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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

ALTUS FINANCE S.A., et al.,

Defendants.

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

**REPLY TO ARTEMIS'S
OBJECTIONS TO
COMMISSIONER AND NOLHGA'S
PROPOSED JUDGMENT**

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

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1 **I. INTRODUCTION**

2 Artemis argues that (1) the Commissioner is not entitled to post-judgment
3 interest from the date of the prior judgment entered on February 13, 2006, which
4 this Court has decided to reinstate; and (2) Artemis is entitled to reduce the
5 restitution judgment by offsetting settlements from other defendants in this case
6 and, as a result, keep all of the illegal profits that Judge Matz and this Court have
7 decided should be disgorged. Artemis is wrong on both counts.

8 First, the Commissioner is entitled to post-judgment interest from the date of
9 the prior restitution judgment. Controlling Ninth Circuit authority holds that the
10 post-judgment interest mandated by 28 U.S.C. § 1961 runs from the date of the
11 original judgment when that judgment is vacated and then reinstated. That well-
12 established principle applies here because this Court had ordered “restitution in the
13 amount ordered by Judge Matz ... [f]or the same reasons stated by Judge Matz.”
14 *See Order Re: Restitution Award (Dkt. No. 4330)*. Artemis has not cited any case
15 that held that, under similar circumstances, post-judgment interest did not run from
16 the prior judgment. Moreover, although Artemis stresses the fact that reinstatement
17 was not certain here until recently ordered by this Court, such uncertainty was also
18 present in many other cases cited below that held that post-judgment interest ran
19 from the prior judgment.

20 Second, Artemis is not entitled to an offset. Artemis has failed to cite a
21 single decision that held that an **individual** judgment for **restitution** should be
22 reduced by settlements from other defendants, and both Judge Matz and the Ninth
23 Circuit have held that such an offset is not appropriate. Moreover, such an offset
24 would be contrary to common sense and the interests of justice because it would
25 permit a wrongdoer like Artemis to keep all of its illegal profits. Accordingly,
26 Artemis’s request for an offset should be denied.

1 **II. THE COMMISSIONER IS ENTITLED TO POST-JUDGMENT**
2 **INTEREST FROM THE FEBRUARY 2006 JUDGMENT**

3 The Ninth Circuit has repeatedly held that post-judgment interest runs from
4 the date of the original judgment when, as here, that judgment was vacated and then
5 reinstated. *See, e.g., Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100
6 F.3d 691, 702-03 (9th Cir. 1996) (finding that "the district court was correct in
7 awarding interest from the date of entry of the original judgment," which had been
8 vacated by appellate court and then reinstated by district court); *Handgards, Inc. v.*
9 *Ethicon, Inc.*, 743 F.2d 1282, 1299 (9th Cir. 1984) (holding that post-judgment
10 interest ran from prior judgment, which had been vacated and then reinstated,
11 because the "second judgment 'remains the same – in the same amount, for the
12 same damages incurred during the same period'" – as the prior judgment); *Twin*
13 *City Sportservice, Inc. v. Charles O. Finely & Co.*, 676 F.2d 1291, 1311 (9th Cir.
14 1982) (same).

15 Artemis concedes that "post-judgment interest accrues from the date the
16 monetary award is 'ascertain[ed].'" *See Artemis Objections to Proposed Judgment*
17 *("Objections") at 4.* As the Ninth Circuit has explained, an award is "ascertained"
18 for this purpose when "the legal and evidentiary basis" of the award is determined.
19 *See Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coalition of Life*
20 *Activists*, 518 F.3d 1013, 1018 (9th Cir. 2008). Here, this Court reinstated the prior
21 restitution award "[f]or the same reasons stated by Judge Matz." *See Dkt. No.*
22 *4330.* Accordingly, the "legal and evidentiary basis" for this Court's restitution
23 award was determined by the prior restitution judgment, so post-judgment interest
24 runs from that prior judgment.

25 Artemis argues that the foregoing Ninth Circuit authority should not apply
26 here because "there was no way for either party to know whether there would be
27 any restitution award or, if so, how much it would be" until this Court decided to
28 reinstate the prior award. *See Objections at 2.* The uncertainty about **whether** the

1 prior judgment would be reinstated, however, does not alter the general rule that
2 post-judgment interest runs from a prior judgment that is reinstated.

