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11 The State Of California in his capacity as
12 Conservator, Liquidator and Rehabilitator of
13 Executive Life Insurance Company

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF LOS ANGELES

16 INSURANCE COMMISSIONER OF THE
17 STATE OF CALIFORNIA,

18 Applicant,

19 v.

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

23 Respondents.

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OF ORIGINAL FILED
Los Angeles Superior Court

JAN 19 2006

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 INTERIM
DISTRIBUTION OF SPECIFIED ALTUS
LITIGATION PROCEEDS TO (1) NON-
OPT OUT CONTRACT HOLDERS AND
THEIR NON-PGA SUBROGREGES (IF
APPLICABLE) CALCULATED
PURSUANT TO ARTICLE 17 OF
ENHANCEMENT AGREEMENT, AND
(2) PGAS PURSUANT TO MAY 13,
2005 LETTER AGREEMENT; AND
SUPPORTING MEMORANDUM OF
POINTS AND AUTHORITIES

Date: March 3, 2006

Time: 8:30 a.m.

Dep't: 36

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that at 8:30 a.m. on March 3, 2006, in the Courtroom of the Honorable Gregory Alarcon, Department 36 of the Los Angeles Superior Court, at 111 Hill Street, Los Angeles, California 90012, or as soon thereafter as the matter may be heard, the Insurance Commissioner of the State of California, in his capacity as conservator, liquidator and rehabilitator (the "Commissioner") of Executive Life Insurance Company ("ELIC"), will and hereby does move the Court (the "Motion") for entry of an Order approving (1) the distribution of specified Altus Litigation Proceeds to the Non-Opt Out Contract Holders and their non-PGA subrogees (if applicable), calculated pursuant to Article 17 of the Enhancement Agreement that constitutes part of the ELIC Rehabilitation Plan,¹ and to the PGAs pursuant to that certain letter agreement dated May 13, 2005 between the Commissioner and NOLHGA (the "May 13 Letter Agreement"), (2) the funding of an Expense Reserve from certain Altus Litigation Proceeds as described more particularly below, and (3) maintaining the balance of specified Altus Litigation Proceeds in a distribution reserve pending resolution of the Article 10/17 Dispute between the Commissioner and NOLHGA that has been referred to arbitration.

More particularly, if the Motion is granted, the Commissioner will distribute the following amounts out of the approximately \$705 million of Altus Litigation proceeds collected by the Commissioner to date: (i) approximately \$93 million to Non-Opt Out Contract Holders and their non-PGA subrogees, calculated under Article 17 of the Enhancement Agreement, and (ii) approximately \$46 million to the PGAs, calculated pursuant to the May 13 Letter Agreement. Further, if the Motion is granted, after giving effect to these distributions, the remainder of the Altus Litigation Proceeds collected by the

¹Any reference in this Motion to the "ELIC Rehabilitation Plan" or "Rehabilitation Plan" means, collectively, all documents comprising the rehabilitation plan approved by the above-captioned Court in this case, including, most importantly, the Amended and Restated Agreement of Purchase and Sale [etc.] dated August 7, 1991, as amended to date (separately referred to as the "Rehabilitation Agreement," where appropriate), and the Amended and Restated Enhancement Agreement dated as of December 5, 1991, as amended to date (separately referred to as the "Enhancement Agreement," where appropriate).

1 Commissioner to date that have not already been authorized by a prior Court order to be
2 distributed to the Opt Out Trust or used for Expenses Reserve purposes shall be reserved as
3 follows: (i) approximately \$53 million shall be included as part of the \$80 million Expense
4 Reserve previously sought to be established pursuant to the Commissioner's previously filed
5 Motion For An Order Approving Distribution Of Opt Out Trust Portion Of Aurora
6 Settlement Amount and CDR Settlement Amount (After Establishment Of Expense Reserve)
7 dated December 13, 2005 and scheduled for hearing on January 18, 2006 (the "Second
8 Distribution Motion"), and (ii) the remaining approximately \$267.5 million will be
9 segregated and maintained pending the outcome of the Article 10/17 Dispute, representing
10 what the PGAs would be due on a distribution of the Altus Litigation Proceeds collected to
11 date (after deducting the distributions to the Opt Out Trust approved by the Court, the
12 Expense Reserve, and the "floor" amount proposed to be distributed to the PGAs pursuant to
13 the May 13 Letter Agreement) calculated pursuant to Article 17 of the Enhancement
14 Agreement. This \$267.5 million will continue to be reserved pending a further Court order
15 following the resolution of the Article 10/17 Dispute, so that this \$267.5 million amount
16 (and any accrued interest thereon) is available (i) to be distributed to the PGAs pursuant to
17 Article 17 if NOLHGA prevails on the Article 10/17 Dispute, or (ii) to be distributed to the
18 Non Opt-Out Contract Holders (and their non-PGA subrogees) pursuant to a calculation and
19 "true up" under Article 10 if the Commissioner prevails on the Article 10/17 Dispute.

20 This Motion is made against the backdrop of the Commissioner's earlier Motion For
21 An Order Approving Distribution Of \$100 Million Of Altus Litigation Proceeds Pursuant To
22 ELIC Rehabilitation Plan dated August 30, 2005 and filed August 31, 2005 (the "August 31
23 Distribution Motion"), which was heard before the above-captioned Court on October 12,
24 2005, and the pending Second Distribution Motion. Because this Motion is being noticed to
25 and served upon all the same parties as the August 31 Distribution Motion and the Second
26 Distribution Motion (the "two prior Motions"), and because the background of this Motion
27 and the two prior Motions are substantially identical, reference is made to the full
28 description of factual matters set forth principally in the August 31 Distribution Motion and

1 to a lesser extent in the Second Distribution Motion, and capitalized words and terms used
2 herein without definition shall have the meanings ascribed to them in the August 31
3 Distribution Motion and/or the Second Distribution Motion, as applicable.

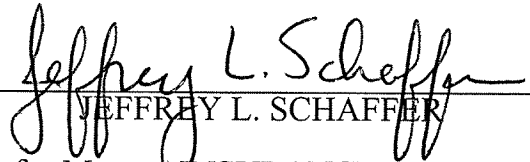
4 This Motion is made pursuant to the Conservation Order entered by this Court on
5 April 11, 1991, the Order of Liquidation entered December 6, 1991, and the final orders
6 entered in this case approving the ELIC Rehabilitation Plan. This Motion is based on the
7 facts and legal argument set forth in this Notice of Motion and Motion, the accompanying
8 Memorandum of Points and Authorities (which constitutes a part of the Motion), the
9 Declarations of Richard Baum, Lauren Roberson and John F. Finston filed concurrently
10 herewith, all other pleadings and papers on file in this matter, and such oral argument of
11 counsel or evidence as may be presented at the hearing on the Motion.

12
13 DATED: January 18, 2006

14 Respectfully,

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

20 By: _____


JEFFREY L. SCHAFFER

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

I.

INTRODUCTION AND OVERVIEW

The Commissioner to date has collected approximately \$705 million of Altus Litigation Proceeds, with the great majority of that amount having been collected quite recently as a result of the consummation of the Aurora Settlement and the CDR Settlement.² The Commissioner strongly desires to distribute as much of the Altus Litigation Proceeds as possible, as promptly as possible, to the rightful recipients thereof pursuant to the ELIC Rehabilitation Plan. However, distribution of a substantial portion of the Altus Litigation Proceeds is not possible until resolution of the Article 10/17 Dispute arising under the ELIC Rehabilitation Plan (described at some length in the August 31 Distribution Motion) between NOLHGA and the PGAs, on the one hand, and the Commissioner on the other.³ That dispute was referred to arbitration pursuant to the Court's Order dated October 12, 2005, and, with the arbitration proceeding still in its preliminary phase, the Commissioner does not expect a ruling on the Article 10/17 Dispute for at least another several months.⁴

Still, the Commissioner desires to distribute reasonably promptly as much of the Altus Litigation Proceeds as is possible without prejudicing interested parties' rights and interests

²The word "approximately" is used throughout this Motion with reference to any specified percentage or specified dollar amount, because virtually all amounts and percentages have been rounded for ease of calculation and/or description.

