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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

7 Attorneys for Third-Party Witness
8 UNIFIED MORTGAGE SERVICE, INC.

BY em DEPUTY

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES SECURITIES AND
12 EXCHANGE COMMISSION,,
13 Plaintiff,

CASE NO. 04CV2295-DMS (POR)

14 RESPONSE BY UNIFIED MORTGAGE
15 SERVICE, INC. TO RECEIVER'S
16 SEVENTH REPORT AND PETITION FOR
17 INSTRUCTIONS

v.

18 EMVEST MORTGAGE FUND, LLC,
19 EMVEST, INC., and MILON LYLE
20 BROCK,,
21 Defendants.

DATE: November 17, 2006
TIME: 1:30 p.m.
PLACE: Courtroom 10

Before the Honorable:
United States District Judge
Dana M. Sabraw

I.

INTRODUCTION

22 Unified Mortgage Service, Inc. (hereinafter, "UMS"), respectfully submits its response to
23 the Receiver's Seventh Report and Petition for Instructions. Although never made a party to this
24 action, UMS continues to have standing to participate in this proceeding, as a person in interest
25 and still a vendor doing loan servicing work for the Emvest Fund.

II.

THE RECEIVER'S SEVENTH REPORT IS MISLEADING

26 The Receiver paints a rosy picture and trumpets his performance managing the Emvest
27 Fund to the Court. However, when you crunch the actual numbers, it becomes readily apparent
28 that the Receivership has been a financial disaster to the Fund. Neither of the two options

1 proffered by Mr. Murphy, either to sell the portfolio now at a thirty percent discount from face
2 value or to continue with his management of the Fund until its original targeted termination date
3 of December 31, 2008, makes sense for the Fund's investors, creditors or vendors.

4 For example, the Receiver reports at page 12 of Exhibit 1 to his Seventh Report, total
5 members' equity of \$15,963,664.00 as of September 30, 2006. Subtracting the proposed thirty
6 percent discount of \$4,789,999.00 from that amount leaves a net return to the investors of
7 \$11,174,565.00. Under the Receivership during 2005 and 2006, Mr. Murphy also distributed
8 \$1,607,653.00 to the investors and an additional \$1,251,245.00 in withdrawals. (Id. at page 14.)
9 Adding the latter two amounts to the anticipated net sale proceeds means that the total funds to be
10 distributed to the investors during Mr. Murphy's reign would amount to only \$14,033,463.00, in
11 the event that an early liquidation of the Fund occurs as proposed.

12 As attested to in the accompanying Declaration of Michele Canty, UMS has collected and
13 paid over to Mr. Murphy since his appointment as Receiver the amount of \$20,594,135.00 as of
14 October 13, 2006. UMS is still servicing Emvest loans in its portfolio with an aggregate principal
15 balance of \$3,160,342.00, which loans have been and are reasonably foreseeable to be performing
16 and paid off according to their terms in the future, so the Fund should receive all of that money,
17 as well, in due course, in addition to interim interest payments from those borrowers.

18 As this Court is already aware, Defendants have made their disgorgement payment to the
19 Fund in the sum of \$1,320,504.00. Accordingly, the Fund has received (or will receive) a total of
20 at least \$25,074,981.00 during the term of the Receivership (\$20,594,135 already from UMS +
21 \$3,160,342 more from borrowers + \$1,320,504 from Defendants). From this amount, the
22 collateralized notes of \$5,062,000.00 which have been repaid should be subtracted, leaving a total
23 which should be otherwise available for distribution to the Funds' investors of \$20,012,981.00.

24 Thus, even *not* including the interest payments due on the remaining loans in the
25 portfolio, and *not* taking into account interest which would accrue on the funds already in hand,
26 Mr. Murphy's proposal to prematurely liquidate the fund would actually cause investors to lose
27 nearly \$6,000,000.00 assuming the proposed thirty percent discount for an early liquidation sale
28 (i.e., \$20,012,981 - \$14,033,463.) This staggering shortfall demonstrates the true cost of the

1 Receivership in this case. That sum can also be independently verified by even a cursory review
2 of Mr. Murphy's schedule of existing loans at page 16 of Exhibit 1 to his Seventh Report. It is
3 shown there that under Mr. Murphy's watch, he turned the nearly \$23,000,000.00 in payments
4 received from UMS and the Defendants into a remaining loan portfolio now worth less than
5 \$16,000,000.00. The missing \$7,000,000 or so difference presumably reflects the ongoing
6 expenses and mismanagement associated with the Receivership, most of which would not have
7 been incurred through normal business operations.

