

**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  
Fourth Distribution to Holders of All Allowed Investor Claims  
and Allowed Non-Investor Claims;  
Memorandum of Points and Authorities;  
Declaration of Brick Kane in Support Thereof**

**Filed November 21, 2008**

1 GARY OWEN CARIS (SBN 088918)  
gcaris@mckennalong.com  
2 LESLEY ANNE HAWES (SBN 117101)  
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6 Attorneys for Permanent Receiver,  
**ROBB EVANS**

7

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**UNITED STATES DISTRICT COURT**

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**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

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SECURITIES AND EXCHANGE  
COMMISSION,

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Plaintiff,

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v.

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

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Defendants.

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CASE NO. CV 04-02949 JFW (Ex)

**NOTICE OF MOTION AND MOTION  
BY RECEIVER FOR ORDER  
APPROVING FOURTH  
DISTRIBUTION TO HOLDERS OF  
ALL ALLOWED INVESTOR CLAIMS  
AND ALLOWED NON-INVESTOR  
CLAIMS; MEMORANDUM OF  
POINTS AND AUTHORITIES**

**[DECLARATION OF BRICK KANE IN  
SUPPORT OF MOTION FILED  
CONCURRENTLY HERewith]**

Date: December 15, 2008  
Time: 1:30 p.m.  
Place: Courtroom 16  
312 N. Spring Street  
Los Angeles, CA

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PLEASE TAKE NOTICE that on December 15, 2008, at 1:30 p.m., or as soon thereafter as counsel may be heard in Courtroom 16 of the above-entitled court located at 312 N. Spring Street, Los Angeles, California, Robb Evans, as permanent receiver of D. W. Heath & Associates, Inc., Private Capital Management, Inc. ("PCM"), Private Collateral Management, Inc. and PCM Fixed Income Fund I, LLC and their subsidiaries and affiliates (collectively, the "Heath

1 Receivership Defendants”) and as Receiver over the Schlarmann Interests  
2 (“Receiver”), will and does hereby move the Court for the following relief:

3 1. An order authorizing the Receiver to make a fourth distribution of  
4 receivership estate assets, including a distribution of assets of John Heath and  
5 Denis O’Brien turned over to the Receiver from the Riverside Criminal Action  
6 pursuant to orders issued in the Criminal Action (“Fourth Distribution”). The  
7 Receiver requests authorization to make a Fourth Distribution in the sum of not  
8 less than \$1,750,000.00 million representing approximately 1.47% of the  
9 combined Allowed Investor Claims and Allowed Non-Investor Claims against the  
10 receivership estate to be paid pro rata on all Allowed Investor Claims and  
11 Allowed Non-Investor Claims against the receivership estate of the Heath  
12 Receivership Defendants and the Schlarmann Interests; and

13 2. An order authorizing the Receiver to make a Fourth Distribution in an  
14 amount higher than \$1,750,000.00, in the Receiver’s sole discretion and judgment,  
15 provided that the Receiver reserves funds sufficient to pay estimated taxes and  
16 other estimated administrative expenses and expenses associated with a final  
17 distribution of estate assets in connection with the Receiver’s wind up of the  
18 receivership estate.

19 PLEASE TAKE FURTHER NOTICE that this Motion is made pursuant  
20 to Local Rules 66-7 and 66-8, and is based upon this notice of motion and motion,  
21 the separate notice of hearing on the Motion served pursuant to the Court’s prior  
22 order limiting notice in the matter,<sup>1</sup> the accompanying memorandum of points and  
23 authorities and declaration of Brick Kane in support hereof, upon the pleadings,  
24 records and files of this Court in connection with this matter of which the Receiver

25 \_\_\_\_\_  
26 <sup>1</sup> Order: (1) Approving Receiver’s Report for the Period July 12, 2004 through  
27 December 31, 2004; (2) Approving Receiver’s Proposed Claims Filing and  
28 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 entered March 4, 2005.

1 requests the Court take judicial notice, and upon such further oral and documentary  
2 evidence and argument as may be presented at or before the time of the hearing on  
3 the Motion.

