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

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SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

BY FAX

SECURITIES AND EXCHANGE
 COMMISSION,
 Plaintiff,
 v.
 EMVEST MORTGAGE FUND, LLC,
 EMVEST, INC., and MILON LYLE BROCK,
 Defendants.

Case No. 04 CV 2295 DMS (POR)

REPLY MEMORANDUM OF POINTS
 AND AUTHORITIES SUPPORTING
 PLAINTIFF'S APPLICATION FOR AN
 ORDER TO SHOW CAUSE RE: CIVIL
 CONTEMPT AGAINST DEFENDANT
 BROCK;
 OBJECTIONS TO EVIDENCE
 PRESENTED BY DEFENDANT.

Date: February 24, 2006
 Time: 1:30 p.m.
 Courtroom: 10 (Hon. Dana M. Sabraw)

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1 **I. INTRODUCTION**

2 In opposing the Application for an Order to Show Cause filed by Plaintiff Securities and
3 Exchange Commission ("Commission"), Milon Lyle Brock ("Brock") admits that he violated the
4 Court's Temporary Restraining Order ("TRO"), the Order Granting Plaintiff's Application for a
5 Preliminary Injunction and Appointment of a Permanent Receiver ("Preliminary Injunction
6 Order"), or both. Brock further admits that he was able to comply with the Court's Orders. And
7 he confirms that Emvest Mortgage Fund, LLC ("the Fund") paid \$4,963 to Unified Mortgage
8 Service, Inc. ("UMS") as a result of his violation of the Court's Orders.

9 In defense of these acts, Brock asserts that his conduct, which bound the Fund to pay
10 thousands of dollars in direct contravention of the Court's orders, is merely a technical violation
11 that does not rise to the level of contempt. Brock's "technicality" argument verges on frivolous.
12 Brock also argues that his actions saved money and thus, the Court should not sanction him.
13 Brock's "no harm, no foul" argument is without merit because the Fund paid about \$5,000 in
14 fees because of Brock's misconduct.

15 As such, the Court should grant the Commission's Application and order Brock to show
16 cause why he should not be held in contempt and ordered to reimburse the Fund the fees that the
17 Fund paid UMS on the loan-servicing agreements at issue.

18 **II. ARGUMENT**

19 **A. Brock's Actions Were Not Merely Technical Violations**

20 Brock appears to think that as long as one mostly complies with a court's order that a
21 court should tolerate a few violations of that order. In presenting this argument, Brock cites to
22 *Go-Video v. M.P.A.A.*, 10 F.3d 693 (9th Cir. 1993). But the conduct in that case is easily
23 distinguishable from the conduct here.

24 In *Go-Video*, plaintiff Go-Video referred to, without disclosing the content of,
25 confidential materials obtained in discovery during an earlier, related lawsuit. *Id.* at 694.
26 Unfortunately for Go-Video, the material was subject to a stipulated protective order that
27 prohibited "any use 'whatsoever' of information obtained in discovery except for preparation and
28 trial of [the earlier action]." *Id.* at 695. The trial court found that Go-Video violated the "any

1 use whatsoever" provision of the protective order and held it in contempt; the Ninth Circuit
2 reversed. While it referred to Go-Video's conduct as technical violations, the Ninth Circuit
3 found that "defendant failed to prove by clear and convincing evidence that under a good faith,
4 reasonable interpretation of the protective order, [plaintiff] did not substantially comply with the
5 order." *Id.* Indeed, the Court noted that "if taken literally, the order would be absurd" and held
6 that for "the protective order to comply with common sense, a reasonable reading must connect
7 its prohibitions to its purpose – protection against disclosure of commercial secrets." *Id.*

8 In contrast, here, there is no absurdity or ambiguity in the literal reading of the Court's
9 orders, which stated that Brock should not "take any action or purport to take any action, in the
10 name of or on behalf of [the Fund] ... without the written consent of the ... receiver or order of
11 this Court." Clearly, Brock does not, and cannot possibly, claim that any reasonable reading of
12 this language permitted him to sign the loan-servicing agreements on behalf of the Fund. Indeed,
13 given that the provision sought to ensure that the Receiver had control over the Fund without the
14 interference of persons that were involved in fraudulent conduct, the only reasonable reading is
15 the literal reading – Brock could not act on behalf of the Fund.

16 Further, Brock's actions on behalf of the Fund were actions with legal significance. He
17 signed a contract on behalf of the Fund, thus, legally obligating the Fund and its investors to pay
18 money to UMS. His acts were not empty gestures. As such, his technicality argument must fail.

19 **B. Brock's Contempt Caused Investors to Lose About \$5,000**

20 Brock does not dispute that the Fund paid UMS close to \$5,000 because of the loan-
21 servicing agreements that he signed in violation of the Court's Orders. However, Brock would
22 like the Court to disregard that liability because he believes that, if he had obeyed the Court's
23 Orders, it would have cost the Fund more money to service the loans at issue. Brock's argument
24 lacks both factual and legal support.

