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U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

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11 UNITED STATES SECURITIES AND  
12 EXCHANGE COMMISSION,

Plaintiff,

13 vs.

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

17 Defendants.

CASE NO. 04cv2295-DMS(LSP)

**ORDER GRANTING  
PLAINTIFF'S APPLICATION  
FOR A PRELIMINARY  
INJUNCTION AND  
APPOINTMENT OF A  
PERMANENT RECEIVER**

18  
19 On December 3, 2004, the Court heard argument on Plaintiff's application for a  
20 preliminary injunction and appointment of a permanent receiver. Attorneys Molly M. White,  
21 Susan F. Hannan, and Alka N. Patel appeared for Plaintiff the United States Securities and  
22 Exchange Commission ("SEC"). Attorney Robert A. Cocchia appeared for Defendants Emvest  
23 Mortgage Fund, LLC; Emvest, Inc.; and Milon Lyle Brock. Dennis M. Murphy, Court-  
24 appointed temporary receiver, appeared in person and with his counsel, James R. Felton.  
25 Attorney David R. Clark appeared for related non-party Unified Mortgage Service, Inc. The  
26 Court has now considered the arguments of counsel and the issues presented in the pleadings.  
27 For the reasons discussed below, the SEC's application is GRANTED.

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I.

**BACKGROUND**

Defendant Milon Lyle Brock is the Chief Executive Officer of Defendant Emvest, Inc. (“Emvest”). Emvest is a California corporation formed in October of 2001. Emvest is the manager of Defendant Emvest Mortgage Fund, LLC (“Fund”), a California limited liability company formed in February of 2002. The Fund buys, hold, and sells real estate-backed mortgages and related instruments. The Fund invests in primarily high-yield, high-risk mortgages, to achieve earnings and grow the Fund’s asset base.

From March 2002 through August 2004, the Fund conducted a \$50 million securities offering: 50,000 shares at \$1,000 per share. The Fund solicited its investors through cold calls, radio ads, newspaper ads, newsletters, and a website—*www.megayield.com*. Some of the Fund’s ads boasted there would be “no loss of principal”; the Fund’s Prospectus stated that one of the Fund’s objectives was to “Preserve and return your capital contributions.” Currently, there are approximately 18,000 shares outstanding, held by roughly 270 investors.

In accordance with the Fund’s Operating Agreement and Share Subscription Agreement, the Fund pays investors a 12% annual return on their initial investment, as reduced by “cumulative Priority Operating Return Distributions to the Shareholders.” These priority returns are paid on a monthly basis. Thus, investors receive 1% of their unreturned invested capital every month. Pursuant to the Fund’s Operating Agreement, when the Fund expires in 2008, the balance of the investors’ capital is returned to the investors, less any distributions made by the Fund which exceeded earnings. In other words, each investor receives his or her 1% monthly distribution regardless of the Fund’s earnings; if the Fund’s earnings have not covered that 1% monthly payment over the life of the Fund, the investor will receive back his or her initial investment less any payments received in excess of available earnings. If the Fund underperforms, the investors risk losing a portion of their initial investment, which would have been used to cover the monthly distributions.

In April or May of 2004, the SEC began investigating whether Defendants violated federal securities laws in the Fund’s offering and related marketing. The SEC believes that

1 the Fund did not generate sufficient income to pay the promised 12% return to investors, and  
2 that by 2004, the Fund was losing money. According to the SEC's calculations, the Fund has  
3 been using new investor capital to pay returns to existing investors and cover operating losses;  
4 the SEC labels the Fund a "Ponzi scheme." The SEC alleges Defendants have dissipated  
5 investor capital, failed to properly value the investors' capital accounts to accurately reflect the  
6 reduction of capital, and neglected to maintain accurate financial statements about the current  
7 value of each investor's capital account.

8 The SEC also avers Defendants have made numerous misrepresentations or omissions  
9 to offerees and investors. First, Defendants told investors that a substantial amount of investor  
10 proceeds would be used to make and purchase loans secured by real property. In fact, the SEC  
11 maintains a substantial portion of investor capital has actually been used to pay returns to other  
12 investors. Second, Defendants claimed the Fund would not pay finders' fees or commissions  
13 to the Fund affiliates. However, the SEC believes the Fund paid a total of \$243,719.47 in  
14 finders' fees or commissions to Emerald Bay ("EB") Financial, Inc., a related company. Next,  
15 Defendants allegedly informed investors that the Fund would pay a 12% return on their  
16 investment; the SEC claims this is misleading because a substantial portion of the return on  
17 the investment was funded by new investor capital. Finally, Defendants represented that the  
18 Fund's objective was to preserve investor capital. But, according to the SEC, Defendants have  
19 known since at least August of 2003 that the Fund was decreasing the investors' capital  
20 accounts by distributing more money than it earned.

21 The SEC believes Defendants are engaged in ongoing fraud. Because the Fund will be  
22 in existence until 2008, Defendants are dissipating Fund assets by paying the 1% monthly  
23 distributions to investors. The SEC states that the Fund continued to lose money in 2004,  
24 although its monthly newsletter informs investors that they could continue to expect the 12%  
25 return in the future. Further, in April of 2004, Defendants announced a new mortgage  
26 investment fund—Emvest Mortgage Fund II ("Fund II")—claiming that the new fund will pay  
27 investors a 9.9% annual return.

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1 On November 16, 2004, the SEC filed the instant action for violations of Section 17(a)  
2 of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77q(a) (fraud in the offer and sales of  
3 securities), and Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C.  
4 § 78j(b), and corresponding Rule 10b-5, 17 C.F.R. § 240.10b-5 (fraud in connection with the  
5 purchase or sale of a security). On the same day, the Court conducted a hearing and issued a  
6 Temporary Restraining Order against Defendants. The TRO froze all distributions from the  
7 Fund to investors, and appointed Dennis M. Murphy as a temporary receiver. Since the filing  
8 of the TRO, the SEC complains that Defendants have refused to comply with the Court's  
9 Order, in that they have failed to allow Mr. Murphy access to the Defendants'  
10 affiliates—namely, EB Financial; EB Funding, Inc.; EB Financial of Southern California, Inc.;  
11 Unified Mortgage Service, Inc.; CNA Foreclosure Services, Inc.; TriStar Mortgage Fund Ltd.;  
12 and Heritage Mortgage Fund Ltd.

