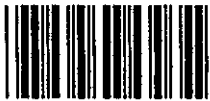


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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 SECURITIES AND EXCHANGE  
11 COMMISSION,

12 Plaintiff,

13 v.

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

16 Defendants.

Case No. 04 CV 2295 DMS (POR)

BY FAX

PLAINTIFF SECURITIES AND  
EXCHANGE COMMISSION'S REPLY  
BRIEF SUPPORTING PARTIAL  
SUMMARY JUDGMENT

Special Briefing Schedule Ordered

Date: December 2, 2005  
Time: 1:30 p.m.  
Place: Courtroom 10 (Honorable Dana M.  
Sabraw)

209

1 The Court should grant the Commission's motion for partial summary judgment  
2 ("Motion"), because Defendants have not affirmatively set forth facts showing that there is a  
3 genuine issue for trial. Rather than address the merits of this Motion, Defendants have chosen to  
4 argue that the Fund's investors were unreasonable in relying on Defendants' misrepresentations  
5 because Defendants purportedly disclosed the Fund's risks and the unreliability of their  
6 representations. Those arguments fail because 1) reliance is not an element of this action, 2) the  
7 purported disclosures were too general and did not address the misrepresentations at issue here,  
8 and 3) the purported disclosures were not made with the same clarity and degree of intensity as  
9 the misrepresentations. Defendants' arguments regarding scienter also fail, as they ignore two  
10 key pieces of evidence: Brock's admission that he knew investors' capital accounts were being  
11 eroded, and the August 16, 2003 memorandum from the Fund's accountants. Finally, there is no  
12 merit to Defendants' arguments regarding the propriety of a permanent injunction.

13 I. **THE UNDISPUTED FACTS SUPPORT SUMMARY JUDGMENT**

14 Defendants try to create the appearance of a factual dispute by denying the facts presented  
15 in the Motion, but Defendants do not provide facts affirmatively showing there is an issue for  
16 trial. "The existence of some alleged factual dispute between the parties will not defeat an  
17 otherwise properly supported motion for summary judgment; to defeat the motion, the non-  
18 moving party must affirmatively set forth facts showing there is a genuine issue for trial." *SEC v.*  
19 *TLC Investments*, 179 F. Supp. 2d 1149, 1153 (C.D. Cal. 2001) (citing *Anderson v. Liberty*  
20 *Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)); *see also* Fed. R. Civ. P. 56(e) (Defendants may not  
21 "rest upon the mere allegations or denials of the [Commission's] pleading, but the [Defendants']  
22 response, . . . , must set forth specific facts showing that there is a genuine issue for trial.")

23 Indeed, the following facts, which Defendants agree are undisputed, more than establish  
24 grounds for granting the Motion:

- 25
- The Fund solicited investors through cold calls, radio ads, newspaper ads, seminars, and newsletters. (Material Fact No. 10.)
  - The Fund's Prospectus represented that the Fund would pay investors "a 12% per annum priority return on their unreturned original invested capital" on a monthly basis. (Material Fact No. 9.)
  - A Fund advertisement stated "Our clients are receiving a 12% plus yield on this
- 26  
27  
28

investment.”<sup>1</sup> (Material Fact No. 59.)

