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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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JOHN GARAMENDI, Plaintiff, v. ALTUS FINANCE S.A., et al., Defendants. AND RELATED COUNTERCLAIMS	)	CASE NO. CV 99-2829 AHM (CWx) [Consolidated with Case No. CV 01-1339 AHM(CWx)] FED. R. CIV. P. 52 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE RESTITUTION

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20 **BACKGROUND**
21 In Phase II of the jury trial, the Commissioner was limited to seeking
22 whatever damages may have been caused by the conspiracy which, the jury had
23 previously found, Artemis joined. The Commissioner sought recovery of the
24 "junk bond" profits that Artemis earned between December 1992 and August
25 1993, when the Rehabilitation Court denied a motion brought by certain parties to
26 rescind the underlying bond sale transactions. The Commissioner was not
27 permitted to seek recovery of the profits Artemis earned from its two-thirds
28 ownership of Aurora - - *i.e.*, the dividends it received - - because in Phase I the

jury had determined that the Commissioner was not harmed by whatever misrepresentations or omissions Artemis had made in obtaining Department of Insurance ("DOI") approval for that ownership.

Now, in his remaining equitable claim for restitution, the Commissioner seeks *all* of the profits that Artemis received from the junk bonds and from owning the insurance company, plus 7% interest. The Commissioner contends that before interest this figure, in rounded-off numbers, is $852,000,000. $459,000,000 of that amount is attributable to profits Artemis earned on the junk bonds. $240,000,000 derives from dividends Artemis received from New California Life Holdings ("NCLH"). $152,000,000 represents the amount Artemis will receive when its previously-agreed-to-sale of its interest in NCLH to REALIC is consummated.

All told, with interest the Commissioner seeks approximately $1,285,000,000 in "restitution" from Artemis, as of August 1, 2005. The Court awards him $189,806,288, plus interest calculated at 7%.

OVERVIEW

The claims and defenses of the parties, to whom I will refer by the shorthand terms used at the trial (with "Artemis" referring to "Artemis S.A."), were thoroughly set forth in the Revised Pretrial Conference Order (PTCO), dated February 11, 2005. The relevant procedural history and key rulings are reflected in the Court's June 10, 2005 "Post-Verdict Order" (Ex. A hereto) and the Court's October 3, 2005 "Order re Punitive Damages" (Ex. B hereto). I incorporate all these materials by reference, as I do all other rulings and jury verdicts mentioned herein.

The premise for the Commissioner's restitution claim is that Artemis engaged in serious misconduct, benefitted massively from that misconduct and should be required to disgorge those benefits. Given the peculiarities of the jury's verdicts, it is appropriate to step back and evaluate the proverbial "Big Picture"

before making additional specific findings and reciting legal conclusions. That picture includes the following factors and considerations.

(1) The most culpable defendants in these cases were parties other than Artemis. Those parties, including Credit Lyonnais/Altus;[1] Aurora; MAAF; SDI Vendome; and individuals such as Henin, Seys and Irigoin, either "settled out" or defaulted. As a result, from other defendants and wrongdoers, the Commissioner has already recovered (or been awarded the right to recover) approximately $696,450,000, not including any of the amounts Artemis set aside in its settlement with the United States Attorney. [2]

(2) Although the Commissioner and his counsel displayed admirable vigor in aggressively pursing their own investigation into state law violations and in litigating their state-based civil claims, it was the investigation conducted by the United States Attorney's Office that led to major portions of the above-mentioned recoveries. That investigation involved criminal violations of federal law. At the trial in this case, the Commissioner fought hard to introduce evidence of various guilty pleas and admissions made in the criminal case by some of the other parties mentioned above. The Commissioner also benefitted from the cooperation of various witnesses who had entered into agreements with the United

[1] Altus later became known as "CDR-E."

[2] Pursuant to its agreement with the United States Attorney's Office, Artemis has paid $110 million into a non-revocable "Settlement Agreement Fund" which requires that upon resolution of this civil case all of that amount (less taxes) will be paid to the Commissioner, for disbursement to ELIC claimants. Artemis also paid another $75 million into a fund designed to be available to satisfy any judgment in excess of $110 million the Commissioner recovers in this action. The Estate of Executive Life Insurance Company ("ELIC") will receive considerably less than all of the money the Commissioner recovers, because the Commissioner has agreed to turn over substantial portions to other parties, including Sierra, the California Attorney-General, the informant Francois Marland and the Commissioner's lawyers. And NOLHGA, too, undoubtedly will claim a right to payment.

States Attorney in lieu of prosecution. Although Artemis and certain of its executives, including its founder Francois Pinault, were "subjects" of the federal criminal investigation, and although Artemis itself entered into the sizeable monetary settlement with the United States Attorney's Office described above, neither Artemis nor any of its top executives was ever indicted. That they were not prosecuted is consistent with the first point, above: Artemis was less culpable.