4 PLEASE TAKE FURTHER NOTICE that the Motion is served in  
5 accordance with the Limited Notice Order. Pursuant to the Limited Notice Order,  
6 this Motion is posted on the Receiver's website at [www.heath-receiver.com](http://www.heath-receiver.com), where  
7 it may be viewed in its entirety. Copies of this Motion will be provided to any  
8 interested party upon receipt of a written request which may be sent to: Robb Evans  
9 & Associates LLC, 11450 Sheldon Street, Sun Valley, California 91352-1121,  
10 facsimile number (818) 768-8802.

11  
12 DATED: November 21, 2008 McKENNA LONG & ALDRIDGE LLP  
13 GARY OWEN CARIS  
14 LESLEY ANNE HAWES

15 By: /s/ Gary Owen Caris  
16 GARY OWEN CARIS  
17 Attorneys for Permanent Receiver,  
18 ROBB EVANS  
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1 **I. INTRODUCTION AND STATEMENT OF FACTS**

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

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

1 Quizno's Entities and the Hotel Entities, as those terms are defined in the  
2 Schlarmann Receivership Order, and the Bonsall property.

3 Judgments have been entered against the Receivership Defendants as well  
4 as against Heath in this civil action in the principal amount of \$109,334,158. The  
5 Receiver's reports filed in this case set forth the Receiver's conclusions as to the  
6 lack of financial basis for the transactions and investments solicited from the  
7 victims of the investment fraud perpetrated by the defendants and further support  
8 the conclusion that funds paid to earlier investors as "interest" or "profits" were  
9 paid with funds from later investors.

10 Trial in the Criminal Action has also been completed, with all defendants  
11 found guilty of numerous counts of fraud, elder abuse and other crimes. All  
12 defendants have now been sentenced.

13 A. Claims Procedures

14 On February 28, 2005, the Court in this action conducted a hearing on  
15 motions brought by the Receiver seeking to have administration and supervision of  
16 the Schlarmann Interests receivership vested in this Court and on a motion seeking  
17 approval of the Receiver's proposed claims filing and allowance procedure (the  
18 "Claims Procedures Motion"). The motion regarding the administration of the  
19 Schlarmann Interests receivership was granted as reflected in the Order: (1)  
20 Approving Stipulation with Chapter 7 Trustee re Administration of Assets,  
21 Withdrawal of Reference and Reservation of Rights Over Proceeds; and (2)  
22 Authorizing Expansion of Receivership to Include Schlarmann Interests entered  
23 March 3, 2005.

24 In February 2005, the Receiver filed a motion for approval of claims filing  
25 and allowance procedures. Only one creditor filed opposition to the Claims  
26 Procedures Motion. That creditor, Clarence Morris, asserted that he was entitled to  
27 a priority claim payable ahead of other receivership claimants from the proceeds of  
28 a deposit made shortly before the imposition of the asset freeze against Daniel

1 Heath. The Receiver filed a reply to the Morris opposition, and the Court overruled  
2 the Morris objection. The Receiver's proposed claims filing and allowance  
3 procedures were granted by Court order entered March 4, 2005 (the "Claims  
4 Procedures Order").

5 Pursuant to the Claims Procedures Order the Receiver has implemented  
6 claims filing and allowance procedures. The Receiver determined the claim  
7 amount of each investor and the amount owed to non-investor creditors and  
8 provided each investor and non-investor creditor claimant with notice of the  
9 Receiver's calculation of their claim. Pursuant to the Claims Procedures Order,  
10 they were given 30 days to object to the proposed claim amount. Although the  
11 Receiver received hundreds of responses to the claims notices, the Receiver  
12 eventually successfully resolved all investor objections regarding the amounts of  
13 Allowed Investor Claims. There are presently a total of \$117,882,011.50 in  
14 Allowed Investor Claims.

15 While most Non-Investor Claims were also resolved without objection,  
16 certain Non-Investor Claims were subject to dispute. The Receiver has now fully  
17 resolved all disputed Non-Investor Claims. There are a total of \$1,271,932.02 in  
18 Allowed Non-Investor Claims, including the claims of those non-investor claimants  
19 that were previously disputed that have either been allowed in compromise amounts  
20 or have been disallowed pursuant to Court order.