- A Fund advertisement stated “Currently, [the Fund] is outperforming projections and is yielding 12½%.” (Material Fact No. 60.)
- A Fund advertisement stated “Emvest Mortgage Fund, LLC provides you with the following advantages: . . . Consistent Yield. We are now and have been, paying 12%+ to all our investors.” (Material Fact No. 61)
- An advertisement stated that if an investor deposited \$100,000 with the Fund, the Fund would pay \$1000 per month and that “you can get your \$100,000 back or keep it working for you” and “one million will earn \$10,000 per month.” (Material Fact No. 62.)
- Each month, Brock reviewed the amount of money that its loan-servicing agent, Unified Mortgage Service, Inc. (“UMS”), had collected on the Fund’s behalf and the discount points the Fund earned, and instructed the Fund’s bookkeeper to send investors their monthly distribution checks based on those collections. (Material Fact No. 22.)
- Brock did not take into consideration the Fund’s expenses, which among other things included “set up” costs, sales commissions, advertising expenses, license fees, permits, bank charges, interest on collateral notes, and management fees. (Material Fact No. 23.)
- Brock directed the bookkeeper to make distributions, even though he knew that if he took expenses into consideration, the Fund was not generating enough earnings to cover those distributions and that as a result, the investors’ capital accounts were dropping. (Material Fact No. 26.)
- By August 16, 2003, the Fund’s accountants warned Brock that the Fund’s 12.5% payments to investors had “been in excess of the actual earnings of the fund,” and that those investors who had left the fund “received distributions in excess of their actual capital accounts. (Material Fact No. 36.)
- Through June of 2004, Brock directed the bookkeeper to pay investors 12.5% of their original investment, later directing her to reduce that amount to 12% of their investment. (Material Fact No. 24.)
- Although the Fund’s net income continued to grow from 2002 through 2004, the Fund’s distributions to investors grew at a much faster rate. (Material Fact No. 29.)
- Timothy Canty, the Fund’s President, admitted that investors were receiving a “return of capital.” (Material Fact No. 30.)
- Defendants’ own expert witness has admitted that the investors were receiving a return of capital. (Material Fact No. 31.)

## II. MATERIAL MISREPRESENTATIONS

### A. The Misrepresentations Regarding Returns and Use of Proceeds Were Material

Defendants claim they made no material misrepresentations because investors signed a Subscription Agreement stating that they read and understood the Fund’s offering documents, and the offering documents contained warnings. (Defendants’ Opposition (“Oppo.”), pp. 5-6.) These arguments should fail for several reasons.

<sup>1</sup> Defendants’ claims that Material Fact Nos. 59 through 61 are “not a fact” do not create genuine issues for trial. (See Defendants’ Response to Separate Statement, Responses to Fact Nos. 59-61.) Material Fact Nos. 59 through 61 are supported by the Fund’s advertisements, which Mr. Governski has stated under oath that he received from the Fund. (Governski Dec. Exs. 2, 3, 6.)

1 First, the basic premise of Defendants' arguments is that it was unreasonable for investors  
2 to rely on Defendants' representations, given the warnings in the Prospectus. But the  
3 reasonableness of the investors' reliance on Defendants' representations is not relevant to this  
4 action, because reliance is not an element of a Commission enforcement action for a Rule 10b-5  
5 violation. *See SEC v. Rana Research*, 8 F.3d 1358, 1364 (9th Cir. 1993).

6 Second, even if investor reliance were relevant, the purported disclosures in the offering  
7 documents were too generalized. To be sufficient, a risk disclosure must "clearly and  
8 specifically" caution investors. *Gray v. First Winthrop Corp.*, 82 F.3d 877, 884 (9th Cir. 1996).  
9 But Defendants' disclosures did not. The disclosed risks were, for example, that the Fund's  
10 success would "depend upon certain factors which are beyond the control of the Company and  
11 cannot be predicted accurately at this time. Such factors include general and local real estate and  
12 economic conditions, values of the Loan Portfolio, changes in spending patterns, and limitations  
13 imposed by government regulation." (White Declaration Supporting Motion ("White Dec."), Ex.  
14 12, p. 393.) These disclosures are similar to the disclosures the Ninth Circuit found too  
15 generalized in *Gray v. First Winthrop Corp.*, 82 F.3d at 884 & n.9 ("some assumptions will  
16 inevitably not materialize" and "the investment was 'subject to the risks inherent in the  
17 ownership of real estate'"). In addition, not one of the risks that the Prospectus disclosed  
18 "clearly" or "specifically" warned investors that Defendants' representations were false – i.e.,  
19 that monthly distributions included a return of capital. *See In re Prudential Sec. Inc. Ltd.*  
20 *Partnerships Lit.*, 930 F. Supp. 68, 72 (S.D.N.Y. 1996 ("Cautionary language . . . must precisely  
21 address the substance of the specific statement or omission that is challenged."))

