

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

11450 Sheldon Street
Sun Valley, California 91352-1121
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 Sixth Distribution to Approved Claimants;
Memorandum of Points and Authorities in Support of Motion by Receiver
for Order Approving Sixth Distribution to Approved Claimants;
Declaration of Brick Kane in Support of Motion by Receiver
for Order Approving Sixth Distribution to Approved Claimants

Filed January 29, 2010

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7 Attorneys for Permanent Receiver,
ROBB EVANS

8

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

11

12 SECURITIES AND EXCHANGE
13 COMMISSION,

14 Plaintiff,

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v.

16

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

19 Defendants.

20

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CASE NO. CV 03-9354 ABC
(VBKx)

**NOTICE OF MOTION AND
MOTION BY RECEIVER FOR
ORDER APPROVING SIXTH
DISTRIBUTION TO APPROVED
CLAIMANTS**

[Filed concurrently with Memorandum
of Points and Authorities in support of
Motion by Receiver for Order
Approving Sixth Distribution;
Declaration of Brick Kane in support
thereof]

DATE: February 22, 2010
TIME: 10:00 a.m.
PLACE: Courtroom 680

22

23 PLEASE TAKE NOTICE that on February 22, 2010 at 10:00 a.m. in
24 Courtroom 680 of the above-referenced Court, located at 255 E. Temple Street, Los
25 Angeles, California, Robb Evans as Receiver over the assets of James P. Lewis, Jr.,
26 individually and doing business as Financial Advisory Consultants, Income Fund,
27 Ltd. and Growth Fund, Ltd. (“Receiver”), will move the Court for an order
28 approving the proposed sixth distribution on all Approved Claims in the

1 receivership estate in the aggregate amount of not less than \$1 million representing
2 approximately 0.6% of Approved Claims, to be distributed pro rata among all
3 Approved Claims of investors and non-investor creditors. If this distribution is
4 approved as requested, total distributions made in the case will equal at least \$19
5 million or over 12.1% of Approved Claims.

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

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

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, Facsimile No.
3 (818) 768-8802.

4
5 DATED: January 29, 2010 MCKENNA LONG & ALDRIDGE LLP
6 GARY OWEN CARIS
7 LESLEY ANNE HAWES
8 ANGELA E. FONES

9 By: /s/ GARY OWEN CARIS
10 GARY OWEN CARIS
11 Attorneys for Receiver, ROBB EVANS
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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

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12 SECURITIES AND EXCHANGE
13 COMMISSION,

Plaintiff,

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v.

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

Defendants.

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CASE NO. CV 03-9354 ABC
(VBKx)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION
BY RECEIVER FOR ORDER
APPROVING SIXTH
DISTRIBUTION TO APPROVED
CLAIMANTS**

[Filed concurrently with Notice of
Motion and Motion by Receiver for
Order Approving Sixth Distribution;
Declaration of Brick Kane in support
thereof]

DATE: February 22, 2010
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PLACE: Courtroom 680

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Robb Evans as Receiver over the assets of James P. Lewis, Jr., individually
and doing business as Financial Advisory Consultants, Income Fund, Ltd. and
Growth Fund, Ltd. (“Receiver”) hereby submits this memorandum of points and
authorities in support of its Motion for Order Approving Sixth Distribution to
Approved Claimants.

1 **I. INTRODUCTION AND STATEMENT OF FACTS**

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

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

27 The Receiver has recovered receivership property by liquidating real and
28 personal property and by collecting on claims against third parties, including

1 “Winning Investors” who received payments from the Receivership Entities in
2 excess of the principal amount of their investments with the Receivership Entities.

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

22 In January 2005, the Receiver filed a motion seeking approval of his
23 proposed claims filing and allowance procedures. The Receiver’s motion and
24 proposed procedures were approved by the Court pursuant to the Claims Procedures
25 Order.¹ Since the entry of the Claims Procedures Order, the Receiver has

26
27 ¹ Order: (1) Approving Receiver’s Report for the Period of March 1, 2004 Through
28 December 31, 2004; and (2) Approving Receiver’s Proposed Claims Filing and
Allowance Procedures filed February 17, 2005 (“Claims Procedure Order”).

