were in fact the same issues identified in the October 1991 statement of conditions placed on acceptance of the NOLHGA bid (*see* Mar. 29, 2005 Dummer Tr. at 132:16-132:23), and, as the Commissioner explained in his rejection, there had been "no satisfactory response to these issues" (TX 989 at 6).

67. Third, the Commissioner informed NOLHGA that another of his specified reasons for the rejection was that the assessment capacity of the guaranty associations was not sufficient to cover certain "worst case" scenarios in which the junk bonds declined in value. *Id*. at 9. Again, Mr. Dummer acknowledged during the 2005 trial that the Commissioner "wasn't satisfied that the credit facility covered" this potential shortfall. Mar. 29, 2005 Dummer Tr. at 135:18-135:21.

68. Fourth, the Commissioner was concerned that "The Guaranty Association Laws Can Change" making it "problematical" for NOLHGA to perform under its bid. TX 989 at 9-10. Fifth, the Commissioner identified "Contractual Infirmities" associated with NOLHGA's bid, classifying NOLHGA's proposal as an incomplete "term sheet," rather than a "definitive document" of the type required to move forward. *Id*. at 10. The Commissioner went on to identify "a number of major problems with" NOLHGA's proposed credit facility "which purports to provide up to $1B in funds." *Id*. at 11. Among these "major problems" was the fact that the $1 billion sum "is, in the view of the Conservator and his advisors insufficient to cover both the downside risk of the bond portfolio and the enhancement amounts." *Id*. Sixth, the Commissioner was concerned about a "Potential Impairment Of The Enhancement Agreement" if he selected NOLHGA's proposal. *Id*. at 14. Seventh, the Commissioner identified various "Economic Issues" presented by the NOLHGA proposal, including, as Mr. Dummer explained: (a) the potential loss of enhancements for policyholders in particular states if a guaranty association did not pay; (b) the reduction in the credit facility by any enhancement amounts paid by guaranty associations; and (c) the risk that policyholder claims would be subordinated to other repayment claims, such as fees and interest charges on the credit facility itself. *Id*. at 15; Mar. 29, 2005 Dummer Tr. at 140:16-141:25.

69. At the 2012 trial, several witnesses testified that the credit facility proposed by NOLHGA was, in fact, attempting to "double count" the billion dollars, by having it support both the junk bond portfolio and the guaranty associations' statutory commitments. *See, e.g.*, Oct. 19, 2012 (A.M.) Sutton Tr. at 48:9-49:3; Oct. 23, 2012 Fleming Tr. at 113:12-114:11; Oct. 24, 2012 Maisel Tr. at 126:2-126:22, 128:7-129:2. Under the terms of the proposed NOLHGA credit facility, any enhancement amounts paid by the guaranty associations would reduce dollar-for-dollar the amounts available to protect against further losses of the junk bond portfolio. TX 946 at ELIC 6299 099981; TX 4189 at C018484.

70. Overall, the Commissioner's summary analysis of some (but not all) of the problems with NOLHGA's bid represented a complete rejection of its plan for rehabilitating ELIC – including the underlying structure, legality, feasibility, security for policyholders, economic value, and overall desirability of the NOLHGA bid.

71. Finally, Mr. Dummer testified at the 2005 trial that NOLHGA was *unwilling* and *unable* to conform its bid to the structure required by the Commissioner. *See* Mar. 29, 2005 Dummer Tr. at 130:16-130:25.

3. Selection Of The Altus/MAAF Bid Over The Sierra Bid

72. "In 1991-1992 the Commissioner and his staff were intent on ridding the ELIC Estate of the bonds. In addition to not wanting to risk a further diminution in the value of the bonds, the Commissioner, an elected political officeholder, believed that the vast majority of policyholders wanted the ELIC Estate to be rid of those bonds." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *33 (¶ 21). Commissioner Garamendi himself testified before the Rehabilitation Court that "I personally met with literally hundreds of policyholders . . . . Their overwhelming desire is to avoid being forced to gamble on the junk-bond market." TX 1459 at 5.

73. On November 14, 1991, through a public auction process, the Commissioner selected the Altus/MAAF bid over the Sierra bid. *See* Court Ex. B at 4; TX 1147; TX 1145. Pursuant to the Altus/MAAF bid, the junk bonds would be sold to Altus in exchange for $3.25 billion in cash (and thus removed from the insurance company), and an additional $300 million would be provided as further capital for the rehabilitated insurance company. *See* TX 1145 at 2. In addition to being the only "bonds-out" bid, the Altus/MAAF bid raised its restructuring percentage to 90.1% so it contained a higher restructuring percentage than the NOLHGA bid (which had already been rejected) and the Sierra bid. TX 1071 at 1; TX 1104 at 4; Oct. 18, 2012 (A.M.) Baum Tr. at 65:11-65:14. The restructuring percentage of NOLHGA's final bid was 89%, and Sierra's restructuring percentage was 84%. TX 1104 at 4; Oct. 18, 2012 (A.M.) Baum Tr. at 65:11-65:14. Based on the restructuring percentages alone, the

Altus/MAAF bid offered $100 million more to policyholders than the NOLHGA bid and approximately $540 million (*i.e.*, $90 million per restructuring percentage point) in greater value to policyholders than the Sierra bid. *See* Oct. 18, 2012 (P.M.) Dummer Tr. at 101:24-102:15; July 19, 2005 Blaydon Tr. at 88:12-88:15. Because the Altus/MAAF bid had the highest restructuring percentage and removed the risk of the junk bonds from the rehabilitated insurance company, it provided the most security and best value to the policyholders. *See* Mar. 29, 2005 Dummer Tr. at 155:5-157:10; TX 1145 at 1; TX 2977 at 19-20; Oct. 18, 2012 (P.M.) Dummer Tr. at 102:10-102:18, 104:17-105:1; Oct. 22, 2012 Garamendi Tr. at 40:11-40:20, 121:14-122:12, 124:18-124:23; Oct. 25, 2012 James Tr. at 41:23-42:14.

74. NOLHGA withdrew its bid and supported the Altus/MAAF bid. Oct. 18, 2012 (P.M.) Dummer Tr. at 102:16-102:18. In a pleading filed with the Rehabilitation Court expressing its support for the Altus/MAAF bid, NOLHGA stated: "Altus has offered to pay a price within roughly ten percent of the market price, and any profit that Altus achieves may be considered a reasonable premium for the risk it will assume by its purchase of the bonds." TX 1288 at 4.

75. "On December 26, 1991, the Rehabilitation Court approved the Commissioner's selection of the Altus/MAAF bid (which was later amended). Ultimately, the California Court of Appeal upheld the Rehabilitation Court's determination, and the California Supreme Court denied a petition for review." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *31 (¶ 16). *See* Court Ex. B at 5, 10; TX 1342; TX 2977; TX 3030.

C. The Plan To Rehabilitate ELIC

1. The Rehabilitation Plan

76. The sale of ELIC's assets to Altus and the MAAF Group was embodied in a written contract, the Rehabilitation Plan. *See* TX 437; TX 1281. Pursuant to the Rehabilitation Plan, the junk bonds were to be sold to Altus in exchange for $3.25 billion. It is undisputed that the amount paid by Altus for the ELIC junk bonds

constituted the fair market value of the bonds. *See* TX 2353 at 32 n.24; Order Denying the CDR Defendants' Motion, dated Feb. 1, 2005 [ECF No. 2674] at 1; *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *32 (¶ 20). Further, under the Rehabilitation Plan, ELIC's insurance assets would be transferred to a new insurance company, which eventually was named Aurora National Life Assurance Company. *See* TX 437. In addition, the Plan provided that Aurora's stock would be held by a holding company, ultimately NCLH, the stock of which, in turn, would be owned by the MAAF Group. *See id.* The Rehabilitation Court ruled that the Altus/MAAF bid was "the highest and best bid received and reflected the fair value of the Transferred Bonds at the time of the sale" and that "the Modified Plan is fair and equitable." TX 2353 at 32 n.24 and 6. The Court of Appeal ruled that "the Altus bid provided significantly better return and less risk to the policyholders than the Sierra and NOLHGA bids." TX 2977 at 19-20.

2. Credit Lyonnais'/Altus' Role With Respect To The ELIC Rehabilitation

a. The DOI's First-Hand Knowledge Of Credit Lyonnais'/ Altus' Involvement With The Insurance Transaction

77. Credit Lyonnais was involved in many aspects of ELIC's rehabilitation, as was evident from the structure of the deal and from the Rehabilitation Plan itself. This involvement was encouraged and valued by Commissioner Garamendi. *See* Feb. 25, 2005 Cogut Tr. at 23:3-23:17, 29:13-29:16, 30:14-30:15.

78. The parties to the Rehabilitation Plan – the contract governing the sale of ELIC's junk bonds and insurance assets – were Altus (a wholly-owned subsidiary of Credit Lyonnais), the Commissioner, and a shell company named Holdco, which eventually became NCLH. *See* TX 437; TX 1281. Under the terms of the Rehabilitation Plan, Altus was contractually liable for Holdco's performance, making it jointly and severally liable for liquidated damages in the event that Holdco failed to perform. *See* TX 1281 at 18 § 1.51, 198-202 § 21.3.

79. Under the express terms of the Rehabilitation Plan, Credit Lyonnais was obligated to provide the entire financial backing for all aspects of the deal. Even before the first draft of the Rehabilitation Plan had been completed, the involvement of Credit Lyonnais as guarantor of the transaction was anticipated by the DOI. *See* TX 245 at ELIC6299 099974. The initial version of the Rehabilitation Plan expressly called for Credit Lyonnais to guarantee *both* the purchase of the bonds by Altus, *and* the purchase of the insurance company by the MAAF Group. *See* TX 437 at 159-60 § 21.2.

