

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 for Order

- (1) Approving Receiver's Report for the Period July 12, 2004 through December 31, 2004;**
- (2) Approving Receiver's Proposed Claims Filing and Allowance Procedures; and**
- (3) Granting an Order Limiting Notice Under Local Rule 66-7 in Connection with Administrative and Similar Motions Under Local Rule 66-7;**

Memorandum of Points and Authorities;
Declaration of Robb Evans in Support Thereof

Dated February 3, 2005

1 Gary Owen Caris (State Bar No. 088918)
2 Lesley Anne Hawes (State Bar No. 117101)
3 FRANDZEL ROBINS BLOOM & CSATO, L.C.
4 6500 Wilshire Boulevard
5 Seventeenth Floor
6 Los Angeles, California 90048-4920
7 Telephone: (323) 852-1000
8 Facsimile: (323) 651-2577
9 Attorneys for Permanent Receiver,
10 ROBB EVANS

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

11 SECURITIES AND EXCHANGE
12 COMMISSION,
13
14 Plaintiff,
15 v.
16 D.W. HEATH & ASSOCIATES, INC.,
17 etc., et al.,
18
19 Defendants.

CASE NO. CV 04-02949 JFW (Ex)
**NOTICE OF MOTION AND
MOTION FOR ORDER (1)
APPROVING RECEIVER'S
REPORT FOR THE PERIOD
JULY 12, 2004 THROUGH
DECEMBER 31, 2004; (2)
APPROVING RECEIVER'S
PROPOSED CLAIMS FILING AND
ALLOWANCE PROCEDURES;
AND (3) GRANTING AN ORDER
LIMITING NOTICE UNDER
LOCAL RULE 66-7 IN
CONNECTION WITH
ADMINISTRATIVE AND SIMILAR
MOTIONS UNDER LOCAL RULE
66-7; MEMORANDUM OF POINTS
AND AUTHORITIES;
DECLARATION OF ROBB EVANS
IN SUPPORT THEREOF**

DATE: February 28, 2005
TIME: 1:30 p.m.
DEPT.: Courtroom 16

TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
I. INTRODUCTION.....	3
II. THE RECEIVER SEEKS APPROVAL OF THE RECEIVER'S REPORT	4
III. THE RECEIVER REQUESTS THAT PROPOSED CLAIMS FILING, ALLOWANCE AND PAYMENT PROCEDURES BE APPROVED	8
A. The Proposed Claims Procedure, Consolidation of Assets and Consolidation of Claims.....	8
B. Consolidation Is Appropriate Under the Circumstances	11
IV. AN ORDER LIMITING NOTICE IS NECESSARY AND APPROPRIATE TO REDUCE ADMINISTRATIVE EXPENSES SINCE ALTERNATIVE MEANS OF OBTAINING NOTICE ARE AVAILABLE	12
V. CONCLUSION	15
DECLARATION OF ROBB EVANS.....	16

FRANZEL ROBINS BLOOM & CSATO, L.C.
6500 WILSHIRE BOULEVARD, 17TH FLOOR
LOS ANGELES, CALIFORNIA 90048-4920
(323) 852-1000

1 **TABLE OF AUTHORITIES**

2 **FEDERAL CASES**

3

4 In re First Alliance Mortgage Co.,
269 B.R. 428 (C.D. Cal. 2001) 14

5

6 S.E.C. v. American Capital Investments, Inc.,
98 F.3d 1133 (9th Cir. 1996) 11

7

8 S.E.C. v. Elliott,
953 F.2d 1560 (11th Cir. 1992) 11

9

10 U.S. v. Durham,
86 F.3d 70 (5th Cir. 1996) 11, 12

11

12 U.S. v. Trudaux,
6 F.3d 222 (4th Cir. 1993) 11

13

14 **FEDERAL STATUTES**

15 11 U.S.C. section 102(1); 11 U.S.C. section 105(a) 14

16

17 **OTHER AUTHORITIES**

18 F.R. Bankr. P. 2002(m) 15

19 F.R. Civ. P. 5(a) 14

20 Local Rule 6-1 14

21

22 Local Rule 7 10

23 Local Rule 66-7 1, 4, 12, 13, 14, 19, 20

24 Local Rule 66-8 14

25

26

27

28

1 PLEASE TAKE NOTICE that on February 28, 2005 at 1:30 p.m., or as soon
2 as thereafter counsel may be heard in Courtroom 16 of the above-entitled Court,
3 located at 312 N. Spring Street, Los Angeles, California, Robb Evans as permanent
4 receiver ("Receiver") of D.W. Heath & Associates, Inc., Private Capital
5 Management, Inc., Private Collateral Management, Inc. and PCM Fixed Income
6 Fund I, LLC and their subsidiaries and affiliates (collectively, the "Receivership
7 Defendants"), will and does hereby move the Court for an order:

8
9 1. Approving the Receiver's third report in this matter, covering the period
10 from July 12, 2004 through December 31, 2004 (the "Receiver's Third Report") filed
11 with the Court on January 21, 2005;

12
13 2. Approving the Receiver's proposed claims filing and allowance
14 procedures as set forth in this Motion and supporting memorandum of points and
15 authorities; and

16
17 3. Granting an order limiting notice of all administrative and similar
18 motions under Local Rule 66-7 to service on the parties to the action and those
19 creditors who make a written request for notice to the Receiver in accordance with
20 procedures more fully outlined in the motion and memorandum of points and
21 authorities in support hereof, and with copies of the motions and notice of hearing
22 on the motions under Local Rule 66-7 being posted on the Receiver's website in this
23 matter at www.heath-receiver.com.

