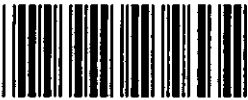


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3:04-CV-02295 SEC V. EMVEST MORTGAGE FUND

37

APPL.

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FILED

04 DEC -9 PM 2:16

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY: *Raymond* DEPUTY

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

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

15 SECURITIES AND EXCHANGE
16 COMMISSION,

17 Plaintiff,

18 v.

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

22 Defendants.

23 CASE NO. 04 CV 2295 DMS (LSP)

24 EX PARTE APPLICATION FOR ORDER
25 CLARIFYING DECEMBER 3, 2004
26 ORDER AND LIMITING POWERS OF
27 PERMANENT RECEIVER

28 ORIGINAL

1 Defendants apply to the Court for an order as follows:

2 (1) Clarifying that Defendant Brock, as CEO of Defendant Emvest, Inc., which is the
3 Manager of Defendant Emvest Mortgage Fund, LLC, is the person in control of the defense of
4 this action, including (but not limited to) the selection and retention of defense counsel and
5 consultants, and that the Receiver does not, by virtue of his receivership or otherwise, control
6 Defendants' defense, their counsel, or their defense consultants;

7 (2) Prohibiting the Receiver from terminating or otherwise affecting the employment
8 of Defendants' attorneys and consultants retained in connection with their defense of this action;

9 (3) Requiring the Receiver to return original documents to Defendants' premises, and
10 that the Receiver be prohibited from interfering with any review of said documents by
11 Defendants' attorneys or consultants retained in connection with this matter;

12 (4) Requiring the Receiver to provide Defendants' counsel with at least five (5)
13 business days' written notice prior to any intended actions that are beyond the conduct of the
14 ordinary, day-to-day business of the Defendants (e.g., layoffs, liquidation, etc.); and

15 (5) Requiring the Receiver to conduct the daily business of the Fund.

16 I.

17 INTRODUCTION

18 On December 3, 2004, the Court issued an Order Granting Plaintiff's Application For A
19 Preliminary Injunction And Appointment Of A Receiver ("December 3 Order"). Wasting no
20 time, the Permanent Receiver, Dennis M. Murphy, has taken several actions that materially
21 undermine Defendants' ability to defend the instant action, threaten the viability of the Fund, and
22 are contrary to the clear intent of the December 3 Order. Mr. Murphy has taken these actions
23 without any consultation or coordination with Defendants or their counsel, and as a result the
24 Fund (and therefore its shareholders) have incurred unnecessary legal expense that may have been
25 avoidable had Mr. Murphy first consulted with Defendants.

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1 II.

2 **MR. MURPHY IS UNDERMINING DEFENDANTS' DEFENSE**

3 One of Mr. Murphy's first actions as permanent receiver was to attempt to terminate the
4 engagement of Defendants' defense counsel (McKenna Long & Aldridge LLP) and accounting
5 consultant (J. Stephen Hawkins). On December 7, 2004, at 4:29 p.m., Mr. Murphy sent a letter to
6 Mr. Hawkins informing him that Mr. Murphy had been appointed permanent receiver and Mr.
7 Hawkins' "services shall no longer be required." *Pistorius Decl.*, ¶ 2. Additionally, during his
8 visit to Defendants' offices on December 8, 2004, Mr. Murphy informed Defendants'
9 representatives that he intended to terminate McKenna Long & Aldridge's services as well.
10 *Pistorius Decl.*, ¶ 3, *Brock Decl.* ¶ 7.¹

11 Additionally, on December 8, 2004, Mr. Murphy removed several boxes of original
12 documents from Defendants' premises to take back to his offices in Pasadena. Mr. Murphy did
13 this despite being notified, both directly and through his counsel, that Defendants' lawyers and
14 accounting consultant urgently required those documents to prepare their defense.² *Pistorius*
15 *Decl.*, ¶ 4. Defendants offered to have a copy service copy any documents Mr. Murphy wanted,
16 but Mr. Murphy preferred to have the documents not in San Diego—where the action is pending,
17 where Defendants and their counsel reside, and where Defendants' accounting consultant
18 resides—but rather in Pasadena. Obviously, even assuming Mr. Murphy diligently responds to
19 requests for documents (which appears unlikely, given his lack of cooperation to date), the
20 relocation will cause Defendants' lawyers and accountants delay and hinder their defense efforts.

