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9 UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BY FAX

12 SECURITIES AND EXCHANGE
13 COMMISSION,
14 Plaintiff,
15 vs.
16 EMVEST MORTGAGE FUND, LLC,
17 EMVEST, INC., and MILON LYLE BROCK,
18 Defendants.

Case No. 04 CV 2295 DMS (LSP)
OPPOSITION TO EX PARTE
APPLICATION FOR ORDER
CLARIFYING DECEMBER 3, 2004
ORDER AND LIMITING POWERS
OF PERMANENT RECEIVER

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1 **I. INTRODUCTION**

2 After notice, two sets of briefs, and two hearings, on December 3, 2004, the Court issued
3 an Order Granting Plaintiff's Application for a Preliminary Injunction and Appointment of a
4 Permanent Receiver ("Order"). The Court found that the Securities and Exchange Commission
5 ("Commission") had made a *prima facie* showing "that a violation of the securities laws had
6 occurred," that "Defendants have acted with a high degree of scienter," and that there was "a
7 reasonable likelihood of future securities laws violations." (Order, pp. 15:2-5, 15:20-22, 16:13-
8 15.) To protect investor assets and prevent further securities law violations, the Court appointed
9 Dennis Murphy as the permanent receiver over Emvest Mortgage Fund, LLC ("Fund") and
10 Emvest, Inc. ("Emvest"). (Order, p. 16:15.) In doing so, the Court gave the receiver "all of the
11 lawful powers of Emvest Mortgage Fund, LLC and Emvest, Inc., and their officers, directors,
12 employees, representatives, or persons who exercise similar powers and perform similar duties."
13 (Order, p. 21:3-5.) Milon Lyle Brock ("Brock") now asks the Court to modify the Order.¹

14 The heart of Brock's complaint is the receiver's decision to terminate the entities'
15 representation in this action by the law firm of McKenna Long & Aldridge. Brock, however, did
16 not have the right to use Fund assets to hire that law firm in the first place. Not only did Brock
17 act in bad faith by transferring investor money from the Fund to his lawyers after his counsel
18 agreed that the defendants would not transfer assets out of the Fund, but courts have held that
19 defendants in securities fraud enforcement actions cannot use investor funds to pay for their legal
20 defense.

21 In his *Ex Parte* Application for Order Clarifying December 3, 2004 Order and Limiting
22 Powers of Permanent Receiver ("*Ex Parte*"), Brock takes the position that he still controls the
23 Fund and Emvest.² But Order is clear: the permanent receiver is now the natural person in
24

25 ¹ Although the *Ex Parte* purports to be filed on behalf of all defendants, in light of the
26 permanent receiver's efforts to terminate the entities' representation by McKenna Long &
Aldridge, the Commission does not believe the *Ex Parte* was filed on behalf of Emvest or the
Fund.

27 ² Apparently, Brock is not the only one who believes he still controls Emvest. On
28 December 7, 2004, Brock's son-in-law, Timothy Canty, sent a letter to investors purportedly
on behalf of Emvest, Inc., claiming that Emvest never knowingly engaged in any practice
harmful to investors, and that the Commission's complaint was "baseless." (Declaration of

1 control of the Fund and Emvest. (Order, p. 21:3-5.) Accordingly, the receiver acted within the
2 scope of the Order when he terminated the engagements of the Fund's and Emvest's prior
3 attorney and accounting consultant, removed original documents from the Fund's premises for
4 his review, and refused to sign trust deed assignments on Brock's behalf.

5 Without citing any legal authority, Brock asks the Court to modify the Order. But Brock
6 offers no explanation how his proposed changes to the Order will serve the interests of the
7 defrauded investors. In fact, the changes that Brock proposes would harm investors and impair
8 the permanent receiver's ability to fulfill his duty to investors. The Court should therefore deny
9 Brock's *Ex Parte* Application.³

10 II. ARGUMENT

11 A. Brock Improperly Used Fund Assets to Hire the Law Firm of McKenna Long 12 & Aldridge

13 On Tuesday, November 16, 2004, the Commission filed its *Ex Parte* Application for a
14 Temporary Restraining Order and other relief. Before doing so, the Commission gave notice to
15 Milon Lyle Brock, Timothy Canty, and their lawyer at the time, Steve Gourley. On Friday,
16 November 12, 2004, Commission counsel called Mr. Gourley, the lawyer for the Fund, Emvest,
17 and Brock. (Declaration of Susan F. Hannan Supporting Opposition ("Hannan Dec.") ¶ 2.)
18 Commission counsel told Mr. Gourley that they wanted to meet with him and his clients on
19 Monday, November 15, to discuss possible settlement. (Hannan Dec. ¶ 2.) During that
20 conversation, Commission counsel informed Mr. Gourley that a precondition to the meeting was

