

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 Approval of Settlement of Claim
Against Chapter 7 Estate of Coast Energy Management, Inc.;**
Memorandum of Points and Authorities in Support Thereof;
Declaration of Brick Kane in Support Thereof

Filed July 31, 2008

1 GARY OWEN CARIS (SBN 088918)
gcaris@mckennalong.com
2 LESLEY ANNE HAWES (SBN 117101)
lhawes@mckennalong.com
3 MCKENNA LONG & ALDRIDGE LLP
444 South Flower Street, 8th Floor
4 Los Angeles, CA 90071-2901
Telephone: (213) 688-1000
5 Facsimile: (213) 243-6330

6 Attorneys for Permanent Receiver
ROBB EVANS

7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

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)

**NOTICE OF MOTION AND MOTION
FOR APPROVAL OF SETTLEMENT
OF CLAIM AGAINST CHAPTER 7
ESTATE OF COAST ENERGY
MANAGEMENT, INC.;**
**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

**[DECLARATION OF BRICK KANE IN
SUPPORT THEREOF FILED
CONCURRENTLY HEREWITH]**

Date: August 25, 2008
Time: 1:30 p.m.
Place: Courtroom 16
312 N. Spring Street
Los Angeles, CA

17
18
19
20
21
22
23 PLEASE TAKE NOTICE that on August 25, 2008, at 1:30 p.m., or as soon
24 thereafter as counsel may be heard in Courtroom 16 of the above-entitled Court
25 located at 312 North Spring Street, Los Angeles, California 90012, Robb Evans, as
26 Permanent 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 and as Receiver over the
2 Schlarmann Interests ("Receiver"), will and does hereby move the Court for an
3 Order approving the Settlement Agreement dated as of July 8, 2008 among the
4 Receiver, Diane Mann ("Trustee") in her capacity as Chapter 7 Trustee of the
5 bankruptcy estate of Coast Energy Management, Inc. ("Coast Energy") and B1-17,
6 L.L.C., an Arizona limited liability company ("B1"), a true and correct copy of
7 which is attached as Exhibit 1 to the Declaration of Brick Kane filed concurrently
8 herewith. As more fully set forth in the Settlement Agreement, the Receiver
9 claimed that D.W. Heath & Associates, Inc. held a first priority security interest in
10 the personal property assets of Coast Energy, a lien which it acquired from B1-17
11 by assignment and the validity and priority of which lien was disputed by the
12 Trustee. Under the Settlement Agreement the Receiver on behalf of the
13 receivership estate is granted an allowed claim of \$540,000 against the Coast
14 Energy bankruptcy estate. The Receiver on behalf of the receivership estate is to be
15 paid the sum of \$67,073.27 from the proceeds of sale of the personal property, and
16 the balance of the allowed claim will be treated as an allowed unsecured claim
17 against the Coast Energy estate.

18 The Receiver seeks approval of the Settlement Agreement and an order
19 authorizing the Receiver (a) to sign and enter into the Settlement Agreement; (b) to
20 sign and enter into all other documents, instruments and papers described in the
21 Settlement Agreement or necessary or convenient to make and implement the
22 Settlement Agreement; (c) to make the releases provided for in the Settlement
23 Agreement; and (d) to perform such other acts necessary or convenient for the
24 Receiver to obtain the benefits and perform all obligations under the Settlement
25 Agreement. The Motion is further made on the grounds that the Settlement
26 Agreement is reasonable, fair and equitable, and in the best interests of the
27 receivership estate.

28

1 This Motion is made pursuant to Local Civil Rules 66-7 and is made and
2 based on this Notice of Motion and Motion, the Memorandum of Points and
3 Authorities attached hereto and the Declaration of Brick Kane filed concurrently
4 herewith in support hereof, the separate notice of hearing served and filed
5 concurrently herewith, and on such further oral and documentary evidence as may
6 be presented at or before the time of the hearing on this Motion.

7 Notice of the hearing on this Motion is provided pursuant to this Court's
8 Order: (1) Approving Receiver's Report for the Period July 12, 2004 Through
9 December 31, 2004; (2) Approving Receiver's Proposed Claims Filing and
10 Allowance Procedure; and (3) Granting an Order Limiting Notice Under Local Rule
11 66-7 in Connection With Administrative and Similar Motions Under Local Rule
12 66-7 entered March 4, 2005.

