

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

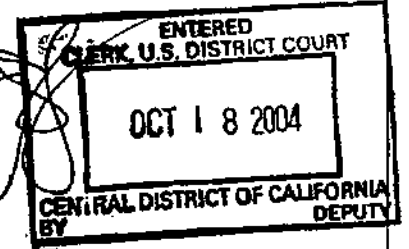
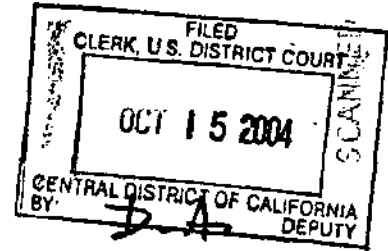
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Securities and Exchange Commission v. James P. Lewis, Jr., et al.
CASE No. CV 03-9354 ABC (VBKx)

Order Granting Receiver's Motion for Instructions Re:
Establishment of Claimant's Distribution Agreement and Opt Out
Procedures Related Thereto

Filed October 15, 2004

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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)

**ORDER GRANTING RECEIVER'S MOTION
FOR INSTRUCTIONS RE ESTABLISHMENT
OF CLAIMANT'S DISTRIBUTION
AGREEMENT AND OPT OUT PROCEDURES
RELATED THERETO**

Pending before the Court is a Motion for Instructions Re
Establishment of Claimant's Distribution Agreement and Opt out
Procedures Related Thereto filed by Robb Evans ("Receiver"). The
Motion came on regularly for hearing before the Court on October 15,
2004. Upon consideration of the parties' submissions, the arguments
of counsel, and the case file, the Court hereby GRANTS the Receiver's
Motion and adopts his asset distribution plan.

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I. BACKGROUND

On December 22, 2004, the SEC initiated this civil action against Lewis, seeking monetary recovery from Lewis for the money he made from operating a Ponzi scheme. Although the vast majority of individuals who invested in Lewis's scheme lost money, approximately 450 investors profited from their investments in Lewis's scheme. In all, these 450 so-called "winning investors" made approximately \$72 million. As part of its civil suit against Lewis, the SEC has also sought to recover any profits that the "winning investors" made from participating, unwittingly or not, in Lewis's scheme.

On January 6, 2004, the Court appointed Robb Evans as the receiver over Lewis's ill-gotten profits. Since then, the Receiver has negotiated with several of the "winning investors" seeking their agreement to voluntarily return the profits that they made from Lewis's illegal scheme.

On September 24, 2004, the Receiver filed the current Motion, in which he has set forth a detailed plan to distribute the recovered assets from Lewis's scheme. On October 24, 2004, Janet Goldblatt, one of the "losing investors" in Lewis's scheme, filed an Opposition to the Receiver's motion.¹ Thereafter, on October 8, 2004, the Receiver filed a Reply to Ms. Goldblatt's Opposition.

DISCUSSION

The following terms, while not comprehensive, comprise the essential components of the proposed asset distribution plan. First, the plan seeks to distribute all assets in the receivership, including

¹ No other "losing investor" or interested party filed an Opposition to the Receiver's Motion.

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1 those derived from the "winning investors," to the "losing investors"
2 who participate in the plan. In exchange, the "losing investors" who
3 agree to participate in the plan, i.e., the "participating investors,"
4 must agree to forfeit any existing or future claims for recovery
5 against any third party in connection with this action. Each "losing
6 investor" shall be notified in writing of the terms of the plan. In
7 that notice, the "losing investors" will be given the option to opt-
8 out of the plan by notifying the Receiver within thirty (30) days of
9 their intent to opt-out. If a "losing investor" does not
10 affirmatively opt-out, then he or she will be deemed a "participating
11 investor," and will be bound by the terms of all approved settlements
12 reached between the Receiver and any third party, including any
13 "winning investors."