13 The SEC now moves for a preliminary injunction against the Defendants, pursuant to  
14 Section 20(b) of the 1933 Act, 15 U.S.C. § 77t(b), and Section 21(d) of the 1934 Act, 15  
15 U.S.C. § 78u(d). The SEC also requests that Mr. Murphy to be appointed as a permanent  
16 receiver. On November 24, 2004, Defendants filed their opposition, and the SEC filed a  
17 supplemental brief in support of the application. Defendants and the SEC both replied on  
18 November 30, 2004. Temporary receiver Murphy submitted a preliminary report, under seal,  
19 on December 3, 2004. On December 3, 2004, related non-party Unified Mortgage Service,  
20 Inc., submitted the declaration of Michele A. Canty.

## 21 II.

### 22 LEGAL STANDARD

23 The SEC is not "an ordinary litigant, but [rather] a statutory guardian charged with  
24 safeguarding the public interest in enforcing the securities laws." *SEC v. Mgmt. Dynamics,*  
25 *Inc.*, 515 F.2d 801, 808 (2<sup>nd</sup> Cir. 1975). As such, the SEC is held to a lower burden than a  
26 private civil litigant seeking injunctive relief. In deciding whether to issue an injunction,  
27 courts will look to the seriousness of the securities laws violations and the impact of the  
28 requested relief on the defendant. Other factors include the degree of defendant's culpability

1 and the length of time between the acts complained of and the time of suit.” 3 Thomas Lee  
2 Hazen, *Treatise on the Law of Securities Regulation* §16.2[2][B], at 449–50 (4<sup>th</sup> ed. 2002).

3 To obtain a preliminary injunction against Defendants in this case, the SEC must show:  
4 (1) a *prima facie* case that there has been a violation of the securities laws; and (2) a reasonable  
5 likelihood of future violations. See *SEC v. Unifund SAL*, 910 F.2d 1028, 1037 (2<sup>nd</sup> Cir. 1990)  
6 (citation omitted); *SEC v. United Fin. Group*, 474 F.2d 354, 358–59 (9<sup>th</sup> Cir. 1973); *SEC v.*  
7 *Fehn*, 97 F.3d 1276, 1295 (9<sup>th</sup> Cir. 1996). Although “an inference arises from illegal past  
8 conduct that future violations may occur,” failure to prove a reasonable likelihood of future  
9 violations may mean that no injunction will be granted. See *SEC v. Keracorp Indus., Inc.*, 575  
10 F.2d 692, 698–99 (9<sup>th</sup> Cir. 1978), *cert. denied* 439 U.S. 953 (1978); *SEC v. Cayman Islands*  
11 *Reinsurance Corp., Ltd.*, 734 F.2d 118, 119 (2<sup>nd</sup> Cir. 1984).

12 In “predicting the likelihood of future violations,” the Court must consider “the totality  
13 of the circumstances surrounding the defendant and his violations.” *SEC v. Murphy*, 626 F.2d  
14 633, 655 (9<sup>th</sup> Cir. 1980). The Court weighs such factors as: (1) the degree of scienter involved;  
15 (2) the isolated or recurrent nature of the infraction; (3) the defendant’s recognition of the  
16 wrongful nature of his conduct; (4) the likelihood, because of a defendant’s professional  
17 occupation, that future violations might occur; and (5) the sincerity of the defendant’s  
18 assurances against future violations. See *id.* (citing *SEC v. Bonastia*, 614 F.2d 908, 912 (3<sup>rd</sup>  
19 Cir. 1980)). The Court, exercising its equitable discretion, should require a more persuasive  
20 showing of the SEC’s entitlement to an injunction, “the more onerous . . . the burdens of the  
21 injunction it seeks.” *Unifund SAL*, 910 F.2d at 1039.

### 22 III.

### 23 DISCUSSION

24 Applying the standard set forth above, the Court must determine whether the SEC has  
25 established a *prima facie* violation of the securities laws, and a reasonable likelihood of future  
26 violations. Defendants insist the SEC falls short on both of these inquiries, because the SEC’s  
27 entire case rests on a flawed premise. Further, the SEC avers Defendants have violated the  
28 TRO by denying the temporary receiver access to certain related entities. Defendants deny that

1 these entities are “affiliates” as contemplated by the TRO, and therefore contend the temporary  
2 receiver has no right to access these entities. Finally, the TRO left open the issue of which  
3 party should pay the receivership fees. The SEC argues that under the securities laws, it should  
4 not be made to pay these fees, and that imposition of such fees on the SEC would violate  
5 public policy and the doctrine of sovereign immunity. The Court shall address each of these  
6 issues below.

7 **A. Prima Facie Violation of Securities Laws**

8 The SEC’s complaint alleges that Defendants have committed “fraud in the offer or sale  
9 of securities” (in violation of Section 17(a) of the 1933 Act), and “fraud in connection with the  
10 purchase or sale of securities” (in violation of Section 10(b) of the 1934 Act, and Rule 10b-5).  
11 To find a violation of Section 17(a) of the 1933 Act, the SEC must show that Defendants  
12 offered or sold a security by use of interstate commerce and, directly or indirectly: (1) with  
13 scienter, “employed devices, schemes, or artifices to defraud”; (2) “obtained money or property  
14 by means of untrue statements of a material fact or by omitting to state a material fact  
15 necessary in order to make the statements made, in light of the circumstances under which they  
16 were made, not misleading”; or (3) “engaged in transactions, practices, or courses of business  
17 which operated or would operate as a fraud or deceit upon the purchaser.” 15 U.S.C. § 77q(a).  
18 To find a violation of Section 10(b) of the 1934 Act, the SEC must show that Defendants,  
19 directly or indirectly, by use of interstate commerce, used or employed, in connection with the  
20 purchase or sale of any security, “any manipulative or deceptive device or contrivance in  
21 contravention of such rules and regulations as the [SEC] may prescribe as necessary or  
22 appropriate in the public interest or for the protection of investors.” 15 U.S.C. § 77q(a). Rule  
23 10b-5 is nearly identical to Section 17(a) of the 1933 Act, except that Rule 10b-5 extends to  
24 misstatements and omissions occurring in connection with either a *purchase or sale* of  
25 securities, while Section 17(a) is limited to fraudulent *sales and offers to sell*. 17 C.F.R. §  
26 240.10b-5; 2 Hazen, *supra* § 12.3[2], at 371–73 (“The clear purpose of Rule 10b-5 is to  
27 provide protection against investors being duped into purchasing or selling securities.”). In  
28 short, to establish a violation of securities laws under these sections, the SEC must show that

1 Defendants have deceived offerees or investors through false or misleading statements or  
2 omissions, in connection with the offering or sale of shares in the Fund.