3 In fact, the general rule has been frequently applied where it was not certain
4 that the district court would reinstate the prior judgment until it did so. For
5 example, in *Guam Society*, the Ninth Circuit held that post-judgment interest ran
6 from the date of the previously vacated judgment when the district court reinstated
7 that judgment after considering intervening case law. See 100 F.3d at 703.
8 Similarly, in *Handgards*, the Ninth Circuit affirmed an award of post-judgment
9 interest “on the amount of the first judgment from its date of entry” after the
10 original judgment for the plaintiff was reversed and the plaintiff won the retrial.
11 See 743 F.2d at 1284 & 1298. See also *Twin City Sportservice*, 676 F.2d at 1296 &
12 1311 (affirming award of post-judgment interest from date of previously reversed
13 judgment when district court reinstated that judgment after considering new
14 evidence); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394, 395 & 406
15 (affirming award of post-judgment interest from previously vacated judgment
16 where district court reinstated that judgment after reconsideration of whether statute
17 of limitations had tolled). As these authorities show, when a prior judgment is
18 reinstated for the same amount and same reasons, as is the case here, the amount of
19 that judgment was “ascertained” at the time of the prior judgment even if the issue
20 of **whether** the prior judgment would be reinstated was not decided until the court
21 ordered such reinstatement.

22 None of the cases cited by Artemis support its contention that post-judgment
23 interest should not accrue from February 2006 here. In fact, as discussed above,
24 several of these cases actually held that post-judgment interest **should** run from the
25 date of a prior judgment that was reinstated. See *Planned Parenthood*, 518 F.3d at
26 1018; *Handgards*, 743 F.2d at 1299; *Mt. Hood Stages*, 616 F.2d at 497. Another
27 case cited by Artemis, *Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983),
28 similarly recognized that post-judgment interest should run from the date of the

1 prior judgment because, “where a judgment for plaintiff is vacated on appeal but a
2 judgment for plaintiff for the same amount of damages incurred during the same
3 period is entered on remand, the date of entry of the judgment [under] . . . section
4 1961 is the date on which the first judgment for plaintiff was entered in the trial
5 court proceedings.” *Id.* at 754.¹

6 The only other cases cited by Artemis on this issue are readily
7 distinguishable. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827
8 (1990), held that post-judgment interest should run from the later judgment because
9 the district court had found that the damages portion of the prior judgment was “**not**
10 **supported by the evidence.**” *Id.* at 852-53 (emphasis added). *United States v.*
11 *Hougham*, 301 F.2d 133 (9th Cir. 1962), held that a plaintiff was not entitled to
12 post-judgment interest from the date of the original judgment on **additional**
13 **damages** that were awarded by the district court after entry of that judgment. *Id.* at
14 134-35. Finally, *James B. Lansing Sound, Inc. v. National Union Fire Ins. Co.*, 801
15 F.2d 1560 (9th Cir. 1986), rejected a plaintiff’s request for “post-judgment interest
16 from the date the trial court should have awarded its damages” because “there was
17 **no original award** in the district court.” *Id.* at 1570 (emphasis added). Unlike
18 those cases, this Court has reinstated a prior judgment for the same amount and
19 based on the same evidentiary and legal basis, so post-judgment interest must run
20 from the date of the prior judgment under the controlling Ninth Circuit authority
21 cited above.

22 Artemis also argues that there “are no equities that favor” awarding post-
23 judgment interest from the prior judgment here. *See Objections at 6.* In fact, the
24

25 ¹ Artemis quotes a statement from the *Turner* opinion out of context, but the
26 holding in that case actually supports the Commissioner’s position here, as
27 explained above. *See Objections at 5.* Artemis also fails to mention that the Ninth
28 Circuit later expressly characterized the *Turner* statement quoted by Artemis as
“dicta” and “decline[d] to interpret [it] ... as an attempt to formulate a general rule
for all cases” because it was “inconsistent with the reasoning supporting [the]
holding and result” in *Turner*. *See Handgards*, 743 F.2d at 1299.

