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

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVE JONES, as Insurance Commissioner of the State of California and as Conservator, Liquidator and Rehabilitator of the ESTATE OF EXECUTIVE LIFE INSURANCE COMPANY,

Plaintiff-Appellant/Cross-Appellee,

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

Intervenors-Appellants/Cross-Appellees,

v.

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

Defendant-Appellee/Cross-Appellant.

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

APPELLANTS' OPENING BRIEF

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Docket

9/30/13

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, undersigned counsel for the National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA") and the California Life and Health Insurance Guarantee Association ("CLHIGA"), Appellants in Case No. 13-55684 and Cross-Appellees in Case No. 13-55699, states that neither NOLHGA nor CLHIGA has a parent corporation and there is no publicly held corporation that owns ten percent or more of the stock of NOLHGA or CLHIGA.

DATED: September 30, 2013.

Respectfully,

LEWIS ROCA ROTHGERBER LLP
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INTRODUCTION

This Court reversed the original judgment and ordered a retrial on whether the fraud perpetrated by Appellee's co-conspirators caused damage to Appellants. *California v. Altus Fin. S.A.*, 540 F.3d 992 (9th Cir. 2008) ("*Altus*"). The case was retried after reassignment to a new judge. The court erroneously permitted Appellee to relitigate a dispositive fact issue that this Court held in *Altus* was resolved in Appellants' favor by the first jury.

To make matters worse, the court refused to give an instruction proposed by Appellants that would have correctly posed the remanded damage causation issue: what would the Commissioner have done if he had learned of the secret "portage agreements" between Appellee's co-conspirators? Instead, the court gave a damage causation instruction that asked the wrong question, which it augmented with ambiguous and confusing comments. After the jury unsuccessfully sought clarification, a frustrated juror blurted out to the judge: "so this [confusion] is your fault." 4-Excerpts of Record ("ER")-768:14-18. It was.

As the result of these errors, Appellants have yet to have their day in court on the central issue of damage causation. The judgment

must be reversed and remanded for retrial on reframed instructions that will ensure a fair jury resolution of that issue.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. §§1330, 1367 and 1441(d). The court entered its final Judgment on April 2, 2013. 1-ER-1. This Court has jurisdiction under 28 U.S.C. §1291. Appellant Insurance Commissioner of the State of California ("Commissioner") filed a timely Notice of Appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) on April 4, 2013. 3-ER-635. This appeal was later consolidated with the timely appeal from the same judgment filed on April 23, 2013, by Intervenors National Organization of Life and Health Insurance Guaranty Associations and California Life and Health Insurance Guarantee Association (collectively, "NOLHGA") and with the cross-appeal from the same judgment filed on April 24, 2013, by Artemis S.A. ("Artemis"). This brief is filed on behalf of all Appellants.

ISSUES PRESENTED

In 1991, the Commissioner held an auction for the assets of the insolvent Executive Life Insurance Company ("ELIC"). He selected the bid of a consortium of French companies ("Altus/MAAF"). Under

this bid, ELIC's insurance business was sold to a new company that, due to a series of secret contracts known as "portage agreements," was owned and controlled by Altus, a wholly owned subsidiary of a bank owned by the French government. This violated a California statute prohibiting foreign governmental ownership or control of a California insurer. It also violated a federal statute prohibiting banks from owning or controlling an insurance company. When the Commissioner subsequently learned of these contracts, he filed this lawsuit, contending that the Altus/MAAF bid was fraudulent.

In a prior appeal, this Court upheld a jury verdict that Artemis joined a conspiracy "to obtain assets from the ELIC Estate by fraud," and that this conspiracy "cause[d] harm to the ELIC Estate." 2-ER-237-39. However, it reversed the jury's determination that no damages had been sustained and remanded for a new trial under a damage causation theory called "the NOLHGA Premise"—*i.e.*, that as a result of the conspiracy, the Commissioner approved the Altus/MAAF bid instead of a rival bid submitted by NOLHGA that would have been billions of dollars better for the ELIC Estate and its policyholders.

The retrial resulted in a verdict for Artemis, and presents the following issues:

1. This Court's prior opinion in *Altus* interpreted the first jury's findings as determining "that, but for the Altus/MAAF Group's conspiracy, the Commissioner would have selected either the Sierra or the NOLHGA bid" (540 F.3d at 1008), and therefore would not have chosen the bid submitted by the conspirators. In light of this ruling, did the District Court err in letting Artemis relitigate the issue of whether, but for the conspiracy, the Commissioner would have chosen the Altus/MAAF bid?

2. Did the District Court commit reversible error at the damages retrial by refusing to instruct the jury that it had to determine what the Commissioner would have done had he learned about the secret portage agreements?

3. The District Court instructed the jury that it had to determine whether the Commissioner would have chosen the NOLHGA bid "but for the conspiracy to defraud." Did the District Court commit prejudicial error by (a) giving this instruction; (b) refusing to tell the jury, despite many questions, what this instruction meant; (c) repeatedly telling the jury that it had to assume that there was "no conspiracy" in the hypothetical "but-for" world; and (d) failing to answer a juror's question as to whether the jury had to assume that the secret portage agreements had been disclosed?

4. In *Altus*, this Court vacated a restitution award made by the District Court with leave to reinstate. After the retrial, the District Court reinstated that award, for the same amount and for the same reasons. If the Court does not remand for a new trial on Appellants' damages claim, did the District Court err by failing to adjust the restitution award for subsequent developments or to include post-judgment interest from the date of the prior award?

STATEMENT OF THE CASE

The Commissioner filed this action in California state court in 1999. After the action was removed to federal court (2-ER-124), the Commissioner added Artemis as a defendant (2-ER-148), and NOLHGA intervened. 2-ER-184.

Appellants' claims against Artemis were tried in 2005. The jury found Artemis liable. *See* p.3, *supra.* The court ordered a damages trial against Artemis before the same jury. 2-ER-226-27. However, because the jury had deadlocked during the liability phase on the NOLHGA Premise, the court precluded the Commissioner from introducing evidence supporting that Premise during the damages phase. *Id.*

The jury awarded the Commissioner no compensatory damages and $700 million in punitive damages. 2-ER-246-47. The court

struck the punitive damages award, but later awarded the Commissioner $241,092,020 in restitution, including prejudgment interest. 2-ER-257-58. The court offset this award by $110 million in prior payments through the U.S. Attorney's Office by Artemis. 2-ER-258.

The Commissioner, NOLHGA and Artemis appealed, and this Court affirmed in part and reversed in part. *Altus*, 540 F.3d 992. The Court affirmed the District Court's decision to strike the punitive damages award. However, the Court ordered "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." *Id.* at 1011. In addition, the Court vacated the restitution award but granted the District Court "leave to reinstate that award, if warranted, at the close of trial." *Id.* at 1009.

At the end of the second damages trial, the jury found that Appellants had not proven the NOLHGA Premise. 2-ER-553. The court then reinstated the restitution award of $241 million made after the first trial, with the same offset, without any adjustment to reflect the actual amount realized from the sale of Artemis's interest in NCLH in 2012 or any additional prejudgment or post-judgment interest. 1-ER-4.

The District Court entered judgment on April 2, 2013. 1-ER-1. The Commissioner and NOLHGA appealed, and Artemis cross-appealed. 3-ER-635, 637, 642, 657. On June 4, 2013, this Court consolidated the appeals and the cross-appeal. Ninth Cir. Dkt. No. 19.

STATEMENT OF FACTS[1]

A. Altus And MAAF Conspire To Evade California Law And Defraud The Commissioner By Signing Secret Portage Agreements.

Because the first jury's findings "constituted a complete finding of liability" (*Altus*, 540 F.3d at 1005), the facts underlying the Commissioner's conspiracy to defraud claim need not be discussed at length.

In 1991, ELIC became insolvent, due in part to heavy investment in junk bonds and the collapse of that market. 4-ER-681:8-22. Then Insurance Commissioner John Garamendi put ELIC into conservation pursuant to California law under the supervision of the Los

[1]This appeal presents legal issues that do not require the Court to weigh the evidence supporting the second jury's verdict. Moreover, "[i]n reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party." *Swinton v. Potomac Corp.*, 270 F.3d 794, 805-06 (9th Cir. 2001) (citation and internal quotation marks omitted). Accordingly, the Statement of Facts that follows presents the facts relevant to this appeal but does not construe disputed facts in Artemis' favor.

Angeles Superior Court ("Conservation Court"). *See id.*; *see also* CAL. INS. CODE §§1010-1019.

The Commissioner opened competitive bidding for ELIC's assets in October 1991. 4-ER-683:2-9. Three entities submitted qualified bids: Altus/MAAF, NOLHGA, and Sierra National Holdings, Inc. ("Sierra"). *Id.* The Altus/MAAF bid was a "bonds-out" bid because Altus would purchase ELIC's junk bonds while MAAF would supposedly own and operate New California Life Holdings ("NCLH"), a new corporation, and its wholly owned subsidiary Aurora National Life Insurance Company ("Aurora"), which would take over ELIC's insurance business. 4-ER-682:4-12, 684:19-21. In contrast, the NOLHGA and Sierra bids were "bonds-in" bids because they proposed that the rehabilitated insurance company would keep ELIC's junk bonds. 4-ER-683:10-17.

On November 14, 1991, the Commissioner recommended to the Conservation Court that it approve the Altus/MAAF bid. 4-ER-684:7-10. The Commissioner's selection of the Altus/MAAF bid became final when it was approved by the Conservation Court on December 26, 1991. 4-ER-684:25-85:1.

When he selected the Altus/MAAF bid, the Commissioner did not know that Altus and MAAF had entered into a conspiracy to fraudu-

lently obtain the ELIC Estate's assets in violation of California and federal law. California Insurance Code Section 699.5, as it existed in 1991, prohibited entities controlled by foreign governments from directly or indirectly owning or controlling a California insurer. 4-ER-770.[2] Federal law prohibited direct or indirect ownership or control of an insurance company by a bank holding company, like Credit Lyonnais, or its subsidiaries. Altus was a subsidiary of Credit Lyonnais, which was controlled by the French government, and was therefore prohibited by both California and federal law from owning or controlling a California insurance company. 4-ER-681:23-25.

Altus and MAAF repeatedly assured the Commissioner, and Altus also assured the federal government, that Altus would not own or control NCLH or Aurora. 4-ER-704:2-13, 705:5-19, 706:3-19, 783-84. Nevertheless, they entered into two sets of secret *contracts de portage*, or portage agreements, that did just that. The first set, which consisted of two agreements (collectively, the "August Portage Agreements"), was signed on August 6, 1991. 4-ER-771, 775. In one of these agreements, Altus gave MAAF a "put"—*i.e.*, an option to sell its shares in the new insurance company to Altus. 4-ER-771, 775.