22 Third, any purported disclosures in the offering documents were not sufficient to neutralize  
23 Defendants' misrepresentations. Fraudulent statements are only neutralized when the correct  
24 information is conveyed to the public "with a degree of intensity and credibility sufficient to  
25 counter-balance effectively any misleading information created by" the alleged misstatements.  
26 *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 167 (2d Cir. 2000); *see also Virginia Bankshares v.*  
27 *Sandberg*, 501 U.S. 1083, 1097 (1991). In discussing "materiality," the Supreme Court  
28 recognized that "not every mixture with the true will neutralize the deceptive. If it would take a

1 financial analyst to spot the tension between the one and the other, whatever is misleading will  
2 remain materially so, and liability should follow." *Virginia Bankshares*, 501 U.S. at 1097; see  
3 also *SEC v. Rana Research*, 8 F.3d at 1363. Given the magnitude and the clarity of the  
4 representations that the Fund would pay a 12% "return," the vague passages buried in the offering  
5 documents are insufficient to neutralize the materiality of Defendants' misrepresentations.

6 **B. The Misrepresentations Regarding Preservation of Investor Capital Were**  
**Material**

7 Defendants argue that the Commission has taken out of context their representations  
8 regarding the preservation of investor capital. (Oppo., pp. 8-9.) In making this argument,  
9 Defendants claim investors should have known these statements were untrue because some  
10 brochures said the "information [was] reliable, but not guaranteed," and told investors that they  
11 should read the Prospectus. (Oppo., p. 9.) The obvious flaw in this argument is that neither of  
12 these two "warnings" addresses Defendants' misrepresentation. The first statement reassures  
13 investors that the information they were given is "reliable," and the second tells investors that  
14 more information is available. Thus, the purported "warnings" do not neutralize the misleading  
15 representations. See *Virginia Bankshares*, 501 U.S. at 1097.

16 Next, citing a string of private securities litigation actions, which are subject to the Private  
17 Securities Litigation Reform Act, the Defendants claim their "optimistic projections" about the  
18 preservation of investor capital were protected by the "bespeaks caution" doctrine. (Oppo., p. 9.)  
19 But the "bespeaks caution" provisions do not apply to the Commission's actions for securities  
20 fraud. The "bespeaks caution" concept relates to the reasonableness of a private investors'  
21 reliance on an issuer's forward-looking statements. Because the Commission is not required to  
22 prove reliance, the "bespeaks caution" concept is not relevant to Commission actions for  
23 securities fraud. See *SEC v. Rana Research*, 8 F.3d at 1364; see also *SEC v. Blavin*, 760 F.2d  
24 706, 711 (6th Cir. 1985).

25 Even if the "bespeaks caution" doctrine applied, the concept does not mean that forward-  
26 looking information cannot be material as a matter of law. "The bespeaks caution doctrine  
27 provides no protection to someone who warns his hiking companion to walk slowly because there  
28 might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot

1 away." *In re Prudential Sec. Inc. Ltd. Partnerships Lit.*, 930 F. Supp. at 72; see also *SEC v.*  
2 *Blavin*, 760 F.2d at 711-12; *La Grasta v. First Union Secs., Inc.*, 358 F.3d 840, 850-51 (11th Cir.  
3 2004). The Ninth Circuit recognizes that "projections and general expressions of optimism may  
4 be actionable under the federal securities laws." *In re Apple Computer Secs. Lit.*, 886 F.2d 1109,  
5 1113 (9th Cir. 1989).

6 A projection or statement of belief contains at least three implicit  
7 factual assertions: (1) that the statement is genuinely believed; (2)  
8 that there is a reasonable basis for that belief; and (3) that the  
9 speaker is not aware of any undisclosed facts tending to seriously  
undermine the accuracy of the statement. A projection or  
statement of belief may be actionable to the extent that one of  
these implied factual assertions is inaccurate.

10 *Id.* Here, there is no reasonable basis for Defendants to believe the Fund's objective was  
11 preservation of investor capital, because at the time Defendants told investors that this was their  
12 objective, they were using investor capital to pay distributions to investors. Moreover,  
13 Defendants were aware of the undisclosed fact that the Fund was using investor capital to pay  
14 distributions to investors, which seriously undermined the accuracy of their representations.