3 The SEC insists the Defendants made a number of misstatements or omissions: (1) that  
4 investor proceeds would be used to make and purchase loans secured by real property; (2) that  
5 the Fund would not pay finders' fees or commissions to Fund affiliates; (3) that the Fund  
6 would pay investors a 12% annual return on their capital; and (4) that the Fund's objective  
7 included preserving investors' capital. (*Ex Parte* App. for TRO, at 11.) The SEC maintains  
8 that none of these statements are true, amounting to liability under the anti-fraud provisions  
9 of the securities laws.

10 Three of the four alleged acts of fraud involve using new investor capital to pay existing  
11 investors' returns—a "Ponzi scheme." In essence, the SEC's entire case against Defendants  
12 boils down to a single allegation: in the past two years, the Fund has paid out more than it has  
13 taken in. The SEC also provides a copy of a fax sent to Defendant Brock from Gary Kornfeld,  
14 the Fund's accountant. Mr. Kornfeld warns that the distributions to investors have been "in  
15 excess of the actual earnings of the fund." (Hannan Decl., Ex. 15, at 229.) With this in mind,  
16 the SEC deduces that substantial portions of investor proceeds must have been used to make  
17 up the difference. Based on this assumption, the SEC maintains the Defendants have  
18 defrauded their investors.

19 It therefore becomes critical to ask how the SEC came up with this assumption. The  
20 SEC relies on the calculations of attorney Kelly Bowers, Assistant Regional Director of the  
21 SEC. Mr. Bowers analyzed Defendants' bank records, financial records, tax records, employee  
22 lists, investor lists, and offering documents. (Bowers Decl. ¶ 3.) He first analyzed the Fund's  
23 records for 2003. He then calculated the Fund's gross income and operating expenses. (*Id.*  
24 at ¶¶ 6–7.) Once Mr. Bowers determined these two figures, he calculated the Fund's total  
25 operating profit by subtracting the operating expenses from the gross income; he arrived at an  
26 operating profit of \$584,696. (*Id.* at ¶ 8.) Because the Fund paid out \$908,462 to investors in  
27 2003, Mr. Bowers concluded that investor distributions exceeded operating profit by \$363,766.  
28 (*Id.* at ¶ 10.) From January through August of 2004, Mr. Bowers performed the same

1 calculations and came up with a \$1,285,965 deficit (operating loss of \$112,259; distributions  
2 to investors of \$1,173,706.). (*Id.* at ¶ 17 & Ex. 11.) To make up for this shortfall, the SEC  
3 assumes Defendants must have paid the existing investors distributions out of new investor  
4 capital, which would constitute securities fraud. The SEC reasons: Where else could the  
5 excess funds have come from?

6 Defendants vehemently deny any fraud in their management of the Fund. They insist  
7 that Mr. Bowers's calculations are fatally flawed in at least three ways: (1) he used the wrong  
8 method of accounting to arrive at his conclusions; (2) he made incorrect classifications and  
9 assumptions; and (3) he failed to reconcile the total distribution to investors against the Fund's  
10 general ledger and other accounting records. (Opp'n at 6.) In support, Defendants provide the  
11 declaration of J. Stephen Hawkins, a Certified Public Accountant. Mr. Hawkins reviewed the  
12 Fund's Quickbooks records (containing the general journal, posting of cash receipts and  
13 disbursements, general ledger, balance sheet, and income statement for January of 2003  
14 through August of 2004), and Mr. Bowers' declaration, with the attached exhibits. (Hawkins  
15 Decl. at ¶ 3.)

16 Mr. Hawkins explains that Mr. Bowers used the Cash Receipts and Disbursements  
17 method of accounting ("Cash Method") to arrive at his results and conclusions. (*Id.* at ¶ 4(A).)  
18 According to Defendants, although the Cash Method may be used by some businesses for tax  
19 purposes, it is not generally satisfactory for arriving at a clear understanding of the profitability  
20 of most companies. (Defendants' Opp'n at 6 & n.2.) Specifically, the Cash Method is  
21 disfavored when there is a delay between earning revenue and depositing the funds into the  
22 company's accounts. (Hawkins Decl. at ¶ 4(A).) Under the Cash Method, only *actual* cash  
23 receipts and *actual* cash disbursements are considered in calculating the net income of the  
24 Fund. (*Id.* at ¶ 5.) Also, the Cash Method risks mislabeling some transactions as expenses:  
25 certain cash disbursements may technically reduce cash, but may not be "expenses" because  
26 they represent the acquisition of an asset, so focusing solely on "cash disbursements" may not  
27 truly reflect the company's net profitability. (*Id.*) Rather than arriving at a net operating profit,

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1 the Cash Method would more appropriately be used to determine a company's "excess of cash  
2 receipts over cash disbursements." (*Id.*)

3 Mr. Hawkins states that the "more correct method of analyzing the Fund's profits is the  
4 Accrual Basis method of accounting" ("Accrual Method"). (*Id.* at ¶ 6.) With the Accrual  
5 Method, a company's income is determined by the company's right to receive revenue in the  
6 year the contracts or sales are consummated (whether or not such revenue is actually collected  
7 in cash and deposited in the bank). (*Id.*) Put another way, the Accrual Method requires that  
8 income be recognized when earned, and that expenses be recorded when incurred. In terms  
9 of this case, using the Accrual Method, the Fund may properly record revenue and expenses  
10 in its books for the year 2004, even though such revenue and expenses have not been reflected  
11 in the Fund's bank account. (*Id.*)

12 Mr. Hawkins then prepared a preliminary draft of the Fund's Balance Sheet and Profit  
13 and Loss Statement for January of 2004 through August 31, 2004, using the Accrual Method.  
14 Mr. Hawkins calculated a net profit for this period of approximately \$1,058,474.70. (*Id.* at ¶  
15 8.) This figure lies in stark contrast to Mr. Bowers' determination that the Fund had a net loss  
16 of \$112,259 for this same period. Recalling the SEC's assumption—that the Fund's  
17 disbursements exceeded its revenue and thus, the Defendants made up the difference with new  
18 investor capital—Mr. Hawkins' explanation and recalculation of the Fund's profitability  
19 discredits the SEC's *prima facie* case of securities fraud.

