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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,

Applicant,

v.

EXECUTIVE LIFE INSURANCE COMPANY, a California corporation, and DOES 1 through 1000,

Respondents.

No. BS 006912

DECLARATION OF KARL D. BELGUM IN SUPPORT OF MOTION OF INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA FOR AN ORDER APPROVING DISTRIBUTION OF $100 MILLION OF ALTUS LITIGATION PROCEEDS PURSUANT TO ELIC REHABILITATION PLAN

Date: October 12, 2005
Time: 8:30 a.m.
Dep't: 36

HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation

I, Karl D. Belgum, declare as follows:

1. I am a member of the firm of Thelen Reid & Priest LLP, counsel to Insurance Commissioner John Garamendi in an action pending in the United States District Court for the Central District of California entitled John Garamendi as Insurance Commissioner of the State of California and as Conservator, Rehabilitator and Liquidator of the Estate of Executive Life Insurance Company v. Altus Finance S.A., et al., Case No. CV 99-02829 AHM (CWx) (the "Civil Action"). I am admitted to practice before the courts of the State of California. I make this declaration in support of the motion of Commissioner Garamendi, in his capacity as conservator, liquidator, and rehabilitator (the "Commissioner") of Executive Life Insurance Company ("ELIC"), for an order approving the distribution of $100,000,000 of Altus Litigation Proceeds pursuant to the ELIC Rehabilitation Plan (the "Motion"). I have personal knowledge of the matters set forth herein and could and would competently testify to the truth thereof, if necessary. I have reviewed the Motion, and except as otherwise expressly stated herein, capitalized words or terms used herein have the meanings ascribed to them in the Motion and/or the Rehabilitation Plan, as applicable.

2. On February 18, 1999, the Commissioner commenced the Civil Action by filing an action in this Court against Credit Lyonnais, S.A. ("Credit Lyonnais"), Altus Finance, S.A. ("Altus"), now known as CDR Entreprises, and Consortium de Realisation S.A. ("CDR"), MAAF, MAAF Vie S.A. (collectively, "MAAF"), Omnium Geneve, S.A., Jean Francois Henin, Jean-Claude Seys and Jean Irigoin. On March 11, 1999, the Commissioner filed a Notice of Related Case pursuant to which he asked that the action, filed generally in the Superior Court for the County of Los Angeles, be assigned to this Court because of its status as the rehabilitation court for the ELIC insolvency. On March 18, 1999, defendants Credit Lyonnais and CDR Entreprises (Altus' new name) removed this action to the District Court pursuant to the provisions of 28 U.S.C. sections 1330(a) and 1441(d) on the basis that they are instrumentalities of the government of France and, as a result, the action was an action against a foreign sovereign state, as that term is defined in

the Foreign Sovereign Immunities Act, and the claims against them therefore were within the exclusive jurisdiction of the District Court.

3. On February 16, 2000, the Commissioner filed his Third Amended Complaint naming new defendants. These new defendants were Aurora National Life Assurance Company ("Aurora"), New California Life Holding, Inc. ("New California") (collectively the "Aurora Defendants"), Artemis S.A., Artemis Finance S.N.C., Artemis America and Francois Pinault (collectively, the "Artemis Defendants"). On April 21, 2000, the Aurora Defendants moved the District Court to dismiss the Commissioner's action on the ground, *inter alia*, that the District Court lacked subject matter jurisdiction. The Artemis Defendants joined in the motion.

4. Attached hereto as Exhibit A is a true and correct copy of a tentative ruling issued on June 28, 2000 by the District Court in the Civil Action.

5. Attached hereto as Exhibit B is a true and correct copy of an order dated July 26, 2000, entered by The Honorable Kurt Lewin in Quackenbush v. Executive Life Insurance Company, Los Angeles Superior Court Docket No. BS006912.

6. The Civil Action was consolidated for purposes of discovery and pretrial with two other subsequently commenced actions before the same District Court that were brought by other plaintiffs (all three consolidated actions being hereafter sometimes collectively referred to as the "Civil Actions"). The two other actions that were consolidated with the Civil Action are entitled Sierra National Insurance Holdings, et al. v. Credit Lyonnais S.A., et al., No. CV 01-1339 AHM (CWx), and State of California ex rel. RoNo, LLC v. Altus Finance S.A., et al., No. CV 01-8587 AHM (CWx). The Civil Action and the Sierra National Insurance Holdings actions were jointly set for trial in February, 2005. The State of California ex rel. RoNo, LLC action was dismissed and is now on appeal to the U.S. Court of Appeals for the Ninth Circuit, which had certified certain issues to the California Supreme Court for resolution. On August 15, 2005, the California Supreme Court issued a decision on the certified questions in which it ruled that the California Attorney General (the "AG") lacked standing to pursue claims for restitution or damages against the defendants,

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and that the Commissioner, as conservator and liquidator of ELIC's assets, has exclusive authority to pursue such claims. The Court also held that the California False Claims Act, Cal. Gov. Code, § 12650, et seq., does not apply to assets transferred to the Commissioner in connection with insurance insolvencies. A copy of the decision is attached as Exhibit C hereto.

7. The relief sought by the Commissioner in the Civil Action includes both damages and restitution based on fraud and conspiracy.

8. While the Civil Action was pending, the United States Attorney's Office for the Central District of California (the "U.S. Attorney") conducted a lengthy criminal investigation into the involvement of a number of parties, including Credit Lyonnais S.A. and Artemis S.A. ("Artemis"), in various ELIC transactions undertaken in connection with the Rehabilitation Plan. The Commissioner provided substantial assistance to the U.S. Attorney during the investigation in the form of documentary evidence and testimony. Certain of the transactions that were the subject of the criminal investigation are also the subject of the Civil Actions. The criminal investigation resulted in grand jury indictments and the filing of a criminal case, United States v. Credit Lyonnais, et al., No. CR 03-760-DT.

9. On December 15, 2003, the United States Attorney's Office entered into a Final Settlement Agreement (the "Final Settlement Agreement" or "FSA") with Artemis and various affiliated parties in the Criminal Case. The Final Settlement Agreement was filed with the District Court presiding over the Civil Action on December 17, 2003.

10. Pursuant to Paragraph 12 of the Final Settlement Agreement, Artemis was required to "establish and fund the 'USAO/Artemis Settlement Fund' by contributing a total of $185,000,000." The $185 Million Settlement Fund was paid by Artemis to the U.S. Attorney on or about March 11, 2004.

11. Paragraph 14(c) of the Final Settlement Agreement states in part as follows (the capitalized terms having the meaning assigned to them in the Final Settlement Agreement):

> As soon as practicable after funding of the [Settlement Fund], the [U.S. Attorney] shall . . . prepare and present for approval to the district court presiding over the Civil Actions payment instructions that, upon delivery to the Depository [i.e., the U.S. Department of Treasury depository maintaining the Settlement Fund under the control of the U.S. Attorney], will direct the Depository to cause [the disbursement of] $110,000,000 (less any required tax withholding) to the California Insurance Commissioner (the "Commissioner"), in his capacity as conservator, rehabilitator, and liquidator of Executive Life Insurance Company of California ("ELIC"), to be disbursed by the Commissioner in accordance with his legal obligations, fiduciary duties, judgment, and discretion . . . to claimants in the ELIC rehabilitation proceeding.

12. On April 9, 2004, the Commissioner filed with the District Court presiding over the Civil Actions a motion for an order approving certain payment instructions necessary to implement the transfer to the Commissioner of the $110 million victim compensation payment for the benefit of the ELIC estate. In connection with such motion and at the request of the U.S. Attorney pursuant to the terms of the FSA, the Commissioner agreed that the $110 million amount to be disbursed to the Commissioner pursuant to the payment instructions would be credited in favor of the "Artemis Parties" (defined in the FSA to mean Artemis and various affiliated parties) against any amount that any of the Artemis Parties might be responsible to pay under a judgment or court-approved settlement in the Civil Actions.

13. Attached hereto as Exhibit D is a true and correct copy of an Amended Order issued on May 5, 2004, by the District Court in the Civil Actions.

14. At the request of Aurora, which is a defendant in the Civil Actions and which is not one of the settling Artemis Parties in the Criminal Case, the Commissioner stipulated that the following language be included in the Amended Order: "This Order does not constitute and may not be cited as a judicial determination: (1) concerning any issue about which claimants should receive distributions and in what proportions; (2) that Aurora's uncovered policyholders are not entitled to receive notice from the Commissioner and an opportunity to be heard in the appropriate forum before any distribution is made by the Commissioner; or (3) concerning whether this Court is the appropriate forum to resolve any distribution dispute."

15. After extensive negotiations and shortly before trial of the Civil Action was scheduled to begin in late February 2005, the Commissioner reached settlements with several key defendants, including a $525 million settlement with the CDR parties and Credit Lyonnais ($8.5 million of which will be paid by such settling parties directly to the AG in exchange for the AG's release of claims against such parties) (the "CDR Settlement"), and an $80 million settlement with Aurora National Life Assurance Company and New California Life Holdings, Inc. ($1.25 million of which similarly will be paid by such settling parties directly to the AG in exchange for the AG's release of claims against such parties) (the "Aurora Settlement," together with the CDR Settlement, the "February 2005 Settlements"). These settlements were read into the record in the District Court, with definitive documentation to be completed and good faith settlement orders to be sought and obtained from the District Court before consummation of the settlements.

16. Once the District Court established a procedure for taking default judgments against several non-appearing defendants, the Commissioner proceeded to trial against the remaining defendants, consisting of the Artemis Defendants. After the trial commenced, the Commissioner dismissed his claims against peripheral and/or non-material Artemis Defendants (including Artemis Finance S.N.C. and Artemis America), leaving Artemis as the sole defendant. The Commissioner proceeded to obtain a favorable ruling on the issue of liability, and, on July 21, 2005, the jury awarded punitive damages to the Commissioner in the amount of $700 million. However, no judgment against Artemis has been entered as of the date of this Motion, because: (1) both parties have submitted post-trial pleadings and (2) the District Court has yet to rule on certain equitable claims asserted by the Commissioner against Artemis, and the resolution of such claims will have an impact on the size of any judgment ultimately entered against Artemis.

17. The process of finalizing the February 2005 Settlements is not complete as there have been (and continue to be with respect to the CDR Settlement) disputes among the parties over some of the terms of the February 2005 Settlements. The parties to the Aurora Settlement have resolved their disputes and executed definitive documentation for the

Aurora Settlement in late July, 2005. Consummation of the Aurora Settlement is subject to several conditions precedent, including, without limitation, obtaining final orders from the District Court regarding approval of the settlement and a good faith determination. Until all conditions precedent to consummation of the Aurora Settlement are satisfied, the settlement funds will be held in escrow. With respect to the CDR Settlement, there remains an unresolved dispute among the parties regarding timing and/or related procedural terms of the CDR Settlement. The District Court has appointed a mediator to help the parties try to reach a reasonably prompt resolution of their differences, and the District Court has indicated that it will resolve the dispute shortly if the mediation is not successful. Once such dispute is resolved, the Commissioner and the parties to the CDR Settlement should be in position to execute definitive documentation and to proceed with the appropriate settlement-related motions in the District Court to obtain the necessary orders approving the CDR Settlement and finding it to be in good faith.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 22 day of August, 2005, at San Francisco, California.

By: _____
KARL D. BELGUM

W03 155930001/166/1185099/v7

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

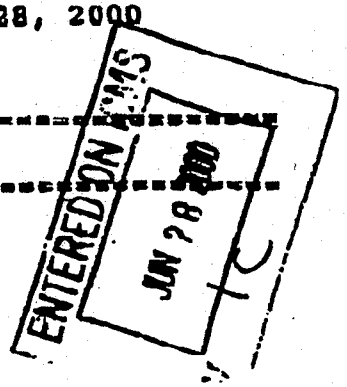
CIVIL MINUTES - GENERAL

P Sent

Case No. CV 99-2829 AHM (CWx) Dated: June 28, 2000

Title: CHUCK QUACKENBUSH v. ALTUS FINANCE S.A., et al.

DOCKET ENTRY



PRESENT: THE HONORABLE A. HOWARD MATZ, JUDGE

Milli Borgarding
Courtroom Clerk

NONE
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: ATTORNEYS PRESENT FOR DEFENDANTS:

No appearance

PROCEEDINGS: IN CHAMBERS

The Court is circulating the attached draft order in the nature of a tentative ruling. The Court does not believe a hearing is necessary and would not want to conduct a hearing if the parties were merely to reiterate what was said in their briefs. However, the Court will permit a party who wants a hearing to request one in writing no later than July 7, 2000. In any such request, the party shall specify what issues or portions of the draft order it wishes the Court to address. If no party requests a hearing, the draft order will become final. If a party requests a hearing, the Court will evaluate the request and determine whether to hold a hearing. If the Court decides to hold a hearing, the hearing will be held on July 17, 2000 at 10:00 a.m. and the Court will inform the parties that such hearing will be held by July 12, 2000.

The parties are not permitted to file any additional briefs; however, the parties are invited to file responses to the draft order that identify factual errors, if any. The Commissioner shall file a statement no later than July 7, 2000 specifically addressing the amount of time that would be appropriate for the Commissioner to seek an order from the Conservation Court divesting that court of exclusive jurisdiction and authorizing the Commissioner to pursue all of his claims in this Court. If the Commissioner or any other party has a basis to object to that provision in the draft order, such objection shall be filed by July 7, 2000.

The Motion of Defendants Artemis, S.A., Artemis Finance S.N.C., Artemis America, and Francois Pinault to Dismiss the Third Amended Complaint is taken off-calendar. Defendants Aurora National Life Assurance Company's and New

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(Continued . . .)

