

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

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Telephone No.: (818) 768-8100
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Securities and Exchange Commission v. James P. Lewis, Jr., et al.
CASE No. CV 03-9354 ABC (VBKx)

**Notice of Motion and Motion by Receiver for Order Approving Third
Distribution to Approved Claimants;
Memorandum of Points and Authorities and Declaration of Kenton
Johnson in Support Thereof**

Filed May 11, 2007

FILED

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2007 MAY 11 PM 3:19

COURT U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

BY _____

7 Attorneys for Receiver
8 **ROBB EVANS**

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

11 SECURITIES AND EXCHANGE
12 COMMISSION,

13 Plaintiff,

14 v.

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

18 Defendants.

CASE NO. CV 03-9354 ABC (VBKx)

**NOTICE OF MOTION AND
MOTION BY RECEIVER FOR
ORDER APPROVING THIRD
DISTRIBUTION TO APPROVED
CLAIMANTS; MEMORANDUM OF
POINTS AND AUTHORITIES AND
DECLARATION OF KENTON
JOHNSON IN SUPPORT THEREOF**

DATE: June 4, 2007
TIME: 10:00 a.m.
PLACE: Courtroom 680

20
21 PLEASE TAKE NOTICE that on June 4, 2007 at 10:00 a.m. in Courtroom
22 680 of the above-referenced Court, located at 255 E. Temple Street, Los Angeles,
23 California, Robb Evans as Receiver over the assets of James P. Lewis, Jr.,
24 individually and doing business as Financial Advisory Consultants, Income Fund,
25 Ltd. and Growth Fund, Ltd. ("Receiver"), will move the Court for an order
26 approving the proposed third distribution on all Approved Claims in the
27 receivership estate in the aggregate amount of not less than \$4 million representing
28

1 approximately 2.6% of Approved Claims, to be distributed pro rata among all
2 Approved Claims of investors and non-investor creditors.

3 This Motion is made pursuant to the Court's prior Claims Procedures Order,¹
4 the Court's order approving the Receiver's pro rata distribution plan for subsequent
5 distributions dated July 19, 2006, Local Civil Rules 66-7 and 66-8, the authorities
6 set forth in the supporting memorandum, and the limited notice order entered
7 July 14, 2004.² This Motion is based upon this Notice of Motion and Motion, the
8 accompanying memorandum of points and authorities and declaration of Kenton
9 Johnson attached hereto and served and filed herewith, any reply, and upon the
10 pleadings, records and files of this Court in connection with this matter, and upon
11 such further oral and documentary evidence as may be presented at or before the
12 time of the hearing on the Motion.

13
14 PLEASE TAKE FURTHER NOTICE that this Motion is served in
15 accordance with the Limited Notice Order. Pursuant to the Limited Notice Order,
16 this Motion has been posted on the Receiver's website at www.facreceiver.com
17 where it may be reviewed in its entirety. This Motion has also been mailed to those
18 creditors and other interested parties who have made requests for notice in
19 accordance with the procedures specified in the Limited Notice Order. Hard copies
20 of the Motion will be provided upon written request for copies submitted to the
21


22
23 ¹ Order: (1) Approving Receiver's Report for the Period of March 1, 2004 Through
24 December 31, 2004; and (2) Approving Receiver's Proposed Claims Filing and
Allowance Procedures filed February 17, 2005 ("Claims Procedure Order").

25 ² The order is entitled "Order Granting Motion by Receiver for Second Omnibus
26 Order: (1) Approving Sale of Coin Collection by Private Sale and Modifying Sale
27 Procedures of 28 U.S.C. sections 2001 and 2004 in Connection Therewith; (2)
28 Approving Sale of All Ownership and Other Claims and Interests in Pyro Shield,
Inc., and Related Compromises and Modifying Sale Procedures of 28 U.S.C.
sections 2001 and 2004 in Connection Therewith; (3) Approving and Authorizing
Payment of Receivership Expenses [January 6, 2004 through April 30, 2004]; and
(4) Limiting Notice" (hereinafter, the "Limited Notice Order").

1 Receiver's office at: Robb Evans & Associates, 11450 Sheldon Street, Sun Valley,
2 California 91352-1121, Attn: Lillian Lee, Deputy to the Receiver.

