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Insurance Company
8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF LOS ANGELES

11
12 INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,

13 Applicant,

14 v.

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

17 Respondents.
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Los Angeles Superior Court

AUG 31 2005

John A. Clarke, Executive Officer/Clerk

By R. Arraiga, Deputy
R. Arraiga

No. BS 006912

NOTICE OF MOTION AND 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;
SUPPORTING MEMORANDUM OF
POINTS AND AUTHORITIES AND
DECLARATIONS OF WILLARD
ROBERTS, KARL BELGUM AND
LAUREN ROBERSON

Date: October 12, 2005

Time: 8:30 a.m.

Dep't: 36

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1 of these funds to the Commissioner, derive from a settlement among Artemis S.A.
2 (“Artemis”), various affiliates and individual representatives of that entity and the U.S.
3 Attorney’s office in criminal litigation. If the Motion is granted, the practical effect will be
4 that approximately \$33.9 million will be distributed to the Opt Out Trust, which in turn will
5 effect a pro-rata distribution of such amount to the approximately 27,000 opt-out former
6 policyholders who are the beneficiaries of the Opt Out Trust, and the other approximately
7 \$66.1 million will be distributed to Aurora National Life Assurance Company (“Aurora”) for
8 distribution and/or crediting by Aurora principally for the benefit of the approximately
9 300,000 opt-in policyholders, all as more specifically described below.²

10 The Commissioner has not typically sought authorization from the Court to effect
11 distributions, and instead has relied on the final orders approving the Rehabilitation Plan as
12 proper and sufficient authority for effecting distributions. However, the Commissioner is
13 aware that certain parties have contended that the \$100 million of Altus Litigation Proceeds
14 now available for distribution should not be distributed pursuant to the Rehabilitation Plan,
15 or that the Rehabilitation Plan requires a different distribution of these funds than the
16 Commissioner believes is mandated by the Plan. In particular, the Commissioner is aware
17 that the Participating Guaranty Associations (“PGAs”), through the National Organization of
18 Life and Health Insurance Guaranty Associations (“NOLHGA”), believe that they have
19 rights with respect to the funds being distributed that are not reflected in the distribution
20 provided for in this Motion.

21 In light of the fact that the \$100 million in Altus Litigation Proceeds presently
22 available for distribution is a material amount, and that the Commissioner expects additional
23 material Altus Litigation Proceeds to become available for distribution at a later date, the
24

25 (. . . continued)
26 Rehabilitation Plan.

27 ²The word “approximately” is used throughout this Motion with reference to any specified
28 percentage or specified dollar amount, because the Opt Out Percentage and Non-Opt Out Percentage
as described in Part III below have been rounded to the nearest tenth of a percentage point for ease
of description and calculation.

1 Commissioner has determined, out of an abundance of caution, that it is appropriate to bring
2 this Motion to allow those who oppose the proposed distribution the opportunity to assert
3 their positions to the Court before the distribution of the subject \$100 million takes place.

4 I.

5 FACTUAL BACKGROUND REGARDING ALTUS LITIGATION
6 PROCEEDS.

7 The Commissioner, acting on behalf of the ELIC estate, commenced a civil
8 action in 1999 against various defendants, alleging that they had fraudulently and unlawfully
9 obtained control over a California insurance company, ELIC's former bond portfolio and
10 insurance assets in violation of Federal and state laws prohibiting a foreign government-
11 owned bank from acquiring control of a California insurance company. Such action is now
12 pending in Los Angeles in the U.S. District Court for the Central District of California (the
13 "District Court"), styled as John Garamendi as Insurance Commissioner of the State of
14 California and as Conservator, Rehabilitator and Liquidator of the Estate of Executive Life
15 Insurance Company v. Altus Finance S.A., et al., Case No. CV 99-02829 AHM (CWx) (the
16 "Civil Action"). Among the defendants in the Civil Action are Aurora, which is the new
17 insurance company that received the Transferred Assets and issued the Restructured Policies
18 under the Rehabilitation Plan, and Altus Finance S.A. ("Altus"), which is the entity that
19 purchased and received the Transferred Bonds pursuant to the Rehabilitation Plan. The
20 relief sought by the Commissioner in the Civil Action includes both damages and restitution
21 based on fraud and conspiracy. Declaration of Karl Belgum ("Belgum Decl.") ¶7. Amounts
22 actually collected by the Commissioner on account of any of the claims asserted in the Civil
23 Action, whether as a result of judgment or settlement, are referred to in this Motion as "Altus
24 Litigation Proceeds."

25 Following the initial filing of the Civil Action in the Conservation Court, its
26 removal to the District Court, and the issuance of a tentative order by the District Court
27 providing for a partial remand to the Conservation Court on the ground that the Conservation
28 Court had exclusive jurisdiction over the claims against the non-"foreign sovereign"

1 defendants, on July 26, 2000, Judge Lewin of the Conservation Court issued an Order
2 permitting such claims in the Civil Action to proceed in the District Court. Belgum Decl.
3 ¶¶4 & 5 and Ex. A & B. This enabled the Commissioner's claims in the Civil Action to
4 proceed more efficiently in one forum, inasmuch as the claims against certain defendants
5 held to be "foreign sovereigns" could only be maintained in District Court. There was not
6 then and never has been any dispute that the claims in the Civil Action are ELIC estate
7 assets being pursued by the Commissioner for the benefit of ELIC claimants, including both
8 the contract holders who elected not to receive Restructured Policies from Aurora and
9 instead chose to receive payments approximating the liquidation value of their former
10 policies (the "Opt Out Contract Holders") and the former policyholders who elected to
11 receive Restructured Policies from Aurora (the "Non-Opt Out Contract Holders"). Simply
12 stated, the Conservation Court's decision to allow the claims asserted in the Civil Action to
13 be liquidated in the District Court was based on judicial economy, and did not bespeak any
14 intention to effect any modification to the Rehabilitation Plan regarding how ELIC estate
15 assets, once liquidated, are distributed under the Rehabilitation Plan.

