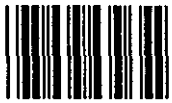
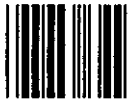


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RESP.

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FILED

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

Laquie DEPUTY

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA *SBF*

11 UNITED STATES SECURITIES AND
12 EXCHANGE COMMISSION,,

13 Plaintiff,

14 v.

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

18 Defendants.

CASE NO. 04cv2295-DMS (POR)

**RESPONSE BY THIRD-PARTY WITNESS,
UNIFIED MORTGAGE SERVICE, INC.,
TO SECOND VERIFIED REPORT OF
RECEIVER AND SEC'S SUBMISSION
REGARDING SAME**

Date: May 27, 2005

Time: 10:30 a.m.

Courtroom No.: 10

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

19 I.

20 INTRODUCTION

21 This response is respectfully submitted by Unified Mortgage Service, Inc., to the Second
22 Verified Report of the Receiver, as well as to the SEC's submission regarding that report. Since
23 Unified Mortgage Service is *not* a party to this action, it has no comments to any portion of that
24 report except to the extent that the Receiver has requested (to which the SEC has concurred)
25 judicial authority to "relet" the existing loan servicing arrangements which Unified Mortgage
26 Service currently has in place with lenders in the Emvest Fund. For the reasons which follow,
27 the Receiver's request should be denied and Unified Mortgage Service should be left in place.
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II.

**THERE IS ABSOLUTELY NO LEGITIMATE BASIS TO RELET UNIFIED
MORTGAGE SERVICE'S LOAN SERVICING CONTRACTS**

In Section 4.2 on page 6 of his Second Verified Report, the Receiver requests approval to cancel Unified Mortgage Service's existing contract with the Emvest Fund, rebid it and then sign a new loan servicing contract for a one-year term without further approval from this Court. At pages 5 – 6 of its submission, the SEC supports and concurs in that request.

There is absolutely no legitimate basis to cancel Unified Mortgage Service's loan servicing arrangements with the Emvest Fund. Irrefutable evidence demonstrates that Unified Mortgage Service has discharged its contractual obligations faithfully, competently and completely. Neither the lenders, nor even the Receiver, have criticized the quality of Unified Mortgage Service's work for the Emvest Fund.

As is established in the accompanying declaration of Unified Mortgage Service's owner, Michele A. Canty, Unified Mortgage Service's fees charged are customary and at market rate, and are not excessive. Moreover, premature termination of Unified Mortgage Service's loan servicing arrangements would constitute a breach of those obligations and subject the Receiver and the Emvest Fund to additional liabilities.

In other words, the Receiver's request to relet this contract would actually cost the Emvest Fund and its investors additional money, not reduce expenses or otherwise preserve assets of the fund. For those reasons, notwithstanding the SEC's joinder in the request, the Receiver should *not* be allowed to terminate and relet Unified Mortgage Service's loan servicing arrangements with the Emvest Fund.

A. Unified Mortgage Service Has Capably Discharged Its Contractual Obligations

Unified Mortgage Service has been the loan servicing agent for lenders funding loans through the Emvest Fund from its beginning through the present time. Unified Mortgage Service has a written Loan Servicing Agreement with each lender who made loans through the Emvest Fund. (Canty Declaration, ¶11.) At no time during its years of service for the Emvest Fund has Unified Mortgage Service received any criticism of its work by the Fund, its lenders or even the

1 Receiver. The individual loan files are complete, current and the accounting for all payments has
2 never been called into question. (Canty Declaration, ¶18.) Thus, there is no cause to prematurely
3 terminate Unified Mortgage Service's loan servicing arrangements with the Emvest Fund.

4 The Receiver (joined by the SEC) nevertheless contends that the fees supposedly paid to
5 Unified Mortgage Service for calendar year 2004 were "significantly above the market rate for
6 the services provided." Like many of the allegations of securities fraud made in this action, the
7 Receiver provides absolutely no evidence to support that assertion, and it is rank speculation.

8 The Receiver's contention is also dead wrong. The contractual loan servicing fee agreed
9 to be paid by lenders in the Emvest Fund to Unified Mortgage Service amounts to one percent of
10 the current principal balance of each loan in the portfolio and allowed Unified Mortgage Service
11 to retain all late charges and related penalties. (See, Section 6.0 of exemplar Loan Servicing
12 Agreement attached as Exhibit 1 to Canty Declaration.)

13 Thus, Unified Mortgage Service has an absolute contractual right to its loan servicing
14 fees. In addition, those fees are also customary and at market. (Canty Declaration, ¶12 -14.) The
15 unsupported speculation by the Receiver to the contrary should therefore be disregarded.