8 Accordingly, as UMS has advocated before, it appears that the cost and mismanagement
9 of the Fund during the Receivership has harmed the investors and creditors of the Fund dearly.
10 Given that it appears that most of the remaining loans in the portfolio are performing, it would
11 also not seem to be in the investors' best interests to prematurely liquidate the fund. Moreover, it
12 would likewise appear to make the most economic sense to terminate the Receivership
13 immediately and to find new management to run the Fund more efficiently and effectively.¹

14 III.

15 **THE RECEIVER SHOULD NOT BE THE FINAL**
16 **ARBITER OF A CLAIM AGAINST THE FUND**

17 There is nothing in the record and it is currently unknown and completely speculative as
18 to the number, nature and extent of any alleged claims from investors or third parties against the
19 Fund's assets. Nevertheless, the Receiver proposes a summary claims procedure purportedly
20 similar to one utilized in SEC v. Hardy (9th Cir. 1986) 803 F.2d. 1034, 1037.

21 At page 9 of his Seventh Report, Mr. Murphy advocates vesting himself with what
22 appears to be sole discretion to resolve and pay any such claim. Mr. Murphy should *not* be the
23 final arbiter with unfettered authority to use (or misuse) assets of the Fund to pay any claim which
24 may be submitted. If a summary claims procedure is to be adopted by this Court, UMS
25 respectfully submits that it include judicial review by this Court of claims accepted and rejected

26 _____
27 ¹ UMS recognizes that it is not an investor in the Fund. However, UMS has a stake because it remains interested in
28 continuing to service its loans and the other loans in the Emvest portfolio that are performing and would be expected
to remain performing, since there would appear to be no legitimate reason to either sell them at a discount or offer
any incentives for the borrowers to pay them off early, either to the detriment of UMS or the Fund's investors.

1 by Mr. Murphy or a replacement manager, so that the Fund's investors and creditors have an
2 opportunity to scrutinize and object, if necessary, to any proposed spending of the Fund's assets.

3 IV.

4 UMS WILL CONTINUE TO COMPLY WITH ALL REASONABLE
5 AND NECESSARY REQUESTS FOR INFORMATION

6 As is routinely the case with the Receiver, Mr. Murphy's accusations at lines 6 - 9 on
7 page 10 of his Seventh Report, that UMS refused repeated requests to furnish certain information,
8 are false and misleading. In truth and in fact, as is reflected on pages 25 - 26 of Exhibit 4 to the
9 Seventh Report, Mr. Murphy already had the loan history information he had requested, both
10 from the loan files themselves and the monthly Lender Statements of Account prepared by UMS.

11 In addition, because most of the loans in question were all current and fully performing,
12 UMS was understandably reluctant to give Mr. Murphy any encouragement to inappropriately
13 propose discounts for someone to acquire them or incentives to those borrowers to prepay,
14 because it would jeopardize and reduce revenue otherwise to be received by the Fund, and
15 negatively impact returns to the investors, in addition to causing a diminution in UMS' servicing
16 income. UMS has historically cooperated and will continue to cooperate with the Receiver.²


17 V.

18 CONCLUSION

19 UMS respectfully urges the Court to make future rulings consistent with the positions
20 advocated in this response.

21 DATED: November 2, 2006

HIGGS, FLETCHER & MACK LLP

22 By: 

23 DAVID R. CLARK, ESQ.
24 Attorneys for Third-Party Witness, Unified
25 Mortgage Service, Inc.

26 ² UMS' cooperation comes despite Mr. Murphy's blatant and repeated refusal to obey the Order of this Court
27 instructing him to cease and desist from investigating UMS for its activities with the Fund. See, the Order of this
28 Court dated August 8, 2006 at page 3, lines 7 - 18. Even following service of that Order, Mr. Murphy has continued
to investigate UMS at the expense of the Fund, and to refer UMS to the Department of Real Estate and the Internal
Revenue Service, as Mr. Murphy admitted in his affidavit filed in his second to last application for fees on or about
September 11, 2006, at page 18 (See, time entries for August 30 - 31, 2006, respectively).