16 The Civil Action was consolidated for discovery and pre-trial purposes with two
17 other subsequently commenced actions pending before the same District Court that have
18 been brought by other plaintiffs (all three consolidated actions being hereafter sometimes
19 collectively referred to as the "Civil Actions").³ Id. ¶6.

20 While the Civil Action was pending, the United States Attorney's Office for the
21 Central District of California (the "U.S. Attorney") conducted a lengthy criminal
22 investigation into the involvement of a number of parties, including Credit Lyonnais S.A.
23 and Artemis, in various ELIC transactions undertaken in connection with the Rehabilitation
24 Plan. The Commissioner provided substantial assistance to the U.S. Attorney during the
25

26 _____
27 ³The two other actions that were consolidated with the Civil Action are styled as Sierra
28 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).

1 investigation in the form of documentary evidence and testimony. At least some of the
2 transactions that were the subject of the criminal investigation are also the subject of the
3 Civil Action. Id. ¶8.

4 The criminal investigation resulted in grand jury indictments and the U.S.
5 Attorney's filing of a criminal case in Federal court in Los Angeles against a number of
6 entities and individuals, styled as United States v. Credit Lyonnais, et al., No, CR 03-760 DT
7 (the "Criminal Case"). Id. On December 15, 2003, the U.S. Attorney entered into a Final
8 Settlement Agreement (the "FSA") with Artemis in the Criminal Case. Pursuant to the FSA,
9 Artemis was required to establish and fund a \$185 million settlement fund (the "Settlement
10 Fund") in exchange for the ultimate resolution of criminal charges against Artemis and
11 various affiliated parties. Id. ¶9. The \$185 Million Settlement Fund was paid by Artemis to
12 the U.S. Attorney on or about March 11, 2004. Id. ¶10.

13 Most importantly for present purposes, the FSA also provided that \$110 million
14 of the \$185 million Settlement Fund was to be unconditionally transferred by the U.S.
15 Attorney to the Commissioner as a victim compensation payment for the benefit of the ELIC
16 estate after the District Court presiding over the Civil Actions approved proposed payment
17 instructions. More specifically, the FSA expressly provides:

18 "As soon as practicable after funding of the [Settlement Fund], the
19 [U.S. Attorney] shall . . . prepare and present for approval to the
20 district court presiding over the Civil Actions payment instructions
21 that, upon delivery to the Depository [i.e., the U.S. Department of
22 Treasury depository maintaining the Settlement Fund under the
23 control of the U.S. Attorney], will direct the Depository to cause [the
24 disbursement of] \$110,000,000 (less any required tax withholding) to
25 the California Insurance Commissioner (the 'Commissioner'), in his
26 capacity as conservator, rehabilitator, and liquidator of Executive Life
27 Insurance Company of California ('ELIC'), to be disbursed by the
28 Commissioner in accordance with his legal obligations, fiduciary
duties, judgment, and discretion . . . to claimants in the ELIC
rehabilitation proceeding. Id. ¶11 (quoting from Paragraph 14(c) of
the FSA).

26 Based on the foregoing provision, on April 9, 2004, the Commissioner filed with
27 the District Court presiding over the Civil Actions a motion for an order approving the
28 payment instructions and authorizing the \$110 million victim compensation payment to be

1 transferred to the Commissioner for the benefit of the ELIC estate (the "Payment Motion").
2 Belgum Decl. ¶12. In connection with such motion and at the request of the U.S. Attorney
3 pursuant to the terms of the FSA, the Commissioner agreed that the \$110 million amount to
4 be disbursed to the Commissioner pursuant to the payment instructions would be credited in
5 favor of the "Artemis Parties" (defined in the FSA to mean Artemis and various affiliated
6 parties) against any amount that any of the Artemis Parties might be responsible to pay
7 under a judgment or court-approved settlement in the Civil Actions. Id.

8 On May 5, 2004, the District Court in the Civil Actions issued its Amended Order
9 granting the Payment Motion, expressly authorizing the payment of \$110 million to the
10 Commissioner for the benefit of the ELIC estate and providing that such amount shall be
11 credited against any amount that any of the Artemis Parties become responsible for under
12 any judgment or court-approved settlement in the Civil Actions. Id. ¶13 & Ex. D.⁴

13 Consistent with such Amended Order, the Commissioner received the \$110 million payment
14 from the U.S. Department of Treasury on May 25, 2004. Declaration of Willard Roberts
15 ("Roberts Decl.") ¶2.

16 Of the \$110 million received by the Commissioner pursuant to the Amended
17 Order, the Commissioner has reserved \$10 million for fees and expenses incurred in
18 connection with the Civil Action. Roberts Decl. ¶¶3, 4. Accordingly, \$100 million of the
19 \$110 million in Altus Litigation Proceeds received by the Commissioner to date is available
20 for distribution pursuant to the Rehabilitation Plan. Id. (For ease of reference, such \$100
21 million presently available for distribution is sometimes referred to herein as "the subject
22 \$100 million" or "this \$100 million.")