3
4 DATED: May 11, 2007

McKENNA LONG & ALDRIDGE LLP
GARY OWEN CARIS
LESLEY ANNE HAWES
ERIN M. JACKSON

7
8 By: 
9 GARY OWEN CARIS
Attorneys for Receiver, ROBB EVANS

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 **INTRODUCTION AND STATEMENT OF FACTS**

4 The Receiver was originally appointed as temporary receiver pursuant to this
5 Court's Order Appointing Temporary Receiver Over the Assets of James P. Lewis,
6 Jr., Individually and Doing Business as Financial Advisory Consultants, Income
7 Fund, Ltd., and Growth Fund, Ltd. filed January 6, 2004. The Receiver learned of
8 his appointment as temporary receiver on January 8, 2004 and commenced work as
9 temporary receiver the following day. Thereafter, the Receiver was appointed as
10 permanent receiver pursuant to this Court's Preliminary Injunction Order and
11 Orders: (1) Freezing Assets; (2) Prohibiting the Destruction of Documents; (3)
12 Granting Expedited Discovery; (4) for Accounting; and (5) Order Appointing a
13 Permanent Receiver ("Permanent Receivership Order"). The Permanent
14 Receivership Order provided that Robb Evans was appointed as receiver over the
15 assets of Defendant James P. Lewis, Jr. ("Lewis"), Financial Advisory Consultants
16 ("FAC"), Income Fund, Ltd. ("Income Fund"), and Growth Fund, Ltd. ("Growth
17 Fund"), and their subsidiaries and affiliates, with full powers of an equity receiver,
18 including but not limited to, full power over all funds, assets, collateral, premises,
19 choses in action, books, records, papers and other property belonging to or in the
20 possession of or control of Lewis, FAC, Income Fund and Growth Fund.

21 The investment scheme operated by Lewis was a Ponzi scheme by which
22 "interest" or investment "returns" were paid with funds paid into the scheme by
23 later investors. The investment in fact generated only losses and the investment
24 enterprise did not generate "profits" from which interest or returns could
25 legitimately be paid. The Receiver's findings and conclusions in this regard are set
26 forth in the Receiver's Reports of Activities filed by the Receiver in this case,
27 including the report for the period of January 16, 2004 through February 27, 2004
28 and for the period of March 1, 2004 through December 31, 2004.

1 The Receiver has recovered receivership property by liquidating real and
2 personal property and by collecting against third parties, including “Winning
3 Investors” who received payments from Lewis in excess of the principal amount of
4 their investments with Lewis.

5 On October 15, 2004, the Court conducted a hearing on a motion for
6 instructions by the Receiver pursuant to which the Receiver sought and obtained
7 authority to establish procedures to address the rights of all investor/creditors of the
8 receivership estate who, prior to the institution of the receivership, received
9 payments totaling less than the amount such persons invested with Lewis (the
10 “Losing Investors”) through a Claimant Distribution Agreement and Opt-Out
11 Procedure (“Distribution Agreement”). Pursuant to the motion, which was granted
12 by this Court’s order entered October 18, 2004, all Losing Investors were notified
13 in writing of the Receiver’s proposed Distribution Agreement and were provided an
14 opportunity to affirmatively elect to “opt out” of participation in the Distribution
15 Agreement. None of the Losing Investors elected to opt out. The Losing Investors
16 who are participating in the distributions from the estate in accordance with the
17 Distribution Agreement and the Court’s October 18, 2004 order are deemed to
18 agree that they will not assert claims against any third party who is the subject of
19 pending or potential claims by the Receiver in connection with this receivership
20 estate and that they will be bound by the terms of all settlements between the
21 Receiver and any third party, including the Winning Investors, so long as the
22 settlement is approved by the District Court after notice and an opportunity for
23 hearing.

24 In January 2005, the Receiver filed a motion seeking approval of his
25 proposed claims filing and allowance procedures. The Receiver’s motion and
26 proposed procedures were approved by the Court pursuant to the Claims Procedures
27 Order. Since the entry of the Claims Procedures Order, the Receiver has taken
28 steps to implement the claims process by completing the complex and difficult

1 reconciliation of investor accounts from the business, banking and investor records
2 of the receivership estate. Based on those records, for each investor, the Receiver
3 determined what the Receiver believes is the amount the investor paid to Lewis for
4 investment purposes, and the amount Lewis paid to the investor on account of the
5 investment. The Receiver provided each investor and non-investor claimant with
6 written notice of the Receiver's calculation of their claim and provided each with
7 the requisite 30 days to object to the proposed claim amount. The Receiver
8 received hundreds of responses to the claims notices and eventually successfully
9 negotiated and resolved all investor and non-investor objections regarding the
10 amounts of Approved Investor Claims and Approved Creditor Claims. With
11 respect to investor creditors, there are a total of \$156,345,149 in Approved Investor
12 Claims. With respect to non-investor creditors, there are a total of \$67,157.74 in
13 Approved Creditor Claims.