(3) California Insurance Code § 699.5 provided the principal basis for the Commissioner's main claims against the defendants in these cases, including Artemis. That statute, which is relatively obscure, precludes the Department of Insurance ("DOI") from authorizing an insurer to do business in California if the insurer is "owned, operated or controlled, directly or indirectly, by . . . a nation or any governmental . . . agency thereof." The extent to which Artemis's "enrichment" might be "unjust" could have been clarified by evidence demonstrating just why California cares whether a foreign government owns or controls a California insurance company. Yet at trial, the Commissioner devoted almost no effort to explaining why or how Section 699.5 protects California citizens, policyholders or annuitants.[3] In contrast, the jury learned that the very language of Section 699.5 actually permits the DOI to license such an insurer under certain specified conditions. The jury learned that as early as February 2, 1993, Lorraine Johnson, a key DOI representative, informed Artemis's lawyers at Morgan, Lewis & Bockius that the DOI previously *had* permitted a foreign government-owned company to operate an insurance company, because the company entered into a voting trust that contained procedural protections against

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[3] The same can be said about the Commissioner's failure to explain the purpose or intended effect of the federal Bank Holding Company Act ("BHCA"), although he introduced evidence of other defendants' violations of that statute.

the foreign government's exercise of control. Indeed, the jury also learned that Artemis itself eventually entered into such an agreement.

Because the purposes and intended benefits of Section 699.5 were never meaningfully addressed, the months-long trial was almost entirely devoid of any overarching public policy considerations. Although there were occasional paeans to the importance of truth-telling and compliance with the law, the case appeared to be about money, and only about money; evidence suggesting other potential equities in favor of the Commissioner were largely obscured. Thus, the jurors undoubtedly found it peculiar that at times everything the Commissioner was attempting to prove and everything he sought to recover appeared to depend on whether Credit Lyonnais owned 25.1% (instead of a mere 24.9%) of Artemis. Given the hyper-technical violations that were at the core of the Commissioner's case against Artemis, there was support for Artemis's contention that the Commissioner seized upon Section 699.5 as an opportunity to get around the financial consequences of decisions he had made in the early 1990s - - decisions that were reasonable at the time, but that later exposed him to second-guessing because of a change in market conditions.

(4) The outcome of the jury trial was not entirely consistent with part of the Commissioner's fundamental premise described above in item one (that Artemis engaged in massive misconduct). In Phase I, the jury did find that Artemis misrepresented or concealed material information from the Commissioner. The Commissioner's counsel opposed the Court's proposal to include questions on the Verdict Form that would have clarified the basis for that finding, so it is not clear what the jury had in mind. (It is probable, however, that the information in question was placed in, or omitted from, one of the regulatory forms that Artemis filed with the Commissioner.) In any event, the jury also found in Phase I that the misrepresentation(s) or omission(s) were not substantial factors in causing harm to the Commissioner.

The jury went on to find in Phase I that Artemis joined a conspiracy previously formed by other defendants, and that the *conspiracy* did cause harm to the ELIC Estate, in that it caused the Commissioner not to choose one of the "bonds-in" bids (NOLHGA's or Sierra's) that were competing with the Altus/MAAF bid.[4] Based on that finding, the Court permitted the Commissioner to attempt in Phase II to recover compensatory damages. The Commissioner advanced two damages theories. The first was the "Loss of Rescission Opportunity" theory, to the effect that had the Commissioner known of the *contrats de portage* discussed below, he would have successfully moved to rescind the bond sale. Under this theory, which he had not fully fleshed out previously, the Commissioner sought to recover some $843 million in junk bonds profit that the various conspirators collectively earned before Judge Lewin denied the rescission motion. The Commissioner's other theory in Phase II was that he would not have paid a $75 million indemnity claim absent the conspirators' fraud. Despite having been permitted to pursue an arguably "expanded" theory of damages, the Commissioner met with defeat; the jury awarded him no compensatory damages from Artemis, not even nominal damages.

Furthermore, here the Commissioner's restitution claim is centered on an allegation of fraud, but in the jury trial the Commissioner failed to prove that Artemis actually was liable for fraud, notwithstanding that it had acted in a misleading manner. That is because the Commissioner failed to prove one of the elements of fraud - - harm. Although as a matter of law the Commissioner's failure to prove Artemis liable for fraud does not flatly preclude him from obtaining restitution, the Commissioner's defeats at trial *do* bear on the equities between the parties and on the amount of any restitutionary award.

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[4] The jury was not required to find that the conduct of Artemis itself was a "substantial factor" in the conspiracy's causing that harm.

The jury's verdicts, in short, do not support the notion that Artemis committed a massive wrong.