23 ⁴At the request of Aurora, which is a defendant in the Civil Actions and which is not one of
24 the settling Artemis Parties in the Criminal Case, the Commissioner stipulated that the following
25 language be included in the Amended Order:

26 "This Order does not constitute and may not be cited as a judicial determination: (1)
27 concerning any issue about which claimants should receive distributions and in what
28 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." Id. ¶14.

1 Between June 2004 and the present, the Commissioner has refrained from
2 seeking authorization from this Court to proceed with distribution of the subject \$100
3 million based on the hope (and at times the expectation) that the pre-trial and trial phases and
4 any resulting additional settlements in the Altus Litigation would proceed more quickly than
5 has proved to be the case, which potentially would have produced some efficiencies by
6 enabling additional Altus Litigation Proceeds to be collected before bringing this Motion so
7 that such additional amounts could be included in this Motion. However, notwithstanding
8 that substantial settlements with various defendants are pending and trial of the Civil Action
9 against the one remaining non-settling defendant has nearly concluded, the Commissioner
10 has determined that in light of the slow pace of finalizing the pending settlements and
11 otherwise proceeding to judgment in the Civil Action, it is not appropriate to wait any longer
12 to seek authorization to distribute the subject \$100 million.⁵

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⁵ 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 California Attorney General (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"). The February 2005 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. After 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 Artemis and several affiliated parties (collectively, 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.

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,

(continued . . .)

1 As set forth in Part II immediately below, the subject \$100 million constitutes an
2 ELIC estate asset. The Commissioner believes it time to proceed with the distribution of this
3 \$100 million to the intended recipients, and brings this Motion to that end.
4

5 II.

6 THE \$100 MILLION IN ALTUS LITIGATION PROCEEDS ARE
7 AN ELIC ESTATE ASSET DISTRIBUTABLE PURSUANT TO
8 THE ELIC REHABILITATION PLAN.

9 In order to understand why the subject \$100 million (and, indeed, any additional
10 Altus Litigation Proceeds, as well as the proceeds of any other claims asserted by the
11 Commissioner for damages to ELIC's former policyholders) constitute ELIC estate assets
12 that are covered by and distributable pursuant to the Rehabilitation Plan, it may be useful to
13 the Court to summarize certain key aspects and provisions of the Rehabilitation Plan.

14 The first important principle under the Rehabilitation Plan is that the
15 Commissioner retained as part of the ELIC estate all Retained Assets, as distinct from (1) the
16 Transferred Bonds, which were transferred to Altus pursuant to the Bond Purchase
17 Agreement and Section 6.1 of the Rehabilitation Agreement, and (2) the Transferred Assets,

18 (. . . continued)

19 without limitation, obtaining final orders from the District Court regarding approval of the
20 settlement and a good faith determination. Until all conditions precedent to consummation of the
21 Aurora Settlement are satisfied, the settlement funds will be held in escrow. With respect to the
22 CDR Settlement, there remains an unresolved dispute among the parties regarding timing and/or
23 related procedural terms of the CDR Settlement. The District Court has appointed a mediator to
24 help the parties try to reach a reasonably prompt resolution of their differences, and the District
25 Court has indicated that it will resolve the dispute shortly if the mediation is not successful. Once
26 such dispute is resolved, the Commissioner and the parties to the CDR Settlement should be in
27 position to execute definitive documentation and to proceed with the appropriate settlement-related
28 motions in the District Court to obtain the necessary orders approving the CDR Settlement and
finding it to be in good faith. Belgum Decl. ¶¶15-17. Given the nature of the central dispute over
timing of the payment of the CDR Settlement and the fact that payment of the Aurora Settlement is
subject to satisfaction of multiple conditions precedent, the Commissioner cannot reasonably predict
when the proceeds of the February 2005 Settlements will be received by the Commissioner and
available for distribution. Similarly, the Commissioner at this late date cannot predict when a
judgment will be finally entered and collected against Artemis. For these reasons, the
Commissioner believes it appropriate to proceed with this Motion as to the subject \$100 million that
is available for distribution. When all or a material part of the amounts from the February 2005
Settlements and/or from the anticipated judgment against Artemis are collected by the
Commissioner, the Commissioner will bring one or more additional motions before the
Conservation Court, similar to this Motion, to seek authorization to distribute such funds.

1 which were transferred to Aurora pursuant to Section 5.1 of the Rehabilitation Agreement
2 (which Transferred Assets included the proceeds received by the Commissioner from the
3 sale of the Transferred Bonds to Altus, as well as other specified assets). Virtually all other
4 ELIC estate assets that did not expressly constitute Transferred Bonds and Transferred
5 Assets fall within the definition of “Retained Assets” set forth in Section 5.4 of the
6 Rehabilitation Agreement. This makes eminent sense because under the structure of the
7 Rehabilitation Plan, the Retained Assets are liquidated by either the Commissioner or one of
8 three Trusts created under the Plan, and, after payment of specified expenses and funding of
9 specified reserves, are then distributed for the benefit of former ELIC policyholders under
10 the Rehabilitation Plan, as explained more fully below.

