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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Irwin Union Collateral Inc., an Indiana corporation,

No. CV 09-605-PHX-MHM
No. CV 09-606-PHX-MHM
(consolidated)

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Plaintiff/Counterdefendant,

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ORDER

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v.

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Peters & Burris, LLC, a Nevada limited liability company; Unlimited Holdings, Inc., a Nevada corporation; Vegas Managers, LLC, a Nevada limited liability company; David Sass Family Trust Dated 3/16/05, a Nevada Trust,

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Defendants/Counterclaimants.

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Currently before the court under case number CV 09-605-PHX-MHM is Defendants' Motion to Dismiss (Dkt.#8), Defendants' Application for a Determination of Fair Market Value Pursuant to A.R.S. § 33-814(A) (Dkt.#20), Plaintiff's Motion to Submit Heavily Redacted Settlement Agreement In Camera to Prevent a Fraud on the Court in Relation to Statements Made in the Pending Motion to Dismiss (Dkt.#21), Defendants' Counter Motion to Strike and Request for Protective Order (Dkt.#28), and Plaintiff's Motion to Defer Ruling on Defendants' Application for A Fair Market Value Hearing and for a Rule 16 Scheduling Hearing (Dkt.# 36). Similar motions are pending under case number CV 09-606-PHX-MHM, including Defendants' Motion to Dismiss (Dkt.#8), Defendants' Application for a Determination of Fair Market Value Pursuant to A.R.S. § 33-814(A) (Dkt.#20), Plaintiff's

1 Motion to Submit Heavily Redacted Settlement Agreement In Camera to Prevent a Fraud on
2 the Court in Relation to Statements Made in the Pending Motion to Dismiss (Dkt.#21), and
3 Defendants' Counter Motion to Strike and Request for Protective Order (Dkt.#26). Given
4 that the cases have been consolidated under the lower case number (CV 09-605-PHX-MHM)
5 as explained in the Court's Order on June 17, 2009 (Dkt.#37 in CV 09-605, Dkt.#31 in CV
6 09-606), the Court will discuss the pending motions using the docket numbering in CV 09-
7 605 unless otherwise specified.

8 **I. Background**

9 It appears that a loan was made, the borrower defaulted, and the underlying loan and
10 loan documents were assigned to Plaintiff, who is Irwin Union Collateral. The Defendants
11 in this action include the original borrower, Peters & Burris, LLC ("Peters & Burris") and
12 the borrower's guarantors, Unlimited Holdings, Inc. ("UMI"), Vegas Managers, LLC
13 ("Vegas Managers"), and the David Sass Family Trust dated March 16, 2005 (the "Trust").
14 (Dkt.#20 at 2) The loan was secured by a deed of trust on certain property owned by
15 Defendant Peters & Burris in Pinal County, Arizona (the "trust property"). After the
16 borrower defaulted, Plaintiff filed the instant action in Maricopa County Superior Court. The
17 Court granted removal based on diversity. Plaintiff simultaneously sought to invoke the
18 power of sale to dispose of the trust property via Trustee's Sale. The Complaint alleges an
19 unpaid principal balance plus interest and late fees of \$4,104,856.87.

20 The Trustee's sale of the trust property was conducted on April 21, 2009. Plaintiff
21 purchased the property for its credit bid of \$2,000,000. Plaintiff alleges that Defendants are
22 jointly and severally liable for the deficiency of \$2,104,856.87, the amount due less the
23 purchase price of the Trust Property at the Trustee's Sale.