California Life Holdings, Inc.'s Ex Parte Application for Continuance of Hearing and Deadline for Filing Reply Brief and the Commissioner's Ex Parte Application Pursuant to Local Rule 3.10 to File a Memorandum of Points and Authorities in Excess of Twenty-five Pages are DENIED as moot.

IT IS SO ORDERED.

MINUTES FORM 11
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Initials of Deputy Clerk

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHUCK QUACKENBUSH,

Plaintiff,

v.

ALTUS FINANCE S.A., *et al.*,

Defendants.

CASE NO. CV 99-2829 AHM (CWx)

ORDER GRANTING DEFENDANTS AURORA NATIONAL LIFE ASSURANCE COMPANY'S AND NEW CALIFORNIA LIFE HOLDINGS, INC.'S MOTION TO DISMISS

I. INTRODUCTION

This case involves allegations of fraud and wrongful conduct in connection with the purchase of the assets of Executive Life Insurance Company ("ELIC") during the ELIC rehabilitation proceedings described below. Plaintiff is Chuck Quackenbush, the Commissioner of Insurance for the State of California ("Commissioner"). The defendants are Altus Finance S.A. ("Altus")[1]; CDR Enterprises ("CDR"); Consortium de Realisation S.A. ("Consortium"); Credit Lyonnais S.A. ("Credit Lyonnais")[2]; MAAF Assurances ("MAAF");

[1]CDR Enterprises is the successor in interest of Altus.

[2]Credit Lyonnais, CDR and Consortium are collectively referred to as the "Credit Lyonnais Defendants."

MAAF Vie S.A. ("MAAF Vie")[3]; Omnium Geneve S.A. ("Omnium")[4]; Jean-Claude Seys ("Seys")[5]; Jean-Francois Henin ("Henin")[6]; Jean Irigoin ("Irigoin")[7]; Aurora National Life Assurance Company ("Aurora"); New California Life Holdings, Inc. ("New California"); Artemis, S.A. ("Artemis"); Artemis Finance S.N.C. ("Artemis Finance"); Artemis America; and Francois Pinault ("Pinault").[8]

On April 21, 2000, Aurora and New California filed a Motion to Dismiss Plaintiff's Claims Against Them Under Rule 12(b)(1) or, in the Alternative, Under Rule 12(b)(3) or Rule 12(b)(6); to Decline Jurisdiction Under 28 U.S.C. § 1367; or to Abstain ("Aurora Motion"). Aurora and New California primarily argue that this case (or at least the claims against them) should be in state court because the Conservation Court in the ELIC rehabilitation proceedings obtained and is entitled to exercise exclusive jurisdiction over the claims asserted by the Commissioner in this action.

Many of the parties in this case filed papers in support of or in opposition to the Aurora Motion. On May 19, 2000, the Artemis Defendants joined the Aurora Motion.[9] The Commissioner filed his Opposition to the Aurora Motion ("Opposition") on May 22, 2000. On that same day, the Credit Lyonnais Defendants, who are entitled to have this case proceed

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[3]MAAF and MAAF Vie are collectively referred to as the "MAAF Defendants."

[4]On June 5, 2000, the Commissioner filed a Notice of Dismissal of Omnium Geneve from all claims in the Third Amended Complaint.

[5]At all relevant times, Seys was an officer of MAAF and MAAF Vie. TAC at ¶ 10.

[6]At all relevant times, Henin was the chief executive officer of Altus. TAC at ¶ 11.

[7]At all relevant times, Irigoin was an officer and/or director of MAAF and MAAF Vie. TAC at ¶ 12.

[8]At all relevant times, Pinault was an officer, director and ultimate majority owner of Artemis, Artemis Finance and Artemis America. TAC at ¶ 17. Artemis, Artemis Finance, Artemis America and Pinault are collectively referred to as the "Artemis Defendants."

[9]The Artemis Defendants' Joinder is stated in its Motion to Dismiss under Rule 12(b)(6) or, in the Alternative, under Rule 12(b)(1) and Related Jurisdictional Bases ("Artemis Motion to Dismiss").

against them in federal court (see below), filed a "Response" to the Aurora Motion, urging denial of the motion because dismissal of the claims against the non-foreign sovereign defendants would split the Commissioner's action into two cases in different forums. The MAAF Defendants adopted the same position as the Credit Lyonnais Defendants. On May 26, 2000, the Artemis Defendants joined the Aurora Motion again. This time, the Artemis Defendants filed a Joinder in the Motion asserting various arguments in response to the Commissioner's Opposition.

The Court GRANTS the Aurora Motion. The Court finds that the Conservation Court has asserted exclusive jurisdiction over a range of claims involving ELIC that include those asserted by the Commissioner. The Conservation Court's exercise of exclusive jurisdiction is entitled to Full Faith and Credit.

Under the Foreign Sovereign Immunities Act ("FSIA"), the Court must retain jurisdiction over the Commissioner's claims against Credit Lyonnais, CDR and Consortium, the foreign sovereign defendants, and that includes Henin's cross-claim against Credit Lyonnais, CDR, Consortium and Altus. As explained below, the Court will stay the execution of this order for _____ days to allow the Commissioner to move the Conservation Court for an order divesting itself of exclusive jurisdiction. Such an order would eliminate the right of the moving parties to have the claims against them decided in state court and would thereby enable the Commissioner and all the parties to pursue all their claims in this Court.

II. FACTUAL BACKGROUND

A. The ELIC Conservation and Rehabilitation Proceedings

The underlying facts relating to those proceedings are set forth in this Court's April 13, 2000 Amended Order in *Sergio Carranza-Hernandez, et al. v. Altus Finance Corp., et al.*, CV 99-8375 AHM (CWx) ("Carranza-Hernandez action"). The Court now incorporates that factual background without references to the supporting documents that were cited in that order.

On April 11, 1991, the California Insurance Commissioner, then John Garamendi, took over ELIC and placed it in rehabilitation proceedings. The conservation and rehabilitation proceedings concerning ELIC were conducted under the supervision of the Honorable Kurt J.

Lewin, Judge of the California Superior Court for the County of Los Angeles (the "Conservation Court"). On the day the Insurance Commissioner first went to court, the Conservation Court issued an "Order Appointing Conservator [the Insurance Commissioner became Conservator], Establishment of Procedures, Issuance of Injunctions and Related Orders (the "Conservation and Stay Order")." The Conservation and Stay Order provides:

> 1. [T]his Court hereby assumes and exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting such Property to the exclusion of any other court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the policyholders and other creditors of Respondent [ELIC was the Respondent] . . . .
> 3. It being found that it is essential to the safety of the public and is in the best interest of the shareholders, policyholders and other creditors of Respondent and to the orderly administration of these proceedings, Respondent and its officers, directors, shareholders, attorneys and attorneys-at-law, agents, affiliates, subsidiaries, reinsurers, brokers, third-party administrators, servants and employees *and all other persons, agencies, associations and entities are hereby enjoined and restrained from*:
>
> a. transacting any of the business of Respondent or the disposition of any of the Property except in accordance with the written instructions of the Conservator until further order of this Court;
> b. interfering with the acquisition of [,] possession by or the exercise of dominion and control over the Property by the Conservator, with the jurisdiction of this Court, or with these proceedings; . . .
> d. the seeking or obtaining of any preference of any kind or nature, the obtaining of any judgments, foreclosures, attachments, levies or liens of any kind or nature, the exercise of any powers of sale or any rights of set-off, rescission or the like against respondent or the Property except pursuant to the prior orders of this Court, this Court having exercised its exclusive jurisdiction with respect to the Property and any claims and rights asserted with respect to it;
> e. *the filing, commencement or prosecution of any new suits, arbitration proceedings, mediations, alternate dispute resolutions or demands or claims or the continued prosecution of any pending suits, arbitration proceedings, mediations, alternate dispute resolutions or claims with respect to Respondent or the Property other than in this proceeding before this Court unless the prior approval of this Court has been granted upon good cause shown; and*
> f. from interfering with the possession, title and rights of the Commissioner, as Conservator, in and to the assets of Respondent and from interfering with the Conservator in

> the conducting of the business of Respondent, and
> *g. Institution of suits to collect any of the Property or institution of suits which purport to assert derivative rights on behalf of [R]espondent.* (Emphasis added.)

On December 6, 1991, the Conservation Court issued an Order of Liquidation. The Order of Liquidation reiterated and made permanent the Court's prior injunctions set forth in its April 11, 1991 Conservation and Stay Order.

Later on, the Insurance Commissioner, as ELIC's conservator, and the Conservation Court conducted an auction of ELIC's junk bond portfolio and/or for the rehabilitation of ELIC's insurance business. This auction produced eight formal bids. In November 1991, the Conservator selected the bid of Altus and the MAAF Group, a consortium of foreign insurers and investment firms. Under the terms of the proposal, "Altus would purchase the ELIC high yield bond portfolio. The insurance business of ELIC . . . would be transferred to a new insurance company (Aurora), the shares of which would be held by a holding company (New California) which would in turn be held by members of the MAAF syndicate." Commissioner's TAC at ¶ 32.

The Conservation Court approved the Conservator's selection of the Altus/MAAF Group bid on December 26, 1991 and in later rulings. Subsequently, due to a delay in implementing a plan of rehabilitation, the Conservation Court approved the sale of the junk bond portfolio to Altus, separate from the plan of rehabilitation. On March 3, 1992, the sale of the junk bond portfolio to Altus was consummated.

With respect to ELIC's insurance assets, the Conservator submitted a rehabilitation plan to the Conservation Court for approval. On July 31, 1992, the Conservation Court approved a plan for rehabilitation, including the transfer to Aurora of ELIC's restructured insurance and annuity contracts.

On August 13, 1993, the Conservation Court issued its Final Order Approving Modified Plan of Rehabilitation ("Final Order"). The Final Order provides:

> 13. This Court reserves jurisdiction necessary to enforce this Final Order and the Order referenced and incorporated herein. *This Court hereby continues to assert and exercise exclusive*

> *Jurisdiction over the Modified Plan, over ELIC and over any claim, counterclaim or other action involving a third party relating to any of the Transferred Assets.* All prior orders of this Court including, but not limited to, all injunctions and restraining orders, are hereby affirmed and continued in full force and effect except to the extent inconsistent with this Final Order. (Emphasis added.)

Following the issuance of the Final Order Approving Modified Plan of Rehabilitation and the transfer of ELIC's assets to Aurora, several third parties filed various lawsuits against Aurora related to the transferred assets. In response, on March 17, 1994, the Conservator filed an *ex parte* application for an Order Clarifying Exclusive Jurisdiction of Court and Applicability to Aurora of Previously Issued Injunctions and Restraining Orders ("Clarifying Order"). On March 22, 1994, the Conservation Court granted the Conservator's *ex parte* application and issued a Clarifying Order. In the Clarifying Order, the Conservation Court once again reiterated its exclusive jurisdiction over ELIC-related claims and assets, extended its exclusive jurisdiction to claims against Aurora, enjoined persons from bringing such claims and continued "in full force and effect" its prior injunctions. The Clarifying Order provides:

> 1. This Court hereby continues to assert and exercise exclusive jurisdiction over the Modified Plan, over ELIC . . . and over any claim, counterclaim or other action against ELIC . . . *Aurora or other third party which artses out of actions taken . . . by the Rehabilitator . . . or otherwise and which relates to any of the transferred assets*, wherever situated or however held (the "Property").
> 2. This Court intended by its prior Orders and hereby continues to assert exclusive jurisdiction over all claims, lawsuits and proceedings of *any type* which arise out of any actions taken by ELIC and/or any ELIC Trust or by the *Rehabilitator* under any contract entered into by ELIC and/or any ELIC Trust *or otherwise and which relates to any of the transferred assets*, also known as the Property . . . . (Emphasis added).

On February 15, 1995, the California Court of Appeals affirmed the Conservation Court's August 13, 1993 Final Order. *In re Executive Life Ins. Co.*, 32 Cal.App.4th 344 (1995). In that opinion, the California Court of Appeals stated that "[t]he rehabilitation of ELIC . . . is a continuing process." *Id.* at 358. (It is undisputed that the California Supreme Court denied review on May 11, 1995.) The Special Deputy Insurance Commissioner has confirmed that "[t]he conservation, liquidation and rehabilitation of ELIC is on-going and is

not complete."

B. The Commissioner's Action

On February 18, 1999, the Commissioner filed this action in the California Superior Court for the County of Los Angeles. On March 18, 1999, Credit Lyonnais and CDR removed the action to this Court pursuant to 28 U.S.C. § 1441(d). Section 1441(d) provides: "Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending . . . ." The Commissioner then filed a first amended complaint on June 18, 1999; a second amended complaint on September 15, 1999; and a third amended complaint ("TAC") on February 16, 2000.

In the TAC, the Commissioner alleges several causes of action for fraud, involuntary trust, unjust enrichment, money had and received, conversion, unfair competition and accounting. The Commissioner's claims arise from alleged misrepresentations made by Defendants during the bidding process that resulted in the sale of ELIC's assets. Specifically, the Commissioner alleges that the parties entered into secret contracts whereby the parties agreed (1) that Altus would purchase MAAF's and Omnium Geneve's shares in New California at some later date and (2) that MAAF and Omnium Geneve would exercise their rights as shareholders of New California at the direction of Altus. TAC at ¶¶ 33, 34. Meanwhile, defendants continued to represent to the Commissioner and the Conservation Court that Altus and Credit Lyonnais, who owned and controlled Altus, would not have any interest in or control of New California or Aurora. The Commissioner asserts that had the Commissioner or the Conservation Court known of the alleged secret agreements or the relationships between the parties, "Altus and Credit Lyonnais would have been prevented from obtaining control over the bond portfolio" and "defendants would have been prevented from obtaining control over ELIC's insurance business." TAC at ¶¶ 45, 58. The Commissioner's Prayer for Relief includes requests for compensatory damages, punitive damages, return of property, restitution, an accounting, and injunctive relief. TAC at 33:10-36:2.