³The Article 10/17 Dispute exists between the Commissioner and NOLHGA/the PGAs with respect to the extent to which the 43 PGAs that participated in the Enhancement Agreement will share in the Non-Opt Out Percentage (which is approximately 66.1%) of net Altus Litigation Proceeds (i.e., Altus Litigation Proceeds minus ELIC estate expenses). The heart of such dispute is whether the net Altus Litigation Proceeds should be distributed pursuant to Article 10 of the Enhancement Agreement as an Article 10 Distribution (as the Commissioner contends) or pursuant to Article 17 of the Enhancement Agreement as an Article 17 Distribution (as NOLHGA and the PGAs contend).

⁴Other interested parties commenced an action in Los Angeles County Superior Court (which has subsequently been removed to the District Court), captioned *Watson, et al. v. Garamendi, et al.*, Case No. 05-08612 AHM (CWx), against NOLHGA and the PGAs (and nominally against the Commissioner) (the "Watson Action"). The Watson Action raises issues similar to those issues raised with respect to the Article 10/17 Dispute. The Plaintiffs in the Watson Action are also seeking to participate in the arbitration of the Article 10/17 Dispute. A motion to dismiss the Watson Action was filed by NOLHGA and the PGAs and is scheduled to be heard by the District Court on January 23, 2006.

1 regarding the outcome of the Article 10/17 Dispute. To that end, the Commissioner already
2 has filed the two prior Motions for authority to effect distributions to the Opt Out Trust for
3 the benefit of Opt Out Contract Holders, inasmuch as the Opt Out Percentage distributable to
4 the Opt Out Trust is not affected by the Article 10/17 Dispute or its outcome. Thus, the
5 August 31 Distribution Motion sought authority to distribute to the Opt Out Trust
6 approximately \$33.9 million, constituting the Opt Out Percentage of the \$100 million in
7 Artemis Settlement Funds that was the subject of the August 31 Motion. By order dated
8 October 12, 2005, the Court approved such \$33.9 million distribution to the Opt Out Trust
9 and required that the other \$66.1 million in Artemis Settlement Funds be maintained by the
10 Commissioner pending further Court order.

11 Similarly, once the Aurora Settlement and the CDR Settlement were close to
12 consummation, the Commissioner on December 15, 2005 filed the Second Distribution
13 Motion, seeking authority to distribute to the Opt Out Trust, for the benefit of Opt Out
14 Contract Holders, the approximately 33.9% Opt Out Percentage of the \$78.75 million
15 Aurora Settlement Amount and the \$516.5 million CDR Settlement Amount (after deduction
16 of a pro rata portion of a proposed \$80 million Expense Reserve to be taken from the Aurora
17 and CDR Settlement Amounts), yielding a proposed distribution of another approximately
18 \$174.5 million to the Opt Out Trust. The Second Distribution Motion is pending and
19 scheduled for hearing on January 18, 2005. The Commissioner anticipates that the Court
20 will approve the distribution of this additional approximately \$174.5 million to the Opt Out
21 Trust for the same reason the Court approved the distribution of the initial \$33.9 million to
22 the Opt Out Trust pursuant to the August 31 Motion, *i.e.*, the portion payable to the Opt Out
23 Trust is not affected by the existence or outcome of the Article 10/17 Dispute, and there
24 accordingly is no reason to delay distribution of such amount to the Opt Out Trust.

25 After the distribution of these substantial amounts to the Opt Out Trust, the
26 Commissioner will still be holding \$400+ million in Altus Litigation Proceeds that but for
27 the Article 10/17 Dispute would be available for distribution pursuant to the ELIC
28 Rehabilitation Plan (the "Available Disputed Funds"). Given the enormity of this \$400+

1 million figure and the fact that a even a partial present distribution of these funds would be
2 of material benefit to Non-Opt Out Contract Holders and their *non-PGA* subrogees (if
3 applicable) (hereinafter collectively referred to as the "Opt In Policyholders" for reference's
4 sake), the Commissioner in recent weeks has been exploring alternative methodologies and
5 proposals for effecting a partial distribution of these Available Disputed Funds to Opt In
6 Policyholders that would not prejudice the parties' rights/positions regarding the Article
7 10/17 Dispute and would allow a practicable "true up" to be done after the Article 10/17
8 Dispute is resolved, giving effect to such resolution. The Commissioner believes he has
9 come up with a workable methodology and proposal for the present distribution of
10 approximately \$93 million to Opt In Policyholders from the Available Disputed Funds
11 without prejudicing the parties' rights/positions regarding the outcome of the Article 10/17
12 Dispute, and by this Motion presents such proposal. At the same time, pursuant to the May
13 Letter Agreement and for the reasons set forth more specifically in Part IV below, the
14 Commissioner by this Motion also seeks approval to distribute to the PGAs a "floor"
15 distribution of approximately \$46 million from the \$300+ million in Available Disputed
16 Funds that will remain after the proposed distribution of approximately \$93 million to the
17 Opt In Policyholders.

18 In broad outline, the \$93 million that the Commissioner proposes to distribute to the
19 Opt In Policyholders is arrived at by doing a provisional calculation under Article 17 of the
20 Enhancement Agreement as to the Available Disputed Funds, and then (i) effecting an
21 interim distribution to the Opt In Policyholders based on such calculation, which will result
22 in the distribution of approximately \$93 million to the Opt In Policyholders, and (ii)
23 maintaining the remainder of the Available Disputed Funds (which constitutes the portion of
24 the Available Disputed Funds that the PGAs would receive in an Article 17 Distribution of
25 such funds) in a reserve pending the outcome of the Article 10/17 Dispute, subject to the
26 Commissioner's distribution of the "floor" amount to the PGAs described in Part IV below.
27 (This proposed distribution to Opt In Policyholders calculated under Article 17 and the
28 reserve of the amount that would be distributed to the PGAs under an Article 17 calculation

1 is hereinafter referred to as the "Provisional Article 17 Distribution").

2 The Commissioner has proposed this Provisional Article 17 Distribution as the method
3 for effecting a present distribution to Opt In Policyholders because it is the only practicable
4 method the Commissioner has been able to devise that allows a present substantial
5 distribution to Opt In Policyholders, and at the same time allows a "true up" to be done after
6 the Article 10/17 Dispute is resolved, such that appropriate adjustments can be made in a
7 subsequent distribution to give effect to the resolution of the Article 10/17 Dispute. Thus,
8 following the proposed Provisional Article 17 Distribution, if the Article 10/17 Dispute is
9 resolved in favor of distribution under Article 17, there is no "true up" necessary and the
10 reserved portion of the Available Disputed Funds will simply be distributed to the PGAs as
11 an Article 17 Distribution, and if the Article 10/17 Dispute is resolved in favor of
12 distribution under Article 10, then a calculation applicable to all the Available Disputed
13 Funds (including the \$93 million that already will have been distributed to Opt In
14 Policyholders pursuant to this Motion) will be made "retroactively" under Article 10 of the
15 Enhancement Agreement as an Article 10 Distribution, and because no Opt In Policyholders
16 will be entitled to fewer dollars under an Article 10 Distribution than what they already will
17 have received under the Provisional Article 17 Distribution, the remaining Available
18 Disputed Funds will be distributed among the Opt In Policyholders pursuant to a "true up"
19 that will result in each Opt In Policyholder having received its total distribution calculated
20 under and consistent with Article 10. And in this circumstance in which the Article 10/17
21 Dispute is resolved in favor of an Article 10 Distribution, NOLHGA will only receive from
22 the then-still-reserved portion of the Available Disputed Funds whatever amount (if any) that
23 would be due it pursuant to an Article 10 Distribution.