24 **A. Defendants' Application for Determination of Fair Market Value Pursuant to**
25 **A.R.S. § 33-814(A) (Dkt.#20)**

26 Defendants have applied for a determination of the trust property's fair market value
27 as of April 21, 2009, the date the Trust property was sold. Defendants rely on Arizona's
28 deficiency statute, A.R.S. § 33-814 to support their application. (Dkt.#20 at 3) Plaintiff

1 responded to this application by stating that it was willing to stipulate to the fair market value
2 credit requested (\$2,000,000), and argued that there was no need for argument or an
3 evidentiary hearing as to the applicable credit. (Dkt.#30) Defendants' reply clarified that
4 Defendants were seeking a hearing to determine fair market value because they plan to argue
5 that the amount the property was sold for was below its fair market value, and pointed out
6 that Plaintiff's response did not adequately address this basis for their request. (Dkt.#32)

7 Plaintiff then filed a Motion to Defer Ruling on Defendants' Application for a Fair
8 Market Value Hearing and for a Rule 16 Scheduling Hearing. (Dkt.#36) This motion did
9 not contest that Defendants were entitled to such a hearing, but rather argued that prior to any
10 such evidentiary hearing, the Court should rule on the pending motion to dismiss, hold a Rule
11 16 Scheduling Hearing, and allow disclosure and discovery to take place. (Dkt.#36 at 1)
12 Defendants do not respond to this motion, apparently conceding that disclosure and discovery
13 should occur before the Court holds the fair market value hearing. LRCiv 7.2(I) (providing
14 in part if the opposing party "does not serve and file the required answering memorandum,
15 . . . such non-compliance may be deemed a consent to the denial or granting of the motion
16 and the Court may dispose of the motion summarily").

17 Under A.R.S. § 33-814, it appears that Defendants are entitled to a determination of
18 fair market value. As such, the Application for Determination of Fair Market Value Pursuant
19 to A.R.S. § 33-814(A) (Dkt.#20) is granted. However, it similarly appears that such a
20 hearing will not be useful until after the completion of some discovery. Therefore, the Court
21 will also grant Plaintiff's Motion to Defer Ruling on Defendants' Application for a Fair
22 Market Value Hearing." (Dkt.#36) The title of the motion is somewhat misleading; based
23 on the relief sought, it would more properly be called a motion to defer the determination of
24 fair market value rather than a motion to defer ruling on the application. To summarize, the
25 Court will need to determine the fair market value of the property, but this determination will
26 be deferred until after the close of discovery. The hearing and/or briefing schedule regarding
27 the Court's determination of the property's fair market value will be scheduled during the
28 Rule 16 scheduling conference.

1 **B. Motion to Dismiss David Sass Family Trust (Dkt.#8)**

2 **(I) Standard of Review**

3 Under Federal Rule of Civil Procedure 12(b)(6), the Court may grant a motion to
4 dismiss only if the moving party demonstrates that the plaintiff cannot prove any claim
5 entitling him or her to relief. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). In making
6 this determination, the Court must take all allegations of material fact as true and construe
7 them in the light most favorable to the plaintiff. Parks School of Business, Inc. v.
8 Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). When ruling on a Rule 12(b)(6) motion to
9 dismiss, the Court must normally convert the motion into a Rule 56 motion for summary
10 judgment if it considers evidence outside the pleadings. Fed. R. Civ. P. 12(d). “A court may,
11 however, consider certain materials – documents attached to the complaint, documents
12 incorporated without reference to the complaint, or matters of judicial notice – without
13 converting the motion to dismiss into a motion for summary judgment.” United States v.
14 Ritchie, 342 F.3d 903, 908-09 (9th Cir. 2003).

15 Here, Defendants move to dismiss the David Sass Family Trust from this action,
16 pointing out that the trust is not a legal entity, that it does not have the capacity to contract
17 or take legal action on its own behalf, and that it has no capacity to sue or be sued. (Dkt.#8
18 at 1) Because of these facts, Defendants argue that the complaint fails to state a claim against
19 the family trust. (Dkt.#8 at 1) Defendants further argue that because the trust does not have
20 the capacity to contract, it could not have subjected itself to the jurisdiction of a court in
21 Arizona. Finally, Defendants argue that the Statute of Frauds bars the enforcement of the
22 Guaranty because it was not signed by the party to be charged (by the trust). (Dkt.#8 at 5)