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

15 Through a motion filed on June 16, 2006, the Receiver sought approval to
16 make a second pro rata distribution of no less than \$4 million on Approved Claims
17 and approval of the Receiver's pro rata distribution plan for that distribution and all
18 subsequent distributions to approved claimants. By order dated July 19, 2006, the
19 Court granted the Receiver's request for approval to make a second distribution of
20 no less than \$4 million and approved the Receiver's pro rata distribution plan for
21 that distribution and for all subsequent distributions. The Receiver's pro rata
22 distribution plan approved by the Court provides for the pro rata distribution of the
23 receivership assets among a combined pool of Approved Investor Claims and
24 Approved Creditor Claims rather than subordinating the non-investor creditor
25 claims ("Distribution Plan").

26 Through the five distributions made to date, the Receiver has distributed
27 approximately \$18 million to approved claimants, or approximately 11.5% of
28 Approved Claims. By this motion, the Receiver seeks to make a sixth distribution

1 pursuant to the Distribution Plan of not less than \$1 million. The Receiver
 2 presently has cash on hand of approximately \$1.3 million. The Receiver continues
 3 to collect a small amount of cash in settlements with Winning Investors that have
 4 already been approved and are the subject of payment plans.² The Receiver
 5 therefore requests the authority to distribute not less than \$1 million to approved
 6 claimants. If the Receiver distributes \$1 million, aggregate distributions will
 7 exceed 12.1% of Approved Claims.

8 **II. THE RECEIVER PROPOSES A SIXTH DISTRIBUTION OF NO**
 9 **LESS THAN \$1 MILLION ON APPROVED INVESTOR AND**
 10 **CREDITOR CLAIMS**

11 “[A] primary purpose of equity receiverships is to promote orderly and
 12 efficient administration of the estate by the district court for the benefit of
 13 creditors.” S.E.C. v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986); see also S.E.C. v.
 14 Wencke, 783 F.2d 829, 837 (9th Cir. 1986) (“The primary purpose of allowing
 15 courts to establish receiverships in securities fraud actions is to prevent further
 16 dissipation of the assets of the defrauded investors...”). Accordingly, courts are
 17 granted “broad powers” and “wide discretion” in supervising and fashioning
 18 appropriate relief in an equity receivership to achieve this purpose. S.E.C. v.
 19 Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992); S.E.C. v. Hardy, 803 F.2d at 1037;
 20 Liberte Capital Group v. Capwill, 229 F. Supp. 2d 799, 802 (N.D. Ohio 2002) *aff’d*,
 21 2004 U.S. App. LEXIS 10107 (6th Cir. May 19, 2004); see also McFarland v.
 22 Winnebago South, Inc., 863 F. Supp. 1025, 1034 (W.D. Mo. 1994) (“A federal
 23 district court presiding over an equity receivership has extremely broad power to
 24 supervise the receivership and protect receivership assets.”).

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 26 _____
 27 ² The Receiver has received the authority to sell several of the judgments against
 28 judgment creditors who have not settled with the Receiver or satisfied their
 judgments, but these judgments have not, as yet, been sold.

1 With respect to a plan to distribute receivership assets, reasonably
 2 expeditious and efficient procedures will generally be upheld so long as they are
 3 also fair and equitable. See Liberte Capital Group v. Capwill, 229 F. Supp. 2d at
 4 804 (“As a court sitting in equity, this Court is governed by a fundamental principle
 5 that the method of distribution should be equitable and fair.”); see also S.E.C. v.
 6 Hardy, 803 F.2d at 1038-39 (“the rights of creditors of a receivership must be
 7 balanced against the need for expeditious administration of the receivership; a
 8 district court in overseeing a receivership must ‘make rules which are practicable as
 9 well as equitable’ (quoting First Empire Bank-New York v. FDIC, 572 F.2d 1361,
 10 1368 (9th Cir.), *cert. denied*, 439 U.S. 919, 58 L.Ed.2d 265, 99 S. Ct. 293 (1978)).

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

19 **III. CONCLUSION**

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

22 DATED: January 29, 2010

MCKENNA LONG & ALDRIDGE LLP
 GARY OWEN CARIS
 LESLEY ANNE HAWES
 ANGELA E. FONES

26 By: /s/ GARY OWEN CARIS
 27 GARY OWEN CARIS
 Attorneys for Receiver, ROBB EVANS

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7 Attorneys for Permanent Receiver,
ROBB EVANS

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UNITED STATES DISTRICT COURT

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CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

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SECURITIES AND EXCHANGE
COMMISSION,

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Plaintiff,

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v.

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

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Defendants.