80. Credit Lyonnais' prominent role was reflected in the final version of the Rehabilitation Plan that was approved in 1991. Thus, under Section 21.1 of the Rehabilitation Plan, both Altus as the buyer of the bonds, and the MAAF Group, as the purchaser of the insurance company, were required to provide guaranties for their performance – guaranties with a combined value of *$3.55 billion*, that is, $3.25 billion to purchase the bonds and $300 million for the capitalization of the insurance company. *See* TX 1281 at 197 § 21.1. The Rehabilitation Plan expressly specified that *both* of these guaranties were to come from Credit Lyonnais. *See id*. at 197-98, § 21.2. Section 21.2 of the Rehabilitation Plan provided: "Each Funding Guaranty *shall be issued by Credit Lyonnais* in the form of an irrevocable letter of credit, guaranty of financial performance or a funding commitment letter. The Newco [MAAF Group] Funding Guaranty shall name Newco as the beneficiary, and the Buyer [Altus] Funding Guaranty shall name Buyer as the beneficiary." *Id.* (emphasis added).

81. It was the Commissioner who insisted upon the guaranties from Credit Lyonnais during the course of the negotiations of the Rehabilitation Plan. *See* Feb. 25, 2005 Cogut Tr. at 23:7-23:17, 29:13-29:16. Not only was Credit Lyonnais' guaranty of the $300 million capital infusion a required part of the deal, but Altus (a Credit Lyonnais subsidiary) agreed to fund $200 million of that amount through a loan to NCLH. *See* Feb. 23, 2005 Rubinstein Tr. at 33:4-33:7; TX 476 at 1; TX 2388. In

other words, between its purchase of the junk bonds and its $200 million loan to NCLH, Altus was putting up $3.45 billion of the $3.55 billion in cash.

82. On November 12, 1991, at the request of the Commissioner's counsel, Altus and the MAAF investors agreed to changes to the Rehabilitation Plan that required them to fund and close the bond sale and the insurance transaction "regardless of the application of any restrictions, prohibitions or limitations arising out of or relating to" the Bank Holding Company Act, and that "[a]ny failure to close as a result of the Banking Acts would be a default by the Holdco parties" under the Rehabilitation Plan. TX 1125 at ELIC6299 11207.

83. The involvement of Credit Lyonnais in the ELIC Rehabilitation was seen as a real strength by interested observers, like David Walsh, the Director of Insurance of the State of Alaska, who considered Credit Lyonnais' involvement to be a "sparkle point" to the deal. TX 3995 Walsh Tr. at 27:24-28:17, 29:25-30:25, 32:6-32:12, 33:14-34:3, 42:8-43:5. At the time, Mr. Walsh represented the State of Alaska at the ELIC task force meetings convened by the National Association of Insurance Commissioners ("NAIC"), the organization of insurance regulators from the 50 States. *See* TX 3995 Walsh Tr. at 32:13-32:24. Mr. Walsh testified: "[W]hat I looked for as a regulator was the financial strength of the entity or entities taking over responsibility for the obligations of policyholders, and Credit Lyonnais, like any large financial institution, brought to the table a level of business acumen and financial strength that would have added depth and breadth to any bid for rehabilitation." TX 3995 Walsh Tr. at 28:10-28:17.

84. "Credit Lyonnais's involvement in the insurance transaction continued after the sale of the junk bonds to Altus in March 1992. The DOI continued to seek extensions *from Credit Lyonnais* of the MAAF Group's $300 million funding guaranty until the formation of the new insurance company. Thus, that guaranty was extended on April 14, 1992, October 1, 1992, January 5, 1993, and March 1, 1993." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *34 (¶ 24) (emphasis added). *See* Feb.

25, 2005 Cogut Tr. at 30:14-30:15; Oct. 18, 2012 (A.M.) Baum Tr. at 94:3-94:15; TX 1056; TX 1389; TX 1658; TX 1809; TX 2010; TX 2067; TX 2096; *see also* TX 4020 Horodas Tr. at 194:21-211:10.

85. If the *portage* agreements had been disclosed, it would not have automatically resulted in disqualification of the Altus/MAAF bid. *See* 2012 Verdict Form [ECF No. 4301].

b. Credit Lyonnais' Involvement With The Insurance Transaction Was Publicly Reported

86. In the early 1990's, Altus' and Credit Lyonnais' involvement in the new insurance company was widely and repeatedly reported in the press. *See, e.g.*, TX 2707; TX 2788 at JG 001061; TX 2857 at JG 001820. "On March 14, 1994, *Forbes* magazine published a lead story entitled 'Smart Buyer, Dumb Seller,' which posed the following rhetorical question – '*How is it that Credit Lyonnais, the $335 billion (assets) bank that is 52% owned by the French government, came to control Aurora National Life Assurance Co., formerly Executive Life, a California insurance company?*'" *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *40 (¶ 33) (emphasis in original). *See* TX 2707 at AKIN036969.

87. "On March 18, 1994, Commissioner Garamendi wrote a seven-page, single-spaced letter to the Editor of *Forbes* disputing what he characterized as 'half-truths,' 'misleading statements' and 'outright falsehoods' in the *Forbes* article. The Commissioner boasted of the 'clear success' of the 1991 bidding process and the 'home run for policyholders' that resulted from it. He noted that 'The bid which ultimately prevailed [i.e., the Altus/MAAF bid] included over $3 billion in cash and a higher return for policyholders without the risk of continuing to hold the junk bonds.' In his letter the Commissioner did not even address, much less refute, the assertion that Credit Lyonnais was in control of the new insurance company." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *40-41 (¶ 34) (alteration in original). *See* TX 2722.

88. Similarly, on May 10, 1994, the *New York Times* published an article, a copy of which was retained in Commissioner Garamendi's personal files, which stated that "[t]he restructured insurance company is now controlled primarily by an affiliate of big French bank Credit Lyonnais." TX 2788 at JG 001061.

89. In the same vein, on July 4, 1994, the *Los Angeles Business Journal* published an article, a copy of which also was kept in Commissioner Garamendi's personal files, which stated that "[t]he 'restructured' Aurora operation is now controlled primarily by an affiliate of big French bank Credit Lyonnais." TX 2857 at JG 001820.

90. In addition, Lorraine Johnson, the DOI's lead regulatory lawyer overseeing the licensing of Aurora, received a phone call from a Credit Lyonnais employee who admitted that Credit Lyonnais owned the insurance company, Aurora. *See* Mar. 18, 2005 Johnson Tr. at 40:17-41:21, 120:1-120:16. "In a letter to Artemis's counsel dated May 26, 1994, Ms. Johnson stated that '[s]enior members of Credit Lyonnais' U.S. office have also publicly introduced themselves as representatives of the company that owns Executive Life Insurance Company.'" *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *40 (¶ 32) (alteration in original). *See* TX 2798; Mar. 18, 2005 Johnson Tr. at 120:17-123:5.

D. The DOI Requests That The Junk Bond Transaction Be Severed From The Insurance Transaction And The Rehabilitation Court Agrees

91. "Shortly after the Rehabilitation Court approved the Altus/MAAF bid in December 1991, third parties challenged various portions of that Plan (primarily portions involving the reorganization of ELIC's insurance liabilities). That led to additional litigation. The junk bond sale, however, was not the subject of the dispute." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *31 (¶ 17). *See* TX 4026; TX 2169 at 3-4.

92. "The Commissioner feared that the ELIC Estate's continued ownership of the junk bonds presented a risk that the value of the bonds would go down. He was intent on eliminating that risk, and so the DOI recommended to the Rehabilitation Court that the junk bond sale be severed from the insurance transaction that was the subject of the litigation. The Commissioner sought approval to sell the bonds even though the Department's regulatory review of the MAAF investors had not been concluded." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *31-32 (¶ 18). *See* Feb. 23, 2005 Rubinstein Tr. at 43:7-43:10; TX 1594; TX 1662.

93. As Mr. Garamendi admitted during the 2012 trial, Section 699.5 did not preclude Altus from purchasing the junk bonds. Oct. 22, 2012 Garamendi Tr. at 112:13-112:15.

94. "On February 18, 1992, the Rehabilitation Court granted the Commissioner's request and severed the junk bond transaction from the insurance transaction. The Court issued an order approving the transfer of the junk bond portfolio to Altus, separate and apart from the insurance business. [*See* TX 1502.] However, the Rehabilitation Court re-opened the bidding process to allow for new bids to compete with the Altus bid. No bidder willing to offer more money for the junk bonds than Altus had bid came forth." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *32 (¶ 19). *See* TX 2224 at 26-28; TX 2353 at 32.

95. "On March 3, 1992, Altus purchased the junk bonds for approximately $3.2 billion cash. That amount was paid to the Commissioner in his capacity as Conservator of the ELIC Estate. $3.2 billion was the fair market value for those bonds." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *32 (¶ 20). *See* Court Ex. B at 6; TX 2977 at 20, 22-23; Order Denying the CDR Defendants' Motion, dated Feb. 1, 2005 [ECF No. 2674] at 1. No higher or better bid for the ELIC junk bonds was ever received. *See* TX 2353 at 32 n.24.

96. The ELIC Estate invested the $3.25 billion received from Altus for the junk bonds in a balanced portfolio of U.S. Treasury notes, mortgage securities, and

safe corporate bonds. *See* July 19, 2005 Blaydon Tr. at 57:4-57:16. Between March 1992 and the closing of the insurance transaction in September 1993, these investments increased in value by approximately $455 million. *See* TX 4076; July 13, 2005 Roberson Tr. at 200:2-200:8.