14 Although the Receiver shall negotiate any proposed settlement, no
15 settlement shall be binding on any "participating investor" unless or
16 until the Court approves of the settlement. Moreover, each
17 "participating investor" shall have the right to object to the
18 settlement's terms before the Court rules on a proposed settlement.
19 Before approving or rejecting a proposed settlement, the Court shall
20 conduct a fairness hearing, during which the Court will hear arguments
21 for and against a proposed settlement. The receiver shall send actual
22 notice regarding the fairness hearings to only those "participating
23 investors" who have previously requested such notice.² Additionally,
24 any "participating investor" can readily learn of all proposed
25 settlements, motions, hearing dates, or objection deadlines by
26 accessing the Receiver's website, which shall contain all such

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28 ² Creditors or other interested parties may also request notice
of all fairness hearings.

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1 information. As discussed below, the distribution plan provides
2 fair and efficient way in which to administer the assets at issue
3 the case.

4 District courts have broad discretion in supervising and
5 administering an equitable receivership. Commodity Futures Trading
6 Comm. v. Topworth International, Ltd., 205 F.3d 1107, 1115 (9th Cir.
7 2000) (stating that district court's decisions in supervising
8 equitable receivership are reviewed only for abuse of discretion);
9 Securities and Exch. Comm. v. Hardy, 803 F.2d 1034, 1037 (9th Cir.
10 1986) (same); James Wm. Moore et al., Moore's Federal Practice ¶ 66.06
11 (2004) ("The district court has a great deal of latitude in its
12 dealings with receivers it appoints . . . [I]n its supervisory role,
13 the powers of the district court are quite broad and versatile.").
14 Indeed, the Ninth Circuit affords "broad deference" to the district
15 court's supervisory role and, generally, will uphold "'reasonable
16 procedures instituted by the district court that serve the purpose' of
17 orderly and efficient administration of the receivership for the
18 benefit of the creditors." Topworth, 205 F.3d at 1115 (quoting Hardy,
19 803 F.2d at 1037-38).

20 A court may administer the receivership in any way it sees
21 appropriate, provided that it has carefully examined the relevant
22 facts and concluded that the given plan is fair and promotes efficient
23 distribution of the assets. James Wm. Moore et al., Moore's Federal
24 Practice ¶ 66.06 (2004); Commodities Futures Trading Comm. v. Richwell
25 Inter., Ltd., 163 B.R. 161, 162-63 (N.D. Cal. 1994) (adopting
26 receiver's plan to distribute assets to investors on pro rata basis,
27 despite objections from individual investor claiming that he could
28 prove entitlement to greater share of assets in receivership). Thus,

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1 in Topworth, the Ninth Circuit affirmed a district court's
2 receivership plan that distributed profits from an illegal investment
3 scheme to the wronged investors on a pro rata basis to the amount
4 invested. Topworth, 205 F.3d at 1110, 1115-16. Before the district
5 court approved any settlement, investors were given the opportunity to
6 object to the terms of the proposed treatment of their claims,
7 although investors were not given an option to opt-out of the
8 distribution plan. Id. at 1110.

9 Here, after carefully examining the facts of this case, the Court
10 concludes that the Receiver's plan is fair and promotes the efficient
11 distribution of the assets in receivership. First, given the limited
12 amount of assets available to the "losing investors," fairness
13 dictates that those assets should be distributed among them. Second,
14 the plan achieves efficient distribution of the assets, in that, once
15 the settlements are approved, the Receiver can easily determine and
16 distribute the amount owed to each "participating investor." Third,
17 subjecting each proposed settlement to the Court's ultimate approval
18 or disapproval ensures that the investors' rights are being protected.
19 Fourth, to the extent that an individual investor feels a proposed
20 settlement is unfair, he or she may object to the settlement and
21 present those objections to the Court in a fairness hearing. Fifth,
22 although participation in the plan requires investors to forego
23 further claims against any third parties for recovery in this matter,
24 the plan also guarantees some recovery for each "participating
25 investor."³ Finally, no investor is required to participate in the
26

27 ³ Moreover, unless the "winning investors" voluntarily disgorge
28 their profits, no guarantee exists that the "losing investors" will
(continued...)

1 plan.

2 Ms. Goldblatt, however, objects to the Receiver's distribution
3 plan on two grounds. Initially, she argues that the opt-out provision
4 fails to afford the "losing investors" due process because it forces
5 them to either opt-in or opt-out of the distribution plan before
6 knowing the precise terms of the settlements with the "winning
7 investors." Additionally, she faults the plan for failing to ensure
8 that each "participating investor" receives actual notice of any
9 fairness hearing regarding the settlements.

