

USDC SCAN INDEX SHEET



CAG 10/4/05 14:27

3:04-CV-02295 SEC V. EMVEST MORTGAGE FUND

156

O.

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

FILED
05 OCT -4 AM 10:23
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
Ragunier DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

vs.

EMVEST MORTGAGE FUND, LLC,
EMVEST, INC., and MILON LYLE
BROCK,

Defendants.

CASE NO. 04cv2295-DMS (POR)

**ORDER RE: RECEIVER'S
THIRD REPORT AND
PETITION FOR INSTRUCTIONS**

On August 19, 2005, the Court-appointed Receiver submitted his Third Verified Report and Petition for Instructions. On September 30, 2005, the Court heard the parties' responses and objections to the Report. Attorneys Molly M. White and Susan F. Hannan appeared for the Securities and Exchange Commission. Attorney Robert A. Cocchia appeared for Defendants. Receiver Dennis M. Murphy appeared in person and with his counsel, James R. Felton. Attorney Mary R. Robberson appeared for non-party Unified Mortgage Services, Inc. ("UMS"). After carefully considering the parties' submissions, arguments of counsel, and the applicable law, the Court's rulings are set forth as follows.

A. MAINTENANCE OF RECEIVERSHIP

In their Response to the Receiver's Third Verified Report, Defendants request that the Court dissolve the receivership and place Emvest, Inc. back in control of the Fund. Defendants

156

1 contend the Third Verified Report reflects the Receiver's lack of neutrality, and further, that the
2 factors relevant in deciding whether to continue or terminate a receivership weigh in favor of
3 terminating the receivership. In addition, in their Reply to Plaintiff's Response to the Third Verified
4 Report of Receiver, Defendants argue the receivership should be terminated because the Receiver has
5 created potential liability for the Fund by making loans which allegedly violate various lending laws.

6 Based on a review of the Receiver's Third Verified Report, the Court finds the investors would
7 best be served by keeping the Receiver in place as currently defined. The Third Verified Report indicates
8 the receivership continues to be successful in achieving the goals established in the Court's previous
9 Order. (See June 7, 2005 Order, at 6-7.) The Receiver has made progress by stabilizing the operations
10 of the business, providing accurate and timely financial reports to its investors, and implementing new
11 financial controls. Moreover, the Receiver has continued to make monthly distributions to the investors
12 at an annual rate of 6% and anticipates these monthly distributions will continue for the foreseeable
13 future. The Receiver also has reported progress in reconstructing the historical loan transaction records
14 and expects to complete the final analysis of all loan source documents by his next report.

15 Finally, balancing the performance of the Fund against the cost of the receivership weighs in
16 favor of continuing the receivership. For the first seven months of 2005, the Fund generated a net
17 income of \$481,192. The total income for the seven month period includes 100% of the fees for the
18 Receiver and his attorney, as well as a foreclosed asset expense of \$293,439. Thus, even when
19 considering 100% of the fees for the Receiver and his counsel, the Fund is still performing better than
20 it did in 2004. In sum, based on the information contained in the Receiver's Third Verified Report,
21 the Court concludes that maintaining the receivership would be in the best interest of the investors.
22 Defendants request to dissolve the receivership is therefore denied.

23 With respect to the allegations raised by Defendants in their Reply to Plaintiff's Response to the
24 Third Verified Report of Receiver, the Court declines to address these issues at this time. As instructed by
25 the Court during the hearing for the Third Verified Report, the parties shall meet and confer no later than
26 October, 14, 2005, and attempt to resolve the issues raised in Defendants' Reply. The parties shall address
27 the issue of the potential liability the Fund may incur as a result of the loans the Receiver made that
28 allegedly violate California lending laws. If the issues raised in Defendant's Reply remain unresolved

1 following that meeting, the parties shall contact the Court and obtain an expedited briefing schedule to
2 address any remaining issues.

3 **B. INSTRUCTIONS PERTAINING TO THE MANAGEMENT OF FUND II**

4 In the Third Verified Report, the Receiver requests this Court provide instruction as to his role in
5 the management of Fund II. Specifically, the Receiver petitions the Court to clarify any ambiguity as to his
6 involvement in Fund II by issuing an order declaring Emvest, Inc. as managing member of Fund II.

7 Finding no objections to the Receiver's request, the Court directs that the Receiver is not to
8 be involved with the management of Fund II. Emvest, Inc. shall remain in place as managing member
9 of Fund II. However, as discussed in the Court's June 7, 2005 Order, the Receiver shall have
10 continued access to Emvest Inc.'s financial data in order to proceed effectively in providing an
11 independent analysis of the Fund's operations.

12 **C. PROCESS FOR OBTAINING NEW CONTRACTS FOR LOAN SERVICING**

13 In its June 7, 2005 Order, the Court concluded that to the extent permissible under existing
14 loan servicing contracts, the Receiver may solicit competitive bids for new loan servicing agents; the
15 Fund's current loan servicing agent, UMS, would retain the right to match any lower bid that was
16 offered for a new contract.

