

ROBB EVANS
Receiver of
D.W. Heath & Associates, Inc.;
PCM Fixed Income Fund I, LLC;
Private Capital Management, Inc.;
Private Collateral Management, Inc.
and the Schlarmann Interests

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Sun Valley, California 91352-1121
Telephone No.: (818) 768-8100
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Securities and Exchange Commission v. D. W. Heath & Associates Inc., et al.
CASE No. CV-04-02949 JFW (Ex)

**Ex Parte Application for Order Shortening Time for Filing, Service and
Hearing on Motion for Order Approving Sale of Bear Manor Property by
Private Sale Free and Clear of Leins and for Modification of Applicable
Sale Procedures of 28 U.S.C. Section 2001(b) in Connection Therewith;
Declaration of Lesley Anne Hawes in Support Thereof**

Filed May 6, 2005

FILED

2005 MAY -6 PM 12:36

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

BY _____

1 Gary Owen Caris (State Bar No. 088918)
Lesley Anne Hawes (State Bar No. 117101)
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6 Attorneys for Permanent Receiver,
7 ROBB EVANS

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

10
11 SECURITIES AND EXCHANGE
COMMISSION,

12 Plaintiff,

13 v.

14 D.W. HEATH & ASSOCIATES, INC.,
15 etc., et al.,

16 Defendants.

CASE NO. CV 04-02949 JFW (Ex)

**EX PARTE APPLICATION FOR
ORDER SHORTENING TIME FOR
FILING, SERVICE AND HEARING
ON MOTION FOR ORDER
APPROVING SALE OF BEAR
MANOR PROPERTY BY PRIVATE
SALE FREE AND CLEAR OF
LIENS AND FOR MODIFICATION
OF APPLICABLE SALE
PROCEDURES OF 28 U.S.C.
SECTION 2001(b) IN
CONNECTION THEREWITH;
DECLARATION OF LESLEY
ANNE HAWES IN SUPPORT
THEREOF**

[No Hearing Set on Ex Parte
Application]

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23 Robb Evans as Permanent Receiver ("Receiver") of D.W. Heath &
24 Associates, Inc., Private Capital Management, Inc., Private Collateral Management,
25 Inc. and PCM Fixed Income Fund I, LLC and their subsidiaries and affiliates
26 (collectively, the "Receivership Defendants") and as Receiver over the Schlarmann
27 Interests, hereby makes this ex parte application for an order shortening time for the
28 filing, service and hearing on his Motion for Order Approving Sale of Bear Manor

1 Property by Private Sale Free and Clear of Liens and for Modification of Sale
2 Procedures of 28 U.S.C. Section 2001(b) in Connection Therewith; Memorandum of
3 Points and Authorities and Declaration of Kenton Johnson in Support Thereof
4 (collectively "Motion").

5 By this ex parte application, the Receiver requests that a hearing be set on the
6 Motion within one week of this filing, and no later than May 16, 2005, because the
7 proposed sale transaction described in the Motion must be closed, funds disbursed
8 and the deed conveying title to the proposed buyer recorded by no later than May
9 27, 2005 to complete a like-kind exchange of real property by the buyer, which is
10 the source of a substantial portion of the purchase price. The Receiver requests that
11 the Court grant an order shortening time for the filing, service and hearing on the
12 Motion pursuant to which the hearing is set within seven days and by no later than
13 May 16, 2005, with copies of the Motion to be served by the Receiver's counsel by
14 overnight mail delivery service and opposition, if any, to the Motion due two court
15 days prior to the hearing and reply, if any, due one court day prior to the hearing.

16 This ex parte application for order shortening time is made pursuant to Local
17 Rule 6-1, and the Receiver submits that good cause exists for the Court to grant
18 relief as requested in this application based on the following:

19 1. The Motion, the original of which is filed with the Court concurrently
20 herewith, seeks approval of the proposed sale of the Bear Manor property by which
21 the receivership estate will receive estimated net sale proceeds of \$1,150,000.

