

USDC SCAN INDEX SHEET



CAG 12/12/05 10:01

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

229

MLIM.

1 CHRISTIAN D. HUMPHREYS, ESQ. (SBN 174802)
2 RANDY S. GROSSMAN, ESQ. (SBN 177890)
3 JOSEPH N. CASAS, ESQ. (SBN 225800)
4 MCKENNA LONG & ALDRIDGE LLP
5 750 B Street, Suite 3300
6 San Diego, CA 92101
7 Telephone: (619) 595-5400
8 Facsimile: (619) 595-5450

05 DEC -9 PM 2: 34
CLERK OF DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: *DeGuerre* DEPUTY

9 Attorneys for Defendants EMVEST MORTGAGE
10 FUND, LLC; EMVEST, INC.; and MILON LYLE
11 BROCK

12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA

14 SECURITIES AND EXCHANGE
15 COMMISSION,

16 Plaintiff,

17 v.

18 EMVEST MORTGAGE FUND, LLC;
19 EMVEST, INC.; and MILON LYLE BROCK,

20 Defendants.

CASE NO. 04 CV 2295 DMS (POR)

DEFENDANTS' MOTION IN LIMINE
TO EXCLUDE ALL EVIDENCE AND
REFERENCE TO ALLEGED FUND
ADVERTISEMENTS,
NEWSLETTERS, AND OTHER
SIMILAR EVIDENCE UNDER FED. R.
EVID. 402, 403, 602, 801, 901 AND 902.

[MOTION IN LIMINE NO. 4 OF 5]

Trial: January 3, 2006
Time: 9:00 a.m.
Ctrm: 10

21 Defendants Milon Lyle Brock, Emvest Mortgage Fund, LLC, and Emvest, Inc.

22 ("Defendants") respectfully submit the following Motion in Limine to exclude all evidence of and
23 references to alleged Fund advertisements, newsletters, and other similar evidence

24 ("advertisements").

25 ///

26 ///

27 ///

28 ///

ORIGINAL

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

I.

BACKGROUND

The Fund and Emvest, Inc. solicited investors through several means, including, *inter alia*, advertisements. The vast majority of Fund advertisements contained slight variations of the following language: “this document is not an offer to sell a security, nor a solicitation of an offer to buy a security. Such offering is made only by the prospectus...” The Fund’s Prospectus stated in capitalized lettering:

OFFERS AND SHARES ARE MADE SOLELY BY MEANS OF THIS PROSPECTUS AND THE ACCOMPANYING MATERIALS REFERRED TO HEREIN, INCLUDING THE OPERATING AGREEMENT OF THE COMPANY AND THE SUBSCRIPTION AGREEMENT ... NO OFFERING LITERATURE OR ADVERTISING IN WHATEVER FORM MAY BE RELIED UPON IN THIS OFFERING EXCEPT FOR THE DOCUMENTS REFERRED TO ABOVE.

Defendants’ MSJ, Docket No. 161, Exh. 7, 2004 Emvest Mortgage Fund LLC Prospectus at i (emphasis added). Further, all investors read and signed the Subscription Agreement which stated that they received, carefully reviewed, and relied only upon the Fund’s offering documents. *Defendants’ MSJ*, Docket No. 161, Exh. 11, *Subscription Agreement of Emvest Mortgage Fund LLC*, p. 1. Accordingly, the “total mix” of information that could have been used by a reasonable investor in making his or her investment decision was expressly limited to the written offering materials. Therefore, advertisements, newsletters, or the purported oral statements of salespersons could not have been material to a reasonable investor.

