

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

11450 Sheldon Street
Sun Valley, California 91352-1121
Telephone No.: (818) 768-8100
Facsimile No.: (818) 768-8802

Securities and Exchange Commission v. D. W. Heath & Associates Inc., et al.
CASE No. CV-04-02949 JFW (Ex)

**Notice of Motion and Motion by Receiver for Order Approving
Settlement and Recovery of Investor Funds from the Bikeboard
Company LLC and Valley of the Sun Cosmetics LLC;
Memorandum of Points and Authorities in Support Thereof;
Declaration of Robb Evans in Support Thereof**

Dated August 27, 2004

1 Gary Owen Caris (State Bar No. 088918)
Lesley Anne Hawes (State Bar No. 117101)
2 FRANDZEL ROBINS BLOOM & CSATO, L.C.
6500 Wilshire Boulevard
3 Seventeenth Floor
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5 Attorneys for Permanent Receiver,
6 ROBB EVANS

7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**

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)

**NOTICE OF MOTION AND
MOTION BY RECEIVER FOR
ORDER APPROVING
SETTLEMENT AND RECOVERY
OF INVESTOR FUNDS FROM THE
BIKEBOARD COMPANY, LLC and
VALLEY OF THE SUN
COSMETICS, LLC;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF; DECLARATION OF
ROBB EVANS IN SUPPORT
THEREOF**

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18
19 Date: September 20, 2004
Time: 1:30 p.m.
20 Courtroom: 16

21 TO: THE PARTIES TO THIS ACTION AND THEIR ATTORNEYS OF
22 RECORD, AND TO CREDITORS AND OTHER PARTIES IN INTEREST:

23 PLEASE TAKE NOTICE that on September 20, 2004 at 1:30 p.m., or as soon
24 as thereafter counsel may be heard in Courtroom 16 of the above-entitled Court,
25 located at 312 N. Spring Street, Los Angeles, California, Robb Evans as permanent
26 receiver ("Receiver") of D.W. Heath & Associates, Inc., Private Capital
27 Management, Inc., Private Collateral Management, Inc. and PCM Fixed Income
28

1 Fund I, LLC and their subsidiaries and affiliates (collectively, the "Receivership
2 Defendants"), will and does hereby move the Court for an order:

3 1. Approving a settlement of claims for recovery of investor funds which
4 were subsequently invested in The BikeBoard Company, LLC ("BikeBoard") by
5 certain Receivership Defendants. The settlement provides for the purchase of the
6 Receivership Defendants' interest in BikeBoard by a third party, Liquet Investments,
7 LLC ("Liquet"), as well as settlement of the respective claims of the Receiver and
8 BikeBoard against each other;

9 2. Approving a settlement of claims for recovery of investor funds which
10 were subsequently loaned to Valley of the Sun Cosmetics, LLC ("VSC") by a
11 Receivership Defendant. The settlement provides for partial repayment of the loan
12 by VSC, as well as settlement of the respective claims of the Receiver and VCS
13 against each other; and

14 3. Granting relief from Local Rule 66-7 pertaining to the giving of notice
15 to all creditors of the receivership estate.

16
17 PLEASE TAKE FURTHER NOTICE that this motion is made pursuant to
18 Local Rule 66-7(b) and (d), and 66-8. This motion is based upon this Notice of
19 Motion and Motion, the accompanying Memorandum of Points and Authorities and
20 Declaration of Robb Evans attached hereto, and upon all other further pleadings, and
21 oral and documentary evidence as may be presented at or before the time of the
22 hearing on the motion.

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PLEASE TAKE FURTHER NOTICE that this motion is posted on the Receiver's website where it may be viewed in its entirety. Copies of this motion will be provided to any interested party upon receipt of a written request which may be sent to: Robb Evans & Associates LLC, 11450 Sheldon Street, Sun Valley, CA 91352-1121, Attn: Lillian Lee.

DATED: August 27, 2004

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

By: 
GARY OWEN CARIS
Attorneys for Permanent Receiver,
ROBB EVANS

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I**

3 **FACTUAL SUMMARY**

4 The Receiver was appointed as the permanent receiver of the assets of D.W.
5 Heath & Associates, Inc., PCM Fixed Income Fund, LLC, Private Capital
6 Management, Inc., Private Collateral Management, Inc., and their subsidiaries and
7 affiliates (individually and collectively, the "Receivership Defendants") by this
8 Court pursuant to the Stipulation and Order Appointing a Permanent Receiver
9 entered on May 19, 2004 (the "Receivership Order").