22 2. Final negotiations for the sale were completed at the end of April 2005.
23 Since then, the Receiver and his counsel have required time to prepare the Purchase
24 and Sale Agreement and the Motion, including developing and presenting the facts
25 and evidence to support the relief sought.

26 3. The source of funds for the purchase of the property are a cash deposit
27 from the proceeds of sale of property as part of a 1031 like-kind exchange, which
28 funds must be paid, escrow closed and the sale of the Bear Manor fully

1 consummated by no later than May 27, 2005 pursuant to the applicable laws and
2 regulations for like-kind exchanges.

3 4. The proposed sale of the Bear Manor property is for an amount that
4 exceeds the statutory threshold for private sales of two-thirds of the appraised value
5 of the property. The sale was negotiated without a real estate broker and therefore,
6 no brokerage commission is due in connection with this sale, resulting in higher net
7 proceeds to the receivership estate than an alternative sale would otherwise produce.

8 5. The Receiver submits that logistical considerations in the completion,
9 closing and funding of the sale, the entry of the order approving the sale and the
10 absolute deadline of May 27, 2005 under applicable laws and regulations in
11 connection with the buyer's pending like-kind exchange warrant the entry of an
12 order shortening time so that the hearing is conducted within one week, and no later
13 than May 16, 2005, to ensure that any order approving the sale can be entered and
14 the sale transaction concluded before the like-kind exchange deadline expires. The
15 Receiver submits that the order shortening time is warranted to avoid the risk of not
16 meeting the legally imposed and absolute like-kind exchange deadline of May 27,
17 2005 and the resulting loss of a valuable and beneficial sale for the receivership
18 estate.

19 Pursuant to Local Rule 7-19, the names, addresses and telephone numbers of
20 counsel for the parties in the above-referenced action are as follows:

21 Counsel

Party Represented

22 David Brown
23 Molly White
24 Securities and Exchange Commission
25 5670 Wilshire Boulevard, 11th Floor
26 Los Angeles, CA 90036
27 Tel: (323) 965-3998
28 Fax: (323) 965-3908

Plaintiff

26 Barry O. Bernstein
27 3727 W. Magnolia Boulevard, Suite 767
28 Burbank, CA 91505
Tel: (818) 558-1717
Fax: (818) 526-7672

Advisory Counsel for Defendant
Daniel William Heath

1 Michael Oswald
Oswald & Yap
2 16148 Sand Canyon Avenue
Irvine, CA 92618
3 Tel: (949) 788-8900
Fax: (949) 788-8980
4

Counsel for Defendant, Denis
Timothy O'Brien

5 Michael Lipman
Stacy Patterson
6 Coughlan Semmer & Lipman, LLP
501 W. Broadway, Suite 400
7 San Diego, California 92101
Tel: (619) 232-0800
8 Fax: (619)

Counsel for Larre Schlarmann

9 David Osias
Debra Riley
10 Allen, Matkins, Leck, Gamble & Mallory
501 West Broadway, Suite 900
11 San Diego, CA 92101
Tel: (619) 233-1155
12 Fax: (619) 233-1158

Counsel for Robert L.
Goodrich, Chapter 7 Trustee

13 Norman L. Hanover
Martha Warriner
14 Reid & Hellyer
15 3880 Lemon Street, 5th Floor
Riverside, CA 92502-1300
16 Tel: (951) 682-1771
17 Fax: (951) 686-2415

Counsel for Robert L.
Goodrich, Chapter 7 Trustee

18
19 The Receiver has provided notice of this ex parte application to the parties
20 referenced above by providing telephonic notice to those persons and by serving
21 copies of this ex parte application on them by overnight mail delivery concurrently
22 with the filing of the ex parte application with the Court. Because defendant Heath
23 is incarcerated and telephone contact is not permitted, counsel for the Receiver did
24 not attempt to contact Heath telephonically except through his advisory counsel
25 noted above. A courtesy copy of the ex parte application has also been served by
26 overnight mail delivery concurrently on the proposed buyer as reflected in the proof
27 of service. In addition, a copy of the ex parte application and the Motion has been
28 concurrently posted on the Receiver's website for this case at www.heath-

1 receiver.com, and the Receiver will post the Notice of Hearing on the Motion on the
2 website when the Court has made a determination regarding this application for an
3 order shortening time. The parties to whom counsel for the Receiver provided
4 telephonic notice as set forth did not express a position on the ex parte application
5 except as otherwise noted in the Hawes Declaration in support hereof.