15 **C. Defendants' Misrepresentations Regarding Their Affiliates Are Material**

16 Defendants' misrepresentations regarding their affiliates are three-fold: 1) that they were  
17 affiliates (which Defendants have denied in this litigation); 2) that the affiliates would not  
18 directly receive fees from the Fund (which the Emerald Bay entities did); and 3) that the affiliates  
19 provided investors "great value" (which they did not). The Defendants provide no evidence  
20 contradicting the Commission's evidence supporting these claims.<sup>2</sup>

21 Instead, Defendants claim that as long as the affiliated entities earned money in  
22 accordance with the Fund's Prospectus, that money was "rightfully earned." (Oppo., pp. 10-11.)  
23 What Defendants fail to recognize is that the Emerald Bay entities and UMS would not have  
24 received any of the more than \$4 million that they received, but for Defendants' fraudulent  
25

26 <sup>2</sup> The only evidence Defendants cite to support their arguments is the Prospectus. Apparently  
27 relying on their evidentiary objections, Defendants attack the Commission's evidence that UMS  
28 charged more than market rates, on grounds that it is "the inadmissible and speculative opinion of  
the Receiver." (Oppo. p. 11.) But the Commission's proffered evidence is not opinion  
testimony; it is the analysis of the court-appointed Receiver, which is the basis for the Court's  
authorization that the Receiver hire a lower-cost loan-servicing agent.

1 offering. Moreover, Defendants now claim that some of the misrepresentations about the Fund  
2 were authored and distributed by the affiliated entities – and not the Fund. (*See Defendants'*  
3 *Response to Separate Statement, Responses to Fact Nos. 11 & 13-15.*) Thus, the affiliated  
4 entities were active participants in the Defendants' fraudulent scheme.

5 **D. Defendants' Misrepresentations Regarding Brock's Prior Legal History**

6 Defendants take issue with the fact that the Commission has included additional facts  
7 supporting its Section 17(a) and Section 10(b) claims. The allegations regarding Defendants'  
8 failure to disclose Brock's prior legal problems do not constitute a new claim; they are additional  
9 facts supporting the Commission's current claims. The evidence concerning Defendants' failure  
10 to disclose Brock as a manager of the Fund evolved during the deposition of Gregg Johnson, who  
11 testified that "[t]here were some matters that I believe that would need to be disclosed that were  
12 material relating to his bankruptcy, which was relatively recent in 2002, and also related to his  
13 revocation of his DRE license." (White Dec. Ex. 35 (Johnson Depo.), pp. 182:25-183:4.)

14 Defendants attempt to revise the record, by arguing that "Brock was not a part of the  
15 Fund's management team until March 2004" and that he preformed tasks "at the direction of  
16 management." (Oppo., p. 12.) Those arguments are not supported by any evidence<sup>3</sup> and are in  
17 fact contradicted by Defendants' own admissions:

- 18 • Defendants' Answer admits "Brock is the founder and Chief Executive Officer of Emvest,  
19 Inc." and states "Defendants admit that Brock controls Emvest, Inc., and the Fund, . . ."<sup>4</sup>  
(Answer, Docket No. 33, ¶¶ 8, 11.)
- 20 • The Declaration of Milon Lyle Brock, which Defendants filed November 24, 2004, states:  
21 "I am the Chief Executive Office of Emvest, Incorporated" and "I am the manger of  
Emvest Mortgage Fund, LLC." (Dec. of Milon Lyle Brock, Docket No. 21, ¶¶ 1 & 2.)
- 22 • The Background Questionnaire that Defendant Brock submitted to the Commission and  
23 swore was true, states that Brock was CEO of Emvest, Inc. from "'02 to the present."  
(White Dec. Ex. 10, p.368.)

24 It is absurd for Defendants to now claim that Brock had no management role until March 2004.

25 \_\_\_\_\_  
26 <sup>3</sup> Defendants cite Brock's deposition testimony. But during his deposition Brock stated that he  
27 was an agent of the manager, Emvest, Inc. until he became CEO of Emvest, Inc. This self-serving  
28 characterization of his role does not negate the fact that Brock operated the Fund since its  
inception, calculating monthly distributions, directing the Fund's bookkeeper to write checks, and  
signing most the Fund's checks. (*See Brief Supptg. Motion, pp. 4-5, & supporting evidence.*)

<sup>4</sup> A statement of fact in an answer is a judicial admission, generally binding on the parties and the  
court. *American Title Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988).

