Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
April 28, 2017

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	)	Case No.: 11-14973-MKN
	)	Chapter 11
R & S ST. ROSE LENDERS, LLC,	)	
	)	Date: December 19, 2016
Debtor.	)	Time: 9:30 a.m.
	)	

MEMORANDUM DECISION ON CONFIRMATION OF DEBTOR'S THIRD AMENDED PLAN OF LIQUIDATION[1]

On November 7, 2016, an evidentiary hearing was conducted on confirmation of the Debtor's Third Amended Plan of Liquidation. The appearances of counsel were noted on the record. After the close of evidence, counsel submitted post-trial briefs.

On December 19, 2016, closing arguments were presented orally, and the matter was taken under submission.

This Memorandum Decision constitutes the court's findings of fact and conclusions of law entered pursuant to FRBP 7052 and FRCP 52.

[1] In this Memorandum Decision, all references to "ECF No." are to the numbers assigned to the documents filed in the bankruptcy case identified by the court, as well as docket entries as they appear on the case dockets maintained by the clerk of the court. All references to "AECF No." are to the numbers assigned to the documents filed in any adversary proceeding identified by the court. All references to "Section" are to provisions of the Bankruptcy Code, 11 U.S.C. §§ 101–1532, unless otherwise indicated. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "FRCP" are to the Federal Rules of Civil Procedure.

BACKGROUND

On April 4, 2011, R&S St. Rose, LLC ("St. Rose"), commenced a voluntary Chapter 11 proceeding. Its primary asset consisted of a fee simple interest in approximately 38 acres of raw land located in Henderson, Nevada (the "Property"). On the same date, R&S St. Rose Lenders, LLC ("Lenders"), commenced a separate voluntary Chapter 11 proceeding, denominated Case No. 11-14973-MKN. Lenders' primary asset consists of its claim in the scheduled amount of $12 million against St. Rose.

Branch Banking and Trust Company ("BB&T") and Commonwealth Land Title Insurance Company ("Commonwealth") are the most active creditors in both Chapter 11 proceedings. Long before the commencement of these Chapter 11 proceedings, Lenders, St. Rose, BB&T (and its predecessor in interest Colonial Bank), Commonwealth, and others, have actively litigated numerous issues in the Eighth Judicial District Court, Clark County, Nevada("State Court"),[2] including whether Lenders or BB&T has a priority lien against the

[2] BB&T and Commonwealth filed a motion to substantively consolidate the two Chapter 11 estates ("Consolidation Motion"). (Lenders ECF No. 135; St. Rose ECF No. 116). The effect of substantive consolidation would be to merge the assets and liabilities of Lenders and St. Rose, thereby extinguishing Lenders' claim against St. Rose based on the St. Rose Note. Because any lien in favor of Lenders would not attach to a separate debt, no priority dispute would remain and BB&T would assert a senior lien against the proceeds of the sale of the Property. On September 4, 2012, this court entered an initial order denying the Consolidation Motion ("Initial Consolidation Order"). (Lenders ECF No. 172; St. Rose ECF No. 168). That order was appealed to the United States District Court for the District of Nevada ("USDC"). On March 27, 2014, the USDC entered an order reversing in part and affirming in part, and remanding the matter to the bankruptcy court ("Remand Order"). (Lenders ECF No. 312; St. Rose ECF No. 378).

On remand, an evidentiary hearing on the Consolidation Motion was conducted over five, non-consecutive days in late 2014 and early 2015, including the live, video, or written testimony of 21 witnesses, as well as the offer of more than 600 exhibits into evidence ("Consolidation Trial"). On March 15, 2016, the court entered an order denying substantive consolidation (Lenders ECF No. 751) that was accompanied by a memorandum decision ("Consolidation Decision") setting forth the court's findings of fact and conclusions of law. (Lenders ECF No. 750). BB&T and Commonwealth appealed that decision, and the appeal is pending before the USDC.