6 The Receiver has served copies of the Motion as well as this Application and
7 proposed Order by overnight mail delivery on the parties to this action, the proposed
8 buyer of the property, counsel for the Chapter 7 Trustee in the Leslee Heath
9 bankruptcy estate and bankruptcy counsel for Leslee Heath and other interested
10 parties as reflected in the accompanying proof of service. Upon the Court's
11 favorable determination of this application, the Receiver proposes to serve copies of
12 a notice of hearing upon the Court's determination of this application on those
13 interested parties previously served with the Application and Motion (by overnight
14 mail or facsimile) and on those parties who have requested service of notice
15 pursuant to the Court's Order: (1) Approving Receiver's Report for the Period July
16 12, 2004 through December 31, 2004; (2) Approving Receiver's Proposed Claims
17 Filing and Allowance Procedures; and (3) Granting an Order Limiting Notice Under
18 Local Rule 66-7 in Connection with Administrative and Similar Motions Under
19 Local Rule 66-7 ("Order Limiting Notice") filed on March 4, 2005 (by regular
20 mail). Unless the Court orders otherwise, the Receiver proposes to serve the notice
21 of hearing on the request for notice parties by mail to limit expense to the
22 receivership estate of overnight service in that the request for notice service list
23 includes approximately 70 parties and in that the pleadings will be posted on the
24 Receiver's website.

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1 WHEREFORE, the Receiver respectfully requests that the Court grant this ex
2 parte application and issue the proposed order shortening time lodged concurrently
3 herewith.

4 DATED: May 6, 2005

FRANDZEL ROBINS BLOOM & CSATO, L.C.
GARY OWEN CARIS
LESLEY ANNE HAWES

7
8 By: *Lesley Anne Hawes*
LESLEY ANNE HAWES
9 Attorneys for Permanent Receiver,
10 ROBB EVANS

FRANDZEL ROBINS BLOOM & CSATO, L.C.
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DECLARATION OF LESLEY ANNE HAWES

I, Lesley Anne Hawes, declare:

1. I am an attorney at law duly admitted to practice before the courts of the State of California and before the United States District Court for the Central District of California and am a member of the firm of Frandzel Robins Bloom & Csato, L.C., the attorneys for Robb Evans as the Permanent Receiver of the assets of D.W. Heath & Associates, Inc., PCM Fixed Income Fund, LLC, Private Capital Management, Inc., Private Collateral Management, Inc., and their subsidiaries and affiliates (individually and collectively, the "Receivership Defendants") in this case and as Receiver over the Schlarmann Interests. I have personal knowledge of the matters set forth in this declaration, and if I were called upon to testify as to these matter, I could and would competently testify based upon my personal knowledge.

2. I have caused to be filed with the Court concurrently herewith the original of the Receiver's Motion for Order Approving Sale of Bear Manor Property by Private Sale and for Modification of Sale Procedures of 28 U.S.C. Section 2001(b) in Connection Therewith; Memorandum of Points and Authorities and Declaration of Kenton Johnson in Support Thereof (collectively "Motion"). The Receiver seeks approval of a proposed sale of the Bear Manor property comprised of 15 cabins located at 20393 Big Bear Blvd., Big Bear Lake, California operated as a lodge. The Receiver proposes to sell the Bear Manor property free and clear of liens in a cash sale without contingencies to Brandon Schlarmann ("Buyer"), the brother of Larre Schlarmann for a purchase price of \$1,200,000.00.