21 Dennis M. Murphy ("Murphy Dec.") Ex. 3.) Mr. Canty sent the letter in direct violation of
22 the Order, which states that "no officer, agent, servant, employee, or attorney of Defendants .
23 . . shall take any action or purport to take any action, in the name of or on behalf of Emvest
24 Mortgage Fund, LLC or Emvest, Inc., without the written consent of the permanent receiver
25 or Order of this Court." (Order, pp. 21:26-22:2.) Mr. Canty was aware of the order, because
26 he references it in his letter. (Murphy Dec. Ex. 3.) Nevertheless, Mr. Canty did not obtain
27 the receiver's permission to send the letter. (Murphy Dec. ¶ 5.) Nor is the Commission aware
28 of a Court order giving Mr. Canty such authority.

³ In filing his *Ex Parte*, Brock failed to comply with the Court's notice requirements.
Local Rule 83.3(h)(2) states that "[a]n application for an order shall not be made by ex parte
unless it appears by affidavit or declaration . . . that within a reasonable time before the
application the party informed the opposing party or the opposing party's attorney when and
where the application would be made . . ." Counsel for Brock did not call Commission
counsel before filing his papers, but merely copied the Commission on his meet and confer
letter 30 minutes before serving his papers. (White Dec. ¶ 5.)

1 that he advise his clients not to transfer any money out of the Fund. (Hannan Dec. ¶ 2.) Mr.
2 Gourley said that he understood and would so advise his clients. (Hannan Dec. ¶ 2.)

3 On the afternoon of Monday, November 15, Commission staff met with Mr. Gourley, Mr.
4 Brock, and Mr. Canty. (Declaration of Kelly Bowers in Support of Opposition ("Bowers Dec.")
5 ¶ 2.) At the outset of the meeting, Commission counsel informed them that the Commission was
6 meeting in good faith to (1) advise Mr. Brock and Mr. Gourley of the findings of the staff's
7 investigation; (2) give them notice that the Commission would file an emergency action against
8 Brock, the Fund, and Emvest; and (3) give the defendants an opportunity to settle the action.
9 (Bowers Dec. ¶ 2.) Commission counsel reiterated that Commission staff was meeting with
10 Messrs. Brock, Canty, and Gourley with the understanding that, and on the condition that,
11 Messrs. Brock and Canty would not transfer money out of the Fund. (Bowers Dec. ¶ 3.) Mr.
12 Gourley said he understood the Commission's position and agreed there would be no transfers
13 out of the Fund, except in the ordinary course of the Fund's business. (Bowers Dec. ¶ 3.)

14 Despite this agreement, the Commission has learned that on Monday, November 15,
15 2004, the Fund wrote a \$150,000 cashier's check to the law firm of McKenna Long & Aldridge
16 LLP.⁴ (Murphy Dec. ¶ 2 & Ex. 1; Bowers Dec. ¶ 5.) Not only were these funds transferred in
17 bad faith, but case law indicates that defendants in fraud actions are not permitted to use investor
18 funds to pay for their defense.⁵

19 Because the legal fees that Mr. Brock paid his law firm are traceable to investor proceeds,
20 those assets may not be used to pay his attorney's fees. In *Caplin & Drysdale, Chartered v.*
21 *United States*, 491 U.S. 617 (1989), in denying a criminal defendant's request to use restrained
22 assets to pay for his defense, the United States Supreme Court stated "[a] robbery suspect, for
23 example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an
24 attorney to defend him if he is apprehended. The money, though in his possession, is not
25

26 ⁴ The fact that the Fund paid McKenna Long & Aldridge with a cashier's check suggests
27 that defendants suspected the Fund's assets would be frozen the next day.

28 ⁵ Brock's misuse of investor funds may constitute another violation of the securities laws.
The Prospectus nowhere discloses that the Fund's manager will use investor funds to pay for
his defense against securities fraud charges.