E. The Rehabilitation Court's Denial Of The Motion To Rescind The Junk Bond Sale To Altus

97. Almost a full year after the bond sale closed and the junk bonds were transferred to Altus, a few of ELIC's largest policyholders – those who owned Municipal Guaranteed Investment Contracts ("Muni-GICs") – moved before the Rehabilitation Court to rescind the bond sale, claiming (among other things) that portions of the Altus/MAAF Rehabilitation Plan were "illegal." *See* TX 2124.

98. "On August 13, 1993, the Rehabilitation Court denied the Motion to Rescind and approved a Modified Plan of Rehabilitation. The Rehabilitation Court found, among other things, that the sale of ELIC's junk bonds had been severed from the transfer of ELIC's other assets. It ruled[:]

> The Court and all parties were aware that the Commissioner proposed to sever the bond sale from the insurance transaction, and that the severed junk bond sale would be final, regardless of whether the Plan was approved or consummated. The Court noted that if the insurance transaction did not close for any reason, including problems with the insurance transaction itself, Altus would retain the junk bonds and ELIC would have its cash equivalent, the $3.25 billion purchase price. In this way, the estate would be insulated from further fluctuations in the junk bond market."

Garamendi, 2005 U.S. Dist. LEXIS 39273, at *35 (¶ 25). *See* TX 2353 at 30-31.

99. The Rehabilitation Court also found that, as a simple matter of fairness, since Altus had taken the risk of further decline in the junk bond market, it was entitled to the profits it had made as a result:

> [T]here can be no dispute that Altus took the risk of declines in the junk bond market and received the right to retain any profits from those bonds. Certainly, if the value of the bonds had declined rather than increased, no one, including this Court, would seriously entertain an effort by Altus to rescind the sale on that basis. In a very real sense, the rescission motions reflect nothing more than an effort to speculate on the outcome of market forces, and, with the benefit of 20-20 hindsight, to take advantage of

> intervening developments. As the courts have long recognized, such a result would be unfair.

TX 2353 at 31.

100. In denying the rescission motion, the Rehabilitation Court also recognized that, in an effort to protect policyholders, the Commissioner had sold the bonds for a fair price and eliminated the risk of owning them:

> The evidence confirms that the irrevocable sale of the junk bonds met the express needs of both the Commissioner and Altus. The Commissioner sold very risky securities for a fair price, and avoided the market risk, regardless of the outcome of the insurance transaction. Altus accepted the risk that the value of the bonds might collapse. In exchange for taking the risk, Altus was entitled to whatever rewards its managerial skills, market and business acumen, ability to invest additional capital, and market forces might bring.

TX 2353 at 33.

101. As the Rehabilitation Court also acknowledged, Altus had paid fair value for the junk bonds, and no higher bidder for the bonds ever had come forward:

> The price Altus paid for the junk bonds was fair at the time of the bid and at the closing. Although the Court invited bidders for the junk bonds alone right up to the time it approved the sale in February 1992, no higher bidders came forth. Given the risk of holding the junk bonds, it cannot be said that selling them for a fair price was contrary to the public interest. It resulted in converting a highly risky portfolio into cash, which has since been prudently invested. The movants essentially ask the Court to redefine the public interest to enable them to take unfair advantage of changes in the market. The Court declines to do so.

TX 2353 at 36.

102. The importance of finality in court-authorized insurance sales, as in bankruptcy sales, was another public policy consideration on which the Rehabilitation Court based its decision to deny the rescission motion:

> Additionally, there is a strong public policy interest in according finality to court-authorized sales in insurance rehabilitation proceedings. That interest in finality would be sacrificed if the movants' argument were adopted. In fact, a lack of finality would chill sales of estate assets, as no one would bid for such assets if a sale could be undone months or even years later, simply because the asset in question had appreciated.

TX 2353 at 36-37.

103. At the time (in 1993), Commissioner Garamendi's lawyers also noted the equity and fairness of the deal in opposing the 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.

TX 2224 at 18 (emphasis added); *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." (emphasis added)); *id*. at 17 ("as 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" (emphasis added)).

104. The Rehabilitation Court's denial of the Motion to Rescind was affirmed on appeal. *See* TX 2977.

105. In Phase I of the 2005 trial, the Commissioner argued to the jury that he would have sought rescission in 1993 if Artemis had disclosed the *portage* agreements in its February 1993 submission to the DOI. *See* Apr. 18, 2005 Pl.'s Closing Arg. Tr. at 48:11-48:24. Similarly, In Phase II of the 2005 trial, in connection with the Commissioner's "lost rescission opportunity" theory of damages (*see supra* ¶¶ 23-24), the Commissioner pursued a theory of damages before the jury that the outcome of the Motion to Rescind in 1993 would have been different had the Commissioner known of the *portage* agreements at the time. Each time, the jury rejected the Commissioner's rescission theory. *See* Verdict Forms 1, 3, A.

F. The MAAF Group's Acquisition Of ELIC's Insurance Business

106. Before the closing of the insurance transaction in September 1993, the DOI was informed that the MAAF investors intended to be merely passive investors in Aurora. *See* TX 1569 at 3 n.2; Feb. 25, 2005 Cogut Tr. at 19:13-20:17.

107. The Commissioner was aware that the composition of the MAAF investor group continued to change from the time of the selection of the Altus/MAAF bid in 1991 up to the closing of the insurance transaction in September 1993. *See* TX 277; TX 283 at 2; TX 449 at 2; TX 1422 at 2; TX 1756 at 2. None of the companies initially proposed to the DOI as the investors for the insurance company in the first Altus bid was still a member of the investor group as of August 1992. *Compare* TX 277 and TX 1756 at 2. As Mr. Baum testified at the 2005 trial, he never took the time at any point to learn the names of the other members of the MAAF Group who invested in Aurora. *See* Mar. 31, 2005 Baum Tr. at 47:10-47:19.

108. By December 1992, the Commissioner was aware that Mr. Henin of Altus was having trouble holding the investor group together. *See* TX 1940.

109. "In February 1993, Artemis informed the DOI that some of the members of the MAAF Group intended to withdraw from the consortium of NCLH stockholders who were slated to own and operate Aurora and that it intended to buy those members' interests in Aurora. The DOI requested Artemis to defer purchase of those shares and instead let the sale and transfer of the insurance assets close with the original members of the MAAF Group still intact." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *37 (¶ 29). *See* Mar. 8, 2005 Harbaugh Tr. at 146:24-147:18; Feb. 22, 2005 Rubinstein Tr. at 159:20-160:2; Mar. 31, 2005 Baum Tr. at 105:24-106:11; Feb. 25, 2005 Cogut Tr. at 62:20-62:24, 66:14-66:25.

110. "The closing of the insurance transaction occurred on September 3, 1993. On that date, ELIC's insurance assets and liabilities were transferred to Aurora. Pursuant to the Stockholders Agreement submitted to the DOI and signed by the MAAF Group at the closing, Artemis was designated as a permitted transferee of NCLH shares and was given one year to acquire NCLH shares owned by the MAAF Group, subject to DOI approval." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *39 (¶ 31). *See* Court Ex. B at 8; TX 2410 at OG 000141, OG 000164.

III. Artemis Has Not Harmed, Or Received Any Benefit "At The Expense Of," The Commissioner Or The ELIC Estate

A. Artemis Acquired Nothing From The Commissioner Or The ELIC Estate

111. "Artemis was not formed until late 1992. It did not participate in the bidding process for the assets of ELIC, the negotiation of and Commissioner's approval of the Altus/MAAF bid or the execution of the *contrats de portage*. These events all occurred in 1991 and Artemis is not responsible for them." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *35-36 (¶ 26). *See* Mar. 2, 2005 Garamendi Tr. at 131:4-131:10, 132:15-132:20; Mar. 31, 2005 Baum Tr. at 19:1-19:3; Mar. 10, 2005 Barbizet Tr. at 132:25-134:24; Apr. 5, 2005 Pinault Tr. at 62:22-63:2; Oct. 23, 2012 Pinault Tr. at 62:13-62:15.

112. Artemis purchased nothing from the Commissioner or the ELIC Estate. *See* July 14, 2005 Garamendi Tr. at 104:12-104:22; Apr. 5, 2005 Pinault Tr. at 42:11-42:15; Mar. 10, 2005 Barbizet Tr. at 134:25-135:3. Rather, in December 1992, Artemis purchased from Altus approximately 21% (in terms of value) of the junk bonds Altus had acquired from ELIC nine months earlier. *See* Trial Stip. No. 1, ¶ 19; Apr. 6, 2005 Blaydon Tr. at 131:14-132:20.

113. It is undisputed that Artemis paid fair market value for the junk bonds, and that the price that Artemis paid for the portion of the Altus junk bond portfolio it obtained was determined by Ernst & Young, a large international accounting firm. *See* July 19, 2005 Blaydon Tr. at 23:12-24:5; TX 1927. Ernst & Young evaluated the portfolio on a bond-by-bond basis to determine the fair market value. *See* Apr. 6, 2005 Blaydon Tr. at 124:13-126:7; TX 1927. The junk bond purchase agreement was drafted by the Paris office of the New York-based law firm, Willkie, Farr & Gallagher. *See* Mar. 24, 2005 Lion Tr. at 75:1-75:5, 80:19-80:25; Mar. 10, 2005 Barbizet Tr. at 146:1-146:12. The purchase and sale of this portion of the Altus junk bond portfolio was an arms-length business transaction between Altus and Artemis that did not

require approval of the DOI or any other regulatory body, and, accordingly, no such approval ever was sought or obtained. *See* Apr. 6, 2005 Blaydon Tr. at 127:9-128:5; July 19, 2005 Blaydon Tr. at 24:10-24:22.