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1 U.S. Supreme Court has explained that the “purpose of postjudgment interest is to
2 compensate the successful plaintiff for being deprived of compensation for the loss
3 from the time between the ascertainment of the damage and the payment by the
4 defendant.” *Kaiser Aluminum*, 494 U.S. at 835. *See also Ministry of Def. &*
5 *Support v. Cubic Def. Sys., Inc.*, 2013 U.S. Dist. LEXIS 1625 at *12 (S.D. Cal. Jan.
6 3, 2013) (“This equitable rule allows postjudgment interest to run from the initial
7 ascertainment of damages so as not to penalize the victor for delay in the eventual
8 entry of the final judgment.”). Here, it would be inequitable for Artemis to benefit
9 from the delay in paying the illegal profits that both Judge Matz and this Court have
10 concluded that it should disgorge, so post-judgment interest should run from the
11 prior judgment.

12 Finally, Artemis argues that the Commissioner should not receive post-
13 judgment interest from February 2006 to date because this Court did not award pre-
14 judgment interest for that period. *See Objections to 6*. This Court’s Order Re:
15 Restitution Award, however, did not reach the issue of post-judgment interest,
16 which was not ripe for briefing or decision until this Court decided the amount of
17 and basis for the restitution award. Accordingly, that Order should not be
18 interpreted as rejecting the arguments and authorities that have now been presented
19 to the Court.²

20
21 ² Artemis also argues that the prior judgment should not be reinstated *nunc pro*
22 *tunc*, as proposed by the Commissioner and NOLHGA. *See Objections at 7*. The
23 only case cited by Artemis, however, involved a request to **amend** a judgment *nunc*
24 *pro tunc*. *See United States v. Sumner*, 226 F.3d 1005, 1009-10 (9th Cir. 2000)
25 (affirming district court’s refusal to set aside conviction). Here, by contrast, the
26 Court is reinstating a judgment for the same amount and the same reasons without
any substantive amendment, so making that reinstatement *nunc pro tunc* is
appropriate. *See Fassbinder v. Pennsylvania R.R. Co.*, 233 F. Supp. 574, 575
(W.D. Pa. 1964) (“It seems obvious to us that the reinstatement of the original
judgment operated to restore the legal relationship existing between the parties,
nunc pro tunc, as of” the date of the original judgment.)

27 In any event, whether or not the prior judgment is reinstated *nunc pro tunc*,
28 post-judgment interest should run from the prior judgment under the cases cited in
the text above, none of which involved a reinstatement of the prior judgment that
was expressly *nunc pro tunc*.

1 **III. ARTEMIS IS NOT ENTITLED TO AN OFFSET**

2 Artemis argues that this Court's restitution award should be reduced to zero
3 by offsetting the settlement payments by other defendants, but Artemis fails to cite
4 a single case that allowed such an offset under similar circumstances. Artemis
5 instead cites irrelevant criminal cases in which defendants were held jointly and
6 severally liable for restitution of the victim's losses, not the defendants' unjust
7 enrichment. *See Objections at 8, citing People v. Blackburn*, 72 Cal. App. 4th
8 1520, 1533 & 1535 (1999); *In re S.S.*, 37 Cal. App. 4th 543, 550 (1995). Moreover,
9 the only civil cases cited by Artemis that actually granted offsets involved
10 judgments for **joint and several liability for damages**. *See, e.g., Reed v. Wilson*,
11 73 Cal. App. 4th 439, 443-45 (affirming trial court decision that appellant-joint
12 tortfeasor was entitled to offset prior settlements by other defendants against jury
13 verdict for damages but **not** against appellant's several liability for taxable costs).
14 These cases did not involve an offset to reduce a wrongdoer's **individual liability**
15 **for unjust enrichment**, which is what Artemis is requesting here.

16 In fact, the only two decisions cited in Artemis's Objections that involved
17 claims to reduce **restitution** awards by offsetting prior settlements actually held
18 that such offsets were not appropriate. *See Garamendi v. Henin*, 683 F.3d 1069,
19 1081-82 (9th Cir. 2012); *Order Denying Motion of the Artemis Defendants for an*
20 *Offset, filed on February 1, 2006 (Dkt. No. 3554)*. These decisions by the Ninth
21 Circuit and Judge Matz rejected the very same arguments that Artemis now makes
22 for an offset.

