UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA *ex rel.* RoNo, LLC, Plaintiffs, v. ALTUS FINANCE, S.A., et. al., Defendants.	CASE NO. CV 01-8587 AHM (CWx) ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

BACKGROUND

This action is one of three lawsuits currently before this Court related to the 1991 insolvency of Executive Life Insurance Company ("ELIC"). The two other actions are suits by the California Insurance Commissioner (*Low v. Altus Finance, S.A., et. al.*, CV 99-2829 AHM (CWx)) and by Sierra National Insurance Holdings, Inc. (*Sierra National Insur. Holdings, Inc., et. al. v. Credit Lyonnais S.A., et. al.*, CV 01-1339 AHM (CWx)). In addition, this Court previously dismissed two other actions directly related to this suit (*Sergio Carranza-Hernandez, et. al. v. Altus Finance Corp*., et. al., CV 99-8375 AHM (CWx) ("*Carranza I*") and *Sergio Carranza-Hernandez, et al. v. Artemis S.A., et. al.*, CV 00-9593 AHM (CWX) ("*Carranza II*").

In this case, the Plaintiff is the State of California, acting through its Attorney General. But it was RoNo LLC, a whistleblower acting as a qui tam plaintiff pursuant to the California False Claims Act ("CFCA"), that actually filed this action, in February 1999. RoNo, LLC sued in California Superior Court. (FAC ¶ 3). On June 19, 2001, the California Attorney General ("AG") intervened in that action pursuant to section 12652(c)(6)(A) of the California Government Code and took over the prosecution of the case. (FAC ¶ 3). The case was removed to federal court on August 17, 2001 and transferred to this district on September 25, 2001. Plaintiff filed the FAC on January 30, 2002.

Before the Court are four separate Motions to Dismiss filed by the following defendants: (1) Aurora National Life Assurance Company and New California Life Holdings, Inc. (collectively "Aurora Defendants"); (2) Credit Lyonnais S.A., CDR Enterprises and Consortium de Realisation S.A. (collectively "CDR Defendants");[1] (3) Artemis S.A., Artemis Finance S.N.C., Aurora S.A., Artemis America and Francois Pinault (collectively "Artemis Defendants"); and (4) Credit Lyonnais S.A. (on behalf of non-entity Credit Lyonnais U.S.A.) and Credit Lyonnais Securities, Inc.[2] However, pursuant to stipulation, the parties have resolved their differences as to the fourth motion, thus rendering that motion MOOT.

All the parties are familiar with the factual allegations underlying this suit, and the Court will not recite them all over again. The collapse of ELIC triggered a long-running saga of litigation. Several cases have been filed in state and federal courts and appeals have been taken to the California Courts of Appeal

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[1] CDR Enterprises is a successor-in-interest to the defendant previously known as "Altus Finance, S.A." (FAC ¶ 5).

[2] Defendants MAAF Assurances and MAAF Vie S.A. (collectively "MAAF Defendants") have joined in portions of both the Aurora Defendants' motion and the Artemis Defendants' motion. When helpful, the Court will refer to all moving defendants, or any subset of such defendants, in the collective as "Defendants."

and, recently, the Ninth Circuit. As this case exemplifies, the litigation battles not only continue, but have a tendency to proliferate. Plaintiff alleges that, on April 11, 1991, by order of the California Superior Court, the Insurance Commissioner for the State of California seized all assets of ELIC and title to those assets vested in the Commissioner as an officer of the State on that date. (First Amended Complaint ("FAC") ¶ 1). After lengthy proceedings, Credit Lyonnais, a French bank owned in part by the government of France, acting through several affiliated companies (defendants herein) and using "phony fronts," acquired the assets of ELIC from the State. (FAC ¶ 2). Plaintiff contends this acquisition violated both state and federal law. (*Id*.). Specifically, plaintiff contends that all the defendants violated the California False Claims Act ("CFCA"), the California Unfair Competition Law ("UCL") and federal RICO.

An action previously filed by the Insurance Commissioner (*Low v. Altus Finance S.A.*, CV 99-2829 AHM (CWx)) has a vital bearing on the pending motions, as will be shown below. In that case, this Court summarized the Commissioner's claims as follows.