13 PLEASE TAKE FURTHER NOTICE that this Motion is posted on the
14 Receiver's website at www.heath-receiver.com, where it may be viewed in its
15 entirety. Copies of this Motion will be provided to any interested party upon
16 receipt of a written request which may be sent to: Robb Evans & Associates LLC,
17 11450 Sheldon Street, Sun Valley, CA 91352-1121, facsimile no. (818) 768-8802,
18 attention: Cherrie Eustaquio.

19
20 Dated: July 31, 2008

Respectfully submitted,

MCKENNA LONG & ALDRIDGE LLP
Gary Owen Caris
Lesley Anne Hawes

21
22
23
24 By: /s/ Gary Owen Caris
Gary Owen Caris

25
26 Attorneys for Robb Evans, Permanent
Receiver

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 By this Motion, the Receiver seeks an order approving the Settlement
4 Agreement among the Receiver, Diane Mann as Chapter 7 Trustee (“Trustee”) of
5 the bankruptcy estate of Coast Energy Management, Inc. (“Coast Energy”), and B1-
6 17, L.L.C. (“B1”) which resolves the treatment of a claim in the amount of
7 \$540,000 filed by the Receiver on behalf of D.W. Heath & Associates, Inc.
8 (“DWH”) in the Coast Energy estate.

9 **II. STATEMENT OF FACTS**

10 **A. The Receivership Estate**

11 On April 28, 2004, the Securities and Exchange Commission initiated this
12 civil enforcement action (“SEC Action”) against Heath, Denis Timothy O’Brien
13 and the entities D.W. Heath & Associates, Inc., PCM, Private Collateral
14 Management, Inc. and PCM Fixed Income Fund I, LLC (“Receivership
15 Defendants”). The Receiver was appointed temporary receiver in the SEC Action
16 and then, by stipulated order filed May 19, 2004, the permanent equity receiver
17 over the Receivership Defendants and their subsidiaries and affiliates
18 (“Receivership Order”).

19 **B. The Coast Energy Loan**

20 As reported to the Court in Receiver’s Reports on file herein, the books and
21 records of the receivership entities include two promissory notes payable to DWH
22 by Coast Energy totaling \$400,000. These debt obligations are secured by a
23 security interest and UCC-1 financing statement granting a first priority security
24 interest in all of Coast’s inventory, accounts, equipment and general intangibles.
25 The security interest and UCC-1 financing statement were acquired by DWH from
26 and assigned to DWH by the entity B1. B1 obtained its interest in the security
27 interest and UCC-1 financing statement by assignment from Wells Fargo Bank as
28

1 successor to Norwest Bank Arizona, the secured party who made the original
2 secured loan to Coast Energy in 1998.

3 **C. Coast Energy Bankruptcy and Claim Dispute**

4 At the time the receivership commenced, DWH had filed suit in April 2004
5 in the Superior Court of Maricopa County, Arizona, where Coast Energy was
6 located, to enforce and recover the obligations due under the two notes to DWH
7 which were in default. The notes were guaranteed by the principal of Coast Energy,
8 Daniel Bach (“Bach”) who was also named in the DWH lawsuit. In November
9 2004, Bach and Coast Energy each filed voluntary petitions under Chapter 11 of the
10 Bankruptcy Code in the United States Bankruptcy Court for the District of Arizona.
11 Diane Mann was later appointed Chapter 11 Trustee of the Coast Energy
12 bankruptcy estate in March 2005, and in May 2005, the case was converted to a
13 Chapter 7 liquidation with Diane Mann retained as Chapter 7 Trustee. Coast
14 Energy scheduled DWH as a creditor of the estate holding a claim of \$540,000.

15 The Trustee liquidated the personal property assets of Coast Energy by
16 public auction in June 2005, pursuant to an order authorizing the sale free and clear
17 of liens with liens to attach to the proceeds of sale. The gross sales proceeds of the
18 Coast Energy assets were \$172,624.50, and the net proceeds of sale were
19 \$134,146.34 (“net sale proceeds”) after deducting all costs and fees associated with
20 the sale, including those of the auctioneer, the Trustee and her professionals.

21 The Trustee subsequently filed suit against the Receiver on behalf of DWH
22 and B1 contesting the validity of the security interest and lien asserted against
23 Coast Energy’s assets (the “Trustee’s litigation”), contending that the perfected
24 security interest and lien had lapsed. The Receiver contended that the security
25 interest and lien were valid first priority encumbrances on the assets and that the
26 lawsuit filed by the Trustee was filed in violation of the stay orders in this action.
27 The parties entered into extended negotiations to resolve their disputes and have
28 reached the settlement proposed herein.