III. THE CONSERVATION COURT'S EXERCISE OF EXCLUSIVE JURISDICTION AND THE FULL FAITH AND CREDIT CLAUSE

A. The Conservation Court's Assertion of Exclusive Jurisdiction Applies to the Commissioner's Claims.

During the ELIC rehabilitation proceedings, the Conservation Court issued a series of orders. Exhs. A, G, J. to the moving papers. Each order separately asserted exclusive jurisdiction over claims relating to ELIC's rehabilitation. As the rehabilitation progressed, the Conservation Court tailored its orders to the developing circumstances. Aurora and New California focus on the language in the April 11, 1991 Conservation and Stay Order, Exh. A; the August 13, 1993 Final Order, Exh. G; and the March 22, 1994 Clarifying Order, Exh. J. Aurora and New California assert that the exercise of exclusive jurisdiction in these orders encompass the Commissioner's claims. The Commissioner disputes that assertion.

The Court concludes that the April 11, 1991 Conservation and Stay Order does not apply to the Commissioner's claims against Aurora and New California. However, the Conservation Court's later orders exercising exclusive jurisdiction -- the August 13, 1993 Final Order and the March 22, 1994 Clarifying Order -- do clearly encompass the Commissioner's claims.

1. April 11, 1991 Conservation and Stay Order

The Commissioner informs the Court that the Commissioner's counsel drafted the 1991 Conservation and Stay Order. Opp. at 1:24-2:2. The Commissioner proceeds to assert that

> [t]he obvious purpose of the Commissioner's application and the injunction that his counsel prepared was to prevent *other* people from filing lawsuits against ELIC in other jurisdictions and to prevent *other* people from taking legal action in other jurisdictions that might interfere with the Commissioner's ability to marshall ELIC assets and to develop a comprehensive plan to conserve and rehabilitate the company.

Opp. at 2:5-10 (emphasis in original). The Commissioner believes that this purpose is clear from the face of the 1991 Conservation and Stay Order. Opp. at 2:11. Therefore, the Court will analyze the language of the 1991 Conservation and Stay Order to determine whether a plain reading of the 1991 Conservation and Stay Order would encompass the Commissioner's

claims.

First, the 1991 Conservation and Stay Order vested the Commissioner with title to ELIC's property and assets ("Property"). Exh. A, ¶ 1. The Conservation Court then "assume[d] and exercise[d] sole and exclusive jurisdiction over all the Property and any claims or rights respecting such Property to the exclusion of any other court or tribunal . . . ." Exh. A, ¶ 1. The Conservation Court proceeded to restrain and enjoin "Respondent [ELIC] . . . and all other persons, agencies, associations and entities" from a list of specific actions. Examples of the prohibited actions include:

> a. transacting any of the business of Respondent or the disposition of any of the Property except in accordance with the written instructions of the Conservator until further order of this Court;
> b. interfering with the acquisition of[,] possession by or the exercise of dominion and control over the Property by the Conservator, with the jurisdiction of this Court, or with these proceedings; . . .
> d. the seeking or obtaining of any preferences of any kind or nature . . . except pursuant to the prior orders of this Court, this Court having exercised its exclusive jurisdiction with respect to the Property and any claims and rights asserted with respect to it;
> e. the filing, commencement or prosecution of any new suits . . . or the continued prosecution of any pending suits . . . with respect to Respondent or the Property other than in this proceeding before this Court unless the prior approval of this Court has been granted upon good cause shown; and
> f. from interfering with the possession, title and rights of the Commissioner, as Conservator, in and to the assets of Respondent, and from interfering with the Conservator in the conducting of the business of Respondent, and
> g. institution of suits to collect any of the Property or institution of suits which purport to assert derivative rights on behalf of [R]espondent.

Exh. A, ¶ 3. Finally, the Conservation Court authorized the Commissioner "to initiate such equitable or legal actions or proceedings in this or other states . . . all as may appear to him necessary to carry out his functions as Conservator." Exh. A, ¶ 8.

The Court agrees with the Commissioner that the Conservation Court's exercise of exclusive jurisdiction in the 1991 Conservation and Stay Order does not encompass the Commissioner's claims against Aurora and New California. True, as Aurora and New California argue, the Conservation Court enjoined all claims by any persons, agencies and

entities outside the Conservation Court. Exh. A, ¶ 3(e). But that provision must be read in context. In paragraph 3, the Conservation Court enjoined any person, agency or entity from transacting business on behalf of ELIC unless pursuant to the *Commissioner's* written instructions; interfering with the *Commissioner's* possession and control over ELIC's property and assets; and filing new lawsuits or claims regarding ELIC outside the Conservation Court. Paragraph 3 prohibits persons, agencies and entities from interfering with the *Commissioner's* duties as Conservator of ELIC; it would make no sense to interpret that provision as a limitation on his authority.[10] The 1991 order did not prohibit the Commissioner from bringing any actions or claims outside the Conservation Court. Indeed, the Conservation Court expressly authorized him to initiate "equitable and legal actions or proceedings in this or other states" on behalf of ELIC.[11] Exh. A, ¶ 8.

2. August 13, 1993 Final Order

In the context of approving the Modified Plan for the transfer of ELIC's insurance business to Aurora, the Conservation Court issued a Final Order and continued to exercise exclusive jurisdiction. Specifically, the Conservation Court stated that it

> reserves jurisdiction necessary to enforce this Final Order and the Order referenced and incorporated herein. This Court hereby continues to assert and exercise exclusive jurisdiction over the Modified Plan, over ELIC and *over any claim, counterclaim or other action involving a third party relating to any of the Transferred Assets.* All prior orders of this Court including, but not limited to, all injunctions and restraining orders, are hereby affirmed and continued in full force and effect except to the extent inconsistent with this Final Order. Exh. G, ¶ 13 (emphasis added).

Aurora and New California assert that the 1993 Final Order's exercise of exclusive

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[10] The April 11, 1991 Conservation and Stay Order did encompass the *Carranza-Hernandez* action because Plaintiff Carranza-Hernandez was a policyholder, not the Conservator of ELIC. As such, he was enjoined from bringing any lawsuits outside the Conservation Court without permission from the Conservation Court to do so.

[11] This grant of authority coincides with the powers granted to the Commissioner in Cal. Ins. Code § 1037(f).

jurisdiction applies to the Commissioner's claims because those claims expressly relate to the transferred assets and other terms of the Modified Plan and the 1993 Final Order. Motion at 11:20-25. The Commissioner disagrees. First, he contends that he was not a "third party" under the 1993 Final Order. "He had been directly involved in the conservation proceedings since April 1991 . . . ." Opp. at 5:4-6. This contention is misplaced and it distorts and narrows the jurisdiction asserted by the Conservation Court. The provision asserts exclusive jurisdiction over actions "*involving* third parties," not merely actions brought *by* third parties. It is undisputed that some of the parties to this action were not parties to the ELIC rehabilitation proceedings; they are third parties.

The Commissioner therefore argues that this action does not "relate to the 'transferred assets' in any sense that would affect Aurora's title or dominion over those assets. The Commissioner is not claiming to [sic] title to any of the transferred assets, nor is he seeking to rescind the rehabilitation plan." Opp. at 5:15-17. According to the Commissioner, "[t]he term 'relating to any Transferred Assets' as it appears in the August 13, 1993 Order cannot be read [to] extend to cases and claims such as those that are before this court that do not directly affect Aurora's title." Opp. at 6:14-16. Once again, the Commissioner tries to limit the Conservation Court's exercise of exclusive jurisdiction too narrowly. The Conservation Court did not limit its jurisdiction to claims affecting title to the transferred assets. The Conservation Court exercised exclusive jurisdiction over "*any claim, counterclaim or other action involving a third party relating to any of the Transferred Assets.*" Exh. G (emphasis added). The Conservation Court could have recognized exceptions to this broad exercise of exclusive jurisdiction but it chose not to.

The "transferred assets" referenced in the 1993 Final Order include the junk bond portfolio transferred to Altus and Credit Lyonnais and the ELIC insurance business transferred to the MAAF Syndicate. Exh. F.[12] The Commissioner has asserted allegations of fraud and

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[12]The Conservation Court's orders refer to the Modified Plan or the Purchase and Sale Agreement for the definition of the component parts of the "Transferred Assets." Exh. D, ¶ 5; Exh. G, at 2 n.1. However, the parties did not provide a copy of the Purchase and Sales Agreement or the

wrongdoing in connection with the purchase of those ELIC assets during the rehabilitation proceedings. TAC at ¶¶ 33, 34, 43, 50. For example, the Commissioner alleges that

> But for the deceit and fraudulent statements made by Credit Lyonnais[,] Altus, MAAF, MAAF Vie, Omnium Geneve, Aurora, New California and their agents and other acts and omissions complained of herein, neither the Commissioner nor the Rehabilitation Court would have allowed ELIC's insurance business to be sold to New California and the MAAF syndicate. Had the Commissioner or the Rehabilitation Court been aware of the secret *conrat de portage* agreements and the true relationship among Credit Lyonnais, Altus and the MAAF syndicate, defendants would have been prevented from obtaining control over ELIC's insurance business.

TAC at ¶ 58. Clearly, the Commissioner's action "relates to" the transferred assets.

In at least two different documents, the Commissioner himself has acknowledged the interrelationship between this lawsuit and the Conservation Court ELIC Rehabilitation proceedings. First, in his very opposition to this motion, the Commissioner states: "In fact, the ELIC conservation/liquidation proceedings are largely concluded. Technically, the case will remain open until the final assets of the ELIC estate (*including the claims asserted in this case*) are liquidated and distributed to ELIC's former policyholders." Opp. at 9 n. 15 (emphasis added). Second, in a Notice of Related Case filed in Superior Court for the County of Los Angeles before this action was removed to this Court, the Commissioner tried to have this action transferred to the Judge presiding over the Conservation Court, the Honorable Kurt Lewin. The Commissioner explained:

> In the original case, Commissioner v. ELIC, plaintiff conserved ELIC and reorganized its business by, *inter alia*, arranging for the sale of high yield bonds owned by ELIC to Altus, and the sale of the ELIC insurance business to a group of investors including Omnium Geneve, MAAF and MAAF VIE .... In the above captioned case, the Insurance Commissioner contends that the defendants defrauded plaintiff and engaged in unfair business practices in the sale of the bonds to Altus and the sale of the ELIC insurance business to MAAF, MAAF VIE and Omnium Geneve. ... Plaintiff contends that the factual issues presented in the new action spring largely from transactions that were part and parcel of the first litigation. ... [T]he factual and legal issues involved in both lawsuits are clearly intertwined."

Modified Plan to the Court.

Exh. N. By the Commissioner's own admissions, this action is related to the transferred assets and the Conservation Court proceedings.

Moreover, in the TAC, the Commissioner not only alleges a fraud on the Commissioner, as Conservator of ELIC, but also on the Conservation Court itself. See TAC at ¶ 58. Sound principles of judicial administration and common sense suggest that the Conservation Court should be allowed to determine whether it was defrauded in the proceedings it has been overseeing since April 1991. Similarly, the Conservation Court should determine the finality of its Court-approved sales and whether the Commissioner's allegations can form the basis for claims of liability and damage that can affect the finality of those sales.

Finally, the Commissioner asserts that the August 13, 1993 Final Order could not encompass the Commissioner's action because that would conflict with paragraph 8 of the April 11, 1991 Conservation and Stay Order. This assertion does not help the Commissioner's cause. The 1993 Final Order stated that "[a]ll prior orders of this Court, including but not limited to, all injunctions and restraining orders, are hereby affirmed and continued in full force and effect *except to the extent inconsistent with this Final Order*." Exh. G, ¶ 13 (emphasis added). If the 1993 Final Order conflicts with the 1991 Conservation and Stay Order, the 1993 Final Order applies.

3. March 22, 1994 Clarifying Order

After the 1993 Final Order, Aurora was named as a defendant in two lawsuits. Exh. J. The first lawsuit, in Kern County Superior Court, involved a claim for damages arising out of a policy issued by ELIC. Exh. J, p. 3, ¶ 7. The second lawsuit, in Florida state court, sought to enforce a stipulation for judgment made by ELIC prior to the rehabilitation proceedings. Exh. J, p. 4, ¶ 8. In order to clarify its exercise of exclusive jurisdiction in the 1993 Final Order, the Conservation Court issued a Clarifying Order, at the request of the Commissioner. First, the 1994 Clarifying Order specifically addressed the lawsuits that had been filed against Aurora.

> 1. This Court hereby continues to assert and exercise exclusive jurisdiction over the Modified Plan, over ELIC and/or any ELIC Trust and *over any claim*, counterclaim or other action against ELIC and/or any ELIC Trust, the Rehabilitator, *Aurora, or other third party* which arises out of the actions taken by ELIC

> and/or any ELIC Trust or by the *Rehabilitator* under any contract entered into by ELIC and/or any ELIC Trust or otherwise and which relates to any of the transferred assets, wherever situated or however held. (Emphasis added.)

Exh. J, p. 5, ¶ 1. The Court then elaborated and reiterated the full extent of its exercise of exclusive jurisdiction:

> 2. This Court intended by its prior Orders and hereby continues to assert exclusive jurisdiction over all claims, lawsuits and proceedings of *any type* which arise out of any actions taken by ELIC and/or any ELIC Trust or by the *Rehabilitator* under any contract entered into by ELIC and/or any ELIC Trust *or otherwise and which relates to any of the transferred assets*, also known as the Property .... Exh. J, ¶ 3 (emphasis added).