10 The duties of the Receiver under the Receivership Order include not only the
11 general powers of an equity receiver, but also the duties to take possession and
12 control of all assets of the Receivership Defendants, with the power to sue,
13 foreclose, marshal, sell and liquidate all assets of the Receivership Defendants.

14 **The BikeBoard Settlement**

15 During his investigations of the finances of the Receivership Defendants, the
16 Receiver discovered that defendant Private Capital Management, Inc. ("PCM") and
17 affiliated entity TITL Equities, LP ("TITL")¹ collectively invested a total of
18 \$399,800.00 in BikeBoard. Specifically, PCM invested \$299,800.00 in exchange
19 for 240 capital units of BikeBoard, and TITL invested \$100,000.00 in exchange for
20 80 capital units of BikeBoard. (The capital units owned by PCS and TITL are
21 referred to hereafter collectively as the "Units.") The money invested in BikeBoard
22 by PCM and TITL was derived from investor funds.

23 The Receiver has reached a settlement with BikeBoard for recovery of a
24 portion of the funds invested in the company by the Receivership Defendants (the
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27 ¹ The Receiver has concluded that TITL is an affiliated entity because most of
28 its cash came from investments made from PCM investor funds.

1 "BikeBoard Settlement"). A true and correct copy of the BikeBoard Settlement is
2 attached hereto as Exhibit 1 and is incorporated herein by reference.

3 The BikeBoard Settlement provides for the purchase of the Units from the
4 Receiver by Liquet for the price of \$60,000.00 (the "BikeBoard Settlement
5 Amount"), as well as the release of all claims among and between the Receiver and
6 BikeBoard. Specifically, the BikeBoard Settlement provides:

7 1. Liquet will remit payment of the BikeBoard Settlement Amount to the
8 Receiver²;

9 2. BikeBoard will provide written consent of all members thereof to the
10 purchase of the Units as required by the Operating Agreement of BikeBoard and as
11 set forth in the BikeBoard Settlement;

12 3. BikeBoard will provide a certified copy of a duly enacted resolution by
13 the board of directors of BikeBoard authorizing the purchase of the Units;

14 4. Liquet will procure and provide to the Receiver an opinion of counsel
15 that the purchase of the Units does not result in a termination of BikeBoard pursuant
16 to Section 708 of the Internal Revenue Code of 1986; and

17 5. Liquet will procure an opinion of counsel that the purchase of the Units
18 does not violate any applicable federal or state securities laws.

19 The BikeBoard Settlement Amount represents a recovery of approximately
20 15% of the amounts invested by the Receivership Defendants in BikeBoard. This is
21 very likely the highest recovery possible from BikeBoard at this juncture. The
22 Receiver's investigations into the financial condition of BikeBoard have revealed
23 that the company is in a precarious financial position. BikeBoard's only product is a
24 hybrid skateboard-bicycle intended for recreational use. The company is still in the
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26 _____
27 ² Liquet has already remitted, and the Receiver is currently holding in trust,
28 the full BikeBoard Settlement Amount of \$60,000.00.

1 process of developing the product, and the Receiver is informed that the company
2 has only produced five prototypes at this time. The company is insolvent, with less
3 than \$1,000 in available cash as of late July 2004, and has few if any assets. In
4 addition, the company recently terminated all of its employees.

5 Given BikeBoard's impaired financial condition, the Receiver submits that the
6 BikeBoard Settlement should be approved, as it offers the receivership estate the
7 opportunity to recover as much as possible from BikeBoard in light of its financial
8 condition.

9 **The VSC Settlement**

10 During his investigations of the finances of the Receivership Defendants, the
11 Receiver also discovered that PCM loaned approximately \$315,000.00 to VSC (the
12 "VSC Loan"). This loan was made in early 2004, and has not been repaid.

13 The Receiver has reached a settlement with VSC for recovery of a portion of
14 the VSC Loan (the "VSC Settlement"). A true and correct copy of the VSC
15 Settlement is attached hereto as Exhibit 2 and is incorporated herein by reference.

16 The VSC Settlement provides for payment of \$150,000.00 (the "VSC
17 Settlement Amount")³ to the Receiver by VSC, as well as the release of all claims
18 among and between the Receiver and VSC. The VSC Settlement Amount
19 represents a recovery of approximately 48% of the VSC Loan. For the reasons
20 discussed below, this is very likely the highest recovery possible from VSC at this
21 juncture.