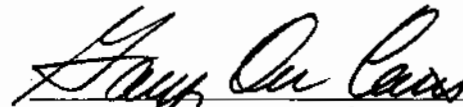
24
25 PLEASE TAKE FURTHER NOTICE that this Motion is made pursuant to
26 Local Rules 66-7(c) and (f), and is based upon this notice of motion and motion, the
27 accompanying memorandum of points and authorities and declaration of Robb
28 Evans, and upon such other pleadings and oral and documentary evidence as may be

1 presented at or before the time of hearing on the motion.
2

3 PLEASE TAKE FURTHER NOTICE that this Motion and the Receiver's
4 Report are posted on the Receiver's website at www.heath-receiver.com where they
5 may be viewed in their entirety. Copies of this Motion and Receiver's Report will
6 be provided to any interested party upon receipt of a written request which may be
7 sent to: Robb Evans & Associates LLC, 11450 Sheldon Street, Sun Valley, CA
8 91352-1121, Facsimile No. (818) 768-8802 Attn: Judi Ehrlich.
9

10 DATED: February 3, 2005 FRANDZEL ROBINS BLOOM & CSATO, L.C.
11 GARY OWEN CARIS
12 LESLEY ANNE HAWES

13 By:



14 GARY OWEN CARIS
15 Attorneys for Permanent Receiver
16 ROBB EVANS
17
18
19
20
21
22
23
24
25
26
27
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4
5 This action was filed by the Securities and Exchange Commission ("SEC")
6 against the Receivership Defendants as well as Daniel William Heath and Denis
7 Timothy O'Brien on or about April 29, 2004. The Receiver is the permanent equity
8 receiver in this matter. The Receiver was initially appointed as temporary receiver
9 pursuant to this Court's Stipulation and Order Appointing Robb Evans Temporary
10 Receiver filed May 3, 2004. Thereafter, the Receiver was appointed as permanent
11 receiver pursuant to the Stipulation and Order Appointing a Permanent Receiver
12 entered May 19, 2004.

13
14 On July 2, 2004, the Riverside County District Attorney initiated a criminal
15 action against Heath, O'Brien, Heath's father, John William Heath, and Larre Jaye
16 Schlarmann ("Schlarmann"), in the action entitled People of the State of California
17 v. Daniel William Heath, et al., Case No. RIF 117775 pending in the Superior Court
18 of California, County of Riverside ("Criminal Action"). The claims asserted in the
19 Criminal Action are subject to the state "Aggravated White Collar Crime
20 Enhancement" provisions of the California Penal Code, pursuant to which the
21 District Attorneys' office has sought and obtained a temporary restraining order
22 prohibiting the disposition or transfer of assets by any of the criminal defendants. In
23 addition, on July 21, 2004, the Riverside Superior Court issued its Order Appointing
24 Robb Evans as Receiver of the Schlarmann Interests Pursuant to Penal Code section
25 186.11 ("July 21 Receivership Order"). The July 21, 2004 Receivership Order was
26 subsequently amended by order entered November 19, 2004 in the Criminal Action
27 to expand the scope of assets subject to the receivership to include certain real
28 property containing avocado groves located in Bonsall, California ("Amended

1 Schlarmann Order"). The July 21, 2004 Receivership Order and the Amended
2 Schlarmann Order are referred to collectively herein as the "Schlarmann
3 Receivership Order." Pursuant to the Schlarmann Receivership Order, the Receiver
4 has been appointed Receiver over all of the Quizno's Entities and the Hotel Entities,
5 as those terms are defined in the Schlarmann Receivership Order, and the Bonsall
6 property.

7
8 In addition, on July 15, 2004, Heath's spouse, Leslee Jane Heath, filed a
9 Chapter 7 petition in bankruptcy in the United States Bankruptcy Court for the
10 Central District of California, Riverside Division, Case No. RS 04-18340-PC. Mrs.
11 Heath claims interests in a number of assets subject to the Heath federal
12 receivership, creating issues regarding the administration and liquidation of the
13 assets as a result.

14
15 By this Motion, the Receiver seeks an order: (1) approving the Receiver's
16 Third Report, which covers the period from July 12, 2004 through December 31,
17 2004, which report was filed with the Court on January 21, 2005; (2) approving the
18 Receiver's proposed claims filing and allowance procedures set forth in this Motion
19 and memorandum of points and authorities; and (3) granting an order limiting notice
20 of this Motion and of all future administrative and similar motions under Local Rule
21 66-7.