11 In particular, two of the broad categories of Retained Assets clearly cover the
12 claims asserted by the Commissioner in the Civil Action and any Altus Litigation Proceeds.
13 These two categories within the definition of Retained Assets are: “(e) claims, suits, rights
14 and choses in action, choate or inchoate, whether now asserted or not previously asserted,
15 with respect to damages or injury to ELIC, its assets or Contract Holders . . . and (f) all other
16 assets of ELIC, excluding the Transferred Assets and the Transferred Bonds”
17 Rehabilitation Agreement §5.4. Category (e) covers all potential claims and causes of
18 action, whether accrued or not, and whether known to exist or not, that relate to damages or
19 injury to ELIC or its policy holders. The Civil Action clearly states claims related to
20 damages or injury to ELIC or its policy holders and therefore is within the definition of
21 category (e) of Retained Assets. See Belgum Decl. ¶7. In addition, even if category (e) did
22 not exist, category (f) is a broad, residual “catch-all” that covers every type of asset not
23 otherwise included in any of the other categories, except for Transferred Assets (i.e., assets
24 transferred to Aurora pursuant to Section 5.1 of the Rehabilitation Agreement) and
25 Transferred Bonds (i.e., assets transferred to Altus pursuant to Section 6.1 of the
26 Rehabilitation Agreement). Thus, because the claims in the Civil Action and any Altus
27 Litigation Proceeds are neither a Transferred Asset nor a Transferred Bond, they necessarily
28 fall within residual category (f).

1 Next, it is important to understand how Retained Assets are liquidated and
2 distributed under the Rehabilitation Plan for the benefit of former ELIC policyholders,
3 including both Opt Out Contract Holders and Non-Opt Out Contract Holders (and, if
4 applicable, their subrogees). In broad outline, Retained Assets, depending on their type,
5 were either transferred to one of three grantor Trusts created pursuant to the Rehabilitation
6 Plan — known as the Base Assets Trust, the Real Estate Trust, and the ELIC Trust — or
7 retained by the Commissioner for liquidation. Any Retained Assets that were transferred to
8 one of the three Trusts were liquidated by the applicable Trust and the net proceeds of
9 liquidation available for distribution were then distributed by such applicable Trust in
10 specified proportions to the Opt Out Trust (for the benefit of Opt Out Contract Holders) and
11 to Aurora (to be credited or paid for the benefit of Non-Opt Out Contract Holders and, if
12 applicable, their subrogees) as provided in the Rehabilitation Plan. See generally Articles 7,
13 10 and 12 of Rehabilitation Agreement, and Articles 10 and 17 of Enhancement Agreement.

14 Contingent and unliquidated litigation claims such as those ultimately asserted in
15 the Civil Action were not the types of Retained Assets transferred to the Base Assets Trust
16 or Real Estate Trust. Rather, the ELIC Trust was the main vehicle for liquidating
17 miscellaneous assets and distributing their proceeds. Roberson Decl. ¶¶9, 10.⁶ While

18 _____
19 ⁶The purpose of the ELIC Trust was to receive various securities and other assets of ELIC,
20 including certain litigation claims, and liquidate those assets into cash under an orderly plan of
21 liquidation. The cash proceeds were to be utilized to pay costs of ELIC Trust administration, pay or
22 provide adequate reserves to meet obligations relative to indemnities in favor of Aurora and certain
23 other non-operating obligations of ELIC under the Rehabilitation Plan and related agreements, and
24 to make distributions both to Aurora for the benefit of contract holders who elected to participate in
25 the Plan (and, if applicable, their subrogees) and to the Opt Out Trust for the benefit of ELIC
26 contract holders who elected not to participate in the Plan. Id. ¶9.

27 Pursuant to the ELIC Trust Agreement, the Trust had three trustees, one appointed by the
28 Commissioner, one appointed by NOLHGA and one appointed by a committee of contract holder
representatives (the "Trustees"). The ELIC Trust was formed on February 15, 1994, at which time
the Trustees received control over all decisions affecting the operations and disposition of the "Trust
Retained Assets" as defined in the ELIC Trust Agreement and the right to receive all proceeds from
the Trust Retained Assets. Certain assets, which were designated "Excluded Assets" and related
liabilities were not to be transferred to the ELIC Trust in accordance with the Rehabilitation Plan at
that date, except in the discretion of the Commissioner, but the Trust had the right to receive all
proceeds from the Excluded Assets upon receipt by ELIC. In addition, any payments by the Trust to
the Commissioner for specified costs, expenses and obligations that, in the Commissioner's
judgment, were not necessary for the payment of such costs, expenses and obligations were to be

(continued . . .)

1 certain specified unliquidated litigation claims were transferred to the ELIC Trust, others
2 were not, and the claims in the Civil Action were not among those transferred. See
3 Agreement of Executive Life Insurance Company Trust, A Liquidating Trust, dated as of
4 February 15, 1994, as amended (the "ELIC Trust Agreement"), Schedules A (listing
5 "Excluded Assets," i.e., various Retained Assets not transferred to the ELIC Trust) and D
6 (listing "Trust Retained Assets," i.e., Retained Assets transferred to the ELIC Trust).
7 However, even though the claims pertaining to the Civil Action were not transferred to the
8 ELIC Trust, under all circumstances the proceeds of such claims (including the \$100 million
9 of Altus Litigation Proceeds that are the subject of this Motion) are distributable pursuant to
10 the same distribution provisions governing distributions by the ELIC Trust, for two related
11 reasons.

12 First, to the extent a Retained Asset was not transferred to the ELIC Trust and
13 was then liquidated by the Commissioner/ELIC, the Rehabilitation Plan provides that the
14 ELIC Trust, so long as it is in existence, shall receive the net liquidation proceeds from the
15 Commissioner/ELIC for distribution by the ELIC Trust pursuant to terms of the
16 Rehabilitation Plan. See Rehabilitation Agreement §12.11.3; ELIC Trust Agreement §3.8.