22 VSC produces cosmetics which are marketed primarily overseas in the
23 Middle East, and there is little local demand. The Receiver's investigations into the
24 financial condition of VSC have revealed that the company is not in a position to
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26 ³ VSC has already remitted, and the Receiver is currently holding in trust, the
27 full VSC Settlement Amount of \$150,000.00.
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1 repay the entire VSC Loan. As of late June 2004, the company had \$300,000.00 in
2 accounts payable, and only approximately \$20,000.00 in receivables. VSC is
3 behind in payments to vendors, who are now threatening legal action. As a result,
4 VSC is having difficulty completing existing customer orders, and has not been able
5 to obtain additional financing. Furthermore, the majority of the company's
6 inventory is printed packaging, and the total value of all finished products may be
7 less than \$5,000.00. Because VSC's products are marketed mainly in the Middle
8 East and have little demand in the United States, liquidation of these assets would be
9 difficult and would likely yield very little.

10 Given VSC's financial condition, engaging in litigation to obtain more than
11 the VSC Settlement Amount would almost certainly be a fruitless exercise and
12 would in all likelihood cost the receivership more than any amount it would recover.
13 The Receiver therefore submits that the VSC Settlement should be approved, as it
14 offers the receivership estate the opportunity to recover a prompt cash recovery.

15 **II**

16 **THE RECEIVER REQUESTS APPROVAL OF**
17 **THE BIKEBOARD SETTLEMENT AND THE VSC SETTLEMENT**

18 Local Rule 66-8 directs receivers to administer receivership estates "as nearly
19 as possible in accordance with the practice in the administration of estates in
20 bankruptcy." Pursuant to Federal Rule of Bankruptcy Procedure 9019, a bankruptcy
21 court may approve a proposed compromise of controversies after notice and an
22 opportunity for a hearing. In determining whether to approve a compromise in a
23 bankruptcy, the Ninth Circuit reviews four factors:

- 24 (a) The probability of success in the litigation; (b) the difficulties, if any to be
25 encountered in the matter of collection; (c) the complexity of the litigation
26 involved, and the expense, inconvenience and delay necessarily attending it;
27 (d) and paramount interest of the creditors and a proper deference to their
28 reasonable views in the premises."

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1 In re A&C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986); See also, In Re
2 Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

3 In light of the factors set forth above, the Receiver submits that the BikeBoard
4 Settlement and the VSC Settlement should be approved. Both BikeBoard and VSC
5 are experiencing serious financial difficulty. The future of both companies is very
6 uncertain and the likelihood of bankruptcy significant. The respective settlement
7 agreements provide for payment of the highest amount possible from each company,
8 due to the companies' precarious financial positions. Further negotiations with
9 either company would almost certainly not result in higher recovery from either
10 company and would instead incur more cost for the receivership estate.
11 Accordingly, the recovery of \$60,000.00 pursuant to the BikeBoard Settlement and
12 \$150,000.00 pursuant to the VSC Settlement is the most favorable outcome for the
13 aggrieved investors in this case.

14 **III**
15 **THE RECEIVER REQUESTS RELIEF FROM**
16 **NOTICE REQUIREMENTS OF LOCAL RULE 66-7**

17 The Receiver requests that this motion be granted, and the order thereon
18 entered, without requiring the Receiver to give notice to all creditors under L.R. 66-
19 7(d), which provides that: "The receiver shall give notice by mail to all parties to the
20 action and to all known creditors of the defendant of the time and place for hearing
21 of: . . . (d) Applications for instructions concerning administration of the estate; . . ."

22 In addition, the Receiver requests that the order on this motion be entered without
23 requiring the Receiver to give notice to creditors pursuant to L.R. 66-7(b), which
24 similarly provides that the Receiver shall notify all known creditors of the time and
25 place for hearing of " . . . (b) petitions for the confirmation of sales of real property
26 and personal property;"

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1 The Receiver has provided notice of this motion to the trade creditors of the
2 estate whose identity currently is known to the Receiver. However, the Receiver
3 requests that he be relieved from his duty under L.R. 66-7 to notify all investor-
4 creditors because there are more than 1,000 such potential creditors in the estate.
5 These potential creditors are investors or consumers, in that they invested in, or
6 purchased investment products from, the Receivership Defendants. Further, the
7 Receiver has been unable to verify at this time whether all of these investors will
8 prove to be actual creditors of the receivership estate. If the Receiver is required to
9 give notice to all of these individuals, such a requirement would be extraordinarily
10 burdensome, time consuming and expensive for the receivership estate, including
11 substantial photocopying and postage costs.