1 rightfully his . . .” 491 U.S. at 626. The defendant has no right to spend another person’s money
2 for his attorney’s fees, and no lawyer has the right to accept stolen property in payment of a fee.
3 *Id.* In *SEC v. Quinn*, 997 F.2d 287 (7th Cir. 1993), the Seventh Circuit applied the reasoning in
4 *Caplin & Drysdale* directly to securities violators, stating:

5 Just as a bank robber cannot use the loot to wage the best defense
6 money can buy, so a swindler in securities markets cannot use the
7 victim’s assets to hire counsel who will help him retain the
8 gleanings of crime.

8 *SEC v. Quinn*, 997 F.2d at 289; accord *SEC v. Roor*, 1999 U.S. Dist. LEXIS 13237, *7
9 (S.D.N.Y. 1999) (“A defendant in a case brought by the S.E.C. may not use income derived from
10 alleged violations of the securities laws to pay for legal counsel”); *SEC v. Current Fin. Servs.,*
11 *Inc.*, 62 F. Supp. 2d 66, 69 (D.D.C. 1999) (“A defendant is not entitled to foot his legal bill with
12 funds that are tainted by his fraud.” (quoting *SEC v. Coates*, 1994 WL 45558, *3 (S.D.N.Y.
13 1994)).

14 Indeed the money that Brock used to pay for his law firm, McKenna Long & Aldridge,
15 came directly out of the Fund’s operating account (Murphy Dec. ¶ 2 & Ex. 1), so they are
16 directly traceable to investor proceeds. As recognized in the Order, “the Fund has been paying
17 out distributions to investors which exceeded its earnings. This raises a strong presumption that
18 the excess cash is taken directly from new investors and paid to existing investors” (Order,
19 p. 14:23-24.) So, too, the \$150,000 that the Fund paid McKenna Long & Aldridge came from
20 new investors’ money. The \$150,000 should therefore be returned to the Fund’s operating
21 account, absent a showing that funding Brock’s defense is in the best interests of the investors.
22 See *SEC v. Grossman*, 887 F. Supp. 649, 661 (S.D.N.Y. 1995). In light of the Court’s findings
23 that the Commission has made a *prima facie* showing that Brock committed securities fraud, that
24 Brock acted with a high degree of scienter, and that absent an injunction there is a reasonable
25 likelihood that Brock would commit future securities laws violations (*see* Order, pp. 15:2-5,
26 15:20-22, 16:13-15), it is hard to conceive how funding Brock’s legal defense would benefit
27 defrauded investors.

28 ///

1 **B. The Defendants Will Not Be Deprived a Legal Defense**

2 Brock claims that denial of his *Ex Parte* will deprive the defendants of a defense. This is
3 not the case. Brock can pay for his own counsel with his own funds, or from assets that he can
4 demonstrate are not derived from investor funds or other ill-gotten gains. *See SEC v. Comcoa*,
5 887 F. Supp. 1521, 1525 (S.D. Fla. 1995). The Court did not freeze any of Mr. Brock's personal
6 assets, so he is free to use his own money to fund his own defense. Moreover, it appears that
7 Brock has significant personal assets. A public records search revealed that his home is valued
8 at about \$1.6 million. (Murphy Dec. ¶ 3 & Ex. 2.)

9 As for the Fund and Emvest, now that the receiver is the natural person in control of those
10 entities, the receiver will determine which attorneys and consultants will best represent the
11 interests of the Fund, Emvest, and the investors. Indeed, as further discussed below, the receiver
12 now controls the attorney-client relationship on behalf of the Fund and Emvest. *See CFTC v.*
13 *Weintraub*, 471 U.S. 343, 354 (1985); *SEC v. Elfindapan*, 169 F. Supp. 2d 420, 431 (M.D. NC
14 2001) (a receiver can waive the attorney-client privilege). It is surprising to the Commission that
15 Brock takes the position that the law firm of McKenna Long & Aldridge should remain counsel
16 for both Brock and the entities, even though their interests are no longer aligned.⁶ Essentially,
17 Brock would presumably agree that if McKenna Long & Aldridge represents both Brock and the
18 entities that the receiver, who controls the entities' attorney-client relationship, can have access
19 to all information in the possession of McKenna Long & Aldridge that pertains to the Fund and
20 Emvest – even confidential information that Brock provides the law firm.