> First, the heart of this case is the Commissioner's fraud claim, which is that in 1991 and continuing thereafter, Altus, Credit Lyonnais, the shareholders of NCLH [New California Life Holdings] (Omnium Geneve and the MAAF parties) and several of the individual defendants (Messieurs Henin, Seys and Irigoin) lied about their various relationships with each other, in order to induce the Commissioner to sell ELIC's junk bond portfolio and transfer its insurance business. More specifically, these defendants illegally concealed the fact that Altus and Credit Lyonnais would control the insurance business, with the MAAF parties acting as their "fronts." [FN3]
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> > FN3. The alleged liabilities of the Aurora Parties and the Artemis Parties arise out of their later acquisitions of ownership and/or controlling interest in some of these other defendants.
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> Second, the fraud and the manner in which it was carried out, including the now much-publicized "*contrats de portage*," were designed to enable the defendants to avoid two laws. One such law prohibited a foreign government (or its agency or subdivision) from directly or indirectly owning, operating or controlling an insurance company in California. California Insurance Code § 699.5. The other, the Federal Bank Holding Company Act, prohibited a bank holding company from

> owning more than 25% of any company that was not a bank or authorized business. 12 U.S.C. § 1841 *et seq*.

(*Low v. Altus Finance S.A.*, 136 F.Supp.2d 1113, 1116-1117 (C.D.Ca. 2001).

Almost all of the parties identified in the above-quoted paragraphs are defendants in this case. Also named as defendants here - - for the first time in ELIC-related litigation - - are a number of parties affiliated with defendant Apollo Advisors, L.P. (the "Apollo defendants"). They are accused of acting as agents for Credit Lyonnais and other defendants, especially Altus Finances, S.A. These defendants are alleged to have controlled the illegally acquired insurance business of ELIC, with an undisclosed interest in the profit. *E.g.*, FAC ¶¶ 11-15; 36-42 45, 52, 59, 63.

Collectively, the moving defendants seek dismissal of all claims in Plaintiffs' FAC. They raise a number of challenges to that complaint, but this Court will deal with only one such challenge, because it is dispositive.

SUMMARY OF RULING

Both the Aurora Defendants and all the CDR Defendants assert that the plaintiff, which is acting through the Attorney General, lacks standing to pursue this action, because California Insurance Code Section 1037(f) vests exclusive standing to bring all claims relating to the ELIC estate in the California Insurance Commissioner. (Aurora Mot. at 5; CDR Mot. at 4). Thus, those defendants argue, the Attorney General has been divested of law enforcement authority to assert these claims against these defendants and this Court must dismiss the action for lack of standing. In opposition, Plaintiff argues that section 1037(f) does not act as a legislative restriction on the Attorney General's power to prosecute the claims at issue in this suit and that, even if it does, Plaintiff's claims are not encompassed within the restrictions of that statute. (Opp'n. at 11). In support of this assertion, Plaintiff relies principally on the California Constitution and California statutory law, which expressly acknowledge the power of the

Attorney General to prosecute claims for unfair competition and violations of the CFCA. (Opp'n. at 8-11). For the reasons set forth below, the Court finds that section 1037(f) does indeed preclude the Attorney General from prosecuting this action, and therefore the case must be dismissed.

There is no dispute that this suit, which in large measure seeks to recover allegedly fraudulently-obtained assets of ELIC, substantially overlaps with the Insurance Commissioner's lawsuit in *Low v. Altus*. As the Court noted at the April 22, 2002 hearing on these motions, the State is utterly dependent on the testimony of the Insurance Commissioner and his office to prove the allegations in the FAC; the exact testimony and evidence that is inherent in (and essential to) the Commissioner's claims in *Low v. Altus* is at the heart of this case. Although Plaintiff has invoked some new theories of recovery, Plaintiff has failed to make a single argument (and this Court cannot conceive of one) why it is necessary or even beneficial for two entirely separate and different agencies of the Executive Branch of the State of California to pursue virtually identical claims against substantially the same defendants.[3]

The interests of the State of California, including (but not limited to) vindicating the rights of ELIC policyholders, are adequately protected by the

[3] At the hearing, counsel for the Attorney General stated that the benefit to the State that would result is twofold: treble damages, which only the Attorney General has authority to pursue, and the value of deterrence. As to the former benefit, in the Insurance Commissioner's action, *Low v. Altus, supra*, punitive damages are available if the Commissioner prevails. *See* 136 F.Supp.2d at 1117. As to the latter benefit, the billions of dollars in compensatory damages and additional billions in punitive damages that the Commissioner may recover in *Low v. Altus, supra*, along with the extensive publicity all these lawsuits have generated, are no less likely to achieve the salutary effect of deterrence.