23 Plaintiff responds to the Statute of Frauds argument by pointing out that Arizona’s
24 Statute of Frauds, A.R.S. § 44-101 *et seq.* merely requires that the contract be “in writing and
25 signed by the party to be charged, or by some person by him thereunto lawfully authorized.”
26 They point out that the Guaranty was in writing and signed by the person to be charged,
27 Sandy Sass, as Trustee of the Sass Trust. (Dkt.#1 at 27 (Exh. C at 3); Dkt.#1 at 64 (Exh. L
28 at 4)) Plaintiff further responds that the loan documents make it plain that the Sass Trust had

1 the capacity to do business in Arizona, that the Sass Trust explicitly represented (via its
2 trustee) that it had “full power, right, and authority,” to enter into the Guaranty at issue.

3 Federal Rule of Civil Procedure 17(b) governs choice of law issues related to a party’s
4 capacity to sue or be sued. For individuals, this capacity (or lack thereof) is determined by
5 the law of the their domicile. Fed. R. Civ. P. 17(b)(1). For corporations, it is determined by
6 the law of the jurisdiction in which the corporation is incorporated. Fed. R. Civ. P. 17(b)(2).
7 For all other parties, it is determined by the law of the state where the court is located. Fed.
8 R. Civ. P. 17(b)(3). Here, since the trust is neither an individual nor a corporation, the law
9 governing whether the Sass Trust has the capacity to sue or be sued is governed by Arizona
10 law, the state in which this Court sits.

11 Neither party appears to have been aware of Rule 17(b), which may explain why
12 neither party has cited controlling Arizona case law. Both parties appear to agree, however,
13 that the vast majority of jurisdictions appear to favor the traditional rule that trusts lack the
14 capacity to sue or be sued. (Dkt.#17 at 2; Dkt.#14 at 8) Attempting to carve an exception
15 to this general rule, Plaintiff cites to the Restatement (Third) of Trusts § 2 (2003) and 12
16 Williston on Contracts § 35:78, claiming that there is a modern trend to tacitly recognize a
17 trust as a legal “entity,” under certain circumstances, however, neither of these treatises
18 explicitly address the issue at hand, whether a trust has the capacity to be sued, or whether
19 the suit must be against the trustee representing the trust.

20 Plaintiff also cites to City of Phoenix v. Garbage Services Co., 827 F. Supp. 600 (D.
21 Ariz. 1993); however, this case fails to present the question of whether a trust has the
22 capacity to sue or be sued under Arizona law and instead addresses the nature and extent of
23 a trustee’s liability under CERCLA (the Comprehensive Environmental Response,
24 Compensation, and Liability Act). Plaintiff admits that the “more prevalent view” is that the
25 *trustee* has the power to bind the trust. (Dkt.#14 at 8). Given the lack of Arizona case law
26 that has been presented to this Court on the subject, it appears logical to assume that if an
27 Arizona state court were presented with this issue, it would follow the vast majority of case
28 law in other jurisdictions. See, e.g., Coverdell v. Mid-South Farm Equip. Ass’n, 335 F.2d

1 9, 13 (6th Cir. 1964) (holding that a trust must be sued through its trustees); George Bogert
2 The Law of Trusts and Trustees § 712 (2009); Restatement (Second) of Trusts § 2.

3 Because it appears that a trust would lack the capacity to sue or be sued under Arizona
4 law, the Sass Trust will be dismissed from this action. As Plaintiff’s arguments demonstrate,
5 the documents purportedly signed by the trust were not actually signed by the trust itself. A
6 trust is inanimate and may only take action through its human representatives. The Guaranty
7 appears to have been signed by “Sandra Sass, Successor Trustee of David Sass Family
8 Trust.” Thus, it is not technically correct to say that the trust signed several documents
9 warranting that it had power and authority to enter into the contracts at issue. In reality, the
10 *trustee*, acting on behalf of the trust, signed these document. Because of this fact, it does not
11 appear unfair to require that a law suit against the trust proceed against the trustee for the
12 trust in her representative capacity.