The SEC, however, apparently intends to introduce a myriad assortment of advertisements, newsletters, and other similar evidence (*e.g.* web pages or purported oral statements of sales persons). By doing so, the SEC will likely argue that language found in these documents was materially misleading to investors and as such, constituted securities fraud. However, before the SEC is allowed to offer such evidence, they must be prepared to pass several evidentiary hurdles – namely, relevance, authentication, hearsay, and that the probative value of the evidence is not outweighed by its prejudicial aspect. Failure on the SEC’s part to satisfy each and every one of these threshold evidentiary issues should result in the exclusion of their

1 proffered advertisement evidence. Thus, Defendants ask the Court to Exclude, in limine, any and
2 all references to such advertisements that fail to comport to the Federal Rules of Evidence.

3
4 **II.**

5 **FUND ADVERTISEMENTS, NEWSLETTERS, AND OTHER SIMILAR EVIDENCE**
6 **THAT FAILS TO PASS EVIDENTIARY SCRUTINY SHOULD BE EXCLUDED**

7 In order for evidence to be admitted, it must be relevant, it must be authenticated, it must
8 not contain hearsay, and its probative value must outweigh its prejudicial aspects.

9 **A. The Prospectus Language Renders the SEC's Proffered Evidence Irrelevant.**

10 The SEC wishes to introduce evidence of alleged Fund advertisements to show that
11 Defendants made material misrepresentations to investors. The United States Supreme Court, in
12 *Basic v. Levinson*, expounded the following test for determining materiality in the context of
13 securities fraud:

14 To fulfill the materiality requirement there must be a substantial likelihood
15 that the disclosure of the omitted fact would have been viewed by the
16 reasonable investor as having significantly altered the total mix of
17 information made available.

18 485 U.S. 224, 231-32 (1988) (quotations omitted.) While it is true that the total mix of
19 information includes: written materials distributed by the Defendants, oral statements made by
20 Defendants, information in newspapers, radio, as well as common knowledge imputed to the
21 general public, it is also true that warnings found in a prospectus that specifically disclaim
22 reliance on outside information can limit the universe upon which the total mix of information
23 exists. *Porter v. Shearson Lehman Brothers Inc.*, 802 F. Supp. 41, 54-58, citing, *Laird v.*
24 *Integrated Resources, Inc.*, 897 F.2d 826, 837 (5th Cir., 1990) (finding plaintiff's reliance on any
25 statements outside the written representations in the Prospectus unjustified).

26 As stated by the United States Supreme Court in *Basic*, "Materiality depends on the
27 significance the *reasonable* investor would place on the withheld or misrepresented information."
28 485 U.S. at 240 (emphasis added). Only an unreasonable investor would rely upon information
that they were expressly warned could not be relied upon and thus no reasonable qualified

1 investor would place any significance on advertisements, because such information was explicitly
2 disclaimed in the Fund's Prospectus.

3 In order to prove a material element of securities fraud, the proffered evidence must be
4 relevant. Here, the Prospectus expressly warned investors not to rely on advertisements. Since
5 no investor could reasonably ignore the plain language of the Prospectus which explicitly
6 disclaims any reliance on advertisements, such documents have no probative value as to the issue
7 of materiality. In other words, the advertisements were not within the "total mix" of information
8 upon which a reasonable investor could have based his or her investment decision. Thus, the
9 Court should exclude the advertisements on these grounds.

10 **B. The SEC's Proffered Evidence which Fails to Deal with the Fund is Irrelevant**

11 In order to prove a material element of securities fraud, the proffered evidence must be
12 relevant. In several instances, the SEC has used irrelevant Emerald Bay advertisements in an
13 attempt to prove its case against Defendants.¹ Because the Emerald Bay entities are not a party to
14 this suit, any representations they may have made in their advertisements, regardless of who
15 received them, lack any probative value as to Defendants' liability. As such, the Court should
16 exclude from evidence any advertisements that fail to deal with the Fund.