(5) On the other hand, that the hardworking jury awarded $700 million in punitive damages to the Commissioner indicates that the jurors believed that Artemis deserved to be punished for *something*. I agree. Artemis was not some innocent enterprise that Francois Pinault created as a vehicle to test his self-professed "gut feeling" that rosy business prospects in the United States warranted a multi-billion dollar risk. Elements of the intertwined financial relationship - - some might characterize it as "cozy," others as "incestuous" - - between Artemis and Credit Lyonnais/Altus were, by American standards, peculiar enough to permit the jury to conclude that Artemis behaved much more deviously than M. Pinault's testimony suggested. Thus, in addition to the facts described below, the jury heard evidence about financial and political difficulties that beset the French government and Credit Lyonnais in 1992, which created an incentive for Credit Lyonnais to offer a favorable deal to M. Pinault in order to allow it to book profits. There also was evidence about a backdated agreement between Altus and Artemis, although the potential significance of this apparent badge of fraud was largely buried in the morass of other documents and testimony the Commissioner offered. 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.

Counsel for the Commissioner repeatedly argued that it was up to the jurors to protect hundreds of thousands of policyholders who had suffered egregious losses, so it is not surprising that the jury evidently did not want policyholders to be left with nothing.[5] Although this Order reflects my independent analysis and

[5] Of course, the jury was never informed that numerous other parties have a right to receive very substantial "portions" of the Commissioner's total recovery. See footnote 2 above. The policyholders are not the only parties who have a stake in this restitution ruling, but the jurors probably thought they were.

conclusions, and although I threw out the jury's punitive damages award, I find that the punitive damage determination is entitled to important consideration, as are the jury's answers to Phase I Verdict Forms 3.1(A); 3.2; 3.3 and Verdict Form 5 (in its entirety). However, the $700 million punitive damages award is far from a benchmark. The size of that award is probably attributable to the fact that at many points in the lengthy trial the lawyers and witnesses blithely bandied about stupendous dollar amounts, thereby inuring jurors to the inherent immensity (and dubiousness) of such an award.

(6) Some of the Commissioner's pre-trial contentions and some portions of the trial testimony of the Commissioner and various witnesses he called to the stand were flatly at odds with, or not entirely consistent with, positions they had previously taken about such critical and hotly-contested issues as the following: (1) Did the Commissioner want to get rid of the junk bonds at virtually all costs? (2) When did the DOI first learn that Credit Lyonnais/Altus controlled NCLH? (3) Would the Commissioner have picked NOLHGA over Sierra? (4) Was the sale of the junk bonds separate and independent from the sale of the insurance assets? (5) Did Altus pay fair market value for the bonds? (6) When did the Commissioner's counsel first learn of the *portages*?

(7) The transnational features of this case slightly affect the equities. Artemis unquestionably acted with a different mindset - - different mores, assumptions and expectations - - than an American company would have acted. For example, central to the Commissioner's claims has always been his contention that the single most important element of the various defendants' misconduct was their participation in, ratification of or (in the case of Artemis) cover-up of, the so-called "*contrats de portage*." (See below.) At trial, there was credible evidence to the effect that in France such *contrats* are far from uncommon, and the parties stipulated that such agreements "are not necessarily used for illegal purposes. In this case, the jury will have to decide what the purposes and effects of the *contrats*

de portage were." Artemis did not even exist at the time the *contrats de portage* were entered into. (That is one reason why it was less culpable than the other French defendants.) Artemis, accordingly, had less reason than an American company would have had to realize that a failure to disclose to the DOI the existence of the Altus/MAAF Group *contrats de portage* would be so wrongful that Artemis would risk having to give back all of the profits it made.

FINDINGS OF FACT[6]

1. On April 11, 1991 Executive Life Insurance Company ("ELIC") was placed in conservation by order of the Los Angeles County Superior Court (the "Conservation Court"). As a result, then-Insurance Commissioner John Garamendi became vested with legal title to all of the assets of ELIC.

2. The failure of ELIC was the result, in part, of the collapse of the junk bond market, the resulting torrent of policyholder redemptions, and the overall mismanagement of the company under the leadership of its Chief Executive Officer, Fred Carr. In February 1992, Commissioner Garamendi sued Mr. Carr and other ELIC representatives, and eventually recovered approximately $350 million.

3. At the time ELIC was placed in conservation and for the remainder of 1991 and into 1992, Altus, a subsidiary of Credit Lyonnais, was attempting to negotiate with ELIC to acquire a portion of ELIC's junk bond portfolio. Credit Lyonnais was owned (at least in part, and directly or indirectly) by the Government of France. Altus was represented in these negotiations by Jean-Francois Henin, by attorneys from the American law firm of Morgan, Lewis & Bockius and by Apollo Advisors, an American investment advisor.

4. Shortly after placing ELIC in conservation, Commissioner Garamendi decided to attempt to rehabilitate ELIC by holding an "overbid

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[6] Ensuing references to dates and sums of money sometimes include approximations.

auction" in which competing bidders would evaluate ELIC's assets and offer ELIC's remaining policyholders "restructured" insurance contracts with a guaranteed minimum value expressed as a percentage of the value of the benefits they had been previously promised by ELIC.

5. On May 21, 1991, the Commissioner issued a "Request for Proposal." The Commissioner continued to negotiate with Altus and its representatives with the objective of establishing a "definitive agreement" with Altus that would form a template against which other bidders would be permitted to present competing bids.