22
23 **II.**

24 **THE RECEIVER SEEKS APPROVAL OF THE RECEIVER'S REPORT**

25
26 The Receiver filed his first report while temporary receiver ("First Report")
27 on May 14, 2004. The Receiver filed his second report ("Second Report") and first
28 as permanent receiver on July 14, 2004, as an exhibit to his Ex Parte Application for

1 Permission to Accept Appointment as State Court Receiver Over the Assets of
2 Daniel William Heath, Denis Timothy O'Brien, John William Heath and Larre Jaye
3 Schlarmann.
4

5 The Receiver's Third Report describes the Receiver's activities during the
6 period from July 12, 2004 through December 31, 2004 and was filed with the Court
7 on January 21, 2005. The Receiver's Third Report, as in the case of the prior
8 reports, has also been posted on the Receiver's website at www.heath-receiver.com.
9

10 The Receiver's Third Report details the continuation of the Receiver's
11 activities in locating and analyzing the use and disposition of investor funds,
12 including conducting depositions, witness interviews and reviewing and reconciling
13 extensive financial records of Heath and his numerous corporate and other entities
14 through which the investment fraud was perpetrated. These activities have resulted
15 in more detailed information concerning the interrelationship of the Heath entities
16 and the Schlarmann entities subject to the state court receivership in the Criminal
17 Action and how the investor funds were generated and then transferred to other
18 entities or to Heath or Schlarmann for their own use or benefit.
19

20 The Receiver has concluded that there was a single, complex fraudulent
21 investment scheme organized and perpetrated by Heath with the participation of
22 Schlarmann, whereby investments were all solicited and obtained through a Heath-
23 controlled entity, primarily D.W. Heath & Associates, Inc. and Private Capital
24 Management, Inc. The funds deposited by investors with the Heath-controlled
25 entity were then turned over by Heath to other Heath investment entities or
26 Schlarmann-owned or -controlled entities or were used by Heath and Schlarmann
27 for their personal benefit.
28

1 The Receiver has concluded that Heath and Schlarman operated a single,
2 fraudulent investment scheme with investments generated by Heath through specific
3 companies and then transferred to other Heath and Schlarman controlled entities.
4 The Receiver has consolidated the investor databases maintained by Heath and
5 Schlarman. Based on these activities and the consolidation of the databases, the
6 Receiver has determined there are 1,692 investors in the fraudulent enterprise who
7 are owed in the aggregate approximately \$118 million. The Receiver has also
8 concluded based on these facts that it is impossible to accurately and equitably
9 attribute specific investors or investor claims to specific companies or entities, and
10 that the only equitable way of treating the claims of defrauded investors under the
11 circumstances is for the Receiver to combine all assets of the Heath and Schlarman
12 receivership estates and the claims of investors on the three databases and to provide
13 investors a pro rata claim to the combined receivership assets, as set forth in further
14 detail in the claims procedures section of this Motion.

15
16 The investigation and other activities of the Receiver have also included
17 evaluations of the investments, businesses and assets subject to the receivership,
18 including the value of those investments, assets and businesses, for the purposes of
19 liquidation for the benefit of the receivership estate. In many cases, as detailed in
20 the Receiver's Third Report, the businesses and investments were made in
21 companies that have since gone out of business or are operating at a loss and have
22 no realizable value. These evaluations have resulted in disposition of a number of
23 assets and businesses which have generated settlements and payments to date of
24 over \$3 million in the aggregate.

25
26 For example, one of the businesses evaluated and ultimately disposed of by
27 the Receiver is the real property development located Big Bear, California known as
28 The Club at Big Bear owned by Prestige Resort Development, LLC ("PRD"), a

1 subsidiary of PCM. The Receiver has concluded approximately \$25.34 million in
2 victim funds were used toward this development, together with millions of dollars in
3 loan proceeds from CapitalSource, for an aggregate investment amount of \$42.5
4 million. The project had immediate and substantial cash needs for which no source
5 of funding existed, and with the approval of the Court on motion, the Receiver
6 negotiated a disposition of this project by which the Receiver has obtained a cash
7 payment from CapitalSource of \$725,000 and has retained an interest in future
8 profits, if any, from the sale of the project under the terms of the Receiver's
9 stipulation with CapitalSource.

10

11 The Receiver's activities in this case have been complicated by the state court
12 Schlarman Receivership and examination of the interrelationship between the
13 assets identified as "Schlarman Interests" subject to the receivership in the
14 Criminal Action and the Heath receivership assets. The Receiver's activities have
15 also been complicated by the Leslee Heath Chapter 7 bankruptcy case. The
16 Receiver has successfully negotiated a stipulation with the Chapter 7 Trustee that
17 proposes to resolve questions regarding the responsibility for administration and
18 liquidation of assets and the proper court and mechanisms to resolve the competing
19 claims to the asset proceeds. The Chapter 7 Trustee's motion to approve the
20 bankruptcy administrative stipulation is set for hearing in the bankruptcy court on
21 February 14, 2005, and the Receiver concurrently herewith is filing a motion to
22 approve the stipulation in this Court which also will be set for hearing on February
23 28, 2005. The Receiver is also seeking relief in the Criminal Action to have the
24 administrative and supervisory authority over the Schlarman Interests receivership
25 transferred to this Court based on the Receiver's findings and conclusions as to the
26 relationship of the assets subject to that receivership and the Heath receivership.