24 The Commissioner emphasizes that he proposes this Provisional Article 17
25 Distribution (and will proceed with such distribution) only on the understanding and
26 condition that neither the Commissioner nor any other party in interest is in any way
27 conceding that the Available Disputed Funds or any other Altus Litigation Proceeds are
28 distributable pursuant to Article 17 of the Enhancement Agreement, or otherwise

1 compromising or affecting its position on the merits of the Article 10/17 Dispute. Rather,
2 the Commissioner proposes this Provisional Article 17 Distribution only because it is the
3 only practicable methodology for presently distributing substantial dollars to Opt In
4 Policyholders, while at the same time allowing for a practicable true-up giving effect to the
5 ultimate resolution of the Article 10/17 Dispute.⁵

6 II.

7 **RELEVANT FACTS, AND CALCULATION OF PROPOSED** 8 **DISTRIBUTIONS TO OPT IN POLICYHOLDERS AND** 9 **DISTRIBUTION RESERVE AMOUNTS⁶**

10 In order to present and explain more specifically the methodology and calculations
11 leading to the proposed distribution of approximately \$93 million to Opt In Policyholders,
12 and the reserves already maintained or proposed to be maintained by the Commissioner, it is
13 most useful to break down the approximately \$705 million in Altus Litigation Proceeds
14 collected by the Commissioner to date into three segments. These include the Artemis

15 ⁵The Commissioner has carefully considered the alternative methodology of similarly
16 calculating (and maintaining in reserve) the portion of the Available Disputed Funds that the
17 PGAs would receive in an Article 17 Distribution, but then distributing the balance of the
18 Available Disputed Funds to the Opt In Policyholders in a provisional distribution calculated
19 under Article 10 of the Enhancement Agreement rather than Article 17, since it remains the
20 Commissioner's position that all Available Disputed Funds should be distributed pursuant to
21 Article 10 and not Article 17. However, this was not a good provisional distribution
22 approach for two reasons. First, because the same dollar amount has to be reserved for the
23 PGAs under either provisional approach in order to protect the PGAs' rights/positions
24 respecting the outcome of the Article 10/17 Dispute, a provisional distribution to Opt In
25 Policyholders calculated under Article 10 would simply re-allocate certain dollars among
26 various Opt In Policyholders, and would not result in a larger aggregate provisional
27 distribution to Opt In Policyholders. Second, and more importantly, if there were a
28 provisional distribution to Opt In Policyholders under Article 10 and the Article 10/17
Dispute is ultimately resolved in favor of an Article 17 Distribution, there would be many
Opt In Policyholders who would have received an over-distribution in the provisional
distribution (*i.e.*, that would have received some provisional distribution under Article 10 but
would not be entitled to any distribution under Article 17), and it for all practical purposes
would be impossible to get these over-distributed amounts back from these policyholders, at
least without incurring potentially large expenses with very uncertain results, including risks
of collection. Thus, the alternative of doing a provisional Article 10 Distribution is not a
good or viable one.

⁶The evidentiary basis for the relevant facts set forth in this Part II is contained in the
Declaration of Lauren Roberson filed concurrently herewith, as well as the Declarations of
Willard Roberts, Karl Belgum and Lauren Roberson filed in support of the August 31
Distribution Motion and the Declaration of Willard Roberts filed in support of the Second
Distribution Motion.

1 Settlement Fund of \$110 million that was the subject of the August 31 Distribution Motion,
2 as well as the CDR Settlement of \$516.5 million and the Aurora Settlement of \$78.75
3 million that were the subject of the Second Distribution Motion.

4 **A. The Artemis Settlement Fund**

5 Pursuant to the August 31 Distribution Motion, \$10 million of the \$110 million
6 Artemis Settlement Fund collected by the Commissioner was set aside for expenses, and the
7 Commissioner proposed to distribute to the Opt Out Trust its 33.9% Opt Out Percentage of
8 the remaining \$100 million, *i.e.*, \$33.9 million. Pursuant to the Court's Order on the August
9 31 Distribution Motion issued October 12, 2005, the Court authorized the Commissioner to
10 so distribute such \$33.9 million to the Opt Out Trust for the benefit of the Opt Out Contract
11 Holders, and to maintain the remaining \$66.1 million for distribution to the Non-Opt Out
12 Contract Holders (and their subrogees, if applicable) at a later date pending further Court
13 order (such \$66.1 million reserved amount being hereinafter referred to as the "Artemis
14 Settlement Fund Distribution Reserve")).

15 Consistent with the Provisional Article 17 Distribution proposed by this Motion, the
16 Commissioner has had an estimated calculation done under Article 17 of the Enhancement
17 Agreement as to the \$66.1 million Artemis Settlement Fund Distribution Reserve. This
18 calculation yields a distribution of approximately 22.87% of the Artemis Settlement Fund
19 Distribution Reserve (or approximately \$15.1 million) to the Opt In Policyholders, and a
20 distribution of approximately 77.13% (or approximately \$51 million) to the PGAs. Thus,
21 under the Provisional Article 17 Distribution proposed by this Motion, approximately \$15.1
22 million of the Artemis Settlement Fund Distribution Reserve would be distributed by Aurora
23 to the Opt In Policyholders, and the remaining approximately \$51 million would continue to
24 be reserved (on account of the distribution that would go to the PGAs under Article 17 if the
25 PGAs prevail on the Article 10/17 Dispute, and on account of the distribution that would go
26 to the Opt In Policyholders under Article 10 if the Commissioner prevails on the Article
27 10/17 Dispute) pending further Court order. See Declaration of Lauren Roberson filed in
28 support of the Motion ("Roberson Decl.") ¶6 & Exhibit A thereto for calculation worksheet.

1 The mechanics of distributing this approximate \$15.1 million component of the
2 Provisional Article 17 Distribution to the Opt In Policyholders and reserving the remaining
3 approximate \$51 million of the Artemis Settlement Fund Distribution Reserve pending
4 further Court order would be accomplished consistent with the provisions of the ELIC
5 Rehabilitation Plan as follows: The Commissioner, as Rehabilitator of the ELIC estate,
6 acting in accordance with Section 12.11.3 of the Rehabilitation Plan, would distribute to
7 Aurora the entire \$66.1 million of the Artemis Settlement Fund Distribution Reserve. Solely
8 for purposes of the Provisional Article 17 Distribution, such funds would be treated as
9 “Deemed Securities Proceeds” under Section 17.1.2.2.2(i) of the Enhancement Agreement.
10 Pursuant to its obligations under Article 9 of the Rehabilitation Agreement, Aurora would
11 then be required to make a precise calculation for an Article 17 Distribution, determining the
12 precise dollars distributable to the Opt In Policyholders, and the precise dollars distributable
13 to the PGAs. Aurora would then proceed (i) to distribute (subject to the “de minimis”
14 exception described in part III below) to the Opt In Policyholders their respective shares as
15 indicated by Aurora’s calculation (which, as to this component of the Provisional Article 17
16 Distribution pertaining to the Artemis Settlement Fund Distribution Reserve, should
17 aggregate approximately \$15.1 million), and (ii) distribute back to the Commissioner the
18 amount distributable to the PGAs as indicated by Aurora’s calculation (which, as to this
19 component of the Provisional Article 17 Distribution pertaining to the Artemis Settlement
20 Fund Distribution Reserve, should be approximately \$51 million), to be held by the
21 Commissioner in reserve pending further Court order. Roberson Decl. ¶7.