Insurance Commissioner's suit.[4] Allowing the Attorney General to maintain this suit might even interfere with the ultimate objective of remedying the alleged wrongs arising out of ELIC's insolvency. Although these respective cases have been consolidated for discovery and probably could be consolidated at trial, the continued prosecution of superfluous lawsuits causes inherent and great delay, huge additional expenses and a host of complicated conceptual and practical problems. The California Legislature surely did not intend such a result when it enacted section 1037(f) of the Insurance Code.

The allegations against defendants in *Low v. Altus, supra,* and this case are serious and troubling. Although the first of these numerous lawsuits, the Insurance Commissioner's action, was filed in February 1999, the validity of these grave allegations is a long way from being determined. The public interest demands that the parties have their proverbial "day in court" as soon as reasonably possible. Permitting the Insurance Commissioner to have an unfettered opportunity to pursue his claims in *Low v. Altus* serves that public interest, and the Court expects him to do so zealously and vigorously. Toward that end, the Court intends to convene a status and scheduling conference in that action.

MOTION STANDARD

On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Thus, if the complaint states a

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[4] If the Commissioner concludes that these interests require that he pursue the claims against the Apollo defendants, which have been alleged for the first time in this case, he may seek leave to amend his complaint in *Low v. Altus, supra.*

claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory, the complaint should not be dismissed. *Haddock v. Bd. of Dental Examiners*, 777 F.2d 462, 464 (9th Cir. 1985). On the other hand, dismissal is proper where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989) (quoting *Conley v. Gibson*). Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. . . . However, material which is properly submitted as part of the complaint may be considered" on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (*citing Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n. 3 (1st Cir. 1991)).

DISCUSSION

EXCLUSIVE STANDING OF THE INSURANCE COMMISSIONER

California Insurance Code Section 1037(f) states, in pertinent part:

> Upon taking possession of the property and business of any person in any proceeding under this article, the commissioner, *exclusively* and except as otherwise provided in this article, either as conservator or liquidator:

> (f) [Lawsuits, execution of instruments.] May, for the purpose of executing and performing any of the powers and authority conferred upon the commissioner under this article, in the name of the person affected by the proceeding or in the commissioner's own name, *prosecute and defend any and all suits and other legal proceedings...in connection with the administration, liquidation, or other disposition of the assets of the person affected by that proceeding...* [Here, ELIC].

CAL. INS. C. § 1037 (f) (emphasis added).

In an order in *Carranza I* filed on April 13, 2000, this Court addressed whether the Insurance Commissioner has the power to preclude other parties - - in that case, private parties - - from asserting claims based on the same fundamental allegations that the Attorney General alleges. Plaintiff Carranza-Hernandez ("Carranza") had purchased an annuity from ELIC. After ELIC's collapse and while the ELIC Rehabilitation Court proceedings were actively underway, Carranza received only some 82.5% of a structured settlement annuity payment then due him. He thereupon sued many of the defendants named in this case, alleging fundamentally the same conspiracy as that alleged here, and in *Low v. Altus Finance, Sierra National v. Credit Lyonnais* and *Carranza II.* Claiming that defendants' secret agreements constituted illegal bid-rigging and violations of the California Cartwright Act, Carranza sought damages and restitution. The Insurance Commissioner intervened and, along with many of the defendants now seeking dismissal of this action, he moved to dismiss Carranza's complaint, arguing (as defendants do here) that only the Insurance Commissioner has standing to pursue claims on behalf of ELIC or to recover ELIC's assets. This Court held that Carranza did indeed lack standing and granted defendants' motion. As the Court put it,

> The plain language of Section 1037...leads to the conclusion

> that the Insurance Commissioner has exclusive standing to pursue claims 'in connection with the administration, liquidation, or other disposition of the assets' of ELIC... These claims clearly involve the 'administration, liquidation, or other disposition' of ELIC's assets. If Defendants defrauded and otherwise wronged ELIC, the Commissioner is the only party who can pursue redress on behalf of all the direct and indirect victims. Unless he is permitted to be the sole warrior seeking redress, the rehabilitation and litigation framework provided in the Insurance Code and implemented by the Conservation Court will be thwarted.

