

USDC SCAN INDEX SHEET



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U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

*Caquiere* 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(LSP)

**ORDER GRANTING NON-  
PARTY UNIFIED MORTGAGE  
SERVICES' APPLICATION TO  
PREVENT RECEIVER FROM  
TRANSFERRING THIRTEEN (13)  
LOAN SERVICING CONTRACTS**

[Doc. No. 204]

On December 2, 2005, the Court heard Non-Party Unified Mortgage Services' ("UMS") *ex parte* application for a temporary restraining order prohibiting the Receiver from transferring thirteen (13) loan servicing contracts from UMS to FCI National Lender ("FCI").<sup>1</sup> David R. Clark, Esq. appeared on behalf of UMS. Receiver Dennis M. Murphy and his counsel, James R. Felton, Esq., appeared telephonically. The Court, having considered UMS' *ex parte* application, declarations and other documents filed in support, the Receiver's Opposition, and the arguments of counsel, grants UMS' application.

<sup>1</sup> In its application for a temporary restraining order, UMS seeks to enjoin the Receiver from transferring fifteen (15) loans to another servicing agent. However, at the hearing on UMS' application, the Receiver clarified that only thirteen loans are subject to transfer. Accordingly, this Court's Order addresses only the thirteen loans in question.

1 On June 7, 2005, this Court issued an Order prohibiting the Receiver from transferring any  
2 loans where an express contract between Emvest Fund, LLC (“the Fund”) and UMS had been  
3 identified. Specifically, the Order provides:

4 For those loans where an express contract between the Fund and UMS  
5 has been identified, it appears that the selection of a new servicing  
6 agent during the term of the loan would breach that agreement . . . .  
7 This of course assumes that all loan contracts between the Fund and  
8 UMS contain a similar term to that contained in the exemplar contract,  
9 regarding the payment of 100% of the servicing fees upon early  
10 termination.

11 (June 7, 2005 Order at 11.) Based on this Court’s June 7, 2005 Order, UMS seeks to prohibit the  
12 Receiver from transferring thirteen loan servicing contracts between UMS and the Fund to FCI.<sup>2</sup> The  
13 Receiver argues that transfer of the loan servicing contracts is appropriate because “UMS has . . . failed  
14 to establish the existence and terms of 13 separate oral agreements with reference to those loans for  
15 which no written agreements exist.” (Receiver’s Opposition to UMS’ Motion at 7.) In other words,  
16 the Receiver contends he has the authority to transfer UMS’ current loan servicing contracts to another  
17 lender because there is insufficient evidence to establish that the thirteen oral agreements in dispute  
18 are identifiable, enforceable contracts.

19 Here, UMS provides as evidence of the existence of the loan servicing agreements, the  
20 declaration of Michele Canty (“Canty”), President and sole owner of UMS, who testified that “UMS  
21 was . . . directed and authorized by the Receiver, either verbally or in writing, to service each of the  
22 loans . . . in question, and UMS has serviced all of those loans since they were funded.” (Canty Decl.  
23 at ¶ 2.) The Receiver does not dispute that he directed and authorized UMS to service the loans in  
24 question; nor does the Receiver dispute that UMS has serviced the loans since they were funded.

25 To the extent the Receiver argues that the loan servicing contracts in question are not subject  
26 to the June 7, 2005 Order, the Court denies that argument. The Order does encompass the thirteen loan

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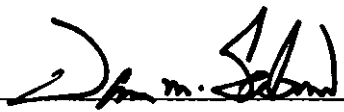
27 <sup>2</sup> A non-party seeking to intervene in an underlying action is ordinarily required to submit a  
28 timely application for intervention, pursuant to Fed.R.Civ.P. 24(a). A non-party that fails to submit  
an application for intervention generally lacks standing to raise claims for relief before the Court.  
Here, however, the Receiver has not opposed UMS’ application based on lack of standing. In addition,  
because UMS seeks only to enforce this Court’s *existing* Order, the Court finds it has jurisdiction to  
entertain UMS’ application, and any argument regarding standing has been waived. Given the limited  
scope of UMS’ request, the Court also treats UMS’ application as a request to enforce this Court’s  
earlier Order, rather than as a motion for temporary restraining order.

1 loan servicing agreements (whether oral or written) between UMS and the Fund which were in  
2 existence *before* the Receiver was appointed to oversee the Fund. Such an interpretation is consistent  
3 with the conduct of the parties and is just under the circumstances, given that trial in this matter will  
4 occur in approximately four weeks and disruption of the loan servicing agreements is unwarranted at  
5 this late date.

6 The Court therefore grants UMS' application. The Receiver is ordered not to transfer the  
7 servicing rights to the thirteen loans in question to FCI, or any other servicing agent, pending further  
8 order of the Court.

9 **IT IS SO ORDERED.**

10 Dated: 12.6.05

  
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**DANA M. SABRAW**  
United States District Judge

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16 CC: ALL PARTIES  
17 JUDGE PAPAS  
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