6. On August 6, 1991, the Commissioner entered into a tentative transaction (the "Agreement of Purchase and Sale") to sell the bond assets of Executive Life to Altus and the remaining assets to a group of other European investors (collectively, the "Altus Investor Group"). Those investors were various French and Swiss companies, who were recruited by Altus. They included MAAF Assurance, MAAF Vie, Omnium Geneve, Financiere du Pacific and SDI Vendome (the "MAAF Group").

7. Altus entered into a conspiracy with the members of the MAAF Group. Altus and the MAAF Group agreed to bid for the ELIC assets with the understanding among themselves that the MAAF Group would organize and appear to own New California Life Holdings ("NCLH") which, in turn, would own and operate what would become the surviving insurance company. In fact, the MAAF Group would actually organize and operate the insurance company not for its members' benefit, but for the benefit of Altus. The conspirators' secret agreements were memorialized in French-language contracts, including those referred to as "*contrats de portage*." The initial *contrats de portage* were executed on August 6, 1991, the same day as the Agreement of Purchase and Sale described above. Such contracts do not necessarily violate French law and are not uncommon in France. At trial, however, the Commissioner introduced

evidence sufficient to permit the conclusion that the particular *contrats de portage* entered into by the Altus Investor group were meant to conceal from California and federal authorities that the MAAF Group was really a "front" for Altus and Credit Lyonnais. In other words, these *contrats de portage* were instrumentalities of an intended fraud on California and the United States.

8. Altus and the MAAF Group did not disclose the *contrats de portage* to Morgan, Lewis & Bockius or to Apollo. In around late 1992 or early 1993 Artemis learned about these "*contrats de portage,*" but never disclosed them to the Commissioner.

9. In October 1991, the Commissioner began receiving bids for ELIC's assets from bidders other than Altus. Of the eight bids the Commissioner received, only three (including a revised bid from Altus) qualified for full consideration. The surviving bids were submitted by: NOLHGA; Sierra National Insurance Holdings, Inc. ("Sierra"); and the Altus/MAAF Group. The Commissioner rejected the other five bids as inadequate.

10. The NOLHGA and Sierra bids were "bonds-in" bids – that is, the junk bonds would remain in the rehabilitated insurance company. By contrast, the Altus/MAAF bid was a "bonds-out" bid, under which: (a) the junk bonds would be sold to Altus in exchange for cash (and thus removed from the insurance company) and (b) the insurance policies of former ELIC policyholders would be restructured and transferred to a new insurance company to be established and owned by the MAAF Group.

11. On October 24, 1991, the Commissioner conditionally accepted the NOLHGA bid, but identified several "serious legal issues" and "potentially grave problems" (*id*. at 4) that he required NOLHGA to cure before its proposal could be finally selected and recommended to the Rehabilitation Court.

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12. NOLHGA responded to the Commissioner's demands on November 4, 1991. A mere two days later, on November 6, 1991, Commissioner Garamendi formally rejected the NOLHGA bid. In a pleading filed with the Rehabilitation Court that same day, the Commissioner identified numerous specific defects in NOLHGA's proposal that provided his "rationale for rejecting the NOLHGA bid . . . ." The Commissioner informed the Rehabilitation Court that he had "determined that it [was] in the best interests of the policyholders . . . to reject the NOLHGA bid and to proceed to select either" the Altus/MAAF bid or the Sierra bid. At trial the Commissioner and his lieutenants gave testimony as to why and how NOLHGA would have gotten the nod if Altus had not been eligible to compete for the deal. This testimony was so flatly at odds with what the Commissioner and his aides did and said from 1991 through at least 1994 as to be devoid of credibility.

13. On November 12, 1991, Sierra submitted a Memorandum to the Commissioner claiming, in essence, that there was reason to believe that Credit Lyonnais and Altus were in control of the MAAF Group, in violation of Section 699.5. The Commissioner thereafter asked for and obtained responses from counsel for Credit Lyonnais and Altus, to the effect that they were not aware of any such secret control. The Commissioner received those assurances, conducted no further investigation, and the next day, November 14, 1991, selected the Altus/MAAF bid over the Sierra bid . Pursuant to that bid, the junk bonds would be sold to Altus in exchange for approximately $3.2 billion in cash and Credit Lyonnais would provide an additional $300 million in loans to help capitalize what would become the rehabilitated insurance company.

14. The next day, November 15, 1991, Altus and MAAF executed a "Management Agreement" that obligated MAAF, in its capacity as a shareholder of NCLH, "to act on behalf of Altus . . . and as its agent to help it to implement its

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strategic decisions" if Altus asked MAAF to do so. Altus and MAAF agreed not to disclose this agreement to any third party.