22 **B. The Aurora and CDR Settlements**

23 As indicated in footnote 5 of the August 31 Motion, the Commissioner in February
24 2005 reached agreements in principle with respect to the following two settlements with
25 various parties in the Altus Litigation (collectively, the “February 2005 Settlements”):

26 (A) a settlement of \$80 million with Aurora National Life Assurance Company
27 and New California Life Holdings, Inc. (the “Aurora Settlement”), \$78.75 million of which
28 would be payable to the Commissioner for the benefit of the ELIC estate and the remaining

1 \$1.25 million of which would be payable to the California Attorney General (the "AG") in
2 exchange for the AG's release of claims against such settling parties; and

3 (B) a settlement of \$525 million with the CDR parties and Credit Lyonnais (the
4 "CDR Settlement"), \$516.5 million of which would be payable to the Commissioner for the
5 benefit of the ELIC estate and the remaining \$8.5 million of which would be payable to the
6 AG in exchange for the AG's release of claims against such settling parties.

7 As further explained in footnote 5 of the August 31 Motion, there were then various
8 conditions precedent to the consummation of the February 2005 Settlements, including,
9 without limitation, that orders approving the February 2005 Settlements be issued by the
10 U.S. District Court with jurisdiction over the Altus Litigation and that such orders become
11 final, which had not yet occurred at the time the August 31 Motion was filed or heard.
12 Accordingly, the proceeds to be received from the February 2005 Settlements were not
13 covered by the August 31 Motion.

14 The conditions precedent to the consummation of the Aurora Settlement have since
15 been fulfilled, and the \$78.75 million of Aurora Settlement funds payable to the
16 Commissioner (the "Aurora Settlement Amount") have been received by the Commissioner.
17 Similarly, the conditions precedent to the consummation of the CDR Settlement also have
18 been fulfilled, and the Commissioner recently has received the full \$516.5 million of CDR
19 Settlement funds payable to the Commissioner (the "CDR Settlement Amount").

20 In December 2005, when the Aurora Settlement already had been consummated and
21 the CDR Settlement was close to consummation, the Commissioner filed the Second
22 Distribution Motion, seeking authority to distribute to the Opt Out Trust the Opt Out
23 Percentage of the Aurora Settlement Amount and the CDR Settlement Amount, minus an
24 Expense Reserve to cover the substantial expenses incurred and to be incurred in connection
25 with prosecuting the Altus Litigation and in winding up the ELIC conservation case. That
26 Expense Reserve to be taken from the aggregate \$595.25 million Aurora and CDR
27 Settlement Amounts was initially proposed to be \$90 million, and was lowered to \$80
28 million pursuant to the Commissioner's supplemental filing with the Court on January 11,

1 2006 and served on all parties in connection with the Second Distribution Motion (the
2 “Supplemental Filing”). Thus, under the Second Distribution Motion (as amended by the
3 Supplemental Filing) scheduled to be heard on January 18, 2005, the Commissioner has
4 proposed to distribute to the Opt Out Trust: (i) approximately \$23.1 million of the Aurora
5 Settlement Amount (which is the approximately 33.9% Opt Out Percentage *times* \$78.75
6 million, *minus* approximately \$3.6 million, which constitutes the pro rata portion of the \$80
7 million Expense Reserve allocable to the Opt Out Percentage of the Aurora Settlement
8 Amount); and (ii) approximately \$151.5 million of the CDR Settlement Amount (which is
9 the approximately 33.9% Opt Out Percentage *times* \$516.5 million, *minus* approximately
10 \$23.5 million, which constitutes the pro rata portion of the \$80 million Expense Reserve
11 allocable to the Opt Out Percentage of the CDR Settlement Amount). Roberson Decl. ¶8.

12 Assuming the distribution to the Opt Out Trust and the proportionate funding of the
13 Expense Reserve pursuant to the Second Distribution Motion and Supplemental Filing are
14 approved by the Court at the scheduled hearing on January 18, the approximate amounts
15 remaining from the Aurora Settlement Amount and the CDR Settlement Amount will be as
16 follows:

17 1. From the Aurora Settlement Amount, approximately \$52 million (*i.e.*, \$78.75
18 million, *minus* approximately \$23.1 million distributed to the Opt Out Trust, *minus*
19 approximately \$3.6 million allocated to the Expense Reserve based on the Opt Out
20 Percentage) (such \$52 million being hereinafter referred to as the “Remaining Aurora
21 Settlement Amount”); and

22 2. From the CDR Settlement Amount, approximately \$341.5 million (*i.e.*, \$516.5
23 million, *minus* approximately \$151.5 million distributed to the Opt Out Trust, *minus*
24 approximately \$23.5 million allocated to the Expense Reserve based on the Opt Out
25 Percentage) (such \$341.5 million being hereinafter referred to as the “Remaining CDR
26 Settlement Amount”). *Id.* ¶9.

27 In addition to holding this \$52 million Remaining Aurora Settlement Amount and
28 \$341.5 million Remaining CDR Settlement Amount, the Commissioner will have funded

1 approximately \$27 million (\$3.6 million and \$23.5 million) of the \$80 million Expense
2 Reserve via proportionate allocations from the Opt Out Percentage as described above.

3 By the current Motion, the Commissioner seeks to fund the remainder of the \$80
4 million Expense Reserve proportionately from the Non-Opt Out Percentage of the Aurora
5 Settlement Amount and the CDR Settlement Amount, and then to effect a Provisional
6 Article 17 Distribution of the balance, as more specifically calculated and described
7 immediately below.

8 First, the proportionate share of the Expense Reserve that will be funded from the Non-
9 Opt Out Percentage (*i.e.*, approximately 66.1%) of the Aurora Settlement Amount and the
10 CDR Settlement Amount is the flip side of the approximately \$27 million that was funded
11 from the Opt Out Percentage calculation. Thus, approximately \$7 million of the \$80 million
12 Expense Reserve is allocable to the Non-Opt Out Percentage of the Aurora Settlement
13 Amount, and approximately \$46 million of the \$80 million Expense Reserve is allocable to
14 the Non-Opt Out Percentage of the CDR Settlement Amount (for a total of approximately
15 \$53 million of the Expense Reserve funded from the Non-Opt Out Percentage of the Aurora
16 and CDR Settlement Amounts). Roberson Decl. ¶11 & Ex. A. After subtracting these
17 amounts from, respectively, the \$52 million Remaining Aurora Settlement Amount and the
18 \$341.5 million Remaining CDR Settlement Amount, this leaves approximately \$45 million
19 of the Aurora Settlement Amount (*i.e.*, \$52 million *minus* \$7 million) (the “Distributable
20 Aurora Settlement Amount”) and approximately \$295.5 million of the CDR Settlement
21 Amount (*i.e.*, \$341.5 million *minus* \$46 million) (the “Distributable CDR Settlement
22 Amount”) available for distribution as a Provisional Article 17 Distribution. *Id.*

23 As the final step in computing the proposed Provisional Article 17 Distribution of the
24 Distributable Aurora Settlement Amount and the Distributable CDR Settlement Amount, the
25 Commissioner has had an estimated calculation done under Article 17 with respect to the
26 \$45 million Distributable Aurora Settlement Amount and the \$295.5 million Distributable
27 CDR Settlement Amount. This calculation under Article 17 yields (i) a distribution of
28 approximately 22.87% of the approximately \$45 million Distributable Aurora Settlement