21 Finally, citing no legal authority, Brock argues that the receiver's conduct has "rob[bed]
22 Defendants of the Constitutional right to defend themselves." (*Ex Parte*, p. 4.) Brock's
23 argument is without merit. There is no constitutional right to a defense in a civil action.⁷ *See*

24
25 ⁶ It is also surprising that McKenna Long & Aldridge would agree to represent clients
26 with adverse interests. The California Rules of Professional Conduct state that "[a] member
27 shall not concurrently represent clients whose interests conflict, except with their informed
28 written consent." Cal. R. Prof. Cond. Rule 3-310. Of course, because the receiver controls
the attorney-client relationship, it will be the receiver's decision whether to waive the conflict.

⁷ This rule applies with equal force to corporate entities such as the Fund and Emvest,
which are considered a legal person with the protections of the Constitution. *See Physicians'*
Serv. Med. Group v. San Bernadino County, 825 F.2d 1404, 1407 (9th Cir. 1987).

1 *United States v. Madden*, 352 F.2d 792, 793 (9th Cir. 1965) (appointment of counsel in a civil
2 action "is a privilege and not a right"); *Bethea v. Crouse*, 417 F.2d 504, 505 (10th Cir. 1969)
3 ("We have often said, and it seems to be universally agreed, that no one has a constitutional right
4 to assistance of counsel in the prosecution or defense of a civil action. . . ."). Thus, the permanent
5 receiver cannot "rob" the Fund and Emvest of a Constitutional right they do not have.

6 **C. The Receiver Has Acted Within the Scope of the Order**

7 The receiver's actions fall well within the scope of the Order appointing him permanent
8 receiver. The Order gave the permanent receiver the "full powers of an equity receiver." (Order,
9 p. 19:12-13.) Thus, Brock no longer controls the Fund and Emvest – the receiver does. Brock
10 nevertheless argues that: (1) the receiver interfered with the defendants' defense by terminating
11 the Fund's and Emvest's representation by McKenna, Long & Aldridge LLP and by J. Stephen
12 Hawkins; (2) the receiver has interfered with the entities' defense by removing original
13 documents; and (3) the receiver is improperly managing the Fund by refusing to sign trust deed
14 assignments that Brock wants him to sign. The Order gave the permanent receiver the authority
15 to take each of these steps.

16 **1. The Receiver Acted Within the Scope of the Order and His Equitable**
17 **Powers By Terminating the Entities' Attorney and Accounting**
18 **Consultant**

19 The Order gives the permanent receiver the authority to terminate the Fund's and
20 Emvest's representation by McKenna, Long & Aldridge LLP and by Mr. Hawkins. Without
21 citing any legal authority, Brock argues that the receiver's actions show that he intends to
22 undermine the defendants' ability to defend against the Commission's claims, and that he lacks
23 independence and objectivity. (*Ex Parte*, pp. 2-3.) Brock's arguments are meritless.

24 The Order expressly gives the permanent receiver, not Brock, the power to decide who, if
25 anyone, should represent the receivership entities. It states that the permanent receiver "is
26 immediately authorized, empowered, and directed to . . . employ attorneys, accountants, and
27 others to investigate and (where appropriate) to pursue and prosecute all claims and causes of
28 action of whatever kind which may now or hereafter exist as a result of the activities of Emvest
Mortgage Fund, LLC or Emvest, Inc., or their past or present employees or agents." (Order, p.

1 20:22-25.) It was therefore well within the receiver's authority to decide, for example, that it
2 was not in the defrauded investors' interests to pay the accounting consultant's \$300 per hour
3 price tag. (White Dec. Ex. 2 (Hawkins test.), pp. 19:23-24.)

4 The permanent receiver's actions do not deprive the Fund and Emvest of a defense. The
5 receiver is free to hire counsel of his choosing to defend those entities if he believes the entities
6 did not engage in fraud and that it would be in the best interests of investors to pay for such a
7 defense.⁸ Nor do the receiver's actions suggest that the receiver lacks "independence and
8 objectivity." (See *Ex Parte*, p. 3.) The receiver acts as an arm of the Court. Brock suggests that
9 because Commission staff has had direct communication with the receiver, the receiver is an
10 advocate for the Commission.⁹ (See *Ex Parte*, p. 3.) But there is no basis for that assertion any
11 more than there is a basis for the Commission to claim that because the receiver has had direct
12 communications with Brock, the receiver is an advocate for Brock.