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III.
THE RECEIVER REQUESTS THAT PROPOSED CLAIMS FILING,
ALLOWANCE AND PAYMENT PROCEDURES BE APPROVED

The Receiver's Third Report proposes certain procedures for the filing and allowance of claims against the receivership estate in anticipation of making initial distributions to claimants by June 30, 2005. The Receiver has analyzed the financial records of the receivership, including the three databases of investors maintained by Heath and Schlarman. For each investor, the Receiver has calculated and determined what the Receiver believes is (a) the amount the investor paid to the Heath enterprise for investment purposes, and (b) the amount the Heath enterprise paid to the investor on account of the investment.

A. The Proposed Claims Procedure, Consolidation of Assets and Consolidation of Claims

The Receiver has evaluated the financial records, investments, and operations of the entities, and sources and uses of investment funds in the Heath receivership entities as well as the entities subject to the Schlarman Receivership Order in the Criminal Action. The Receiver has concluded that the investment scheme operated by Heath is a Ponzi scheme by which "interest" or investment "returns" were paid with funds paid into the scheme by later investors, that the investments in fact generated only losses, and that the investment enterprise did not generate "profits" from which interest or returns could legitimately be paid. The Receiver has further concluded the Ponzi scheme was operated in a manner where the entities subject to the federal receivership in this case and the entities subject to the Schlarman Interests receivership were part of a single fraudulent investment scheme and are affiliates subject to the common control of Heath and Schlarman.

1 As a result, the Receiver proposes the following treatment of investor
2 accounts and claims against the federal receivership and Schlarmann Interests
3 receivership estates:

4
5 1. All investors identified on the databases maintained by Heath and
6 Schlarmann will be merged into a single investor claimant class and their claims
7 will be treated similarly by being entitled to share in all receivership assets subject
8 to the Heath receivership, including the assets of the Schlarmann Interests
9 receivership which the Receiver contends should be included in this receivership
10 estate¹;

11
12 2. Investor account balances will be credited for funds actually deposited
13 or paid by the investor to the Heath/Schlarmann enterprise;

14
15 3. Credits characterized as interest and applied by Heath and/or
16 Schlarmann to increase investor account balances will be reversed;

17
18 4. Actual payments of interest and actual payments for any other
19 purposes, such as withdrawals of investment amounts, will be treated as a return of
20 capital and the investor account balance reduced accordingly. "Paper" transfers
21 from one account to another account or to another account holder will be
22 disregarded because in such instances there was no actual transfer of funds to an
23 investor by Heath and/or Schlarmann.

24
25
26 ¹ The Receiver is taking steps through a motion in the Criminal Action and a
27 contemporaneous motion in this Court to transfer the Schlarmann Receivership to
28 this Court.

1 After the Court approves this procedure, the Receiver will provide formal
2 written notice to each investor of the Receiver's calculation of the investor's account
3 balance and the amount the Receiver calculates as the claim of the investor based on
4 the treatment of the account and payments and adjustments set forth above. The
5 Receiver proposes that the investor/claimant be provided 30 days from the date of
6 service of written notice of the calculation of the claim to object to the proposed
7 claim amount. The objection by the investor must be in writing and received by the
8 Receiver within the 30-day period of the notice. If the investor creditor fails to
9 timely object to the notice and the Receiver's calculation of the investor claim
10 amount, then the amount set forth in the notice shall be the Approved Investor
11 Claim Amount upon which future distributions in the case will be made.

12
13 The Receiver proposes that non-investor claimants be provided with a similar
14 written notice of the amount the Receiver calculates is owed to the creditor based on
15 the records of the receivership. The Receiver proposes that the creditor have 30
16 days from the date of service of the notice to object to the proposed allowed amount
17 of the creditor's claim and that if no timely written objection is received by the
18 Receiver within that 30-day period, that the amount stated in the notice will become
19 the creditor's Approved Creditor Claim Amount.

20
21 If the Receiver receives a timely objection to any proposed claim amount, the
22 Receiver will attempt to resolve the claim dispute through negotiation. If the parties
23 are unable to resolve the dispute through negotiation, the Receiver will resolve
24 claims objections by motion filed by the Receiver pursuant to Local Rule 7 to
25 determine the proper allowed amount of the claim.