17 Second, pursuant to companion motions of the Commissioner and the ELIC Trust
18 filed in 1999,⁷ the above-captioned Court approved the termination of the ELIC Trust

19 (. . . continued)
20 transferred to the ELIC Trust for distribution. Id. ¶10.

21 In addition to its distributive functions for the benefit of ELIC's former policyholders, the
22 Trust was required to remain open to fund certain indemnity obligations of ELIC. After satisfactory
23 arrangements were made with the principal indemnitee for settling such indemnity obligations, and
24 as explained in the text above, the ELIC Trust was terminated effective August 31, 1999 with Court
25 approval. At the time the ELIC Trust applied for termination, the ELIC Trust had distributed
26 approximately \$367.4 million to its beneficiaries, including approximately \$171,440,000 to Aurora
27 for the benefit of Non-Opt Out Contract Holders, approximately \$114,360,000 to the Opt Out Trust
28 for the benefit of Opt Out Contract Holders, \$55,500,000 to Aurora and its affiliates in settlement of
certain indemnity claims pursuant to the Settlement Agreement entered as of June 27, 1998, and
approximately \$26,275,000 to the Commissioner for ELIC costs, expenses and obligations. In
addition, the Trustees established a Wind-Up Reserve of approximately \$1.1 million for the payment
of the costs and expenses of the final administration of the ELIC Trust after its termination. Id. ¶11.

⁷See Insurance Commissioner of California's Motion For Approval of Modification to
Rehabilitation Agreement Re Executive Life Insurance Company dated September 3, 1999;
Executive Life Insurance Company Trust's Motion For An Order: (A) Approving Disposition Of
(continued . . .)

1 effective as of August 31, 1999 by Orders dated September 23, 1999 and November 15,
2 1999 (referred to, respectively, as the "September 23, 1999 Trust Termination Order" and
3 the "November 15, 1999 Trust Termination Order," and collectively referred to as the "Trust
4 Closing Orders"). Roberson Decl. ¶7. The ELIC Trust has long since been fully
5 administered and terminated pursuant to the Trust Closing Orders. Id. ¶8.

6 Most important for present purposes, as part of the September 23, 1999 Trust
7 Termination Order, the Court approved an amendment to the Rehabilitation Agreement
8 providing that any amounts distributed by ELIC from the liquidation of assets after the
9 termination of the ELIC Trust shall be distributed the same way as if they had been
10 distributed by the ELIC Trust, such that the identical provisions of the Enhancement
11 Agreement that governed distributions by the ELIC Trust before its termination also govern
12 distributions by the Commissioner/ELIC after the termination of the ELIC Trust. See
13 September 23, 1999 Trust Termination Order (entitled "Order Regarding Insurance
14 Commissioner Of The State Of California's Motion For Approval Of Modifications To
15 Rehabilitation Agreement Re: Executive Life Insurance Company"), approving amendments
16 to Section 12.11.3 of Rehabilitation Agreement, as set forth in Exhibit 1 to the Declaration
17 of Richard G. Krenz filed as part of the Commissioner's Motion For Approval Of
18 Modifications to Rehabilitation Agreement Re Executive Life Insurance Company dated
19 September 3, 1999.⁸

20 (. . . continued)

21 Remaining Trust Assets; (B) Approving Trustees' Final Report; (C) Releasing And Discharging
22 Trustees And The Rehabilitator; and (D) Approving Severance Payment filed October 22, 1999

23 ⁸The final amended Section 12.11.3 of the Rehabilitation Agreement, as approved by the
24 September 23, 1999 Trust Termination Order, reads as follows (with the amendments underscored):

25 "12.11.3. Other Distributions. Unless otherwise provided in this Agreement, any cash
26 to be distributed by ELIC shall be transferred to the ELIC Trust and distributed in accordance with
27 the terms and conditions applicable to the ELIC Trust; provided that any cash to be distributed by
28 ELIC after the termination of the ELIC Trust to Contract Holders shall not be transferred to the
ELIC Trust but rather (a) ELIC shall distribute to the Opt Out Trust a portion, equal to the product
of the Opt Out Percentage times the aggregate cash to be distributed, and thereafter such portion
shall be distributed by the Opt Out Trust in accordance with the applicable provisions of this
Agreement and the Opt Out Trust Agreement, and (b) ELIC shall distribute to Newco a portion,
equal to the product of the Non-Opt Out Percentage times the aggregate cash to be distributed, and
thereafter such portion shall be allocated, paid and credited by Newco as if such funds had been

(continued . . .)

1 Thus, although the claims asserted in the Civil Action were Retained Assets that
2 were not transferred to the ELIC Trust and thus were necessarily maintained by the
3 Commissioner in the ELIC estate, all proceeds of the claims in the Civil Action (including
4 the \$100 million in Altus Litigation Proceeds that are the subject of this Motion) are
5 distributable pursuant to the same provisions of the Rehabilitation Plan that governed any
6 distributions by the ELIC Trust prior to its termination. Accordingly, we turn now to the
7 proposed distribution under the relevant provisions of the Rehabilitation Plan, i.e., those
8 governing distributions by the ELIC Trust.