13 **2. The Receiver Acted Within the Scope of the Order When He Removed**
14 **Documents From the Fund's Offices**

15 The permanent receiver also acted within the scope of the Court's order when he took
16 original documents from the Fund's offices for his review. The Order states that the receiver is

17 immediately authorized, empowered, and directed to . . . access and
18 to take custody of all funds, assets, collateral, premises (whether
19 owned, leased, occupied, or otherwise controlled), choses in action,
20 books, records, papers, and other real property, including notes,

21 ⁸ The Commission concedes that the receiver is unlikely to make such a decision, light of
22 the receiver's findings in his preliminary report to the Court that "(1) the Fund was not
23 generating sufficient income to cover the cost of operations and meet its monthly distribution
24 obligations to shareholders; (2) the Fund was apparently using investor capital to cover its
25 shortfall; and (3) investors' capital position ha[d] been eroded." (Order, pp. 12:26-13:3.)
26 However, if the permanent receiver were to uncover evidence showing that these findings were
27 wrong (which the Commission does not believe will happen), the receiver would be required to
28 put that information in his report to the Court. The Court could then take whatever action it
deemed appropriate, including terminating the permanent receivership and returning control of
the Fund and Emvest to Brock.

29 ⁹ When Commission counsel was served with the Order on December 7, 2004,
30 Commission counsel contacted the receiver's office to find out whether the receiver had also
31 been served with the Order, which appointed him permanent receiver. (White Dec. ¶ 3.)
32 When Commission counsel was advised that the receiver had not yet received the Order,
33 counsel for the Commission faxed the Order to him. (White Dec. ¶ 3.) That day and the
34 following day, Commission counsel also fax served copies of the Order on the Fund's and
35 Emvest's affiliates, including Emerald Bay Financial, Inc., Emerald Bay Funding, Inc., and
36 Unified Mortgage Service. (White Dec. ¶ 4.)

1 deeds of trust, and other interests in real property of or managed by
2 Emvest Mortgage, LLC and Emvest, Inc. . . .

3 (Order, p. 19:17-24.) If the receiver determined that he needed original documents to carry out
4 his obligations, then it is within his authority to take them.

5 Brock has not sufficiently explained why he cannot run his defense with copies of
6 documents, other than to cast baseless claims that obtaining duplicates will cause delay. Indeed,
7 Brock's purported concern about obtaining documents for his legal defense is unfounded. On
8 November 17, 2004, defense counsel asked the Commission to produce documents. (White Dec.
9 ¶ 2.) Without waiting for service of formal discovery, the Commission produced more than
10 10,000 pages of documents, the investigative testimony transcripts, and testimony exhibits to
11 defense counsel by November 19, 2004. (White Dec. ¶ 2.) Those documents are the basis for
12 the Commission's allegations against Brock, and should aid Brock in any defense.

13 Further, the permanent receiver has not hindered the defense of the Fund or Emvest
14 because the receiver, not Brock, controls the Fund's legal representation. (*See supra*, p. 4.)
15 Indeed, it appears that Brock's true motive in obtaining the original documents may be to prevent
16 the permanent receiver from timely completing his work. But the Order requires Brock to
17 "cooperate with and assist the permanent receiver" and prohibits him from taking any action to
18 "hinder, obstruct, or otherwise interfere with the permanent receiver's duties." (Order, p. 22:26-
19 23:8.) The permanent receiver should not be ordered to return original documents to Brock. If
20 Brock needs the documents for his legal defense, the Commission is confident that the
21 permanent receiver will provide Brock copies of the documents in a timely basis.

22 **3. The Receiver Acted Within the Scope of the Order and in the Interests**
23 **of Investors By Refusing to Blindly Sign Trust Deed Assignments**

24 Brock claims that by refusing to sign trust deed assignments, the permanent receiver is
25 managing the fund improperly. (*Ex Parte*, pp. 4-5.) But the Court found a *prima facie* case that
26 Brock committed securities fraud, that Brock acted with a "high degree" of scienter, and that if
27 Brock continued to control the Fund "there [was] a significant risk of continued asset
28 dissipation." (Order, pp. 14:22-23, 15:20-23, 15 n.2.) If the receiver were to blindly follow
Brock's instructions, and sign off on the trust deed assignments without questioning their
propriety, the receiver would run the risk of perpetuating Brocks' fraud. That would not be in

1 the best interests of investors.