20 Mr. Hawkins also explains several other problems with Mr. Bowers' calculation.  
21 Specifically, when Mr. Bowers included certain amounts in the "other payments" category  
22 (Bowers Decl. ¶ 15(b)(ix)), he apparently misclassified approximately \$571,000 of the Fund's  
23 cash disbursements as "expenses," which inaccurately reduced the Fund's net income. These  
24 disbursements include such items as trust deed purchases and capital advances, which would  
25 not be characterized as an "expenses," but more properly as "assets." (Hawkins Decl. ¶ 9 &  
26 Ex. C.) In total, Mr. Hawkins states that because Mr. Bowers improperly relied on the Cash  
27 Method of valuation, and erroneously labeled some cash disbursements as expenses, his

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1 calculation for 2004 (net operating loss of \$112,259) is off by approximately \$1,170,000. (*Id.*  
2 at ¶ 10.)

3 Further, Mr. Hawkins critiques Mr. Bowers' calculation of distributions to investors.  
4 In 2004, Mr. Bowers determined that the Fund made distributions to investors of  
5 \$1,173,706.22. (Bowers Decl., Ex. 11.) However, Mr. Hawkins points out that this figure  
6 incorporates only a review of bank records and cash disbursements, without any reconciliation  
7 with the Fund's general ledger or other accounting records. (Hawkins Decl. at ¶ 11.) With  
8 these additional tools, Mr. Hawkins recalculated the distributions to investors in 2004, and  
9 found a total of \$1,008,743.66. (*Id.* at ¶ 12.) Returning to Mr. Hawkins' determination above,  
10 that the Fund's net profit for this period was \$1,058,474.70, this leaves the Fund with net  
11 profits in excess of investor distributions in the amount of \$49,984.60. (*Id.*)

12 Due to time constraints, Mr. Hawkins did not calculate the Fund's net profitability for  
13 2003. (*Id.* at ¶ 14.) However, he did indicate that Mr. Bowers' calculations for 2003 are  
14 similarly flawed, because of the use of the Cash Method of accounting, and because Mr.  
15 Bowers used only the Fund's 2003 income tax return (not the Fund's bank statements) to  
16 determine the Fund's cash receipts and disbursements for 2003. (*Id.* at ¶ 13.) With Mr.  
17 Hawkins's declaration and explanation of the shortcomings in the Mr. Bowers's analysis,  
18 Defendants argue the Fund's net profit for 2003 and 2004 exceeded its disbursements to  
19 investors. Because of this, the SEC's underlying assumption no longer holds up. In other  
20 words, the SEC cannot show of a *prima facie* case of securities fraud.

21 In reply, the SEC attacks Mr. Hawkins's analysis as misleading and incomplete. It  
22 provides the declaration of Alka N. Patel, an attorney with the SEC and a Certified Public  
23 Accountant. In addition, the SEC sheds additional light on Mr. Hawkins's analysis with a copy  
24 of his deposition. Most important, in applying the Accrual Method to the Fund's financial  
25 situation, Mr. Hawkins only accounted for revenues on the accrual basis; he did not accrue  
26 expenses. (Patel Decl. at ¶ 4(a); Hawkins Depo. at 90:15-92:10 ("Q: Did you account for  
27 accrued expenses at all in your analysis? A: Not specific accrued expenses, no.") Mr.  
28 Hawkins stated in his deposition (and common sense would agree) that any business, including

1 the Fund, incurs certain expenses in a current period that are actually paid some time  
2 later—using the Cash Method, these expenses would be recorded later, when paid; using the  
3 Accrual Method, these expenses would have been recorded earlier, when incurred. By only  
4 accounting for accrued revenues, Mr. Hawkins would not have recorded such expenses until  
5 some time in the future, although corresponding revenues would be recorded now (these  
6 revenues may not be collected until later). Put simply, Mr. Hawkins did not match the Fund’s  
7 accrued revenues to its accrued expenses, thus painting an inaccurately optimistic picture of  
8 the Fund’s profitability. In the words of the SEC: “He took into account all the benefits of an  
9 accrual method, by including the current period revenue that the Fund expect to collect in the  
10 future, but he did not include any of the corresponding expenses that it incurred.” (SEC Reply  
11 at 2–3.)

12 Moreover, Mr. Hawkins could not identify the specific items that were adjusted to  
13 convert the Fund’s financial statements from the Cash Method to the Accrual Method.  
14 (Hawkins Depo. at 86:21–87:3.) According to Mr. Hawkins’ Exhibit C, in 2004, the  
15 adjustment in net income for the change from the corrected Cash Method to the Accrual  
16 Method was \$599,322.44. (Hawkins Decl., Ex. C.) But \$415,000 of this amount represents  
17 misclassification errors identified by the Fund’s controller as adjustments.<sup>1</sup> (Hawkins Depo.  
18 at 82:7–85:18.)

19 Mr. Hawkins also reclassified some of Mr. Bowers’ “expenses” as “capital advances.”  
20 (Hawkins Decl., Ex. C.) A portion of these capital advances were costs incurred by the Fund  
21 for collection of delinquent loans, including disbursements to collection agencies and law  
22 firms. (Patel Decl. at ¶ 4(c).) But Mr. Hawkins had no way of knowing whether these costs  
23 would be recoverable—he did not review the loan contracts to determine whether they  
24 contained a right of reimbursement, but simply relied on Defendant Brock’s representations.  
25 (*Id.*) In other words, some of all of these disbursements expended for collecting delinquent  
26 loans might accurately be characterized as non-recoverable “expenses,” rather than merely

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28 <sup>1</sup> For example, the Fund’s controller misclassified a \$94,774 check as an “interest expense” when it  
\$94,000 of this amount was actually repayment of principal (not an expense); only \$774 of this amount was  
correctly labeled an “expense.” (Hawkins Depo. at 83:12–20.)

1 “capital advances.” (SEC Reply at 3.) Further, Mr. Hawkins apparently failed to account for  
2 \$342,391.27 in collection-related costs, evidencing that some of the loans owned by the Fund  
3 might be experiencing collectibility issues; he did not provide any reserves to account for  
4 uncollectible loans. (Patel Decl. at ¶ 4(c).) Nor did he have any knowledge concerning the  
5 trust deeds’ market value, or whether any of the loans were not performing. (Hawkins Depo.  
6 at 32:22–33:7 & 50:18–51:12.) A substantial portion of the Fund’s assets are the trust-deeds  
7 on the real estate loans. Because Mr. Hawkins assumed all of these high-risk loans would be  
8 repaid (by not providing for any “bad debt” reserves), and because he did not know whether  
9 any of the loans were non-performing, Mr. Hawkins’s assessment of the Fund’s assets and  
10 revenues is likely overstated. (SEC Reply at 3.)