April 13, 2000 Order at 24-25.[5]

A few days after the April 22, 2002 hearing on these motions, the Ninth Circuit affirmed this Court's dismissal of *Carranza I*. It stated, "The district court correctly concluded that the California Insurance Commissioner has exclusive standing under California law to bring the claims asserted in Carranza's action."

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[5] In the same order, the Court also noted that the 1991 order of the California Superior (Rehabilitation) Court appointing the Insurance Commissioner as conservator provided, among other things,

> 3. It being found that it is essential to the safety of the public and is in the best interest of the shareholders, policyholders and other creditors of Respondent and to the orderly administration of these proceedings, Respondent [ELIC] . . . *and all other persons, agencies, associations and entities are hereby enjoined and restrained from*: . . .
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> > *g. institution of suits to collect any of the Property or institution of suits which purport to assert derivative rights on behalf of Respondent* [ELIC].

Sergio Carranza-Hernandez v. Altus Finance Corporation, No. 00-55839 (9th Cir. April 24, 2002).[6]

Here, the Attorney General contends that his claims are not precluded by this Court's (and, later, the Ninth Circuit's) holding in *Carranza I* for two reasons: (1) *Carranza I* did not involve the express constitutional and statutory powers of the Attorney General and (2) unlike Carranza, his claims are on behalf of the State, not on behalf of a failed insurance company (ELIC), because the property that the defendants fraudulently induced the State to transfer was owned by the State (Opp'n. at 13-14).

A. **May The Attorney General Rely On His Designated Powers To Divest The Insurance Commissioner Of Exclusive Jurisdiction?**

Plaintiff is correct that both the California Constitution and California statutory law expressly support the power of the Attorney General to bring claims for unfair competition and violations of the CFCA. CAL. CONST. ART. V, § 13 ("It shall be the duty of the Attorney General to see that the laws of the state are uniformly and adequately enforced."); CAL. GOV. C. § 12652(a)(1) ("If the Attorney General finds that a person has violated or is violating Section 12651 [of the CFCA], the Attorney General may bring a civil action under this section against that person."); CAL. BUS. & PROF. C. § 17204 ("Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General ...."). But the general power of the Attorney General to enforce the California False Claims Act and California Unfair Competition Law is not the real issue here; the issue is whether he may do so against these defendants under these allegations, when the Insurance Commissioner has already sued almost all of the defendants for the same conduct (albeit on other grounds). To answer that question requires this Court to analyze

[6] This Court cites the Ninth Circuit's Memorandum Opinion not as binding precedent but, pursuant to 9th Cir. R. 36-3(b)(ii), as a related case.

under what circumstances the California Attorney General's enforcement powers may be circumscribed because of the powers delegated to other State of California Executive Branch agencies.

California courts have held that the broad powers of the Attorney General exist only in the absence of legislative restriction. *D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 14-15 (1974), citing *Pierce v. Superior Ct.*, 1 Cal. 2d 759, 761-62 (1934) (holding that the Attorney General has broad powers derived from the common law, and "*in the absence of any legislative restriction*, has the power to file any civil action or proceeding directly involving the rights and interests of the state...") (emphasis added); *People v. New Penn Mines, Inc*., 212 Cal. App. 2d 667, 672 (1963) (recognizing that the common law powers of the Attorney General are broad "in the absence of legislative restriction"); *Van de Kamp v. Gumbiner*, 221 Cal. App. 3d 1260, 1282-93 (1990) (affirming the dismissal of a suit brought by the Attorney General "on behalf of the state" against a health maintenance organization because the legislature had superseded the authority of the Attorney General to oversee health plans).