26
27 The Receiver is not yet in a position to make distributions to claimants and
28 will make a subsequent motion to authorize distributions when the claims filing and

1 allowance procedures have been approved and implemented. Nevertheless, by this
2 Motion, the Receiver seeks approval for allowance and payment of Approved
3 Investor Claims on a pro rata basis. As used in these claims procedures, "pro rata"
4 means the ratio of the amount that the Approved Investor Claim bears to the total
5 amount of all Approved Investor Claims. The Receiver is evaluating whether to
6 recommend subordination of Approved Creditor Claims to Approved Investor
7 Claims, and will make a recommendation once the claims process has been
8 completed and in conjunction with the Receiver's first motion to authorize
9 distributions.

10
11 B. Consolidation Is Appropriate Under the Circumstances

12 Where creditors of a federal equity receivership are similarly situated, equity
13 demands that their claims be treated similarly. S.E.C. v. American Capital
14 Investments, Inc., 98 F. 3d 1133 (9th Cir. 1996) (affirming "comprehensive
15 equitable remedy" crafted by district court on receiver's motions, including Equal
16 Treatment Order providing for pro rata payment from all receivership assets of all
17 investor claimants). As a result, pro rata, equal treatment orders have been approved
18 by the courts even over the objection of a creditor who could demonstrate a right to
19 specific receivership assets through tracing and other theories. U.S. v. Durham, 86
20 F. 3d 70 (5th Cir. 1996); U.S. v. Trudaux, 6 F. 3d 222 (4th Cir. 1993); S.E.C. v.
21 Elliott, 953 F. 2d 1560 (11th Cir. 1992). For example, in U.S. v. Durham, the
22 United States seized assets of a fraudulent scheme by which thirteen innocent third
23 parties were induced to deliver over \$800,000 in funds to the defendants as part of a
24 phony loan brokerage business. The funds were deposited in multiple accounts and
25 then transferred to the personal use of the defrauding parties. When the fraud was
26 discovered, approximately \$83,000 in funds remaining in one account were frozen
27 and seized. These funds were the sole source of repayment of the defrauded parties.

1 The District Court proposed to distribute the seized assets to the thirteen fraud
2 victims pro rata. Claremont objected on the ground that it could demonstrate
3 through tracing that \$70,000 of the seized funds were funds paid by Claremont.
4 Three other investors could also directly trace their payments to the funds remaining
5 in the seized account. The District Court found that all of the defrauded victims
6 were similarly situated and that it would be inequitable to allow Claremont to
7 recover most of the seized funds, finding it "inequitable to allow Claremont to
8 benefit merely because the defendants spent the other victims' funds first." U.S. v.
9 Durham, 86 F. 3d at 72. The District Court therefore overruled Claremont's
10 objection, and the Fifth Circuit affirmed the order for pro rata distribution of the
11 funds based on the discretion granted to the District Court as "a court of conscience"
12 when it sits in equity. U.S. v. Durham, 86 F. 3d at 72.

13
14 IV.

15 **AN ORDER LIMITING NOTICE IS NECESSARY AND APPROPRIATE TO**
16 **REDUCE ADMINISTRATIVE EXPENSES SINCE ALTERNATIVE MEANS**
17 **OF OBTAINING NOTICE ARE AVAILABLE**

18
19 The Receiver requests that the notice procedures of Local Rule 66-7 be
20 modified as they pertain to motions subject to the notice requirements of Local Rule
21 66-7 ("Rule 66-7 Motions") which require notice to all known creditors of the
22 following matters: (a) petitions for payment of dividends to creditors; (b) petitions
23 for confirmation of sales of real property and personal property; (c) reports of the
24 Receiver; (d) applications for instructions concerning administration of the estate;
25 (e) applications for discharge of the Receiver; and (f) applications for fees and
26 expenses of the Receiver, the attorney for the Receiver and any other person
27 appointed to aid the Receiver. The modifications of the notice requirements are
28 sought for the purpose of assisting the Receiver in expeditiously and cost-effectively

1 administering the receivership estate. The fees and expenses associated with giving
2 notice to all of the approximate 1,692 investor creditors and the over 100 vendor
3 creditors of each Rule 66-7 Motion would result in excessive expense to the
4 receivership estate to the detriment of creditors, particularly in light of the
5 alternative means of providing notice that are available.² Specifically, the Receiver
6 proposes the following modified notice procedures:

7
8 (1) That copies of Rule 66-7 Motions be served on the SEC, the
9 defendants and all creditors who serve the Receiver with a written request for notice
10 and to remain on/be added to the Receiver's master mailing list for this matter, with
11 such requests to be directed to Judi Ehrlich at Robb Evans & Associates, 11450
12 Sheldon Street, Sun Valley, California 91352-1121, Facsimile No. (818) 768-8802;

13
14 (2) That the Receiver will also post such Rule 66-7 Motions on the
15 Receiver's website for this case at www.heath-receiver.com concurrently with the
16 filing and service thereof;

17
18 (3) That a creditor may request copies of a specific Rule 66-7
19 Motion in writing directed to the Receiver at the address set forth above, which the
20 Receiver will provide; and

21
22 (4) The Receiver further seeks authority to serve copies of such
23 pleadings by electronic mail only if requested and agreed to by an interested party,
24 to further reduce the costs to the estate of service of such pleadings by mail.