9 III.

10 THE PROPOSED DISTRIBUTION PURSUANT TO THE
11 APPLICABLE PROVISIONS OF THE REHABILITATION PLAN.

12 Having already established that distribution of the subject \$100 million of Altus
13 Litigation Proceeds should follow the distributive provisions of the Rehabilitation Plan
14 applicable to a distribution by the ELIC Trust, the first step is to determine the portion that is
15 distributable to the Opt Out Trust. Under the Rehabilitation Plan, the Opt Out Trust is
16 entitled to receive the Opt Out Percentage of any distributions from the ELIC Trust. The
17 Opt Out Percentage is approximately 33.9%, which is the claim value of the former ELIC
18 contracts held by Opt Out Contract Holders, as a percentage of the claim value of all of the
19 former ELIC contracts held by Opt Out Contract Holders and Non-Opt Out Contract
20 Holders. Roberson Decl. ¶3; Rehabilitation Agreement §7.7; ELIC Trust Agreement §§
21 3.5, 4.1 and 5.3.2; Amended and Restated Opt Out Trust Agreement dated August 17, 1994

22 _____
23 (. . . continued)

24 received from the ELIC Trust and in accordance with Article 9 of this Agreement and Articles 4, 10,
25 12 and 17 of the Enhancement Agreement.”

26 This amendment was necessary to ensure that there was a clear distribution principle and
27 mechanism for any assets remaining to be liquidated for the benefit of former policyholders after the
28 termination of the ELIC Trust. Before this amendment, Section 12.11.3 simply provided that any
funds to be distributed by ELIC must be transferred to the ELIC Trust and distributed in accordance
with the terms and conditions applicable to the ELIC Trust. The effect of the amendatory language
quoted above is to provide that after the termination of the ELIC Trust, the Commissioner/ELIC
must follow the same distribution principle and mechanism as was applicable to the ELIC Trust
before it was terminated.

1 (the "Opt Out Trust Agreement"), Article Three & §6.5. Accordingly, under the
2 Commissioner's proposed distribution of the \$100 million of Altus Litigation Proceeds,
3 approximately \$33.9 million will be distributed by the Commissioner to the Opt Out Trust,
4 to be distributed pro rata based on relative claim values to the approximately 27,000 Opt Out
5 Contract Holders that are the beneficiaries of the Opt Out Trust, pursuant to the terms of the
6 Opt Out Trust Agreement. Roberson Decl. ¶4.

7 Pursuant to the terms of the Rehabilitation Plan, the remaining approximately
8 66.1% of any distribution by the ELIC Trust is the Non-Opt Out Percentage, which is the
9 claim value of the former ELIC contracts held by Non-Opt Out Contract Holders, as a
10 percentage of the total claim value of all of the former ELIC contracts (including those held
11 by Opt Out Contract Holders and those held by Non-Opt Out Contract Holders). Under the
12 Rehabilitation Plan, such Non-Opt Out Percentage is paid to Aurora for distribution for the
13 benefit of Non-Opt Out Contract Holders (and their subrogees, if applicable) pursuant to the
14 terms of the Enhancement Agreement. Accordingly, approximately \$66.1 million of the
15 proposed \$100 million distribution is distributable to Aurora, which in turn must distribute
16 the \$66.1 million for the benefit of Non-Opt Out Contract Holders (and their subrogees, if
17 applicable) as provided in the Enhancement Agreement. Roberson Decl. ¶5; Rehabilitation
18 Agreement §9.6; Enhancement Agreement, Articles 4, 10, 12 and 17; ELIC Trust Agreement
19 §5.3.4. Such distribution by Aurora takes the form of cash distributions to some Non-Opt
20 Out Contract Holders and credits to Restructured Account Values of other Non-Opt Out
21 Contract Holders, depending on the type of policy. Roberson Decl. ¶5; Rehabilitation
22 Agreement §9.1 (last sentence).

23 As a final step in the process with respect to the \$66.1 million distributable to
24 Aurora for the benefit of Non-Opt Out Contract Holders (and their subrogees, if applicable),
25 it must be determined whether the \$66.1 million is or is not a "Deemed Securities
26 Distribution" within the meaning of Section 17.1.2.2.2 (i) of the Enhancement Agreement.
27 In a nutshell, any distributable amounts that constitute "Excess Funds," "Michigan Excess"
28 or "Securities Proceeds" (as defined, respectively, in Sections 2.35, 2.54 and 2.77A of the

1 Rehabilitation Agreement) are a “Deemed Securities Distribution” that must be distributed
2 by Aurora pursuant to the terms of Section 17.1.2.2.2 (i) of the Enhancement Agreement,
3 without regard to the assignment by the Participating Guaranty Associations (“PGAs”) of
4 their subrogation rights pursuant to Article 10 of the Enhancement Agreement (an “Article
5 17 Distribution”). Conversely, any amounts distributable to Aurora for the benefit of Non-
6 Opt Out Contract Holders (and their subrogees, if applicable) that are not a “Deemed
7 Securities Distribution” must be distributed by Aurora pursuant to the terms of Article 10
8 and Article 17.1.2.2.2(iv) of the Enhancement Agreement, taking into account and giving
9 effect to the PGAs’ assignment of their subrogation rights pursuant to Article 10 of the
10 Enhancement Agreement (an “Article 10 Distribution”).