1 Amount (or approximately \$10.3 million) and a distribution of approximately 22.87% of the
2 approximately \$295.5 million Distributable CDR Settlement Amount (or approximately
3 \$67.5 million) to Opt In Policyholders, for a total distribution to Opt In Policyholders of
4 approximately \$77.8 million, and (ii) a distribution of approximately 77.13% of the
5 approximately \$45 million Distributable Aurora Settlement Amount (or approximately
6 \$34.75 million) and a distribution of approximately 77.13% of the approximately \$295.5
7 million Distributable CDR Settlement Amount (or approximately \$228 million) to the
8 PGAs, for a total distribution to the PGAs of approximately \$262.75 million. *Id.* Thus,
9 under the Provisional Article 17 Distribution proposed by this Motion, the Commissioner
10 would distribute approximately \$10.3 million of the Distributable Aurora Settlement
11 Amount and approximately \$67.5 million of the Distributable CDR Settlement Amount (for
12 a total of approximately \$77.8 million) to the Opt In Policyholders, and the remaining
13 approximately \$34.75 million of the Distributable Aurora Settlement Amount and
14 approximately \$228 million of the Distributable CDR Settlement Amount (for a total of
15 approximately \$262.75 million) would continue to be reserved (on account of the
16 distribution that would go to the PGAs under Article 17 if the PGAs prevail on the Article
17 10/17 Dispute, and on account of the distribution that would go to the Opt In Policyholders
18 under Article 10 if the Commissioner prevails on the Article 10/17 Dispute) pending further
19 Court order (subject only to the distribution of the approximately \$46 million “floor” amount
20 to the PGAs from the reserved \$228 million of the Distributable CDR Settlement Amount,
21 as requested and described in greater detail in Part IV below). *Id.* ¶12 & Ex. A.

22 As was the case with the first component of the proposed Provisional Article 17
23 Distribution described in Part II.A above, the mechanics of distributing this approximate
24 \$77.8 million component to the Opt In Policyholders and reserving the remaining
25 approximate \$262.75 million of the Distributable Aurora Settlement Amount and
26 Distributable CDR Settlement Amount pending further Court order would be accomplished
27 consistent with the provisions of the ELIC Rehabilitation Plan as follows: The
28 Commissioner, as Rehabilitator of the ELIC estate, acting in accordance with Section

1 12.11.3 of the Rehabilitation Plan, would distribute to Aurora the entire approximately \$340
2 million of the Distributable Aurora Settlement Amount and Distributable CDR Settlement
3 Amount. Solely for purposes of the Provisional Article 17 Distribution, such funds would
4 be treated as “Deemed Securities Proceeds” under Section 17.1.2.2.2(i) of the Enhancement
5 Agreement. Pursuant to its obligations under Article 9 of the Rehabilitation Agreement,
6 Aurora would then be required to make a precise calculation for an Article 17 Distribution,
7 determining the precise dollars distributable to the Opt In Policyholders, and the precise
8 dollars distributable to the PGAs. Aurora would then proceed (i) to distribute (subject to the
9 “de minimis” exception described in part III below) to the Opt In Policyholders their
10 respective shares as indicated by Aurora’s calculation (which, as to this component of the
11 Provisional Article 17 Distribution pertaining to the Distributable Aurora Settlement
12 Amount and Distributable CDR Settlement Amount, should aggregate approximately \$77.8
13 million), and (ii) distribute back to the Commissioner the amount distributable to the PGAs
14 as indicated by Aurora’s calculation (which, as to this component of the Provisional Article
15 17 Distribution pertaining to the Distributable Aurora Settlement Amount and the
16 Distributable CDR Settlement Amount, should be approximately \$262.75 million), to be
17 held by the Commissioner in reserve pending further Court order. *Id.* ¶13.

18 **C. Total Proposed Provisional Article 17 Distribution**

19 Based on the calculations and explanations in Parts II.A. and II.B immediately above
20 as applied to the three sources/segments of Altus Litigation Proceeds addressed by this
21 Motion, the Commissioner by this Motion proposes a Provisional Article 17 Distribution
22 that will (i) provide aggregate distributions of approximately \$93 million to Opt In
23 Policyholders (i.e., approximately \$15.1 million from the Artemis Settlement Fund
24 Distribution Reserve, plus approximately \$10.3 million from the Distributable Aurora
25 Settlement Amount, plus approximately \$67.5 million from the Distributable CDR
26 Settlement Amount), and (ii) require the remaining approximately \$313.75 million combined
27 total of the Artemis Settlement Fund Distribution Reserve (i.e., approximately \$51 million),
28 Distributable Aurora Settlement Amount and Distributable CDR Settlement Amount (i.e., a

1 combined total of approximately \$262.75 million) that would be distributable to the PGAs in
2 an Article 17 Distribution to be reserved pending further Court order, subject only to the
3 payment of the “floor” amount to the PGAs from the reserved \$228 million of the
4 Distributable CDR Settlement Amount as described in Part IV below.⁷

5 **D. The Expense Reserve**

6 As indicated in the Second Distribution Motion and the Supplemental Filing with
7 respect thereto, the Commissioner proposes to set aside the \$80 million Expense Reserve to
8 ensure that the estate maintains adequate funds to cover (1) the substantial legal fees and
9 expenses already incurred in connection with the Commissioner’s prosecution of the Altus
10 Litigation; (2) the legal fees and expenses that may be incurred in any appeal and/or retrial
11 of the Altus Litigation as against the non-settling parties, (3) legal fees and expenses already
12 incurred and to be incurred by the Commissioner in connection with the Article 10/17
13 Dispute; and (4) expenses of administering the ELIC estate that are not related to the Altus
14 Litigation or the Article 10/17 Dispute. The Commissioner believes that the proposed \$80
15 million Expense Reserve represents an appropriate high-side estimate of such fees and
16 expenses. If the Commissioner does not so establish such an Expense Reserve from the
17 Aurora Settlement Amount and the CDR Settlement Amount that the Commissioner is
18 comfortable under virtually all circumstances will cover estate expenses, including much of
19 the considerable costs of prosecuting the Altus Litigation that produced the Aurora and CDR
20 Settlements, any proposed material distribution to the Opt Out Trust or for the benefit of Opt
21

22 ⁷The approximate calculations for the Provisional Article 17 Distribution have been
23 broken down and presented in three separate components (*i.e.*, Artemis Settlement Fund
24 Distribution Reserve, the Distributable Aurora Settlement Amount and the Distributable
25 CDR Settlement Amount) for clarity and precision in explaining the proposed Provisional
26 Article 17 Distribution. However, it is not required or intended that Aurora, once the funds
27 constituting these amounts have been turned over to Aurora by the Commissioner, perform
28 three separate calculations or make three separate sets of distributions. Rather, Aurora, once
it receives these funds, can make a unitary calculation for a Provisional Article 17
Distribution of the entire amount, and make one set of distributions to the Opt In
Policyholders, and one distribution to the Commissioner (of the amount that otherwise
would be distributable to the PGAs under an Article 17 Distribution, to be reserved by the
Commissioner as specified above).