The Commissioner argues that the Conservation Court's "exclusive jurisdiction *only* applies to claims against Aurora *based on actions taken by ELIC, the ELIC trusts or the Commissioner*. Plainly the order does not apply to suits against Aurora based on actions taken by Aurora, itself." Opp. at 9:8-11 (emphasis in original).

The Commissioner's argument is flawed. It ignores the plain fact that what Aurora did was inextricably linked to and dependent on what the Commissioner, acting in part on behalf of ELIC as its "Rehabilitator," did. In fact, this lawsuit is based on actions he took. *E.g.*, throughout the TAC, the Commissioner asserts that he would not have approved the sale of the Transferred Assets had he known about the *contrats de portage* agreements between the defendants. TAC at ¶¶ 33, 34, 43, 50. He asserts that both he and the Conservation Court approved the sale of the Transferred Assets in reliance upon numerous misrepresentations and omission by the defendants. *Id.*

As discussed above, this lawsuit clearly relates to the transferred assets. Therefore, the 1994 Clarifying Order's exercise of exclusive jurisdiction encompasses the Commissioner's claims.

B. The Conservation Court's Assertion of Exclusive Jurisdiction Over the Commissioner's Claims in its 1993 Final Order and 1994 Clarifying Order is Entitled to Full Faith and Credit.

Aurora and New California assert that this Court should give full faith and credit to the Conservation Court's orders asserting exclusive jurisdiction over the Commissioner's claims. Motion at 10:2-7. The Commissioner does not address this argument because he contends that the Conservation Court's orders do not apply to his claims. *See* Opp. at 9 n. 14. As discussed above, the Commissioner's premise is wrong. Therefore, the Court now turns to the issue of whether it must accord full faith and credit to those orders.

Article IV of the United States Constitution mandates that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof." To reinforce this mandate, Congress passed the Full Faith and Credit Act, 28 U.S.C. § 1738, which provides, in relevant part, " . . . Acts, records and judicial proceedings . . . [of any State] shall have full faith and credit in every court within the United States . . ." The Full Faith and Credit Act requires a district court to "give the same preclusive effect to a state-court judgment as another court of that State would give." *International Evangelical Church of the Soldiers of the Cross of Christ v. Church of the Soldiers of the Cross of Christ of the State of California*, 54 F.3d 587, 590 (9th Cir. 1995) (finding that the state court judgment did not have a preclusive effect on the federal court action). In 1996 the Supreme Court held that a state court judgment settling federal claims asserted by shareholders had preclusive effect in federal courts under Section 1738, notwithstanding that the federal claims could not be adjudicated in state court. In analyzing the "implied repeal" doctrine, which it found inapplicable, the Court reiterated the broad purposes and intended scope of the Full Faith and Credit doctrine. *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873 (1996).

"Section 1738 'commands a federal court to accept the [preclusion] rules chosen by the State from which the judgment is taken.'" *Morgan Stanley Mortgage Capital, Inc. v. Insurance*

Commissioner of California, 18 F.3d 790, 792 (9th Cir. 1993) (citation omitted).[13] "A federal court may not refuse to enforce a valid state judgment on the ground that enforcement would violate some unarticulated federal public policy. Section 1738 'does not allow federal courts to employ their own rules . . . in determining the effect of state judgments.'" *Valley National Bank of Arizona v. A.E. Rouse & Company*, 121 F.3d 1332, 1335 (9th Cir. 1997). Therefore, the Court must look to California preclusion laws in analyzing whether to give the Conservation Court's orders full faith and credit. The Ninth Circuit has set forth the framework for that analysis:

> California applies collateral estoppel when: (1) the issue decided in the prior adjudication is identical to the issue presented in the second action; (2) there was a final judgment on the merits; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication.

Morgan Stanley Mortgage Capital, Inc., supra, 18 F.3d at 792-93 (holding that the Full Faith and Credit Act required the federal court to give preclusive effect to the state court's decision) (citation omitted).

Aurora and New California satisfy all three prongs of California's collateral estoppel rule. First, as described in Section III(A) above, the Conservation Court decided the issue of its exclusive jurisdiction in various orders and injunctions, including its Final Order.[14] Next, the issue of exclusive jurisdiction decided by the Conservation Court is identical to the issue presented here. Finally, by his own admission, the Commissioner was a party to the prior adjudication before the Conservation Court. *See* Opp. at 5:5-7. Therefore, the Court must accord full faith and credit to the Conservation Court's orders asserting exclusive jurisdiction

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[13] In *Morgan Stanley Mortgage Capital*, the Commissioner successfully argued that the Conservation Court in the ELIC proceedings had exclusive jurisdiction over a dispute involving notes that the California Court of Appeal treated as assets of ELIC. The Ninth Circuit found that the Court of Appeal's decision was entitled to Full Faith and Credit and upheld the dismissal of the federal lawsuit.

[14] Although the Court of Appeal in *In re Executive Life Ins. Co.*, 32 Cal.App.4th 344 (1995), affirmed the Conservation Court's Final Order, it did not explicitly affirm the Conservation Court's exercise of exclusive jurisdiction. On May 11, 1995, the California Supreme Court denied review of the Court of Appeal's decision.

over the Commissioner's claims and dismiss his claims as to all non-foreign sovereign defendants.

IV. JURISDICTION AS TO FOREIGN SOVEREIGN DEFENDANTS

It is not disputed that under 28 U.S.C. § 1603, the Foreign Sovereign Immunities Act ("FSIA"), Credit Lyonnais and CDR are "agencies or instrumentalities of a foreign state" and were entitled to remove this action under 28 U.S.C. § 1441(d). Nor is there any dispute that defendant Consortium de Realisation S.A. ("Consortium") is a foreign entity. (It is alleged to be the successor in interest to Credit Lyonnais.) For purposes of this order all these parties shall be referred to as "the foreign sovereign defendants."

Credit Lyonnais, CDR and Consortium all oppose dismissal of the Commissioner's claims against all the other defendants because, they assert, it would deprive them of their "absolute right and opportunity to fully litigate their liability in federal court." Credit Lyonnais Opp., 3:22-23. They argue that the Court "can and should decline to split this case in two . . . ." *Id.*

To start with, it is necessary to state what the issue is . . . and is not. The question is not whether a federal court to which an action has been removed under the FSIA has jurisdiction over non-foreign sovereign parties and over pendent, state-based claims against those parties; in general, such a court clearly does have jurisdiction. Nor is the question whether under 28 U.S.C. § 1367 and principles of supplemental jurisdiction such a court ordinarily should exercise that jurisdiction; ordinarily, it should. The cases discussed below clearly stand for these propositions. Instead, the issue before this Court on this motion is framed by the overriding fact that makes this case unique: another court, the California Conservation Court, has asserted and is entitled to assert exclusive jurisdiction over the claims against the non-foreign sovereign parties. So the issue is whether under the FSIA the foreign-sovereign defendants have the right to preclude this Court from remanding those claims. If so, that would result in this Court disregarding and divesting the state court of the exclusive jurisdiction it is entitled to exercise over non-foreign sovereign defendants. Put another way, this case and this motion involve a collision of conflicting assertions of exclusive jurisdiction. None of the cases

and authorities the foreign sovereign defendants cite involves or addresses that issue.

There is authority for the proposition that in actions removed under 28 U.S.C. § 1441(d) the Court "has discretion to remand to state court the portion of the action that relates to defendants as to whom there is no independent basis for subject matter jurisdiction." 14C Wright, Miller & Cooper, Fed. Prac. Proc. § 3729.1 at 243 (1998). *see* also *Birkinshaw v. Armstrong World Indus.*, 715 F. Supp. 126 (E.D. Pa. 1989); *cf. Admiral Ins. Co. v. L'Union des Assurances de Paris Incendie* Accidents, 758 F. Supp. 293 (E.D. Pa 1991).

Notwithstanding these authorities, the foreign sovereign defendants argue that the Court does not have discretion to dismiss Plaintiff's claims against the other defendants, citing *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1990); and *In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11th Cir. 1992).[13] These cases are not persuasive, for the following reasons.

In *Chuidian*, the Ninth Circuit chose to decide a jurisdictional issue: whether removal pursuant to section 1441(d) transfers the entire action or only the claim against the removing entity. It held that "section 1441(d) requires, in the case of a removal by a foreign sovereign, that the federal court *initially* exercise jurisdiction over claims against co-defendants even if such claims could not otherwise be heard in federal court." *Chuidian*, 912 F.2d at 1099 (emphasis added). The court did not preclude the remand of claims against co-defendants after the initial exercise of jurisdiction over the entire case. Indeed, its brief treatment of the jurisdictional issue was a *dictum*; the parties had agreed there was federal court jurisdiction

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[13] Credit Lyonnais cited these cases in the *Carranza-Hernandez* action. Here, the foreign sovereign defendants also cite additional authority: *Consumers Energy Company v. Certain Underwriters at Lloyd's London*, 45 F. Supp. 2d 600 (E.D. Mich. 1999) and Nash, Pendent Party Jurisdiction Under the Foreign Sovereign Immunities Act, 16 B.U. Int'l. L.J. 71, 118 (1998) (hereinafter, "Nash"). *Consumers Energy* did indeed deny the plaintiff's motion to remand, holding that unless federal jurisdiction under the FSIA has been destroyed because no claims remain against the foreign sovereign, the federal court "retains the jurisdiction it had at the time the action was removed [and] . . . lacks discretion whether to remand the remaining pendent claims" (citing *Surinam*). The Nash article basically agrees. Neither authority is dispositive, for the reasons explained below.

over all the claims and the opinion deals almost entirely with other issues.

In *Teledyne*, the court merely held that the FSIA authorizes pendent party jurisdiction in cases removed under section 1441(d). *Teledyne*, 892 F.2d at 1409. The language the Ninth Circuit used to reflect this ruling is telling:

> At the very least, subsection 1441(d) expresses an intention to give sovereign foreign defendants an absolute right to a federal forum coupled with an unusually strong *preference* for the consolidation of claims. We conclude that those *preferences* are expressed strongly enough to overcome any presumption against pendent party jurisdiction. (Emphasis added.) *Id.*

A "preference" that a district court exercise pendent party jurisdiction is not inconsistent with that court having the authority to remand such claims to state court - - especially where (as here) another court has properly asserted exclusive jurisdiction over those claims.

The case that does give the court most pause is *Surinam Airways, supra.* In that case, after an airplane crash killed their decedents, two persons filed separate wrongful death actions in state court against various Florida corporations and the estates of the deceased cockpit crew, but not against the air carrier, Surinam Airways. One of the named defendants impleaded the air carrier into each action as a third-party defendant, asserting indemnity, contribution, and breach of contract claims. Surinam Airways removed both cases to federal court pursuant to section 1441(d) and they were consolidated. The district court remanded plaintiff's claims but retained jurisdiction over the third party claims asserted against Surinam Airways. On a mandamus petition, the Eleventh Circuit rejected the district court's remand and stated that "[a]llowing the district court discretion to remand part of a case involving a sovereign foreign defendant would defeat Congress' intent to grant foreign sovereigns the absolute right to defend civil actions against them in federal court." *Surinam Airways* at 1260. This Court agrees that partial remand would encroach on the foreign sovereign defendants' ability to defend themselves in this court, but does not agree that Congress' intent was to make that ability absolute and unqualified.

In *Surinam*, the Eleventh Circuit itself recognized that "a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by

or against different parties," *Surinam Airways* at 1258, citing *Finley v. United States*, 490 U.S. 545, 556, 109 S.Ct. 2003, 2010 (1989). Moreover, the Court of Appeals also acknowledged that the "legislative history of § 1441(d) shows that Congress intended to 'give sovereign foreign defendants an absolute right to a federal forum coupled with an unusually strong preference for the consolidation of claims.'" *Surinam Airways, supra*, at 1260, citing *Teledyne, supra*, at 1409. Exactly; as noted above, a "preference" is not a "command." Sometimes what is preferable is not possible, or at least not advisable. Such is the situation here, where (unlike in *Surinam Airways*) this Court is required to balance conflicting principles of exclusive jurisdiction.

This Court adopts Judge Cox's dissenting opinion in *Surinam Airways*. He stated,

> . . . nothing in the statute indicates that Congress also intended to give the foreign defendant an absolute right to have the pendent-party claims heard in [the] federal forum. I therefore believe the district court has discretion to remand pendent-party claims removed under § 1441(d) where the exercise of pendent jurisdiction is inappropriate.

Surinam Airways, supra, at 1262. This Court finds that for the reasons discussed above in Section III, it would be inappropriate not to remand the claims against the non-foreign sovereign defendants.

The Court recognizes that "splitting" this case into two will create significant additional expense to all the parties. It will also trigger, or at least invite, thorny questions about discovery, trial priorities, evidence and substantive issues. For these reasons, the Commissioner joins the foreign sovereign defendants in opposing the remand of any claims (even though he initiated this action by filing it in state court).

There is a simple solution: the Commissioner may move the Conservation Court for an order divesting that court of exclusive jurisdiction and authorizing the Commissioner to pursue all of his claims in this Court. Without presuming to speculate on whether the Conservation Court would grant that motion, it is entirely certain that if it did, the movant non-foreign sovereign defendant parties no longer would have a right to have the claims against them (and any cross-claims they have against other non-foreign sovereign defendants) adjudicated in state

court.

Because it appears that this solution is both simple and not likely to require a lengthy delay, this Court *sua sponte* will stay the execution of this order for at least _____ days to permit the Commissioner to evaluate his options. Unless within that period the Commissioner files a status report confirming that he has made such a motion or intends to do so within a reasonable and specified period of time, this Order will automatically go into effect on _____.