25 Courts have "longstanding authority ... to enter broad compensatory awards for all
26 contempts through civil proceedings." *International Union, United Mine Workers of America v.*
27 *Bagwell*, 512 U.S. 821, 838 (1994). Such compensatory sanctions for civil contumacy should
28 "compensate the contemnors' adversary for the injuries which result from the noncompliance."

1 *Falstaff Brewing Corp. v. Miller Brewing Corp.*, 702 F.2d 770, 778 (9th Cir. 1983). Thus,
2 compensatory sanctions "must be based upon evidence of complainant's actual loss." *United*
3 *States v. United Workers of America*, 330 U.S. 258, 304 (1947). At the same time, a
4 compensatory "sanction need not be perfectly commensurate, dollar for dollar, with the
5 aggrieved party's actual loss." *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 344 F.3d 16, 21 (1st Cir.
6 2003) (*Goya II*). The sanction must simply "bear a reasonable relationship to the actual losses
7 sustained by the injured party." *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 78 (1st
8 Cir. 2002) (*Goya I*). Furthermore, where the "contumacious conduct render[s] it impossible to
9 determine with certainty" the exact loss amount, "[i]n fairness, then, doubts ought to be resolved
10 against the contemnor[]." *Goya II*, 344 F.3d at 21.

11 Here, the Fund paid fees in the amount of \$4,963 because of Brock's contumacious
12 conduct. As such, a sanction of \$4,963 is wholly appropriate and consistent with sanctions in
13 other civil contempt actions. For example, in *Goya I*, the contemnors sold an apartment for the
14 price of \$4,600,000 in violation of a court order. 290 F.3d at 78. The First Circuit affirmed the
15 trial court's compensatory sanction consisting of the full sale price of the apartment and did not
16 credit or even discuss any costs that may have been associated with the sale of the apartment.
17 The First Circuit, in *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979), also
18 affirmed a civil contempt sanction against a defendant that was based on the revenues, as oppose
19 to profits, that plaintiff would have received from selling spare parts that defendant sold. 605
20 F.2d at 20. In fact, the Court noted that defendant "puts itself in a vulnerable position by
21 arguing" against such a calculation of damages giving its contemptuous conduct. *Id.*

22 Furthermore, assuming the Court is willing to consider the irrelevant evidence presented
23 by Brock,¹ he offers nothing more than speculation as to what the costs would have been to the
24 Fund if he had decided to comply with the Court's Orders. He claims that the Receiver's only
25 option would have been to service the loans himself. This, of course, is simply speculation; we
26 do not know what the Receiver might have done because of Brock's contumacy.

27
28 ¹ As noted in the attached Objections to Brock's evidence, the Commission objects to the
evidence submitted by Brock.

1 Similarly, Brock argues that the Receiver's servicing of the loan would have cost more
2 than the payments made to UMS. Again, this is pure speculation. In support of his conclusion,
3 he points to Mr. Canty's declaration. Mr. Canty attempts to manipulate some numbers to come
4 up with what the Receiver would have charged to service the nine loans at issue, if Brock had not
5 violated the Court's order. Mr. Canty makes up a "service fee per service month" and applies
6 that number to the purported service months on the nine loans at issue. The Commission objects
7 to the relevance and competency of this evidence. But even if the Court were to consider it, the
8 evidence has nothing to do with the charging structure used by the Receiver on those loans that
9 he did service. The evidence presented by Brock shows that the Receiver charged on an hourly
10 basis to service loans. (See Declaration of Christian D. Murphy In Support of Defendants'
11 Opposition, Exh. 1 (Murphy Depo.) at 107:12-16.) Brock presents no evidence as to how long it
12 would have taken to service the nine loans at issue. At least then, Brock's speculation would
13 align with what might have been, if he had obeyed the Court's Orders.

14 In any event, Brock's effort to mitigate the costs of his noncompliance is too little and
15 comes too late. The Fund was forced to pay close to \$5,000 as a direct result of his contumacy.
16 That constitutes the actual loss that is compensable by a civil contempt sanction. Any doubts as
17 to whether that is, in fact, the actual loss suffered by the Fund was created solely because of
18 Brock's contumacy and, as such, should be resolved against him.

19 **C. The Court Should Hold Brock In Contempt**

20 Brock cannot identify any legal barrier that precludes this Court from finding Brock in
21 contempt and requiring him to reimburse the Fund the fees paid to UMS. Not surprisingly, the
22 thrust of Brock's opposition appears to be that the Court should exercise its discretion and turn a
23 blind eye to Brock's misconduct because he claims that he had a clean heart and the impact of
24 his misconduct was small. The Court should reject Brock's request.

25 "The absence of willfulness does not relieve from civil contempt." See *McComb v.*
26 *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); accord *In re Crystal Palace*, 817 F.2d 1361,
27 1365 (9th Cir. 1986) (rejecting entreaty to create a good faith exception to the requirement to
28 obey a court order). Thus, even if Brock could prove that his violations of the Court's Orders

1 were unintentional, his lack of intent is no defense.