17 In his Third Verified Report, the Receiver requests that the Court modify the bidding process
18 to incorporate a "10% underbid" feature to promote competition for the Fund's benefit. Under the
19 Receiver's proposed plan, UMS would be awarded the new loan servicing contract if no party bids at
20 least 10% less than UMS. In addition, UMS would be awarded the new contract if it underbid the
21 lowest offer by 10%.

22 UMS objects to the Receiver's proposed plan. It argues that there is no legitimate reason to
23 disrupt its agreements with lenders to the fund, since the Receiver has not come forward with evidence
24 that any potential bidders were deterred from making a bid, or that any potential bidders did not have
25 a fair opportunity to obtain a new loan servicing contract.

26 Based on the Court's review of the current bidding process (in which three bids have been
27 received), the Court finds that modification of the bidding process is not warranted at this time.
28 Because this case will be set for trial on an expedited basis, modification of the current bidding process

1 is not warranted. Accordingly, the Receiver's request to incorporate the 10% underbid feature into the
2 current bidding process is denied.

3 **D. FEE APPLICATIONS**

4 The Receiver and his counsel have submitted their third fee applications. For the period
5 between May 1, 2005 and August 31, 2005, the Receiver requests \$109,305 in fees and \$2,813.26 in
6 costs (\$112,118.26 total). For the period between May 15, 2005 and August 31, 2005, the Receiver's
7 counsel requests \$11,325.50 in fees and \$1,140.69 in costs (\$12,466.19 total). Pursuant to the Court's
8 7, 2005 Order, the Receiver and his counsel shall receive 30% of the interim fee expense and 100%
9 of the cost expense. Accordingly, the Court awards the Receiver \$32,791.50 in interim fees and
10 \$2,813.26 in interim expenses (\$35,604.76 total). The Receiver's counsel is awarded \$3,397.65 in
11 interim fees and \$1,140.69 in interim expenses (\$4,538.34 total).

12 The Receiver and his counsel are again reminded that they are not required to submit any
13 additional interim fee requests. Rather, they shall provide a monthly reporting of fees and costs,
14 broken down by hour, to be filed with the Court, provided electronically to the parties, and posted on
15 the website. This shall be done within two weeks of the end of each month. Then, each month,
16 without further leave of Court, the Receiver and his counsel shall draw 30% of their billed fees and
17 100% of their costs. At the end of the litigation, the Receiver and his counsel shall submit their final
18 comprehensive fee applications.

19 **E. CONCLUSION AND ORDER**

20 For these reasons, **IT IS HEREBY ORDERED** that the receivership shall remain in place
21 as set forth above. **IT IS FURTHER ORDERED** that:

22 1. All parties shall meet and confer no later than October 14, 2005, in order to attempt
23 to resolve the issues raised by Defendants in their Reply to Plaintiff's Response to the Third Verified
24 Report of Receiver. If at the conclusion of that meeting, any issues raised in Defendant's Reply remain
25 unresolved, the parties shall contact the Court's Law Clerk to obtain an accelerated briefing schedule
26 to address the remaining issues.

27 2. The Receiver is not to be involved in any capacity with the management of Fund II.
28 Emvest, Inc. shall remain as the managing member of Fund II. The Receiver shall have continued

1 access to Emvest Inc.'s financial data in order to proceed effectively in providing an independent
2 analysis of the Fund's operations.

3 3. The Receiver's petition to incorporate a modified bidding process for obtaining new
4 contracts for loan servicing is **DENIED**.

5 4. The Receiver is awarded \$35,604.76 in interim fees and expenses. The Receiver's
6 counsel is awarded \$4,538.34 in interim fees and expenses. No future fee applications shall be made
7 until the end of the receivership. At that time, the Receiver and his counsel shall each submit a final
8 comprehensive fee application.

9 5. As discussed at the hearing on the Third Verified Report, this case will be set for trial
10 on an expedited basis. Accordingly, the parties shall take note of the following dates:

11 (a) All discovery, including expert discovery, and all motions, other than motions to amend of
12 join parties, or motions in limine, shall be completed or submitted by **November 10, 2005**.

13 (b) Pursuant to Civ.L.R. 66.1, the Receiver shall file, serve, and make available on the
14 website his Fourth Verified Report and Petition for Instructions, no later than **November**
15 **18, 2005**. Comments or objections shall be filed and served no later than **November 25,**
16 **2005**. No reply briefs shall be filed. Courtesy copies of all documents shall be delivered
17 to chambers. The Court shall hear this matter along with the final pretrial conference.

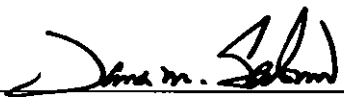
18 (c) The final pretrial conference shall occur on **December 2, 2005**, at **1:30 p.m.**

19 (d) The trial date is hereby scheduled for **January 3, 2006**, at **9:00 a.m.**

20 6. Pursuant to Civ.L.R. 83.9, the investors are again reminded that ex parte communication
21 with the Court is prohibited. Future requests from the investors shall be made as provided in the Federal
22 Rules of Civil Procedure and the Local Rules of this Court.

23 **IT IS SO ORDERED.**

24 Dated: 10-3-05



DANA M. SABRAW
United States District Judge

25
26
27
28 CC: JUDGE PORTER
ALL PARTIES