15. The sale of ELIC's assets to the Altus/MAAF group was embodied in the Rehabilitation Plan, a written contract between the Commissioner and that group. Under the Rehabilitation Plan, ELIC's insurance assets would be, and eventually were, transferred to a new insurance company, Aurora National Life Assurance Company ("Aurora"). The Rehabilitation Plan also provided that Aurora would be owned by a holding company, ultimately NCLH, whose stock, in turn, would be owned by members of the MAAF Group.

16. On December 26, 1991, the Rehabilitation Court approved the Commissioner's selection of the Altus/MAAF bid (which later was amended). Ultimately, the California Court of Appeal upheld the Rehabilitation Court's determination, and the California Supreme Court denied a petition for review.

17. Shortly after the Rehabilitation Court approved the Altus/MAAF bid in December 1991, third parties challenged various portions of that Plan (primarily portions involving the reorganization of ELIC's insurance liabilities). That led to additional litigation. The junk bond sale, however, was not the subject of the dispute.

18. The Commissioner feared that the ELIC Estate's continued ownership of the junk bonds presented a risk that the value of the bonds would go down. He was intent on eliminating that risk, and so the DOI recommended to the Rehabilitation Court that the junk bond sale be severed from the insurance transaction that was the subject of the litigation. The Commissioner sought approval to sell the bonds even though the Department's regulatory review of the MAAF investors had not been concluded.

19. On February 18, 1992, the Rehabilitation Court granted the Commissioner's request and severed the junk bond transaction from the insurance transaction. The Court issued an order approving the transfer of the junk bond

portfolio to Altus, separate and apart from the insurance business. However, the Rehabilitation Court re-opened the bidding process to allow for new bids to compete with the Altus bid. No bidder willing to offer more money for the junk bonds than Altus had bid came forth.

20. On March 3, 1992, Altus purchased the junk bonds for approximately $3.2 billion cash. That amount was paid to the Commissioner in his capacity as Conservator of the ELIC Estate. $3.2 billion was the fair market value for those bonds. From March 3, 1992 to the time of the trial in this case, the ELIC Estate earned approximately $455 million from the use of these funds.

21. In 1991-1992 the Commissioner and his staff were intent on ridding the ELIC Estate of the bonds. In addition to not wanting to risk a further diminution in the value of the bonds, the Commissioner, an elected political officeholder, believed that the vast majority of policyholders wanted the ELIC Estate to be rid of those bonds.

22. In 1991 and continuing until the end of 1994, the key Department of Insurance ("DOI") decisionmakers concerning which bid to accept and what requirements to impose upon the successful bidder were Commissioner Garamendi, his Chief Deputy (Richard Baum) and the DOI's "outside" counsel, the law firm of Rubenstein & Perry. Sometimes these decisionmakers did not timely transmit important information about the negotiations to the DOI regulatory staff and sometimes they did not timely solicit or thoroughly evaluate information which that regulatory staff had developed.

23. After the sale of the junk bonds to Altus closed on March 3, 1992, Credit Lyonnais caused a portion of those bonds to be transferred to a closed-end investment partnership called the Apollo Investment Fund II ("Apollo II"). In return, Altus/Credit Lyonnais received shares of the Apollo II fund. In order to disguise the extent of its ownership of the Apollo II fund from the Federal Reserve Board, Credit Lyonnais entered into additional *portage* agreements with several of

the members of MAAF Investor Group. In the summer of 1992 Credit Lyonnais made false statements to the Federal Reserve Board concerning the circumstances under which it had acquired the ELIC bonds and the extent of its ownership and control of the Apollo II fund. Artemis had nothing to do with those *portage* agreements and false statements.

24. Credit Lyonnais's involvement in the insurance transaction continued after the sale of the junk bonds to Altus in March 1992. The DOI continued to seek extensions from Credit Lyonnais of the MAAF Group's $300 million funding guaranty until the formation of the new insurance company. Thus, that guaranty was extended on April 14, 1992, October 1, 1992, January 5, 1993, and March 1, 1993.

25. In April 1993, various owners of Municipal Guaranteed Investment Contracts ("Muni-GICs") that ELIC had issued before it was placed in conservation filed a motion in the Rehabilitation Court to rescind the sale of the junk bonds to Altus. The Commissioner opposed their motion. On August 13, 1993, the Rehabilitation Court denied the Motion to Rescind and approved a Modified Plan of Rehabilitation. The Rehabilitation Court found, among other things, that the sale of ELIC's junk bonds had been severed from the transfer of ELIC's other assets. It ruled,

> The Court and all parties were aware that the Commissioner proposed to sever the bond sale from the insurance transaction, and that the severed junk bond sale would be final, regardless of whether the Plan was approved or consummated. The Court noted that if the insurance transaction did not close for any reason, including problems with the insurance transaction itself, Altus would retain the junk bonds and ELIC would have its cash equivalent, the $3.25 billion purchase price. In this way, the estate would be insulated from further fluctuations in the junk bond market.

26. Artemis was not formed until late 1992. It did not participate in the bidding process for the assets of ELIC, the negotiation of and Commissioner’s approval of the Altus/MAAF bid or the execution of the

contrats de portage. These events all occurred in 1991 and Artemis is not responsible for them.