V. CONCLUSION

For the foregoing reasons, and good cause appearing therefor, the Court orders as follows:

(1) The claims of the Commissioner against all the defendants except (a) the foreign sovereign defendants and (b) the cross-claim for contribution of defendant Henin are dismissed and remanded to the Conservation Court.

(2) The effective date of this order shall be _____.

(3) In the interim, the Commissioner shall evaluate whether to seek an order from the Conservation Court authorizing the Commissioner to pursue his claims in this court. Unless within that period the Commissioner files a status report confirming that he has made such a motion or intends to do so within a reasonable and specified period of time, this order will automatically go into effect on _____.

IT IS SO ORDERED.

DATE: June ___, 2000

DRAFT

A. Howard Matz
United States District Judge

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/26/00			DEPT. 4
HONORABLE Kurt Lewin	JUDGE	E. A. DESPOL	DEPUTY CLERK
HONORABLE 10	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. RODRIGUEZ, CSLO	Deputy Sheriff	NONE	Reporter

1:30 pm	BS006912 CHARLES QUACKENBUSH, Insurance Commissioner of the State of California vs. EXECUTIVE LIFE INSURANCE COMPAN [And Related Cases]	Plaintiff Counsel Defendant Counsel	NO APPEARANCES

NATURE OF PROCEEDINGS:

Ruling on Submitted Matter: EX PARTE APPLICATION FOR ORDER AUTHORIZING PETITIONER TO PROCEED IN DISTRICT COURT

The matter heretofore having been argued and submitted on JULY 20, 2000, and the Court having reviewed and considered, the Court now rules as follows:

The benefit of judicial economy argued by counsel for the Commissioner as a basis for this court's continued assertion of exclusive jurisdiction is illusory. The personal memory, knowledge or intent of any particular judge ought not to be a basis for perpetual and exclusive jurisdiction over any new and subsequent action brought by or against any of the parties to the original action. In fact it is a proper basis for continuing jurisdiction, if possible, only where the particular judge's recollection of the evidence is critical. (As for example in a motion for new trial, judgment n.o.v., etc.) Nor is there any certainty that a particular judge (or this judge) will remain available through conclusion of any action.

This court's prior orders in this action require no post facto personal interpretation, nor should they require any. In large part they were proposed by counsel and subject to intense scrutiny by all parties. The orders have been in place for some time with no known misunderstanding. They seem clear and speak for

MINUTES ENTERED
07/26/00
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/26/00			DEPT. 4
HONORABLE Kurt Lewin	JUDGE	E. A. DESPOL	DEPUTY CLERK
HONORABLE 10	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
M. RODRIGUEZ, CSLO	Deputy Sheriff	NONE	Reporter

1:30 pm BS006912

Plaintiff Counsel: NO APPEARANCES

CHARLES QUACKENBUSH, Insurance Commissioner of the State of California
vs.
EXECUTIVE LIFE INSURANCE COMPAN
[And Related Cases]

Defendant Counsel:

NATURE OF PROCEEDINGS:

themselves. The court perceives no ambiguity.

The need for exclusive jurisdiction was necessary in the administration of conservation itself; i.e. the marshaling of assets, presentation of claims, rehabilitation, etc., for obvious reasons. Continuing exclusive jurisdiction is not necessary nor perhaps even desirable in relation to subsequent independent though related actions such as this one.

It appears that Federal District Judge Matz felt strongly that the Commissioner's action ought not to be bifurcated between two courts and that he would not have ordered remand but for this court's assertion of exclusive jurisdiction. This court concurs that the Commissioner's action proceed in a single forum, and by this order relinquishes exclusive jurisdiction to whatever extent required in order that the action proceed in a single court.

Counsel for moving party to give written notice. Counsel appearing at the time of the hearing, except MICHAEL J MILLINS, are notified by a copy of this minute order by U S MAIL, addressed as follows:

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RICHARD D BERNSTEIN
Sidley & Austin
1722 Eye Street, N.W.
Washingtonm D.C. 20006

MINUTES ENTERED
07/26/00
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/26/00 DEPT. 4

HONORABLE Kurt Lewin JUDGE E. A. DESPOL DEPUTY CLERK

HONORABLE 10 JUDGE PRO TEM ELECTRONIC RECORDING MONITOR

M. RODRIGUEZ, CSLO Deputy Sheriff NONE Reporter

1:30 pm BS006912

CHARLES QUACKENBUSH, Insurance Commissioner of the State of California
vs.
EXECUTIVE LIFE INSURANCE COMPAN
[And Related Cases]

Plaintiff Counsel NO APPEARANCES

Defendant Counsel

NATURE OF PROCEEDINGS:

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MINUTES ENTERED
07/26/00
COUNTY CLERK

Filed 8/15/05

IN THE SUPREME COURT OF CALIFORNIA

STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Appellant,	)	
	)	S119046
v.	)	
	)	
ALTUS FINANCE, S.A. et al.,	)	
	)	
Defendants and Respondents.	)	
	)	

We granted the request of the United States Court of Appeals for the Ninth Circuit to answer two questions of law. (Cal. Rules of Court, rule 29.8.) (1) Can the Attorney General pursue civil remedies, under the California False Claims Act (CFCA) (Gov. Code, § 12650 et seq.) and the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) concerning the assets of an insolvent insurance company for which the Insurance Commissioner is acting as conservator or liquidator, or does the Insurance Code, particularly section 1037, give exclusive authority to the Insurance Commissioner to bring civil actions? (2) Do assets to which the Insurance Commissioner acquires title from an insolvent insurance company under Insurance Code section 1011 constitute "state funds" within the meaning of the CFCA?

Answering the second question first, we conclude that the Insurance Commissioner (Commissioner), as a conservator of the insolvent insurance company's assets, holds these assets in trust for private parties, primarily the

insurance company's policyholders. These assets do not become "state funds" within the meaning of Government Code section 12650. The CFCA does not apply because it was intended to prevent false requests or demands that impact the public treasury.

Turning to the first question, we conclude that the Attorney General may not pursue an action under the CFCA because the assets in question are not "state funds" within the meaning of the CFCA. As to the UCL claims, as explained below, these claims must be parsed according to the type of remedies sought. The Attorney General seeks to pursue three remedies under the UCL: restitution, civil penalties, and injunctive relief. The first, restitution from the losses resulting from the allegedly fraudulent acquisition of the insolvent insurance company's assets, trespasses directly on the core function of the Commissioner as conservator of the company. We conclude the Attorney General may not, consistent with Insurance Code section 1037 subdivision (f), pursue such a remedy. In pursuing the second remedy, civil penalties based on defendants' allegedly unlawful conduct in violating state and federal statutes, the Attorney General acts primarily in his role as the state's chief law enforcement officer, seeking to punish and deter unlawful conduct. We conclude that the Attorney General may pursue such a remedy under the UCL. Third, the Attorney General seeks injunctive relief, but the object of the injunctive relief is unclear from the record. As explained below, he may pursue that relief only to the extent that it implicates core law enforcement functions rather than duplicating the role played by the Commissioner as conservator of the insolvent company.

I. STATEMENT OF FACTS

We state the facts as they appear in the Ninth Circuit's request to this court. Because the case came to the Ninth Circuit as a motion to dismiss, its statement of the facts is based on the Attorney General's pleadings. They are as follows:

More than a decade ago, Executive Life Insurance Company (ELIC), a California insurance company with approximately 300,000 insureds, became insolvent when many policyholders cashed out their policies because of concerns about ELIC's large junk bond portfolio. Pursuant to California law (see Ins. Code, § 1011), the Commissioner seized ELIC's assets on April 11, 1991, by order of the superior court and put ELIC into conservatorship.

The Commissioner adopted and implemented a two-part plan to rehabilitate ELIC. First, defendant Altus Finance, S.A. (Altus), a French company, purchased the company's junk bond portfolio. Second, other French investors, the MAAF Group, formed a holding company, New California Life Holdings (NCLH), that in turn purchased ELIC's insurance business and named the new company Aurora National Life Assurance Company (Aurora). The MAAF Group owned two-thirds of NCLH.

According to the Attorney General, the corporation behind these transactions was Crédit Lyonnais, a French bank owned in part by the government of France, operating through its subsidiary, Altus. Crédit Lyonnais and affiliated companies are among the defendants here, along with American investment bankers (hereinafter the Apollo parties) and other purported coconspirators that acted as fronts for Altus. The complaint alleges that "[t]he Commissioner did not know that the MAAF Group was controlled by Altus or that Apollo would share in the profits generated by the Insurance Business or the Bonds. California law required disclosure of such an interest." Moreover, Apollo and Altus/Crédit Lyonnais knew they could not meet the announced bidding requirements because neither had any experience operating an insurance business, and state and federal law prohibited Altus from owning or operating the insurance business anyway. Apollo also knew that the Commissioner would not approve of Apollo acquiring any financial interest in the insurance business because of its bad public image as a

result of its extensive connections with Drexel Burnham Lambert and Michael Milken.

The Attorney General alleges that Altus fraudulently acquired ELIC's insurance company assets from the Commissioner, in violation of state insurance and federal banking law. Insurance Code section 699.5 precludes foreign governments, agencies, or subdivisions thereof from owning, operating, or controlling, directly or indirectly, a California insurance company. The Bank Holding Company Act, 12 United States Code section 1841 et seq., prohibits a foreign bank from owning an American insurance company.

Altus and its fronts purportedly made false statements denying that Crédit Lyonnais would have any equity interest in or control over the buyers. Yet after Altus secretly acquired the insurance company assets, "[u]sing a back-dated and falsified agreement, Altus sold Artemis [S.A., a French company owned in part by Crédit Lyonnais and François Pinault] the insurance business, and Apollo orchestrated the timing of formal transfers of ownership from the phony fronts to Artemis in order to avoid public scrutiny." The Attorney General's complaint states that "[h]ad the true facts been disclosed, the Commissioner could not and would not have approved the Altus/NCLH bid."

Artemis subsequently obtained the Commissioner's approval to buy shares in NCLH from the MAAF Group, using applications that did not disclose the Artemis-Altus relationship. By 1995, Artemis had acquired all of the MAAF Group's interest in NCLH and therefore controlled Aurora.

After the Commissioner discovered that the purchasers of ELIC's insurance company assets were controlled by prohibited foreign entities, he filed suit in state court on February 18, 1999, alleging fraud and seeking damages. Crédit Lyonnais removed the case to federal court. The same district court judge who decided the

instant case is hearing that litigation, in which most of the defendants are also defendants here.

Also in February 1999, a qui tam plaintiff (RoNo LLC) filed a sealed whistle-blower complaint. The Attorney General intervened in the qui tam action, which was subsequently removed by defendants to federal court based on the Foreign Sovereign Immunities Act, 28 United States Code sections 1330, 1602 et seq., and consolidated with the Commissioner's action for discovery and pretrial purposes. In January 2002, the Attorney General filed his first amended complaint, naming the Apollo parties as additional defendants. The Attorney General asserts that the State of California was damaged in an amount in excess of $2 billion by defendants' unlawful transactions, because the ELIC business could have been sold to other entities at a higher price and a lower cost had the truth been known, with the result that more money would have been available for ELIC's policyholders.

The present lawsuit seeks, inter alia, treble damages under the CFCA, as well as "civil penalties and an order for restitution of all monies and property obtained and disgorgement of all profits derived . . . as well as injunctive relief" under the UCL.

The district court found that Insurance Code section 1037 subdivision (f), which as explained below, grants the Commissioner, as conservator and liquidator of the insolvent insurer's assets, exclusive authority to litigate matters in connection therewith, precludes the Attorney General from prosecuting this action. The court expressed concern that the Attorney General's claims are "utterly dependent on the testimony of the Insurance Commissioner . . . . Plaintiff has failed to make a single argument (and this Court cannot conceive of one) why it is necessary or even beneficial for two entirely separate and different agencies of the Executive Branch of the State of California to pursue virtually identical claims

against substantially the same defendants." As a matter of statutory interpretation, the district court held that "[a]lthough these respective cases have been consolidated for discovery and probably could be consolidated at trial, the continued prosecution of superfluous lawsuits causes inherent and great delay, huge additional expenses and a host of complicated conceptual and practical problems. The California Legislature surely did not intend such a result when it enacted section 1037 [subdivision] (f) of the Insurance Code."

The Attorney General appealed, and the Ninth Circuit requested a decision from this court on the above questions.[1]

II. DISCUSSION

A. Are Assets of the Insolvent Insurer "State Funds"?

We answer the second question first, i.e., whether assets to which the Commissioner acquires title constitute "state funds" within the meaning of the CFCA, and specifically Government Code section 12650, subdivision (b)(1) (hereinafter Government Code, section 12650(b)(1)).

The CFCA imposes liability on any person who "[k]nowingly presents or causes to be presented to an officer or employee of the state . . . a false claim for payment or approval." (Gov. Code, § 12651, subd. (a)(1).) The CFCA defines a "claim" as "any request or demand for money, property, or services made to any employee, officer, or agent of the state or of any political subdivision, or to any contractor, grantee, or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from, or was

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1 Since accepting the Ninth Circuit's request, we have been informed by the Attorney General that he has entered into a settlement with some but not all of the defendants, apparently in conjunction with a settlement between these defendants and the Commissioner. The defendants include Crédit Lyonnais, Aurora, and NLCH.

provided by, the state (hereinafter 'state funds') . . . . " (Gov. Code, § 12650(b)(1)).