25
26
27 ² An abbreviated notice of this motion and the other motions set for hearing
28 concurrently was served on all creditors, although the full motion was not.

1 The Receiver further proposes to implement the limited notice requirement by
2 first sending notice in writing to all creditors and interested parties of the Court's
3 ruling, the means of obtaining written copies of Rule 66-7 Motions by requesting
4 notice in writing and the means of obtaining notice through electronic means,
5 including the website information and ability to request electronic mail
6 transmissions of the Rule 66-7 Motions in lieu of service copies by mail. The
7 Receiver submits that the limitations and procedures for providing notice of Rule
8 66-7 Motions proposed by the Receiver are reasonable and designed to provide fair
9 notice and an opportunity to be heard to all creditors and interested parties in the
10 receivership estate while minimizing expense of service that would otherwise be
11 borne by those creditors.

12
13 Local Rule 66-7 provides that the provisions of Local Rule 6-1 apply to notice
14 of Rule 66-7 Motions. Local Rule 6-1 in turn provides for the filing and service of
15 written notices of motion "[u]nless otherwise provided by rule or ordered by the
16 Court." This Court, as a court of equity supervising the receivership estate, may
17 make appropriate administrative orders governing the receivership, including
18 limitations on and changes in notice and other procedures. See F.R. Civ. P. 5(a) and
19 (c) (authorizing the court to modify service procedures when numerous defendants
20 are involved in litigation). Pursuant to Local Rule 66-8, a receiver is directed to
21 administer receivership estates "as nearly as possible in accordance with the practice
22 in the administration of estates in bankruptcy." Orders limiting notice when the
23 Bankruptcy Code or Rules would otherwise require notice to all creditors are
24 routinely granted in bankruptcy cases to promote the expeditious and economical
25 administration of bankruptcy estates. See In re First Alliance Mortgage Co., 269
26 B.R. 428, 442 (C.D. Cal. 2001) (referencing in dicta in the court's recitation of facts
27 the bankruptcy court's order limiting notice issued in that case); 11 U.S.C. section
28 102(1)(A) (defining the phrase "after notice and a hearing" to mean "after such

FRANDZEL ROBINS BLOOM & CSATO, L.C.
6500 WILSHIRE BOULEVARD, 17TH FLOOR
LOS ANGELES, CALIFORNIA 90048-4920
(323) 852-1000


1 notice as is appropriate in the particular circumstances, and such opportunity for
2 hearing as is appropriate in the particular circumstances"); 11 U.S.C. section 105(a)
3 and (d) (granting broad equitable powers to the court to issue orders "necessary or
4 appropriate to carry out the provisions" of title 11 including "prescribing such
5 limitations and conditions as the court deems appropriate to ensure the case is
6 handled expeditiously and economically"); and F.R. Bankr. P. 2002(m) (authorizing
7 the court to enter "orders designating the matters in respect to which, the entity to
8 whom, and the form and manner in which notices shall be sent except as otherwise
9 provided by these rules").

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V.
CONCLUSION

Based on the foregoing, the Receiver respectfully requests that this Court grant this motion, approve the Receiver's Third Report, approve the proposed claims filing and allowance procedures set forth in this Motion and grant the order limiting notice as requested herein.

DATED: February 3, 2005 FRANDZEL ROBINS BLOOM & CSATO, L.C.
GARY OWEN CARIS
LESLEY ANNE HAWES

By: 
GARY OWEN CARIS
Attorneys for Permanent Receiver
ROBB EVANS

FRANZEL ROBINS BLOOM & CSATO, L.C.
6500 WILSHIRE BOULEVARD, 17TH FLOOR
LOS ANGELES, CALIFORNIA 90048-4820
(323) 852-1000

1 second report was entitled Report of Receiver's Activities May 15, 2004 Through
2 July 9, 2004. Both of the Receiver's Reports have been posted on the Receiver's
3 website at www.heath-receiver.com.

4
5 5. The second report analyzes the intertwined relationship between Daniel
6 Heath, the Receivership Defendants, Larre Schlarmann and Mr. Schlarmann's
7 entities. In that regard, the Second Report also charts the movement of funds
8 raised from investors to and through a web of entities. It also provides a
9 preliminary schedule of investor information broken down by the nature of the
10 investment, the number of investors, and the dollar amount invested.

11
12 6. I filed my Report of Receiver's Activities for the period from July 12,
13 2004 through December 31, 2004 on January 21, 2005. Based on the extensive
14 evaluation of the voluminous financial data, records and documents of receivership
15 entities and investigation conducted by my deputies and me, I have concluded that
16 there was a single, complex fraudulent investment scheme organized and
17 perpetrated by Heath with the participation of Schlarmann, whereby investments
18 were all solicited and obtained through a Heath-controlled entity, primarily D.W.
19 Heath & Associates, Inc. and Private Capital Management, Inc. The funds
20 deposited by investors with the Heath-controlled entity were then turned over by
21 Heath to other Heath investment entities or Schlarmann-owned or -controlled
22 entities or were used by Heath and Schlarmann for their personal benefit.