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[2]Section 699.5 contained certain exceptions that Altus never attempted to satisfy. *See id.*

The August Portage Agreements also gave Altus control over the new company and made MAAF a "front" for Altus. 4-ER-682:4-24.

The second set of portage agreements (the "November Portage Agreements") were signed the day after the Commissioner recommended approval of the Altus/MAAF bid. 4-ER-785, 793. The November Portage Agreements expressly superseded the August Portage Agreements. 4-ER-788, 797. Instead of a "put" for MAAF, one of the new agreements required MAAF to sell its interest in NCLH to Altus at a fixed time in the future. In the interim MAAF would "act on behalf of Altus . . . as its agent to implement its strategic decisions" about the new insurance business. 1-ER-69-70; 4-ER-684:10-15. The November Portage Agreements gave Altus "complete control over the management of [NCLH]" and made MAAF "a fronting agent for Altus Finance." 4-ER-691:12-92:4. The November Portage Agreements contained confidentiality clauses. 4-ER-787, 795.

Both sets of portage agreements were concealed from the Commissioner and the federal government. And both were inconsistent with Altus/MAAF's representations regarding NCLH's independence from Altus that began in April 1991. 4-ER-709:12-12:13. For example, on the same day that Altus and MAAF signed the August Portage

Agreements, they entered into a "stalking horse bid" agreement with the Commissioner (4-ER-779), which provided a baseline for other competitive bidders. 4-ER-689:12-23. In the stalking horse bid agreement, Altus/MAAF falsely affirmed they had "no knowledge that the execution, delivery and performance of this Agreement and the other Definitive Agreements by Buyer will violate any laws or statutes to which Buyer is subject." 4-ER-780. Similarly, two weeks after the August Portage Agreements were signed, Credit Lyonnais' attorney falsely represented to the Federal Reserve Board that Credit Lyonnais and Altus would not own or control the successor insurance company. 4-ER-783-84.

B. Artemis Joins The Conspiracy, And Earns Almost A Billion Dollars From Its Participation In The Scheme.

Artemis was formed in December 1992 as a joint venture between Altus and another French company. 4-ER-803. Artemis then obtained a portion of the ELIC junk bond portfolio and Altus's secret interest in NCLH. *See id.*

Artemis learned of the conspiracy shortly after its formation but did not disclose it to the Commissioner. 1-ER-74. Instead, it joined the conspiracy by submitting multiple fraudulent applications to the Department of Insurance that concealed Altus's control of NCLH. *See id.*

Although the first jury found that Artemis's own misrepresentations did not harm the ELIC Estate (2-ER-197-98), Artemis benefitted greatly from joining the conspiracy, receiving profits of more than $990 million from the ELIC assets it purchased from Altus/MAAF. 1-ER-77; 3-ER-579.

C. The Jury In The First Trial Finds That Artemis Participated In A Conspiracy To Defraud That Harmed The ELIC Estate.

During the first trial, Artemis attempted to rebut the Commissioner's contention that he would have "done something different . . . if he'd only known about these portage agreements between Altus and MAAF." 4-ER-672:22-73:2 (Artemis's closing argument). It told the jury that the Commissioner would not have cared about the portage agreements because his "actions in . . . 1991 through 1993 clearly indicate that the Commissioner . . . . didn't care at all who owned the insurance company." 4-ER-675:8-13. Accordingly, Artemis contended that the Commissioner had not been harmed by the alleged conspiracy because he would have chosen the Altus/MAAF bid even if he had known about the portage agreements. As Artemis put it in closing argument:

> If you find that the Commissioner suffered no harm from what he now claims was the fraud by Altus and MAAF [*i.e.*, the concealment of the portage agreements]—meaning . . . if you believe he would have picked the Altus/MAAF bid anyway . . . [then] he hasn't suffered any harm from anyone, and the case

> against Artemis and Mr. Pinault just goes away. (4-ER-674:9-14)

The jury rejected this argument. After a nine-week trial, it found that Artemis knowingly joined a conspiracy "to obtain assets from the ELIC Estate by fraud," *and that this conspiracy "cause[d] harm to the ELIC Estate."* 2-ER-237-39 (emphasis added). Accordingly, the court ordered a damages trial in front of the same jury. 2-ER-226-27.

However, the jury had deadlocked on Verdict Form 7, which asked: "Did the Commissioner prove that, but for the misrepresentation, concealment or conspiracy that led to your answers to previous questions, he probably would have entered into a transaction with NOLHGA for the benefit of the ELIC Estate?" ER-211.[3] The court construed the deadlock against the Commissioner and prohibited any evidence of damages based on the NOLHGA Premise during the damages phase. 2-ER-225-26.

The jury awarded the Commissioner $0 compensatory damages and $700 million in punitive damages. 2-ER-248. The court struck

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[3]The junk bond portfolio materially increased in value after Altus purchased the bonds. The Commissioner's theory of damages—the NOLHGA Premise—was that, because the NOLHGA bid was "bonds in," the policyholders and other creditors of the ELIC Estate would have benefitted from this increase had the Commissioner selected the NOLHGA bid.

the punitive damages award because the jury had not awarded compensatory damages. 2-ER-254-55. However, the court awarded restitution because Artemis had "played a shady game" and failed to "tell the truth and comply with the law." 1-ER-64, 80. The court determined that the Commissioner was not entitled to any of Artemis' junk bond profits, but was entitled to half of Artemis' profits from NCLH, plus prejudgment interest. 1-ER-81-82. The restitution award of $241,092,020 was offset by Artemis' prior payment of $110 million, leaving $131,092,020 due as of February 13, 2006. 1-ER-81-82; 2-ER-258.

D. This Court Orders A New Trial On The "NOLHGA Premise": That The Commissioner Would Have Selected The NOLHGA Bid Had He Learned Of The Portage Agreements And The Fraud Prior To The Final Selection Of The Altus/MAAF Bid.

The Commissioner, NOLHGA and Artemis all appealed. This Court affirmed the District Court's decision to strike the punitive damages award and its rejection of Artemis' *res judicata* defense. *Altus*, 540 F.3d at 1003, 1010. However, the Court reversed the decision in favor of Artemis on the NOLHGA Premise. The Court first held that the jury's "harm finding"—*i.e.*, its finding that the conspiracy had harmed the ELIC estate—could not be construed as a determination that the Commissioner would have chosen NOLHGA in the "but-for" world because it interpreted that finding as determining

that the Commissioner would have chosen *either* NOLHGA or Sierra. *Id.* at 1008; *see* pp.40-42, *infra*. The Court then held that the jury's inability to answer Verdict Form 7 could not be resolved in favor of either party. *Id.* at 1008. Accordingly, it remanded "for a new damages phase trial limited to the proffer of the NOLHGA Premise and a determination of damages (including punitive damages), if any, on that theory." *Id.* at 1009. In addition, the Court vacated the restitution award but granted the District Court "leave to reinstate that award, if warranted, at the close of trial." *Id.*

This Court's opinion noted that the parties had defined the NOLHGA Premise as the question posed by Verdict Form 7. *See id.* at 999. There was no dispute in the briefs filed in this Court about what the jury had to assume in order to answer that question. The Commissioner summarized the NOLHGA Premise as whether "the NOLHGA bid would most likely have been selected in the fall of 1991 if the truth about the *portage* agreements had been known." Brief of Appellant Commissioner, No. 06-552997, 2006 U.S. 9th Cir. Briefs LEXIS 826, at *84 (9th Cir. June 22, 2006). Similarly, Artemis stated that the Commissioner's damages theory was based on the premise that he "would have selected the NOLHGA bid *if he had known of the supposed fraud.*" Brief of Appellee/Cross-Appellant

Artemis S.A., No. 06-55297, 2006 U.S. 9th Cir. Briefs LEXIS 827, at *114-15 (9th Cir. Aug. 28, 2006) (emphasis added). In sum, both sides defined the NOLHGA Premise as what would have happened had the Commissioner known of the portage agreements, and the fraud created by their concealment, before final selection of the Altus/MAAF bid.

E. The District Court Rejects Appellants' Contention That Both The First Verdict And This Court's Prior Opinion Precluded Artemis From Presenting Evidence Or Arguing That, But For The Conspiracy, The Commissioner Would Have Selected The Altus/MAAF Bid.

Upon remand, Appellants filed a motion *in limine* to preclude Artemis from presenting evidence that the Commissioner would have chosen the Altus/MAAF bid in the hypothetical, "but-for" world. 2-ER-279, 281, 294, 296. They argued that the jury's harm finding in the first trial necessarily determined that, had the Commissioner known of the fraud, he would have selected either the Sierra bid or the NOLHGA bid, and therefore not the Altus/MAAF bid, and that the Seventh Amendment barred relitigation of this issue. 2-ER-288-91. They also contended that this interpretation of the harm finding had been adopted by this Court in *Altus* and was therefore the law of the case. 2-ER-288-89. The District Court denied the motion. 1-ER-45.

F. The New District Judge Redefines The NOLHGA Premise.

On remand, the parties initially agreed that the NOLHGA Premise required the Commissioner to prove that he would have selected NOLHGA if he had learned of the fraudulent conspiracy before selecting the winning bidder. For example, Artemis stated in a status conference statement that the "most sensible option" on remand was "to ask the jury to assume that: . . . the Commissioner discovered [the] conspiracy at some point prior to the rejection of the NOLHGA bid in November 1991." 2-ER-269.

Judge Matz—who had conducted the first trial—expressed an identical understanding of the NOLHGA Premise. He stated that:

> [T]he NOLHGA Premise is what this Court has always understood, what the Ninth Circuit indisputably understood and what the Commissioner himself has acknowledged: "The NOLHGA Premise is the contention that the Commissioner would have selected the NOLHGA bid if he had learned of the fraud *before* selecting the Altus/MAAF bid." (2-ER-298 (emphasis in original))

Accordingly, Judge Matz ruled in August 2010 that the "first phase of the upcoming trial" would determine this precise issue. 2-ER-300.