The opinions in *Gumbiner* and *New Penn Mines* are instructive. In *Gumbiner*, the California Court of Appeal dismissed the Attorney General's petition in intervention because the California Legislature had crafted a "comprehensive system of licensing and regulation" of health care plans that demonstrated an intent to have the Department of Corporations "occupy the field." *Gumbiner*, 221 Cal. App. 3d at 1284. By doing so, the court found, the Legislature had supplanted the Attorney General's common law authority to regulate such plans. *Id*. at 1285. Similarly, in *New Penn Mines*, the California Court of Appeal affirmed the dismissal of a suit brought by the Attorney General to abate a public nuisance. *New Penn Mines*, 212 Cal. App. 2d at 670. The court found that the California Legislature had enacted a detailed statutory scheme empowering the appropriate regional water pollution control board to provide

"the exclusive means and procedures by which agencies of the state government, including the Attorney General, are to control water pollution and nuisance." *Id*. at 675. Noting that the Legislature had established "a hierarchy of administrative agencies . . . [and] a deliberately designed distribution of powers," the court ruled that to allow "any branch of the state government armed only with loosely defined traditional functions" to bring suit would be inconsistent with that scheme. *Id*.

Defendants contend that, as in *Gumbiner* and *New Penn Mines*, the Attorney General has been divested of his general law enforcement authority, this time by California Insurance Code Section 1037(f). Although few cases have interpreted the meaning and scope of section 1037(f), those cases addressing the issue contain language supporting Defendants' position. In *Quackenbush v. Superior Ct.*, 79 Cal. App. 4th 867 (2000), the California Court of Appeal held that the Insurance Commissioner, as liquidator of and on behalf of an insolvent insurance company, had authority to prosecute a malpractice action against an auditor. *Quackenbush*, 79 Cal. App. at 870. In so finding, the court noted that under section 1037(f) "the Commissioner has been given exclusive right to pursue, collect and sue on any and all claims" of the failed insurer. *Id*. at 874. In *Garris v. E. Forrest Mitchell*, 7 Cal. App. 2d 430 (1935), the issue was whether the creditors of an insurance company placed in receivership could maintain an action for fraud against the Insurance Commissioner as receiver. The California Court of Appeal held that such a claim was not prohibited by California law. *Garris*, 7 Cal. App. 2d at 434. However, the Court recognized that the general rule is that when the Insurance Commissioner has taken possession of the assets of an insurance corporation, "he is the only person authorized to maintain an action to recover the assets of the corporation." *Id.*

Plaintiff argues that the principles and holdings in *New Penn Mines* and *Gumbiner* are inapplicable because those cases involved an Attorney General's

effort to wield common law authority, whereas here he is relying on powers conferred by statutes. In *New Penn Mines*, however, to support his authority to prosecute the lawsuit, the Attorney General also invoked a provision of the broad statutory program at issue (the Dickey Water Pollution Act). 212 Cal. App. 2d at 674. Moreover, even if this case is different than *New Penn Mines* and *Gumbiner* because the Attorney General has specific statutory authorization to sue for CFCA and UCL violations, his general authorization under those statutes cannot be reconciled with the language of section 1037(f). The latter section confers *exclusive* standing on the Insurance Commissioner to "prosecute any and all" suits "in connection with" the assets of "an insolvent insurer." "As a principle of construction, it is well-established that a specific provision prevails over a general one relating to the same subject." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, 71 Cal. App.4th 1518, 1524 (1999). Moreover, ". . . specific provisions relating to a particular subject take priority over a general statute covering the same subject . . . ." *Turlock Irrigation District v. Hetrick*, 71 Cal. App. 4th 948, 951 (1999). That being so, section 1037(f) should trump the statutes on which the Attorney General relies.

Plaintiff nevertheless argues that because the CFCA and UCL were enacted significantly after Section 1037(f) became the law, they should be deemed to negate the grant of exclusive standing to the Commissioner. However, in *Atchison, Topeka and Santa Fe Railway Co. v. Division of Industrial Safety*, 64 Cal. App.3d 188 (1976), the California Court of Appeal addressed a similar question and rejected Plaintiff's position. *Atchison* involved a rail carrier's challenge to the authority of the Division of Industrial Safety ("Division") to issue an order requiring the rail carrier to undertake an employee training program. *Atchison*, 64 Cal. App. 3d at 190. The Division argued it had authority to issue the order based on broad powers conferred on it by a 1973 act. *Id*. at 190-91. The court disagreed with the Division, finding it was without authority

to issue the order because a previously-enacted (1917) provision did not authorize such an order. *Id*. at 191-92. As here, the court reasoned that the specific provisions of the previously-enacted statute "must be held to control over the general provisions" of the later-enacted statute. *Id*. at 192.