27. On December 24, 1992, Artemis, Altus and Credit Lyonnais signed a contract by which Altus sold to Artemis approximately 21% (in terms of value) of the ELIC junk bond portfolio that Altus had acquired from ELIC nine months earlier. The price was approximately $2 billion. Altus financed most of the cost. Artemis also acquired an option to purchase "those rights acquired by Altus . . . [in] the Aurora Insurance Company (formerly Executive Life) . . .." In other words, under this agreement Artemis not only purchased junk bonds but also acquired an option to exercise the rights that Altus held in NCLH as a result of the Altus/MAAF Group *portage* agreements.

28. In December 1992 attorneys at Morgan, Lewis & Bockius started work on behalf of Artemis to enable Artemis to acquire an ownership interest in NCLH and Aurora. In January and February 1993, Morgan, Lewis & Bockius attorneys disclosed to Artemis the kind of information the DOI would require in connection with any application by Artemis to acquire control of NCLH or Aurora. Artemis's lawyers, and other Artemis advisors as well, informed Artemis of the requirements of California Insurance Code section 699.5, to the effect that California prohibited a foreign government from directly or indirectly controlling an insurance company. Officers and agents of Artemis (Patricia Barbizet and Marie Christine de Percin) understood that the information they would provide, and did provide, to Morgan, Lewis & Bockius would be submitted to and relied upon by the DOI.

29. In February 1993, Artemis informed the DOI that some of the members of the MAAF Group intended to withdraw from the consortium of NCLH stockholders who were slated to own and operate Aurora and that it

intended to buy those members' interests in Aurora. The DOI requested Artemis to defer purchase of those shares and instead let the sale and transfer of the insurance assets close with the original members of the MAAF Group still intact.

30. At some point, Artemis became aware of the scheme of Altus, Credit Lyonnais, MAAF Assurance or MAAF Vie, Omnium Geneve, SDI Vendome and Finapaci to obtain insurance assets of the ELIC Estate by concealing French governmental control or ownership of NCLH and Aurora. Artemis agreed to participate with one or more of those entities to accomplish their scheme, knowing their wrongful objective. In furtherance of the initial conspirators' scheme, on various dates in the spring and summer of 1994, including March 23, 1994, April 22, 1994, May 17, 1994, July 1, 1994 and July 6, 1994, Artemis submitted Form A applications to the DOI related to Artemis' proposed acquisition of stock in NCLH. One or more entries on one or more of these applications was false or misleading, in that Artemis either (a) failed to disclose the existence of the option clause in the December 24, 1992 contract; (b) failed to disclose the existence of the *portage* agreements between Altus and MAAF and other members of the MAAF Investor Group; (c) failed to disclose that in December 1993 Artemis had contracted with Fimilac (one of the members of the MAAF Investor Group) to obtain ownership of Fimilac's shares of NCLH stock without DOI approval; (d) concealed the fact that the money Artemis would use for the purchase of the MAAF Investor Group's shares had been loaned to Artemis by Credit Lyonnais; or (e) materially understated the extent of Credit Lyonnais ownership and control over Artemis and Financiere Pinault. The Commissioner relied on the false or misleading representation[s] or omission[s] in Artemis's Form A filing.

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31. The closing of the insurance transaction occurred on September 3, 1993. On that date, ELIC's insurance assets and liabilities were transferred to Aurora. Pursuant to the Stockholders Agreement submitted to the DOI and signed by the MAAF Group at the closing, Artemis was designated as a permitted transferee of NCLH shares and was given one year to acquire NCLH shares owned by the MAAF Group, subject to DOI approval.

32. The DOI was aware that if Artemis acquired indirect ownership of Aurora by purchasing shares of NCLH from the MAAF Group, there was -- at the very least -- a likelihood that the French government would be in a position to control or influence Aurora. Thus, in May 1994, Lorraine Johnson, the key DOI staffer responsible for assuring compliance with the applicable Insurance Code provisions and DOI regulations (including Insurance Code §699.5), wrote that "even when looking at [Artemis's] initial proposal to acquire 16%, this proposal by Credit Lyonnais and Mr. Pinault cannot be viewed as a simple investment with little-to-no probability of French governmental control and influence." In 1995, Ms. Johnson advised her superiors that she viewed "the Artemis acquisition as primary [sic] an acquisition by Credit Lyonnaise [sic]/French gov." In a letter to Artemis's counsel dated May 26, 1994, Ms. Johnson stated that "[s]enior members of Credit Lyonnais' U.S. office have also publicly introduced themselves as representatives of the company that owns Executive Life Insurance Company."

33. On March 14, 1994, *Forbes* magazine published a lead story entitled “Smart Buyer, Dumb Seller,” which posed the following rhetorical question - *“How is it that Credit Lyonnais, the $335 billion (assets) bank that is 52% owned by the French government, came to control Aurora National Life Assurance Co., formerly Executive Life, a California*

insurance company?" (emphasis added). The same article noted that Altus owned 19.7% of Artemis and that Clinvest, yet another Credit Lyonnais division, owned 11% of Financiere Pinault.