21 B. Administration of Assets Subject to Criminal Action

22 In the Criminal Action, the Court issued an order authorizing the Receiver to  
23 liquidate the real property assets of criminal defendant John Heath. Pursuant to  
24 order of Court in the Criminal Action, the Receiver liquidated those real estate  
25 assets, and the Receiver is holding the proceeds thereof subject to further order of  
26 this Court regarding the distribution of those proceeds. In addition, pursuant to a  
27 forfeiture order issued by the Court in the Criminal Action, proceeds of certain  
28 bank accounts of Denis O'Brien have also been turned over to the Receiver and are

1 being held by the Receiver subject to further orders of this Court authorizing the  
2 distribution of those assets to receivership estate claimants.

3 The remaining assets as to which forfeiture proceedings are still pending in  
4 the Criminal Action consist of funds in one or more IRA accounts in the name of  
5 Daniel Heath. The forfeiture hearing was originally scheduled to be conducted in  
6 September 2008, was continued to October 24, 2008 and again to November 4,  
7 2008. The November 4, 2008 hearing was then continued to January 2009. The  
8 value of the funds in the IRA account(s) vary based on market values, although the  
9 Receiver believes the minimum value at this time is approximately \$25,000 and has  
10 been as high as \$75,000 or more.

11 The Receiver cannot fully administer the estate and complete the wind up of  
12 the estate until the forfeiture motion has been finally determined. So as not to  
13 unduly delay providing additional payments to claimants, the Receiver seeks an  
14 order authorizing the Receiver to make a Fourth Distribution of funds currently on  
15 hand in the receivership estate, with the Receiver retaining a reserve sufficient to  
16 pay any taxes that may be owed by the estate, any estimated administrative  
17 expenses and any estimated wind up expenses and to make a final distribution to  
18 claimants from funds turned over to the Receiver pursuant to the anticipated  
19 forfeiture of Daniel Heath's IRA accounts.

20 C. Prior Distributions

21 The Receiver has previously made three distributions of estate assets on  
22 Allowed Claims pursuant to Court orders approving those distributions. The  
23 Initial Distribution was in the amount of \$18,028,912.56 representing 15.29% of  
24 Allowed Investor Claims. The Initial Distribution was paid pro rata on all  
25 Allowed Investor Claims, and the Receiver reserved estate assets sufficient to  
26 make the same pro rata distribution on the Allowed Non-Investor Claims and  
27 disputed Non-Investor Claims then pending.

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1 The Receiver's Second Distribution was approved pursuant to Court order  
2 entered August 28, 2006. A second distribution on Allowed Investor Claims was  
3 made in the amount of \$4 million, bringing total distributions on Allowed Investor  
4 Claims at that time to \$22,028,912.56, representing 18.69% of Allowed Investor  
5 Claims. The Receiver continued to reserve additional estate funds sufficient to  
6 make a pro rata distribution on all potential Non-Investor Claims, including  
7 Allowed Non-Investor Claims and Disputed Non-Investor Claims.

8 The Receiver's motion for authorization to make a Third Distribution was  
9 heard on November 19, 2007. The Receiver sought and obtained approval to  
10 distribute an additional \$3.5 million of receivership funds on Allowed Investor  
11 Claims, representing 2.97% of those claims, for an aggregate total of over \$25.5  
12 million or 21.66% in distributions paid on Allowed Investor Claims. The Court  
13 granted the relief sought by the Receiver pursuant to the Court's order entered  
14 November 19, 2007.

15 The Receiver subsequently filed an omnibus motion seeking an order  
16 approving a settlement of the disputed non-investor claim of Travelers Casualty  
17 and Surety Company of America and disallowing other Disputed Non-Investor  
18 Claims. As part of that motion, the Receiver also sought and obtained an order  
19 disallowing disputed Non-Investor Claims and authorizing the Receiver to pay  
20 holders of Allowed Non-Investor Claims pro rata along with Allowed Investor  
21 Claims from the funds reserved under the Court's prior distribution orders. The  
22 Receiver also reached a Court-approved compromise regarding the allowance of  
23 the final disputed Non-Investor Claim of F. Elliot Goldman. These orders were  
24 entered by the Court on March 6, 2008 and March 12, 2008, respectively.