B. Artemis Earned Profits On The Portion Of The Junk Bond Portfolio That It Purchased From Altus Because It Took A Risk That Paid Off And It Actively Managed The Junk Bonds

114. The bonds that Artemis bought from Altus were the *riskiest* bonds from Altus' junk bond portfolio – *i.e.*, those most likely to default. *See* Apr. 7, 2005 Blaydon Tr. at 39:24-40:19; Apr. 1, 2005 Hannan Tr. at 110:21-111:23. Mr. Pinault was willing to take on the risk of these junk bonds because he is an entrepreneur, and he is in the business of taking risks. Oct. 23, 2012 Pinault Tr. at 64:24-65:6.

115. Successfully investing in junk bonds requires skilled, active management. Oct. 23, 2012 Blaydon Tr. at 226:4-226:9. Successful junk bond management also requires a willingness to invest additional money in junk bonds and the skills to know how to make a company valuable. Oct. 23, 2012 Blaydon Tr. at 227:2-230:2.

116. Mr. Pinault had the skills to successfully manage the junk bonds he purchased from Altus, and he put them to use in working with Apollo to manage the bonds. By the time Artemis purchased the junk bonds from Altus, Mr. Pinault had spent twenty years building a business turning around troubled companies. Oct. 23, 2012 Pinault Tr. at 65:22-66:21. In managing the bond portfolio, Mr. Pinault met regularly with Apollo, and he visited a number of the companies whose bonds he purchased. Oct. 23, 2012 Pinault Tr. at 67:21-68:13. He made judgment calls about the companies' management and the way the companies were run. Oct. 23, 2012 Pinault Tr. at 72:4-72:19.

117. Mr. Pinault put all of his assets at risk when he bought the junk bonds from Altus. Oct. 23, 2012 Pinault Tr. at 77:16-77:20. If the junk bonds had declined significantly in value, Mr. Pinault could have lost everything. Oct. 23, 2012 Pinault Tr. at 78:5-78:7. But because Mr. Pinault had the ability to successfully manage the

junk bonds and because he was willing to take the risk – a risk that paid off – Artemis earned profits on the junk bonds it purchased from Altus. None of the profits Artemis earned on the junk bonds it bought from Altus were earned at the expense of the Commissioner or the ELIC Estate.

C. Artemis Sought And Obtained The Approval Of The DOI Before Purchasing Shares Of NCLH

118. Neither Francois Pinault nor Artemis was a party to the *portage* agreements involving shares of NCLH. *See* Feb. 23, 2005 Rubinstein Tr. at 15:6-15:20; Mar. 31, 2005 Baum Tr. at 20:21-21:12; *see also Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *35-36 (¶ 26). The parties have stipulated that *portage* agreements "do not necessarily violate French law and are not uncommon in France." Trial Stip. No. 1, ¶ 7.

119. In 1994, Artemis made regulatory filings and received regulatory approval from the DOI to buy 50% of NCLH, Aurora's holding company, from certain members of the MAAF Group. *See* Trial Stip. No. 1, ¶ 22; Court Ex. B at 9; TX 2726; TX 2755; TX 2787; TX 2824; TX 2840; TX 2884. Artemis increased that stake to 67% in 1995, after it sought and received permission from the DOI to acquire the additional 17% interest still held by MAAF. *See* Trial Stip. No. 1, ¶ 23; Court Ex. B at 10; TX 3074; TX 3079; TX 3085; TX 3086.

120. In its regulatory filings in connection with the acquisition of an interest in Aurora, Artemis disclosed to the DOI that Altus and Credit Lyonnais owned minority interests in Artemis, and Artemis' parent company, respectively. *See* TX 2755 at AKIN 009945. Artemis also disclosed that, in December 1992, it had purchased approximately $2 billion worth of junk bonds from Altus, and revealed that more than $2.5 billion in financing or credit lines had been made available to Artemis and its affiliates by Credit Lyonnais. *See* TX 2755 at AKIN 009848, AKIN 009942.

121. Based upon the disclosures Artemis made, the DOI treated Artemis, for legal and analytical purposes, as if it were controlled by Credit Lyonnais, even though

Credit Lyonnais had never owned, directly or indirectly, more than a 25% minority interest in Artemis or its parent. In February 1993, Lorraine Johnson, the DOI regulator responsible for approving Artemis' applications, characterized Artemis as the "Pinault/Altus investor" with "substantial indirect French government ownership interests." TX 2051 at 3. "[I]n May 1994, Lorraine Johnson, the key DOI staffer responsible for assuring compliance with the applicable Insurance Code provisions and DOI regulations (including Insurance Code § 699.5), wrote that 'even when looking at [Artemis's] initial proposal to acquire 16%, this proposal by Credit Lyonnais and Mr. Pinault cannot be viewed as a simple investment with little-to-no probability of French governmental control and influence.' [TX 2797 at 3.] In 1995, Ms. Johnson advised her superiors that she viewed 'the Artemis acquisition as primary [sic] an acquisition by Credit Lyonnaise [sic]/French gov.' [TX 3070 at 2.]" *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *39-40 (¶ 32).

122. Notwithstanding its perception that Artemis had substantial French Government control, the DOI did not reject Artemis as an investor in Aurora. Instead, the DOI required the use of a voting trust to "provide a barrier with regard to concerns as to governmental influence" from Credit Lyonnais. TX 2051 at 2. Chief Deputy Baum testified at the 2012 trial that if Lorraine Johnson "approved a voting trust, then the conclusion that she would have drawn and I would have accepted is that there was no control." Oct. 18, 2012 (A.M.) Baum Tr. at 102:17-102:23.

123. Throughout Aurora's existence, *no* influence or control has been exercised over the company by Altus, Credit Lyonnais, or the French Government. *See*, *e.g.*, Feb. 24, 2005 Cogut Tr. at 168:8-168:16; Feb. 25, 2005 Cogut Tr. at 68:20-69:21; Mar. 22, 2005 Johnson Tr. at 51:16-51:25; TX 4009 Clark Tr. at 314:14-316:2; Apr. 12, 2005 Turner Tr. at 47:17-48:8; Feb. 25, 2005 Hartigan Tr. at 185:20-186:11; Mar. 1, 2005 Hartigan Tr. at 56:6-59:25; Mar. 11, 2005 Barbizet Tr. at 43:1-43:13.

D. The Law Firms Engaged By Artemis For Advice Were Aware Of The *Portage* Agreements

124. In 1994, before Artemis purchased any interest in Aurora, Artemis sought advice concerning the NCLH/Aurora transaction from Sydney ("Terry") Cone, a U.S. partner at Cleary Gottlieb Steen & Hamilton LLP specializing in corporate law, who was resident in the Paris office at the time. *See* TX 3932 Cone Tr. at 19:17-20:2; Mar. 10, 2005 Barbizet Tr. at 159:25-160:5. In an April 29, 1994 memorandum to Artemis, Mr. Cone observed that any acquisition of NCLH would require the approval of the California DOI, and that the deadline for Artemis to acquire shares of NCLH was September 3, 1994, when Artemis' option (as a "permitted transferee" under the NCLH Stockholders' Agreement) would expire. TX 2773 at ART-G 00351-00352. Mr. Cone noted that "[s]hould the option expire unexercised, the four current holders of the 67%, *who are in effect nominees of Altus, will have the right to put the shares back to Altus*." *Id.* at ART-G 00352 (emphasis added). Mr. Cone thus understood the principal provisions of the *portage* agreements.

125. After drafting this memorandum, Mr. Cone reviewed the Form A application submitted to the DOI on behalf of Artemis. *See* TX 3713 at 2. After reviewing that application, Mr. Cone never advised Artemis that the *portage* agreements were illegal or improper. *See* TX 3932 Cone Tr. at 245:6-245:23. In fact, Mr. Cone testified that he never thought that there was anything improper or illegal about Artemis having an option to acquire 67% of Aurora (*see id.* at 215:17-215:23) or that there was anything improper or illegal about the MAAF Group, as nominees for Altus, having the right to put their NCLH shares back to Altus. *See id.* at 217:3-217:8.

126. Each of the law firms Artemis relied upon for advice about its acquisition of an interest in Aurora had specific references to the *portage* arrangement documented in its files. For example, Morgan, Lewis & Bockius LLP was told by SDI Vendome (one of the members of the MAAF Group) on February 7, 1994 that it was about to "exchange contracts" *with Altus* in connection with the sale of its shares in

NCLH to Artemis. TX 2661 at CDR 00016585; *see also* Apr. 12, 2005 Allan Tr. at 12:5-12:15. Similarly, documents in Akin Gump Strauss Hauer & Feld LLP's files referred to agreements between Altus and members of the MAAF Group. *See* TX 2673. LeBoeuf, Lamb, Greene & MacRae LLP also had documents in its files referring to agreements between Altus and members of the MAAF Group, as well as documents expressly referencing *portage* commissions. *See* TX 2674; TX 2627 at 2, 4.

E. Throughout The Time That Artemis Owned A Majority Interest In Aurora, Aurora Met All Of Its Obligations To The Policyholders

127. Artemis' ultimate acquisition of 67% of Aurora beginning in 1994 and thereafter did not harm the policyholders in any way. ELIC's insurance business had already been sold to the MAAF Group in 1993, pursuant to the Rehabilitation Plan. In addition, Aurora – of which Artemis ultimately came to own a majority interest – met all policyholder obligations, and ran a successful, well-managed company. *See* Feb. 25, 2005 Cogut Tr. at 70:18-71:1; Apr. 12, 2005 Turner Tr. at 43:10-43:14, 43:25-44:8; July 12, 2005 Dummer Tr. at 169:6-169:8.

128. As Gilles Erulin, an Artemis-appointed member of the Aurora board of directors who served on the board from 1996 to August 2012, explained, managing an insurance company like Aurora, in a run-off situation, is difficult. Oct. 23, 2012 Erulin Tr. at 197:13-197:19, 198:21-200:6. The Aurora board of directors made a number of strategic decisions about how the company should be run and what types of investments it should and should not make to ensure that the company would have sufficient assets to pay policyholder claims. *Id*. at 200:7-201:13, 207:14-210:5.