The Attorney General argues that ELIC's assets temporarily became "state funds" when the Commissioner exercised his authority under Insurance Code section 1011 to acquire and subsequently distribute those assets to the defendants in the ELIC conservatorship proceedings. Insurance Code section 1011 provides in pertinent part: "The superior court of the county in which the principal office of a person described in Section 1010 [i.e., insurance companies and specified other entities] is located shall, upon the filing by the commissioner of the verified application showing any of the following conditions hereinafter enumerated to exist, issue its order *vesting title to all of the assets of that person, wheresoever situated, in the commissioner* or his or her successor in office, in his official capacity as such, and direct the commissioner forthwith to take possession of all of its books, records, property, real and personal, and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the commissioner may seem appropriate, and enjoining said person and its officers, directors, agents, servants, and employees from the transaction of its business or disposition of its property until the further order of said court: [¶] . . . . [¶] (d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or creditors, or to the public." (Ins. Code, § 1011, italics added.)

The statute is part of a statutory scheme found in chapter 1, article 14 of the Insurance Code (hereinafter article 14), relating to the Commissioner's treatment of insolvent insurers. Article 14 is the functional equivalent of federal bankruptcy laws, which generally do not apply to insurance companies. (11 U.S.C. § 109(b)(2).) After acquiring title to the insolvent insurer's assets, the Commissioner's role is as "a trustee for the benefit of all creditors and other

persons interested in the estate of the person against whom the proceedings are pending." (Ins. Code, § 1057.) The Commissioner acts as "conservator or liquidator" of the assets. (*Id.*, § 1037.) Public policy favors rehabilitating the insurance company if possible, with liquidation as a last resort. (*Id.*, § 1016 [proceeding to liquidation when conservation is "futile"]; *Commercial Nat. Bank v. Superior Court* (1993) 14 Cal.App.4th 393, 398.) In order to effect rehabilitation, the Commissioner may enter into a court-approved rehabilitation agreement. (Ins. Code, § 1043.) The Commissioner's conservatorship is terminated by the court at the behest of either the Commissioner or the insurer when the ground for such conservatorship "does not exist or has been removed" and when the insurer "can properly resume title and possession of its property and the conduct of its business." (*Id.*, § 1012.) If the Commissioner goes the liquidation route, his or her role terminates after executing a court-approved plan for dispersing the insurer's assets among its creditors. (*Id.*, § 1035.5.)

The Attorney General argues that the phrase "issued from" as it appears in Government Code, section 12650(b)(1) encompasses the transfer of property at issue in this case, i.e., property temporarily controlled by the Commissioner as a trustee on behalf of private parties. "In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. [Citation]. 'We begin by examining the statutory language, giving the words their usual and ordinary meaning.' " (*Estate of Griswold* (2001) 25 Cal.4th 904, 910-911.) The Attorney General contends that the dictionary definition of the phrase "to issue" supports his position. Specifically, the Attorney General points to Black's Law Dictionary (5th ed. 1979) page 745, which defines the verb "to issue" as, inter alia, "[t]o send out, to send out officially . . . to deliver, for use or authoritatively . . . ." The Attorney General also cites Webster's Third New International Dictionary (1981) page 1201, which defines "to issue" as, inter

alia, "1. to cause to come forth . . . . 3.a. to cause to appear or become available by bringing out for distribution to or sale or circulation among the public."

" 'To seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results. Rather, it is to discern the sense of the statute, and therefore its words, *in the legal and broader culture*. Obviously, a statute has no meaning apart from its words. Similarly, its words have no meaning apart from the world in which they are spoken.' " (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114 [considering the term "arising out of"].) In the present case, we do not believe that the Attorney General's proffered dictionary definitions shed light on the narrow question at issue here. The term "to issue" is generally employed as an abstract legal term that can apply to a broad range of activities — including "issuing" a search warrant or "issuing" capital stock of a company. (Black's Law Dict. (7th ed. 1999) p. 836.) Although the dictionary definitions of "to issue" cited by the Attorney General could theoretically encompass a transfer of private property held in trust by a public official, the use of the general term "issued from" does not definitively resolve whether the Legislature intended that specific meaning. Certainly, the term "issued from" has no special or connotative meaning that points inexorably to its application in the present context.

Because the language of the statute does not answer the question before us, "we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, . . . and the statutory scheme of which the statute is a part.' " (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744.) The legislative history of the CFCA indicates that the statute's purpose was to protect the public treasury and the taxpayers. The principal drafter of the statute testified before the Assembly Committee on the Judiciary that the statute, which has a whistleblower component (see Gov. Code, § 12653), would be

self-executing in that it would "deputiz[e] citizens to join the fight to protect the public treasury." (Sen. Com. on Judiciary, Rep. on Assem. Bill No. 1441 (1987-1988 Reg. Sess.) appended testimony of David Huebner, representative of the Center for Law in the Public Interest, before Assem. Com. on Judiciary, May 6, 1987, p. 3) Moreover, "taxpayers benefit because their hard-earned dollars are no longer squandered through fraudulent practices . . . . [T]axpayers see their elected representatives . . . calling upon the source of the funds, the taxpayers themselves, for assistance. The only losers . . . are those who . . . . expect to get away with raiding the public treasury." (*Id.*, at p. 4.) The statute's legislative sponsor, Assemblyman Floyd, stated in his letter urging Governor Deukmejian to sign the CFCA: "This bill lets the state recover treble damages plus penalties from contractors who try to rip off the taxpayer." (Assemblyman R.E. Floyd, sponsor of Assem. Bill No. 1441 (1987-1988 Reg. Sess.), letter to Governor Deukmejian, Sept. 15, 1987.)

California courts have consistently reaffirmed that the Legislature "obviously designed [the CFCA] to prevent fraud on the public treasury," (*Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 725 (*Southern Cal. Rapid Transit Dist.*), and that "[t]he ultimate purpose of the [CFCA] is to protect the public fisc." (*City of Hawthorne ex rel. Wohlner v. H & C Disposal Co.* (2003) 109 Cal.App.4th 1668, 1677; accord, *Laraway v. Sutro & Co., Inc.* (2002) 96 Cal.App.4th 266, 274; *City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 801; *Levine v. Weis* (1998) 68 Cal.App.4th 758, 765; *Wells v. One2One Learning Foundation* (2004) 10 Cal.Rptr.3d 456, 471-472).

Because the purpose of the CFCA is to protect the public treasury and the taxpayer, we next inquire into whether that purpose would be fulfilled by treating the property at issue in this case as "state funds." Our starting point is *Carpenter v. Pacific Mutual Life Ins. Co.* (1937) 10 Cal.2d 307 (*Carpenter*), in which this

court addressed the nature of the Commissioner's property interest in the assets of an insolvent insurance company. In *Carpenter*, policyholders of an insolvent insurer subject to rehabilitation proceedings under Insurance Code section 1011 challenged a court order affirming the rehabilitation plan, arguing that the Commissioner improperly used the insolvent insurer's assets to purchase stock in a new insurance company. (*Carpenter, supra*, 10 Cal.2d at p. 339.) The policyholders asserted that in using the assets to purchase stock of another company, the "commissioner as conservator" violated a California constitutional provision (Cal. Const., former art. XII, § 13, now art. XVI, § 17), prohibiting the state from loaning its credit to, subscribing to, or otherwise being interested in the stock of a corporation.

This court acknowledged that Insurance Code section 1011 "vest[s] the commissioner with title to all the assets of the [insolvent insurance] company." (*Carpenter, supra*, 10 Cal.2d at p. 330.) It also recognized that the Commissioner is a "state officer" and that the "state has an interest in rehabilitating insolvent insurance companies." (*Id.* at p. 340.) *Carpenter* nonetheless rejected the argument that the Commissioner's temporary control over the property rendered the state "interested" in the stock of the new insurer. "Of course the insurance commissioner is a state officer, and of course the state has an interest in rehabilitating insolvent insurance companies, but that interest is not a vested interest as is contemplated by the above constitutional provision. Section 1057 of the Insurance Code . . . expressly provides that in all proceedings thereunder the commissioner acts as trustee for the benefit of all of the creditors of the insolvent company. It is quite clear that the commissioner by subscribing to the stock of the new company has not loaned the credit of the state to the new company. *Not a penny of state money has gone into the treasury of the new company* . . . . The commissioner acting pursuant to statute, with court approval, took certain assets of

the old company and transferred them to the new company in exchange for the stock which he holds as trustee for the benefit of the creditors of the old company. Obviously, the commissioner as a state officer did not subscribe to the stock of the new company so as to make the state a stockholder." (*Ibid.*, italics added.)

Thus, both *Carpenter* and the Insurance Code provisions cited above demonstrate that the assets to which the Commissioner holds title do not become part of the public treasury, but are held in trust for the benefit of private parties. This point is underscored by what the Commissioner actually did with the proceeds of the sale of ELIC's assets in the present case. As recounted by the district court in this case, these proceeds were not transferred to the state's General Fund, but rather were initially invested in an escrow account established by the Commissioner, and were ultimately conveyed to private corporations. (*State of California ex rel. RoNo, LLC,* (C.D.Cal. 2002) No. CV01-8587AHM (CWX), 2002 WL 1008251 at *9; see also *In re Executive Life Ins. Co.* (1995) 32 Cal.App.4th at pp. 360-361.) At no time did these funds in any sense become public funds.

The Attorney General's argument that the assets are state funds is further undermined by language elsewhere in the CFCA, particularly Government Code section 12651, subdivision (a). That subdivision states that the penalty for a violation of the CFCA is "three times the amount of damages which the state . . . sustains." In the present case, in which the state holds property in trust for private beneficiaries, the state has sustained no damages. The Attorney General contends that absent the defendants' allegedly fraudulent bid for ELIC's assets, another bidder would have paid more money for the property. But the Attorney General does not dispute that any additional money paid for ELIC's assets by an alternate bidder would have ultimately been distributed to policyholders and other creditors of ELIC rather than deposited into the state treasury. (See Ins. Code, § 1033.)

Indeed, the state has disclaimed any liability under the rehabilitation plan, which states that "the parties hereto agree and acknowledge that the State of California is not a party and shall have no liability with respect hereto. [2]"

The Attorney General cites *Southern Cal. Rapid Transit Dist.*, *supra*, 30 Cal.App.4th 713, for the proposition that a false claim under the CFCA does not require financial harm to the public treasury. In that case, the court held that defendants' false documentation regarding their status as a disadvantaged business enterprise fell within the scope of the CFCA. The distinction between that case and the present one is fundamental. In *Southern Cal. Rapid Transit Dist.*, defendants' fraudulent documentation was in connection with a bid that would have led a governmental entity to provide funds from the public treasury under false pretenses. In other words, it was an *attempt* to defraud the government out of public funds. In the present case, no such public funds are at issue. In fact, *Southern Cal. Rapid Transit Dist.* stated that "As a statute obviously designed to *prevent fraud on the public treasury*, [Government Code] section 12653 plainly should be given the broadest possible construction consistent with that purpose." (*Southern Cal. Rapid Transit Dist*, *supra*, 30 Cal.App.4th at p. 725, italics added.) Although the CFCA authorizes civil penalties for attempts to misappropriate public funds that were not in fact completed by payment from the treasury (see

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2 The Attorney General also argues that one category of damages that the state can recover is the cost of the rehabilitation proceeding, as well as the cost of the subsequent governmental investigation in this case, citing *U.S. v. Halper* (1989) 490 U.S. 435, 445. But *Halper* merely held that investigation costs could be included as one category of damages under the federal False Claims Act (FFCA, 31 U.S.C. § 3729 et seq.). (*Halper*, *supra*, 490 U.S. at p. 445.) It did not hold that investigation costs of a claim that is outside the purview of that statute are reimbursable under the statute, or that investigation costs transmute a common law fraud claim into an FFCA claim.

Gov. Code, § 12651, subd. (a)(1) [anyone who "[k]nowingly presents or causes to be presented . . . a false claim for payment or approval" may be liable under the CFCA]), we are aware of no successful CFCA case that did not involve either potential or actual harm to the public treasury.[3]

Moreover, the CFCA "is patterned on similar federal legislation" and it is appropriate to look to precedent construing the equivalent federal act. (*Laraway v. Sutro & Co., Inc., supra*, 96 Cal.App.4th at pp. 274-275.) Federal authority construing the FFCA supports our construction of the CFCA. In *Hutchins v. Wilentz, Goldman & Spitzer* (3d Cir. 2001) 253 F.3d 176 (*Hutchins*), the court affirmed the dismissal of a claim brought under the FFCA based on fraudulently inflated legal bills submitted to the United States Trustee[4] and United States Bankruptcy Court in various bankruptcy proceedings. Although the fraudulently

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[3] The Attorney General cites various cases which purportedly stand for the proposition that "federal courts find cognizable a claim under the [FFCA] if the false claim impairs the government's achievement of public goals and objectives, irrespective of financial harm to the treasury." However, the cited cases do not prove the Attorney General's proposition, nor do they contradict our conclusion that the underlying purpose of the FFCA is to deter fraud on public funds. (See *Rex Trailer Co. v. United States* (1956) 350 U.S. 148, 150 [action for recovery under the Surplus Property Act predicated upon false statements made in obtaining government property]; *United States v. Mackby* (9th Cir. 2003) 339 F.3d 1013, 1018 [action under the FFCA involving fraudulent demands for Medicare reimbursement]; *Bly-Magee v. State of Calif.* (9th Cir. 2001) 236 F.3d 1014, 1017 [qui tam action under the FFCA seeking to recover allegedly misappropriated federal funds made available to the State of California for vocational rehabilitation services].) Although the above cases state that financial loss is not a prerequisite to recovery under the FFCA, they clearly involve claims for public, rather than private funds.