23
24 7. I have caused the investor databases maintained by Heath and
25 Schlarmann to be consolidated. Based on these activities and the consolidation of
26 the databases, I have determined there are 1,692 investors in the fraudulent
27 enterprise who are owed in the aggregate approximately \$118 million. I have also
28 concluded based on these facts that it is impossible to accurately and equitably

1 attribute specific investors or investor claims to specific companies or entities, and
2 that the only equitable way of treating the claims of defrauded investors under the
3 circumstances is for the Receiver to combine all assets of the Heath and
4 Schlarmann receivership estates and the claims of investors on the three databases
5 and to provide investors a pro rata claim to the combined receivership assets, as set
6 forth in further detail in the claims procedures section of this Motion.

7
8 8. My investigation and other activities in relation to the receiverships
9 have also included evaluations of the investments, businesses and assets subject to
10 the receivership, including the value of those investments, assets and businesses,
11 for the purposes of liquidation for the benefit of the receivership estate. In many
12 cases, as detailed in the Receiver's Third Report, the businesses and investments
13 were made in companies that have since gone out of business or are operating at a
14 loss and have no realizable value. These evaluations have resulted in disposition of
15 a number of assets and businesses which have generated settlements and payments
16 to date of over \$3 million in the aggregate.

17
18 9. My activities in this case have been complicated by the state court
19 Schlarmann Receivership and examination of the interrelationship between the
20 assets identified as "Schlarmann Interests" subject to the receivership in the
21 Criminal Action and the Heath receivership assets. My activities have also been
22 complicated by the Leslee Heath Chapter 7 bankruptcy case. I have successfully
23 negotiated a stipulation with the Chapter 7 Trustee that proposes to resolve
24 questions regarding the responsibility for administration and liquidation of assets
25 and the proper court and mechanisms to resolve the competing claims to the asset
26 proceeds. The Chapter 7 Trustee's motion to approve the bankruptcy
27 administrative stipulation is set for hearing in the bankruptcy court on February 14,
28 2005, and concurrently herewith I am filing a motion to approve the stipulation in

1 this Court which also will be set for hearing on February 28, 2005. I will also be
2 seeking relief in the Criminal Action to have the administrative and supervisory
3 authority over the Schlarmann Interests receivership transferred to this Court based
4 on the Receiver's findings and conclusions as to the relationship of the assets
5 subject to that receivership and the Heath receivership.

6
7 10. The Receiver's Third Report also proposes a claims filing and
8 allowance procedure in anticipation of my moving the Court for authority to begin
9 making interim distributions by June 30, 2005. The proposed claims filing and
10 allowance procedures are addressed in detail in the Motion.

11
12 11. I am also requesting that the notice procedures of Local Rule 66-7 be
13 modified as they pertain to motions subject to the notice requirements of Local
14 Rule 66-7 ("Rule 66-7 Motions"). I am seeking modifications of the notice
15 requirements to assist me in expeditiously and cost-effectively administering the
16 receivership estate. The fees and expenses associated with giving notice to all of
17 the approximate 1,692 investor creditors and the over 100 vendor creditors of each
18 Rule 66-7 Motion would result in excessive expense to the receivership estate to
19 the detriment of creditors, particularly in light of the alternative means of providing
20 notice that are available. Specifically, the Receiver proposes the following
21 modified notice procedures:

22
23 (1) That copies of Rule 66-7 Motions be served on the SEC, the
24 defendants and all creditors who serve the Receiver with a written request for notice
25 and to remain on/be added to the Receiver's master mailing list for this matter, with
26 such requests to be directed to Judi Ehrlich at Robb Evans & Associates, 11450
27 Sheldon Street, Sun Valley, California 91352-1121, Facsimile No. (818) 768-8802;

1 (2) That the Receiver will also post such Rule 66-7 Motions on the
2 Receiver's website for this case at www.heath-receiver.com concurrently with the
3 filing and service thereof;


4
5 (3) That a creditor may request copies of a specific Rule 66-7
6 Motion in writing directed to the Receiver at the address set forth above, which the
7 Receiver will provide; and

8
9 (4) The Receiver further seeks authority to serve copies of such
10 pleadings by electronic mail only if requested and agreed to by an interested party,
11 to further reduce the costs to the estate of service of such pleadings by mail.

12
13 12. I propose to implement the limited notice requirement by first sending
14 notice in writing to all creditors and interested parties of the Court's ruling, the
15 means of obtaining written copies of Rule 66-7 Motions by requesting notice in
16 writing and the means of obtaining notice through electronic means, including the
17 website information and ability to request electronic mail transmissions of the Rule
18 66-7 Motions in lieu of service copies by mail.