12 In light of the fact that the motion is being served on the list of known trade
13 creditors and is being posted on the Receiver's website, it is reasonable and
14 appropriate to consider this motion based on the modified notice procedure set forth
15 herein. In order to maximize notice in this situation, the Receiver has taken the
16 following steps:

17 1. The motion has been served on all parties named in this action, as well
18 as all trade creditors of the receivership estate;

19 2. Notice has been given herein that the Receiver will provide copies of
20 the motion to any interested party upon receipt of a written request. Parties may
21 direct such a request to the Receiver as follows: Robb Evans & Associates LLC,
22 11450 Sheldon Street, Sun Valley, CA 91352-1121, Attn: Lillian Lee; and

23 3. The motion been posted on the Receiver's website at the following
24 address: www.heath-receiver.com .

25 The procedure outlined above is designed to permit the Receiver to obtain
26 approval of the settlements described herein in an expeditious and cost-effective
27 manner. The Receiver submits that this notice is reasonable and designed to provide
28 fair notice and an opportunity to be heard to all creditors and interested parties in the

1 receivership estate, while minimizing the expense of photocopying and postage that
2 would otherwise be borne by those creditors if universal notice by mail was
3 required. Accordingly, it is respectfully requested that the Receiver be relieved of
4 giving notice to those investors who are or may be creditors of this receivership
5 estate.

6 IV

7 CONCLUSION

8 Based on the foregoing, the Receiver respectfully requests that the Court
9 grant relief as requested herein.

10
11 DATED: August 27, 2004

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

12
13
14 By:



GARY OWEN CARIS
Attorneys for Permanent Receiver,
ROBB EVANS

1 **DECLARATION OF ROBB EVANS**

2 I, Robb Evans, declare:

3 1. I am the Permanent Receiver of the assets of D.W. Heath & Associates,
4 Inc., PCM Fixed Income Fund, LLC, Private Capital Management, Inc., Private
5 Collateral Management, Inc., and their subsidiaries and affiliates (individually and
6 collectively, the "Receivership Defendants"). I have personal knowledge of the
7 matters set forth in this declaration and if I were called upon to testify as to these
8 matter, I could and would competently testify based upon my personal knowledge.

9 2. I was appointed the permanent receiver in this action by this Court
10 pursuant to the Stipulation and Order Appointing a Permanent Receiver entered on
11 May 19, 2004 (the "Receivership Order"). My duties under the Receivership Order
12 include not only the general powers of an equity receiver, but also the duties to take
13 possession and control of all assets of the Receivership Defendants, with the power
14 to sue, foreclose, marshal, sell and liquidate all assets of the Receivership
15 Defendants.

16 3. During my investigation of the finances of the Receivership
17 Defendants, I discovered that defendant Private Capital Management, Inc. ("PCM")
18 and affiliated entity TITL Equities, LP ("TITL") collectively invested a total of
19 \$399,800.00 in BikeBoard. Specifically, PCM invested \$299,800.00 in exchange
20 for 240 capital units of BikeBoard, and TITL invested \$100,000.00 in exchange for
21 80 capital units of BikeBoard. (The capital units owned by PCS and TITL are
22 referred to hereafter collectively as the "Units.") The money invested in BikeBoard
23 by PCM and TITL was derived from investor funds.

24 4. I have reached a settlement with BikeBoard for recovery of a portion of
25 the funds invested in the company by the Receivership Defendants (the "BikeBoard
26 Settlement"). A true and correct copy of the BikeBoard Settlement is attached
27 hereto as Exhibit 1.

28 5. The BikeBoard Settlement provides that a third party, Liquet

1 Investments, LLC ("Liquet") will purchase the Units for the price of \$60,000.00 (the
2 "BikeBoard Settlement Amount"). In consideration for BikeBoard's consent to the
3 sale and performance of other acts required to effect the sale, the BikeBoard
4 Settlement will also include a release of the respective claims of the Receiver and
5 BikeBoard against each other.

6 6. BikeBoard has already paid the BikeBoard Settlement Amount, which
7 is currently being held in trust.