[4] The United States Trustee, who is appointed in each of 21 regions, assumes various administrative responsibilities in bankruptcy cases, including supervising bankruptcy trustees and serving as trustee in certain cases. (1 Cowan, Bankruptcy Law & Practice (7th ed. 1998) § 2.09, pp. 174-175.)

procured check in *Hutchins* was signed by a "government agent," payment came not from the United States government but from the assets of those in bankruptcy. Like the CFCA, the FFCA defines "claim" to include requests for property "if the United States Government provides any portion of the . . . property." (31 U.S.C. 3729(c).)

The *Hutchins* court held there was no false claim under the FFCA. The court first reviewed the legislative history behind the statute. "The False Claims Act was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury. At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government." (*Hutchins*, *supra*, 253 F.3d at p. 183.)

The *Hutchins* court then concluded that the bills submitted to the bankruptcy court and United States Trustee were not within the scope of the FFCA because "the submission of false claims to the United States government for approval which do not or would not cause financial loss to the government are not within the purview of the False Claims Act." (*Hutchins*, *supra*, 253 F.3d at p. 184.) "[T]he purpose of the [FFCA] 'was to provide for restitution to the government of any money taken from it by fraud.' [Citation.] It was not intended to impose liability for every false statement made to the government . . . ." (*Ibid.*) "Extending the [FFCA] to reach any false statement made to the government, regardless of any impact on the United States Treasury, would appear to impermissibly expand standing doctrine and essentially permit any [qui tam] plaintiff to sue on behalf of the government when false or misleading statements

are made to any government agent including the courts, the legislature or any law enforcement officer." (*Id.* at p. 184, fn 5.)

The Attorney General contends *Hutchins* is distinguishable because in that case the United States Trustee may not have been acting as a bankruptcy trustee, analogous to the conservatorship role played by the Commissioner in this case, but merely as an administrator overseeing bankruptcy proceedings. Yet whether the United States Trustee was serving as a trustee or merely supervising trustees, the significant similarity remains: false claims were made to assets that never became public funds, and therefore those claims had no potential or actual impact on the public treasury.[5]

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5 The Attorney General cites *Hayes v. CMC Electronics, Inc.* (2003) 297 F.Supp.2d 734 (*Hayes*), in support of its position and to illustrate the limits of *Hutchins*. In *Hayes*, the United States contracted with AEC Electronics (AEC) for the purchase of defense equipment, and AEC in turn contracted with the Canadian Marconi Corporation (CMC) to fill the necessary order. The United States then resold the equipment to Saudi Arabia under an agreement authorized by the Arms Export Control Act, 22 United States Code section 2751 et seq. (See 22 U.S.C. § 2762, under which the President may sell defense articles and services to eligible foreign entities.) The United States intervened in a qui tam action brought against CMC under the FFCA, alleging that CMC submitted fraudulently inflated invoices for the defense equipment to the United States. The District Court upheld the FFCA action against the defendant's motion to dismiss.

The Attorney General, citing 22 United States Code section 2762(a), argues that in *Hayes* "[n]o government funds were involved, since Saudi Arabia was required to protect the federal government against any risk of loss and to advance the money used to purchase the radios." But the *Hayes* court identified several tangible potential harms to the United States Treasury from the alleged false claim: "First, the Government paid more money than it otherwise would have paid if CMCE had disclosed that the radios contained used parts. . . . Second, the U.S. government is likely to be required to reimburse the Saudi government for the loss sustained by the Saudi government. Third, the Government suffered damage to the integrity of the contracting process as Saudi Arabia received used radio sets despite paying for new ones. Finally, it is possible that Saudi Arabia will have less money to spend on other defense needs, thereby forcing the U.S. to increase its

(footnote continued on next page)

The Attorney General argues that the Commissioner, in discharging his duties under in article 14, is primarily acting not as a trustee of private funds but as a public officer. He cites Insurance Code section 1059, which provides that in the performance of any of his duties under article 14, the Commissioner "shall be deemed to be a public officer acting in his official capacity on behalf of the State." (Ins. Code, § 1059.) In that connection he also cites *Mitchell v. Taylor* (1935) 3 Cal.2d 217. In *Mitchell,* the Commissioner was appointed liquidator of an insolvent insurance company and on appeal from an adverse ruling, sought to avoid a statutory filing fee. The *Mitchell* court found that the Commissioner was acting in his official capacity on behalf of the state, and thus was exempt from the fee under former Political Code section 4295, which stated that " 'the state . . . or any public officer . . . acting in his . . . official capacity on behalf of the state . . . shall not be required to pay or deposit any fee for the filing of any document or paper, or for the performance of any official service . . .' " (*Mitchell,* at p. 218.) In arriving at this conclusion, the *Mitchell* court reasoned that the "state has an

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expenditures by a like amount to obtain the same level of global security. [¶] Even if the false claim had thus far resulted in only the potential for loss to the U.S. Government, this would be sufficient for a cause of action under the [F]FCA." (*Hayes, supra,* 297 F.Supp.2d at pp. 737-738.)

Hayes explicitly distinguished *Hutchins.* "The Third Circuit [in *Hutchins*] recognized that 'the False Claims Act seeks to redress fraudulent activity which attempts to or actually causes economic loss to the United States Government.' [Citation.] . . . CMCE's claim was made for funds in the United States Treasury. Thus, CMCE's alleged fraudulent or false statements are within the category contemplated in *Hutchins* as actionable under the [F]FCA." (*Hayes, supra,* 297 F.Supp.2d at pp. 738-739, fns. and emphasis omitted.) The present case, as discussed above, resembles *Hutchins* rather than *Hayes,* involving funds that were not part of the public treasury and a fraud that did no damage to the public fisc.

interest" in the liquidation of insolvent insurance companies and that the Insolvency Act has "made provision for a state officer to protect and advance that interest." (*Id.* at p. 219.)

There is no question that when the Commissioner acts to rehabilitate an insolvent insurer, he does so as a public officer and furthers a public interest. But it is equally clear that, when he performs that particular public office, he also serves as a conservator and trustee on behalf of private policyholders and creditors. "The commissioner is an officer of the state [citation] who, when he or she is a conservator, exercises the state's police power to carry forward the public interest and to protect policyholders and creditors of the insolvent insurer." (*In re Executive Life Ins. Co.*, *supra*, 32 Cal.App.4th at p. 356.) The Commissioner's role as a public officer is wholly consistent with his role as a trustee under article 14. Nothing in *Mitchell* suggests that, because the Commissioner acts as a public officer under article 14, he or she transforms the assets acquired pursuant to Insurance Code section 1011 into public funds.

In sum, we conclude that, the "state funds" necessary to state a claim under the CFCA only include funds that are in some sense part of the public treasury, the diminution of which harms or would harm taxpayers. When the Commissioner takes title to the assets of an insolvent insurer pursuant to Insurance Code section 1011, he holds them as a trustee for the benefit of private parties, and they never become part of the public treasury. Because the Attorney General alleges that defendants falsely procured private, rather than public, funds, he may not allege a claim under the CFCA.

Our holding that such fraud is not within the scope of the CFCA obviously does not mean that those perpetuating the fraud may escape liability. As the record makes clear, the Commissioner as trustee of the insolvent insurance company has sought both substantial compensatory and punitive damages against

at least some of the defendants in this action for their alleged fraud and misconduct. All that we hold is that the specific remedies under the CFCA are available not for *any* fraud against the government but rather one which leads to potential or actual injury to the public treasury and the taxpayer. No such injury is present when false claims involve the insolvent insurers' assets that the Commissioner holds in trust for private parties.

B. The Attorney General's Standing to Pursue its Claims in Light of Insurance Code Section 1037, Subdivision (f).

We turn now to the first question, that is, can the Attorney General pursue civil remedies, under the CFCA and the UCL, concerning the assets of an insolvent insurance company for which the Commissioner is acting as conservator or liquidator, or does the Insurance Code, particularly section 1037, subdivision (f), give exclusive authority to the Commissioner to bring civil actions?

As discussed in the first part of this opinion, the assets to which the Commissioner acquires title from an insolvent insurance company under Insurance Code section 1101 are not "state funds" within the meaning of the CFCA. Therefore, the Attorney General has no standing to pursue a CFCA claim that pertains to those assets.

As for the UCL claim, as explained below, we conclude the answer varies depending upon the remedy sought. Accordingly, each remedy the Attorney General seeks under the UCL — restitution, civil penalties, and injunctive relief — will be discussed in turn.

1. Restitution

"Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126 (*Kraus*);

see Bus. & Prof. Code, § 17204.) A UCL action may be prosecuted by the Attorney General, by certain specified local law enforcement officials, "or by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." (*Ibid.*)

Business and Professions Code section 17205 provides: "Unless otherwise expressly provided, the remedies or penalties provided by [the UCL] are cumulative to each other and to the remedies or penalties available under all other laws of this state." Therefore, the fact that there are alternative remedies under a specific statute does not preclude a UCL remedy, unless the statute itself provides that the remedy is to be exclusive. (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 573 (*Stop Youth Addiction*).) We conclude that Insurance Code section 1037, subdivision (f) is such an express limit on the authority of the Attorney General to seek a restitutionary remedy under the UCL.[6]

As discussed in the previous part of this opinion, Insurance Code section 1057 defines the Commissioner's basic role in insolvent insurance company proceedings: "In all proceedings under this article, the commissioner shall be deemed to be a trustee for the benefit of all creditors and other persons interested in the estate of the person against whom the proceedings are pending." Insurance Code section 1037 further defines the Commissioner's role when he takes possession of the property of the insolvent company. It provides in pertinent part: "Upon taking possession of the property and business of any person in any

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6 We have left open the question whether Business and Professions Code section 17205 precludes the Legislature from impliedly repealing a UCL remedy if the two are " ' " 'clearly repugnant and so inconsistent that the two cannot have concurrent operation.' " ' " (*Stop Youth Addiction*, *supra*, 17 Cal.4th at p. 574.) Because we decide the limit on UCL remedies is express in the present case, we need not decide that question.

proceeding under this article, the commissioner, *exclusively and except as otherwise expressly provided by this article*, either as *conservator or liquidator*: [¶] . . . [¶] (f) May, for the purpose of executing and performing any of the powers and authority conferred upon the commissioner under this article, in the name of the person affected by the proceeding or in the commissioner's own name, *prosecute and defend any and all suits and other legal proceedings*, and execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary and proper to effectuate any sale of any real and personal property . . . ." (Italics added.)

The purpose of article 14 is, like federal bankruptcy law, to ensure the equitable distribution of an insolvent debtor's property among creditors, but also has "the additional and more urgent purpose of protecting an insurance company's policyholders, as well as its creditors, by preventing dissipation of the company's assets when it is found by the commissioner to be a hazardous condition." (*Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 519.) Insurance Code section 1037, subdivision (f) recognizes that the Commissioner as trustee has the exclusive right to protect the interests of policyholders and other creditors. The statute is therefore in accord with the law of trusts, which generally gives the trustee, rather than the beneficiaries of the trust, the right to sue on behalf of the trust. (See *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 461-462; see also 4 Scott on Trusts (4th ed. 1989) § 282, pp. 26-28.) The Attorney General recognizes that the purpose of article 14 is to preclude "common-law derivative actions by interested persons which are historically barred under trust laws."

A UCL claim for restitution seeks to compel "defendant[s] to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in

the property or those claiming through that person." (*Kraus*, *supra*, 23 Cal.4th at pp. 126-127, fn. omitted.) The Attorney General affirms that the restitutionary remedy "will inure to the benefit of ELIC's creditors."[7]

There can be little doubt that if, for example, a policyholder attempted a common law action seeking restitution as a remedy to restore property lost by an insolvent insurance company, such an action would be precluded by Insurance Code section 1037, subdivision (f). The suit would fall squarely within the exclusive role of the Commissioner, as conservator and trustee, to "prosecute and defend any and all suits and other legal proceedings" pertaining to the insolvent insurer's property and business. (*Ibid.*) There can also be little doubt that a policyholder's suit seeking such a restitutionary remedy on behalf of the insolvent company would be precluded by section 1037, subdivision (f), regardless of whether the claim for restitution was brought under the UCL or under a common law theory. In either case, the claim, in substance, would usurp the Commissioner's exclusive role as conservator and trustee under article 14 generally and section 1037, subdivision (f) specifically.

It is difficult to see how the situation would be different if it were the Attorney General, rather than a policyholder, bringing a UCL action for

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7 The Attorney General refers in his complaint to "restitution/disgorgement" remedies. As we explained, "[a]n order that a defendant disgorge money obtained through an unfair business practice may include a restitutionary element, but is not so limited . . . . [S]uch orders may compel a defendant to surrender all money obtained through an unfair business practice of all unlawfully obtained profits even though not all is to be restored to the person from whom it was obtained or those claiming under those persons." (*Kraus*, *supra*, 23 Cal.4th at p. 127.) In this case, although the Attorney General refers to a disgorgement remedy, we understand his claim as essentially one for restitution, i.e., to return the money to the insurer's creditors. Moreover, outside the class action context, a disgorgement remedy in the sense described above is not authorized. (*Id.* at p. 137.)

restitution. It is true that the Attorney General is the state's chief law enforcement officer, and that restitution may have a collateral law enforcement effect, punishing the wrongdoer against whom restitution is sought. But the primary purpose of the Attorney General's attempt at restitution is to recover lost property on behalf of an insolvent insurer's creditors and policyholders. As such, he seeks to perform an action that is quintessentially within the scope of the Commissioner's power as conservator and trustee of the insolvent company. Because section 1037, subdivision (f) assigns the role of pursuing such restitutionary remedies on behalf of creditors and policyholders of the insolvent company exclusively to the Commissioner, we conclude that the Attorney General may not pursue that remedy.[8]

The Attorney General cites *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10 (*Pacific Land Research Co.*) in support of his position. In that case the Attorney General sought civil penalties, injunctive relief, and restitution pursuant to Business and Professions Code section 17535[9] against a company alleged to have made the misrepresentations in connection with the sale of land. This court rejected defendant's contention that the Attorney General's action for restitution

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8 The principal exception to the rule that the trustee rather than the beneficiary may prosecute lawsuits against those who harm trust property is under certain circumstances in which the trustee itself breaches its duty to the trust and third parties participate with the trustee in the breach. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra*, 68 Cal.App.4th at pp. 462-467.) There is no suggestion in the present case that the Commissioner has breached its duty as trustee, and we do not consider whether the Attorney General's UCL action for restitution would be warranted under such circumstances.