13 Somewhat creatively, Defendants also argue that this naming defect precludes this
14 Court from having jurisdiction over the trust. If the trust itself has no ability to contract, sue,
15 or be sued, it could not have availed itself of Arizona as a forum and thus this Court could
16 not have attained jurisdiction over it. However, because the Court is granting the motion to
17 dismiss the trust, the discussion regarding whether the Court has jurisdiction over the trust
18 is moot.

19 Plaintiff has requested that if the motion to dismiss is granted, that the Court allow it
20 to amend the complaint. A related portion of Rule 17, subsection (a)(3), provides that “[t]he
21 court may not dismiss an action for failure to prosecute in the name of the real party in
22 interest until, after an objection, a reasonable time has been allowed for the real party in
23 interest to ratify, join, or be substituted into the action.” While this rule technically applies
24 to the inverse of the current proposition (“a trustee may bring suit without naming the trust”
25 as opposed to “no suits against a trust without naming the trustee”), the principle of this rule
26 appears to apply to here. The purpose of the Federal Rules of Civil Procedure is to “secure
27 the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R.
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1 Civ. P. 1. For this reason, Plaintiff will be allowed to amend the complaint and name the
2 trustee of the Sass Family Trust as a defendant and secure service of process accordingly.

3 In their Reply, Defendants argue that the Guaranty is void against the Trustee as well.
4 However, Plaintiff has not had the opportunity to respond to this argument and the Court
5 declines to opine on an issue that is not presently before it. Plaintiff will be permitted to
6 amend the Complaint. Only if Plaintiff chooses to do so (and the Trustee subsequently
7 moves to dismiss the complaint) will this issue be fairly presented to the Court.

8 **C. Motion to Submit Heavily Redacted Settlement Agreement in Camera to**
9 **Prevent a Fraud on the Court in Relation to Statements Made in the**
10 **Pending Motion to Dismiss (Dkt.#21), Counter Motion to Strike and**
11 **Request for a Protective Order (Dkt.#28)**

12 Plaintiff seeks to submit a “heavily redacted settlement agreement” for *in camera*
13 review in order to “prevent a fraud upon this Court.” (Dkt.#21 at 1) Plaintiff appears
14 particularly interested in drawing the Court’s attention to a sentence that purportedly relates
15 to the scope and authority of Ms. Sass to bind the Sass Trust to contracts as of May 12, 2009.
16 (Dkt.#21 at 1) Plaintiff argues that this would not run afoul of Federal Rule of Evidence 408
17 (which generally prohibits the use of settlement agreements and offers to settle as evidence
18 of liability) because it is “designed to advance the truth and the presentation of the truth” to
19 this Court. (Dkt.#21 at 2)

20 Defendants respond by arguing that Plaintiff’s proposal to submit the settlement
21 agreement goes to the heart of the policies involved in Rule 408 – it is being offered in order
22 to attempt to prove an admission (and hence, liability). (Dkt.#28 at 5) Defendants further
23 argue that Plaintiff has not laid the required foundation to admit the proffered evidence.

24 Because the in camera review of the settlement agreement appears unnecessary, and
25 given that it would potentially violate Rule of Evidence 408, the Court declines to review the
26 heavily redacted settlement agreement, denies the Motion to Submit Heavily Redacted
27 Settlement Agreement In Camera to Prevent a Fraud on the Court (Dkt.#21) and grants
28 Defendants’ Countermotion to Strike this motion (Dkt. #28). However, it does not appear
that a protective order is necessary to prevent Plaintiff from disclosing, referring to, or using

1 the settlement agreement in this action. As such, to the extent that Defendants sought a
2 protective order prohibiting such use, the Request for Protective Order (Dkt.#28) is denied.