Plaintiff argues, next, that section 1037's delegation of executive enforcement powers to the Commissioner does not divest other law enforcement officers of their powers. (Opp'n. at 12). In support of this claim, Plaintiff relies principally on *People v. McKale*, 25 Cal. 3d 626 (1979). In *McKal*e, the California Supreme Court addressed the authority of a district attorney ("DA") to bring a claim for unfair competition based on violations of the Mobilehome Parks Act ("MPA"). *McKale*, 25 Cal. 3d at 631. Defendants argued that because the DA lacked express authority to enforce the MPA, if he were allowed to sue for unfair competition based on violations of that act such suit would circumvent the MPA statutory enforcement scheme, which called for enforcement by the Department of Housing and Community Development (DHCD). *Id*. at 632. In rejecting that argument, the court noted that although the DA lacked express authority to enforce the MPA, the DA was expressly authorized to pursue claims for unfair competition. *Id*. at 633. On this basis, the court held the MPA did not preclude the DA from prosecuting an unfair competition claim. *Id*.

McKale is distinguishable for two reasons. First, it did not involve California Insurance Code Section 1037. Second, and more significantly, the MPA does not contain an exclusivity provision similar to section 1037(f). In fact, although the MPA expressly designated the DHCD as the principal enforcement agency, unlike section 1037 the MPA did *not* mandate that the authority of that department was "exclusive." CAL. HEALTH & SAFETY C. § 18207. Rather, the MPA provided for enforcement by a potentially wide range of city and county agencies. *Id*.

The plain language of the underlying statutory scheme in the Insurance Code provides that the power of the Insurance Commissioner is "exclusive."[7] Thus, if the Attorney General's claims are among those covered by Section 1037(f), to allow him to assert those claims would require the Court to disregard the plain language of the statute. Absent a compelling reason to do so, this is not allowed under California law. *Tiernan v. Trustees of Calif. State University and Colleges*, 33 Cal. 3d 211, 218-219 (1982) (stating that unless the party seeking an alternate construction can "demonstrate that the natural and customary import of the statute's language is either 'repugnant to the general purview of the act,' or for some other compelling reason, should be disregarded, this court must give effect to the statute's 'plain meaning.'").

B. **Are Plaintiff's Claims Encompassed By Section 1037(f)?**

Alternatively, Plaintiff argues that even if Section 1037(f) does restrict the power of the Attorney General to assert basically the same claims (or claims arising out of the same facts) as the Insurance Commissioner, the Attorney General's claims here are not covered by that statute, because they involve State property, not the assets of an insolvent insurance company. The Attorney General alleges that the Insurance Commissioner, as an officer of the State, held title to ELIC's assets at the time of their transfer to defendants (FAC ¶¶ 1, 46).[8] He

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[7] In contrast, under neither the CFCA nor the UCL is the Attorney General the only authorized representative of the State. *See* CAL. GOV. C. § 12652; CAL. BUS. & PROF. C. § 17204.

[8] It is significant that, in the FAC, Plaintiff does not expressly allege that the State actually owned the assets sold to defendants, but rather that title to ELIC's assets vested in the Commissioner upon his filing a petition with Los Angeles Superior Court pursuant to CAL. INS. C. § 1011. (FAC ¶ 1, 46) Holding title to an asset can be consistent not only with full ownership rights, but also with the powers of a trustee, who, generally speaking, holds such title for the benefit of a third party. Under California law, it is clear that the Insurance Commissioner performs primarily the latter role in relation to an insolvent insurance company's assets. *See infra.*