Artemis never requested Judge Matz to reconsider his definition of the NOLHGA Premise. However, as the second trial approached, Artemis saw an opportunity arising from the transfer of the case to a new judge and seized it. Shortly before the retrial, Artemis argued

for the first time that, to prevail on the NOLHGA Premise, "plaintiff must prove that if Altus and MAAF either (a) did not enter into the *portage* agreements in the first place, *or* (b) disclosed these agreements to the DOI, the Commissioner would have rejected the Altus/MAAF bid and selected NOLHGA instead." 2-ER-314 (emphasis added). Artemis's two formulations of the NOLHGA Premise were mutually exclusive.

In addition, Artemis proposed a jury instruction that presented a third definition of the NOLHGA Premise, this time without mentioning the portage agreements:

> To decide the NOLHGA Premise, the jury will need to determine if plaintiff has proved that Commissioner Garamendi would have selected NOLHGA's bid, and that the NOLHGA bid would have been approved by the Rehabilitation Court, *had the Altus/MAAF conspiracy never occurred.* (2-ER-341 (emphasis added))

In contrast, Artemis's opening statement contended that a "but-for" world with "no conspiracy" was a world in which there had been disclosure of the portage agreements:

> The question that you are going to be asked to answer is what would have happened if there was no conspiracy? What would Commissioner Garamendi have done if Altus had told the department about the portage agreements in 1991? (4-ER-679:22-25)[4]

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[4]Artemis argued at trial that, even if disclosure had occurred, the (continued . . .)

Despite Artemis's acknowledgement that disclosure of the portage agreements would have occurred in the "but-for" world, the District Court told the jury to ignore the Commissioner's evidence that the Commissioner would not have chosen the Altus/MAAF bid had the portage agreements been disclosed. Counsel for the Commissioner asked former Chief Deputy Commissioner Baum, the Commissioner's first witness, if the Commissioner would have accepted the Altus/MAAF bid if the conspirators, "after entering into the various portage agreements . . . [had] told you about all the things they had done." 4-ER-696:3-8. Mr. Baum said no because disclosure of the portage agreements would have revealed that Altus/MAAF had been lying to the Commissioner for months. 4-ER-696:12-18. At that point, the court interjected:

> Counsel, that's not the correct question for the jury. The question is: *If there had never been a conspiracy to conceal*, not if they had had a conspiracy and then told you later. The question is: If there never had been a conspiracy to conceal, if they had divulged *this* in the *very beginning*, that's the question.

(. . . continued)
Commissioner would still have chosen the Altus/MAAF bid because there were "regulatory solutions" for "any problems caused by the Portage agreements." 4-ER-680:10-11. To support this claim, Artemis primarily relied on testimony by an expert witness who testified that a "reasonable regulator [would] have considered the possibility of using a voting trust" to "insulate an insurance company" from control by a foreign owned entity. 3-ER-719:18-20:15.

> What would have happened then? (4-ER-696:19-97:1 (emphases added))

However, the court never explained what "this" or "in the very beginning" meant. Nor did it explain how the portage agreements could have been disclosed "in the very beginning" when the negotiations between the Commissioner and Altus began in April 1991 but the portage agreements were signed in August and November 1991.

Two days before the case went to the jury the court again stated that the jury had to decide what would have happened "if there had not been this concealment, the conspiracy to conceal." 4-ER-716:13-20. The next day the court told the jury that it was to decide whether the Commissioner would have accepted the NOLHGA bid "but for the conspiracy *and* concealment." 4-ER-725:11-16 (emphasis added).[5]

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[5]The court had suggested a quite different formulation of the NOLHGA Premise earlier in the trial. Then it told the jury that the issue it had to decide was whether, if the Commissioner "had *known of* the conspiracy and the concealment," would he "have rejected Altus's bid and gone with NOLHGA?" 4-ER-700:24-01:2 (emphasis added). The next day it told the jury that the only information that was relevant was "anything that pertained to what [the Commissioner] would have done in 1991 if he had *known of* the portage agreements at that time." 4-ER-713:21-25 (emphasis added). However, as the trial neared its conclusion, the court consistently directed the jury to assume that there had been no conspiracy at all (*see* p.21, *infra*), and this same command was repeatedly given during jury deliberations. *See* pp.25-27, *infra*.

Beginning with the closing arguments, the court adopted a different definition of the NOLHGA Premise that did not mention concealment. During the closing arguments, the court directed the jury "to determine [what would have happened] *if there had not been a conspiracy.*" 4-ER-740:24-25 (emphasis added). The court attempted to explain what this meant right after closing arguments and before the formal jury instructions, but told the jury only what it didn't mean:

> "But for the conspiracy" means if there had been no conspiracy. . . . If there had been no conspiracy what would he have done. Okay? *You're not to assume what he would have done if he had known of a conspiracy because if he had known of a conspiracy, he might be offended or whatever and done different things.* But the question is: If there had never been a conspiracy, what would he have done. (4-ER-746:12-47:2 (emphasis added))

G. The District Court Denies Appellants' Request For An Instruction Telling The Jury To Decide What The Commissioner Would Have Done Had He Learned Of The Portage Agreements And Instead Instructs The Jury To Decide What He Would Have Done "But For The Conspiracy To Defraud."

From the formal jury instructions through the rendition of the verdict, the court continued to define the NOLHGA Premise without mentioning concealment or the portage agreements.

Shortly before the case went to the jury, the court asked the parties to submit revised jury instructions regarding the NOLHGA

Premise. 4-ER-721:18-24. In doing so, it expressly stated to counsel—*but not to the jury*—that the "but-for" world should assume the existence and disclosure of the portage agreements:

> [B]asically, . . . but for the conspiracy [means], if there had not been a conspiracy, *if these things had been divulged and never hidden, would they have gone with NOLHGA.* You can use your own words on it, but I'd like to get that.
>
> Keep in mind one thing: It's not whether or not they would have discovered the conspiracy what would they have done. *It's whether there had been no conspiracy, if these letters had been made known to the Commissioner, would they have gone with NOLHGA.* (4-ER-722:1-10 (emphases added))

In response to these rulings, Appellants submitted a revised instruction that expressly referred to the portage agreements:

> The NOLHGA Premise is the Commissioner's claim that, but for the conspiracy to conceal the portage agreements, he probably would have entered into a transaction with NOLHGA. In other words, had the Commissioner learned of the portage agreements, he probably would have entered into a transaction with NOLHGA. (3-ER-660)[6]

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[6]Appellants' initial instruction on the NOLHGA Premise, submitted shortly before trial, would have asked the jury to decide "what the Commissioner would have done if he had *learned of the fraud* before the Commissioner's selection of the Altus/MAAF bid was approved by the Conservation Court on December 26, 1991." 3-ER-469 (emphasis added). The revised instruction was clearer than the initial instruction because it referred specifically to the portage agreements instead of to the more general concept of "fraud." It also described the NOLHGA Premise more accurately than the instruction and the special verdict form used in the first trial and not challenged in the prior appeal. *See Altus,* 540 F.3d at 999 (verdict form); *id.* at 1006 n.13 (instruction).

Artemis's proposed supplemental instruction likewise referred to the portage agreements. It asked the jury to decide what the Commissioner would have done had there never been a conspiracy to conceal these contracts:

> In order to decide the NOLHGA Premise, you must determine what would have happened had there never been a conspiracy to conceal the portage agreements between Altus and MAAF. If there had never been a conspiracy to conceal the portage agreements, would Commissioner Garamendi have recommended, and obtained court approval of, a transaction with NOLHGA for the benefit of the ELIC Estate in 1991. (3-ER-664)

Although the revised instructions submitted by both sides expressly referred to the portage agreements, the court gave an instruction defining the NOLHGA Premise that did not mention these contracts:

> You must determine whether the Commissioner has proved that, but for the conspiracy to defraud, he probably would have entered into a transaction with NOLHGA for the benefit of the ELIC Estate. (1-ER-35; *see also* 4-ER-748:11-14)[7]

After the jury began deliberations, the Commissioner objected that the "no conspiracy" direction given immediately before the instructions (*see* p.21, *supra*), and the instruction itself, permitted—

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[7]The verdict form tracked the same language. 3-ER-553.

and in fact encouraged—the jury to assume that the portage agreements had never existed:

> [B]y simply saying "no conspiracy," it suggests that maybe there were never any portages at all, maybe no ownership or control. And that goes too far.
>
> * * * *
>
> And here I'm concerned that the way it has been stated for the jury right now, they may be under the mistaken impression that they're supposed to assume away the portages and that's my concern. (4-ER-750:11-25)

The court overruled this objection and stated:

> I think it's very clear to the jury and it's certainly clear in the instructions that they are to assume that there is *no conspiracy* . . . . (4-ER-751:3-5 (emphasis added))

H. The Court Repeatedly Tells The Jury During Deliberations That It Has To Decide What The Commissioner Would Have Done Had There Been "No Conspiracy" And, Despite The Jury's Expressed Confusion, Fails To Tell The Jury (1) What That Means; And (2) That It Had To Assume The Existence Of The Portage Agreements In The "But-For" World.

The court's confidence that its damage causation instruction would be clear to the jury was quickly shown to be misplaced. On the second day of deliberations, the jury submitted two written questions to the judge. 4-ER-755:10-56:7.[8] Rather than responding to these

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[8]The two questions were: "Are we deciding the Commissioner, upon seeing the portage documents, would have disqualified or eliminated Altus or MAAF? . . . [O]r are we deciding the Commissioner seeing the portage up front would have negotiated . . . (continued . . .)

questions in writing, the court chose to talk to the jury directly in open court, as it did in response to all the subsequent jury questions. After reiterating the "but-for" jury instruction (4-ER-756:13-18), the court told the jury again that it had to assume there was no conspiracy:

> For the purposes of this first question, only for the purpose of the first question, you're to assume what would have happened if there had been no conspiracy. What would the Commissioner have done if there were no conspiracy . . . . (4-ER-757:7-11)

Juror No. 3 then asked pointedly: "So the portage agreements were disclosed?" 4-ER-757:14-15. Although the court had previously told counsel out of the jury's presence that the portage agreements "had been made known to the Commissioner" in the "but-for" world, and although both sides had submitted revised jury instructions that expressly referred to the portage agreements, the court declined to answer the question and instead told the jury twice more that it had to assume there had been no conspiracy:

> Well, I mean, all that evidence was presented to you and I can't comment on the evidence. It was already presented to you. But the question is: If there had been no conspiracy to defraud, what the Commissioner would have done. (4-ER-757:16-19)

* * * *

(. . . continued)
about alternative solutions with Altus? 4-ER-755:12-17.