129. Christopher Maisel, the Special Deputy Insurance Commissioner for Executive Life, testified at the 2012 trial that Aurora made all of the payments it was required to make under the Rehabilitation Plan. Oct. 24, 2012 Maisel Tr. at 176:12-176:14.

130. Between 1993 and 2003, Aurora paid over $4.6 billion in benefits to policyholders from its own resources. *See* Oct. 25, 2012 James Tr. at 23:12-24:11. The total amount of benefits paid to policyholders through 2003 (including amounts NOLHGA was statutorily obligated to contribute) was $6.561 billion. *See id*.

131. "Under Artemis's ownership and control, Aurora has fulfilled its obligations under the Rehabilitation Plan, and policyholders have not been injured by the conduct of Artemis and NCLH in managing Aurora." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *42 (¶ 39). "Artemis consistently operated Aurora in a lawful and businesslike manner." *Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *49 (¶ 13). Throughout the eighteen years of Artemis' ownership of Aurora, the Commissioner continued to receive the benefits for which he bargained. *See* Feb. 25, 2005 Hartigan Tr. at 190:3-190:11; Apr. 12, 2005 Turner Tr. at 35:5-35:17.

132. Artemis was the majority owner of Aurora from August 1994 to August 2012. The DOI never sought to remove Artemis as majority owner of Aurora – not after learning about the *portage* agreements in 1998, not after suing Artemis in 2000, and not after the first jury found in 2005 that Artemis joined a conspiracy. *See* Oct. 23, 2012 Erulin Tr. at 197:13-197:19.

IV. The ELIC Rehabilitation Was A Success

133. In a press release announcing his selection of the Altus/MAAF bid on November 14, 1991, Commissioner Garamendi stated: "the Aurora proposal satisfies the conditions I established for rehabilitating Executive Life, provides the needed security by removing the junk bonds from the company, and is superior since it delivers more money to policyholders. . . . The competitive bidding process has yielded an outstanding outcome for policyholders." TX 1145 at 1.

134. The Rehabilitation Court determined that the Altus/MAAF bid was "the highest and best bid received and reflected the fair value of the [junk bonds] at the time of the sale." TX 2353 at 32 n.24.

135. The Rehabilitation Court also 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." TX 2353 at 6.

136. The California Court of Appeal ruled that "the Altus bid provided significantly better return and less risk to the policyholders than the Sierra or NOLHGA bids." TX 2977 at 19-20.

137. Even the President of NOLHGA, in a statement following the Rehabilitation Court's approval of the Altus/MAAF bid, stated: "We are pleased that Judge Lewin has selected the Altus bid for the rehabilitation of Executive Life Insurance Company. The approval of this bid, supported by the guarantees and commitment of the state guaranty associations, provides policyholders with the maximum possible value and financial security." TX 1344.

138. When Commissioner Garamendi announced the closing of the insurance company transaction on September 3, 1993, he described the new insurance company, Aurora, as "one of the best capitalized insurers in the nation." TX 2386 at ELIC6299 102998.

139. In his letter to the Editor of *Forbes* on March 18, 1994, Commissioner Garamendi classified the ELIC Rehabilitation as a "*home run for policyholders*" (TX 2722 at 3 (emphasis added)) and took issue with the critique of the rehabilitation that had appeared in *Forbes*, pointing out, for example, that:

a. "92 % of the policyholders of Executive Life will receive a full and complete recovery, an outcome most people never dreamed possible when the company was first found to be insolvent back in 1991." *Id*. at 1 (emphasis in original).

b. "Overall, [*Forbes*] termed the junk bond market 'a dangerous place, full of unexploded bombs and swarming with predators.' Yet now, with an amazingly cavalier attitude toward your own earlier, prudent advice, [*Forbes*] propose[s] that this dangerous place full

of bombs and predators is exactly where I should have left the unfortunate policyholders of Executive Life." *Id*. at 4.

c. "Policyholders knew that by selling the junk bonds for cash they were giving up any potential up-side, but were understandably unwilling to run the down-side risks entailed in holding them." *Id*. at 5.

d. "*Policyholders* rightly perceived the risk of continuing to hold such an asset, and *with near unanimity urged sale of the entire junk portfolio*." *Id*. (emphases added).

e. "Given these choices, *it would have been irresponsible for me*, as Conservator of an estate with over 60% of its assets in junk, *to in effect 'double-down' and allow policyholders to become even more entangled in the junk market*, especially when the potential returns were so speculative and the market so volatile." *Id*. at 5-6 (emphases added).

f. "[A]s Conservator of Executive Life, *I had no right to gamble policyholder's money on the future direction of speculative markets* let alone stake nearly all of it on any one, highly risky asset like junk bonds." *Id*. at 7 (emphasis added).

g. "Our decision to sell the junk bond portfolio helped provide a solid and certain recovery for Executive Life policyholders, without the huge risk involved in retaining the junk." *Id*.

h. "*At the time this was, unquestionably, the only responsible choice a prudent fiduciary could make*, and, given the same circumstances, is one we would make again." *Id*. (emphasis added).

140. As Christopher Maisel, the Special Deputy Insurance Commissioner for Executive Life and one of the lead DOI negotiators in connection with the ELIC Rehabilitation, explained: "[W]e have executed a plan that ensures that 92 percent of

ELIC's policyholders will receive full and complete recovery within the construct of a new, viable free-standing and well-capitalized insurance company. Such a result is far better than anyone predicted in 1991." TX 4008 Maisel Tr. at 86:4-86:10.

141. Even Commissioner Garamendi's successor and political rival, Commissioner Quackenbush, acknowledged how successful the rehabilitation of ELIC was, stating: "Given the condition of this company when it collapsed, this is far better than anyone thought possible." TX 3178 at 1. As Commissioner Quackenbush explained, "the vast majority of policyholders . . . will receive 100% of their account value" and the remainder "will receive approximately 92.5% of their account value." *Id*.

V. In Addition To Continuing To Receive Benefits Under The Rehabilitation Plan, The Commissioner Also Reaffirmed The Plan After He Became Aware Of The *Portage* Agreements

142. It is undisputed that the Commissioner had reason to suspect the existence of the claims he has asserted in this action no later than June of 1998 when the Commissioner's senior staff was told about *portage* agreements between Altus and members of the MAAF Group. *See Garamendi v. SDI Vendome S.A.*, 276 F. Supp. 2d 1030, 1035, 1042 (C.D. Cal. 2003). In February 1999, the Commissioner filed his initial complaint in this action. In addition, Judge Matz ruled in a related matter that the Commissioner had *actual knowledge* of his claims by July 15, 1999, at the latest, when he received a production of documents from Artemis. *See id*. at 1043.

143. The Rehabilitation Plan remains in existence today as an operative contract, and the Commissioner and the ELIC Estate continue to retain all of the benefits under that contract. *See* TX 4065 LeVine Tr. at 424:23-425:1.

144. In September, October, and December 1999 (while Artemis owned a majority interest in Aurora), the Commissioner reaffirmed the Rehabilitation Plan by both invoking and amending certain of its provisions. *See* TX 4007 LeVine Tr. at 408:1-408:6, 416:1-416:15; TX 3515; TX 3522; TX 3530. For example, in a

September 1, 1999 letter agreement, the Commissioner expressly stated that he (and the other parties to the Plan) were making "modifications to the Rehabilitation Plan." TX 3515 at 1. Pursuant to that letter agreement, the Commissioner required, among other things, that Aurora make certain payments due to policyholders "in accordance with Article 9 of the Rehabilitation Agreement," and pay interest on certain funds "as provided in the Rehabilitation Agreement." TX 3515 at 3. That letter agreement also included detailed amendments to the Rehabilitation Plan. *See* TX 3515.

145. In addition, in an October 14, 1999 letter agreement, the Commissioner further amended Section 1.128 of the Rehabilitation Plan. *See* TX 3522. Then, by letter dated December 23, 1999, the Commissioner specifically invoked the provisions of Section 9.2.6 of the Rehabilitation Plan to require Aurora to participate in an "Accounting Procedure" because of a dispute over the amount of profit participation to be paid to the former policyholders of ELIC. TX 3530.

CONCLUSIONS OF LAW

I. California Law Does Not Recognize A Stand-Alone "Claim" For Unjust Enrichment

146. "Under California law, 'there is no cause of action for unjust enrichment.'" *Gearing v. China Agritech, Inc.*, No. 12-05039-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, 1489, 49 Cal. Rptr. 3d 227 (2006)); *see also Smith v. Ford Motor Co.*, 462 F. App'x 660, 665 (9th Cir. 2011) (unjust enrichment "is not an independent cause of action in California"); *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.'") (quoting *McKell*, 142 Cal. App. 4th at 1489); *Bosinger v. Belden CDT, Inc.*, 358 F. App'x 812, 815 (9th Cir. 2009) (same).[5]

---

[5] Instead, unjust enrichment "is a general principle underlying various doctrines and remedies, including quasi-contract." *Jogani v. Superior Court*, 165 Cal. App. 4th 901, 911, 81 Cal. Rptr. 3d 503 (2008). But as discussed *infra*, this

[Footnote continued on next page]

147. While the theory of unjust enrichment may be used to seek restitution of a benefit procured by fraud, in such a case, a plaintiff's entitlement to restitution rises and falls with its substantive tort claim. *Levine v. Blue Shield of California*, 189 Cal. App. 4th 1117, 1138, 117 Cal. Rptr. 3d 262 (2010) ("[W]e have concluded that the trial court properly sustained Blue Shield's demurrer to the Levines' claims for fraudulent concealment, negligent misrepresentation, and unfair competition . . . [t]he Levines thus have not demonstrated any basis on which they would be entitled to restitution pursuant to a theory of unjust enrichment."); *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 517 (7th Cir. 2011) ("[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.").