Property[3] to secure payment of their respective claims.[4] BB&T also commenced Adversary Proceeding No. 13-01182-MKN in the Lenders proceeding, against St. Rose and Lenders ("BB&T Adversary"). The Adversary Complaint asserts many of the same legal theories that

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[3] In August 2005, Colonial Bank, predecessor in interest to BB&T, had loaned a portion of the funds needed for St. Rose to acquire the Property from a third party, while St. Rose also obtained a separate loan to fund the purchase. The separate loan was funded through monies borrowed from Robert E. Murdock ("Murdock") and Eckley M. Keach ("Keach"), as well as other individual lenders. The separate loan was made to St. Rose by Lenders and was secured by a deed of trust against the Property. Thereafter, in 2007, Colonial Bank made a construction loan to St. Rose ("Construction Loan") that was to be secured by a deed of trust against the Property. Shortly thereafter, a dispute arose between Colonial Bank and Lenders as to the priority of their deeds of trust. The litigation in State Court began in 2008, when Murdock and Keach sued St. Rose and others, for breach of the promissory notes they received from Lenders, as well as on other legal theories. Thereafter, a separate action was brought in 2009, by Colonial Bank against St. Rose and others. The two proceedings ("State Court Action") were eventually consolidated. See Consolidation Decision at 3-4 n.3. On June 23, 2010, the State Court entered Findings of Fact and Conclusions of Law ("State Court FFCL") after ten days of trial held between January 8, 2010 and April 14, 2010. Id.

[4] The dispute wound its way through the courts of State of Nevada and the judgment of the State Court was affirmed by the Nevada Supreme Court. BB&T also sought review by the United States Supreme Court, but its petition for writ of certiorari was denied. See Branch Banking & Trust Co. v. R&S St. Rose Lenders, LLC, 135 S.Ct. 85 (2014). At one point, BB&T also commenced an involuntary Chapter 7 proceeding against St. Rose to prevent Lenders from foreclosing on the Property as a result of unfavorable rulings in the State Court Action. See R&S St. Rose, LLC, Involuntary Case No. 10-18827-MKN (Bankr. D. Nev. May 13, 2010). The involuntary proceeding commenced by BB&T eventually was dismissed. See Consolidation Decision at 3-4 n.3.

Approximately two years later, after Lenders and St. Rose commenced voluntary Chapter 11 proceedings, BB&T objected to proof of claim number 12-1 that Lenders had filed in the St. Rose bankruptcy proceeding ("Lenders POC"). That objection ("BB&T Claim Objection") was filed on September 24, 2013. (St. Rose ECF No. 257). Commonwealth did not join in that objection and was not a party to that proceeding. This court entered an order overruling the objection (St. Rose ECF No. 400) and BB&T appealed that order to the USDC. (St. Rose ECF No. 406). On October 2, 2014, the USDC reversed the order with respect to any determination as to the amount of Lenders' claim, but affirmed the order as to BB&T's failure to overcome the prima facie validity of the claim ("USDC Remand Order"). (St. Rose ECF No. 476). Lenders appealed that order to the Ninth Circuit Court of Appeals. On November 2, 2015, the Ninth Circuit entered a memorandum dismissing the appeal for lack of jurisdiction, stating that the USDC Remand Order opens the door to "further factfinding and litigation surrounding the amount of Lenders' proof of claim."

were pled before the State Court.[5]

On July 22, 2011, BB&T filed proof of claim number 29-1 ("POC 29-1") in Lenders proceeding, in the unsecured amount of $38,539,707.47. Attached to POC 29-1 is a summary indicating that the claim is based on a loan between Colonial Bank and St. Rose, secured by a deed of trust against the Property, the rights under which loan and deed of trust allegedly had been obtained by BB&T from the Federal Deposit Insurance Corporation ("FDIC") as receiver for Colonial Bank. The summary further explained BB&T's contention that its loan is senior to that of Lenders and references an action previously commenced in state court by Colonial Bank. The summary further refers to a variety of documents that are not attached to the claim.

On July 26, 2011, Commonwealth filed proof of claim number 30-1 ("POC 30-1") in Lenders proceeding, in an unsecured, but unknown amount. It references the state court proceeding commenced by Murdock and Keach and asserts that it has potential tort claims arising from that litigation. The summary attaches a copy of an insurance policy issued by Commonwealth that covered the transaction underlying the state court litigation.

On July 26, 2011, Commonwealth also filed proof of claim number 31-1 ("POC 31-1") in Lenders proceeding, in the unsecured amount of $1,175,905.44. It is based on an assignment of the judgment received by Murdock and Keach in the state court proceeding. Attached to the proof of claim are copies of the judgment and the assignment.