> The first question and only for the first question, you are asked if there was no conspiracy, but for the conspiracy, would the Commissioner probably have entered into a transaction with NOLHGA for the benefit of—you know, the jury instruction really spells it out. (4-ER-758:1-5)

On the next morning, the third day of deliberations, the jury stated that it was "hopelessly deadlocked," and the court read an *Allen* charge. 4-ER-761:11-63:11. Then, shortly after lunch, the jury asked the court two additional questions. The first was whether, if the "Commissioner is presented with the portage agreements before the stalking [horse] bid was signed, would he move forward with the Altus bid?" 4-ER-764:13-15. The court responded by saying that it couldn't "comment on the evidence." 4-ER-764:19.

The second question asked the court to "[p]lease explain the phrase 'but for a conspiracy to defraud.'" 4-ER-765:4-5. The court responded:

> I can't do much for you on it. 'But for' means basically what it says. It means in the absence of or if there had never been so you can put either one of those phrases in there. (4-ER-765:20-23)

The foreperson stated this was a "similar answer" to what the court had previously said and announced that the jury "cannot reach a decision." 4-ER-766:1-9. The court told the jury to continue deliberating and explained again that "but for the conspiracy to defraud" meant "[i]n the absence of any conspiracy or if there'd never been a

conspiracy to defraud, he probably would have—the instruction reads on." 4-ER-766:10-23. Juror No. 3 responded by stating:

> When you answered our question, it's still so vague that there is—it opens a can of worms and that's why we're, you know, where we are right now. (4-ER-767:2-4)

Juror No. 4 again noted the NOLHGA Premise required the jury to "assume something and make a decision on that," to which Juror No. 3 added that this assumption "can be interpreted in different ways." 4-ER-767:6-23. The court told the jury to continue deliberating. 4-ER-768:2-7. Juror No. 4 responded that "[w]e knew you were going to answer it that way," adding "[s]o this is your fault." 4-ER-768:14-18.

Later that afternoon, the jury rendered its verdict answering "No" to whether the Commissioner had proved that "but for the conspiracy to defraud, he probably would have entered into a transaction with NOLHGA for the benefit of the ELIC estate." 3-ER-553.

I. The District Court Reinstates The Prior Restitution Award Without Taking Into Account Events That Took Place After The First Trial Or Awarding Interest From The Date Of The Original Award.

After the verdict, the Commissioner again sought restitution and sought to have the prior award adjusted to reflect subsequent events. 3-ER-570. He argued that the award should be updated to reflect the

actual proceeds Artemis received when it sold its interest in NCLH in 2012 and that he was entitled to additional prejudgment interest. *See id.*[9] Artemis responded that no restitution was warranted and, alternatively, that any award had to be limited to the amount granted after the first trial. 3-ER-588-612.

The court reinstated the prior restitution award for the same amount and "for the same reasons stated by Judge Matz." 1-ER-4. The court ordered the Commissioner to submit a proposed judgment, and the Commissioner submitted a proposed judgment that included post-judgment interest from the date of the first judgment in 2006. 3-ER-613, 618, 622.

The District Court entered judgment for $241,092,020 with the $110 million offset. The Judgment stated that, "as of the date of this Judgment," Artemis was required to pay the Commissioner the "Net Artemis Judgment Obligation" of $131,092,020. 1-ER-2 ¶4. The Court did not mention the Commissioner's requests for adjustments for subsequent events or post-judgment interest from the date of the February 2006 Judgment. 1-ER-1-3.

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[9]The Commissioner had requested the jury to decide that the Commissioner was entitled to prejudgment interest on any *damage* award (3-ER-510), but that issue became moot when the jury held that the Commissioner had failed to prove the NOLHGA Premise.

The Commissioner and NOLHGA have appealed from the Judgment, and Artemis has cross-appealed. 3-ER-635, 637, 642, 657. On June 4, 2013, this Court consolidated the appeals and the cross-appeal. Ninth Cir. Dkt. No. 19.

SUMMARY OF ARGUMENT

1. ***Preclusive Effect Of Prior Verdict And Opinion***: A plaintiff cannot show harm if it would have done the same thing in the "but-for" world that it did in the real world. Artemis therefore argued in the first trial that the alleged conspiracy had not harmed the ELIC Estate because the Commissioner would have chosen the Altus/MAAF bid even if he had known of the portage agreements. The first jury rejected this argument and found that the conspiracy *had* harmed the ELIC Estate. Accordingly, the first jury must have found that, but for the conspiracy, the Commissioner would not have chosen the Altus/MAAF bid but would have picked either the NOLHGA bid or the Sierra bid.

That is precisely how Judge Matz, who presided over the first trial, interpreted the first jury's verdict in three separate post-trial orders. *See* pp.39-40, *infra*. And it is precisely how this Court interpreted the verdict in its prior opinion. The Court held that, in adopting the harm finding, the first jury must have concluded that

"the Commissioner would have entered a transaction with either of the 'bonds-in' bidders, NOLHGA or Sierra, but for the Altus/MAAF Group conspiracy." *Altus*, 540 F.3d at 1008. Although the prior verdict did not determine whether the Commissioner would have picked NOLHGA or Sierra, the Court concluded that the jury necessarily found that, but for the conspiracy, he would have selected *one* of those two—and therefore not Altus/MAAF. *Id.*

On remand, Appellants filed a motion *in limine* based on the first jury's harm finding and this Court's opinion. The motion sought to preclude Artemis from introducing at the damages retrial any evidence or argument that the Commissioner would have chosen Altus/MAAF even if he had known of the fraud. Judge Matz denied the motion because, in his opinion, this Court had misinterpreted the first jury's harm finding and the instruction on which it was based. *See* 1-ER-51. This was error. The law of the case doctrine barred the District Court from rejecting this Court's prior construction of the jury's verdict regardless of the District Court's disagreement with it. Similarly, the Seventh Amendment barred the court from disregarding the first jury's harm finding and allowing Artemis to relitigate the harm issue. Accordingly, the court erred in permitting Artemis to contend that the Commissioner would have chosen the

Altus/MAAF bid in the hypothetical "but-for" world. *See* Part I, *infra*.

2. ***Instructional Error Regarding The NOLHGA Premise***:

a. ***Refusal To Give Appellants' Revised Instruction***: Appellants' revised instruction defined the NOLHGA Premise as whether "but for the conspiracy to conceal the portage agreements, [the Commissioner] probably would have entered into a transaction with NOLHGA. In other words, had the Commissioner learned of the portage agreements, he probably would have entered into a transaction with NOLHGA." 3-ER-660. The District Court's refusal to give this instruction was error.

A party is entitled to jury instructions setting forth its theory of the case if that theory is consistent with applicable law and supported by substantial evidence. Appellants' revised instruction met both of these criteria. Under California law, a fraud plaintiff proves damage causation by showing that it would have avoided injury had it known the truth hidden by the defendant's deceit. Consequently, Appellants were entitled to an instruction asking the jury to determine what the Commissioner would have done had he learned the truth about all the portage agreements before he detrimentally relied on the deceit. This would have minimized jury speculation by

requiring the jury to assume a "but-for" world that was the same as the real world except that any actionable fraud would have been eliminated by the Commissioner's hypothetical knowledge of the portage agreements. *See* Part II(A)(1), *infra*.

This instruction also was supported by substantial evidence. Both the Commissioner and his Chief Deputy testified unequivocally that that they would not have chosen the Altus/MAAF bid had they learned about the portage agreements. As a fiduciary of ELIC's policyholders (*In re Exec. Life Ins. Co.*, 32 Cal. App. 4th 344, 356 (1995)), the Commissioner would not have entrusted the Estate's insurance business to entities that could not legally own or control them under California and federal law and that had entered into the portage agreements despite repeated assurances that Altus would not own or control the new insurance company. *See* Part II(A)(2), *infra*.

This Court has repeatedly ordered new trials where the District Court failed to give jury instructions about the plaintiff's theory of the case. The same result should follow here. The court's failure to give Appellants' proposed instruction left the jury unaware of the key legal principle supporting the Commissioner's damage causation case—that it had to assume the existence of the portage agreements in the "but-for" world. This prejudice was exacerbated by the court's

directives telling the jury to ignore evidence that the Commissioner would not have chosen the Altus/MAAF bid if he had learned of the conspirators' dishonesty through disclosure of these contracts. Consequently, the court failed to identify the correct issue that the jury had to decide while simultaneously telling the jury to disregard the critical evidence that supported the Commissioner's contention that the issue should be decided in his favor. *See* Part II(A)(3), *infra*.

b. ***Prejudicial Ambiguity In The Instructions Given***: Even if this Court concludes that the District Court did not err in rejecting Appellants' revised instruction, the instructions the court gave, its extemporaneous comments and its refusal to answer critical jury questions were prejudicially erroneous.

The court instructed the jury to "determine whether the Commissioner has proved that, but for the conspiracy to defraud, he probably would have entered into a transaction with NOLHGA for the benefit of the ELIC Estate." 1-ER-35; *see also* 4-ER-748:11-14; *see* p.23, *supra*. Significantly, the court refused to answer repeated questions from the jury as to what this instruction meant, other than telling the jury ten times that it had to assume that there had never been a conspiracy. Nor was the jury told whether to assume that any or all of the portage agreements existed in the "but-for" world.

The jury tried to resolve this ambiguity by asking the court point-blank whether it had to assume disclosure of the portage agreements. *See* p.25, *supra.* Unfortunately, the court refused to answer this critical question. Jurors also told the court that its answer to another jury questions was "vague," and "open[ed] a can of worms," and that it required an "assumption" that could "be interpreted in different ways." 4-ER-767:2-4, 6-23; *see* p.27, *supra.* Indeed, in frustration one juror even told the court that "this is your fault." 4-ER-768:14-18; *see* p.27, *supra.*

The jury's consternation was understandable. The court's instructions and directions were ambiguous because, as the Commissioner's counsel objected, they failed to tell the jury to assume existence of the portage agreements in the "but-for" world. *See* pp.23-24, *supra.* Consequently, the jury almost certainly interpreted the court's directives to assume "no conspiracy" as a command to assume that none of the portage agreements had ever existed. The portage agreements memorialized the conspiracy—even though they did not constitute actionable fraud by themselves—by giving Altus illegal control of the new insurance company; and the November agreements transferred ownership of that company to Altus in violation of California and federal law. The November Portage Agreements also contained con-

fidentiality provisions that required concealment of the conspiracy. Accordingly, the court's repeated instructions that the jury had to assume that there was "no conspiracy" in the "but-for" world were highly likely to have been interpreted by a lay jury as a command to assume that there were no portage agreements either—an interpretation that was made even more probable by the trial court's refusal to answer the jury's direct question about disclosure of the portage agreements.