23 In 2006, Judge Matz denied Artemis's motion to reduce its liability for
24 restitution by offsetting the settlements by other defendants. *Id.* Artemis argued
25 then, as it does again now, that it was entitled to an offset under California Code of
26 Civil Procedure Section 877 because the Commissioner had alleged that defendants
27 were jointly and severally liable for restitution, that the "only requirement" for such
28 an offset was that "the plaintiff *allege* joint liability among the defendants," and

1 that "Section 877 specifically applies to all claims arising from the wrong for which
2 the settling defendants were alleged to be liable." *See Dkt. No. 3251 at 8* (emphasis
3 in original). Artemis also argued, as it does now, that both the Commissioner's
4 restitution claim and his damages claim "sought the profits generated from the
5 insurance business." *Id. at 11*.

6 Judge Matz rejected these arguments when he denied Artemis's motion for
7 an offset. *See Dkt. No. 3554*. He expressly held that "Section 877(a) does not
8 require an offset" because "there is no risk of double recovery if Artemis disgorges
9 the benefit it derived unjustly" and there is "a difference between disgorgement and
10 damages." *Id. at 2*.

11 Artemis argues that "Judge Matz's reasoning no longer applies" because the
12 Commissioner was permitted at the 2012 trial to seek damages based on a model
13 that took into account the profits of the successor insurance company. *See*
14 *Objections at 12*. Artemis never explains, however, why that asserted distinction
15 should make any difference. In fact, Judge Matz held, and this Court agreed, that
16 the failure to recover damages did not preclude an award of partial restitution here
17 because such an award is "consistent with the principle embodied in Cal. Civ. Code
18 § 3517 that no one can 'take advantage of his own wrong.'" *See Garamendi v.*
19 *Altus Fin., S.A.*, 2005 U.S. Dist. LEXIS 39273 at *47 (C.D. Cal. Nov. 21, 2005).

20 Moreover, the Ninth Circuit expressly held that a restitution judgment against
21 another defendant in this action, Jean-Francois Henin, should not be offset by
22 settlements from other defendants "because his liability is individual, not joint."
23 *See Garamendi v. Henin*, 683 F.3d at 1074 & 1081-82. The court stressed that such
24 individual liability was not offset because the "relevant language of section 877(a)
25 ... presupposes the existence of multiple defendants jointly liable for the same
26 damages." *Id.*, quoting *Vesey v. United States*, 626 F.2d 627, 633 (9th Cir. 1980).
27 *See also Wilson v. John Crane, Inc.*, 81 Cal. App. 4th 847, 864 (2000) (holding that
28 settlements from other joint tortfeasors should not offset non-settling tortfeasor's

1 several and individual liability for non-economic damages under California Civil
2 Code Section 1431.2); *In re Piper Aircraft*, 792 F. Supp. 1189, 1192-93 (N.D. Cal.
3 1992) (same).

4 In addition, the *Henin* decision expressly rejected the argument that Artemis
5 now makes, based on *Vesey* and *McComber v. Wells*, 72 Cal. App. 4th 512 (1999),
6 that “the complaint, rather than the judgment, ... controls” whether Section 877(a)
7 requires an offset. The court explained:

8 In those cases [*i.e.*, *Vesey* and *McComber*], it was the complaint that
9 controlled, meaning that the non-settling (and liable) defendants could
10 claim setoff for the amounts paid by the settling (and non-liable)
11 defendants even though the two groups of defendants had not been
12 judged to be jointly liable.... But those cases have no application to
13 this case, where the district court *apportioned damages individually* to
14 Henin rather than making him liable, jointly or otherwise, for the *total*
15 claimed loss.

16 683 F.3d. at 1082 n.8 (emphasis in original).³

17 Artemis tries to distinguish *Henin* by arguing that the judgment against
18 Henin specifically imposed individual liability on Henin alone. *See Objections at*
19 *14 n.10*. In fact, the judgment against Artemis also imposes individual liability on
20 Artemis alone. Far from claiming that any one else is jointly and severally liable
21 for restitution of Artemis’s profits, Artemis has asked the Court to add language to
22 the Commissioner’s [Proposed] Judgment to make it clear that Artemis is “the **sole**
23 Net Artemis Judgment Obligation Party.” *Id. at 15 n.12* (emphasis added).
24 Accordingly, the liability of Artemis, like that of Henin, is individual, and not joint,
25 so this individual liability is not reduced by settlements from other defendants.

