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WRITTEN DECISION - NOT FOR PUBLICATION

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CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA	
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re)	Case No. 07-04501-B11
)	
SECURED ASSETS TRUST,)	ORDER ON MOTION TO
)	DISMISS
Debtor.)	
)	

This chapter 11 case was filed as a related case to SAIF, Inc., No. 07-04500, by the same counsel. The cover sheet of the petition asserted that Secured Assets Trust (hereinafter SAT) is a "business trust". The petition was signed by Thomas Sterling as trustee.

Debtor's schedules revealed that debtor owed no taxes, has no unsecured creditors, does have a bank account, and has secured creditors of almost \$16 million. Debtor also listed as an asset accounts receivable owned by SAIF in the same amount owed the secured creditors.

In mid-October, 2007, the United States Trustee filed a motion to dismiss or appoint a Chapter 11 trustee. In the two-

1 page motion, the trustee raised as an additional argument, the
2 issue of whether the debtor is eligible to be a debtor, by saying
3 "this entity may not be a 'business trust' that is eligible to be
4 a debtor." The United States Trustee amplified on the argument
5 in its reply papers. At the hearing on the motion, without
6 ruling on the eligibility issue, the Court ordered the
7 appointment of a Chapter 11 trustee.

8 Now the issue has been raised, again, this time by the
9 Official Committee of Unsecured Creditors for SAIF. It is
10 recognized that 11 U.S.C. § 109 limits eligibility to a "person",
11 as that term is defined in § 101, which includes corporations.
12 In turn, § 101(9) defines "corporation" to include a "business
13 trust", but does not go on to define what constitutes a "business
14 trust".

15 The most useful case discussing what constitutes a "business
16 trust" for purposes of the Bankruptcy code is In re Sung Soo Rim
17 Irrevocable Intervivos Trust, 177 B.R. 673 (Bankr. C.D. CA 1995).
18 There, the court undertook a multi-step analysis, beginning with
19 whether relevant state law recognizes such an entity. Because
20 the court concluded that state law could not dictate access to
21 the federal bankruptcy courts, whether an entity fit the state's
22 definition of a "business trust" could not be conclusive. But it
23 can be, in effect, "a rebuttable presumption which must be tested
24 against the fundamental federal purpose of the restrictions on
25 eligibility to file a bankruptcy petition." 177 B.R. at 676.

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1 California defines a "business trust" to include:

2 [E]very business organization consisting
3 essentially of an arrangement whereby
4 property is conveyed to one, or more than
5 one, trustee for purposes other than the mere
6 conservation of assets, collecting and
7 disbursing of fixed or periodic income, or
8 the securing of an obligation.

6 Revenue & Taxation Code § 23038(b)(1). Under California law
7 there are a number of attributes of a qualified "business trust",
8 including compliance with applicable fictitious name statutes,
9 taxation by the state as a corporation, the creators of the trust
10 share in the profits, and management is vested in one or more
11 trustees.

12 The trust in Sung Soo Rim was easily identified as a probate
13 trust, not a "business trust" under California law. The trust in
14 this case - if, indeed, it even is a trust - is different in
15 multiple ways. First, it appears from concessions made at oral
16 argument that there are no traditional documents creating the
17 entity of the trust, much less ones incorporating the California
18 Probate Code. On the other hand, the uncontroverted evidence is
19 that SAT has not filed any tax returns or paid any taxes. It has
20 not complied with any applicable fictitious name statutes. It
21 appears its sole purpose is to borrow funds which it "loans" to
22 SAIF, Inc., which SAIF then loans to used auto dealers,
23 primarily. As those loans are repaid to SAIF distributions are
24 made to SAT to make payments to its lenders.

25 Based on the record developed to date, the Court finds and
26 concludes that SAT does not qualify as a "business trust" under

1 applicable California law. As already noted, however, that does
2 not end the inquiry. Rather, the Court looks to what Congress
3 contemplated when it decided only a "person" could be a debtor,
4 and excluded a "trust" from the definition of "person" while at
5 the same time including "business trust" within the meaning of
6 "corporation", which in turn is included in the definition of
7 "person".