That interpretation would have been wrong as a matter of law. The portage agreements did not have to be eliminated to create a fraud-free "but-for" world. The actionable fraud consisted of Altus/MAAF's misrepresentations about the independence of the new insurance company and their concealment of those agreements, not the agreements themselves.

That interpretation would also have been prejudicial. A jury which believed that "no conspiracy" meant "no portage agreements" would have to reach a defense verdict. The Commissioner had accepted the Altus/MAAF bid when he was unaware of the portage agreements and believed that Altus/MAAF had complied with the federal and state laws governing ownership of the new insurance company. His decision would surely have been the same in a hypo-

thetical world with honest, lawful applicants and no secret portage agreements.

The court therefore erred by giving an ambiguous instruction the most likely interpretation of which was substantively erroneous, erred again by repeatedly refusing to tell the jury what this meant except by telling the jury to assume that there was "no conspiracy," and erred yet again by failing to answer a juror's question as to whether the jury had to assume disclosure of the portage agreements. The court should have dispelled this confusion by directing the jury to assume that, in the hypothetical "but-for" world, both the August and November Portage Agreements were signed and disclosed to the Commissioner before the Conservation Court approved the Altus/MAAF bid. *See* Part II(B), *infra.*

3. ***Failure To Adjust The Restitution Award For Subsequent Events Or To Award Interest:*** Reversal for a retrial on the damage causation issue will obviate the need for the Court to reach any issues relating to restitution. But if the Court affirms the jury's resolution of the Commissioner's damages claim, those issues will have to be reached.

Judge Matz awarded prejudgment interest on the 2006 restitution award. Judge Klausner reinstated that award (including the

prejudgment interest included therein), but declined to award any additional interest through the date of the reinstated award. Nor did Judge Klausner adjust the 2006 award to reflect Artemis' actual profits from its sale of its ownership interest in NCLH in 2012. The restitution award should therefore be modified in two respects: (1) adding prejudgment interest for the period between 2006 and 2013 to the value of the dividends included in the 2006 restitution award; and (2) substituting the actual net profit that Artemis received from selling its interest in NCLH in 2012 (plus prejudgment interest) for the estimated value that Judge Matz posited in 2006. *See* Part III(A), *infra*.

Even if the Court does not require these adjustments, it should require post-judgment interest to run from the date of the original (and now reinstated) restitution judgment—*i.e.*, February 13, 2006. This Court has repeatedly held that, when a judgment or order is reinstated after an appeal or remand, for the same amount and for the same reasons as the first judgment or order, post-judgment interest should run from the date of the first judgment or order. *See* Part III(B), *infra*.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN PERMITTING ARTEMIS TO INTRODUCE EVIDENCE THAT THE COMMISSIONER WOULD HAVE CHOSEN THE ALTUS/MAAF BID IN THE HYPOTHETICAL "BUT-FOR" WORLD.

At the first trial, the jury found that Altus, Credit Lyonnais and others had agreed to "participate in a common scheme to obtain assets from the ELIC Estate by fraud." 2-ER-205 (Question 1). The jury also found that Artemis had agreed to participate "in furtherance of that scheme, knowing its wrongful objective and before the scheme was accomplished." 2-ER-206 (Questions 2 and 3). Finally, the jury found that "*the scheme cause[d] harm to the ELIC Estate.*" 2-ER-207 (Question 4) (emphasis added).

The first jury could not have found harm had it believed that the Commissioner would still have selected the Altus/MAAF bid even if he had known of the portage agreements. After all, a plaintiff cannot show harm if he would have done the same thing in the "but-for" world that he did in the real world. Indeed, Artemis made just this argument in the first trial when it attempted to persuade the jury that the conspiracy had not harmed the ELIC Estate because the Commissioner would have chosen the Altus/MAAF bid despite the fraud. *See* pp.12-13, *supra*. The jury's harm finding rejected this

argument and impliedly found that, but for the fraud, the Commissioner would have chosen a bid other than the Altus/MAAF bid—*i.e.*, either the NOLHGA or Sierra bid.

Judge Matz endorsed this interpretation of the "harm finding" in three separate post-trial orders following the jury's verdict. In its Post-Verdict Order, the court held that the jury must have found "that the scheme caused the Commissioner not to choose *one* of the bonds-in bids (either NOLHGA or Sierra)." *Garamendi v. Altus*, No. CV-99-2829, 2005 U.S. Dist. LEXIS 40047, at *29 (C.D. Cal. June 10, 2005) (emphasis in original). As the court explained, "to find that the *scheme* caused 'harm' on Verdict Form 5, it was not necessary for the jury to find . . . that the Commissioner would have picked the NOLHGA bid; the jury could have concluded that he would have picked *either* that bid *or* the Sierra bid." *Id.* (emphases in original). Similarly, in its Punitive Damages Order, the court explained that "[a]lthough the jury did not specify what the harm was, presumably it was that the Commissioner selected the Altus/MAAF bid, thereby causing the ELIC Estate to incur losses, costs or expenses that it would not otherwise have incurred if the Commissioner had picked a 'bonds in' bid." *Garamendi v. Altus*, No. CV-99-2829, 2005 U.S. Dist. LEXIS 39214, at *14 (C.D. Cal. Oct. 4, 2005). And in its Restitution

Order, the court stated that the jury had found "in Phase I that Artemis joined a conspiracy previously formed by other defendants, and that the *conspiracy* did cause harm to the ELIC Estate, *in that it caused the Commissioner not to choose one of the "bonds-in" bids (NOLHGA's or Sierra's) that were competing with the Altus/MAAF bid.*" *Garamendi v. Altus*, No. CV-99-2829, 2005 U.S. Dist. LEXIS 39273, at *19 (C.D. Cal. 2005) (second emphasis added).

This Court adopted that interpretation of the harm finding when it resolved the prior appeal. While the Court was "not persuaded" that the jury's finding of harm implied a determination in the Commissioner's favor on the NOLHGA Premise (*Altus*, 540 F.3d at 1008), it held that the harm finding incorporated an implied determination that, but for the fraud, the Commissioner would have picked *either the NOLHGA bid or the Sierra bid. Id.*

The Court first explained why this conclusion was supported by Instruction No. 30[10]:

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[10]Instruction 30 stated:

> The Commissioner claims that he was harmed by the [Altus/MAAF Group] that allegedly conspired to, and did obtain, ELIC's junk bonds and insurance business through fraud: Altus/Credit Lyonnais, MAAF, Omnium Geneve, SDI Vendome, and Financiere de Pacifique (Finapaci). The Commissioner contends that Artemis and Pinault are responsible for the harm because they joined those companies' (continued . . .)

> [T]he jury could have reasonably believed that Instruction 30, which was the instruction on proving harm resulting from conspiracy, was broader than the definition in Instruction 25, which was the instruction on harm for intentional misrepresentation and concealment. Because Instruction 30 did not depend on the NOLHGA Premise, the jury could have found harm *if it concluded that the Commissioner would have entered a transaction with either of the "bonds-in" bidders, NOLHGA or Sierra, but for the Altus/MAAF Group conspiracy.* (540 F.3d at 1008 (emphasis added))

The Court then reached the same conclusion with respect to Instruction No. 25, which likewise permitted the jury to find harm if it found that the Commissioner would have picked *either* the NOLHGA bid or another "bonds-in" bid[11]:

> We think a better reading of the instruction would have allowed the jury to find the Commissioner was harmed if it determined either that the Commissioner would have accepted the NOLHGA bid or that the Commissioner would have incurred losses, costs or expenses that the ELIC Estate would not otherwise have incurred if the Commissioner had picked a "bonds in" bid. (*Id.*)

(. . . continued)
alleged conspiracy to commit this fraud. (*Altus*, 540 F.3d at 1006 n.14)

[11]Instruction 25 stated:

> The Commissioner claims that the ELIC Estate was harmed by his selecting the Altus/MAAF bid instead of the NOLHGA bid. In order to find that the Commissioner was harmed, you must determine whether the Commissioner would have agreed to the NOLHGA bid had the alleged fraud not occurred and whether the Commissioner's acceptance of the Altus/MAAF bid caused the ELIC Estate to incur losses, costs or expenses that the ELIC Estate would not otherwise have incurred if the Commissioner had picked a 'bonds in' bid. (*Altus*, 540 F.3d at 1006 n.13)

Based on these two instructions, the Court concluded that the jury's finding of harm necessarily meant that the Commissioner would have picked *either* the NOLHGA bid or the Sierra bid:

> NOLHGA and Sierra both submitted "bonds in" bids. Thus, the jury could have found "losses, costs or expenses" causing "harm" in Form 5 *if it concluded that, but for the Altus/MAAF Group's conspiracy, the Commissioner would have selected either the Sierra or the NOLHGA bid.* Because we cannot determine *which of these conditions* the jury found, the answered verdict forms do not establish the NOLHGA Premise conclusively. (*Id.* (emphases added))

After the remand for a retrial of damages under the NOLHGA Premise (*see* pp.15-16, *supra*), Appellants filed a motion *in limine*, based on this Court's interpretation of the jury verdict, as well as the Seventh Amendment, to preclude Artemis from contending at the upcoming trial that the Commissioner would have chosen the Altus/MAAF bid even if he had known of the fraud. 2-ER-279, 281, 294, 296. The court denied the motion. 1-ER-45. Its thirteen-page order did not mention that it had previously held on three separate occasions that the first jury's verdict contained an implied determination that, but for the conspiracy to defraud, the jury would have picked either the NOLHGA bid or the Sierra bid. *See* pp.39-40, *supra*. The court refused to apply this Court's interpretation of the "harm" verdict because, in the District Judge's opinion, the interpretation was erroneous. 1-ER-51-52.

That was wrong. Under the law of the case doctrine, "a court generally is precluded from reconsidering an issue previously decided by . . . a higher court in the identical case." *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007) (citation and internal quotation marks omitted). Moreover, an appellate court's decision on an issue need not be explicit to be entitled to law of the case effect. *Id.* ("For the doctrine to apply, the issue in question must have been decided explicitly *or by necessary implication* in the previous disposition") (citation and internal quotation marks omitted; emphasis added). Consequently, despite the District Court's disagreement with this Court's opinion (*see* p.42, *supra*), it was required by the law of the case to give preclusive effect to this Court's interpretation of the first jury's harm finding.[12]

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[12]The applicable standard of review for District Court decisions refusing to apply the law of the case depends on the precise issue decided by the court. As this Court held in *Thomas v. Bible*, 983 F.2d 152 (9th Cir. 1993), while trial "courts have some discretion not to apply the doctrine of law of the case, that discretion is limited." *Id.* at 155 (citation omitted). In particular, a District Court "may have discretion to reopen a previously resolved question under one or more of the following circumstances: (1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; (5) a manifest injustice would otherwise result." *Id.* However, where none of these conditions exists, as in this case, "the district court's failure to apply the doctrine of law of the case constitutes an abuse of discretion." *Id.*

Moreover, this Court's interpretation of the jury's verdict *was* correct. The District Court initially adopted the same interpretation, right after the liability trial, when it repeatedly said that the harm finding necessarily implied that, but for the conspiracy to defraud, the Commissioner would have chosen one of the two "bonds-in" bids. *See* pp.39-40, *supra*. Indeed, any other interpretation of the harm finding would render it meaningless.