11 The Commissioner maintains that the \$66.1 million in Altus Litigation Proceeds
12 distributable to Aurora does not constitute Excess Funds, Michigan Excess or Securities
13 Proceeds as defined in the Rehabilitation Agreement (and accordingly does not constitute a
14 Deemed Securities Distribution) and therefore must be distributed by Aurora as an Article
15 10 Distribution rather than an Article 17 Distribution. Following the calculation applicable
16 to an Article 10 Distribution, under the Commissioner’s proposed distribution, of the total
17 approximately \$66.1 million distributable to Aurora, Aurora will be required to distribute
18 (i) approximately \$2 million to the PGAs pursuant to Section 17.1.2.2.2 (iv)(y) of the
19 Enhancement Agreement, and (i) the remaining approximately \$64.1 million (by a
20 combination of cash distributions and credits to Restructured Account Values) for the direct
21 benefit of Non-Opt Out Contract Holders (or their non-PGA, third-party subrogees, as
22 applicable) pursuant to Article 10 and Section 17.1.2.2.2(iv) of the Enhancement Agreement.
23 Roberson Decl. ¶12.⁹

24 _____
25 ⁹The Commissioner notes that NOLHGA, as the umbrella organization for the PGAs, has
26 articulated a different view to the Commissioner, with NOLHGA contending that the \$66.1 million
27 distributable to Aurora should be distributed by Aurora as an Article 17 Distribution rather than an
28 Article 10 Distribution. The Commissioner understands that NOLHGA reaches this conclusion
because it believes that the \$66.1 million distributable to Aurora constitutes “Securities Proceeds”
and therefore constitutes a “Deemed Securities Distribution” requiring an Article 17 Distribution.
The Commissioner believes that litigation proceeds of contingent tort-based claims such as the Altus
(continued . . .)

1 Accordingly, pursuant to this Motion, the Commissioner seeks an Order
2 approving the distribution of the subject \$100 million in Altus Litigation Proceeds as follows
3 (subject to the “de minimis exception” described in Part IV below):

4 1. approximately \$33.9 million to the Opt Out Trust, for distribution to the Opt
5 Out Contract Holders pursuant to the terms of the Opt Out Trust Agreement; and

6 2. approximately \$66.1 million to Aurora, for distribution by Aurora as follows
7 pursuant to the terms of the Enhancement Agreement:

8 a. such amount as remains due to the PGAs pursuant to Section
9 17.1.2.2.2(iv) of the Enhancement Agreement, estimated to be approximately \$2 million;
10 and

11 b. approximately \$64.1 million (by a combination of cash distributions and
12 credits to Restructured Account Values as provided in Section 9.1 of the Rehabilitation
13 Agreement) for the direct benefit of Non-Opt Out Contract Holders (or their non-PGA, third-
14 party subrogees, as applicable) pursuant to Article 10 and Section 17.1.2.2.2(iv) of the
15 Enhancement Agreement.

16 The Commissioner would like to see the distribution of the subject \$100 million
17 in Altus Litigation Proceeds proceed at the earliest possible time, so that such funds redound
18 to the benefit of those entitled to receive them pursuant to the Rehabilitation Plan.

19 IV.

20 THE DE MINIMIS EXCEPTION TO THE PROPOSED
21 DISTRIBUTION.

22 Pursuant to this Motion, the Commissioner requests that the foregoing proposed

23 (. . . continued)

24 Litigation Proceeds are part of the assets (and their proceeds) as to which the PGAs assigned their
25 subrogation rights pursuant to Article 10 of the Enhancement Agreement and therefore do not fall
26 within the definition of “Securities Proceeds.” For ease-of-comparison purposes, the Commissioner
27 notes that if the PGAs’ position were correct and the \$66.1 million distributable to Aurora were
28 distributed by Aurora as an Article 17 Distribution, Aurora would distribute approximately \$48.3
million to the PGAs pursuant to their subrogation rights, and would distribute the remaining
approximately \$17.8 million (by a combination of cash distributions and credits to Restructured
Account Values) for the direct benefit of Non-Opt Out Contract Holders (or their non-PGA, third-
party subrogees, as applicable). Roberson Decl. ¶12

1 distribution be subject to the exception described in this Part IV (the “de minimis
2 exception”) pertaining to any distribution check that is issuable by Aurora to any Non-Opt
3 Out Contract Holder, or by the Opt Out Trust to any Opt Out Contract Holder, that would be
4 less than the amount of \$2.00.

5 All distributions by the Opt Out Trust to Opt Out Contract Holders are in cash
6 (effected by the issuance of checks to the Opt Out Contract Holders). Roberson Decl. ¶6.
7 And as noted above, when Aurora makes a distribution to Non-Opt Out Contract Holders,
8 whether or not a Non-Opt Out Contract Holder receives cash for his or her allocation of the
9 distribution (effected by the issuance of a check to such Non-Opt Out Contract Holder) or
10 receives a credit to his or her Restructured Account Value depends upon the type of policy
11 held by such Non-Opt Out Contract Holder. Id. For any cash distributions by either the Opt
12 Out Trust (for the benefit of Opt Out Contract Holders) or Aurora (for the benefit of Non-
13 Opt Out Contract Holders or their subrogees, if applicable), there are significant costs
14 associated with cash distributions effected by checks. Those costs include check-printing
15 costs, mailing costs, costs associated with provision of annual tax forms (1099s) and
16 escheatment costs. Id. Based on an analysis of costs incurred in making various prior
17 distributions, these costs are estimated to be approximately \$2.00 per check issued. Id.
18 Accordingly, in order to provide that the cost of a cash distribution to any Opt Out Contract
19 Holder or Non-Opt Out Contract Holder does not exceed the cash amount distributable to
20 such policyholder, this Motion proposes that no check shall be issued by the Opt Out Trust
21 to any Opt Out Contract Holder, or by Aurora to any Non-Opt Out Contract Holder, where
22 the cash amount distributable to such contract holder is less than \$2.00. Further, because
23 such amount is de minimis, and because the cost of carrying a future credit for the account of
24 any affected Opt Out Contract Holder or Non-Opt Out Contract Holder would be
25 disproportionate to the de minimis benefit, the Motion also proposes that no credit or future
26 benefit with regard to any such undistributed amount of less than \$2.00 shall be maintained
27 or provided by either the Opt Out Trust or Aurora, and instead that any such undistributed
28 amounts shall be distributed by the Opt Out Trust and Aurora back to the