148. Because the Commissioner did not prevail on any of his underlying claims, he is not entitled to restitution from Artemis.

II. The Juries' Verdicts Bind This Court And Foreclose Any Award Of Restitution

A. The Court Is Bound By The Juries' Factual Findings In Its Completed Verdicts

149. Long established precedent provides that a court sitting in equity may not overrule a jury's determination. *See, e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 507, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959).

150. The Seventh Amendment requires courts sitting in equity to follow the jury's implicit or explicit factual findings:

[Footnote continued from previous page]
quasi-contractual remedy is not available where (as here) there is a binding agreement defining the parties' rights.

> 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) (internal quotation marks and citations omitted); *see also L.A. Police Prot. League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993) (same). Thus, it is well established in this Circuit that when a jury rejects a plaintiff's theory, a court may not award restitution based on the same facts that the jury considered and rejected.

151. This Court may not contravene the juries' explicit or implicit findings in ruling on the Commissioner's equitable claim. *Ag Servs. of Am. v. Nielsen*, 231 F.3d 726, 733 (10th Cir. 2000) (reversing restitution award because it contravened the jury's implicit findings in rejecting plaintiff's fraud claims); *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) (holding 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").

152. Thus, the Court is bound by the juries' determinations in (a) Verdict Forms 1 and 3 (from the 2005 trial) that nothing that Artemis said or concealed was a substantial factor in causing any harm to the Commissioner or the ELIC Estate, (b) Verdict Form A (from the 2005 trial) that, while Artemis joined a conspiracy to conceal the *portage* agreements from the Commissioner, that scheme caused no actual damages to the Commissioner or the ELIC Estate, and (c) the 2012 Verdict Form that, even if the *portage* agreements had been disclosed, the Commissioner would not have disqualified the Altus/MAAF bid and picked the NOLHGA bid.

B. The Court Is Not Bound By The First Jury's Subsidiary Findings Not Necessary To The Verdicts Returned

153. While the first jury found some elements of the Commissioner's misrepresentation and concealment claims, those individual findings were not determinative of the fraud claims and the Ninth Circuit confirmed that Artemis had "no legal liability" for any alleged misrepresentation or concealment. *See Altus*, 540 F.3d at 1003. As a result, those intermediate findings do not have any binding effect on the Court's determination of the equitable claims. *See, e.g., Ag Servs.*, 231 F.3d at 734 (district court judge bound by the principles of issue preclusion in determining the equitable claims).

154. Notwithstanding the answers to individual questions which the first jury returned on Verdict Forms 1 and 3, issue preclusion provides that only those findings "necessarily decided" are determinative and binding on the Court. *See Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000); *United States v. Good Samaritan Church*, 29 F.3d 487, 488-89 (9th Cir. 1994) (adverse finding made by the district court against party that prevailed could not have been necessary to the court's prior judgment, and thus was not entitled to preclusive effect in subsequent litigation); *Floyd v. Laws*, 929 F.2d 1390, 1397-99 (9th Cir. 1991) (jury's findings that are "surplusage" "must be disregarded").

155. In considering the extent of issue preclusion, the Ninth Circuit has held, "relitigation of an issue presented and decided in a prior case is *not* foreclosed if the decision of the issue was *not necessary to the judgment reached* in the prior litigation." *Segal v. AT&T*, 606 F.2d 842, 845 n.2 (9th Cir. 1979) (emphasis added); *see also Fireman's Fund Ins. Co. v. Int'l Market Place*, 773 F.2d 1068, 1069 (9th Cir. 1985) ("A determination adverse to the winning party does not have preclusive effect."); *Balcom v. Lynn Ladder & Scaffolding Co.*, 806 F.2d 1127, 1127 (1st Cir. 1986) (concluding that jury's special verdict finding "has no collateral estoppel effect, for it was not essential to the favorable judgment").

156. Here, the jury's answers to the individual questions on misrepresentation and concealment within the 2005 verdict forms were not necessary to the ultimate conclusion that the jury reached in finding that Artemis was not liable for fraud. The Court is therefore guided (consistent with the principles articulated above) by the juries' ultimate findings on all of the verdict forms; namely, the fact that Artemis was not liable for fraud, the fact that any scheme that Artemis joined caused zero damages to the Commissioner or the ELIC Estate, and the fact that if the *portage* agreements had been disclosed, the Commissioner would not have disqualified the Altus/MAAF bid and picked the NOLHGA bid.

C. The Court Is Not Bound By The First Jury's Finding As To Punitive Damages In Verdict Form B

157. Similarly, in evaluating the Commissioner's equitable claims, it would be improper to consider the first jury's invalidated attempt to award $700 million in punitive damages. 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.'" *United States 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.

158. As the Ninth Circuit ruled, because the first jury found no actual damages, there was no basis for the jury to award punitive damages. *Altus*, 540 F.3d at 1001, 1004. Accordingly, its findings on the punitive damages form were surplusage, and thus, not necessary to its verdict. As such, these findings must be disregarded, and can have no binding legal effect in this action or in any subsequent action. *See, e.g.*, *Floyd*, 929 F.2d at 1399-1400 (disregarding as surplusage a jury's award of damages, following a "no" response to question regarding *whether* plaintiff had been damaged).

III. The Commissioner Cannot Establish The Required Elements For A Restitution Award

159. In addition to proving an underlying cause of action, to obtain the equitable remedy of restitution, plaintiff must establish (a) the receipt of a benefit, (b) at the expense of another, and (c) that retention of the property at issue is "unjust" or inequitable. *Ghirardo v. Antonioli*, 14 Cal. 4th 39, 51, 57 Cal. Rptr. 2d 687 (1996). Even when a person has received a benefit from another, he is required to make restitution "'only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.'" *Id*. (citation omitted).

A. The Commissioner Has Not Directly Conferred A Benefit On Artemis

160. To be entitled to the equitable remedy of restitution, a plaintiff must prove that he has "directly conferred a benefit upon [the] defendant[]." *See City & County of San Francisco v. Philip Morris*, 957 F. Supp. 1130, 1144-45 (N.D. Cal. 1997).

161. There is no "benefit" conferred when the plaintiff obtains fair market value in the transaction as to which he claims "unjust enrichment." *See Rheem Mfg. Co. v. United States*, 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").

162. The Commissioner and the ELIC Estate did not "directly confer" a benefit upon Artemis because: (a) Artemis did not obtain any portion of the junk bond portfolio or any interest in the insurance company from either the Commissioner or the ELIC Estate; and (b) the Commissioner and the ELIC Estate received full and fair value for the junk bonds and the assets of the insurance company which they transferred pursuant to the Rehabilitation Plan.

B. Artemis Was Not Enriched "At the Expense" Of The Commissioner Or The ELIC Estate

163. Artemis was not enriched "at the expense" of the Commissioner or the ELIC Estate because:

a. Artemis did not engage in any transaction concerning the junk bonds or the assets of the new insurance company with either the Commissioner or the ELIC Estate;

b. The Commissioner and the ELIC Estate received fair value for the junk bonds they sold to Altus and the other insurance company assets that they transferred to the MAAF Group;

c. The 2005 jury found that neither the Commissioner nor the ELIC Estate suffered any damages as the result of anything that Artemis did or failed to do; and

d. Two unanimous juries have now found that the Commissioner "lost" nothing and suffered no compensable harm or damages. These verdicts thus reflect the conclusive determination that nothing is (or was) being held by anyone "at the expense of" the Commissioner or the ELIC Estate.

C. It Is Not "Unjust" For Artemis To Retain The Profits It Earned On The Junk Bonds And Through Operation Of The Insurance Company

164. As noted previously, under California law, "[e]ven where a person has received a benefit from another, he is required to make restitution 'only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.'" *Ghirardo*, 14 Cal. 4th at 51 (citation omitted).

165. "'[W]here the plaintiff acts in performance of his own duty or in protection or improvement of his own property, any incidental benefit conferred on the defendant is not unjust enrichment.'" *California Med. Assoc. v. Aetna U.S. Healthcare*

of Cal., Inc., 94 Cal. App. 4th 151, 174, 114 Cal. Rptr. 2d 109 (2001) (quoting 1 Witkin, Summary of California Law, Contracts § 97 (9th ed. 1987)); *see also Dinosaur Dev. v. White*, 216 Cal. App. 3d 1310, 1315, 265 Cal. Rptr. 525 (1989).

166. A plaintiff is "not entitled to restitution" where he "received the benefit of the bargain." *Peterson v. Cellco P'Ship*, 164 Cal. App. 4th 1583, 1596, 80 Cal. Rptr. 3d 316 (2008).

167. Moreover, where an award of restitution is sought under the theory of unjust enrichment, and the compensation sought is based upon the increased value of the property involved, there must be an offset for the detriment to the defendant resulting from having had its money tied up during the course of the transaction. *Legny Dev. Co. v. Kendall*, 164 Cal. App. 3d 1010, 1022, 210 Cal. Rptr. 890 (1965).