"[I]t would be a violation of the seventh amendment right to jury trial for the court to disregard a jury's finding of fact." *Floyd v. Laws*, 929 F.2d 1390, 1397 (9th Cir. 1991). Accordingly, quite apart from the law of the case, the District Court violated the Seventh Amendment when it refused to give preclusive effect to the first jury's harm finding. *See Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993) ("Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations") (citation and internal quotation marks omitted); *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 507 (9th Cir. 1989) (same); *see White v. Ford Motor Co.*, 500 F.3d 963, 974-75 (9th Cir. 2007) (approved trial court instructing second jury to accept explicit and implicit findings of the first jury as binding). Whether the District Court erred in failing to apply Seventh Amendment

preclusion is an issue of constitutional law that is reviewed *de novo*. *See Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009).

The District Court's erroneous decision to permit Artemis to retry its contention that the Commissioner would have chosen the Altus/MAAF bid even if he had known of the portage agreements was unquestionably prejudicial. That contention was Artemis' principal defense at the second trial. Artemis repeatedly argued to the jury that the Altus/MAAF bid was superior to the other bids—in particular, to the NOLHGA bid—and that the Commissioner would still have chosen that bid even if the conspirators had disclosed the portage agreements. 4-ER-678:3-10, 735:7-9, 736:15-39:22. But, as this Court recognized in *Altus* (*see* 540 F.3d at 1008), the jury in the first trial had found otherwise. Accordingly, the judgment against the Commissioner on his damages claims must be vacated, and the case remanded for a new trial at which the issue will be a narrower one: whether, in the hypothetical, "but-for" world, the Commissioner would have chosen the NOLHGA bid rather than the Sierra bid.

II.

APPELLANTS ARE ENTITLED TO A NEW TRIAL BECAUSE THE COURT ERRONEOUSLY REFUSED THEIR DAMAGE CAUSATION INSTRUCTION AND BECAUSE THE INSTRUCTIONS IT GAVE PREJUDICIALLY MISCHARACTERIZED THE NOLHGA PREMISE ON WHICH THEIR DAMAGE CLAIM RESTED.

A. The Court Erred By Refusing To Instruct The Jury On Appellants' Theory Of Damage Causation—That The Commissioner Would Have Chosen The NOLHGA Bid Had He Learned Of The Portage Agreements.

Appellants' revised instruction asked the jury to decide whether, if "the Commissioner learned of the portage agreements, he probably would have entered into a transaction with NOLHGA." 3-ER-660; *see* p.22, *supra*. The court's refusal to give this instruction was error.

A plaintiff is "entitled to an instruction about his or her theory of the case if it is supported by the law and has foundation in the evidence." *Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009) (citation and internal quotation marks omitted). Indeed, "[f]ailure to give an instruction on a party's theory of the case is reversible error if the theory is legally sound and evidence in the case makes it applicable." *Dang v. Cross*, 422 F.3d 800, 811 (9th Cir. 2005) (citation and internal quotation marks omitted). Appellants' revised instruction satisfied both of these criteria.[13]

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[13] When evaluating a District Court's refusal to give a requested instruction, the Court reviews *de novo* whether the requested (continued . . .)

1. Appellants' Instruction Was Consistent With California Law And The General Principles For Determining Damages Causation In Tort Cases.

California law requires the plaintiff in a fraudulent concealment case to establish that he "would not have acted as he did if he had known of the concealed or suppressed fact." *Boschma v. Home Loan Ctr., Inc.*, 198 Cal. App. 4th 230, 248 (2011) (citation and internal quotation marks omitted). The same showing is required where the truth has been concealed by an affirmative misrepresentation. *See, e.g., McClain v. Octagon Plaza, LLC*, 159 Cal. App. 4th 784, 793-94 (2008) (lessee sufficiently pled fraud by alleging that lessor misrepresented size of leased space and that "[h]ad she known the correct sizes, she would not have agreed to the base rent and share of the common expenses stated in the lease"); *Lacher v. Superior Court*, 230 Cal. App. 3d 1038, 1045, 1049 (1991) (fraud properly pled where plaintiffs allegedly would not have supported new housing development had they "known the true facts about the development").

(. . . continued)
instruction correctly stated the law, and for abuse of discretion whether the requested instruction had evidentiary support. *See Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005); *see also Dang*, 422 F.3d at 804 (*de novo* review where the District Court "rejected [the plaintiff's] proposed instruction as contrary to the law of this circuit"). Here, there is no indication that Appellants' revised instruction was refused for lack of supporting evidence, and it could not have been given the record. *See* Part II(A)(2), *infra*.

Accordingly, damage causation in fraud cases is established if the plaintiff shows that he would have acted differently, and not suffered injury, had he known the truth. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343-44 (2005) ("the common law [of deceit] has long insisted that a plaintiff in such a case show not only that had he known the truth he would not have acted but also that he suffered actual economic loss").

This principle is a specific application of a more general rule, applicable in all tort cases, that the "causal inquiry asks whether the harm would have occurred if the actor had not acted tortiously." RESTATEMENT (THIRD) OF TORTS §26, cmt. f (2010) ("RESTATEMENT"). Moreover, the alterations that are made to eliminate the tort in the "but-for" world "must be careful, conservative, and modest." David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770 (1997) ("Robertson"); *see* RESTATEMENT §26, Reporter's Note to cmt. f (endorsing Professor Robertson's approach to determining causation); *Cabral v. Ralphs Grocery Co.*, 51 Cal. 4th 764, 785 (2011) ("but-for" world in negligence case is one without the defendant's negligent conduct).

These principles serve multiple functions: they keep the "but-for" trial manageable and minimize jury speculation. *See* Robertson, 75

TEX. L. REV. at 1770 n.21 (citing cases).[14] Importantly, they also provide an objective standard for defining the hypothetical "but-for" world that does not favor one side or the other.[15]

The "truth" that the conspirators should have disclosed in this case consisted of both the August and November Portage Agreements, which collectively gave Altus control and ownership of the new insurance company in violation of state and federal law. Accordingly, Appellants were entitled to an instruction telling the jury to determine what the Commissioner would have done had he learned about all of the portage agreements. Appellants' revised instruction

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[14]Defining the "but-for" world is an issue of law. *See* RESTATEMENT §26, Reporter's Note to cmt. f ("the law determines the way in which the causal inquiry is framed") (citation and internal quotation marks omitted).

[15]Numerous scholars have endorsed Professor Robertson's view of causation, and recognized that framing the but-for world permits only modest and conservative modifications to the facts in the real world. *See, e.g.*, Mark P. Gergen, *Causation in Disgorgement*, 92 B.U. L. Rev. 827, 833 & n. 27 (2012) (citing Professor Robertson and stating that when "a court is asked to disregard something that actually happened in answering the causal question," it violates the principle that in formulating the but-for world, the counterfactual must be crafted in "'an intellectually conservative way, employing as little creativity as possible'") (citation omitted); *see also* Luke Meir, *Using Tort Law to Understand the Causation Prong of Standing*, 80 FORD. L. REV. 1241, 1248 n.25 (2011) (endorsing Professor Robertson's view of causation); Adam L. Fletcher, Note, *Alternative Liability and Deprivation of Remedy: Teaching Old Tort Law New Tricks*, 56 CLEV. ST. L. REV. 1029, 1031 & n.9 (2008) (same).

asked the jury to decide this very question. *See* p.22, *supra*. It therefore was consistent with the California law requiring a fraud plaintiff to show that he would have suffered damage had he learned the truth hidden by the defendants' misrepresentations and concealment.

Appellants' revised instruction also conformed to the principle that the hypothetical but-for world be as close as possible to the real world except for elimination of the defendants' tortious conduct—here, the fraudulent concealment of the portage agreements. California law required the conspirators to disclose the portage agreements *before* the Commissioner detrimentally relied on their prior misstatements and omissions. *See Koch v. Williams*, 193 Cal. App. 2d 537, 541 (1961) ("One who learns that his statements, even if thought to be true when made, have become false through a change in circumstances, has the duty *before his statements are acted on* to disclose the new conditions to the party relying on his original representations") (emphasis added). Accordingly, a "but-for" world in which the Commissioner learned about the portage agreements *before* detrimental reliance is a world identical to the real world except for the minimum changes necessary to eliminate the actionable fraud.

For these reasons, Appellants were entitled to have the jury determine what would have happened had the Commissioner learned about the portage agreements. The jury instruction requested by Appellants was therefore correct.[16]

2. Appellants' Instruction Was Supported By The Evidence.

Appellants' revised instruction was supported by substantial evidence. This evidence demonstrated that the Commissioner would not have supported the Altus/MAAF bid if he had learned that the bidders had entered into the portage agreements. Former Commissioner John Garamendi testified unequivocally that he would have immediately disqualified the Altus/MAAF bid if those agreements had been disclosed:

> Q. If you had been told by Altus or MAAF about these secret agreements before the conservation court approved the Altus/MAAF bid on December 26th, 1991, would you still have recommended the Altus/MAAF bid for approval?
>
> A. No.
>
> Q. How would you have dealt with Altus and MAAF?

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[16]Even if Appellants' instruction was imperfectly phrased, the District Court would have been obliged to correct it. "If a party's proposed instruction has brought an 'issue . . . to the district court's attention,' the court commits error if it 'omit[s] the instruction altogether, rather than modifying it to correct the perceived deficiency.'" *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1235 n.11 (9th Cir. 2011) (citation omitted; brackets in original).