contends that "the State's ownership of the Bonds and Insurance Business of ELIC after April 11, 1991, is based on the Commissioner's vested legal and equitable title to those assets, and, among other things, the Commissioner's power and authority in the exercise of the State's police power to operate and manage the Insurance Business, to sell or otherwise dispose of the Bonds, Insurance Business and other assets and to modify insurance policies of other contracts, as provided by the Insurance Code." (Response of Plaintiff to Questions Raised by Court at April 22, 2002 Hearing ("Response") at 4). For that reason, the Attorney General argues, his claims concern the "fraudulent scheme of the defendants to induce a State official to transfer *property owned by the State* to them." (Opp'n. at 14 (emphasis added)). In support of this position, the Attorney General relies principally on *Mitchell v. Taylor*, 3 Cal. 2d 217, 43 P. 2d 803 (1935). (Opp'n. at 21). *Mitchell* held only that the Insurance Commissioner, as a State officer, was exempt from the payment of an otherwise statutorily-required fee for the purchase of a transcript on an appeal of a court ruling. *Id*. at 218-219. The case says nothing as to whether the assets of an insolvent insurer become State property; it merely notes that the Commissioner is a state officer performing duties enjoined upon him by statute, not merely a private trustee dependent upon an appointing court for his powers.

The Commissioner holds title to the assets of an insolvent insurer as a trustee for the benefit of creditors and other persons interested in the estate of the insolvent insurer. CAL. INS. C. § 1057 ("In all proceedings under this article, the commissioner shall be deemed to be a trustee for the benefit of all creditors and other persons interested in the estate of the person against whom the proceedings are pending.").[9] Consistent with that provision, in *Carpenter v. Pacific Mutual*

[9] Insurance Code § 1019 provides that "Upon issuance of an order of liquidation...the rights and liability of ... [the liquidated party] and of creditors, policyholders, shareholders and members, and *all other persons interested in its*

Life Insur. Co. of Calif., 10 Cal. 2d 307, 74 P. 2d 761 (1937), the California Supreme Court denied a challenge to a rehabilitation plan under which the Commissioner exchanged the insolvent insurer's assets for stock in a new insurance company. *Carpenter*, 10 Cal. 2d at 339-40. Policyholders of the insolvent insurer argued that the plan violated the California Constitution because the Commissioner had subscribed State property to the stock of the new company. *Id*. The Court rejected the argument, finding that the Commissioner had taken "certain assets *of the old company* and transferred them to the new company..." *Id*. (emphasis added). The Court noted that this transfer was "in exchange for the stock *which he holds as trustee for the benefit of the creditors of the old company*." *Id*. (emphasis added). As such, the Court held,"the commissioner as a state officer did not subscribe to the stock of the new company so as to make the state a stockholder." *Id*.

Both *Carpenter* and the Insurance Code provisions cited *supra* demonstrate that the assets to which the Commissioner, as an officer of the State, holds title do not become State property in the manner, for example, that land the State acquires pursuant to eminent domain becomes an asset of the State. Rather, the Commissioner serves as a trustee of those assets on behalf of the insurer's creditors. It furthers the purpose of the Insurance Code for the Commissioner to function in this manner. As the California Supreme Court noted in *Carpenter*, "The public has a grave and important interest in preserving the [insurance] business if that is possible." *Id*. at 329. Accordingly, it "is [the Commissioner's] duty to operate the company and to try to remove the causes leading to its difficulties." *Id.* at 331. It would be inconsistent with that duty for an insurance

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assets, including the State of California, shall...be fixed as of the date of the entry of the order...") (emphasis added). This suggests that the State certainly is not the only, nor the outright, owner of those assets.

company's assets to be treated as within the unqualified dominion of the State immediately upon insolvency.

Furthermore, what the State actually did with the proceeds of the sale of ELIC's assets to defendants is inconsistent with the Attorney General's assertion that what the defendants wrongfully acquired was the State's property. Following the hearing and pursuant to the Court's authorization, the Attorney General filed a supplemental memorandum and declaration that established the following.

- All of the proceeds of the sale of the "junk bonds" were initially invested in interest-earning accounts and ultimately conveyed to Aurora [the newly-formed company that took over ELIC's insurance business], except possibly for some proceeds that were used "to continue the Insurance Business, to pay administrative expenses, or to pay emergency policyholder or other claims that required immediate payment."
- The Attorney General does not believe there were any payments to shareholders or any payments to the State's general revenue account, which is understood to refer to the General Fund.

(Response at 2-3).

