

ROBB EVANS
Receiver of
Assets of James P. Lewis, Jr.,
Financial Advisory Consultants,
Income Fund Ltd. &
Growth Fund Ltd.

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Securities and Exchange Commission v. James P. Lewis, Jr., et al.
CASE No. CV 03-9354 ABC (VBKx)

Memorandum of Points and Authorities of
Plaintiff Securities and Exchange Commission in opposition to (1) to
Intervene and (2) For Leave to File State Court Class Action Lawsuit

Filed Dated April 26, 2004

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

JAMES P. LEWIS, JR., individually
and doing business as FINANCIAL
ADVISORY CONSULTANTS,
INCOME FUND, LTD. AND
GROWTH FUND, LTD.,

Defendant.

Case No. CV 03-9354 ABC (VBKx)

**MEMORANDUM OF POINTS
AND AUTHORITIES OF
PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION IN
OPPOSITION TO MOTION (1) TO
INTERVENE AND (2) FOR LEAVE
TO FILE STATE COURT CLASS
ACTION LAWSUIT**

Date: May 10, 2004

Time: 10:00 a.m.

Place: Courtroom of the Hon. Audrey
B. Collins

1 I.

2 INTRODUCTION

3 The Securities and Exchange Commission (the "Commission") opposes the
4 Motion to Intervene ("Motion") of Janet Goldblatt ("Movant"). Movant is one of
5 the thousands of persons who invested in the massive Ponzi scheme perpetrated by
6 James P. Lewis, Jr., Financial Advisory Consultants, Income Fund, Ltd., and
7 Growth Fund, Ltd. (collectively "Lewis") and received less money from Lewis
8 than they invested with him ("Net Loss Investors"). Movant filed the Motion for
9 the purpose of obtaining leave to file a class action lawsuit in California state court
10 against (1) Lewis and (2) all persons who invested in the same Ponzi scheme and
11 who received more money from Lewis than they invested with him ("Net Gain
12 Investors").

13 Movant's Motion should be denied for several reasons. First, Movant
14 cannot meet the standards established for intervention "as of right" set forth in
15 Fed. R. Civ. P. 24(a). Movant fails to demonstrate that her interests are not being
16 adequately represented by the Receiver in its efforts to recover monies from the
17 Net Gain Investors for the benefit of the Net Loss Investors. Second, Movant fails
18 to establish a viable claim for permissive intervention under Fed. R. Civ. P. 24(b).
19 Indeed, Movant expressly is barred from suing Lewis by the terms of the Court's
20 Order Appointing A Permanent Receiver ("Order") and impliedly barred from
21 suing the Net Gain Investors because doing so would inevitably lead to counter-
22 claims by the Net Gain Investors against Lewis, also in violation of the Order.
23 Third, granting Movant's Motion would serve only to duplicate the Receiver's
24 efforts, increase costs to the estate, and decrease funds available for distribution to
25 the defrauded investors. For all these reasons, this Court should deny Movant's
26 Motion in its entirety.

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II.

PROCEDURAL BACKGROUND

The Commission filed its Complaint in this matter on December 22, 2003. The following day, the Hon. Audrey B. Collins granted the Commission's Ex Parte Application for a Temporary Restraining Order and other relief.

On January 8, 2004, the Court appointed Robb Evans & Associates, LLC ("Evans") as Temporary Receiver over Lewis' assets. On January 16, Evans filed its Report of Receiver's Activities (January 8, 2004 through January 15, 2004). On January 22, the Court granted the Commission's Application for a Preliminary Injunction and appointed Evans as Permanent Receiver ("Receiver"). On March 8, the Receiver filed its Report of Receiver's Activities (January 16, 2004 through February 27, 2004). The Receiver's Reports detail the exemplary job he has done identifying and marshaling the assets of the receivership estate and tracing the disposition of investor proceeds over the course of Lewis' long-running fraudulent scheme. In addition, the Receiver's second Report disclosed his intention "to file a motion with this Court within the next two weeks requesting authorization to initiate litigation, as appropriate, to recover various funds, including funds that were paid to investors in excess of the amounts they invested."

On April 2, after a courtesy call from Movant's counsel to inform the Commission of her intentions, Movant filed her Motion, announcing her intention to file a class action lawsuit also seeking the recovery from those investors who "received more money . . . than they invested."

III.

ARGUMENT

A. Movant Has Failed To Establish Mandatory Or Permissive Intervention

As a general matter, intervention is controlled by Fed. R. Civ. P. 24, which sets forth the two types of intervention, namely (i) intervention "as of right," and

1 (ii) permissive intervention. Rule 24(a) provides in pertinent part:

2 “(a) Intervention of Right: Upon timely application,
3 anyone shall be permitted to intervene in an action: (1)
4 when a statute of the United States confers an
5 unconditional right to intervene; or (2) when the
6 applicant claims an interest relating to the property or
7 transaction which is the subject of the action and the
8 applicant is so situated that the disposition of the action
9 may as a practical matter impair or impede the
10 applicant’s ability to protect that interest, unless the
11 applicant’s interest is adequately represented by the
12 existing parties.”

