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19 UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA

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

24 Plaintiff,

25 v.

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

27 Defendants.
28

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

**DECLARATION OF CHARLES R.
RICE IN SUPPORT OF RESPONSE
TO ARTEMIS’S POST-TRIAL
BRIEF REGARDING
RESTITUTION**

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

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I, Charles R. Rice, declare:

1. I am one of the counsel of record for Plaintiff Insurance Commissioner of the State of California, as Conservator, Rehabilitator and Liquidator of Executive Life Insurance Company, in the above-referenced action. I have personal knowledge of the facts stated herein and, if called as a witness, I could and would testify competently thereto under oath.

2. Attached hereto as Exhibit A is a true and correct copy of selected pages of the Principal and Response Brief of Appellee/Cross-Appellant Artemis S.A. that was filed in the Ninth Circuit on or about August 23, 2006.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed on December 7, 2012, at San Francisco, California.

/s/Charles R. Rice
Charles R. Rice

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I, Charles R. Rice, declare:

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed on December 7, 2012, at San Francisco, California.

Charles Rice

Charles R. Rice

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Exhibit A

Docket Nos. 06-55297, 06-55379, 06-55391
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff/Appellant/Cross-Appellee,

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

Intervenors-Appellants,

vs.

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

Defendant/Appellee/Cross-Appellant.

PRINCIPAL AND RESPONSE BRIEF
OF APPELLEE/CROSS-APPELLANT ARTEMIS S.A.

Appeal and Cross-Appeal from the United States District Court,
Central District of California, Case No. CV-99-02829 AHM (CWx)
The Honorable A. Howard Matz, Judge Presiding

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- "All in all, there was enough evidence to demonstrate to both the jury and the Court that in some respects Artemis had played a shady game." ER 1488.

These findings constitute the principal pillars upon which the district court justified its restitution award of nearly a quarter-*billion* dollars; none of them provides a proper basis for that judgment. The reasons compelling this conclusion can be succinctly stated.

First, the Commissioner failed to prove the elements of unjust enrichment, he also failed to establish his fraud claim (which he identified as a necessary predicate to his equitable claim), and the court relied erroneously on the already-invalidated punitive damages award as a basis for restitution.

Second, the Commissioner cannot obtain an equitable award of "restitution" when he had, and pursued through trial, an alternative and adequate remedy at law. The fact that the Commissioner was unable to prove or establish his right to any legal damages does not make the remedy he sought "inadequate."

Third, the restitution award was impermissible because a valid, enforceable contract governs the transaction at issue. It is black-letter law that the parties cannot avoid their obligations under that contract and attempt an "end run" around the agreement by seeking "restitution" in equity.

2. The Commissioner Failed To Establish His Entitlement To Restitution, And The Invalidated Punitive Damages Verdict Is An Improper Basis For Such An Award

a. The Commissioner Failed To Establish The Elements Of Unjust Enrichment

As a preliminary matter, the restitution award in this case must be reversed because the Commissioner failed to establish each of the elements of that cause of action in California. A claim based on unjust enrichment is an action based in

quasi-contract. See *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996).⁷

To succeed on his claim for unjust enrichment, the Commissioner had to prove: (1) the receipt of a *benefit*; (2) *at the expense of another*; and (3) that retention of the property at issue is "unjust" or "inequitable." See *Ghirardo v. Antonioli*, 14 Cal. 4th 39, 51 (1996); *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (2000). He established none of those elements here.

As an initial matter, the Commissioner failed to allege, much less prove, that any "benefit" was conferred upon Artemis. As a matter of law, there is no "benefit" conferred when the plaintiff obtains fair market value in the transaction as to which he claims "unjust enrichment." See *Rheem Mfg. Co. v. United States*, 57 Cal. 2d 621, 626 (1962) (proof of payment of fair market value "tends to show that there was no unjust enrichment"); *Beanstalk Group, Inc. v. AM Gen. Corp.*, 283 F.3d 856, 863-64 (7th Cir. 2002) (finding that unjust enrichment was inappropriate where plaintiff had "received the full consideration for which it had negotiated"). Here, no "benefit" was bestowed upon Artemis because it was undisputed at trial that the Commissioner and the ELIC Estate received fair market value for ELIC's junk bonds. SER 281, 283. And, the Commissioner and the ELIC Estate obtained the best deal possible for the rehabilitated insurance company. SER 16-19; 41; 44; 536-37.

Second, the district court's decision is erroneous because it awarded restitution even though Artemis never received or retained anything "at the expense of" the Commissioner. Restitution under California law requires a defendant to

⁷ There is no distinction between unjust enrichment and restitution under California law. See *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003); *Dinosaur Dev. Inc. v. White*, 216 Cal. App. 3d 1310, 1315 (1989).