168. In light of these principles, it is not "unjust" for Artemis to retain the profits derived from its investment in the junk bonds it purchased from Altus and from its investment in and operation of the insurance company for the following reasons:

a. The jury found that nothing that Artemis did or failed to do caused any monetary harm to the Commissioner or to the ELIC Estate;

b. Artemis purchased nothing from the Commissioner or the ELIC Estate;

c. Artemis paid the fair market price for the bonds it purchased from Altus, and the interests in NCLH and Aurora it obtained from the MAAF Group;

d. As a majority owner of NCLH and Aurora, Artemis has discharged its obligations fully, in accordance with the Rehabilitation Plan proposed by the Commissioner, and adopted by the Rehabilitation Court;

e. After the 2005 trial, the Court found that on Artemis' watch, Aurora fulfilled its obligations under the Rehabilitation Plan and policyholders were not injured by Artemis' conduct in managing

Aurora, and it found no fault with the way in which Artemis operated Aurora;

f. The Commissioner and the ELIC Estate received fair value for the bonds they sold to Altus, and the other insurance company assets that they transferred to the MAAF Group;

g. Judge Lewin expressly found that the Rehabilitation Plan, including the price paid for the junk bonds and the treatment of the insurance policies, was "fair and equitable";

h. In selling the risky junk bonds to Altus, and transferring the other insurance assets of the ELIC Estate to the MAAF Group, the Commissioner was acting, appropriately, in the discharge of his own fiduciary duties to the former policyholders of ELIC and the ELIC Estate, and to protect the property of the ELIC Estate;

i. The Commissioner, in seeking restitution, has not returned or offered to return the benefits that he and the ELIC Estate have received under the Executive Life Rehabilitation Plan; and

j. Artemis, like Altus, assumed the risk of further declines in the junk bond market, and is entitled to retain the profits it realized as a result of taking that risk.

D. The Commissioner Has Not Established Either Fraud Or Conspiracy As A Predicate To Equitable Relief

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

170. Before the 2005 trial, the Commissioner obligated himself to prove fraud in order to prevail under an unjust enrichment theory. Pursuant to the Final Pretrial Conference Order, which is the governing pleading in this case (*see Patterson v. Hughes Aircraft Co.*, 11 F.3d 948, 950 (9th Cir. 1993) (*per curiam*)), he expressly alleged that although "unjust enrichment may be found for wrongdoing that does not necessarily rise to the level of fraud or misrepresentation[,] . . . the Commissioner claims unjust enrichment *based on grounds of defendants' fraud and negligent misrepresentations*." Revised Final Pretrial Conference Order, dated February 11, 2005, at 32-35 & n.20 (emphasis added).

171. The Commissioner has not proven these fraud claims. First, he abandoned his negligent misrepresentation claim during the 2005 trial, and the Court dismissed that claim with prejudice. *See* Apr. 12, 2005 Tr. at 5:13-6:1. Second, the 2005 jury expressly found that nothing Artemis represented, nor its concealment of any material fact, was a substantial factor in causing harm to the Commissioner or to the ELIC Estate. Verdict Forms 1, 3. As a result, the Commissioner failed to prove a claim of fraudulent misrepresentation or concealment against Artemis. *See Altus*, 540 F.3d at 1003 ("As a result [of the jury's failure to find any harm caused by the alleged fraud], Artemis had no legal liability for its own misrepresentation or concealment.").

172. Because the Commissioner failed to prove fraud by Artemis, he is not entitled to prevail on his "claim" of unjust enrichment. "It is well settled that where claims at law and in equity are joined and the legal claims are tried separately by a jury, the jury's verdict operates as a finding of fact binding on the trial court in its determination of the equitable claims." *Dybczak v. Tuskegee Inst.*, 737 F.2d 1524, 1526-27 (11th Cir. 1984); *see also GTE Sylvania Inc. v. Cont. 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. We therefore rely upon the findings of the jury if they appear to be inconsistent with findings of the trial judge."), *aff'd*, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (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).

173. The Commissioner never linked his theory of unjust enrichment to conspiracy. But even if he had, the juries' refusal to award any damages on that claim would preclude unjust enrichment, and the jury's conspiracy finding in the liability phase of the 2005 trial is insufficient to support an equitable award. Both juries specifically found that neither the Commissioner nor the ELIC Estate suffered any actual damage resulting from the conspiracy, and "[a] conspiracy which does not result in actual damages is not actionable." *Shiba v. Chikuda*, 214 Cal. 786, 789, 7 P.2d 1011 (1932); *see also Harrell v. 20th Cent. 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.'") (citation 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 not *per se* give rise to a cause of action unless a civil wrong has been committed resulting in damage.'") (quoting *Doctors' Co. v. Superior Court*, 49 Cal. 3d 39, 44, 260 Cal. Rptr. 183, 185 (1989)); *Okun v. Superior Court*, 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. Though conspiracy may render additional parties liable for the wrong, the conspiracy itself is not actionable without a wrong."); *Unruh v. Truck Ins. Exch.*, 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815 (1972) ("The gist of an action charging civil conspiracy is not the conspiracy *but the damages suffered*. A civil conspiracy, however atrocious, does not per se give rise to a cause of action unless a civil wrong has been committed *resulting in damage*.") (citation omitted), *superseded by statute on other grounds as stated in Gomes v. Michaels Stores, Inc.*, No. S-06-1921, 2006 U.S. Dist. LEXIS 86307, at *8 n.3 (E.D. Cal. Nov. 15, 2006).

174. For all of these reasons, the Commissioner is not entitled to the equitable remedy of restitution.

IV. The Commissioner Had – And Pursued – An Adequate Remedy At Law And, Therefore, Restitution Is Now Neither Permitted Nor Required

175. "An equitable remedy is available in fraud cases if there is no adequate remedy at law, but an equitable remedy will not be available if there is a complete legal remedy." 37 Am. Jur. 2d, *Fraud and Deceit*, § 356 (2012); *see also Thompson v. Allen County*, 115 U.S. 550, 553-554, 6 S. Ct. 140 (1885). The Commissioner had the burden of proving that his remedy at law is inadequate. *Philpott v. Superior Court*, 1 Cal. 2d 512, 515, 36 P.2d 635 (1934) ("To entitle the plaintiff to the equitable interposition of the Court, he must show a proper case for the interference of a Court of Chancery, and one in which he has no adequate or complete relief at law.") (internal quotation marks omitted).

176. The fact that the Commissioner failed to prove his claims at law against Artemis does not permit him to try again by pursuing equitable claims. *See Thompson*, 115 U.S. at 554 ("By inadequacy of the remedy at law is here meant, not that it fails to produce the money – that is a very usual result in the use of all remedies – but that in its nature or character it is not fitted or adapted to the end in view . . . . *The want of a remedy, and the inability to obtain the fruits of a remedy, are quite distinct* . . . .") (emphasis added); *see also 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.") (internal quotation marks omitted).

177. Accordingly, an inability to prove damages does not justify the award of an equitable remedy. Indeed, a remedy at law is not rendered inadequate merely because a plaintiff fails to prove damages. *See Rieder v. Rogan*, 12 F. Supp. 307, 318 (S.D. Cal. 1935) ("But mere difficulty in proving damages does not destroy the effectiveness of a remedy at law, so as to justify the intervention of a court of equity.").

178. Moreover, not only was the Commissioner given a full opportunity to prove damages through fraud and conspiracy before the juries, he 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 – the junk bond profits from the first jury and the junk bond and insurance company profits from the second jury.

179. In pursuing damages before the first jury in 2005 for the lost opportunity to rescind the junk bond sale to Altus, the Commissioner tried to obtain a restitutionary recovery of the profits Altus and Artemis made on the junk bonds. He failed to do so when the jury found zero compensatory damages in response to the question concerning the Commissioner's "lost rescission opportunity" theory. *See* Verdict Form A, Question No. 2(a).

180. In the 2012 trial, the Commissioner made another explicit request for a restitutionary remedy – this time based on the junk bond profits *and* the insurance company profits – in arguing to the jury that: "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." *See* Oct. 25, 2012 Pl.'s Closing Arg. Tr. at 180:11-14; *see also supra* ¶ 36; Oct. 25, 2012 Pl.'s Closing Arg. Tr. at 98:4-98:8, 100:6-100:7, 103:15-104:4, 111:18-111:20, 113:15-113:25, 179:15-179:17. Because he fully tried to the juries the basis for the equitable recovery he is seeking here and the juries rejected his claims, the Commissioner is not entitled to restitution.

181. The juries' rejection of the Commissioner's attempt to recover the profits Artemis and Altus made on the junk bonds and the profits Artemis made on the insurance company is binding on 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."); *Gates*, 995 F.2d at 1473 (same); *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 506-507 (9th Cir. 1989) (same); *GTE*, 537 F.2d at 986 n.7 ("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."); *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).

V. The Commissioner Cannot Obtain Equitable Relief Because He Received The Benefit Of His Bargain Under A Valid Contract

A. Under Long-Standing And Clear California Law, An Action On A Quasi-Contract Theory Cannot Lie Where There Is A Valid Express Contract Covering The Same Subject Matter

182. When a valid and binding contract exists covering the subject matter of a dispute, an equitable claim under the theory of unjust enrichment is precluded. *See Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996) (applying California law and dismissing unjust enrichment and equitable subordination claims against a third party because the "subject matter" of the dispute was "covered by several valid and enforceable written contracts"); *see also California Medical Assn.*, 94 Cal. App. 4th at 172; *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal. App. 4th 194, 203, 51 Cal. Rptr. 2d 622 (1996); *Wal-Noon Corp. v. Hill*, 45 Cal. App. 3d 605, 613, 119 Cal. Rptr. 646 (1975).

183. No action based in quasi-contract for unjust enrichment lies where there is a valid express contract. *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004) (citing *Paracor*, 96 F.3d at 1167); *see also McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1091 (9th Cir. 2003). "A plaintiff may recover for unjust enrichment only where there is no contractual relationship between the parties." *Gerlinger*, 311 F. Supp. 2d at 856; *see also Lance Camper Mfg. Corp.*, 44 Cal. App. 4th at 203 ("[I]t is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter.").

184. The Federal Courts have consistently and properly recognized this fundamental principle underlying California's law of quasi-contracts and restitution. *See, e.g., Berkla v. Corel Corp.*, 302 F.3d 909, 918 (9th Cir. 2002); *Paracor*, 96 F.3d at 1167; *Gerlinger*, 311 F. Supp. 2d at 856.