25 To date, the Receiver has distributed a total of \$25,804,528.92 pro rata  
26 among all Allowed Investor Claims and Allowed Non-Investor Claims. The  
27 Receiver presently has net funds on hand in the estate of approximately  
28 \$1,970,000.00 as of October 31, 2008. This sum represents the net sum available

1 after deducting accrued but unpaid administrative expenses, including fees and  
2 costs of the Receiver and the Receiver's counsel that are subject to payment upon  
3 motion and Court approval. As set forth above, the Receiver anticipates obtaining  
4 additional forfeited funds of Daniel Heath through an order in the Criminal Action  
5 with a value of at least \$25,000.00 in early 2009. The Receiver expects to file a  
6 final report and accounting, a final fee motion and motion to wind up the  
7 receivership estate shortly after the forfeiture proceedings are determined.

8 The Receiver has determined that an appropriate reserve to be maintained by  
9 the estate at this time is a minimum of \$220,000.00 and the Receiver seeks  
10 authorization to distribute not less than \$1,750,000.00 for the Fourth Distribution.  
11 The reserve amount takes into account a reserve for possible taxes, anticipated  
12 administrative expenses and the need to reserve sufficient funds to make a final  
13 distribution to creditors. If the proposed Fourth Distribution is approved, total  
14 distributions in the case will equal not less than \$27,554,528.92. Given the  
15 amounts on hand, the modest expense associated with making the distributions in  
16 question, and the delay in making meaningful additional funds available to  
17 claimants if the Receiver waits to distribute funds until the Daniel Heath forfeiture  
18 proceedings conclude, the Receiver seeks authority to make this Fourth  
19 Distribution.

20 **II. THE RECEIVER PROPOSES A FOURTH DISTRIBUTION OF**  
21 **NO LESS THAN \$1,750,000.00 ON ALLOWED INVESTOR**  
22 **CLAIMS**

23 **A. Courts Have Broad Authority To Adopt Distribution Plans of**  
24 **Receivership Assets**

25 “[A] primary purpose of equity receiverships is to promote orderly and  
26 efficient administration of the estate by the district court for the benefit of  
27 creditors.” S.E.C. v. Hardy, 803 F.2d 1034, 1038 (9<sup>th</sup> Cir. 1986); See also, S.E.C.  
28 v. Wencke, 783 F.2d 829, 837 (9<sup>th</sup> Cir. 1986) (“The primary purpose of allowing

1 courts to establish receiverships in securities fraud actions is to prevent further  
2 dissipation of the assets of the defrauded investors . . .”). Accordingly, courts are  
3 granted “broad powers” and “wide discretion” in supervising and fashioning  
4 appropriate relief in an equity receivership to achieve this purpose. S.E.C. v.  
5 Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992); S.E.C. v. Hardy, 803 F.2d at 1037;  
6 Liberte Capital Group v. Capwill, 229 F. Supp. 2d 799, 802 (N.D. Ohio 2002) *aff’d*,  
7 2004 U.S. App. LEXIS 10107 (6th Cir. May 19, 2004); See also, McFarland v.  
8 Winnebago South Inc., 863 F. Supp. 1025, 1034 (W.D. Mo. 1994) (“A federal  
9 district court presiding over an equity receivership has extremely broad power to  
10 supervise the receivership and protect receivership assets.”).

11 With respect to a plan to distribute receivership assets, reasonably  
12 expeditious and efficient procedures will generally be upheld so long as they are  
13 also fair and equitable. (See, Liberte Capital Group v. Capwill, 229 F. Supp. 2d at  
14 804 (“As a court sitting in equity, this Court is governed by a fundamental principle  
15 that the method of distribution should be equitable and fair.”); See also, S.E.C. v.  
16 Hardy, 803 F.2d at 1038-39 (“the rights of creditors of a receivership must be  
17 balanced against the need for expeditious administration of the receivership; a  
18 district court in overseeing a receivership must ‘make rules which are practicable  
19 as well as equitable’ (*quoting First Empire Bank-New York v. FDIC*, 572 F.2d  
20 1361, 1368 (9<sup>th</sup> Cir.), *cert. denied*, 439 U.S. 919, 58 L. Ed. 2d 265, 99 S. Ct. 293  
21 (1978)).