2 Furthermore, even though he argues that he acted unintentionally, Brock presents no
3 evidence that he inadvertently signed the nine loan-servicing agreements. Conspicuously absent
4 from the evidence presented in opposition is a declaration from Brock attempting to explain why
5 he disregarded the Court's order. Instead, without even arguing that such was the case with
6 respect to the nine agreements at issue, Brock points out that he "often 'raced' through
7 documents placed on his desk and quickly signed them in the course of business." (Def.'s Opp.
8 at 2.) It seems unclear why this "practice" should provide any level of comfort to the Court. In
9 fact, Brock's statement raises the questions of (1) why he would have been racing through
10 documents related to the Fund after the issuance of the Court's orders, and (2) whether, given his
11 knack for failing to date his signatures, he improperly signed other loan-servicing agreements on
12 behalf of the Fund when he was so belatedly racing through Fund documents.²

13 With respect to the fact that the Fund paid just under \$5,000 because of Brock's
14 contumacy, there is no reason that the Fund should be forced to incur that cost because it might
15 seem paltry when compared to the \$1.26 million that Defendants will have to pay for their
16 fraudulent conduct. If anything, Brock should consider himself lucky that his contemptuous
17 conduct only resulted in a loss by the Fund of less than \$5,000. It is worth noting that Brock
18 likely did not know, at the time he signed, that the nine loan-servicing agreements at issue would
19 generate just below \$5,000. As explained in the Commission's initial memorandum, the loan-
20 servicing agreements would have required significantly higher payments had the loans not been
21 paid off so quickly. In fact, to the extent that he had any level of awareness of his misconduct,
22 Brock knew that these loan-servicing agreements could generate a substantial windfall for UMS
23 and result in a substantial loss for the Fund.

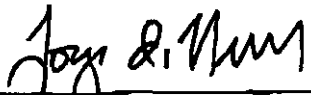
24
25 ² Additionally, Brock claims he did not know that Emerald Bay Financial, Inc. had assets greater
26 than \$5,000, thus excusing his failure to disclose his ownership interest in that company as
27 required by the TRO. This testimony is simply not credible. As established in trial, EB
28 Financial made over \$2 million in fees from the Fund. Further, Brock knew that EB Financial
held the title to the \$160,000 Bentley that he drove. (Declaration of Molly White Supporting
Plaintiff's Application for an Order to Show Cause Re: Civil Contempt Against Defendant
Brock, Ex. 3 (Brock Depo.) at 59:18-60:5.)

1 In short, the equities presented do not support allowing Brock to get away with
2 disregarding the Court's Orders. The Court should hold Brock in contempt.

3 **III. CONCLUSION**

4 As Brock admits, there is no dispute that he violated the Court's Orders. Further, there is
5 no dispute that the Fund had to pay \$4,963 as a result of Brock's contumacy. As such, the Court
6 should grant the Commission's Application for an Order to Show Cause. Alternatively, given
7 the lack of disputed, material facts, the Court should hold Brock in contempt and order him to
8 reimburse the Fund in the amount of \$4,963.

9
10 DATED: February 16, 2006



MOLLY M. WHITE
SUSAN F. HANNAN
J. JORGE DENEVE
Attorneys for Plaintiff
Securities and Exchange Commission

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3. With respect to ¶ 8 of Canty's Declaration:

- a. Rule 402 and Rule 403: Based on the same reasons as Objections 1.a. and 1.b. above.
- b. Rule 602: Based on the same reasons as Objection 1.c. above.

DATED: February 16, 2006

Respectfully submitted,



MOLLY M. WHITE
SUSAN F. HANNAN
J. JORGE DENEVE
Attorneys for Plaintiff
Securities and Exchange Commission

1 **PROOF OF SERVICE**

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

4 United States Securities and Exchange Commission, Pacific
5 Regional Office, 11th Floor, 5670 Wilshire Boulevard,
6 Los Angeles, California 90036-3648, Fax: (323) 965-3908.

7 On February 16, 2006, I served the foregoing document entitled **REPLY
8 MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING PLAINTIFF'S APPLICATION FOR AN
9 ORDER TO SHOW CAUSE RE: CIVIL CONTEMPT AGAINST BROCK; OBJECTIONS TO EVIDENCE
10 PRESENTED BY DEFENDANT** on all parties to this action addressed as
11 stated on the attached service list:

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

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

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

27 **PERSONAL SERVICE:** I personally delivered each such envelope by
28 hand to the office of the addressee.

FEDERAL EXPRESS: By placing in sealed envelope(s) designated
by Federal Express 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, California.

FAX (BY AGREEMENT ONLY): By transmitting the document by
facsimile transmission at the time shown on the attached
transmission report. The transmission was reported as complete
and without error, and the attached transmission report was
properly issued by the transmitting fax machine.

(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.

26 Date: February 16, 2006

27 
Brigitte Matthews

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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15 **And Milon Lyle Brock**

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