8 7. I have investigated the financial condition of BikeBoard and have
9 concluded that it is in a precarious financial position. BikeBoard's only product is a
10 hybrid skateboard-bicycle intended for recreational use. The company is still in the
11 process of developing the product, and I am informed that the company has only
12 produced five prototypes at this time. The company is insolvent, with less than
13 \$1,000 in available cash as of July 2004, and has few if any assets. In addition, the
14 company recently terminated all of its employees.

15 8. I believe the BikeBoard Settlement Amount is the maximum recovery
16 available from the company, and that it is in the best interest of the receivership
17 estate to accept this amount. Given BikeBoard's impaired financial condition, I
18 believe that the BikeBoard Settlement offers the receivership estate the opportunity
19 to recover as much as possible from BikeBoard in light of its financial condition.

20 9. Through the investigation of my office into the finances of the
21 Receivership Defendants, it was also discovered that PCM loaned approximately
22 \$315,000 (the "VSC Loan") to Valley of the Sun Cosmetics, LLC ("VSC").

23 10. I have reached a settlement with VSC for recovery of a portion of the
24 VSC Loan (the "VSC Settlement"). A true and correct copy of the VSC Settlement
25 is attached hereto as Exhibit 2.

26 11. The VSC Settlement provides that VSC will pay \$150,000.00 (the
27 "VSC Settlement Amount"), and also includes a release of the respective claims of
28 the Receiver and VSC against each other. VSC has in fact paid the VSC Settlement

1 Amount, which is currently being held in trust.

2 12. I have investigated the financial condition of VSC and have concluded
3 that it is not in a position to repay the entire VSC Loan. VSC produces cosmetics
4 which are marketed primarily overseas in the Middle East, and there is little local
5 demand. As of late June 2004, the company had \$300,000.00 in accounts payable,
6 and only approximately \$20,000.00 in receivables. VSC is behind in payments to
7 vendors, who are now threatening legal action. As a result, VSC is having difficulty
8 completing existing customer orders, and has not been able to obtain additional
9 financing. Furthermore, the majority of the company's inventory is printed
10 packaging, and the total value of all finished products may be less than \$5,000.00.
11 Because VSC's products are marketed mainly in the Middle East and have little
12 demand in the United States, liquidation of these assets would be difficult and would
13 likely yield very little.

14 13. For the foregoing reasons, I believe the VSC Settlement Amount is the
15 maximum recovery available from the company, and that it is in the best interest of
16 the receivership estate to accept this amount. Given VSC's financial condition,
17 engaging in litigation to obtain more than the VSC Settlement Amount would
18 almost certainly be a fruitless exercise and would in all likelihood cost the
19 receivership more than any amount it would recover. Accordingly, I believe that the
20 VSC Settlement offers the receivership estate the best opportunity to recover a
21 prompt cash recovery.

22 14. There are more than 1,000 potential aggrieved investors in this case.
23 My office has not yet verified whether all such investors will be actual creditors of
24 the receivership estate. Service of this motion upon each of potential investor
25 pursuant to Local Rule 66-7 would prove prohibitively expensive and time
26 consuming. For instance, the costs associated with photocopying and postage alone
27 for thousands of investors would prove prohibitive.

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1 15. In order to maximize notice of this motion, I have taken the
2 following steps:

3 a. This motion has been served on all parties named in this action, as well
4 as all trade creditors of the receivership estate;

5 b. Notice is given in the motion that my office will provide copies of the
6 motion to any interested party upon receipt of a written request. Parties may direct
7 such a request to my office as follows: Robb Evans & Associates LLC, 11450
8 Sheldon Street, Sun Valley, CA 91352-1121, Attn: Lillian Lee; and

9 c. This motion been posted on the Robb Evans website at the following
10 address: www.heath-receiver.com.

11 16. This procedure outlined in paragraph 15 above is designed to permit me
12 to obtain approval of the settlements described herein in an expeditious and cost-
13 effective manner. I submit that this notice is reasonable and designed to provide
14 fair notice and an opportunity to be heard to all creditors and interested parties in the
15 receivership estate while minimizing the expense of photocopying and postage that
16 would otherwise be borne by those creditors if universal notice by mail was
17 required. Accordingly, I respectfully request relief from giving notice to those
18 investors who are or may be creditors of this receivership estate.

19 I declare under penalty of perjury under the laws of the State of California
20 that the foregoing is true and correct. Executed on August 27, 2004 at

21 Washington, D.C.



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24 ROBB EVANS, Declarant