1 In Policyholders could result in an over-distribution that for all practical purposes could be
2 impossible to recover at a later date.⁸

3 Thus, while the Commissioner certainly hopes that additional funds beyond the Aurora
4 Settlement Amount and the CDR Settlement Amount will be available for distribution
5 pursuant to the ELIC Rehabilitation Plan, because there is no assurance as to when (or if)
6 such funds will be available, the Commissioner must proceed on the assumption that all
7 accrued and future expenses must be funded from the Aurora Settlement Amount and CDR
8 Settlement Amount. Accordingly, the Commissioner seeks to establish the Expense Reserve
9

10
11 ⁸This is so because the Commissioner does not know if and when there will be any
12 additional recoveries in the Altus Litigation beyond the Aurora Settlement Amount and the
13 CDR Settlement Amount. On November 21, 2005, the District Court issued its "Fed R. Civ.
14 P. 52 Findings of Fact and Conclusions of Law Re Restitution" (the "Restitution Decision")
15 in the Altus Litigation. Pursuant to the Restitution Decision, the District Court found that
16 Artemis, the non-settling party against whom trial of the Altus Litigation proceeded in 2005,
17 had been unjustly enriched as a result of making certain misrepresentations in connection
18 with its acquisition of its interest in Aurora. The District Court determined that judgment
19 would be entered against Artemis in the amount of \$189,806,288 (plus interest on such
20 amount at 7%) to the Commissioner as restitution (the "Restitution Award"). Pursuant to the
21 terms of the Final Settlement Agreement entered into on December 15, 2003 between the
22 U.S. Attorney and Artemis in a criminal action against Artemis and others as described more
23 particularly in Part I of the August 31 Distribution Motion, under which \$110 million of the
24 monies paid by Artemis to the U.S. Attorney to settle criminal charges would be paid over to
25 the Commissioner for the benefit of the ELIC estate, the Commissioner agreed that Artemis
26 would receive a credit in the amount of \$110 million against any amount that Artemis is
27 responsible to pay under a judgment in favor of the Commissioner or a court-approved
28 settlement of the Commissioner's claims against Artemis in the Altus Litigation. See
Declaration of Karl D. Belgum in Support of August 31 Distribution Motion ¶12. The
Restitution Award has not yet been reduced to a judgment pending the District Court's final
calculation and award of pre-judgment interest. The parties have submitted contending
positions on the calculation of such interest. The District Court is expected to enter
judgment in the near future. Payment of any such judgment, when entered, may be delayed
in light of the possibility of an appeal and/or retrial. In addition, any such judgment may be
in effect reduced to zero if the District Court grants a post-trial "Motion for Offsets" filed by
Artemis, whereby Artemis is seeking to offset any judgment against it against the
settlements paid to the Commissioner by other defendants in the Altus Litigation (i.e., the
Aurora and CDR Settlements). Moreover, the Commissioner cannot be certain whether
there will be any additional recoveries in the Altus Litigation from other non-settling parties,
such as parties against whom default judgments have been or may in the future be obtained.
Consequently, the Commissioner must assume for purposes of any present distributions that
all presently accrued estate expenses and future estate expense will have to be funded at least
in material part from the substantial Aurora and CDR Settlement Amounts, and the
Commissioner therefore must first deduct and establish the Expense Reserve before
calculating and effecting any distribution or other type of distribution reserve from the
Aurora Settlement Amount or the CDR Settlement Amount.

1 for that purpose and be able to use the Expense Reserve as necessary to pay approved estate
2 expenses. In the event that actual expenses turn out to be less than the amount of the
3 Expense Reserve, the Commissioner will distribute the unused Expense Reserve in a
4 subsequent distribution in accordance with the terms of the ELIC Rehabilitation Plan.

5 The Expense Reserve is separate and distinct from the distribution reserve that is part
6 of the Provisional Article 17 Distribution. As noted in Part II.B. above, the Commissioner
7 has allocated the \$80 million Expense Reserve proportionately to the Opt Out Contract
8 Holders and the Non-Opt Out Contract Holders (and their subrogees, if applicable) in
9 accordance with the Opt Out Percentage and the Non-Opt Out Percentage. Thus,
10 approximately 33.9% of \$80 million (or \$27 million) has been deducted off the top in
11 calculating the portion of Aurora Settlement Amount and the CDR Settlement Amount
12 distributable to the Opt Out Trust pursuant to the Second Distribution Motion and the
13 Supplemental Filing, and approximately 66.1% of \$80 million (or \$53 million) has been
14 deducted off the top before calculation of the Provisional Article 17 Distribution proposed
15 by this Motion.

16 The Commissioner understands that there are or may be disagreements among various
17 interested parties as to whether this proportionate allocation of expenses based on the Opt
18 Out Percentage and Non-Opt Out Percentage is appropriate as to all expenses. The
19 Commissioner by this Motion does not purport to decide or ask the Court to decide presently
20 any such issue, but rather proposes to effect the Expense Reserve based on the
21 straightforward allocation method, with interested parties reserving their right to seek a
22 Court determination and a "true up" adjustment if any such issue is presented and cannot be
23 resolved consensually with the Commissioner.

24 III.

25 THE DE MINIMIS EXCEPTION TO THE PROPOSED 26 PROVISIONAL ARTICLE 17 DISTRIBUTION

27 As part of the Motion, the Commissioner requests that the foregoing proposed
28 Provisional Article 17 Distribution be subject to the exception described in this Part III (the

1 “de minimis exception”) pertaining to any distribution check that is issuable by Aurora to
2 any Opt In Policyholder, that would be less than the amount of \$2.00.

3 As explained in Part IV of the August 31 Distribution Motion, when Aurora makes a
4 distribution to Opt In Policyholders, whether or not an Opt In Policyholder receives cash for
5 his or her allocation of the distribution (effected by the issuance of a check to such Non-Opt
6 Out Contract Holder) or receives a credit to his or her Restructured Account Value depends
7 upon the type of policy held by such Opt In Policyholder. Declaration of Lauren Roberson
8 filed August 31, 2005 in Support of August 31 Distribution Motion (“August 31 Roberson
9 Decl.”) ¶6. There are significant costs associated with cash distributions effected by checks.
10 Those costs include check-printing costs, mailing costs, costs associated with provision of
11 annual tax forms (1099s) and escheatment costs. *Id.* Based on an analysis of costs incurred
12 in making various prior distributions, these costs are estimated to be approximately \$2.00
13 per check issued. *Id.*

14 Accordingly, in order to provide that the cost of a cash distribution to any Opt In
15 Policyholder does not exceed the cash amount distributable to such policyholder, this
16 Motion proposes that no check shall be issued by Aurora to any Opt In Policyholder, where
17 the cash amount distributable to such contract holder is less than \$2.00. Further, because
18 such amount is de minimis, and because the cost of carrying a future credit for the account of
19 any affected Opt In Policyholder would be disproportionate to the de minimis benefit, the
20 Motion also proposes that no credit or future benefit with regard to any such undistributed
21 amount of less than \$2.00 shall be maintained or provided by Aurora, and instead that any
22 such undistributed amounts shall be distributed by Aurora back to the Commissioner/ELIC
23 and maintained as part of the ELIC estate, and included in the next or final distribution by
24 the Commissioner/ELIC or disposed of as otherwise may be ordered by the Court.

25 IV.

26 THE PROPOSED DISTRIBUTION TO THE PGAS PURSUANT 27 TO THE MAY 13 LETTER AGREEMENT

28 The \$516.5 million CDR Settlement Amount is by far the largest component of the

1 \$705 million in Altus Litigation Proceeds collected by the Commissioner to date, and under
2 virtually any circumstance will represent a material portion of all Altus Litigation Proceeds
3 ultimately realized and collected. Like many settlements in large-scale cases, the CDR
4 Settlement was intensively negotiated and reached on the eve of trial after years of hard-
5 fought litigation. The Commissioner obviously believes that the substantial CDR Settlement
6 was a fair and significant settlement in the best interests of the ELIC estate and the
7 beneficiaries of the ELIC Rehabilitation Plan, and the District Court with jurisdiction over
8 the Altus Litigation had no issue approving the settlement as a good faith settlement.
9 Declaration of Richard Baum filed in support of the Motion ("Baum Decl.") ¶¶3-4.