11 Finally, Mr. Hawkins’s calculations depend on the reclassification of two separate  
12 categories of transactions: Mr. Bowers called these transactions “expenses”; Mr. Hawkins  
13 reclassifies them as “capital advances incorrectly reported by Bowers as expenses,” and “costs  
14 of assets or investments incorrectly reported by Bowers as expenses.” (Hawkins Decl., Ex. C;  
15 SEC Reply at 4.) However, Mr. Hawkins only reclassified these transactions in reliance on  
16 Defendant Brock’s representations that these items would be recoverable. (Hawkins Depo.,  
17 at 17:17–20:3.) Mr. Hawkins did not review any source documentation to substantiate  
18 Defendant Brock’s claims: “As far as trying to determine whether Mr. Brock’s explanation was  
19 valid based on looking at supporting documents, at this time I have not done that.” (*Id.* at  
20 18:20–22.) The same unsupported reliance on Mr. Brock’s assurances also led to the  
21 reclassification of \$229,020 in checks from “expenses” to “assets.” (*Id.* at 67:13–69:3.)

22 In comparing the accounting methods and assumptions employed by the parties, the  
23 Court concludes it is unable to rely on Mr. Hawkins’s determination that the Fund profited in  
24 2004. More likely, even using the Accrual Method of accounting to interpret the Fund’s  
25 financial transactions over the past few years, the Fund did not have sufficient revenue to cover  
26 its distributions to investors. Since the issuance of the TRO, Mr. Murphy (the temporary  
27 receiver) has identified significant financial issues, and made several “preliminary findings”:  
28 (1) the Fund was not generating sufficient income to cover the cost of operations and meet its

1 monthly distribution obligations to shareholders; (2) the Fund was apparently using investor  
2 capital to cover its shortfall; and (3) investors' capital position has been eroded. (Preliminary  
3 Report of Receiver, at 5–6.) Absent some other explanation, the Court is persuaded that  
4 Defendants used new investor funds to pay the 12% annual returns to existing investors. The  
5 SEC has therefore made an adequate showing that the Fund operates as a classic Ponzi scheme.  
6 See Black's Law Dictionary at 1180 (7<sup>th</sup> ed. 1999) (defining "Ponzi scheme" as: "A fraudulent  
7 investment scheme in which money contributed by later investors generates artificially high  
8 dividends for the original investors, whose example attracts even larger investments.").

9 The SEC points to several specific misstatements or omissions made by Defendants in  
10 connection with soliciting investors for the Fund. In their pleadings, Defendants acknowledge  
11 that the Fund would not return the entirety of the shareholders' original investments. Rather,  
12 the Fund would only return the initial investment "less any payments he has received in excess  
13 available earnings." (Opp'n at 4.) However, the Fund did not adequately convey this risk to  
14 potential investors. Rather, the Fund's newsletters and advertisements boasted that there  
15 would be "no loss of principal." (Hannan Decl., Ex. 11, at 192; Ex. 13, at 214.) Moreover,  
16 as to the investors whose capital had already been returned, the Fund gave them their entire  
17 investment back, even though the Fund was experiencing a net operating loss. According to  
18 the Fund's accountant: "It appears that when an investor leaves the Fund, you distribute their  
19 original investment in full. . . . Therefore, the investors which have left the fund will have  
20 received distributions in excess of their actual capital accounts." (*Id.*, Ex. 15, at 229.)

21 Looking at the Fund's Prospectus, Defendants claim the language adequately conveys  
22 that investors were told about the potential loss of principal. The Prospectus tell investors that  
23 they are entitled to a 12% annual return of "unreturned original invested capital" (Opp'n, Ex.  
24 B, at 7), and that shareholders were entitled to 12% annual returns on their original investments  
25 "as reduced by cumulative Priority Operating Return Distributions to the Shareholders" (*id.*  
26 at 18). The Fund's Operating Agreement reiterates that 12% return would be calculated using  
27 "the amount of capital contributed to the Company in consideration for Shares reduced by the  
28 cumulative amount of distributions to shareholders in respect of such Shares." (*Id.* at 37.)

1 Defendants claim the inclusion of “unreturned” and “as reduced by . . .” adequately warned  
2 investors that some of their original capital might be used to fund the 12% annual distributions.  
3 (Opp’n at 9–10.) However, the SEC responds that this language is too confusing to  
4 sufficiently convey the risk. Because investors were allowed to withdraw portions of their  
5 original investment (*see* Hannan Decl. in Supp. of Reply (Testimony of Defendant Brock), Ex.  
6 6, at 140:16–141:19.), the term “unreturned” might reasonably apply to that portion of the  
7 investment which had not been withdrawn by the investor. Also, the Fund had apparently been  
8 making 12.5% distributions based on the investors’ original investments, not their “reduced”  
9 capital accounts. (SEC Reply at 7.)

10 The SEC also focuses on Defendants’ promises not to pay finders’ fees from the Fund.  
11 The SEC claims Defendants paid “almost \$245,000 in commissions and finders’s fees to one  
12 of its affiliates, EB Financial” (*Ex Parte* App. at 7), despite the statement in the Fund’s  
13 prospectus that “affiliates of [Emvest] may receive loan origination, broker’s, finder’s, and/or  
14 other fees from third-parties (*but not the Company*), in connection with the acquisition and/or  
15 disposition of assets comprising of the [Fund’s] Loan Portfolio . . . .” (Opp’n, Ex. B, at 20)  
16 (emphasis added). Defendants argue that the \$243,719.47 check paid to EB Financial was  
17 merely a “discount fee” paid to EB Financial for “arranging the purchase of bulk loans for the  
18 Fund at a substantial discount.” (Opp’n at 11.) According to the SEC, Defendants are simply  
19 recharacterizing a “finders’ fee” as a “discount fee.” (SEC Reply at 8.) Moreover, a “discount  
20 fee” paid by Emvest to EB Financial certainly falls within the prohibition on “other fees”  
21 contained in the Prospectus. (*Id.*)

22 For all these reasons, the SEC has sufficiently established a *prima facie* case of  
23 securities fraud. The Fund has been paying out distributions to investors which exceed its  
24 earnings. This raises a strong presumption that the excess cash is taken directly from new  
25 investors and paid to existing investors in order to generate an artificially high return (a Ponzi  
26 scheme). The language of the Fund’s Prospectus and Operating Agreement omits or  
27 misrepresents the risk of losing the original investment, or that a portion of the 12% annual  
28 return would be paid out of that original investment—especially in light of the Fund’s

1 advertisements that there would be “no loss of principal” and that the Fund’s objective was  
2 “capital preservation.” Further, it appears that Defendants have paid a finders’ fee to EB  
3 Financial, in contravention of the express language of the Prospectus. Consequently, the SEC  
4 has met its burden of showing “a *prima facie* case that a violation of the securities laws has  
5 occurred.” *Mgmt. Dynamics, Inc.*, 515 F.2d at 808.