1 Finally, recognizing they must at least admit that Brock was managing the Fund as of  
2 March 2004, Defendants attempt to explain why the June 2004 Prospectus did not disclose that  
3 Brock was a member of management. In doing so, they admit that Brock should have at least  
4 disclosed his "February 2000 stipulated settlement with the State of California" – in other words,  
5 the criminal action for, in Brock's own words, "attempted extortion" and fraud. (See Oppo., p.  
6 13 n.10.) Defendants also admit that Canty filed the 2004 Prospectus *without relying on the*  
7 *advice of counsel*, because the Fund's counsel had been fired by then.<sup>5</sup> (Oppo., p. 13.) This  
8 undermines Defendants' reliance on advice of counsel defense.

### 9 III. DEFENDANTS ACTED WITH SCIENTER

10 Defendants continue to assert that the Commission has failed to show scienter because  
11 they relied on (a) the advice of counsel; (b) "other sources"; (c) "verifiable" revenue streams; (d)  
12 the previous performance of Heritage and TriStar; and (e) the representations of the Fund's loan-  
13 servicing company.<sup>6</sup> (Oppo., p. 14.) In making those arguments, Defendants nowhere address 1)  
14 Brock's admission that he knew that if he considered expenses, the investors' capital accounts  
15 were eroding, or 2) the August 16, 2003 memorandum from the Fund's accountants, which  
16 warned "[s]ince inception you have been paying a 12.5% distribution based on their original  
17 capital contributed. However, *this has been in excess of the actual earnings of the fund.*"  
18 (White Dec. Ex. 11 (emphasis added).) These important facts defeat Defendants' arguments. In  
19 fact, Brock's failure to heed his accountants' advice, which was conveyed in the August 16, 2003  
20 memorandum, completely undermines the notion that Brock lacked scienter because he relied on  
21 the advice of others.

22 Finally, even if Defendants relied on the advice of counsel (which they did not),<sup>7</sup> they  
23 knew they were making misrepresentations about the Fund's returns and its use of proceeds.

24  
25 <sup>5</sup> Defendants claim Mr. Canty "inadvertently left out Defendant Brock's prior legal history during  
the Fund's offering renewal process." (Oppo., p. 13.) In fact, he totally failed to mention that  
Brock was a manager of the Fund at all. (White Dec. Ex.14, pp. 467-68.)

26 <sup>6</sup> The Commission has addressed these issues in its Opposition to Defendants' Motion for  
Summary Judgment, and those arguments are incorporated by reference here.

27 <sup>7</sup> Even if Defendants had established reliance on counsel, "such reliance does not operate as an  
automatic defense, but is only one factor to be considered in determining the propriety of  
28 injunctive relief." *SEC v. Goldfield Deep Mines Co.*, 758 F.2d 459, 467 (9th Cir. 1985) (quoting  
*SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981)).

1 Thus, "[w]hile good faith reliance on advice of counsel may be a factor to consider in deciding  
2 whether to grant injunctive relief, [Defendants'] proven lack of good faith here precludes them  
3 from relying on this argument." *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d  
4 Cir. 1972).

5 **IV. THERE ARE ADEQUATE GROUNDS FOR A PERMANENT INJUNCTION**

6 Permanent injunctions may be granted on summary judgment, given the proper record.  
7 *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980); *see also SEC v. TLC Investments*, 179 F.  
8 Supp. 2d 1149, 1157 (C.D. Cal. 2001). The Commission has provided undisputed evidence  
9 showing that Defendants engaged in an ongoing scheme, acted knowingly, were unlikely to  
10 recognize the wrongful nature of their conduct, and have an opportunity to commit future  
11 violations. In fact, Defendants admit that "Heritage II and Emvest Fund II are both in operation."  
12 (Oppo. p. 20 n.13.) Because Defendants still operate mortgage funds, they still have an  
13 opportunity to commit fraud, further supporting the need for a permanent injunction.