1 Commissioner/ELIC and maintained as part of the ELIC estate, and included in the next or
2 final distribution by the Commissioner/ELIC to the Opt Out Trust (for the benefit of Opt Out
3 Contract Holders) and to Aurora (for the benefit of Non-Opt Out Contract Holders or their
4 subrogees, if applicable).

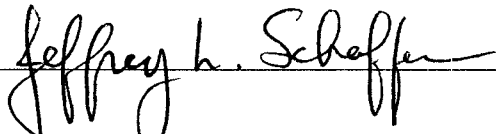
6 CONCLUSION

7 For all the reasons set forth above, the Commissioner respectfully requests that
8 the Court grant this Motion and enter an Order approving the distribution of the subject \$100
9 million of Altus Litigation Proceeds as requested above, in the form of the Proposed Order
10 Approving Distribution Of \$100 Million Of Altus Litigation Proceeds submitted herewith.

11
12 DATED: August 30, 2005

13 Respectfully,

14 JEFFREY L. SCHAFFER
15 ETHAN P. SCHULMAN
16 HOWARD, RICE, NEMEROVSKI, CANADY,
17 FALK & RABKIN
18 A Professional Corporation

19 By: 

20 Attorneys for Movant INSURANCE
21 COMMISSIONER OF THE STATE OF
22 CALIFORNIA in his capacity as Conservator,
23 Liquidator and Rehabilitator of Executive Life
24 Insurance Company

1 **PROOF OF SERVICE BY MAIL**

2 I am employed in the City and County of San Francisco, State of California. I am over
3 the age of eighteen (18) years and not a party to the within action; my business address is
4 Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024.

5 I am readily familiar with the practice for collection and processing of documents for
6 mailing with the United States Postal Service of Howard Rice Nemerovski Canady Falk &
7 Rabkin, A Professional Corporation, and that practice is that the documents are deposited
8 with the United States Postal Service with postage fully prepaid the same day as the day of
9 collection in the ordinary course of business.

10 On August 30, 2005, I served the following document(s) described as follows:

11 1. NOTICE OF MOTION AND MOTION OF INSURANCE COMMISSIONER
12 OF THE STATE OF CALIFORNIA FOR AN ORDER APPROVING DISTRIBUTION OF
13 \$100 MILLION OF ALTUS LITIGATION PROCEEDS PURSUANT TO ELIC
14 REHABILITATION PLAN; SUPPORTING MEMORANDUM OF POINTS AND
15 AUTHORITIES AND DECLARATIONS OF WILLARD ROBERTS, KARL BELGUM
16 AND LAUREN ROBERSON;

17 2. DECLARATION OF WILLARD ROBERTS IN SUPPORT OF MOTION OF
18 INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA FOR AN ORDER
19 APPROVING DISTRIBUTION OF \$100 MILLION OF ALTUS LITIGATION
20 PROCEEDS PURSUANT TO ELIC REHABILITATION PLAN;

21 3. DECLARATION OF LAUREN ROBERSON IN SUPPORT OF MOTION OF
22 INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA FOR AN ORDER
23 APPROVING DISTRIBUTION OF \$100 MILLION OF ALTUS LITIGATION
24 PROCEEDS PURSUANT TO ELIC REHABILITATION PLAN;

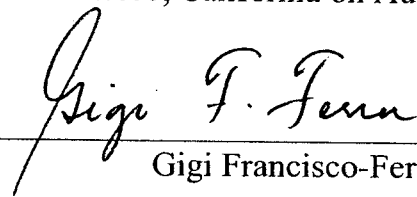
25 4. DECLARATION OF KARL D. BELGUM IN SUPPORT OF MOTION OF
26 INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA FOR AN ORDER
27 APPROVING DISTRIBUTION OF \$100 MILLION OF ALTUS LITIGATION
28 PROCEEDS PURSUANT TO ELIC REHABILITATION PLAN;

1 5. [PROPOSED] ORDER GRANTING MOTION OF INSURANCE
2 COMMISSIONER OF THE STATE OF CALIFORNIA FOR AN ORDER APPROVING
3 DISTRIBUTION OF \$100 MILLION OF ALTUS LITIGATION PROCEEDS PURSUANT
4 TO ELIC REHABILITATION PLAN.

5 on the persons listed below by placing the document(s) for deposit in the United States
6 Postal Service through the regular mail collection process at the law offices of Howard Rice
7 Nemerovski Canady Falk & Rabkin, A Professional Corporation, located at Three
8 Embarcadero Center, Seventh Floor, San Francisco, California, to be served by mail
9 addressed as follows:

10 PLEASE SEE ATTACHED SERVICE LIST

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct. Executed at San Francisco, California on August 30, 2005.

13
14 

15 Gigi Francisco-Ferrer

16 W03 155930001/1238499/v1

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