3 **D. Duplicative Filings**

4 As explained initially, this case was consolidated for all pretrial proceedings. Though
5 the Court has been discussing the motions that were filed under case number CV 09-605,
6 similar, if not identical, motions were filed and remain pending under case number CV 09-
7 606. Because these motions present the same issues that are discussed above (and in fact
8 appear to be exact duplications in many instances), there is no need to discuss them
9 separately and they will be summarily termed.

10 Specifically, the Motion to Dismiss David Sass Family Trust that was filed under case
11 number CV 09-606 at Dkt.#8. This motion (Dkt.#8), response (Dkt.#16), and reply
12 (Dkt.#18) in the -606 case appear identical to motions in the -605 case that are discussed
13 above, although they have slightly different docket numbers, with the -605 motion to dismiss
14 being numbered at Dkt.#8, the response at Dkt.#14, and reply at Dkt.#18. Similarly,
15 Defendants' Application for Determination of Fair Market Value Pursuant to A.R.S. § 33-
16 814(A) (Dkt.#20) in the -606 case also appears to be a duplicate of Defendants' Application
17 for Determination of Fair Market Value Pursuant to A.R.S. § 33-814(A) (Dkt.#20) in the -
18 605 case. Finally, Plaintiff's Motion to Submit Heavily Redacted Settlement Agreement In
19 Camera to Prevent a Fraud on the Court in Relation to Statements Made in the Pending
20 Motion to Dismiss (Dkt.#21) in the -605 case appears to duplicate the same paper that was
21 filed at Dkt.#21 in the -606 case. The response to this document, identified above as the
22 Counter Motion to Strike and Request for Protective Order (Dkt.#28 in the -605 case) also
23 appears identical to Dkt.#26 in the -606 case.

24 **Accordingly,**

25 **IT IS HEREBY ORDERED** granting Defendants' Application for Determination
26 of Fair Market Value Pursuant to A.R.S. § 33-814(A) (Dkt.#20). The scheduling of the
27 hearing and/or briefing regarding this determination will occur during the Rule 16
28 Scheduling Conference.

1 **IT IS FURTHER ORDERED** granting Plaintiff's Motion to Defer Ruling on
2 Defendants' Application for a Fair Market Value Hearing." (Dkt.#36)

3 **IT IS FURTHER ORDERED** granting Defendants' Motion to Dismiss David Sass
4 Family Trust (Dkt.#8) without prejudice to Plaintiff's amendment of the Complaint to
5 include the Trustee of the Trust in her representative capacity.

6 **IT IS FURTHER ORDERED** denying Plaintiff's Motion to Submit Heavily
7 Redacted Settlement Agreement In Camera to Prevent a Fraud on the Court in Relation to
8 Statements Made in the Pending Motion to Dismiss (Dkt.#21).

9 **IT IS FURTHER ORDERED** granting Defendants' Counter Motion to Strike
10 (Dkt.#28).

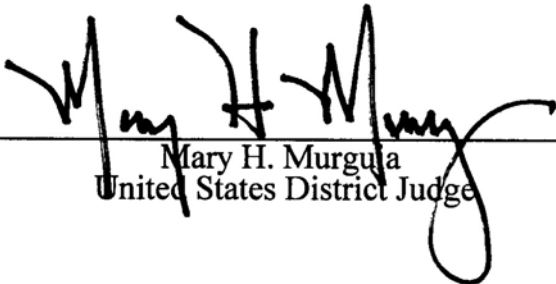
11 **IT IS FURTHER ORDERED** denying Defendants' Request for Protective Order
12 (Dkt.#28).

13 **IT IS FURTHER ORDERED** directing the Clerk of Court to term the following
14 motions that remain pending under case number CV 09-606: (Dkt.#s 8, 20, 21, and 26).

15 **IT IS FURTHER ORDERED** that, as explained in the Court's Consolidation Order
16 (Dkt.#37), all future filings for all pretrial matters should be filed under the lower case
17 number CV 09-605 in order to prevent needless confusion and unnecessary duplication.

18 DATED this 21st day of December, 2009.

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Mary H. Murgula
United States District Judge