10 In the intensive settlement negotiations leading directly to the CDR Settlement, the
11 CDR parties made an immutable condition of settlement that the Commissioner not only
12 provide a release on behalf of the ELIC estate, but also that the Commissioner procure and
13 deliver full and final releases of the CDR parties by NOLHGA and the 43 PGAs represented
14 by NOLHGA. *Id.* ¶5. NOLHGA and the PGAs were under no obligation to provide any
15 releases of the CDR parties, and upon the Commissioner's request to provide such releases,
16 were reluctant to provide them and indicated that they would not provide them gratuitously
17 because NOLHGA and the PGAs maintained that such releases would or could be
18 prejudicial to various of their rights and interests. *Id.* ¶6.

19 More specifically, NOLHGA pointed out to the Commissioner that with the Article
20 10/17 Dispute already having arisen at that time, depending on how the Article 10/17
21 Dispute was ultimately resolved, the value of the CDR Settlement to NOLHGA and the
22 PGAs could be significantly impacted and could affect their judgment about whether it
23 would be reasonable for NOLHGA and the PGAs to provide the requested releases in order
24 to facilitate finalizing and implementing the CDR Settlement. Declaration of John F.
25 Finston filed in support of the Motion ("Finston Decl.") ¶¶4-5.

26 Second, NOLHGA advised the Commissioner that at the time of the intensive
27 settlement negotiations between the Commissioner and CDR and the request for
28 NOLHGA's and the PGAs' releases, NOLHGA believed that it and the PGAs had valuable

1 rights against the CDR parties based on an agreement executed by one of CDR's
2 predecessors in interest in 1993. *Id.* ¶6. NOLHGA maintained that under the terms of that
3 agreement, if the CDR parties were to settle with the Commissioner or other parties
4 concerning disputes regarding various assets and bonds on terms more favorable than terms
5 received by NOLHGA and the PGAs, NOLHGA and the PGAs would have direct rights
6 against the CDR parties. With the Article 10/17 Dispute between the Commissioner and
7 NOLHGA already extant and unresolved, NOLHGA stated that it believed that the proposed
8 CDR Settlement would qualify as a settlement that would trigger NOLHGA's and the
9 PGAs' rights against the CDR parties. Accordingly, in light of these potential claims against
10 the CDR parties, NOLHGA expressed concern about the prejudice to NOLHGA and the
11 PGAs if they released all of their rights and claims against the CDR parties. *Id.* ¶¶6-7.

12 In order to avoid losing what the Commissioner perceived to be a very favorable
13 settlement to the ELIC estate with the CDR parties, and to avoid unnecessary and costly
14 litigation and complications, the Commissioner, pursuant to his statutory authority set forth
15 in Sections 1037 and 1057 of the California Insurance Code, reached an agreement with
16 NOLHGA (on behalf of itself and the 43 PGAs) reflected in the May 13 Letter Agreement, a
17 true and correct copy of which is attached as Exhibit A to the Baum Declaration. Baum
18 Decl. ¶7 & Ex. A. The May 13 Letter Agreement ensured that the requisite releases could
19 be obtained from NOLHGA and the 43 PGAs and that the CDR Settlement accordingly
20 could be finalized and consummated. Pursuant to the May 13 Letter Agreement, NOLHGA
21 and the 43 PGAs in fact signed and delivered full and final releases in favor of the CDR
22 parties in a form acceptable to both the Commissioner and the CDR parties and in a timely
23 fashion, allowing the CDR Settlement to be finalized and consummated. Without the
24 releases from NOLHGA and the PGAs, the CDR Settlement — and the CDR parties'
25 payment of \$516.5 million for the benefit of the ELIC estate and \$8.5 million for the benefit
26 of the California Attorney General as part of that settlement — would not have occurred.
27 *Id.* ¶8.

28 In connection with the May 13 Letter Agreement, NOLHGA and the PGAs further

strengthened the Commissioner's position by their agreeing to provide, at the Commissioner's request at any time in the future, similar full and final releases in favor of Artemis in connection with any potential future settlement negotiated by the Commissioner with Artemis of the Commissioner's claims against Artemis in the Altus Litigation. *Id.* ¶9.

In exchange for these valuable undertakings by NOLHGA and the PGAs, including most importantly their execution and delivery of full releases that made the consummation of the CDR Settlement possible, the Commissioner by the May 13 Letter Agreement agreed to a "floor" distribution to the PGAs from the CDR Settlement Amount based on a formula applied to the CDR Settlement Amount after reduction for various expenses. While this "floor" recovery in favor of the PGAs cannot under any circumstance exceed \$50 million, the Commissioner estimates that the "floor" recovery distributable to the PGAs pursuant to the formula in the May 13 Letter Agreement is approximately \$46 million. Accordingly, as part of the Motion, the Commissioner seeks authority to distribute approximately \$46 million to the PGAs as the "floor" distribution he committed to make to the PGAs from the CDR Settlement Amount pursuant to the May 13 Letter Agreement. *Id.* ¶¶10-11.⁹

The effect of the requested "floor" distribution is straightforward. It presently does not affect any amount that any other interested parties would otherwise receive, inasmuch as the "floor" distribution will be made from the \$228 million reserved portion of the Distributable

⁹The amount of the "floor" distribution to the PGAs set forth in this Motion is approximate, because one of the components in the formula for calculating the "floor" distribution to the PGAs pursuant to the May 13 Letter Agreement requires a determination of the expenses relating to the litigation against the CDR parties and resulting CDR Settlement (the "CDR Expenses"). The Commissioner based his calculation of the "floor" distribution amount for purposes of this Motion in part on an estimate of the CDR Expenses. It is possible that the actual amount of such CDR Expenses will be more or less than the amount of this estimate. The Commissioner and NOLHGA therefore each reserves the right to seek a "true up" of the amount of the "floor" distribution payment to the PGAs to the extent that the actual amount of the CDR Expenses varies from the amount estimated by the Commissioner for purposes of this Motion. Thus, if it is determined that the actual amount of the CDR Expenses is less than the amount estimated by the Commissioner, the Commissioner will distribute this differential to the PGAs as a second part of the "floor" distribution; if on the other hand, it is determined that the actual amount of the CDR Expenses is more than the amount estimated by the Commissioner, the PGAs will be obligated to return this differential to the Commissioner from the "floor" distribution made to the PGAs pursuant to this Motion.

1 CDR Settlement Amount described in Part II.B. above (*i.e.*, from the portion that in any
2 event would be reserved pending the outcome of the Article 10/17 Dispute). If NOLHGA
3 prevails on the Article 10/17 Dispute, the “floor” distribution will have had no practical
4 meaning or affect, inasmuch as the PGAs would be entitled to receive the entire \$228
5 million reserved portion of the Distributable CDR Settlement Amount, and the
6 approximately \$46 million “floor” distribution paid therefrom would simply have been an
7 advance payment of a portion of what the PGAs were ultimately entitled to receive. If, on
8 the other hand, the Commissioner prevails on the Article 10/17 Dispute, then the effect of
9 the “floor” distribution to the PGAs will be to have reduced by approximately \$46 million
10 the \$228 million reserved portion of the Distributable CDR Settlement Amount, leaving
11 approximately \$182 million (rather than \$228 million) of the Distributable CDR Settlement
12 Amount, together with the full approximately \$51 million of the Artemis Settlement Fund
13 Distribution Reserve and the full approximately \$34.75 million of the reserved Distributable
14 Aurora Settlement Amount, to be distributed to Opt In Policyholders after a recalculation
15 under Article 10. Baum Decl. ¶¶12-13.