> A. . . . They would have been out. They would not be participating further. (4-ER-711:7-15; *see also* 4-ER-707:4-08:21, 712:8-13)

This testimony was corroborated by Mr. Garamendi's then-Chief Deputy, Richard Baum. He first testified that the Commissioner would not have let Altus/MAAF bid for ELIC's assets if Altus was going to own and control the new insurance company (which is exactly what the portage agreements provided):

> Q. If, in the beginning of the process of the Commissioner meeting with Altus and setting up the bidding, if Altus had told you that Altus wanted to own and control the insurance company, what would you have done?
>
> A. We would have told them that they could not bid on the company because that would have been illegal. (4-ER-697.1:25-97.2:5)

In addition, Mr. Baum testified that knowledge of the portage agreements and the misstatements made by the conspirators to the federal government (*see* p.11, *supra*) would have caused immediate disqualification of the Altus/MAAF bid due to concerns about the bidders' candor:

> Q. Mr. Baum, had you seen the portages and learned that these statements were being made to the Federal Reserve Board, would you have continued to allow Altus to participate in the bidding process?
>
> A. No.
>
> Q. Why not?
>
> A. *Because they would have lied to us.*

> Q. Why is that significant in insurance?
>
> A. One of the issues with respect to the ownership of an insurance company is the responsibility that people have to the policyholders; *and integrity and the manner in which you represent yourself to the department is a critical piece of how we can—whether we approve it, a license or not.* (4-ER-690:6-18 (emphases added))[17]

This testimony made perfect sense. As a public official, the Commissioner had the responsibility to ensure compliance with applicable law. Both California and federal law prohibited ownership or control of the new insurance company by Altus. *See* p.9, *supra*. And, as a fiduciary for ELIC's policyholders (*In re Exec. Life Ins. Co.*, 32 Cal. App. 4th 344, 356 (1995)), the Commissioner had to be satisfied that the buyer of the ELIC Estate's insurance business met the highest standards of integrity. Any illegality or lack of candor vis-à-vis the state or federal governments was, as the Commissioner and his Deputy testified, a compelling ground for disqualification.

3. The Court's Refusal To Give Appellants' Instruction Was Prejudicial.

This Court has repeatedly ordered new trials where the District Court failed to give jury instructions about the plaintiff's theory of the case. *See, e.g., Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1234-36 (9th Cir. 2011) (new trial required where trial court refused

[17] *See also* 4-ER-686:12-18, 693:21-94:11, 695:7-19, 696:3-18.

to give instruction that tracked plaintiffs' theory of liability); *Dang v. Cross*, 422 F.3d 800, 811-12 (9th Cir. 2005) (new trial required where trial court failed to instruct jury that punitive damages could be awarded for oppressive conduct).

The failure to give Appellants' revised instruction left the jury unaware of the key legal principle that damage causation depends on what the plaintiff would have done had he known the truth concealed by the defendants, which in this case consisted of the portage agreements. *See* pp.47-48, *supra*. Because "juries are not clairvoyant and will not know to follow a particular legal principle unless they are told to do so" (*Hunter*, 652 F.3d at 1235 (citation and internal quotation marks omitted)), the jury had no way to know that it had to determine damage causation by asking what the Commissioner would have done had he known about these secret contracts.

The prejudice was exacerbated by the court's directives telling the jury to ignore evidence that the Commissioner would not have chosen the Altus/MAAF bid if he had learned through disclosure of the portage agreements of the conspirators' lack of candor. *See* pp.22-23, *supra*. As shown above, both former Commissioner Garamendi and former Chief Deputy Commissioner Baum testified that the Commissioner would not have sold ELIC's insurance business to parties that

had entered into secret agreements contradicting their prior representations about the independence of the new insurance company. *See* pp.51-53, *supra*. This testimony was a critical element of the Commissioner's damages case. 4-ER-690:6-18, 711:7-15; *see* p.53, *supra*. Accordingly, the prejudice caused by the court's refusal to instruct the jury that it had to decide what the Commissioner would have done had he learned about the portage agreements—the central issue before the jury—was compounded by the court's directives to disregard the critical evidence supporting Appellants' contention that that issue should be decided in his favor.

B. Even If The Court Did Not Err In Refusing To Give Appellants' Instruction, It Prejudicially Erred By Giving The Jury An Ambiguous "But-For" Instruction And Then Failing To Answer The Jury's Reasonable Questions Except By Repeatedly And Unhelpfully Telling The Jury That It Had To Assume That There Had Never Been A Conspiracy.

If—despite the arguments in Part II(A)—the Court were to hold that Appellants' revised instruction was properly refused, it should nevertheless conclude that the District Court committed prejudicial error by (1) giving an ambiguous jury instruction defining the "but-for" world, an instruction that the jury was highly likely to interpret in a substantively erroneous manner; (2) refusing to answer the jury's requests for clarification except by repeatedly and unhelpfully telling the jury to assume that there was "no conspiracy" in the "but-

for" world; and (3) failing to respond to a juror's question asking whether the jury should assume that the portage agreements had been disclosed. These errors deeply prejudiced Appellants' damage causation case.

Jury instructions must "fairly and adequately cover the issues presented, . . . correctly state the law, and . . . not be misleading." *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (citation and internal quotation marks omitted). The court's instruction defining the NOLHGA Premise (quoted on p.23, *supra*) satisfied none of these requirements. This instruction, given over the Commissioner's objection,[18] told the jury to determine "whether the Commissioner has proved that but for the conspiracy to defraud, he would have entered into a transaction with NOLHGA for the benefit of the ELIC Estate." 4-ER-748:11-14; *see also* 3-ER-553. This instruction failed to "adequately cover the issues presented" because it failed to define what "but for the conspiracy to defraud" meant. In particular, the

[18]The Commissioner repeatedly objected to the court's formulation of the NOLHGA Premise during the retrial. 4-ER-723:11-24:7, 728:25-30:15, 731:11-34:4, 741:4-44:1, 744:9-45:21, 749:21-52:6. In response, the court ruled that "everybody's objections to everything are reserved." 4-ER-733:14-34:4.

jury was never told whether it should—or even could—assume that the portage agreements existed in the "but-for" world.[19]

The court's failure to properly define the NOLHGA Premise in its instructions was particularly problematic because the jury received conflicting definitions during trial. Early in the trial, the jury was told that it had to decide what the Commissioner would have done if he "had known about the conspiracy and the concealment." 4-ER-700:24-01:2. During the next day of testimony, the jury was told that it had to decide what the Commissioner "would have done in 1991 if he had known of the portage agreements at that time." 4-ER-713:21-25. Then the jury was told that it had to decide what would have happened if there had never been a "conspiracy to conceal." *See* pp.19-20, *supra*. Finally, as the trial neared its end, particularly during and immediately after the closing arguments, the jury was told to decide what would have happened had there simply been "no conspiracy." *See* p.21, *supra*.

The court then compounded its error by refusing the jury's repeated requests to explain what the "but-for" instruction meant. Instead, the court told the jury four times during the trial and at

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[19]Where, as here, an instruction sets forth an "incomplete, and therefore incorrect statement of law," review is *de novo*. *Hunter*, 652 F.3d at 1232 (citation and internal quotation marks omitted).

least six times immediately before and during deliberations to assume that there had never been a conspiracy at all. *See* pp.19-21, 25-27, *supra*. This was error. *See Dawson v. New York Life Ins. Co.*, 135 F.3d 1158, 1167 (7th Cir. 1998) ("Rather than defining the term for the jury, the instruction given did little more than assert that 'reckless disregard' means 'reckless disregard").

In addition, the court refused to answer a juror's direct question as to whether the jury had to assume disclosure of the portage agreements. *See* pp.25-26, *supra*. This failure was incomprehensible because the court had told counsel out of the jury's presence that the portage agreements "had been made known to the Commissioner" in the "but-for" world. 4-ER-722:6-10. It was also erroneous. "After the jury requested clarification, the district court had an obligation to clear away the confusion with concrete accuracy." *Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 986 (9th Cir. 2002) (citations and internal quotation marks omitted). That is particularly true where the judge's repeated attempts to define the issue that the jury had to determine were "punctuated by questions from the jury demonstrating that the jurors had difficulty following the court's explanation." *Id.* at 987. Indeed, jurors expressly told the court that its attempt to explain the NOLHGA Premise was "vague" and

"open[ed] a can of worms," because it required an "assumption" that could "be interpreted in different ways." 4-ER-767:2-23. One frustrated juror went so far as to blame the court for the jury's confusion, bluntly telling the judge that "this [confusion] is your fault." 4-ER-768:14-18.

Once the Court finds error in what the District Court told and failed to tell the jury, the burden shifts to Artemis to show that these errors were not prejudicial. *See Medtronic, Inc. v. White*, 526 F.3d 487, 493-94 (9th Cir. 2008). Artemis cannot meet that burden.

The jury was highly likely to interpret the court's repeated directions to assume "no conspiracy" as requiring it to assume that in the "but-for" world none of the portage agreements had ever existed. The portage agreements were an essential component of the conspiracy, as that term would be understood by lay jurors. Indeed, the jury was told, in a stipulation that it had to accept as true (3-ER-549-52), that "[t]he conspirators' secret agreements were memorialized" in the portage agreements. 3-ER-550. Moreover, the stipulation accurately reflected the evidence. The August Portage Agreements made MAAF a "front" for Altus in violation of California and federal law (*see* pp.9-10, *supra*); the November Portage Agreements provided for the sale of NCLH to Altus in violation of California and federal law (*see* p.10,

supra); and the November Portage Agreements included confidentiality provisions that barred their disclosure to the Commissioner (and to the Federal Reserve). 4-ER-787, 795. Accordingly, all of these agreements both furthered the conspiracy's substantive goal—obtaining ELIC's insurance business for Altus—and ensured the conspiracy's secrecy. A jury that was repeatedly instructed to assume that there was "no conspiracy" in the hypothetical "but-for" world was exceedingly likely to assume that there also were no portage agreements in that world. That interpretation would have been buttressed when the court refused to answer a juror's question as to whether it had to assume that the portage agreements had been disclosed. *See* pp.25-26, *supra*.