2 The Order does not, and should not, give Brock the right to make such demands on the
3 receiver. The Order states that the receiver

4 is immediately authorized, empowered, and directed to . . . make such
5 payments and disbursements from the funds and assets taken into
6 custody, control, and possession or thereafter received by him, and to
incur, or authorize the making of such agreements as may be necessary
and advisable in discharging his duties

7 (Order, p. 20:18-21.) Nowhere does the Order state that Brock may require the receiver to sign
8 trust deed assignments. In fact, it states just the opposite: "that no officer, agent, servant,
9 employee, or attorney of Defendants or their subsidiaries or affiliates shall take any action or
10 purport to take any action, in the name of or on behalf of Emvest Mortgage Fund, LLC or
11 Emvest, Inc., without the written consent of the permanent receiver or Order of this Court."

12 (Order, pp. 21:26-22:2.)

13 **D. The Order Falls Within the Scope of Actions Permitted Under Receivership**
14 **Law and Should Not be Modified**

15 The provisions of the Order are reasonable, are in the best interests of the investors, and
16 fall within the bounds of receivership law. Brock has made no showing that modifying the Order
17 will serve investor interests or the interests of the Fund. *See SEC v. Grossman*, 887 F. Supp. at
18 661 (to modify asset freeze, defendant "must establish that such a modification is in the interests
19 of the defrauded investors"). Indeed, it is in the best interests of the investors that the Order not
20 be revised.

21 District courts have broad authority to supervise an equity receivership and determine the
22 appropriate form of relief. *See SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986); *SEC v.*
23 *Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980) ("The Supreme Court has repeatedly emphasized
24 the broad equitable powers of the federal courts to shape equitable remedies to the necessities of
25 particular cases, especially where a federal agency seeks enforcement in the public interest.").
26 This broad authority is necessary to ensure that the receiver is able to fulfill his fiduciary duty to
27 protect the receivership property. *See In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402,
28 1408 (9th Cir. 1992) ("Under federal law, the receiver . . . shall manage and operate the property

1 in his possession . . . in the same manner that the owner or possessor thereof would be bound to
2 do if in possession thereof.” (internal citation omitted)); *SEC v. Hardy*, 803 F.2d at 1038 (“a
3 primary purpose of equity receiverships is to promote orderly and efficient administration of the
4 estate by the district court for the benefit of creditors”).

5 Consistent with these principles, courts have allowed receivers to liquidate a corporation
6 in a securities receivership, see *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 609 (9th Cir. 1978),
7 conduct a sale of the assets of a partnership in receivership, see *SEC v. American Capital*
8 *Invests., Inc.*, 98 F.3d 1133 (9th Cir. 1996), *abrogated on other grounds by Steel Co. v. Citizens*
9 *for a Better Environ.*, 523 U.S. 83 (1998), to issue blanket stays preventing non-parties from
10 filing claims against the receivership estate, *SEC v. Wencke*, 622 F.2d at 1369, and waive a
11 receivership entity’s attorney-client privilege with respect to its pre-receivership
12 communications, see *SEC v. Elfindepan*, 169 F. Supp. 2d at 420. Thus far, the receiver’s
13 conduct in this case is far less drastic than the actions approved by the courts in *Lincoln Thrift*
14 *Ass’n*, *American Capital Investments, Inc.*, and *Elfindepan*.

15 The Order should not be modified to put Brock in control of the legal representation of
16 Emvest and the Fund. The Court has already found that the Commission made a *prima facie*
17 showing “that a violation of the securities laws had occurred,” that Brock acted with a “high
18 degree of scienter,” and that there was “a reasonable likelihood of future securities laws
19 violations.” (Order, pp. 15:2-5, 15:20-22, 16:13-15.) Brock should not be trusted to run the
20 entities’ legal representation. Moreover, courts have recognized that a receiver controls the
21 attorney-client relationship of the receivership entity. The United States Supreme Court has held
22 that a bankruptcy trustee has the authority to waive the attorney-client privilege of a corporation.
23 See *CFTC v. Weintraub*, 471 U.S. at 354 (“Without control over the [prebankruptcy] privilege,
24 the trustee might not be able to discovery hidden assets or looting schemes”); *Meoli v. American*
25 *Medical Service of San Diego*, 287 B.R. 808, 817 (S.D. Cal. 2003) (accord). The Supreme
26 Court’s holding has been applied to receivers in the securities enforcement context. See *SEC v.*
27 *Elfindepan*, 169 F. Supp. 2d at 431 (a receiver can waive the attorney-client privilege). If a
28 receiver controls the attorney-client privilege, it follows that a permanent receiver controls the

1 legal representation of the receivership estate.