16 The Commissioner believes that the tradeoff represented by the May 13 Letter
17 Agreement was and is plainly in the best interests of the ELIC estate. It produced a
18 substantial benefit to the estate by making a significant \$516.5 million settlement possible,
19 without any potential cost under one unknown future scenario (*i.e.*, NOLHGA prevailing on
20 the Article 10/17 Dispute), and at an approximately \$46 million potential cost, or less than
21 9% of the CDR Settlement Amount, under a second unknown future scenario (*i.e.*, the
22 Commissioner prevailing on the Article 10/17 Dispute). In practical terms, the
23 Commissioner effectively agreed that the PGAs under this second scenario are entitled to an
24 approximately \$46 million portion of the CDR Settlement Amount for having given 44
25 releases to the CDR parties that were a *sine qua non* of the CDR Settlement, thus ensuring
26 that the other \$476.5 million of the CDR Settlement Amount was in all circumstances
27 available for the benefit of the ELIC estate. *Id.* ¶14.

28 For all of these reasons, the Court should approve the Commissioner’s request to honor

1 the commitment he made to NOLHGA and the PGAs, pursuant to the May 13 Letter
2 Agreement, to distribute the approximately \$46 million "floor" amount to the PGAs from the
3 \$228 million reserved portion of the Distributable CDR Settlement Amount.

4 **CONCLUSION**

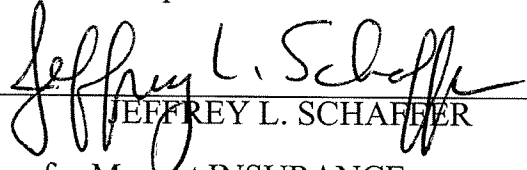
5 Based on the foregoing, the Commissioner respectfully requests that the Court grant
6 the Motion and the relief requested therein, and enter an order in the proposed form
7 submitted herewith.

8
9 DATED: January 18, 2006

10 Respectfully,

11 JEFFREY L. SCHAFER
12 ETHAN P. SCHULMAN
13 HOWARD RICE NEMEROVSKI CANADY
14 FALK & RABKIN
15 A Professional Corporation

16 By: _____


JEFFREY L. SCHAFER

17 Attorneys for Movant INSURANCE
18 COMMISSIONER OF THE STATE OF
19 CALIFORNIA in his capacity as Conservator,
20 Liquidator and Rehabilitator of Executive Life
21 Insurance Company
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HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

1 **PROOF OF SERVICE**

2 I, Katy Sakamoto, declare:

3 I am a resident of the State of California and over the age of eighteen years, and not a
4 party to the within action; my business address is Three Embarcadero Center, 7th Floor, San
5 Francisco, California 94111-4024. On January 18, 2006, I served the following
6 document(s) described as:

7 1. MOTION OF INSURANCE COMMISSIONER OF THE STATE OF
8 CALIFORNIA FOR AN ORDER APPROVING INTERIM DISTRIBUTION OF
9 SPECIFIED ALTUS LITIGATION PROCEEDS TO (1) NON-OPT OUT CONTRACT
10 HOLDERS AND THEIR NON-PGA SUBROGNEES (IF APPLICABLE) CALCULATED
11 PURSUANT TO ARTICLE 17 OF ENHANCEMENT AGREEMENT, AND (2) PGAS
12 PURSUANT TO MAY 13, 2005 LETTER AGREEMENT; AND SUPPORTING
13 MEMORANDUM OF POINTS AND AUTHORITIES

14 2. DECLARATION OF RICHARD BAUM IN SUPPORT OF MOTION OF
15 INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA FOR AN ORDER
16 APPROVING INTERIM DISTRIBUTION OF SPECIFIED ALTUS LITIGATION
17 PROCEEDS TO (1) NON-OPT OUT CONTRACT HOLDERS AND THEIR NON-PGA
18 SUBROGNEES (IF APPLICABLE) CALCULATED PURSUANT TO ARTICLE 17 OF
19 ENHANCEMENT AGREEMENT, AND (2) PGAS PURSUANT TO MAY 13, 2005
20 LETTER AGREEMENT

21 3. DECLARATION OF LAUREN ROBERSON IN SUPPORT OF MOTION OF
22 INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA FOR AN ORDER
23 APPROVING INTERIM DISTRIBUTION OF SPECIFIED ALTUS LITIGATION
24 PROCEEDS TO (1) NON-OPT OUT CONTRACT HOLDERS AND THEIR NON-PGA
25 SUBROGNEES (IF APPLICABLE) CALCULATED PURSUANT TO ARTICLE 17 OF
26 ENHANCEMENT AGREEMENT, AND (2) PGAS PURSUANT TO MAY 13, 2005
27 LETTER AGREEMENT

28 4. DECLARATION OF JOHN F. FINSTON IN SUPPORT OF MOTION OF
INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA FOR AN ORDER
APPROVING INTERIM DISTRIBUTION OF SPECIFIED ALTUS LITIGATION
PROCEEDS TO (1) NON-OPT OUT CONTRACT HOLDERS AND THEIR NON-PGA
SUBROGNEES (IF APPLICABLE) CALCULATED PURSUANT TO ARTICLE 17 OF
ENHANCEMENT AGREEMENT, AND (2) PGAS PURSUANT TO MAY 13, 2005
LETTER AGREEMENT

5. [PROPOSED] ORDER GRANTING MOTION OF INSURANCE
COMMISSIONER OF THE STATE OF CALIFORNIA FOR AN ORDER APPROVING
INTERIM DISTRIBUTION OF SPECIFIED ALTUS LITIGATION PROCEEDS TO (1)
NON-OPT OUT CONTRACT HOLDERS AND THEIR NON-PGA SUBROGNEES (IF
APPLICABLE) CALCULATED PURSUANT TO ARTICLE 17 OF ENHANCEMENT
AGREEMENT, AND (2) PGAS PURSUANT TO MAY 13, 2005 LETTER AGREEMENT

☒ by transmitting via e-mail the document(s) listed above to the e-mail
address(es) indicated below on this date.

☐ by transmitting via facsimile the document(s) listed above to the fax number(s)
set forth below on this date before 5:00 p.m.

- 1 ☒ by placing the document(s) listed above in a sealed envelope with postage
2 thereon fully prepaid, in the United States mail at San Francisco, California
3 addressed as set forth below.
4 ☒ by causing personal delivery by Free Wheelin' Attorney Service of the
5 document(s) listed above to the person(s) at the address(es) set forth below.
6 ☐ by placing the document(s) listed above in a sealed Federal Express envelope
7 and affixing a pre-paid air bill, and causing the envelope to be delivered to a
8 Federal Express agent for delivery
9 ☐ by personally delivering the document(s) listed above to the person(s) at the
10 address(es) set forth below.

11 **See Attached Service List**

12 I am readily familiar with the firm's practice of collection and processing
13 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
14 Service on that same day with postage thereon fully prepaid in the ordinary course of
15 business. I am aware that on motion of the party served, service is presumed invalid if
16 postal cancellation date or postage meter date is more than one day after date of deposit for
17 mailing in affidavit.

18 I declare under penalty of perjury that the foregoing is true and correct. Executed at
19 San Francisco, California on January 18, 2006.

20 

21 KATY SAKAMOTO

Service List

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