6 **B. Reasonable Likelihood of Future Violations**

7 Having established a *prima facie* case of securities fraud, the SEC must also show a  
8 reasonable likelihood of future violations. As mentioned above, “an inference arises from  
9 illegal past conduct that future violations may occur.” *Keracorp Indus., Inc.*, 575 F.2d at  
10 698–99. The Court also must consider: (1) the degree of scienter involved; (2) the isolated or  
11 recurrent nature of the infraction; (3) the defendant’s recognition of the wrongful nature of his  
12 conduct; (4) the likelihood, because of a defendant’s professional occupation, that future  
13 violations might occur; and (5) the sincerity of the defendant’s assurances against future  
14 violations. *See Bonastia*, 614 F.2d at 912.

15 Defendants argue that there is no possibility of future violations (let alone a  
16 “probability”), because the Fund is now closed to new investments.<sup>2</sup> (Opp’n at 13.)  
17 Nonetheless, future violations need not involve new investments in the Fund; rather, continued  
18 distributions in excess of Fund revenue may constitute securities fraud, making actionable  
19 certain statements made by Defendants to offerees when soliciting investors. (SEC Reply at  
20 10.) Further, it appears at this stage of the proceedings that Defendants have acted with a high  
21 degree of scienter, given the Fund’s accountant’s warning on August 16, 2003, that the Fund  
22 was not taking in adequate revenue to cover disbursements to investors. (Hannan Decl., Ex.  
23 15, at 229.)

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26 <sup>2</sup> There is a dispute concerning whether Defendants accepted new investments after August 16, 2004.  
27 (SEC Supp. Brief at 7; Defendants’ Reply at 8.) Defendants maintain any monies deposited after August 16,  
28 2004, were merely permitted to honor transactions occurring before August of 2004. (Defendants’ Reply at  
8.) Regardless, the Court finds a substantial likelihood of future violations: there is a significant risk of  
continued asset dissipation; and any moratorium on accepting new investments is self-imposed. (Brock Decl.  
in Support of Defendants’ Reply, at ¶ 6.)

1 Defendant Brock also appears to have a history in his business transactions involving  
2 governmental oversight or intervention. For example, his real estate license was suspended  
3 for 30 days in 1984, because of trust account violation. (Hannan Decl. in Supp. of Reply, Ex.  
4 1.) Again in 1986, Defendant Brock's real estate license was revoked until he paid \$10,000  
5 restitution plus interest to Robert Mitchell. (*Id.*, Ex. 2.) Nine years later, the California  
6 Department of Corporations ordered Defendant Brock to desist and refrain from further  
7 offering or selling securities, unless certain qualifications were met. (*Id.*, Ex. 4.) Finally, in  
8 1995, all of Defendant Brock's real estate licenses and licensing rights were again revoked.  
9 (*Id.*, Ex. 3.)

10 Based on the totality of the circumstances, and because Defendants remain in a position  
11 to continue making distributions of Fund assets to certain investors, in excess of the Fund's  
12 assets and revenues, there is a significant risk that Fund assets will continue to dissipate.  
13 Therefore, the Court finds there is a reasonable likelihood of future securities laws violations.  
14 Consequently, the SEC has met its burden in seeking a preliminary injunction against  
15 Defendants. Further, Mr. Murphy shall be appointed as permanent receiver.

16 **C. Scope of Order**

17 The SEC argues Defendants have violated the TRO by not giving the temporary  
18 receiver access to certain entities the SEC believes are "affiliates" of Emvest. (Supp. Brief at  
19 2.) The TRO specifically appoints Mr. Murphy as temporary receiver over Emvest, the Fund,  
20 "and their subsidiaries and affiliates . . . ." (TRO at ¶ IV.) The SEC contends EB Financial;  
21 Emerald Bay Funding, Inc.; Emerald Bay Financial of Southern California, Inc.; Unified  
22 Mortgage Service, Inc.; CNA Foreclosure Services, Inc.; TriStar Mortgage Fund Ltd.; and  
23 Heritage Mortgage Fund Ltd., are "affiliates" of Emvest. (Supp. Brief at 2.) The SEC  
24 therefore insists Defendants have not honored the TRO. Defendants respond that these entities  
25 do not fit within the concept of "affiliates" as contemplated by the TRO and thus, there is no  
26 basis for giving the temporary receiver access to these companies.

27 Rather than address the nature of the relationships between Defendants and these related  
28 entities, the Court is satisfied that the SEC will be able to perform its investigatory function,

1 and protect the public, by relying on its subpoena and deposition powers. According to Mr.  
2 Murphy, he can achieve his stated goals as receiver without expanding the scope of the  
3 receivership to include these entities. Consequently, the Court limits the scope of the TRO,  
4 this Order, and the permanent receivership, to Defendants Emvest, the Fund, and Mr. Brock  
5 only. Except as otherwise set forth below, this Order and the permanent receivership do not  
6 relate to EB Financial; Emerald Bay Funding, Inc.; Emerald Bay Financial of Southern  
7 California, Inc.; Unified Mortgage Service, Inc.; CNA Foreclosure Services, Inc.; TriStar  
8 Mortgage Fund Ltd.; or Heritage Mortgage Fund Ltd.

9 **D. Receivership Fees**

10 In the TRO, the Court left open the issue of which party would pay the receivership  
11 fees. (TRO at 9.) The SEC contends it should not be made to pay these fees for several  
12 reasons. First, Section 22(a) of the 1933 Act, 15 U.S.C. § 77v, and Section 27 of the 1934 Act,  
13 15 U.S.C. § 78aa, state that “[n]o costs shall be assessed for or against the [SEC] in any  
14 proceeding under this title brought by or against it in the Supreme Court or other such courts.”  
15 Second, the doctrine of sovereign immunity instructs that the SEC, as an agent of the  
16 Government, may not be assessed damages or fees absent its consent. *See SEC v.*  
17 *Independence Drilling Corp.*, 595 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1975) (reversing the district court’s  
18 assessment of receivership fees upon the SEC, based on the federal securities laws and  
19 sovereign immunity). Finally, public policy mandates that the SEC not bear this cost. In this  
20 case, the receiver acts to benefit the Fund by managing the business’s day-to-day operations,  
21 and ensuring that the Fund’s assets are not further dissipated; the public enjoys no direct  
22 benefit. Accordingly, the Court should assess fees to the party receiving the benefit. *See In*  
23 *re San Vincente Med. Partners, Ltd.*, 962 F.2d 1402, 1409 (9<sup>th</sup> Cir. 1992). In light of these  
24 arguments, the Court agrees that the receivership fees should be assessed to Defendants.