10 Both of these objections lack merit. First, the plan's opt-out
11 provision does not violate due process. The law governing opt-out
12 provisions in class actions is instructive. In class actions, due
13 process requires only that class members receive an initial
14 opportunity to opt-out of the class, notice of a proposed settlement,
15 and an opportunity to be heard at a fairness hearing. Officers for
16 Justice v. Civil Serv. Comm'n of the City and County of San Francisco,
17 688 F.2d 615, 635 (9th Cir. 1982). If the proposed settlement is fair,
18 adequate, and reasonable, due process does not afford class members a
19 second opportunity to opt out once the settlement's terms are known:

20 [W]e have found no authority of any kind
21 suggesting that due process requires that members
22 of a Rule 23(b) (3) class be given a second chance
23 to opt out. We think it does not. [The class

24

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26 ³(...continued)
27 recover anything from the "winning investors." And in addition to
28 sparing the "participating investors" from this uncertainty, the plan
also spares the "participating investors" from the costs of litigation
- costs that may, in some cases, exceed the investor's potential for
recovery.

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1 member's] rights are protected by the mechanism
2 provided in the rule: approval by the district
3 court after notice to the class and a fairness
4 hearing at which dissenters can voice their
5 objections, and the availability of review on
6 appeal.

7 Id. Additionally, the Ninth Circuit has observed that such late-in-
8 the-day opt-out provisions would likely thwart the settlement process.

9 Id.⁴

10 The same holds true in this situation. Ms. Goldblatt, like all
11 other "losing investors," has the option to participate or not in the
12 Receiver's distribution plan. If she elects to participate, she, like
13 all other "participating investors," has the right to object to any
14 proposed settlement and present those objections at the resulting
15 fairness hearing. Thus, the opt-out provision does not violate due
16 process, but instead ensures that each "participating investors'" due
17 process rights are protected. Moreover, as the Ninth Circuit wisely
18 observed in Officers for Justice, allowing "participating investors"
19 to opt-out after learning of the settlement terms would likely
20 discourage the "winning investors" from settling in the first place.
21 Indeed, such a provision would essentially strip the Receiver of his

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23 ' "[T]o hold that due process requires a second opportunity to
24 opt out after the terms of the settlement have been disclosed to the
25 class would impede the settlement process so favored in the law.
26 '[A]llowing objectors to opt out would discourage settlements because
27 class action defendants would not be inclined to settle where the
28 result would likely be a settlement applicable only to class members
with questionable claims, with those having stronger claims opting out
to pursue their individual claims separately.' Id. (quoting Kincade
v. General Tire & Rubber Co., 635 F.2d 501, 507 (5th Cir. 1981).

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1 most valuable bargaining chip in negotiating settlements with the
2 "winning investors."
3 Second, to the extent that any "participating investor" seeks
4 actual notice of a proposed settlement, he or she need only request to
5 be so notified. Every "losing investor" will receive actual notice of
6 this Order approving the distribution plan. Thus, every "losing
7 investor" who chooses to participate in the Receiver's plan will be
8 aware of his or her right to request actual notice of proposed
9 settlements in this matter.⁵ Moreover, the Receiver has agreed to
10 post any proposed settlement, relevant hearing date, or objection
11 deadline on his web-site, which is readily accessible by any
12 "participating investor." In any event, Ms. Goldblatt is aware of her
13 right to request actual notice in this matter. In fact, she is

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22 ⁵ There are approximately 2,200 "losing investors" from Lewis's
23 scheme, in addition to about 500 other interested parties.
24 Recognizing the burden of requiring the Receiver to send actual notice
25 to each of these 2,700 parties, the Court previously approved of a
26 limited service order. (Order, dated July 14, 2004). Pursuant to
27 that Order, the Receiver was to serve written notice of motions,
28 applications, and other requests for relief on the following: (1) the
Plaintiff, Securities and Exchange Commission; (2) the Defendant,
James P. Lewis; and (3) all parties who have served the Receiver with
a written request for notice in this matter. (Id.). The Court's
previous Order, like this Order, required the Receiver to post any
relevant filings on his website. (Id.).