14 **A. Lulling Applies in the Securities Fraud Context**

15 Defendants engaged in an ongoing lulling scheme. Defendants provide no basis for their  
16 argument that wire fraud cases in which criminal defendants employed lulling tactics are  
17 inapplicable in the securities fraud context. (*See* Oppo. pp. 16-17.) Fraud is fraud. And  
18 fraudsters often use lulling tactics to avoid detection.

19 Defendants claim they were "nothing but candid and forthright with investors." (Oppo.,  
20 p. 17.) If that were the case, then why when Defendants sent investors their K-1s, didn't the  
21 accompanying letter state "the Fund is not earning enough net income to cover the 12%  
22 distributions, so your monthly distributions included a return of investor capital"? Instead, the  
23 accompanying letter from the Fund's President said "the fund is continuing to generate returns  
24 above 12%" and "We take pride in the fact that we can provide an outstanding return to our  
25 investors . . ." (*See* White Dec. Ex. 2.) Moreover, it would take a financial analyst to determine  
26 that the reduction in the investors' capital account was attributable to a return of investor capital -  
27 as opposed to the 4% commission the Fund charged investors. *See Virginia Bankshares*, 501 U.S.  
28 at 1097.

1 Finally, Defendants claim they had a valid reason for paying withdrawing investors their  
2 entire capital investment – to protect the Fund from lawsuits. (Oppo., p. 17-18.) That begs the  
3 question: Why were investors threatening lawsuits? Perhaps because they were told they would  
4 receive a 12% distribution with no loss of capital. If Defendants were nothing but forthright and  
5 candid with investors, there would have been no grounds for investor lawsuits.

6 **B. Evidence of Brock's Prior Legal Issues Are Admissible**

7 The evidence of Brock's prior legal problems is admissible. Rule 404(b) of the Federal  
8 Rules of Evidence prohibits "[e]vidence of other crimes, wrongs, or acts . . . to prove the  
9 character of a person in order to show action in conformity therewith." (Fed. R. Evid. 404(b)  
10 (emphasis added).) The Commission did not submit evidence of Brock's prior legal problems to  
11 show that he committed fraud here. It submitted the evidence to establish two of the factors  
12 courts consider in deciding the propriety of a permanent injunction: the past illegal conduct of  
13 Defendants and the (un)likelihood that Defendants will recognize their wrongful conduct.

14 Moreover, Rule 404(b) expressly permits the admission of evidence of prior bad acts to  
15 show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake  
16 or accident." In fraud cases like this, evidence of prior similar schemes is highly relevant to the  
17 issue of intent. *See, e.g., United States v. Hewes*, 729 F.2d 1302, 1314 (11th Cir. 1984). Thus,  
18 even if the Commission used evidence of Brock's prior frauds to prove its case in chief, the  
19 evidence would be admissible to show Brock's "intent" and his "absence of mistake or accident."  
20 It is irrelevant that Brock's prior legal problems involve fraud – and not securities fraud. The law  
21 does not require such a showing. Fraud is fraud – whether in connection with the sale of trust  
22 deeds, or in connection with the sale of securities.

23 Finally, Defendants claim that because Brock was in the sub-prime lending business, he  
24 was subject to lawsuits in connection with foreclosures and point out that the Receiver is  
25 currently involved in four foreclosures. (Oppo., pp. 18-19.) The Commission encourages the  
26 Court to read the allegations underlying the fraud lawsuits against Brock. Most of the lawsuits  
27 do not emanate from foreclosures, but from allegations that Brock made intentional  
28 misrepresentations in connection with the sale of trust deeds to investors. For example, in April

1 2000, Brock agreed to pay \$35,000 to settle a lawsuit wherein Brock and his prior company,  
2 Golden Pacific Funding (which was located at the same address as the Fund and its affiliated  
3 entities), were sued for allegedly misrepresenting to a trust-deed purchaser the value of the  
4 property securing the trust deed. (Request for Judicial Notice Exs. 21 & 22.)