25 **IV.**

26 **CONCLUSION AND ORDER**

27 For these reasons, the SEC’s motion for a preliminary injunction is **GRANTED**. **IT**  
28 **IS HEREBY ORDERED** that Defendants are hereby restrained and enjoined from directly

1 or indirectly, in the offer or sale of any securities, by the use of any means or instruments or  
2 transportation or communication in interstate commerce or by the use of the mails:

- 3 A. employing any device, scheme, or artifice to defraud;
- 4 B. obtaining money or property by means of any untrue statement of a material fact  
5 or any omission to state a material fact necessary in order to make the statements  
6 made (in light of the circumstances) not misleading;
- 7 C. engaging in any transaction, practice, or course of business which operates or  
8 would operate as a fraud or deceit upon the purchaser;

9 in violation of Section 17(a) of the 1933 Act, 15 U.S.C. § 77q(a).

10 **IT IS FURTHER ORDERED** that Defendants are hereby restrained and enjoined from  
11 directly or indirectly, in the offer or sale of any securities, by the use of any means or  
12 instrumentality of interstate commerce, or of the mails, or of any facility of any national  
13 securities exchange:

- 14 A. employing any device, scheme, or artifice to defraud;
- 15 B. making any untrue statement of a material fact or omitting to state a material fact  
16 necessary in order to make the statements made (in light of the circumstances)  
17 not misleading;
- 18 C. engaging in any act, practice, or course of business which operates or would  
19 operate as a fraud or deceit upon any person;

20 in violation of Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder,  
21 17 C.F.R. § 240.10b-5.

22 **IT IS FURTHER ORDERED** that, except as otherwise ordered by this Court,  
23 Defendants are hereby restrained and enjoined from making any direct or indirect distribution  
24 of assets to investors in Emvest Mortgage Fund, LLC. This Order shall not be construed as  
25 an all-encompassing “asset freeze,” but rather prohibits only distributions made to investors  
26 from Fund assets—as either a return on principal or as a return of the investors’ original  
27 capital. This distribution freeze relates to all accounts at any bank, financial institution or  
28 brokerage firm, all certificates of deposit, and other funds or assets, held in the name of, for

1 the benefit of, or over which account authority is held by Emvest Mortgage Fund, LLC or  
2 Emvest, Inc., including but not limited to the following accounts:

<u>Bank Name</u>	<u>Account Name</u>	<u>Account No.</u>
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11 **IT IS FURTHER ORDERED** that temporary receiver Dennis M. Murphy is hereby  
12 appointed as permanent receiver of Emvest Mortgage Fund, LLC and Emvest, Inc., with full  
13 powers of an equity receiver, including (but not limited to) full power of all funds, assets,  
14 collateral, premises (whether owned, leased, occupied, or otherwise controlled), choses in  
15 action, books, records, papers, and other real or personal property, including notes, deeds of  
16 trust, and other interests in real property belonging to, managed by, or in the possession or  
17 control of Emvest Mortgage Fund, LLC, and Emvest, Inc., and that Mr. Murphy is immediately  
18 authorized, empowered, and directed to:

- 19 A. access and to take custody and control of all funds, assets, collateral, premises  
20 (whether owned, leased, occupied, or otherwise controlled), choses in action,  
21 books, records, papers, and other real property, including notes, deeds of trust,  
22 and other interests in real property of or managed by Emvest Mortgage, LLC and  
23 Emvest, Inc., with full power to sue, foreclose, marshal, sell, liquidate, collect,  
24 receive, and take into possession all such property;
- 25 B. control and to be added as the sole authorized signatory for all accounts of  
26 Emvest Mortgage Fund, LLC and Emvest, Inc., including all accounts over  
27 which Emvest Mortgage Fund, LLC or Emvest, Inc., and any of their officers,  
28 employees or agents, have signatory authority, at any bank, title company,

1 escrow agent, financial institution, or brokerage firm, which has possession,  
2 custody, or control of any assets or funds of Emvest Mortgage Fund, LLC or  
3 Emvest, Inc., or which maintains accounts over which Emvest Mortgage Fund,  
4 LLC and Emvest, Inc., and/or any of their officers, employees, or agents have  
5 signatory authority;

6 C. conduct such investigation and discovery as may be necessary to locate and  
7 account for all assets of, or managed by, Emvest Mortgage Fund, LLC or  
8 Emvest, Inc., and to employ attorneys, accountants, and other persons to assist  
9 in such investigation and discovery;

10 D. take such action as is necessary and appropriate to preserve and take control of  
11 and to prevent the dissipation, concealment, or disposition of any assets or, or  
12 managed by, Emvest Mortgage Fund, LLC or Emvest, Inc.;

13 E. make an accounting, as soon as practicable, to this Court and the SEC of the  
14 assets and financial condition of Emvest Mortgage Fund, LLC and Emvest, Inc.,  
15 and the assets under their management, including all notes, deeds of trust, and  
16 other interests in real property, and to file the accounting with the Court and  
17 deliver copies to all parties;

18 F. make such payments and disbursements from the funds and assets taken into  
19 custody, control, and possession or thereafter received by him, and to incur, or  
20 authorize the making of such agreements as may be necessary and advisable in  
21 discharging his duties as temporary receiver;

22 G. employ attorneys, accountants, and others to investigate and (where appropriate)  
23 to pursue and prosecute all claims and causes of action of whatever kind which  
24 may now or hereafter exist as a result of the activities of Emvest Mortgage Fund,  
25 LLC or Emvest, Inc., or their past or present employees or agents;

26 H. access, monitor, and redirect all mail (including email) of Emvest Mortgage  
27 Fund, LLC and Emvest, Inc., in order to review such mail which he deems

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1 relevant to the business of these companies, and the discharging of his duties as  
2 receiver;

3 I. exercise all of the lawful powers of Emvest Mortgage Fund, LLC and Emvest,  
4 Inc., and their officers, directors, employees, representatives, or persons who  
5 exercise similar powers and perform similar duties.