22 **B. The Receiver’s Distribution Plan Provides Fair and Appropriate**  
23 **Treatment to Claimants Under the Circumstances**

24 The Receiver seeks authority to make an additional distribution of  
25 receivership funds of not less than \$1,750,000.00 to be distributed pro rata on all  
26 Allowed Investor Claims and Allowed Non-Investor Claims, representing  
27 approximately 1.47% of those claims. The Receiver proposes a pro rata  
28 distribution plan that treats all creditors of the estate alike by dividing the

1 receivership assets available for distribution among the investor creditors and non-  
2 investor creditors according to the Allowed Claims of such creditors. The plan is  
3 consistent with the Court's previously approved claims filing and allowance  
4 procedures in this case.

5 **III. CONCLUSION**

6 Based on the foregoing, the Receiver respectfully requests that the Court  
7 grant relief as sought herein.

8  
9 DATED: November 21, 2008 McKENNA LONG & ALDRIDGE LLP  
10 GARY OWEN CARIS  
11 LESLEY ANNE HAWES

12 By: /s/ Gary Owen Caris  
13 GARY OWEN CARIS  
14 Attorneys for Permanent Receiver,  
15 ROBB EVANS  
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6 Attorneys for Permanent Receiver,  
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**UNITED STATES DISTRICT COURT**

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**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

10

SECURITIES AND EXCHANGE  
COMMISSION,

CASE NO. CV 04-02949 JFW (Ex)

11

Plaintiff,

**DECLARATION OF BRICK KANE IN  
SUPPORT OF MOTION BY RECEIVER  
FOR ORDER APPROVING FOURTH  
DISTRIBUTION INCLUDING  
DISTRIBUTION TO HOLDERS OF  
ALLOWED NON-INVESTOR CLAIMS**

12

v.

13

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

14

Defendants.

Date: December 15, 2008  
Time: 1:30 p.m.  
Place: Courtroom 16  
312 N. Spring Street  
Los Angeles, CA

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I, Brick Kane, declare:

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1. I am a Deputy to Robb Evans, who has been appointed as permanent receiver of D.W. Heath & Associates, inc., Private Capital Management, Inc., Private Collateral Management, Inc. and PCM Fixed Income Fund I, LLC and their subsidiaries and affiliates (collectively, the "Heath Receivership Defendants") and as Receiver over the Schlarman Interests ("Receiver") and am a principal in Robb Evans & Associates LLC. I have personal knowledge of the matters set forth in this

1 declaration, and if I were called upon to testify as to these matters, I could and  
2 would competently testify based upon my personal knowledge.

3 2. The Receiver was initially appointed as temporary receiver in this  
4 matter pursuant to this Court's Stipulation and Order Appointing Robb Evans  
5 Temporary Receiver entered May 4, 2004. Thereafter, the Receiver was appointed  
6 as permanent receiver pursuant to the Stipulation and Order Appointing a  
7 Permanent Receiver entered May 19, 2004.

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

1 Criminal Action has also ordered that the Receiver liquidate real property assets of  
2 John Heath.

3 4. I participated in the preparation of the Receiver's Reports of Activities  
4 previously filed with the Court and approved by Court orders in this case, including  
5 the Receiver's Report of Activities for the Period of May 15, 2004 Through July 9,  
6 2004 filed July 14, 2004 and the Receiver's Report of Activities for the Period of  
7 July 12, 2004 Through December 31, 2004 filed January 21, 2005. The reports  
8 describe the lack of financial basis for the transactions and investments solicited  
9 from the victims of the investment fraud perpetrated by the defendants and further  
10 support the conclusion that funds paid to earlier investors as "interests" or "profits"  
11 were paid with funds solicited from later investors. The findings in the reports  
12 indicate that Heath Receivership Defendants operated a fraudulent investment  
13 scheme in effect as a Ponzi-type scheme and that the investment entities were  
14 insolvent at all times as a result, with obligations owed by the entities exceeding the  
15 assets available to repay them. Judgments have been entered against the  
16 Receivership Defendants as well as against Heath in this civil action in the  
17 principal amount of \$109,334,158.

18 5. Trial in the Criminal Action has also been completed, with all  
19 defendants found guilty of numerous counts of fraud, elder abuse and other crimes.  
20 All defendants have now been sentenced.