185. Indeed, the doctrine that a quasi-contractual claim for unjust enrichment may not be brought where the claim's subject matter is covered by an express contract has been "followed universally in both federal and state courts." *County Comm'rs v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600, 607 (Md. Ct. App. 2000).

186. Because this doctrine applies to any claim that relates to the subject matter of the contract in question, a cause of action seeking restitution is likewise precluded even against non-signatories to the contract. *See Paracor*, 96 F.3d at 1166-67 (dismissing unjust enrichment claim against third party; recognizing the similarity between New York and California law on the issue).

B. The Rehabilitation Plan, As A Valid Contract Governing The Rights And Obligations Of The Parties, Precludes Equitable Relief Here

187. To succeed under a theory of unjust enrichment, the Commissioner was required to establish that the Rehabilitation Plan – the written contract governing the sale of ELIC's junk bonds and insurance assets – is void or was rescinded. *See Lance Camper Mfg. Corp.*, 44 Cal. App. 4th at 203; *see also Lloyd v. Williams*, 227 Cal. App. 2d 646, 649, 38 Cal. Rptr. 849 (1964) ("[I]t necessarily follows that until an express contract is avoided, an action on an implied contract cannot be maintained.").

188. Because the Rehabilitation Plan is still in existence today and the Commissioner has received (and, indeed, continues to receive) all of the benefits for which he bargained under that contract, his quasi-contractual claim based on a theory of unjust enrichment cannot stand.

189. Moreover, the verdicts of the two juries compel the conclusion that, even if the Commissioner had known of the *portage* agreements, it would not have caused the rejection or the rescission of the Rehabilitation Plan. As a result, the valid contract would not have been disturbed and there is no basis for restitution.

C. Because The Commissioner Reaffirmed The Plan After Learning Of The *Portage* Agreements, He Cannot Recover Restitution

190. It is well-settled that "[t]he affirmance of a voidable transaction by a person who, and who alone, can avoid it because of fraud or mistake terminates his right to restitution." Restatement (First) of Restitution § 68(1) (2012).

191. Here, the Commissioner has continued to demand performance of obligations under the Rehabilitation Plan, and invoked and amended certain of its provisions in the fall of 1999, with full knowledge of the *portage* agreements and his fraud claims. Therefore, because the Commissioner continued to demand performance, and reaffirmed the Rehabilitation Plan in the fall of 1999, he cannot recover restitution from Artemis.

VI. Principles Of Basic Fairness Also Mitigate Against Any Equitable Relief

192. Even if there was a basis for restitution, the fact that nothing Artemis did caused damage to the ELIC Estate compels the conclusion that restitution would not be fair in this situation. *See, e.g., Univ. of Colo. Found., Inc. v. American Cyanamid Co.*, 342 F.3d 1298, 1311-12 (Fed. Cir. 2003) ("'Courts must resort to general considerations of fairness, taking into account the nature of the defendant's wrong, the relative extent of his or her contribution, and the feasibility of separating this from the contribution traceable to the plaintiff's interest . . . . The trial court must ultimately decide whether the whole circumstances of a case point to the conclusion that the defendant's retention of any profit is unjust.'") (citation omitted); *Bishop v. Equinox Int'l Corp.*, 256 F.3d 1050, 1056 (10th Cir. 2001) (denying claim based on unjust enrichment and "'recogniz[ing] that a finding of actual damage remains an important factor in determining whether an award of profits is appropriate.'") (citation omitted).

A. The Juries Have Rejected All Of Plaintiff's Theories Of Harm

193. Here, the first jury found that Artemis and Mr. Pinault did not commit fraud. In addition, the juries found that whatever scheme Artemis joined caused $0 in actual damages, and that if the *portage* agreements had been disclosed, the

Commissioner would not have disqualified the Altus/MAAF bid and picked the NOLHGA bid.

194. The Commissioner asks this Court to award equitable relief against Artemis even though the jury found that Artemis was not liable for fraud and did not cause any actual damage.

195. Balancing the equities in this case compels denial of the Commissioner's equitable claims based on the following:

a. Artemis was not involved in the rehabilitation process. It had no role in the Commissioner choosing the Altus/MAAF bid in 1991, the Commissioner's decision to sever the junk bond transaction from the insurance transaction, his decision to sell the junk bonds to Altus in 1992, or the closing of the insurance transaction with the MAAF Group in 1993.

b. Instead, Artemis subsequently purchased a portion of ELIC's former junk bonds for fair market value from Altus, and subsequently made regulatory filings and received regulatory approval to purchase an interest in NCLH (Aurora's holding company) from the MAAF Group.

c. There was no inequity in the Commissioner's decision to accept the Altus/MAAF bid because he received everything he bargained for under the Rehabilitation Plan. The Commissioner removed ELIC's risky junk bonds from the insurance company in exchange for $3.25 billion – the fair market value of those bonds. The Commissioner also received a $300 million capital infusion into the rehabilitated insurance company.

d. In connection with its acquisition of an interest in Aurora, Artemis disclosed to the DOI that Altus and Credit Lyonnais owned minority interests in Artemis, and Artemis' parent

company, respectively, as well as that it had purchased approximately $2 billion worth of junk bonds from Altus and that more than $2.5 billion in financing or credit lines had been made available to Artemis and its affiliates by Credit Lyonnais. Based on these disclosures, the DOI treated Artemis as though it was controlled by Credit Lyonnais. Notwithstanding that perception, the DOI did not reject Artemis as an investor in Aurora, but instead required the use of a voting trust that eliminated the potential of French governmental involvement. The DOI has never alleged that the voting trust was ineffective.

e. There was no evidence that Altus, Credit Lyonnais, or the French Government ever exercised any improper influence or control over Aurora.

f. Under Artemis' ownership, the Rehabilitation Plan was successfully carried out, and Aurora met all policyholder obligations and ran a successful, well-managed company.

g. Artemis was the majority owner of Aurora from August 1994 to August 2012. The DOI never sought to remove Artemis as majority owner of Aurora – not after learning about the *portage* agreements in 1998, not after suing Artemis in 2000, and not after the first jury found in 2005 that Artemis joined a conspiracy.

h. The unanimous jury verdict rejecting the NOLHGA Premise compels the conclusion that the Commissioner would not have acted differently even with full knowledge of the *portage* agreements.

B. The 2005 Jury Specifically Rejected The Commissioner's Rescission Theory

196. The Commissioner attempted in Phase II of the 2005 trial to attack and overturn Judge Lewin's findings in his August 1993 Order denying the Motion to Rescind, and failed in that attempt before the jury. For this reason, and for the reasons that follow, the Commissioner is estopped from challenging the Rehabilitation Court's findings regarding the sale of the junk bonds to Altus.

197. The Commissioner previously litigated, and the Rehabilitation Court already has decided, a number of issues that should be given collateral estoppel effect here. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980) (citation omitted).

198. Having fully and fairly litigated these issues before the Rehabilitation Court, the Commissioner cannot now challenge the Rehabilitation Court's decisions and findings in this case. *See Diruzza v. County of Tehama*, 323 F.3d 1147, 1152 (9th Cir. 2003) (plaintiff's federal action collaterally estopped by state action).

199. Nonmutual collateral estoppel precludes an issue from being relitigated, even where the party seeking preclusion was not a party to the first action. *See Columbia Steel Fabricators, Inc. v. Ahlstrom Recovery*, 44 F.3d 800, 802 (9th Cir. 1995).

200. Collateral estoppel applies to the Commissioner's present claims because he was a party to the proceedings before the Rehabilitation Court, and the issues he raises here: (a) are identical to those decided in the former proceeding; (b) were actually litigated in the former proceeding; (c) were necessarily decided in the former proceeding; and (d) the decision in the former proceeding was final and on the merits. *See Diruzza*, 323 F.3d at 1152.

201. Accordingly, the Commissioner is collaterally estopped from challenging the Rehabilitation Court's findings and decisions, including that: (a) Altus assumed the risks associated with the junk bonds and it would be unfair to deprive it of the right to retain any profits; (b) it was in the best interest of ELIC's policyholders to sell the junk bond portfolio to Altus for $3.25 billion in cash, which was a fair price at the time of the bid and the closing; and (c) there is a strong public interest in according finality to court-supervised sales in insurance rehabilitation proceedings just as is the case in bankruptcy sales.

C. The Doctrine Of Unclean Hands Bars Equitable Relief Here

202. The Commissioner's conduct – constantly changing positions – is another reason to deny him equitable relief. Judge Matz has recognized in prior rulings that Commissioner Garamendi and "his lieutenants" are "devoid of credibility" as a result of the inconsistent positions they have taken between 1991 and the present. *Garamendi*, 2005 U.S. Dist. LEXIS 40047, at *31; *see also Garamendi*, 2005 U.S. Dist. LEXIS 39273, at *23. This "flip-flopping" is another basis for denying the Commissioner's equitable claims. Therefore, the doctrine of unclean hands supports a finding in favor of Artemis on plaintiff's equitable claim. *See, e.g.*, *DeRosa v. Transamerica Title Ins. Co.*, 213 Cal. App. 3d 1390, 1395-96, 262 Cal. Rptr. 370 (1989).

203. For all of these reasons, the Commissioner's "claim" of unjust enrichment is denied.

CONCLUSION

For the reasons set forth above, the Court hereby finds in favor of Artemis and against the Commissioner on the equitable claim before the Court.

DATED: November 30, 2012

GIBSON, DUNN & CRUTCHER LLP

By: /s/ *Robert L. Weigel*
ROBERT L. WEIGEL
Attorneys for Defendant ARTEMIS S.A.