9 Business and Professions Code section 17535, which pertains to certain forms of misleading advertising, provides essentially the same remedies as the UCL under Business and Professions Code section 17203.

was in substance a class action lawsuit that was required to comply with the same procedural safeguards as private class action suits. (*Pacific Land Research Co., supra*, 20 Cal.3d at p. 16.) As we stated, in distinguishing the Attorney General's action from a private class action suit: "An action filed by the People seeking injunctive relief and civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties. The purpose of injunctive relief is to prevent continued violations of the law and to prevent violators from dissipating funds illegally obtained. Civil penalties, which are paid to the government [citations], are designed to penalize a defendant for past illegal conduct. The request for restitution on behalf of vendees in such an action is only ancillary to the primary remedies sought for the benefit of the public. [Citation.] While restitution would benefit the vendees by the return of the money illegally obtained, such repayment is not the primary object of the suit, as it is in most private class actions." (*Id.* at p. 17.)

While the above is true, it is not significant in the present context. Although the action by the Attorney General for restitution may be ancillary to the "primary remedies" tied directly to law enforcement actions, the Attorney General cannot, when the Commissioner acts as conservator of an insolvent insurance company, pursue such remedies without trespassing on the Commissioner's role.

The Attorney General also cites cases holding that the UCL endowed the Attorney General and the Commissioner with concurrent jurisdiction over violations of the Insurance Code. In *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, for example, we concluded that a statutory scheme that permitted those improperly denied a good drivers discount to pursue an administrative remedy with the Commissioner (see Ins. Code, §§ 1858, 1861.02 and 1861.05) did not preclude the Attorney General's UCL action, although we held the Commissioner had primary jurisdiction over the complaint. (*Farmers Ins.*

Exchange, *supra*, 2 Cal.4th at pp. 394-395, 398-399.) But in that and other cases cited by the Attorney General, the Commissioner acted as a regulator, and there was nothing in the regulatory scheme to suggest an exception to the rule that UCL remedies are "cumulative . . . to remedies and penalties available under all other laws of this state." (*Id.*, at p. 395; see also *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132, 1155 [district attorney may pursue UCL action against public utility for misleading representations despite the Public Utility Commission's concurrent jurisdiction].) In the present case, the Commissioner is acting primarily not as regulator but as conservator and trustee, and is given, as discussed, the exclusive authority to act on behalf of the insolvent insurer's policyholders and creditors in civil actions. This exclusive authority precludes the Attorney General from exercising concurrent jurisdiction in a manner that would essentially duplicate the Commissioner's legal action. The Attorney General's claim for restitution under the UCL does precisely that and is therefore barred by Insurance Code section 1037 subdivision (f).

2. Civil Penalties

The Attorney General's claim for civil penalties under the UCL is a different matter. Civil penalties are authorized by Business and Professions Code section 17206, which provides in pertinent part: "(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General," and by district attorneys, city attorneys and county counsel under specified circumstances. Thus, unlike Business and Professions Code section 17204, which authorizes that the injunctive and restitutionary remedies provided in the UCL may be pursued by

"any person who has suffered injury in fact," section 17206 limits the acquisition of civil penalties to the Attorney General and other specified government officials.

Further, Business and Professions Code section 17206, subdivision (c) provides: "If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered." The recent amendment of section 17206 by Proposition 64 further provides that the penalty funds "shall be for the exclusive use by the Attorney General [and other public officials] for the enforcement of consumer protection laws." (Bus. & Prof. Code, § 17206, subd. (c), as amended by Prop. 64, as approved by voters, Gen. Elec. Nov. 2, 2004.)

In the present case, defendants are alleged to have violated several laws, including California Insurance Code section 699.5, precluding foreign governments from owning or controlling a California insurance company, and the Bank Holding Company Act, 12 United States Code section 1841 et seq., prohibiting a foreign bank from owning an American insurance company. Defendants concede Insurance Code section 1037, subdivision (f) does not preclude the Attorney General from bringing a criminal action against them. We fail to discern a difference, for present purposes, between the Attorney General seeking criminal penalties or civil penalties. "Civil penalties, which are paid to the government [citations] are designed to penalize a defendant for past illegal conduct." (*Pacific Land Research Co., supra*, 20 Cal.3d at p. 17.) Such penalties are not primarily concerned with restoring policyholders' or creditors' property. Thus the public, penal objective of civil penalties under the UCL differs fundamentally from the Commissioner's purpose under article 14 of protecting the

beneficiaries of the insolvent insurance company. We conclude that nothing in article 14 precludes the Attorney General from suing for civil penalties under the UCL.

3. Injunctive Relief

We employ the same analysis when it comes to injunctive relief. As we have recognized, injunctive relief may fall into two categories: injunctions intended "to remedy a public wrong" (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1080) and injunctions primarily intended to resolve "a conflict between the parties and rectify[] individual wrongs" (*id.*, at p. 1080, fn. 5). Injunctions sought under the UCL may fall into either category. (See *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315.)

In line with the above discussion, we hold that when the Attorney General seeks an injunction that will protect the public and prevent defendants from committing future unlawful acts, he is fulfilling primarily a law enforcement function. Such a claim is therefore not prohibited by Insurance Code section 1037, subdivision (f). If however, he seeks an injunction designed to resolve a conflict or in some way change the relationship between defendants and policyholders, creditors or others represented by the Commissioner as conservator and trustee of the insolvent insurance company, that injunction would be precluded by Insurance Code section 1037 subdivision (f). It is unclear from the record before us into which category the Attorney General's requested injunctive relief falls.

III. CONCLUSION

We conclude that assets held in trust by the Insurance Commissioner pursuant to Insurance Code section 1011 are not state funds within the meaning of the CFCA, and that the Attorney General has standing only to pursue civil penalties and possibly injunctive relief under the UCL.

MORENO, J.

WE CONCUR: GEORGE, C. J.
KENNARD, J.
BAXTER, J.
YEGAN, J.*
ZELON, J.**

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* Honorable Kenneth R. Yegan, Associate Justice, Court of Appeal, Second Appellate District, Division Six, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constituton.

** Honorable Laurie D. Zelon, Associate Justice, Court of Appeal, Second Appellate District, Division Seven, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constituton.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion State of California v. Altus Finance

Unpublished Opinion
Original Appeal XXX (on certification pursuant to rule 29.8, Cal. Rules of Court)
Original Proceeding
Review Granted
Rehearing Granted

Opinion No. S119046
Date Filed: August 15, 2005

Court:
County:
Judge:

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

ALTUS FINANCE S.A., et al.,

Defendants.

Case No.: CV 99-02829 AHM(CWx) consolidated for discovery and pre-trial purposes with Case Nos.: CV-01-01339 AHM (CWx) and CV-02-5983 AHM (CWx)

AMENDED [PROPOSED] ORDER APPROVING PAYMENT INSTRUCTIONS FOR TRANSFER TO THE CALIFORNIA INSURANCE COMMISSIONER, IN HIS CAPACITY AS CONSERVATOR, REHABILITATOR, AND LIQUIDATOR OF EXECUTIVE LIFE INSURANCE COMPANY OF CALIFORNIA, OF $110,000,000 CONTRIBUTED BY DEFENDANT ARTEMIS S.A. PURSUANT TO ITS FINAL SETTLEMENT AGREEMENT WITH THE UNITED STATES

(1726)

SIERRA NATIONAL INSURANCE HOLDINGS, INC. et and., Plaintiffs, V. CRÉDIT LYONNAIS S.A., et al., Defendants.	Hearing: May 10, 2004 Time: 10:00 a.m. Courtroom: 14 The Honorable A. Howard Matz
JOHN GARAMENDI, as Commissioner of Insurance for the State of California and as conservator, liquidator, and rehabilitator of EXECUTIVE LIFE INSURANCE COMPANY, Plaintiff, V. SDI VENDOME S.A., et al., Defendants.	

1. This Court has reviewed the ~~ex parte application~~ motion filed by Plaintiff, John Garamendi, the California Insurance Commissioner (the "Commissioner"), together with its supporting declarations and exhibits. There ~~has been no~~ was one objection to the Commissioner's ~~ex parte application~~ motion, which the parties have resolved. Based on the facts set forth in the supporting declarations and exhibits, this Court finds and orders as set forth below.

2. Pursuant to paragraphs 12 and 14(a) of the Final Settlement Agreement Between the United States Attorney's Office and Artemis S.A., Francois Pinault, Patricia Barbizet, Marie-Christine de Percin, and Emmanuel Cueff (the "Final Settlement Agreement"), Artemis S.A. ("Artemis") has complied with its obligation to "establish and fund the 'USAO/Artemis Settlement Fund' by contributing a total of $185,000,000" by causing $185,000,000 to be wire transferred to the USAO/Artemis Settlement Account (as defined in paragraph 13(f) of the Final Settlement Agreement) on March 11, 2004.

3. Pursuant to paragraph 14(c) of the Final Settlement Agreement, the United States Attorney's Office for the Central District of California has prepared payment instructions (the "Payment Instructions") that, upon delivery to the United States Department of Treasury ("Treasury"), will direct Treasury to cause the USAO/Artemis Settlement Account to disburse $110,000,000 (less any required tax withholding) to the California Insurance Commissioner (the "Commissioner"), in his capacity as conservator, rehabilitator, and liquidator of Executive Life Insurance Company of California ("ELIC"). A copy of the Payment Instructions is attached hereto as Exhibit 1.

4. Pursuant to paragraph 16 of the Final Settlement Agreement, the USAO forwarded the Payment Instructions to counsel for Artemis with a notification that Artemis had 48 hours to review the Payment Instructions and provide notice of any objections. Counsel for Artemis responded that Artemis had no objections to the Payment Instructions.

5. Pursuant to paragraph 14(c) of the Final Settlement Agreement, the Payment Instructions have been submitted to this Court for approval. Based on the findings set forth above, this Court approves the Payment Instructions.

6. This Court further finds that, in accordance with paragraph 14(c) of the Final Settlement Agreement, the amount, disbursed to the Commissioner pursuant to the Payment Instructions shall be credited against: (i) a judgment or judgments in the Civil Actions (as defined in paragraph 13(a) of the Final Settlement Agreement) awarding damages against and/or ordering restitution or disgorgement by any of the Artemis Parties (as defined in paragraph 13(b) of the Final Settlement Agreement), which judgment or judgments become final because it is, or they are, upheld on appeal or the time for filing an appeal expires; or (ii) a court order or orders approving a settlement in the Civil Actions that requires any of the Artemis Parties to pay claims against them.

7. This Order does not constitute and may not be cited as a judicial determination: (1) concerning any issue about which claimants should receive distributions and in what proportions; (2) that Aurora's uncovered policyholders are not entitled to receive notice from the Commissioner and an opportunity to be heard in the appropriate forum before any distribution is made by the Commissioner; or (3) concerning whether this Court is the appropriate forum to resolve any distribution disputes.

Dated: May 5, 2004

A. HOWARD MATZ
United States District Judge

Presented by:

Karl D. Belgum

Counsel for Plaintiff
California Insurance Commissioner

PAYMENT INSTRUCTIONS

PURSUANT TO PARAGRAPHS 14(C) AND 16 OF THE FINAL SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES ATTORNEY'S OFFICE AND ARTEMIS S.A., FRANCOIS PINAULT, PATRICIA BARBIZET, MARIE-CHRISTINE DE PERECIN, AND EMMANUEL CUEFF

Pursuant to paragraphs 14(C) and 16 of the Final Settlement Agreement Between the United States Attoney's Office and Artemis S.A., Francois Pinault, Patricia Barbizet, Marie-Christine de Percin, and Emmanuel Cueff (the "Final Settlement Agreement"), this constitutes instructions to the United States Department of Treasury to cause the USAO/Artemis Settlement Account to disburse $110,000,000 (less any required tax withholding) to the California Commissioner of Insurance (the "Commissioner"), in his capacity as conservator, rehabilitator, and liquidator of Executive Life Insurance Company ("ELIC"), by transferring those funds, by wire, to the following account maintained by the Commissioner's Conservation and Liquidation Office for the estate of Executive Life Insurance Company:

Bank:	Union Bank of California
Address:	400 California Street San Francisco, California 94104
Credit:	California Insurance Commissioner, Conservation & Liquidation Office Cash Receipt Account
Account No.:	2380013013
ABA#:	122000496
Reference:	Executive Life, Estate No. 617 (must be included)

The funds to be transferred have been paid to the United States on behalf of Artemis S.A. ("Artemis") pursuant to paragraph 14(a) of the Final Settlement Agreement, and are being disbursed to the Commissioner, in his capacity as conservator, rehabilitator, and liquidator of ELIC, pursuant to paragraph 14(c) of the Final Settlement Agreement, to be dibursed by the Commissioner in accordance with his legal obligations, fiduciary duties, judgment, and discretion.

Dated: April __, 2004

_____
George S. Cardona
Chief Assistant United States Attorney
Central District California

_____
Mary Ellen Wagner
Assistant Director, Budget Execution
Executive Office for United States Attorneys
United States Department of Justice