8 Federal tax law also recognizes "business trust" as an
9 entity with certain attributes. They include:

- 10 (1) creation and maintenance for a
business purpose or function;
- 11 (2) title to property held by
trustee;
- 12 (3) centralized management;
- 13 (4) continuity of business existence
uninterrupted by death among beneficial
owners;
- 14 (5) transferability of interests; and
- 15 (6) limited liability.

16 177 B.R. at 677. Assessing SAT against those attributes also
17 leads to the conclusion that SAT is not a "business trust" as
18 that term is used in the Bankruptcy Code. Among other factors,
19 the evidence is uncontroverted that the sole beneficiary has no
20 control over management of SAT. Further, it appears that the
21 beneficiary's interest in SAT is not transferable, nor has it
22 been shown that SAT would continue to exist if something happened
23 to her.

24 The Chapter 11 trustee's argument, in essence, is that for a
25 number of years SAT has, in fact, been doing business and is
26 therefore a *de facto* business trust. Perhaps in the lower case

1 sense, SAT may be a business trust - that is, a trust that is
2 doing business. But as the Sung Soo Rim court explained: "The
3 mere fact that the trust happens to engage in business does not
4 make it a "business trust". 177 B.R. at 678.

5 The difficulty in grappling with the concept of a "business
6 trust" is that there are many shadings. The trust in Sung Soo
7 Rim was a classic example of a probate-type trust. On the other
8 hand, one court has noted: "The less restrictive view is that a
9 trust can be classified as a business trust if it merely conducts
10 business." In re Parade Realty, Inc. Employees Retirement
11 Pension Trust, 134 B.R. 7 (Bankr. D. HI 1991). That court cited
12 to In re Medallion Realty Trust, 103 B.R. 8 (Bankr. D. MA 1989)
13 for the proposition, but Medallion found the debtor to be a
14 partnership, not a business trust. Medallion did include a
15 useful discussion of the genesis of "Business trust", and it
16 concluded "the test should be simpler - whether the trust was
17 created to transact business for the benefit of investors." 103
18 B.R. at 11. While the Medallion court stated:

19 I conclude, therefore, that Congress
20 intended to permit bankruptcy relief for all
21 trusts which are created for the purpose of
22 transacting business and whose beneficiaries
23 make a contribution in money or money's worth
to the enterprise, without regard to whether
the trust has characteristics of a
corporation such as separate certificates of
ownership.

24 (Id. At 11-12), the Medallion court also concluded that the
25 entity before it was a partnership because the so-called
26 beneficiaries controlled the entity's operations and the so-

1 called trustee carried out their directions and "[t]his so-called
2 'trust' is a creature of the beneficiaries and a mere conduit for
3 their income." Id.

4 This Court does not have to choose between the "less
5 restrictive" or other views of a "business trust" because SAT is
6 not an investment entity. Rather, the Trustee's declaration
7 makes clear that people loan money to SAT and receive a
8 promissory note fixing a rate of return and a maturity date. The
9 form of the transaction is clearly not an investment in SAT for
10 some equity participation, much less sharing in any up-side
11 profit. Moreover, it does not appear that SAT receives any up-
12 side profit notwithstanding the money SAIF purports to make off
13 its loans (of SAT's borrowed funds). As already noted, SAT does
14 not pay taxes.

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Conclusion

For all the foregoing reasons, the Court finds and concludes that Secured Assets Trust (SAT) is not a "business trust" within the meaning of California law, federal tax law, or the Bankruptcy Code. Therefore, it is not a "person" for purposes of eligibility to file a bankruptcy petition. Therefore, the motion of the OCC of SAIF, Inc. to dismiss this Chapter 11 case shall be, and hereby is, granted.

Counsel for the OCC shall prepare and lodge a separate form of judgment consistent with the foregoing within fifteen (15) days of the date of entry of this Order.

IT IS SO ORDERED.

DATED: MAY 12 2008



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court