21 These actions are troubling in at least two respects. First, these actions directly and
22 irreparably undermine Defendants' ability to defend the SEC's claims, essentially converting
23

24 ¹ On December 8, 2004, Mr. Murphy's counsel informed Defendants' counsel that Mr. Murphy is
25 willing to keep the defense team employed long enough for Mr. Murphy to interview the firms in
26 order to ascertain whether Mr. Murphy will agree to retain them. *Pistorius Decl.*, ¶ 3.
Defendants suspect that this offer is a subterfuge, and that Mr. Murphy will terminate the firms'
services after the "interviews."

27 ² The original documents taken by Mr. Murphy include check reconciliations, bank statements,
28 cancelled checks, deposit records, collateral note files, and investor subscription agreements.

1 Plaintiff's Preliminary Injunction into summary judgment.³ The Court has astutely recognized
2 that this case boils down to a question of accounting. *See generally, December 3 Order, 7:19-*
3 *13:8*. Without an accounting consultant, Defendants will be prohibited from offering evidence to
4 contradict the SEC's analysis. Mr. Murphy's conduct, if permitted, essentially negates the need
5 for a trial and results in an automatic verdict, by way of preliminary injunction, for the SEC.
6 With respect to Mr. Murphy's attempt to terminate defense counsel, Defendants' need for legal
7 representation, independent of the supervision and intervention of the SEC-endorsed Receiver, is
8 so rudimentary that it need not even be addressed. The imposition of a permanent receiver should
9 not be tantamount to destroying the attorney-client relationship (and attendant privileges) by
10 placing a third party, with the duty to publicly report to the Court and the SEC, in the defendant's
11 place.

12 Second, these actions put Mr. Murphy's independence and objectivity into serious
13 question. Mr. Murphy owes a fiduciary duty to the Fund and to the Court to preserve assets and
14 to protect investors. His responsibilities do not include assisting the SEC's case by intentionally
15 undermining Defendants' defense. However, Mr. Murphy's actions indicate that he views
16 himself more as an advocate for the SEC than an independent fiduciary. Indeed, Mr. Murphy was
17 apparently in direct contact with the SEC concerning the December 3 Order, as evidenced by the
18 fact that Mr. Murphy's counsel was unaware that the December 3 Order had been issued even
19 after Mr. Murphy had sent the December 7, 2004 termination letter to Mr. Hawkins, referencing
20 the December 3 Order. *Pistorius Decl.*, ¶¶ 2, 6.

21 Mr. Murphy has been appointed permanent receiver to essentially take control of the
22 business affairs of the Fund, to investigate the assets of the Fund, and to make an accounting.
23 *December 3 Order, 19:11-21:5*. Clearly, Mr. Murphy has the power to defend or pursue chooses
24 in action related to the Fund's business. But Mr. Murphy was not appointed permanent receiver
25

26 ³ This is particularly troubling in light of the fact that a preliminary injunction can be obtained
27 with otherwise inadmissible evidence. *SEC v. General Refractories, Co.*, 400 F.Supp. 1248, 1255
28 (D.D.C. 1975).

1 to rob Defendants of the Constitutional right to defend themselves. It is Mr. Murphy's position
2 that he has been "handed the keys" to the Fund and to Emvest, Inc., and that therefore he can hire
3 and fire defense counsel as he chooses. *Pistorius Decl.*, ¶ 3. Based on this logic, Mr. Murphy
4 presumably believes that he is also empowered to settle the SEC's claims or otherwise resolve
5 this litigation, without any checks and balances. If Mr. Murphy's position is vindicated, then the
6 SEC's burden to prove securities violations has essentially been reduced to the burden to obtain a
7 preliminary injunction and the appointment of a permanent receiver (indeed, an SEC-endorsed
8 receiver).

9 III.

10 **COURT INTERVENTION MAY HAVE BEEN AVOIDED HAD MR. MURPHY**
11 **CONSULTED WITH DEFENDANTS, AS ORIGINALLY PROMISED**

12 On December 7, 2004, Defendants' counsel received assurances from Mr. Murphy's
13 counsel that Defendants would be afforded notice and an opportunity to object or otherwise
14 respond to any actions Mr. Murphy intended to take that were beyond the ordinary course of
15 business. *Pistorius Decl.*, ¶ 6. Counsel agreed that this arrangement would likely minimize the
16 need to trouble the Court with disputes over Mr. Murphy's proposed actions. *Id.* Nonetheless, as
17 detailed above, on December 7 and 8, 2004, Mr. Murphy reneged on this agreement and
18 proceeded to act beyond the scope of his authority, thus necessitating this Application.