16 Moreover, the Receiver's statement that Unified Mortgage Service collected
17 approximately \$250,000 in loan servicing fees for calendar year 2004 from the Emvest Fund is
18 also misleading. The actual loan servicing fees collected by Unified Mortgage Service for
19 calendar year 2004 from the lenders in the Emvest Fund was only \$103,415.34. Any additional
20 money collected by Unified Mortgage Service during that year was attributable to late fees or
21 other related charges paid *solely* by the borrowers, money which the Emvest Fund was never
22 entitled to receive in the first place. (Canty Declaration, ¶16-17.)

23 Thus, there is no legitimate basis to question, let alone cancel, the Emvest Fund's lenders'
24 contractual arrangements with Unified Mortgage Service to service loans in the Emvest Fund
25 portfolio. Indeed, cancellation of Unified Mortgage Service's contractual arrangements without
26 cause would constitute a breach of contract, and expose the Receiver and the Emvest Fund to
27 additional liabilities. As even the SEC has recognized in its response, minimizing expenses and

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1 preserving the investors' assets are paramount. See, SEC v. Wencke, (9th Cir. 1980) 622 F.2d
2 1363, 1372. Retaining, not replacing, Unified Mortgage Service would achieve those objectives.

3 **B. Premature Termination Would Also Expose the Emvest Fund To Even Greater**
4 **Liabilities**

5 Each and every Loan Servicing Agreement which Unified Mortgage Service has entered
6 into with lenders funding loans through the Emvest Fund has an identical term and stipulated
7 consequences for premature termination. Indeed, as set forth in Section 2.0(c) of the exemplar
8 Loan Servicing Agreement attached to the Canty Declaration, the lender may prematurely
9 terminate Unified Mortgage Service before the loan is repaid, on thirty days' written notice, but:

10 "...in which case Lender shall immediately pay [Unified Mortgage
11 Service] the present value, assuming a rate of return of 100.0% of the sum of
12 [Unified Mortgage Service's] servicing fee for the remaining term of the loan..."

13 Therefore, the Receiver's request here to relet the loan servicing contract would obviously
14 *not* be in the best interest of the Emvest Fund. It would not reduce expenses or preserve investor
15 assets. Indeed, if the request were granted, it would increase expenses and reduce investor assets,
16 because the Emvest Fund would have to pay to Unified Mortgage Service the present value of
17 one hundred percent of its servicing fee for the remaining term of each loan, and also pay a new
18 servicing company additional charges to take over the loan servicing obligations. For those
19 reasons, as well, Unified Mortgage Service should be kept in place.

20 **C. The SEC's Allegations Against Unified Mortgage Service Are False and Arguably**
21 **Violate Rule 11**

22 At footnote 7 on page 5 of its response, the SEC asserts that Unified Mortgage Service has
23 skimmed money from the Emvest Fund. However, the SEC cites to absolutely no evidence to
24 support that allegation. The suggestion that Unified Mortgage Service either committed or
25 participated in criminal fraud is preposterous. Unified Mortgage Service has functioned only as a
26 vendor to the Emvest Fund, and vigorously denies and objects to this false accusation made by
27 the SEC. (Canty Declaration, ¶19-21.) Indeed, this accusation arguably runs afoul of Rule 11 of

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1 the Federal Rules of Civil Procedure, since the SEC recites no evidentiary support for it
2 (presumably in recognition that there is none).

3 III.

4 CONCLUSION

5 There is no reason, let alone a compelling reason, to accept the Receiver's unfounded
6 recommendation to relet Unified Mortgage Service's contracts in violation of their terms.
7 Accordingly, the Receiver's request should be denied in its entirety.

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9

10 DATED: May 13, 2005

HIGGS, FLETCHER & MACK LLP

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By: 

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

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UNIFIED MORTGAGE SERVICE, INC.
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7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

CASE NO. 04cv2295-DMS (POR)

DECLARATION OF SERVICE

11 Plaintiff,

12 v.

13 EMVEST MORTGAGE FUND, LLC,
14 EMVEST, INC., and MILON LYLE
BROCK,

15 Defendants.
16

17 I, the undersigned, declare:

18 I am a resident of the State of California and over the age of eighteen years, and not a
19 party to the within action; my business address is 401 West "A" Street, Suite 2600, San Diego
20 California 92101. On May 13, 2005, I served the within documents:

21
22 **RESPONSE BY THIRD-PARTY WITNESS, UNIFIED MORTGAGE SERVICE, INC.,**
TO SECOND VERIFIED REPORT OF RECEIVER AND SEC'S SUBMISSION
23 **REGARDING SAME**

24 on the interested parties in this action, by placing true copies thereof in a separate envelope
25 addressed to each addressee, respectively, as follows:
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- By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmission report issued by the transmitting facsimile machine is attached hereto.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.
- by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on

1 motion of the party served, service is presumed invalid if postal cancellation date or postage
2 meter date is more than one day after date of deposit for mailing in affidavit.

3 I declare under penalty of perjury under the laws of the State of California that the above
4 is true and correct.

5 Executed on May 13, 2005, at San Diego, California.

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7 _____
8 IRENE CASTRUITA
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