14 Through a motion filed on October 20, 2005, the Receiver sought approval to
15 make an initial distribution of approximately \$5 million on Approved Claims
16 ("Initial Distribution Motion"). The Receiver proposed an initial distribution plan
17 which provided for the pro rata distribution of receivership assets among a
18 combined pool of Approved Investor Claims and Approved Creditor Claims. On
19 November 17, 2005, the Court entered an order granting the Receiver's request for
20 approval to make an initial distribution of approximately \$5 million pursuant to his
21 proposed distribution plan.

22 Through a motion filed on June 16, 2006, the Receiver sought approval to
23 make a second pro rata distribution of no less than \$4 million on Approved Claims
24 and approval of the Receiver's pro rata distribution plan for that distribution and all
25 subsequent distributions to approved claimants. By order dated July 19, 2006, the
26 Court granted the Receiver's request for approval to make a second distribution of
27 no less than \$4 million and approving the Receiver's pro rata distribution plan for
28 that distribution and for all subsequent distributions. The Receiver's pro rata

1 distribution plan approved by the Court provides for the pro rata distribution of the
2 receivership assets among a combined pool of Approved Investor Claims and
3 Approved Creditor Claims rather than subordinating the non-investor creditor
4 claims and paying investor claims from the receivership assets on a priority basis
5 ahead of non-investor creditors (“Distribution Plan”). Through the two
6 distributions made to date, the Receiver has distributed approximately \$9 million to
7 approved claimants, or approximately 5.7% of Approved Claims.

8 By this motion, the Receiver seeks to make a third distribution pursuant to
9 the Distribution Plan of no less than \$4 million. Based on the cash presently on
10 hand, approximately \$4.6 million, the Receiver seeks to distribute at least \$4
11 million on Approved Claims. However, since the Receiver continues to liquidate
12 receivership assets and collect cash in settlement with Winning Investors, the
13 amount of cash on hand is subject to increase before the Receiver obtains the
14 Court’s approval and makes the third distribution. The Receiver therefore requests
15 the authority to distribute more than \$4 million should he have sufficient funds on
16 hand to do so.

17 **II.**

18 **THE RECEIVER PROPOSES A THIRD DISTRIBUTION OF**
19 **NO LESS THAN \$4 MILLION ON APPROVED INVESTOR**
20 **AND CREDITOR CLAIMS**

21 “[A] primary purpose of equity receiverships is to promote orderly and
22 efficient administration of the estate by the district court for the benefit of
23 creditors.” S.E.C. v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986); see also S.E.C. v.
24 Wencke, 783 F.2d 829, 837 (9th Cir. 1986) (“The primary purpose of allowing
25 courts to establish receiverships in securities fraud actions is to prevent further
26 dissipation of the assets of the defrauded investors...”). Accordingly, courts are
27 granted “broad powers” and “wide discretion” in supervising and fashioning
28 appropriate relief in an equity receivership to achieve this purpose. S.E.C. v.

1 Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992); S.E.C. v. Hardy, 803 F.2d at 1037;
2 Liberte Capital Group v. Capwill, 229 F. Supp. 2d 799, 802 (N.D. Ohio 2002) *aff'd*,
3 2004 U.S. App. LEXIS 10107 (6th Cir. May 19, 2004); see also McFarland v.
4 Winnebago South, Inc., 863 F. Supp. 1025, 1034 (W.D. Mo. 1994) (“A federal
5 district court presiding over an equity receivership has extremely broad power to
6 supervise the receivership and protect receivership assets”).

7 With respect to a plan to distribute receivership assets, reasonably
8 expeditious and efficient procedures will generally be upheld so long as they are
9 also fair and equitable. See Liberte Capital Group v. Capwill, 229 F. Supp. 2d at
10 804 (“As a court sitting in equity, this Court is governed by a fundamental principle
11 that the method of distribution should be equitable and fair.”); see also S.E.C. v.
12 Hardy, 803 F.2d at 1038-39 (“the rights of creditors of a receivership must be
13 balanced against the need for expeditious administration of the receivership; a
14 district court in overseeing a receivership must ‘make rules which are practicable as
15 well as equitable’ (*quoting* First Empire Bank-New York v. FDIC, 572 F.2d 1361,
16 1368 (9th Cir.), *cert. denied*, 439 U.S. 919, 58 L. Ed. 2d 265, 99 S. Ct. 293 (1978)).