19 IV.

20 **MR. MURPHY IS NOT MANAGING THE FUND**

21 Mr. Murphy is not managing the Fund. On more than one occasion, Defendant Brock has
22 presented Mr. Murphy with trust deed assignments that need to be signed in order to consummate
23 transactions that bring profit into the Fund. *Brock Decl.*, ¶¶ 4,5. Mr. Murphy has refused to
24 complete these transactions, stating instead that he is going to "freeze" all activity for thirty days.
25 *Id.* Not only is Mr. Murphy's conduct contrary to his fiduciary duties to manage the Fund, it is in
26 direct violation of the December 3 Order. The December 3 Order makes clear that "This Order
27 shall not be construed as an all-encompassing 'asset freeze,' but rather prohibits only distributions
28 made to investors from Fund assets...." *December 3 Order*, 18:24-26. Indeed, the SEC has

1 never alleged that the Fund's operations are not profitable; rather, the SEC contends that the 12%
2 distributions exceed that profit. The December 3 Order put an end to those distributions, so any
3 profit earned by the Fund will simply grow upon itself. Mr. Murphy's intended action (or
4 inaction) violates the December 3 Order and harms Fund investors by not maximizing the Fund's
5 profits.

6 V.

7 CONCLUSION

8 Defendants respectfully submit that an order of the Court is required to clarify that Mr.
9 Brock, as CEO of Defendant Emvest, Inc., which manages Defendant Emvest Mortgage, LLC, is
10 the person who may control Defendants' defense, and that Mr. Murphy, by virtue of his
11 receivership, may not render Defendants defenseless. Furthermore, Defendants request an order
12 prohibiting Mr. Murphy from taking any actions beyond conducting the ordinary business of the
13 Fund without first notifying Defendants and affording Defendants an opportunity to object or
14 otherwise respond. Finally, Defendants request that the Court order Mr. Murphy to continue the
15 conduct of the business, including the buying and selling of trust deeds, so that the estate will
16 continue to grow for the benefit of its investors.

17 Dated: December 9, 2004

MCKENNA LONG & ALDRIDGE LLP

18
19
20 By: B. Luke Pistorius
21 Robert S. Brewer, Jr.
22 Robert A. Cocchia
23 B. Luke Pistorius
24 Joseph N. Casas
25 Attorneys for Defendants
26 EMVEST MORTGAGE FUND, LLC;
27 EMVEST, INC.; and MILON LYLE BROCK
28

SD:22131796.1

3 **CERTIFICATE OF SERVICE**

4 I hereby certify that on **December 9, 2004**, I served a copy of the document
5 entitled:

6 **Ex Parte Application for Order Clarifying December 3, 2004 Order
and Limiting Powers of Permanent Receiver**

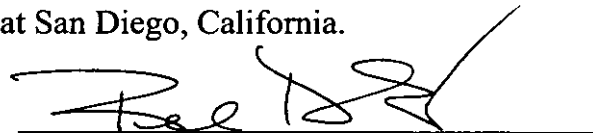
7 **Declaration of B. Luke Pistorius in Support of Ex Parte Application
8 for Order Clarifying December 3, 2004 Order and Limiting Powers of
Permanent Receiver**

9 **Declaration of Milon Lyle Brock in Support of Ex Parte Application
10 for Order Clarifying December 3, 2004 Order and Limiting Powers of
Permanent Receiver**

11 via personal service, overnight mail (VIA UPS), facsimile or U.S. (first class) mail, as
12 indicated below, upon the following counsel and parties of record:

<p>13 <u>VIA UPS (overnight) and Facsimile</u> 14 Molly M. White, Esq. 15 Securities and Exchange Commission 16 5670 Wilshire Boulevard, 11th Floor 17 Los Angeles, CA 90036 Tel.: (323) 965-3998 Fax (323) 965-3908</p>	<p><i>Attorneys for Plaintiff</i> SECURITIES AND EXCHANGE COMMISSION</p>
<p>18 <u>VIA UPS (overnight) and Facsimile</u> 19 James R. Felton, Esq. 20 Greenberg & Bass 1600 Ventura Blvd., Suite 1000 21 Encino, CA 91436 Tel: (818) 986-5687 22 Fax: (818) 986-6534</p>	<p><i>Attorneys for Receiver DENNIS MURPHY</i></p>

23 Executed on **December 9, 2004**, at San Diego, California.

24 
25 _____
26 Rosalinda De Luca