5 C. Defendants' Failure to Comply with the TRO Demonstrates Their Failure to  
6 Abide by the Law

7 In a blatant effort to mislead the Court, Defendants claim that Brock testified that he  
8 "inadvertently" signed the loan-servicing agreements with UMS.<sup>8</sup> (Oppo., p. 19.) But Brock  
9 testified exactly the opposite. Brock testified that he thought that one loan-servicing agreement  
10 that he signed on behalf of Clarence J. Richard was mixed in "with some others, and I signed it  
11 inadvertently." (White Dec. Ex. 27 (Brock Depo.), pp. 150:20-152:9 & Ex. 29.) But when asked  
12 if he signed "any of the other [seven] loan-servicing agreements inadvertently," Brock expressly  
13 stated, "Not that I know of." (White Dec. Ex. 27 (Brock Depo.) p. 152:10-12 & Ex. 29.)


14 Defendants' argument that Brock did not know EB Financial was worth more than \$5,000  
15 is just as specious. (Oppo., p. 20.) Brock testified that he drives a \$160,000 Bentley to which EB  
16 Financial holds title. (Brief Supptg. Motion, pp. 14.) That asset alone is worth more than \$5,000.

17 Finally, although Mr. Canty wrote his December 7th letter to investors just days after the  
18 preliminary injunction was issued, Mr. Canty was aware of the TRO, which had been issued  
19 several weeks before, and which similarly prohibited him from taking action on behalf of the  
20 Fund or Emvest, Inc. without prior approval from the Court or the Receiver.

21 V. CONCLUSION

22 For the foregoing reasons, the Court should grant Plaintiff's Motion for Partial Summary  
23 Judgment.

24 DATED: November 29, 2005

25   
26 Molly M. White  
27 Susan F. Hannan  
28 Attorneys for Plaintiff Securities and Exchange  
Commission

29 <sup>8</sup> Defendants did not provide the transcript pages preceding Brock's statement, which show that  
30 Brock inadvertently signed only one loan-servicing agreement. (See Casas Dec. Ex. 2.)

**PROOF OF SERVICE**

1 I am over the age of 18 years and not a party to this action. My business address is:

2  
3  U.S. SECURITIES AND EXCHANGE COMMISSION, 5670 Wilshire Boulevard, 11th  
Floor, Los Angeles, California 90036-3648

4 Telephone No. (323) 965-3998; Facsimile No. (323) 965-3908.

5 On November 29, 2005, I served the document entitled **PLAINTIFF SECURITIES AND**  
6 **EXCHANGE COMMISSION'S REPLY BRIEF SUPPORTING PARTIAL SUMMARY**  
**JUDGMENT** upon the parties to this action addressed as stated on the attached service list:

7  **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and  
8 mailing today following ordinary business practices. I am readily familiar with this  
agency's practice for collection and processing of correspondence for mailing; such  
9 correspondence would be deposited with the U.S. Postal Service on the same day in the  
ordinary course of business.

10  **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I  
11 personally deposited with the U.S. Postal Service. Each such envelope was  
deposited with the U.S. Postal Service at Los Angeles, California, with first class  
12 postage thereon fully prepaid.

13  **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly  
maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles,  
14 California, with Express Mail postage paid.

15  **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of  
the addressee as stated on the attached service list.

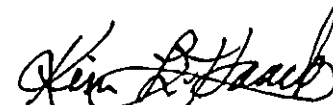
16  **FEDERAL EXPRESS:** By placing in sealed envelope(s) designated by Federal Express  
17 with delivery fees paid or provided for, which I deposited in a facility regularly  
maintained by Federal Express or delivered to a Federal Express courier, at Los Angeles,  
18 California.

19  **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the  
electronic mail address as stated on the attached service list.

20  **FAX:** By transmitting the document by facsimile transmission. The transmission was  
21 reported as complete and without error.

22  **(Federal)** I declare that I am employed in the office of a member of the bar of this Court,  
at whose direction the service was made. I declare under penalty of perjury that the  
23 foregoing is true and correct.

24 Date: November 29, 2005



25 KIM L. HAACK

1                    **SEC v. EMVEST MORTGAGE FUND, LLC, et al.**  
2                    **United States District Court – Southern District of California**  
3                    **Case No. 04 CV 2295 DMS (POR)**  
4                    **(LA-2864)**

5                    **SERVICE LIST**

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26                   ***Permanent Receiver***