19
20 I declare under penalty of perjury that the foregoing is true and correct and
21 that this declaration was executed on February 3rd, 2005 at

22 Los Angeles, California.

23
24
25 

26 ROBB EVANS, Declarant

27
28

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 February 4, 2005, I served true copy(ies) of the **NOTICE OF MOTION AND MOTION FOR ORDER (1) APPROVING RECEIVER'S REPORT FOR THE PERIOD JULY 12, 2004 THROUGH DECEMBER 31, 2004; (2) APPROVING RECEIVER'S PROPOSED CLAIMS FILING AND ALLOWANCE PROCEDURES; AND (3) GRANTING AN ORDER LIMITING NOTICE UNDER LOCAL RULE 66-7 IN CONNECTION WITH ADMINISTRATIVE AND SIMILAR MOTIONS UNDER LOCAL RULE 66-7; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF ROBB EVANS 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.

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 February 4, 2005, at Los Angeles, California.


BONITA ZEIER

SERVICE LIST

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

1
2
3 David S. Brown, Esq. Attorneys for Plaintiff Securities
4 Molly White, Esq. and Exchange Commission
5 Securities and Exchange Commission
6 5670 Wilshire Boulevard, 11th Floor
7 Los Angeles, CA 90036-3648
8 Tel: (323) 965-3841
9 Fax: (323) 965-3908
10
11 Barry O. Bernstein, Esq. Advisory Counsel for Defendant
12 3727 W. Magnolia Boulevard, Suite 767 Daniel William Heath
13 Burbank, CA 91505
14 Tel: (818) 558-1717
15 Fax: (818) 526-7672
16
17 Michael A. Oswald, Esq. Attorney for Defendant
18 Oswald & Yap, APC Denis Timothy O'Brien
19 16148 Sand Canyon Avenue
20 Irvine, CA 92618
21 Tel: (949) 788-8900
22 Fax: (949) 788-8980
23
24 R. L. Goodrich, Chapter 7 Trustee Bankruptcy Trustee
25 3600 Lime Street, Suite 416
26 Riverside, CA 92501
27 Tel: (951) 341-9300
28 Fax: (951) 341-9309
29
30 Jeffrey W. Broker, Esq. Attorney for Debtor
31 18191 Von Karman Avenue, Suite 470
32 Irvine, CA 92612
33 Tel: (949) 222-2000
34 Fax: (949) 222-2022
35
36 Norman Hanover, Esq. Attorney for Chapter 7 Trustee
37 Reid & Hellyer
38 3880 Lemon Street, 5th Floor
39 Riverside, CA 92502-1300
40 Tel: (951) 682-1771
41 Fax: (951) 686-2415
42
43 David Osias, Esq. Attorney for Chapter 7 Trustee
44 Allen Matkins Leck Gamble & Mallory LLP
45 501 West Broadway, Suite 900
46 San Diego, CA 92101
47 Tel: (619) 233-1155
48 Fax: (619) 233-1158

1 Mr. Daniel Heath
Booking No. 200427981
2 Robert Presley Detention Center
P. O. Box 710
3 Riverside, California 92501

Defendant

4 Michael Silverman, Esq.
Mark Mandio, Esq.
5 District Attorney's Office
4075 Main Street
6 Riverside, CA 92501
Tel: (951) 955-5400
7 Fax: (951) 955-5682

Attorneys for The People of the State
of California

8 Michael Lipman, Esq.
Coughlan Semmer & Lipman LLP
9 501 W. Broadway, Suite 400
San Diego, CA 92101
10 Tel: (619) 232-0800
Fax: (619) 232-0107

Attorney for Defendant Larre Jaye
Schlarmann

11 Steve Harmon, Esq.
12 The Law Offices of Harmon & Harmon
3685 Main St., Suite 250
13 Riverside, CA 92501
Tel: (951) 787-6800
14 Fax: (951) 787-6700

C-Counsel for Larre Jaye
Schlarmann

15 Gina Filippone
Attorney at Law
16 Inns of Court
3877 12th Street
17 Riverside, CA 92501
Tel: (951) 274-0009
18 Fax: (951) 788-9040

Attorney for Denis Timothy
O'Brien

19 Jeff Van Wagenen
Attorney at Law
20 4129 Main St., Suite 200
Riverside, CA 92501
21 Tel: (909) 369-3555
Fax: (909) 359-3777

Attorney for John Heath

22 Amy Powers, Esq.
23 Andy Isidore, Associate General Counsel
The Quizno's Master, LLC
24 1475 Lawrence Street, Suite 400
Denver, CO 80202
25 Tel: (720) 931-2224
26 Fax: (720) 932-0317

Attorney for Quizno's

27
28

FRANZEL ROBINS BLOOM & CSATO, L.C.
6500 WILSHIRE BOULEVARD, 17TH FLOOR
LOS ANGELES, CALIFORNIA 90048-4920
(323) 852-1000

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Charles G. La Bella, Esq.
La Bella & McNamara, LLP
401 W. A Street, Suite 1150
San Diego, CA 92101
Tel: (619) 696-9200
Fax: (619) 696-9269

Sharre Schlarmann
604 Via Del Caballo
San Marcos, CA 92078
Tel: (760) 471-4738

Pamela Jandt
78660 Highway 111, #213
La Quinta, CA 92253

Attorneys for Cameron Rooke