1 **D. The Terms of the Settlement Agreement**

2 After lengthy negotiations between the Receiver and the Trustee, the parties
3 entered into the proposed Settlement Agreement attached as Exhibit 1 to the
4 Declaration of Brick Kane filed in support hereof. The Settlement Agreement
5 provides the following material terms:

6 1. In compromise of the Trustee's litigation and the Receiver's claim
7 against the Coast Energy estate, the Receiver on behalf of DWH is granted an
8 allowed claim of \$540,000 against the estate.

9 2. The Receiver on behalf of DWH and the receivership estate shall be
10 paid \$67,073.27 of the net sale proceeds. This sum represents 50% of the net
11 proceeds from the sale of the personal property assets.

12 3. The balance of the allowed claim (\$472,926.73) will be an allowed
13 unsecured claim against the estate,

14 4. The Trustee's litigation will be dismissed with prejudice upon court
15 approval of the settlement by the Bankruptcy Court in the Coast Energy bankruptcy
16 case and by this Court.

17 5. The settlement payment when made will result in a mutual release of
18 claims.

19 **III. THE TERMS OF THE SETTLEMENT AGREEMENT ARE**
20 **REASONABLE, FAIR, EQUITABLE AND IN THE BEST INTERESTS**
21 **OF THE RECEIVERSHIP ESTATE**

22 Pursuant to Local Civil Rule 66-8, a receiver is directed to administer
23 receivership estates "as nearly as possible in accordance with the practice in the
24 administration of estates in bankruptcy." Under Rule 9019 of the Federal Rules of
25 Bankruptcy Procedure, the court in a bankruptcy case may approve a proposed
26 compromise of controversies after notice and an opportunity for hearing. Ninth
27 Circuit decisions in *In re A & C Properties*, 784 F.2d 1377 (9th Cir. 1986), *cert.*
28 *denied*, 479 U.S. 854 (1986) and *In re Woodson*, 839 F.2d 610 (9th Cir. 1988)

1 establish four factors the Court must consider in ruling on the approval of
2 compromises in bankruptcy:

3 “(a) The probability of success in the litigation; (b) the
4 difficulties, if any, to be encountered in the matter of
5 collection; (c) the complexity of the litigation involved,
6 and the expense, inconvenience and delay necessarily
7 attending it; (d) the paramount interest of the creditors
8 and a proper deference to their reasonable views in the
9 premises.”

10 *In re A & C Properties*, 784 F.2d at 1381. *See also In re Woodson*, 839 F.2d at
11 620.

12 A bankruptcy court is not required to decide the questions of law and fact
13 raised in the controversies sought to be settled, nor is it required to determine
14 whether the settlement presented is the best one that could possibly have been
15 achieved. Rather, it is sufficient that the settlement does not fall “below the lowest
16 point in the zone of reasonableness.” *See Newman v. Stein*, 464 F.2d 689, 698 (2d
17 Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972).

18 The Receiver believes that the settlement is reasonable and in the best
19 interests of the receivership estate, and should be approved consistent with
20 applicable Ninth Circuit authority. The settlement avoids costly and uncertain
21 litigation over a finite and relatively small pool of assets available to satisfy the
22 DWH claim and avoids the delay of litigating the claim, whether through an
23 adversary proceeding in Arizona or in this Court, that could delay the closing of the
24 estate without any likely net material benefit being realized by the estate when the
25 costs of litigation and cost of preservation of the estate are taken into account. The
26 Trustee asserted that the perfection of the security interest had lapsed despite the
27 various assignments and transfers made that ultimately resulted in DWH acquiring
28 the lien, and the Receiver believes that the Trustee’s assertion was not wholly

1 without merit and that the compromise recovery of 50% of the net sale proceeds
2 represents a fair allocation of the costs and risks of a potential adverse ruling under
3 the circumstances. The Receiver believes this settlement is a good result for the
4 receivership estate and recommends approval of the compromise.

5 **V. CONCLUSION**

6 For the reasons set forth herein, the Receiver respectfully requests that this
7 Court grant this motion and approve the Receiver's Settlement Agreement with the
8 Trustee in its entirety.