13 Movant has the burden of demonstrating that the conditions for either type
14 of intervention are satisfied. *See Petrol Stops Northwest v. Continental Oil Co.*,
15 647 F.2d 1005, 1010 n. 5 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 672, 70
16 L.Ed.2d 639 (1981). For the reasons set forth below, Movant fails to meet her
17 burden, warranting denial of her Motion.

18 **1. Movant Is Not Entitled To Intervention “As Of Right”**

19 To obtain an order granting intervention as of right, the application must (1)
20 be timely; (2) assert an interest relating to the subject property; (3) demonstrate
21 that without intervention the disposition may, as a practical matter, impair or
22 impede the applicant’s ability to protect that interest; and (4) demonstrate that the
23 existing parties will not adequately represent the applicant. *See United States ex*
24 *rel McGough v. Covington Technologies*, 967 F.2d 1391, 1394 (9th Cir. 1992). In
25 *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996),
26 the Circuit added the term “significantly protectable” to the interest sought to be
27 protected in the second part of the test. Failure to satisfy any one of these
28 elements constitutes sufficient grounds to deny an intervention application. *SEC*

1 v. *TLC Investments and Trade Co.*, 147 F.Supp.2d 1031, 1041 (C.D. Cal. 2001),
2 citing *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th
3 Cir. 1997).

4 a. **Movant Has Failed To Demonstrate That The Commission**
5 **And The Receiver Will Not Adequately Represent Her**
6 **Interests**

7 In evaluating whether there already exists a party who will adequately
8 represent the proposed intervenor's interests, the Court must consider three
9 factors: (1) whether the interests of a present party to the lawsuit are such that it
10 will undoubtedly make all of the intervenor's arguments; (2) whether the present
11 party is able and willing to make such arguments; and (3) whether the intervenor
12 would offer any necessary element to the proceedings that the other parties would
13 neglect. See *United States v. Stringfellow*, 783 F.2d 821, 827 (9th Cir. 1986).

14 When an applicant for intervention and an existing party "have the same
15 ultimate objective, a presumption of adequacy of representation arises."
16 *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 828 (9th Cir. 1996)
17 (upholding denial of intervention of environmental group where it alleged only
18 minor differences in opinion with the Defendant Secretaries of the Interior and
19 Agriculture in interpreting statute at issue). Minor differences of opinion and
20 differing strategies in pursuing the litigation will not overcome this presumption.
21 *Id.*

22 Movant and the Receiver share the same ultimate objective and the same
23 legal theory for realizing that objective: the recovery of purported profits paid to
24 the Net Gain Investors via application of California's Uniform Fraudulent Transfer
25 Act. Thus, the Receiver's representation of Movant is presumed to be adequate
26 and Movant must rebut that presumption. *SEC v. TLC Investments & Trade Co.*,
27 147 F.Supp.2d 1031, 1042 (C.D. Cal. 2001).

28 Movant does not directly address any of the *Stringfellow* factors or offer any

1 evidence to rebut the *Glickman* presumption. Instead, as the sole basis of her
2 contention that intervention is warranted, Movant relies upon the Rules of
3 Professional Conduct regarding the simultaneous representation of clients with
4 actual or potentially conflicting interests. According to Movant, said Rules
5 prohibit the Receiver from representing the Net Loss Investors in a lawsuit against
6 the Net Gain Investors, as his loyalties will or may be divided between the two
7 classes of “clients” he purportedly represents.

8 Movant’s Motion is premised entirely on a flawed rendering of the law. It is
9 well settled that neither the Net Gain nor the Net Loss Investors are the Receiver’s
10 clients; instead, the Receiver has stepped into the shoes of Lewis and FAC. *See*
11 *CFTC v. Weintraub*, 471 U.S. 343, 105 S.Ct. 1986, 1993, 85 L.Ed.2d 372 (1985)
12 (receiver ultimately appointed trustee in bankruptcy “plays the role most closely
13 analogous to that of a solvent corporation’s management”). *See also Banco de*
14 *Desarrollo Agropecuario, S.A. v. Gibbs*, 709 F.Supp. 1302, 1305 (S.D. New York
15 1989) (receiver stands in shoes of corporation and can assert only those claims
16 which corporation itself could have asserted). In his capacity as Receiver over the
17 assets of Lewis and FAC, the Receiver endeavors to recover from the Net Gain
18 Investors, for the benefit of the Net Loss Investors such as Movant, the sums they
19 were paid in excess of their investment.