34. On March 18, 1994, Commissioner Garamendi wrote a seven-page, single-spaced letter to the Editor of *Forbes* disputing what he characterized as "half-truths," "misleading statements" and "outright falsehoods" in the *Forbes* article. The Commissioner boasted of the "clear success" of the 1991 bidding process and the "home run for policyholders" that resulted from it. He noted that "The bid which ultimately prevailed [*i.e.*, the Altus/MAAF bid] included over $3 billion in cash and a higher return for policyholders without the risk of continuing to hold the junk bonds." In his letter the Commissioner did not even address, much less refute, the assertion that Credit Lyonnais was in control of the new insurance company.

35. Between June 22, 1994 and August 25, 1994, the DOI approved applications that allowed Artemis to acquire 50% of the stock of NCLH.

36. On August 31, 1994 the DOI approved a Voting Trust Agreement between Artemis and Aurora, concerning Artemis's ownership of NCLH shares. Under the agreement, three Voting Trustees acquired the right to vote the NCLH shares that Artemis owned and at least two of those trustees had to be citizens of the United States. The agreement also provided that none of the trustees "shall be an elected or appointed official of the French State or officer or director of Altus Finance, Credit Lyonnais or any other business organization controlled by the French State." Artemis thereafter complied with these terms. This Voting Trust Agreement, or one like it, could have been approved by the DOI much earlier, and if such a trust had been approved much of what the Commissioner pointed to as false

or misleading in the Form A applications described above (see ¶ 30 above) either would not have been false or misleading or would have been immaterial.

37. In the spring of 1995 Artemis submitted an application to the DOI for permission to acquire an additional 17% of the stock of NCLH. The DOI approved that application.

38. Artemis ultimately acquired 67% of the shares of NCLH.

39. Under Artemis's ownership and control, Aurora has fulfilled its obligations under the Rehabilitation Plan and policyholders have not been injured by the conduct of Artemis and NCLH in managing Aurora.

40. The Commissioner and his representatives did not learn of the *portage* contracts until January 1999.

41. After December 24, 1992, Artemis obtained at least $459,008,378 in profit attributable to the bonds that it acquired from Altus. At trial, the amount of dividends that Artemis received from NCLH was specified as $240,814,087. Of that amount, $13,086,807 was obtained in connection with a secret "dividend swap" agreement that Artemis negotiated with MAAF in 1995.)[7] Artemis and the other current owner of NCLH have contracted to sell NCLH to "REALIC" (a subsidiary of Swiss Reinsurance). Artemis will be entitled to receive $151,885,297 upon the closing of that transaction.

CONCLUSIONS OF LAW

1. A claim for unjust enrichment is an action in quasi-contract. *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004). Under California law, "[unjust enrichment] is synonymous with restitution."

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[7] The Court previously ruled that all of this amount is attributable to MAAF and will be included in the judgment to be entered in favor of the Commissioner against MAAF.

McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004).

2. To prevail on a claim for unjust enrichment, the plaintiff must establish that the defendant received a benefit and that it would be unjust to allow the defendant to retain the benefit at the expense of the plaintiff. *Lectrodryer v. Seoul Bank*, 77 Cal. App. 4th 723, 726 (2000); *Ghirando v. Antonioli,* 14 Cal. 4th 39, 51 (1996).

3. "For a benefit to be conferred, it is not essential that money be paid directly to the recipient by the party seeking restitution." *County of Solano v. Vallejo Redevelopment Agency*, 75 Cal. App. 4th 1262, 1278 (1999).

4. "A person is unjustly enriched if the retention of the benefit would be unjust." *Restatement of Restitution*, § 1, cmt. a, p. 12 (1937); *California Federal Bank v. Matreyek*, 8 Cal. App. 4th 125, 131 (1992).

5. "Even when a person has received a benefit from another, he is required to make restitution 'only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust [for him] to retain it.'" *Ghirardo v. Antonioli* 14 Cal.4th 39, 51(1996) (quoting *Restatement of Restitution*, cmt. c, p. 13).

6. "Determining whether it is unjust for a person to retain a benefit may involve policy considerations." *First Nationwide Savings v. Perry*, 11 Cal. App. 4th 1657, 1663 (1992). One of the policies underlining the purpose and function of equitable relief is that "The doors of a court of equity are closed 'to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief . . ..'" *Thomas v. Gordon*, 85 Cal. App. 4th 113, 123 (2000).

7. In determining what, if any, amount of equitable relief to grant, the Court may also take into account "general considerations of fairness . . . [including] the nature of the defendant's wrong . . . [and] the relative extent

of his . . . contribution . . . . The trial court must ultimately decide whether the whole circumstances . . . point to the conclusion that the defendant's retention of any profit is unjust." *University of Colo. Found., Inc. v. American Cyanamid Co.*, 342 F.3d 1298, 1311-12 (Fed. Cir. 2003).