17 The Distribution Plan previously approved by the Court treats similarly
18 situated investors and creditors alike by dividing the receivership assets available
19 for distribution among the investor and non-investor creditors according to the
20 Approved Claims of such creditors. The plan is consistent with the Court’ s
21 previously approved claims filing and allowance procedures in this case and the
22 third distribution should be made pursuant to the Distribution Plan whereby all
23 investors and creditors receive a pro-rata distribution based upon their Approved
24 Claims.

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III.

CONCLUSION

Based upon the foregoing, the Receiver respectfully requests that the Court grant relief as sought herein.

DATED: May 11, 2007

McKENNA LONG & ALDRIDGE LLP
GARY OWEN CARIS
LESLEY ANNE HAWES
ERIN M. JACKSON

By: 
GARY OWEN CARIS
Attorneys for Receiver, ROBB EVANS

1 4. The Receiver has recovered receivership property by liquidating real
2 and personal property and by collecting against third parties, including “Winning
3 Investors” who received payments from Lewis in excess of the principal amount of
4 their investments with Lewis.

5 5. On October 15, 2004, the Court conducted a hearing on a motion for
6 instructions by the Receiver pursuant to which the Receiver sought and obtained
7 authority to establish procedures to address the rights of all investor/creditors of the
8 receivership estate who, prior to the institution of the receivership, received
9 payments totaling less than the amount such persons invested with Lewis (the
10 “Losing Investors”) through a Claimant Distribution Agreement and Opt-Out
11 Procedure (“Distribution Agreement”). Pursuant to the motion, which was granted
12 by this Court’s order entered October 18, 2004, all Losing Investors were notified
13 in writing of the Receiver’s proposed Distribution Agreement and were provided an
14 opportunity to affirmatively elect to “opt out” of participation in the Distribution
15 Agreement. None of the Losing Investors elected to opt out. The Losing Investors
16 who are participating in the distributions from the estate in accordance with the
17 Distribution Agreement and the Court’s October 18, 2004 order are deemed to
18 agree that they will not assert claims against any third party who is the subject of
19 pending or potential claims by the Receiver in connection with this receivership
20 estate and that they will be bound by the terms of all settlements between the
21 Receiver and any third party, including the Winning Investors, so long as the
22 settlement is approved by the District Court after notice and an opportunity for
23 hearing.

24 6. In January 2005, the Receiver filed a motion seeking approval of his
25 proposed claims filing and allowance procedures. The Receiver’s motion and
26 proposed procedures were approved by the Court pursuant to the Claims Procedures
27 Order. Since the entry of the Claims Procedures Order, the Receiver has taken
28 steps to implement the claims process by completing the complex and difficult

1 reconciliation of investor accounts from the business, banking and investor records
2 of the receivership estate. Based on those records, for each investor, the Receiver
3 determined what the Receiver believes is the amount the investor paid to Lewis for
4 investment purposes, and the amount Lewis paid to the investor on account of the
5 investment. The Receiver provided each investor and non-investor claimant with
6 written notice of the Receiver's calculation of their claim and provided each with
7 the requisite 30 days to object to the proposed claim amount. The Receiver
8 received hundreds of responses to the claims notices and eventually successfully
9 negotiated and resolved all investor and non-investor objections regarding the
10 amounts of Approved Investor Claims and Approved Creditor Claims. With
11 respect to investor creditors, there are a total of \$156,345,149 in Approved Investor
12 Claims. With respect to non-investor creditors, there are a total of \$67,157.74 in
13 Approved Creditor Claims.

14 7. Through a motion filed on October 20, 2005, the Receiver sought
15 approval to make an initial distribution of approximately \$5 million on Approved
16 Claims ("Initial Distribution Motion"). The Receiver proposed an initial
17 distribution plan which provided for the pro rata distribution of receivership assets
18 among a combined pool of Approved Investor Claims and Approved Creditor
19 Claims. On November 17, 2005, the Court entered an order granting the Receiver's
20 request for approval to make an initial distribution of approximately \$5 million
21 pursuant to his proposed distribution plan.