17 **C. The SEC's Proffered Evidence Lacks Foundation**

18 In order to admit evidence of the Fund's alleged advertisements into evidence, the
19 documents must be authenticated under Federal Rules of Evidence 901 or 902. Authentication is
20 satisfied by evidence sufficient to support a finding that the matter in question is what its
21 proponent claims. Fed. R. Evid. 901. The SEC claims the Fund misrepresented to investors ,
22 *inter alia*, that the Fund would pay 12% returns on investments through advertisements. *See, e.g.,*
23 *SEC's MSJ*, Docket No. 174 at 10. This claim implies the advertisements were actually received
24 by investors.² That was not always the case. In many instances, the SEC submitted

25 _____
26 ¹ *See, e.g., Sable Depo.*, Exhibits. 292.9, 292.31, 292.32, 292.36, 292.39.

27 ² Miriam Webster's Online Dictionary defines Advertisement as: a public notice; *especially* : one
28 published in the press or broadcast over the air. (emphasis added.) <http://www.m-w.com/dictionary/advertisement>

1 advertisements in support of their claims without an offer of proof that Defendants actually sent
2 the advertisements out or that any investor received them. Moreover, a substantial amount of
3 alleged advertisements were nothing more than unused drafts of advertisements downloaded from
4 Emvest, Inc. Vice President Steven Bradley's computer. *See Defendants Response to SEC's*
5 *Separate Statement of Material Fact*, Docket No. 190, no 58. As such, the SEC has failed to
6 provide evidence sufficient to support a finding that all alleged advertisements were what they
7 were purported to be – received advertisements. Thus, the Court should not allow the SEC to
8 offer into evidence any advertisement without proof that Defendants actually published it, along
9 with proof of when, how, and by whom publication was made.

10 **D. The SEC's Proffered Evidence Constitutes Inadmissible Hearsay**

11 The SEC's proffered advertisements are inadmissible hearsay since the alleged
12 advertisements are out of court statements offered to prove the truth of the matter asserted. Fed.
13 R. Evid. 801(c) and 802. While the SEC may claim that the advertisements constitute a party
14 admission under Rule 801(d), such a claim is undermined by the SEC's lack of foundation. As
15 demonstrated above, the SEC has not, and cannot, prove that all of the alleged Fund
16 advertisements were finalized and sent to investors as many of the alleged Fund advertisements
17 were drafts downloaded off of Mr. Bradley's computer. And because many of the Fund's alleged
18 advertisements were never sent out, they are irrelevant and cannot constitute an admission. The
19 Court should exclude the advertisements as inadmissible hearsay.

20 **E. The SEC's Proffered Evidence Should Be Excluded Under Rule 403.**

21 The gravamen of the SEC's case is that the Prospectus is materially misleading and/or
22 omits material facts. A plethora of alleged advertisements adds nothing to this inquiry.
23 Especially when the majority of the alleged advertisements mimics the language of the Prospectus
24 and points potential investors directly to the Prospectus for sales. Because the SEC's proposed
25 evidence contains irrelevant material, lacks foundation, and constitutes hearsay, it would unduly
26 waste judicial resources to review the admissibility of each and every advertisement. Given the
27 nil weight each advertisement has in conjunction with the Prospectus' disclaimer, the Court
28 should exclude the advertisements, newsletters, and purported oral statements.

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


III.

CONCLUSION

The SEC's proffered advertisement evidence should be excluded because (1) it is not probative to any issue in this case, (2) the evidence lacks foundation, (3) the evidence constitutes hearsay, and (4) it wastes the Court's time. As such, Defendants request this Court to exclude, in limine, any and all references to such advertisements, newsletters, and purported oral statements. In the alternative, Defendants request this Court order the SEC to make an strict offer of proof as to why this evidence should be introduced, why it is admissible, and how the SEC intends to introduce the evidence.

Dated: December 9, 2005

McKENNA LONG & ALDRIDGE LLP


By: _____

Christian D. Humphreys
Randy S. Grossman
Joseph N. Casas
Attorneys for Defendants
EMVEST MORTGAGE FUND, LLC;
EMVEST, INC.; and MILON LYLE BROCK

SD:22141481.1