9

10 Dated: July 31, 2008

Respectfully submitted,

11

MCKENNA LONG & ALDRIDGE LLP
Gary Owen Caris
Lesley Anne Hawes

12

13

14

By: /s/ Gary Owen Caris
Gary Owen Caris

15

16

Attorneys for Robb Evans, Permanent
Receiver

17

18

19

20

21

22

23

24

25

26

27

28

1 GARY OWEN CARIS (SBN 088918)
gcaris@mckennalong.com
2 LESLEY ANNE HAWES (SBN 117101)
lhawes@mckennalong.com
3 MCKENNA LONG & ALDRIDGE LLP
444 South Flower Street, 8th Floor
4 Los Angeles, CA 90071-2901
Telephone: (213) 688-1000
5 Facsimile: (213) 243-6330

6 Attorneys for Permanent Receiver
ROBB EVANS

7

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10

11 SECURITIES AND EXCHANGE
COMMISSION,

12 Plaintiff,

13 v.

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

16 Defendants.

17

18

19

CASE NO. CV 04-02949 JFW (Ex)

**DECLARATION OF BRICK KANE IN
SUPPORT OF MOTION FOR
APPROVAL OF SETTLEMENT OF
CLAIM AGAINST CHAPTER 7
ESTATE OF COAST ENERGY
MANAGEMENT, INC.**

Date: August 25, 2008
Time: 1:30 p.m.
Place: Courtroom 16
312 N. Spring Street
Los Angeles, CA

20 I, Brick Kane, declare:

21 1. I am a Deputy to Robb Evans, who has been appointed as permanent
22 receiver of D.W. Heath & Associates, Inc. ("DWH"), Private Capital Management,
23 Inc., Private Collateral Management, Inc. and PCM Fixed Income Fund I, LLC and
24 their subsidiaries and affiliates (collectively, the "Heath Receivership Defendants")
25 and as Receiver over the Schlarmann Interests ("Receiver") and am a principal in
26 Robb Evans & Associates LLC. As Deputy to the Receiver and a principal in Robb
27 Evans & Associates LLC, I have been one of the Receiver's deputies with primary
28 responsibility for the day to day supervision and management of the receivership

1 over the Heath Receivership Defendants since the Receiver first began to act
2 pursuant to his appointment as temporary receiver in this matter on May 4, 2004
3 and in the receivership over the Schlarmann Interests since that receivership was
4 instituted on July 21, 2004. I have been responsible for investigating the various
5 assets of the receivership estate held by the Heath Receivership Defendants and the
6 Schlarmann Interests and in supervising personnel at Robb Evans & Associates
7 LLC in their review and pursuit of recovery of those assets, including the recovery
8 of the promissory notes executed by Coast Energy Management, Inc. ("Coast
9 Energy") in favor of DWH prior to the commencement of the receivership. I have
10 also been primarily responsible for the preparation of the various Receiver's
11 Reports filed with the Court throughout the receivership proceeding. The matters
12 set forth in this Declaration are based upon my personal knowledge or have been
13 obtained by me in the course of my supervision and management of personnel at
14 Robb Evans & Associates LLC who have performed tasks in connection with this
15 matter under my direction.

16 2. On April 28, 2004, the Securities and Exchange Commission initiated
17 this civil enforcement action ("SEC Action") against Heath, Denis Timothy
18 O'Brien and the entities D.W. Heath & Associates, Inc., PCM, Private Collateral
19 Management, Inc. and PCM Fixed Income Fund I, LLC ("Receivership
20 Defendants"). The Receiver was appointed temporary receiver in the SEC Action
21 and then, by stipulated order filed May 19, 2004, the permanent equity receiver
22 over the Receivership Defendants and their subsidiaries and affiliates
23 ("Receivership Order").

24 3. As reported to the Court in Receiver's Reports on file herein, when the
25 Receiver was appointed as Receiver over the Heath Receivership Entities, the
26 books and records of the Heath Receivership Entities included two promissory
27 notes payable to DWH by Coast Energy totaling \$400,000. The books and records
28 further indicated that the notes were secured by a security interest and UCC-1

1 financing statement granting a first priority security interest in all of Coast's
2 inventory, accounts, equipment and general intangibles. The security interest and
3 UCC-1 financing statement held by DWH were obtained by DWH by assignment
4 from the entity B1-17, L.L.C., an Arizona limited liability company ("B1"). The
5 records further indicated that B1 obtained its interest in the security interest and
6 UCC-1 financing statement by assignment from Wells Fargo Bank as successor to
7 Norwest Bank Arizona, the secured party who made the original secured loan to
8 Coast Energy in 1998.