21 6 On February 28, 2005, the Court in this action conducted a hearing on  
22 motions brought by the Receiver seeking to have administration and supervision of  
23 the Schlarmann Interests receivership vested in this Court and on a motion seeking  
24 approval of the Receiver's proposed claims filing and allowance procedure (the  
25 "Claims Procedures Motion"). The motion regarding the administration of the  
26 Schlarmann Interests receivership was granted as reflected in the Order: (1)  
27 Approving Stipulation with Chapter 7 Trustee re Administration of Assets,  
28 Withdrawal of Reference and Reservation of Rights Over Proceeds; and (2)

1 Authorizing Expansion of Receivership to Include Schlarmann Interests entered  
2 March 3, 2005.

3 7. In February 2005, the Receiver filed a motion for approval of claims  
4 filing and allowance procedures. Only one creditor filed opposition to the Claims  
5 Procedures Motion. That creditor's objection was overruled, and the Receiver's  
6 proposed claims filing and allowance procedures were granted by Court order  
7 entered March 4, 2005 (the "Claims Procedures Order").

8 8. Pursuant to the Claims Procedures Order, the Receiver has  
9 implemented claims filing and allowance procedures. The Receiver determined the  
10 claim amount of each investor and the amount owed to non-investor creditors and  
11 provided each investor and non-investor creditor claimant with notice of the  
12 Receiver's calculation of their claim. Pursuant to the Claims Procedures Order,  
13 creditors were given 30 days to object to the proposed claim amount. Although the  
14 Receiver received hundreds of responses to the claims notices, the Receiver  
15 eventually successfully resolved all but two investor objections regarding the  
16 amounts of Allowed Investor Claims, and several Non-Investor Claims were not  
17 resolved. The claims of the two investor creditors who asserted objections to the  
18 Receiver's proposed allowance of their claims were later resolved, and there are a  
19 total of \$117,882,011.50 in Allowed Investor Claims.

20 9. While most Non-Investor Claims were also resolved without objection,  
21 certain Non-Investor Claims were subject to dispute. The Receiver has now fully  
22 resolved all disputed Non-Investor Claims. There are a total of \$1,271,932.02 in  
23 Allowed Non-Investor Claims, including the claims of those non-investor claimants  
24 that were previously disputed that have either been allowed in compromise amounts  
25 or have been disallowed pursuant to Court order.

26 10. In the Criminal Action, the Court issued an order authorizing the  
27 Receiver to liquidate the real property assets of criminal defendant John Heath.  
28 Pursuant to order of Court in the Criminal Action, the Receiver liquidated those real



1 estate assets, and the Receiver is holding the proceeds thereof subject to further  
2 order of this Court regarding the distribution of those proceeds. In addition,  
3 pursuant to a forfeiture order issued by the Court in the Criminal Action, proceeds  
4 of certain bank accounts of Denis O'Brien have also been turned over to the  
5 Receiver and are being held by the Receiver subject to further orders of this Court  
6 authorizing the distribution of those assets to receivership estate claimants.

7 11. The remaining assets as to which forfeiture proceedings are still  
8 pending in the Criminal Action consist of funds in one or more IRA accounts in the  
9 name of Daniel Heath. The forfeiture hearing was originally scheduled to be  
10 conducted in September 2008, was continued to October 24, 2008 and again to  
11 November 4, 2008. The November 4, 2008 hearing was then continued to January  
12 2009. The value of the funds in the IRA account(s) vary based on market values,  
13 although the Receiver believes the minimum value at this time is approximately  
14 \$25,000 and has been as high as \$75,000 or more.

15 12. The Receiver cannot fully administer the estate and complete the wind  
16 up of the estate until the forfeiture motion has been finally determined. So as not to  
17 unduly delay providing additional payments to claimants, the Receiver seeks an  
18 order authorizing the Receiver to make a Fourth Distribution of funds currently on  
19 hand in the receivership estate, with the Receiver retaining a reserve sufficient to  
20 pay any taxes that may be owed by the estate, any estimated administrative  
21 expenses and any estimated wind up expenses and to make a final distribution to  
22 claimants from funds turned over to the Receiver pursuant to the anticipated  
23 forfeiture of Daniel Heath's IRA accounts.