3. The final negotiations of the proposed sale transaction were concluded in late April 2005. Since then, the Receiver and his counsel have required time to prepare the Purchase and Sale Agreement and the Motion, including developing and presenting the facts and evidence to support the relief sought.

4. The sale is part of a 1031 like-kind exchange by the Buyer. The source of funds for the deposit are proceeds of the sale of property by the Buyer which are

1 being held by an accommodator. Under applicable tax laws and regulations, the last
2 date for the sale to close, for all funds to be paid and the deed conveying title
3 recorded is May 27, 2005.

4 5. As set forth in the Motion, the Receiver believes the sale is of
5 substantial benefit to the receivership estate based on many factors, including the
6 fact that the price exceeds the minimum threshold of two-thirds of appraised value
7 under the private sale provisions of 28 U.S.C. section 2001(b), the sale does not
8 require payment of real estate broker commissions that would otherwise likely be
9 required if this sale is not consummated, and the sale provides for an immediate
10 cash payment to the estate at a fair value price based on the appraisals obtained by
11 the Receiver.

12 6. With the like-kind exchange deadline of May 27, 2005 and the
13 logistical considerations in obtaining an entered order approving the sale,
14 completing the documentation of the sale, closing the escrow and recording the
15 documents necessary to transfer title by May 27, 2005, the Receiver and the Buyer
16 believe it is necessary for the hearing on the Motion to be set within one week and
17 no later than May 16, 2005. For that reason, the Receiver seeks an order shortening
18 time under the terms and conditions set forth in the foregoing application.

19 **NOTICE OF EX PARTE APPLICATION**

20 7. Pursuant to Local Rule 7-19, on May 5, 2005, commencing at 10:30
21 a.m, I placed telephone calls to counsel for plaintiff SEC, advisory counsel for
22 defendant Heath, counsel for defendant O'Brien and counsel for Larre Schlarmann
23 advising them of the Receiver's intention to file this Ex Parte Application for an
24 order shortening time on the Motion by May 6, 2005. I personally spoke with Molly
25 White of the SEC who indicated she had no opposition to the ex parte application. I
26 left detailed messages for Heath's advisory counsel by voicemail with a follow up
27 written letter, and I left a detailed voicemail message for O'Brien's counsel as I was
28 unable to reach him personally. I also spoke with an associate in Michael Lipman's

1 office representing Larre Schlarman who received the information and indicated
2 she did not anticipate her client opposing the sale but would evaluate the papers.
3 Commencing at approximately 1:00 p.m. on May 5, 2005, I also placed telephone
4 calls to counsel for the Chapter 7 Trustee and left detailed voicemail messages for
5 Debra Riley of Allen Matkins Leck Gamble & Mallory LLP, and Martha Warriner
6 (attorney) and Wendy Patrick (paralegal) of Reid & Hellyer, APC, counsel for
7 Robert L. Goodrich, Chapter 7 Trustee of the Leslee Heath bankruptcy estate,
8 regarding the ex parte application and Motion. As of the date and time of execution
9 of this declaration, I have received no indication of any opposition from any of those
10 parties to the order shortening time.

11 Executed this 5th day of May 2005 at Los Angeles, California.

12 I declare under penalty of perjury that the foregoing is true and correct.

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15 LESLEY ANNE HAWES
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(323) 852-1000

PROOF OF SERVICE

I, the undersigned, declare and certify as follows:

I am over the age of eighteen years, not a party to the within action and employed in the County of Los Angeles, State of California. I am employed in the office of FRANDZEL ROBINS BLOOM & CSATO, L.C., members of the Bar of the above-entitled Court, and I made the service referred to below at their direction. My business address is 6500 Wilshire Boulevard, Seventeenth Floor, Los Angeles, California 90048-4920.

On May 6, 2005, I served true copy(ies) of the **EX PARTE APPLICATION FOR ORDER SHORTENING TIME FOR FILING, SERVICE AND HEARING ON MOTION FOR ORDER APPROVING SALE OF BEAR MANOR PROPERTY BY PRIVATE SALE AND FOR MODIFICATION OF APPLICABLE SALE PROCEDURES OF 28 U.S.C. SECTION 2001(B) IN CONNECTION THEREWITH; DECLARATION OF LESLEY ANNE HAWES IN SUPPORT THEREOF**, the original(s) of which is(are) affixed hereto, to the party(ies) listed on the attached service list.

- BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such document(s) were placed in envelopes addressed to the person(s) served hereunder for collection and mailing with postage thereon fully prepaid at Los Angeles, California, on that same day following ordinary business practices.
- BY FACSIMILE:** At approximately _____, I caused said document(s) to be transmitted by facsimile. The telephone number of the sending facsimile machine was (323) 651-2577. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The document was transmitted by facsimile transmission, and the sending facsimile machine properly issued a transmission report confirming that the transmission was complete and without error.
- BY OVERNIGHT DELIVERY:** I deposited such document(s) in a box or other facility regularly maintained by the overnight service carrier, or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier with delivery fees paid or provided for, addressed to the person(s) served hereunder.
- BY EXPRESS MAIL:** I deposited such document(s) in a box or other facility regularly maintained by the United States Postal Service, in an envelope or package designated by the United States Postal Service with delivery fees paid or provided for, addressed to the person(s) served hereunder.
- BY PERSONAL SERVICE:** I personally delivered such document(s) to the person(s) served hereunder.

I certify under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on May 6, 2005, at Los Angeles, California.


BONITA ZEIER

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SERVICE LIST

Securities and Exchange Commission v. D.W. Heath & Associates, Inc., et al.
U.S.D.C. Case No. CV 04-02949

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|----|---|--|
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Booking No. 200427981 | Defendant |
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P. O. Box 710 | |
| 3 | Riverside, California 92501 | |
| 4 | Michael Silverman, Esq.
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PROOF OF SERVICE

I, the undersigned, declare and certify as follows:

I am over the age of eighteen years, not a party to the within action and employed in the County of Los Angeles, State of California. I am employed in the office of FRANDZEL ROBINS BLOOM & CSATO, L.C., members of the Bar of the above-entitled Court, and I made the service referred to below at their direction. My business address is 6500 Wilshire Boulevard, Seventeenth Floor, Los Angeles, California 90048-4920.

On May 6, 2005, I served true copy(ies) of the **EX PARTE APPLICATION FOR ORDER SHORTENING TIME FOR FILING, SERVICE AND HEARING ON MOTION FOR ORDER APPROVING SALE OF BEAR MANOR PROPERTY BY PRIVATE SALE FREE AND CLEAR OF LIENS AND FOR MODIFICATION OF APPLICABLE SALE PROCEDURES OF 28 U.S.C. SECTION 2001(B) IN CONNECTION THEREWITH; DECLARATION OF LESLEY ANNE HAWES IN SUPPORT THEREOF**, the original(s) of which is(are) affixed hereto, to the party(ies) listed on the attached service list.

- BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such document(s) were placed in envelopes addressed to the person(s) served hereunder for collection and mailing with postage thereon fully prepaid at Los Angeles, California, on that same day following ordinary business practices.
- BY FACSIMILE:** At approximately _____, I caused said document(s) to be transmitted by facsimile. The telephone number of the sending facsimile machine was (323) 651-2577. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The document was transmitted by facsimile transmission, and the sending facsimile machine properly issued a transmission report confirming that the transmission was complete and without error.
- BY OVERNIGHT DELIVERY:** I deposited such document(s) in a box or other facility regularly maintained by the overnight service carrier, or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier with delivery fees paid or provided for, addressed to the person(s) served hereunder.
- BY EXPRESS MAIL:** I deposited such document(s) in a box or other facility regularly maintained by the United States Postal Service, in an envelope or package designated by the United States Postal Service with delivery fees paid or provided for, addressed to the person(s) served hereunder.
- BY PERSONAL SERVICE:** I personally delivered such document(s) to the person(s) served hereunder.

I certify under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on May 6, 2005, at Los Angeles, California.


BONITA ZEIER

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SERVICE LIST

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