8. The fact that the Commissioner received fair market value for the benefit he conferred in transferring the junk bonds does not necessarily preclude him from obtaining restitution. *See, Ward v. Taggart*, 51 Cal. 2d 736, 741-742 (1959). Nevertheless, the Commissioner is not entitled to recover the profits Artemis earned on the junk bonds, for the following reasons: (1) the transfer of the junk bonds occurred before Artemis came into existence; (2) the transfer was a separate transaction from the sale of the insurance assets; (3) the Commissioner was intent on selling the ELIC Estate's junk bonds anyway; (4) the Commissioner received fair market value for the bonds and earned some $455 million upon investing the $3.2 billion that Altus had paid.

9. Although a claim for unjust enrichment generally is precluded where there is a valid and binding contract covering the subject matter of the dispute, *Paracor Finance., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir 1996), "[r]estitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud . . . [or] where the defendant obtained a benefit from the plaintiff by fraud . . . ." *McBride v. Boughton*, 123 Cal. App. 4th 379, 388 (2004). Thus, the Commissioner's restitution claim is not barred because of any failure on his part to rescind the approvals DOI gave to Artemis to acquire ownership of NCLH shares, the Amended Rehabilitation Plan or any other contract. *See Low v. Altus Finance S.A.*, 136 F. Supp. 2d 1113, 1121 (C.D. Cal. 2001); *Stegeman v. Vandeventer*, 57 Cal. App. 2d 753, 761-62 (1943).

10. The jury's finding that the Commissioner was entitled to no compensatory damages does not flatly bar the Commissioner's restitution claim. *Restatement of Restitution* § 1, cmt. e (1937). *Ward v. Taggart*, 51 Cal. 2d 736, 741 (1959). *See, Coleman v. Ladd Ford Co.*, 215 Cal. App. 2d 90, 93-94 (1963) (*Ward* permits exceptions to the out-of-pocket rule "to avoid injustice in the particular case"). To permit partial restitution here is consistent with the principle embodied in Cal. Civ. Code § 3517 that no one can "take advantage of his own wrong."

11. The public interest will be served if the statutory framework for insurance regulation in California is vindicated by a ruling requiring Artemis to make at least some restitution. Owners and executives of insurance companies, including powerful and sophisticated companies like Artemis, are subject to disclosure and compliance requirements imposed by the California Insurance Code and by the regulations of the DOI; they must tell the truth and comply with the law. In certain respects, Artemis failed to comply with these duties.

12. After joining the other defendants' conspiracy to defraud the Commissioner, Artemis obtained a benefit (its ownership interest in NCLH and control over Aurora.) It did so after making misrepresentations to the DOI and concealing material information from the DOI. As between the Commissioner and Artemis, it would be unjust for Artemis to retain *all* (as opposed to *any*) of the profits it derived from that ownership interest. On the other hand, under well-established principles of equity it would be unjust to require Artemis to surrender *all* of the profits that it derived from obtaining control over Aurora. To award the Commissioner the full amount of the restitution - - $1,285,000,000 - - that he seeks would provide him with an undeserved windfall. Under the facts and circumstances here, justice requires that Artemis surrender only *some* of those profits.

13. To the extent that any French-government controlled entity acquired control over Aurora, the ELIC policyholders were not injured. The Commissioner requested and obtained from French Government - related defendants a $300 million capital infusion that was critical to establishing what became the successful rehabilitated insurance company. Moreover, although the Commissioner learned of the *contrats de portage* and alleged fraud sometime in early 1999, he did not revoke Aurora's license to carry on the insurance business and he permitted NCLH (and therefore Artemis) to remain in control of Aurora. Artemis consistently operated Aurora in a lawful and businesslike manner. It would be particularly inequitable to permit the Commissioner to obtain restitution of dividends that Artemis earned for any period in which the Commissioner actually required Aurora to continue managing the insurance company.

14. Artemis derived the following benefits.

Dividends		$240,814,087
	-	$ 13,086,807 (attributable to MAAF)
		$227,727,280
Capital Value of its Ownership Interest in NCLH		$151,885,297
Total:		$379,612,577

15. The Court finds that Artemis shall restore to the Commissioner one-half of the foregoing benefits, or $189,806,288, plus interest calculated at 7%. The parties shall stipulate to the interest calculation and by not later

than November 30, 2005 they shall file a joint statement specifying the amount to be entered in the final judgment.

16. It is unnecessary to address the Commissioner's request for imposition of a constructive trust because this ruling renders duplicative any such remedy. Nor is an "accounting" warranted.

17. To the extent that any of the foregoing findings of fact, including the observations in the Introduction section of this ruling, may also be deemed conclusions of law, they shall be so deemed. And to the extent that any of the foregoing conclusions of law may also be deemed findings of fact, they shall be so deemed.

IT IS SO ORDERED.

DATED: November ____, 2005

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A. Howard Matz
United States District Judge