6 **IT IS FURTHER ORDERED** that except otherwise ordered by this Court, Defendants  
7 and their officers, agents, servants, employees, attorneys, subsidiaries and affiliates, and those  
8 persons in active concert or participation with any of them—including EB Financial; Emerald  
9 Bay Funding, Inc.; Emerald Bay Financial of Southern California, Inc.; Unified Mortgage  
10 Service, Inc.; CNA Foreclosure Services, Inc.; TriStar Mortgage Fund Ltd.; and Heritage  
11 Mortgage Fund Ltd.—who receive actual notice of this Order, by personal service or  
12 otherwise, are temporarily restrained from directly or indirectly: destroying, mutilating,  
13 concealing, transferring, altering, or otherwise disposing of, in any manner, any documents,  
14 including all books, records, computer programs, computer files, computer printouts,  
15 correspondence, memoranda, brochures, or any other documents of any kind in their  
16 possession, custody, or control, however created, produced, or stored (manually, mechanically,  
17 electronically, or otherwise), pertaining in any manner to Defendants.

18 **IT IS FURTHER ORDERED** that Defendants and their subsidiaries and  
19 affiliates—including EB Financial; Emerald Bay Funding, Inc.; Emerald Bay Financial of  
20 Southern California, Inc.; Unified Mortgage Service, Inc.; CNA Foreclosure Services, Inc.;  
21 TriStar Mortgage Fund Ltd.; and Heritage Mortgage Fund Ltd.—and their officers, agents,  
22 servants, employees, and attorneys, and any other persons who are in custody, possession, or  
23 control of any assets, collateral, books, records, papers, notes, deeds of trust, or other interests  
24 in real property, or other property of, or managed by Emvest Mortgage Fund, LLC and Emvest,  
25 Inc., shall forthwith give access to and control of such property to the permanent receiver.

26 **IT IS FURTHER ORDERED** that no officer, agent, servant, employee, or attorney  
27 of Defendants or their subsidiaries or affiliates shall take any action or purport to take any

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1 action, in the name of or on behalf of Emvest Mortgage Fund, LLC or Emvest, Inc., without  
2 the written consent of the permanent receiver or Order of this Court.

3 **IT IS FURTHER ORDERED** that, except by leave of this Court, during the pendency  
4 of this receivership, all clients, investors, trust beneficiaries, note holders, creditors, claimants,  
5 lessors, and all other persons or entities seeking relief of any kind (in law or equity) from  
6 Emvest Mortgage Fund, LLC or Emvest, Inc., and all other persons acting on behalf of any  
7 such investor, trust beneficiary, note holder, creditor, claimant, lessor, or other person,  
8 including sheriffs, marshals, servants, agents, employees, and attorneys, are hereby temporarily  
9 restrained and enjoined from directly or indirectly, with respect to Emvest Mortgage Fund,  
10 LLC and Emvest, Inc.:

- 11 A. commencing, prosecuting, continuing, or enforcing any suit or proceeding (other  
12 than the present action by the SEC) against Emvest Mortgage Fund, LLC or  
13 Emvest, Inc.;
- 14 B. using self-help or executing or issuing or causing the execution or issuance of  
15 any court attachment, subpoena, replevin, execution, or other process for the  
16 purpose of impounding or taking possession of or interfering with or creating or  
17 enforcing a lien upon any property or property interests owned by or in the  
18 possession of Emvest Mortgage Fund, LLC or Emvest, Inc.;
- 19 C. doing any act or thing whatsoever to interfere with taking control, possession,  
20 or management by the permanent receiver of the property and assets owned,  
21 controlled, or managed by or in the possession of Emvest Mortgage Fund, LLC  
22 or Emvest, Inc., or in any way to interfere with or harass the permanent receiver,  
23 or his attorneys, accountants, employees, or agents, or to interfere in any manner  
24 with the discharge of the temporary receiver's duties and responsibilities  
25 hereunder.

26 **IT IS FURTHER ORDERED** that Defendants and their subsidiaries and affiliates, and  
27 their officers, agents, servants, employees, and attorneys—including EB Financial; Emerald  
28 Bay Funding, Inc.; Emerald Bay Financial of Southern California, Inc.; Unified Mortgage

1 Service, Inc.; CNA Foreclosure Services, Inc.; TriStar Mortgage Fund Ltd.; and Heritage  
2 Mortgage Fund Ltd.—shall cooperate with and assist the permanent receiver, his attorneys,  
3 accountants, employees, and agents, and shall take no action (directly or indirectly) to hinder,  
4 obstruct, or otherwise interfere with the permanent receiver, his attorneys, accountants,  
5 employees, or agents, or in the conduct of the permanent receivers’s duties or to interfere  
6 in any manner (directly or indirectly) with the custody, possession, management, or  
7 control by the permanent receiver of the funds, assets, collateral, premises, and choses in action  
8 described above.

9 **IT IS FURTHER ORDERED** that Defendants shall be responsible for the payment  
10 of costs, fees, and expenses of the permanent receiver incurred in connection with the  
11 performance of his duties described in this Order, including the costs and expense of those  
12 persons who maybe employed by the permanent receiver to assist him in carrying out his  
13 duties. The receiver shall maintain detailed records of all expenses incurred in conducting the  
14 receivership, such as salaries, rent, and any other reasonable operating and liquidating  
15 expenses.

16 **IT IS FURTHER ORDERED** that no bond shall be required in connection with the  
17 appointment of the permanent receiver. Except for an act of gross negligence, the permanent  
18 receiver shall not be liable for any loss or damage incurred by any of the Defendants, their  
19 officers, agents, servants, employees, attorneys, or by any other person, by reason of any act  
20 performed or omitted to be performed by the permanent receiver in connection with his duties  
21 and responsibilities.

22 **IT IS FURTHER ORDERED** that representatives of the SEC are authorized to have  
23 continuing access to inspect or copy any of the corporate books and records and other  
24 documents of Emvest Mortgage Fund, LLC and Emvest, Inc., and to have continuing access  
25 to inspect their funds, property, assets, and collateral, wherever located.

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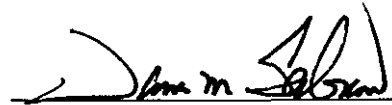
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1           **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction over this action  
2 for the purpose of implementing and carrying out the terms of all Orders and decrees which  
3 may be entered herein and to entertain any suitable application or motion for additional relief  
4 within the jurisdiction of this Court.

5           **IT IS SO ORDERED.**

6 Dated: 12-3-04



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

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9 CC: ALL PARTIES  
JUDGE PAPAS

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