That interpretation would have been incorrect as a matter of law. If "no conspiracy" meant "no portage agreements," as the jury very probably assumed, the jury would have assumed hypothetical facts that were materially different from what actually occurred. In particular, it would have eliminated the legal barriers to acceptance of the Altus/MAAF bid: if no portage agreements were signed, Altus would not have owned or controlled the new insurance company in violation of California and federal law. This miraculous hypothetical cleansing would have violated the rule that damage causation in a

fraud case must be determined by looking at what the plaintiff would have done had he known the truth, which included the August and November Portage Agreements. *See* pp.47-50, *supra.* Moreover, because it was the concealment—not the existence—of the portage agreements that gave rise to actionable fraud (*see* pp.50-51, *supra* and n.21, *infra*), any assumption that the portage agreements did not exist would have violated the principle that changes in the "but-for" world must be "careful, conservative and modest" and should be made "only to the extent necessary" to eliminate the tort. *See* pp.48-49, *supra.*

The court's confusing "no conspiracy" instructions, and its failure to tell the jury that it had to assume the existence of the portage agreements, were deeply prejudicial. Without portage agreements, the "but-for" world would have been the *same* as the world the Commissioner believed existed in 1991—*i.e.*, a world in which the proposed transaction would have complied with California and federal law and Altus/MAAF would have acted lawfully and honestly. Accordingly, the jury would have to find that, in this hypothetical "no portage agreement" world, the Commissioner would have done exactly what he did in 1991 when he did not know about the portage agreements: select the Altus/MAAF bid.

At the very least, the court should have dispelled the jury's confusion by answering the query about disclosure of the portage agreements (4-ER-757:14-15) with an instruction directing the jury to assume execution and disclosure of *both* the August *and* the November Portage Agreements prior to the Commissioner's detrimental reliance on the deceit.[20] This would have defined the hypothetical "but-for" world in a way that eliminated any actionable fraud by Altus/MAAF.[21] That hypothetical scenario would also have been the most consistent with actual historical events and would have required the least speculation by the jury, and it would have eliminated the prejudice caused by the vague and erroneous instruction and comments to the jury.

Consequently, at a minimum the Court should reverse and remand for a new trial at which the jury is instructed to assume that, in the hypothetical "but-for" world, both the August and November

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[20]Alternatively, of course, the court could have avoided any jury confusion at the outset by giving Appellants' proposed instruction. *See* p.22, *supra.*

[21]Disclosure of all of the portage agreements after the November Portage Agreements were signed and before the Conservation Court approved the Altus/MAAF sale would have cured the prior misrepresentations and concealment before detrimental reliance, and therefore would have created an appropriate hypothetical, "but-for" scenario. *See* pp.50-51, *supra.*

Portage Agreements existed, and that they were disclosed after the November Portage Agreements were signed and before the Conservation Court approved the Altus/MAAF bid in December 1991.

III.

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

If this Court orders a new damages trial, for any of the reasons set forth in Parts I and II, it should vacate the restitution award with leave to reinstate, as it did in the prior appeal. *See Altus*, 540 F.3d at 1009. If, however, it does not order a new trial, the Court would need to address the restitution issues that follow.

Judge Matz included prejudgment interest in the restitution award he made in 2006. *Garamendi v. Altus Fin., S.A.*, No. CV-99-2829, 2005 U.S. Dist. Lexis 39273, at *12, *50 (C.D. Cal. Nov. 21, 2005). Yet, when Judge Klausner reinstated the same award seven years later, he failed to adjust the award to reflect the passage of time and subsequent developments. 1-ER-4. For the reasons discussed below, this was error.

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

Judge Matz granted restitution of half of certain dividends that Artemis received from NCLH plus half the estimated capital value of Artemis' ownership interest in the company. 1-ER-81-82. Each of these amounts needed to be updated when the restitution award was reinstated in 2013.

First, prejudgment interest needed to be added to the dividends that Judge Matz used to calculate the 2006 restitution award. The reasons that led Judge Matz to include prejudgment interest on these dividends also apply to the reinstated award. "[W]here a person has a duty to pay the value of a benefit which he has received, he is 'also under a duty to pay interest upon such value . . . .'" *E.H. Boly & Son, Inc. v. Schneider*, 525 F.2d 20, 25 (1975) (quoting RESTATEMENT OF RESTITUTION §156 (1937)); *see William A. Graham Co. v. Haughey*, 646 F.3d 138, 145 (3d Cir. 2011) ("Requiring only that a losing defendant pay back the principal amount of a wrongfully obtained sum permits him to retain the money's time-value as a windfall in the form of an interest-free loan"). In other words, "interest is just as appropriate to achieve full disgorgement as to ensure just compensation" to the plaintiff. *Id.* In addition, California Civil Code Section 3287(a) requires an award of

prejudgment interest on money paid as restitution where, as here, the benefits to be disgorged are "'certain, or capable of being made certain by calculation.'" *Irwin v. Mascott*, 112 F. Supp. 2d 937, 956 (N.D. Cal. 2000).

There is no reason why an award of prejudgment interest through February 2006 on the dividends was proper but an award of such interest for the subsequent seven years would not be. The District Court's unexplained refusal to award such interest was therefore an abuse of discretion.

Second, the amount attributable to the value of Artemis's ownership interest in NCLH needed to be updated to reflect the sale of that investment in 2012. That value was estimated in 2006, based on a contemplated sale. 1-ER-77. When the sale actually occurred in 2012, Artemis's net proceeds amounted to $291,288,942, far more than the $151,885,297 in estimated sale proceeds found by Judge Matz in 2006. 3-ER-579 ¶13. The District Court's unexplained refusal to substitute the actual sales price for the earlier estimate in its restitution award should be reversed as an abuse of discretion. That amount should bear prejudgment interest from the date of sale (August 2012) through the date of judgment.

The Commissioner calculated that, with these adjustments, he would be entitled to a restitution award of $230,151,036 if the judgment were entered on December 13, 2012. 3-ER-569, 581-82 ¶23, 587. However, the restitution judgment was not entered until April 2, 2013, 110 days later. Accordingly, the Commissioner was also entitled to 110 additional days of prejudgment interest at $28,653/day, for an additional $3,151,830. 3-ER-587. The Court should therefore direct the District Court to enter a net restitution award in favor of the Commissioner for $233,302,866.

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

After the damages retrial, Judge Klausner found "restitution in the amount awarded by Judge Matz appropriate." 1-ER-4. Accordingly, "for the same reasons stated by Judge Matz," he "reinstate[d] the award of $241 million in restitution," offset by the $110 million that Judge Matz had also offset. *Id.*

Judge Klausner erred by not awarding post-judgment interest on the reinstated restitution judgment from the date it was originally entered: February 13, 2006. This Court repeatedly has held that, where a judgment or order is reinstated for the same amount and for the same reasons, interest on the judgment must run from the date on which it was first entered. *Planned Parenthood of*

Columbia/Willamette Inc. v. Am. Coal. of Life Activists, 518 F.3d 1013, 1018 (9th Cir. 2008); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 703 (9th Cir. 1996); *Handgards, Inc. v. Ethicon*, 743 F.2d 1282, 1298-1300 (9th Cir. 1984); *see also In re Exxon Valdez*, 568 F.3d 1077, 1080-81 (9th Cir. 2009) (post-judgment interest runs from date of original judgment even though intervening Supreme Court decision reduced amount); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1311 (9th Cir. 1982) (post-judgment interest runs from date of original judgment where first and second judgments were for same amount).

For example, in *Planned Parenthood*, where a damages award was reinstated after an appeal and remand, the Court held that post-judgment interest should run from the date of the first judgment. The Court recognized that "the basis for the punitive damages award had already been meaningfully ascertained" in the initial judgment because neither the first nor the second appellate decision had concluded that the "award was erroneous or unsupported by the evidence." 518 F.3d at 1021. Accordingly, "the legal and evidentiary basis of the original punitive damages award . . . remained unaltered" through both appeals so post-judgment interest should run from that original award. *Id.*

Similarly, in *Guam Society*, this Court held that post-judgment interest on an attorneys' fees award should run from the date of its initial entry because the post-remand award was based on the same hourly rates and multiplier as the initial award. 100 F.3d at 695, 703. And in *Handgards*, this Court held that post-judgment interest ran from the date of the first judgment, which had been vacated and then reinstated, because the "second judgment 'remains the same—in the same amount, for the same damages incurred during the same period'—as the prior judgment." 743 F.2d at 1298-99.

These cases stand for a single principle: when this Court reverses and remands a judgment or order "without concluding that it is erroneous or unsupported by the evidence," and the judgment or award is reinstated by the District Court following remand for the same amount and for the same reasons, post-judgment interest should run from the date of the original judgment or award.

This case is on all fours with *Planned Parenthood*, *Guam Society*, and *Handgards*, and follows *a fortiori* from *Exxon Valdez*.[22] In this case, too, the original restitution award was vacated by this Court

[22]In *Exxon Valdez*, the Court held that interest on the punitive damages award should run from its initial entry in 1996 even though the amount of punitive damages was reduced by the Supreme Court twelve years later. Here, the restitution award made by Judge Matz was adopted without reduction by Judge Klausner.

without finding that it was legally erroneous or unsupported by the evidence. In this case, too, the original award was reinstated after remand for precisely the same amount and precisely the same reasons. Accordingly, the District Court's denial of post-judgment interest is legally erroneous under this Court's precedents.

This is a pure issue of law, involving the construction of 28 U.S.C. §1961, so the abuse of discretion standard does not apply. *See Planned Parenthood*, 518 F.3d at 1016-17 ("Because this case involves the proper construction of 28 U.S.C. §1961 . . . our review is de novo"); *Handgards, Inc.*, 743 F.2d at 1298 n.24; *Twin City Sportservice, Inc.*, 676 F.2d at 1310. Accordingly, if this Court affirms the restitution award notwithstanding Artemis' cross-appeal and without the adjustments advocated in Part III(A), *supra*, it should award post-judgment interest from the date of the original restitution award in 2006.

CONCLUSION

The Judgment should be reversed and the case remanded for a new trial on the NOLHGA Premise at which Artemis should be precluded from arguing, or putting on evidence, that in the hypothetical "but-for" world, the Commissioner would have chosen the Altus/MAAF bid. Alternatively, the jury at the retrial should be

instructed to determine what the Commissioner would have done had he known about all the portage agreements before the Conservation Court approved that bid. Finally, if the Court affirms the judgment against the Commissioner with respect to his damages claim, the award of restitution should be increased by making the

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

DATED: September 30, 2013.

Respectfully,

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ATTESTATION UNDER CIRCUIT RULE 25-5(f)

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

DATED: September 30, 2013.

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

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant/Cross-Appellee Insurance Commissioner of the State of California states that it is not aware of any related cases pending in this Court.

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

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached **Appellants' Opening Brief** is proportionally spaced, in a typeface of 14 points or more and contains 15,128 words, exclusive of those materials not required to be counted under Rule 32(a)(7)(B)(iii).

DATED: September 30, 2013.

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

CERTIFICATE OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on September 30, 2013, I electronically filed the foregoing **Appellants' Opening Brief and Appellants' Excerpts Of Record, Volumes One through Six** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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

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