22 8. Through a motion filed on June 16, 2006, the Receiver sought
23 approval to make a second pro rata distribution of no less than \$4 million on
24 Approved Claims and approval of the Receiver's pro rata distribution plan for that
25 distribution and all subsequent distributions to approved claimants. By order dated
26 July 19, 2006, the Court granted the Receiver's request for approval to make a
27 second distribution of no less than \$4 million and approving the Receiver's pro rata
28 distribution plan for that distribution and for all subsequent distributions. The

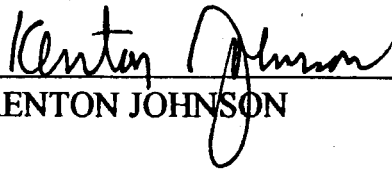
1 Receiver's pro rata distribution plan approved by the Court provides for the pro rata
2 distribution of the receivership assets among a combined pool of Approved Investor
3 Claims and Approved Creditor Claims rather than subordinating the non-investor
4 creditor claims and paying investor claims from the receivership assets on a priority
5 basis ahead of non-investor creditors ("Distribution Plan"). Through the two
6 distributions made to date, the Receiver has distributed approximately \$9 million to
7 approved claimants, or approximately 5.7% of Approved Claims.

8 9. By this motion, the Receiver seeks to make a third distribution
9 pursuant to the Distribution Plan of no less than \$4 million. I have reviewed the
10 Receiver's accounting and have determined that the Receiver presently has on hand
11 cash in the amount of approximately \$4.6 million. This amount may increase
12 before the Court issues an order approving the third distribution as the Receiver
13 continues to liquidate receivership assets and collect cash in settlement with
14 Winning Investors. The Receiver therefore requests the authority to distribute more
15 than \$4 million should he have sufficient funds on hand to do so. If \$4 million is
16 distributed this would bring total distributions to date to approximately \$13 million,
17 representing approximately 8.3% of all Approved Claims.

18 10. The Distribution Plan previously approved by the Court treats
19 similarly situated investors and creditors alike by dividing the receivership assets
20 available for distribution among the investor and non-investor creditors according
21 to the Approved Claims of such creditors. The plan is consistent with the Court's
22 previously approved claims filing and allowance procedures in this case and the
23 third distribution should be made pursuant to the Distribution Plan whereby all
24 investors and creditors receive a pro-rata distribution based upon their Approved
25 Claims.

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1 I declare under penalty of perjury that the foregoing is true and correct and
2 that this declaration was executed on this 11 day of May 2007 at Sun Valley,
3 California.

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5 _____
6 KENTON JOHNSON
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1 Case: *Securities and Exchange Commission v. James P. Lewis, et al.*
2 Case Number: CV03-09354 ABC(VBKx)

3 **CERTIFICATE OF SERVICE BY MAIL**

4 I am a citizen of the United States and employed in Los Angeles County,
5 California. I am over the age of eighteen years and not a party to the within-entitled
6 action. My business address is 444 South Flower Street, 8th Floor, Los Angeles,
7 California 90071. I am readily familiar with this firm's practice for collection and
8 processing of correspondence for mailing with the United States Postal Service. On
9 May 11, 2007, I placed with this firm at the above address for deposit with the
10 United States Postal Service a true and correct copy of the within document(s):

11 ***1. Notice of Motion and Motion by Receiver for Order Approving
12 Third Distribution to Approved Claimants; Memorandum of Points
13 and Authorities and Declaration of Kenton Johnson in Support
14 Thereof; and***

15 ***2. Notice of Motion and Motion by Receiver for Order (1)
16 Approving Receiver's Report of Activities [July 1, 2006 through
17 January 31, 2007]; and (2) Approving and Authorizing Payment of
18 Receivership Expenses [October 1, 2006 through March 31, 2007];
19 Memorandum of Points and Authorities and Declaration of Kenton
20 Johnson in Support Thereof***

21 in a sealed envelope, postage fully paid, as designated on the attached Service List.
22 Following ordinary business practices, the envelope was sealed and placed for
23 collection and mailing on this date, and would, in the ordinary course of business,
24 be deposited with the United States Postal Service on this date.

25 I declare that I am employed in the office of a member of the bar of this court
26 at whose direction the service was made.

27 Executed on May 11, 2007, at Los Angeles, California.

28

Candace Roni

CERTIFICATE OF SERVICE

-15-

1 Case: *Securities and Exchange Commission v. James P. Lewis, et al.*
Case No: CV03-09354 ABC (VBKx)

2 **SERVICE LIST**

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5 Peter F. Del Greco, Esq. *Exchange Commission*

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Harman, Tamara Harman, Jack
Merrill Harman, Shelley Harman,
Bob Merrill Harman, Twila
Harman, Brent Maurice Harman,
Kristin Harman, Kurt Ivie Harman,
Robin Harman, and other investors*

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25 Pickering & Peterson
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27 900 Bank of America Plaza
28 Las Vegas, NV 89101

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- 7 431 Nyes Place
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