26 ³ Artemis stresses that there is some overlap between the Commissioner’s
27 claim for restitution of Artemis’s unjust enrichment and his claim for all damages
28 caused by the conspiracy, but Artemis does not cite any authority that indicates that
that point is relevant to whether the Commissioner is entitled to restitution or
Artemis is entitled to an offset. In fact, the restitution award requires disgorgement
of only a portion of the undisputed profits of Artemis, not the profits received by
any other defendant. *See Garamendi v. Altus Fin.*, 2005 U.S. Dist. LEXIS 39273 at
*42-43 & 49 (deducting Artemis profits received from defendant MAAF in
calculating total restitution award against Artemis).

1 **IV. ARTEMIS'S OTHER OBJECTIONS TO THE COMMISSIONER'S**
2 **PROPOSED JUDGMENT SHOULD BE REJECTED**

3 Artemis objects to Judge Matz's Findings of Fact and Conclusions of Law
4 Re: Restitution (Dkt. No. 3494) being reinstated, as provided in the Commissioner
5 and NOLHGA's [Proposed] Judgment and expressly permitted by the Ninth
6 Circuit, because they are "significantly incomplete" and do not mention "the events
7 of the last seven years." *See Objections at 7 n.3*. In fact, this Court is reinstating
8 the prior judgment for the reasons stated by Judge Matz in these Findings of Fact
9 and Conclusions of Law, so subsequent events are irrelevant.

10 In addition, Artemis objects to the statement in the [Proposed] Judgment that
11 the "Net Artemis Judgment Obligation is for restitution and does not include any
12 punitive damages component." *See Objections at 7 n.4*. Artemis contends that
13 Judge Matz supposedly "based his restitution award primarily on the 2005 jury's
14 invalidated attempt to award \$700 million in punitive damages." *Id.* In fact, Judge
15 Matz vacated the punitive damages award, and his restitution award was expressly
16 based on Artemis's undisputed profits and was considerably smaller than the
17 punitive damages award. *See Garamendi v. Altus Fin., S.A.*, 2005 U.S. Dist.
18 LEXIS 39273 at *42-43 & 49.

19 The challenged sentence was added to the [Proposed] Judgment to make sure
20 that a French court, if asked to enforce this Judgment, would not mistakenly believe
21 that the award was punitive, rather than restitutionary, as a French court did with
22 the Commissioner's restitution judgment against Henin. *See Garamendi v. Henin*,
23 683 F.3d at 1075 (explaining that French court had refused to enforce the
24 Commissioner's and Sierra's judgments against Henin because "the judgments did
25 not clearly allow [the French court] ... to rule out the possibility that some of the
26 damages were punitive in nature, in contravention of French public policy").
27 Accordingly, the Commissioner and NOLHGA request that the challenged
28 statement be included in the Judgment to avoid this potential problem.

1 **V. CONCLUSION**

2 In summary, the Commissioner is entitled to post-judgment interest from the
3 date of the prior restitution award because the Court has ordered that judgment to
4 be reinstated for the same reasons stated by Judge Matz. Moreover, Artemis should
5 not benefit from the delay in disgorging the designated portion of its unjust
6 enrichment.

7 In addition, Artemis should not escape its individual obligation to disgorge
8 these illegal profits by offsetting the settlements from the other defendants. The
9 restitution award requires Artemis to disgorge only some of its **own** profits, so there
10 is no risk of double recovery. In addition, the settlements from other defendants did
11 not reduce Artemis's profits and should not reduce its liability.

12 DATED: March 19, 2013

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14 By: /s/Charles R. Rice
CHARLES R. RICE

15 Attorneys for Plaintiff
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1 **V. CONCLUSION**

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3 date of the prior restitution award because the Court has ordered that judgment to
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5 not benefit from the delay in disgorging the designated portion of its unjust
6 enrichment.

7 In addition, Artemis should not escape its individual obligation to disgorge
8 these illegal profits by offsetting the settlements from the other defendants. The
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10 is no risk of double recovery. In addition, the settlements from other defendants did
11 not reduce Artemis's profits and should not reduce its liability.

12 DATED: March 19, 2013

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