20 Even assuming *arguendo* that the Receiver did represent both sets of
21 Investors, then the Net Gain Investors whom the Receiver proposes to sue might
22 have standing to raise a credible claim of inadequate representation – not the Net
23 Loss Investors on whose behalf the Receiver seeks recovery.

24 The Commission and the Receiver undoubtedly share Movant’s purported
25 ultimate objective – to maximize distributions to defrauded investors. The
26 Commission exposed this fraud and brought an emergency action to halt further
27 dissipation of investor assets. The Commission is “statutorily commissioned to
28 represent the interests of individual investors in the public at large.” *SEC v.*

1 *Qualified Pensions, Inc.*, 1998 U.S. Dist. Lexis 942, *11 (D.D.C. 1998), *citing*
2 S.Rep. No. 94-75, at 74. The Receiver, under the Court’s watchful eye, is
3 similarly acting for the benefit of investors by maximizing investor distributions
4 by the orderly marshaling of the estate’s assets and the frugal management thereof.
5 *See SEC v. Wencke (Wencke II)*, 783 F.2d 829, 837 n. 9 (9th Cir. 1986) (primary
6 purpose of equity receiverships is to promote orderly and efficient administration
7 of the estate by the district court); *SEC v. Elliott*, 953 F.2d 1560, 1577 (11th Cir.
8 1992) (“Even though Receiver may at times take adverse positions to certain
9 claimants, the Receiver acts under supervision of the court; for the court must
10 independently approve the Receiver’s legal and factual findings.”). Thus, Movant
11 fails to establish a claim for intervention under Fed. R. Civ. P. 24(a).

12 **2. Movant Has Failed To Establish A Claim To Permissive**
13 **Intervention**

14 A court may also allow intervention if the terms of Rule 24(b) are met. This
15 Rule provides in pertinent part:

16 “(b) Permissive Intervention. Upon timely application,
17 anyone may be permitted to intervene in an action: (1)
18 when a statute of the United States confers a conditional
19 right to intervene; or (2) when an applicant’s claim or
20 defense and the main action have a question of law or
21 fact in common. ****In exercising its discretion the
22 court shall consider whether the intervention will unduly
23 delay or prejudice the adjudication of the rights of the
24 original parties.”

25 The decision to deny permissive intervention is committed to the sound
26 discretion of the district court. *See Donnelly v. Glickman*, 159 F.3d 405, 412 (9th
27 Cir. 1998) (district court has discretion to deny permissive intervention even if an
28 applicant satisfies threshold requirements). There are sound policy reasons why

1 this Court should deny Movant's request.

2 **b. Movant Is Expressly And Impliedly Barred From Suing**
3 **Lewis By The Terms Of The Order Appointing The**
4 **Receiver**

5 Movant proposes filing a class action lawsuit against both Lewis and the
6 Net Gain Investors.^{1/} Movant's proposal to seek relief directly from Lewis is
7 diametrically opposed to the Order, which states, in paragraph XI:

8 that "except by leave of this Court, during the pendency
9 of this permanent receivership, all clients, investors, . . .
10 and all other persons or entities seeking relief of any
11 kind, in law or in equity, from Lewis, FAC, Income
12 Fund, and Growth Fund, . . . are hereby preliminarily
13 restrained from, directly or indirectly, . . . (A)
14 commencing, prosecuting, continuing or enforcing any
15 suit or proceeding (other than the present action by the
16 Commission) against Lewis, FAC, Income Fund, and
17 Growth Fund."

18 Even if this Court were to deny Movant leave to sue Lewis but grant her
19 leave to sue the Net Gain Investors, the ultimate result would be a proliferation of
20 lawsuits against Lewis in contravention of the terms of the Order cited in the
21 preceding paragraph. If this Court permits Movant to pursue her proposed class
22 action claims against the Net Gain Investors in state court, it necessarily would
23 open the door to potentially hundreds of counter-claims by those same Net Gain
24 Investors against Lewis. Such an outcome is not conjecture on the part of the

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26 ^{1/} As the Hon. Richard Posner noted, in favoring the merits of a receiver's
27 efforts to recover assets from the net gain investors of another Ponzi scheme over
28 the conceivable alternatives, "class actions are clumsy devices." *Scholes v.*
Lehmann, 56 F.3d 750, 755 (7th Cir. 1995).

1 Commission but a clear-eyed appraisal of the circumstances; indeed, the Net Gain
2 Investors would have no other recourse but to sue Lewis in order to minimize their
3 personal exposure. Even if the inevitable proliferation of lawsuits did not directly
4 involve the Receiver, it would, by involving Lewis and the Investors, further
5 deplete resources that might otherwise be made available to the Receivership
6 estate, as well as further impede judicial economy.