2 Nor should the Order be modified to require the permanent receiver to relinquish control
3 of original documents. It is in the investors' interests that the permanent receiver maintain the
4 original documents, so he can run the Fund and Emvest. More importantly, as set forth above,
5 Brock has not sufficiently shown that obtaining copies will hamper his defense.

6 Finally, Brock argues that the Order should be modified to require the receiver to give
7 him five-days written notice before taking any actions beyond the ordinary, day-to-day business
8 of the Fund and Emvest. (Ex Parte Application, p. 1.) It is unclear what actions would qualify
9 as "ordinary, day-to-day business," and the Commission is concerned that thus modifying the
10 Order will hamstring the receiver by requiring him to notify Brock at every turn. That would not
11 be in the best interests of investors. Moreover, when Brock was provided notice in the past, such
12 as when the Commission gave Brock notice that it was going to file its application for a TRO
13 (see *supra* pp. 2-4), Brock used that information to further dissipate the Fund's assets. Based on
14 Brock's prior bad faith actions, and Brock's failure to recognize the permanent receiver as the
15 person in control of the Fund and Emvest, the Commission believes that if the receiver give
16 Brock's notice, Brock will take steps to frustrate the receiver's administration of the estate and
17 force the receiver to expend the Fund's resources to challenge dilatory tactics.

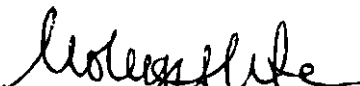
18 Finally, the Commission is confident that the Court will establish other, less burdensome
19 means of protecting any legitimate interests that claimants have in the receivership estate.
20 Because the receivership is supervised by the Court, the Court will likely establish procedures to
21 approve any extraordinary steps that the permanent receiver might recommend, such as
22 liquidating or selling the business. See, e.g., *SEC v. Hardy*, 803 F.2d at 1037. Generally, courts
23 set up procedures whereby interested parties can file claims regarding receivership assets. See
24 *id.* at 1038 (because district judges supervising equity receiverships face "complicated problems
25 in dealing with the various parties and issues involved in administering the receivership," court
26 can craft "[r]easonable administrative procedures" to "deal with the complex circumstances of
27 each case"); see also *SEC v. Universal Financial*, 760 F.2d 1034, 1036-37 (9th Cir. 1985)
28 (confirming district court's decision to use summary procedures to dispose of claims). The

1 Commission believes that such procedures will protect any interests claimants might have in the
2 administration of the receivership estate.

3 **III. CONCLUSION**

4 For the foregoing reasons, the Court should deny Brock's *Ex Parte* Application for Order
5 Clarifying December 3, 2004 Order and Limiting Powers of Permanent Receiver.

6
7 DATED: December 16, 2004


Molly M. White
Susan F. Hanman
Attorneys for Plaintiff
Securities and Exchange Commission

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PROOF OF SERVICE

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

3 U.S. SECURITIES AND EXCHANGE COMMISSION, 5670 Wilshire
4 Boulevard, 11th Floor, Los Angeles, California 90036-3648
Telephone No. (323) 965-3998; Facsimile No. (323) 965-3908.

5 On December 16, 2004, I served the document entitled **OPPOSITION TO EX**
6 **PARTE APPLICATION FOR ORDER CLARIFYING DECEMBER 3, 2004**
7 **ORDER AND LIMITING POWERS OF PERMANENT RECEIVER** upon the
parties to this action addressed as stated on the attached service list:

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

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

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

16 **HAND DELIVERY:** I caused to be hand delivered each such envelope to
the office of the addressee.

17 **FEDERAL EXPRESS BY AGREEMENT OF ALL PARTIES:** By
18 placing in sealed envelope(s) designated by Federal Express with delivery
fees paid or provided for, which I deposited in a facility regularly maintained
19 by Federal Express or delivered to a Federal Express courier, at Los
Angeles, California.

20 **ELECTRONIC MAIL:** By transmitting the document by electronic mail
21 to the electronic mail address as stated on the attached service list.

22 **FAX (BY AGREEMENT ONLY):** By transmitting the document by
facsimile transmission. The transmission was reported as complete and
23 without error.

24 **(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. I declare under
25 penalty of perjury that the foregoing is true and correct.

26 Date: December 16, 2004


27 KIM L. HAACK
28

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 (LSP)**
4 **(LA-2864)**

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