9 4. At the time the receivership commenced, a lawsuit was pending in the
10 Superior Court of Maricopa County, Arizona, by DWH against Coast Energy and
11 its principal Daniel Bach ("Bach"), who had executed a guaranty of Coast Energy's
12 obligations. The lawsuit had been filed by DWH in April 2004 and sought to
13 enforce and recover the obligations due under the two notes to DWH which were in
14 default and to enforce and recover under the guaranty by Bach.

15 5. In November 2004, Bach and Coast Energy each filed voluntary
16 petitions under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy
17 Court for the District of Arizona. Diane Mann was later appointed Chapter 11
18 Trustee of the Coast Energy bankruptcy estate in March 2005 ("Trustee"), and in
19 May 2005, the case was converted to a Chapter 7 liquidation with Diane Mann
20 retained as Chapter 7 Trustee. Coast Energy's bankruptcy schedules listed DWH
21 as a creditor of the estate holding a claim of \$540,000.

22 6. With the consent of the Receiver, the Trustee liquidated the personal
23 property assets of Coast Energy by public auction in June 2005, pursuant to an
24 order authorizing the sale free and clear of liens with liens to attach to the proceeds
25 of sale. The gross sales proceeds of the Coast Energy assets were \$172,624.50, and
26 the net proceeds of sale were \$134,146.34 ("net sale proceeds") after deducting all
27 costs and fees associated with the sale, including those of the auctioneer, the Trustee
28 and her professionals.

1 7. The Trustee subsequently filed suit against the Receiver on behalf of
2 DWH and B1 contesting the validity of the security interest and lien asserted
3 against Coast Energy's assets (the "Trustee's litigation"), contending that the
4 perfected security interest and lien had lapsed. The Receiver contended that the
5 security interest and lien were valid first priority encumbrances on the assets and
6 that the lawsuit filed by the Trustee was filed in violation of the stay orders in this
7 action.

8 8. The Trustee and the Receiver, through their respective counsel, have
9 engaged in lengthy negotiations to try to resolve the Trustee's litigation and the
10 treatment of the DWH claim in the Coast Energy bankruptcy without litigation.
11 Through these negotiations, the Receiver, the Trustee, and B1 entered into the
12 proposed Settlement Agreement, a true and correct copy of which is attached hereto
13 as Exhibit 1.

14 9. The Settlement Agreement provides the following material terms:

15 A. In compromise of the Trustee's litigation and the Receiver's claim
16 against the Coast Energy estate, the Receiver on behalf of DWH is granted an
17 allowed claim of \$540,000 against the estate.

18 B. The Receiver on behalf of DWH and the receivership estate shall be
19 paid \$67,073.27 of the net sale proceeds. This sum represents 50% of the net
20 proceeds from the sale of the personal property assets.

21 C. The balance of the allowed claim (\$472,926.73) will be an allowed
22 unsecured claim against the estate,

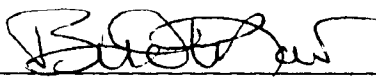
23 D. The Trustee's litigation will be dismissed with prejudice upon court
24 approval of the settlement by the Bankruptcy Court in the Coast Energy bankruptcy
25 case and by this Court.

26 E. The settlement payment when made will result in a mutual release of
27 claims.

28

1 10. The Receiver believes the Settlement Agreement, Exhibit 1, provides a
2 good result for the receivership estate. The Settlement Agreement provides the
3 receivership estate substantial recoveries from the net sale proceeds of Coast
4 Energy's assets and provides a prompt, certain and cost-effective realization by
5 DWH on its claim against the Coast Energy estate. The Settlement Agreement
6 avoids the delay and expense of litigation, whether in the Bankruptcy Court for the
7 District of Arizona or in this Court, the costs of which would diminish any recovery
8 realized from the assets even if the Receiver prevailed entirely in the action. The
9 Settlement Agreement provides a fair and reasonable recovery given the risks and
10 uncertainty of litigation concerning the validity and priority of the DWH security
11 interest in the assets based on the Trustee's contention that the perfection of the
12 security interest lapsed despite the numerous transfers and assignments by which
13 DWH acquired its lien, an assertion that was not wholly without merit. The
14 Settlement Agreement avoids the delay that would result from defending the
15 Trustee's litigation that could delay the closing of the receivership estate without
16 any likelihood of a material net benefit to the estate. For these reasons, the
17 Receiver recommends approval of the Settlement Agreement.

18 I declare under penalty of perjury that the foregoing is true and correct and
19 that this declaration was executed on July 30, 2008 at Sun Valley, California.

20
21 

22 Brick Kane
23
24
25
26
27
28