7 c. **If Movant's Motion Is Granted, She And All Other Net**
8 **Loss Investors Will Lose, And Only Her Attorneys Will**
9 **Win**

10 As previously stated, Movant's Motion to Intervene is unwarranted and
11 unnecessary, as there is no reason why her interests will not be represented by the
12 Commission's ongoing lawsuit against Lewis and the Receiver's efforts to seek
13 redress from the Net Gain Investors. Allowing Movant to independently pursue
14 her class action claims against Lewis and the Net Gain Investors will lead,
15 inevitably, to a duplication of effort for no constructive purpose, and a further
16 squandering of the resources of the receivership estate.

17 In this regard, there is an elephant in the room whose presence must be
18 acknowledged – the law firm that represents Movant and the fees the firm will
19 generate if Movant is permitted to pursue her class-action claims. Those fees will
20 not be peanuts. Yet there is simply no reason to believe that Movant's class-action
21 lawsuit would yield a greater return to the Net Loss Investors than would the
22 efforts of the Receiver, and there is ample reason to suspect that, after legal fees
23 are deducted, it would yield less. The Receiver has had the advantage of having
24 already spent hundreds of man-hours on this matter, giving it an institutional
25 knowledge that cannot be reproduced quickly or at little cost. Moreover, the
26 Receiver had to submit a competitive proposal to the Commission in order to be
27 nominated as Receiver, and has to submit his billings to the Court for approval –
28 cost-effective safeguards that serve to further maximize the pool of assets that will

1 be available for distribution to the Net Loss Investors. For all these reasons, the
2 suspicion lingers that if Movant's Motion is granted, Movant would be the
3 ostensible prevailing party, but her attorneys would be the real beneficiaries. *See*
4 *TLC*, 147 F.Supp.2d at 1037 ("It would be duplicitous and a waste to pay other
5 lawyers out of the same funds, even if payment was only for the "value added" by
6 those lawyers.").

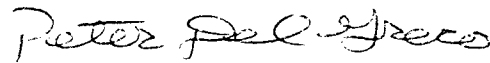
7 **IV.**

8 **CONCLUSION**

9 For the foregoing reasons, the Commission requests that this Court deny
10 Movant's Motion to Intervene in its entirety.

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12 DATED: April 26, 2004

Respectfully submitted,

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15 _____
16 Gregory C. Glynn
17 Peter F. Del Greco
18 Attorneys for Plaintiff
19 Securities and Exchange Commission
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1 **PROOF OF SERVICE**

2 I am over the age of 18 years and not a party to this action. My business address
3 is:

4 U.S. SECURITIES AND EXCHANGE COMMISSION, 5670 Wilshire
Boulevard, 11th Floor, Los Angeles, California 90036.

5 Telephone: (323) 965-3998 Fax: (323) 965-3908

6 On April 26, 2004, I served the document entitled **MEMORANDUM OF**
7 **POINTS AND AUTHORITIES OF PLAINTIFF SECURITIES AND**
8 **EXCHANGE COMMISSION IN OPPOSITION TO MOTION (1) TO**
9 **INTERVENE AND (2) FOR LEAVE TO FILE STATE COURT CLASS**
ACTION LAWSUIT upon the parties to this action addressed as stated on the
attached service list:

10 **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for
collection and mailing today following ordinary business practices. I am
11 readily familiar with this agency's practice for collection and processing of
correspondence for mailing; such correspondence would be deposited with
12 the U.S. Postal Service on the same day in the ordinary course of business.

13 **PERSONAL DEPOSIT IN MAIL:** By placing in sealed
envelope(s), which I personally deposited with the U.S. Postal
14 Service. Each such envelope was deposited with the U.S. Postal
Service at Los Angeles, California, with first class postage thereon
15 fully prepaid.

16 **EXPRESS U.S. MAIL:** Each such envelope was deposited in a
17 facility regularly maintained at the U.S. Postal Service for receipt of
Express Mail at Los Angeles, California, with Express Mail postage
paid.

18 **PERSONAL SERVICE:** I caused to be personally delivered each such
19 envelope by hand to the office of the addressee in the attached service list.

20 **FEDERAL EXPRESS:** By placing in sealed envelope(s) designated by
Federal Express with delivery fees paid or provided for, which I deposited
21 in a facility regularly maintained by Federal Express or delivered to a
Federal Express courier, at Los Angeles, California.

22 **FACSIMILE (by agreement of parties only):** By transmitting the
document by facsimile transmission. The transmission was reported as
23 complete and without error.

24 **(Federal)** I declare that I am employed in the office of a member of the bar
25 of this Court, at whose direction the service was made. I declare under
penalty of perjury that the foregoing is true and correct

26 Date: April 26, 2004

27 
28 MAGNOLIA M. MARCELO