In addition, at the hearing a Deputy Attorney General appearing on behalf of Plaintiff displayed commendable candor in acknowledging that if ELIC's assets had been sold to a rival bidder (*i.e.*, not to Defendants and their alleged co-conspirators and agents) and if the price had been higher than Defendants paid, such "additional" money would not have gone into the State's general revenue

account and would not have been subject to ordinary general budgetary and political considerations.[10]

Notwithstanding that no money was diverted from the State's General Fund, the Attorney General contends that in exercising his broad powers under the Insurance Code, the Commissioner was acting on behalf of the State "for the benefit of not only the general creditors [of the failed insurer] but also of the policyholders and the public generally." (Opp'n. at 21, *citing Garris v. Carpenter*, 33 Cal. App. 2d 649, 655 (1939)). That is quite true. Indeed, as stated by the California Court of Appeals in one of the many judicial opinions that ELIC's collapse generated, "The Commissioner is an officer of the State . . . who, when he or she is a conservator, exercises the State's police power to carry forward the public interest and to protect policyholders and creditors of the insolvent insurer." *In re Executive Life Insurance Company*, 32 Cal. App. 4th 344, 356 (1995) (citations deleted). But although the Commissioner acts as a public officer on behalf of the State (Insurance Code § 1059), he still remains trustee vis-a-vis the failed company's assets. *Id.* at 376; *Texas Commerce Bank-El Paso v. Garamendi*, 28 Cal.App.4th 1234, 1243 (1994). That the Attorney General relies on the Insurance Commissioner's status as an officer of the State is surprising, for it is precisely because his powers in dealing on behalf of the State with insolvent insurance companies are so extensive that it makes sense to interpret Section 1037(f) in accordance with its literal meaning – *i.e.*, the Insurance Commissioner has *exclusive* authority to bring claims regarding the

[10] The Deputy Attorney General was, however, careful to note that treble damage or civil penalty recoveries could go to a so-called "false claims fund," although some 15% would be paid to the private relator (RoNo, LLC). That a private party-relator, who is not a creditor, would benefit from the Attorney General's action is in contrast with the Insurance Commissioner's lawsuit, which will not put money in non-creditor, private parties' pockets.

"administration, liquidation, or other disposition" of the assets of an insolvent insurer.

This motion to dismiss challenges the standing of the Attorney General based on *his* allegations in the FAC. It therefore is especially telling that the FAC establishes that this suit is "in connection with the administration, liquidation, or other disposition of the assets" of ELIC. The FAC repeatedly alleges that the wrongdoing occurred in connection with the bidding for and ultimate disposition of "ELIC's assets." (FAC ¶ 2 (accusing Defendants of using "phony 'fronts' to acquire from the State the ELIC insurance business and certain junk bonds selected by Apollo")); (FAC ¶ 31 (accusing Defendants of entering into an illegal conspiracy "to induce the State to sell, transfer and convey ...the business and assets of ELIC seized by the State")); (FAC ¶ 55 (alleging that because of Defendants' conspiracy and wrongful acts, "the State has suffered damage in excess of $2 billion by the sale of the Insurance Business and Bonds")); (FAC ¶ 83 (alleging that Defendants repeatedly misrepresented that their bid for the "ELIC assets" was in compliance with the Commissioner's requirements)); (FAC ¶ 134 (alleging that the defendants engaged in unlawful competition by "acquiring ownership and control of the Insurance Business and Bonds...as agencies of a foreign government")). Thus, despite Plaintiff's argument to the contrary, this suit is ultimately about the alleged wrongdoing of the defendants in connection with the State's disposition of *ELIC's* assets. Any other interpretation would place form over substance.

For the foregoing reasons, the Court finds this action concerns the disposition of the assets of ELIC and thus the Insurance Commissioner has exclusive standing to pursue the Attorney General's claims, pursuant to California Insurance Code Section 1037(f). Because the Attorney General lacks authority to pursue this action, the FAC must be DISMISSED WITH

PREJUDICE.[11] Given this ruling, it is unnecessary to address the many other bases for dismissal that defendants assert in these various motions.

IT IS SO ORDERED

DATE: May ___, 2002

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A. Howard Matz
United States District Judge

[11] Docket Nos. 76, 79, 82 and 93.