24 13. The Receiver has previously made three distributions of estate assets  
25 on Allowed Claims pursuant to Court orders approving those distributions. The  
26 Initial Distribution was in the amount of \$18,028,912.56 representing 15.29% of  
27 Allowed Investor Claims. The Initial Distribution was paid pro rata on all  
28 Allowed Investor Claims, and the Receiver reserved estate assets sufficient to

1 make the same pro rata distribution on the Allowed Non-Investor Claims and  
2 disputed Non-Investor Claims then pending.

3 14. The Receiver's Second Distribution was approved pursuant to Court  
4 order entered August 28, 2006. A second distribution on Allowed Investor Claims  
5 was made in the amount of \$4 million, bringing total distributions on Allowed  
6 Investor Claims at that time to \$22,028,912.56, representing 18.69% of Allowed  
7 Investor Claims. The Receiver continued to reserve additional estate funds  
8 sufficient to make a pro rata distribution on all potential Non-Investor Claims,  
9 including Allowed Non-Investor Claims and Disputed Non-Investor Claims.

10 15. The Receiver's motion for authorization to make a Third Distribution  
11 was heard on November 19, 2007. The Receiver sought and obtained approval to  
12 distribute an additional \$3.5 million of receivership funds on Allowed Investor  
13 Claims, representing 2.97% of those claims, for an aggregate total of over \$25.5  
14 million or 21.66% in distributions paid on Allowed Investor Claims. The Court  
15 granted the relief sought by the Receiver pursuant to the Court's order entered  
16 November 19, 2007.

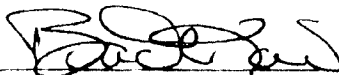
17 16. The Receiver subsequently filed an omnibus motion seeking an order  
18 approving a settlement of the disputed non-investor claim of Travelers Casualty  
19 and Surety Company of America and disallowing other Disputed Non-Investor  
20 Claims. As part of that motion, the Receiver also sought and obtained an order  
21 disallowing disputed Non-Investor Claims and authorizing the Receiver to pay  
22 holders of Allowed Non-Investor Claims pro rata along with Allowed Investor  
23 Claims from the funds reserved under the Court's prior distribution orders. The  
24 Receiver also reached a Court-approved compromise regarding the allowance of  
25 the final disputed Non-Investor Claim of F. Elliot Goldman. These orders were  
26 entered by the Court on March 6, 2008 and March 12, 2008, respectively.

27 17. To date, the Receiver has distributed a total of \$25,804,528.92 pro rata  
28 among all Allowed Investor Claims and Allowed Non-Investor Claims. The

1 Receiver presently has net funds on hand in the estate approximately \$1,970,000.00  
2 as of October 31, 2008. This sum represents the net sum available after deducting  
3 accrued but unpaid administrative expenses, including fees and costs of the  
4 Receiver and the Receiver's counsel that are subject to payment upon motion and  
5 Court approval. As set forth above, the Receiver anticipates obtaining additional  
6 forfeited funds of Daniel Heath through an order in the Criminal Action with a  
7 value of at least \$25,000.00 in early 2009. The Receiver expects to file a final  
8 report and accounting, a final fee motion and motion to wind up the receivership  
9 estate shortly after the forfeiture proceedings are determined.

10 18. The Receiver has determined that an appropriate reserve to be  
11 maintained by the estate at this time is a minimum of \$220,000.00 and seeks  
12 authorization to distribute not less than \$1,750,000.00 as the Fourth Distribution.  
13 The reserve amount takes into account a reserve for possible taxes, anticipated  
14 administrative expenses and the need to reserve sufficient funds to make a final  
15 distribution to creditors. Given the amounts on hand, the modest expense  
16 associated with making the distributions in question, and the delay in making  
17 meaningful additional funds available to claimants if the Receiver waits to  
18 distribute funds until the Daniel Heath forfeiture proceedings conclude, the  
19 Receiver seeks authority to make this Fourth Distribution pending the Receiver's  
20 final wind up motion.

21 I declare under penalty of perjury that the foregoing is true and correct and  
22 that this declaration was executed on this 21 day of November 2008 at Sun  
23 Valley, California.

24   
25 \_\_\_\_\_  
26 BRICK KANE  
27  
28