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CASE NO. CV 03-9354 ABC
(VBKx)

**DECLARATION OF BRICK
KANE IN SUPPORT OF MOTION
BY RECEIVER FOR ORDER
APPROVING SIXTH
DISTRIBUTION TO APPROVED
CLAIMANTS**

[Filed concurrently with Notice of
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Approving Sixth Distribution]

DATE: February 22, 2010
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PLACE: Courtroom 680

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DECLARATION OF BRICK KANE

I, Brick Kane, declare:

1. I am a Deputy to the Receiver Robb Evans, and am a principal in Robb Evans & Associates LLC. I have been one of the deputies to the Receiver with primary responsibility for the day to day supervision and management of the receivership estate of James P. Lewis, Jr., individually and doing business as Financial Advisory Consultants, Income Fund, Ltd. and Growth Fund, Ltd. (collectively, the “Receivership Entities”), since the Receiver first began to act pursuant to his appointment as temporary receiver on January 9, 2004. I have personal knowledge of the matters set forth in this declaration, and if I were called upon to testify as to these matters, I could and would competently testify based upon my personal knowledge.

2. Robb Evans was first appointed as temporary receiver in this matter by Court order dated January 6, 2004. The Receiver is acting as permanent receiver pursuant to this Court’s Preliminary Injunction Order and Orders: (1) Freezing Assets; (2) Prohibiting the Destruction of Documents; (3) Granting Expedited Discovery; (4) For Accountings; and (5) Order Appointing a Permanent Receiver (“Preliminary Injunction Order”) filed January 22, 2004. Under Section VIII.A. of the Preliminary Injunction Order, the Receiver is authorized, empowered and directed to take custody, control and possession of all of the Receivership Entities’ assets, with full power to liquidate all such assets.

3. The investment scheme operated by the Receivership Entities was a Ponzi scheme by which “interest” or investment “returns” were paid with funds paid into the scheme by other investors. The investment in fact generated only losses and the investment enterprise did not generate “profits” from which interest or returns could legitimately be paid. The Receiver’s findings and conclusions in this regard are set forth in the Receiver’s Reports of Activities filed by the Receiver

1 in this case, including the report for the period of January 16, 2004 through
2 February 27, 2004 and for the period of March 1, 2004 through December 31, 2004.

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

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

26 6. In January 2005, the Receiver filed a motion seeking approval of his
27 proposed claims filing and allowance procedures. The Receiver’s motion and
28 proposed procedures were approved by the Court pursuant to the Claims Procedures

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

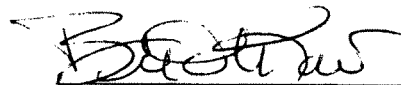
16 7. Through a motion filed on June 16, 2006, the Receiver sought
17 approval to make a second pro rata distribution of no less than \$4 million on
18 Approved Claims and approval of the Receiver's pro rata distribution plan for that
19 distribution and all subsequent distributions to approved claimants. By order dated
20 July 19, 2006, the Court granted the Receiver's request for approval to make a
21 second distribution of no less than \$4 million and approved the Receiver's pro rata
22 distribution plan for that distribution and for all subsequent distributions. The
23 Receiver's pro rata distribution plan approved by the Court provides for the pro rata
24 distribution of the receivership assets among a combined pool of Approved Investor
25 Claims and Approved Creditor Claims rather than subordinating the non-investor
26 creditor claims ("Distribution Plan").

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1 8. Through the five distributions made to date, the Receiver has
 2 distributed approximately \$18 million to approved claimants, or approximately
 3 11.5% of Approved Claims. By this motion, the Receiver seeks to make a sixth
 4 distribution pursuant to the Distribution Plan of not less than \$1 million. The
 5 Receiver presently has cash on hand of approximately \$1.3 million. The Receiver
 6 continues to collect a small amount of cash in settlements with Winning Investors
 7 that have already been approved and are the subject of payment plans. The
 8 Receiver has received authority to sell several of the judgments against judgment
 9 creditors who have not settled with the Receiver or satisfied their judgments, but
 10 these judgments have not, as yet, been sold. The Receiver therefore requests the
 11 authority to distribute not less than \$1 million to approved claimants. If the
 12 Receiver distributes \$1 million, aggregate distributions will exceed 12.1% of
 13 Approved Claims.

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

22 I declare under penalty of perjury that the foregoing is true and correct and
 23 that this declaration was executed on this 20 day of January 2010 at Sun Valley,
 24 California.

25
 26 
 27 _____
 28 BRICK KANE