On July 27, 2011, BB&T filed proof of claim number 43-1 ("POC 43-1") in Lenders

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[5] On June 3, 2014, an order was entered granting in part a motion to dismiss brought by Lenders. (AECF No. 32). The motion to dismiss was granted as to the first through sixth causes of action alleged in the adversary complaint, but was denied as to the seventh cause of action seeking a determination of the amount of Lenders' claim. The order specifically states that the seventh cause of action "shall be treated as an objection under 11 U.S.C. § 502(b)(1) as to the amount of the claim asserted by defendant [Lenders]." Additionally, the order specifically directs that "Plaintiff may not relitigate the issue of whether defendant [Lenders] loaned $12,300,000 to defendant [St. Rose] in September 2005." The order on the motion to dismiss therefore was consistent with the USDC Remand Order eventually entered in connection with this court's ruling on the BB&T Claim Objection. See note 4, supra.

proceeding, in an unsecured amount of $38,539,707.47.[6] It references the amended cross-complaint that BB&T filed in the state court proceeding alleging six separate causes of action, including fraudulent misrepresentation and civil conspiracy between St. Rose and Lenders. The summary further referred to a variety of documents that were not attached to POC 29-1, but which are attached to POC 43-1.[7]

On August 2, 2011, Lenders filed a proof of claim ("Lenders POC") in the St. Rose proceeding in the amount of $27,460,871, with $12,000,000 claimed as secured and the remaining $15,460,871 claimed as unsecured. Attached to the Lenders POC is a copy of a Promissory Note Secured by Deed of Trust in the amount of $12,000,000, dated as of August 23, 2005, executed by St. Rose in favor of Lenders ("St. Rose Note").[8]

On August 2, 2013, St. Rose filed a proposed Chapter 11 liquidating plan ("St. Rose Plan"). (St. Rose ECF No. 242).

On November 8, 2013, in the St. Rose Chapter 11 proceeding, an order was entered on confirmation of the St. Rose Plan ("St. Rose Confirmation Order"). (St. Rose ECF No. 291). On November 21, 2013, in the St. Rose proceeding, an order was entered approving a sale of the subject Property in accordance with the confirmed St. Rose Plan ("Sale Order"). (St. Rose ECF

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[6] Like POC 29-1, attached to POC 43-1 is a summary indicating that the claim is based on the Construction Loan obtained by St. Rose from Colonial Bank in 2007.

[7] The loan transaction between St. Rose and Colonial Bank, as well as the litigation, referenced in the various proofs of claim are all the same and encompassed by the consolidated State Court Action.

[8] Paragraph 1 of the St. Rose Note states that interest accrues on the outstanding portion at a rate of 13.5% per annum. Paragraph 8 provides for a charge of 5% of any late payment. Paragraph 9 provides for the borrower to pay the costs of collection, including actual attorneys fees, and further provides for the award of reasonable attorneys fees in any suit or action to enforce the St. Rose Note.

No. 302).[9] BB&T and Commonwealth appealed the St. Rose Confirmation Order to the USDC. (St. Rose ECF Nos. 308 and 315).[10]

On March 13, 2014, in the Lenders proceeding, an objection to BB&T's POC 29-1 and POC 43-1 was filed by the "Creditor Group." (Lenders ECF No. 306).[11]

On April 1, 2014, BB&T filed its response to the Creditor Group's objection to POC 29-1 and POC 43-1. (Lenders ECF No. 313). On April 9, 2014, the Creditor Group filed its reply. (Lenders ECF No. 323). The objection to BB&T's claims was heard on April 16, 2014, and the matter was taken under submission.[12]

On June 3, 2014, an order was entered sustaining the objections to BB&T claims, i.e., POC 29-1 and POC 43-1, based on the outcome of the State Court Action. (Lenders ECF No. 365). The bankruptcy court's order was appealed to the USDC. On or about March 30, 2015, the USDC entered an order reversing the bankruptcy court order. (Lenders ECF No. 639). The Creditor Group appealed that decision to the Ninth Circuit Court of Appeals. (Lenders ECF No. 655). That appeal is currently pending.

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[9] Under the Sale Order, the Property was sold for the purchase price of $13,500,000, with the liens in favor of Lenders and Colonial Bank attaching to the proceeds of sale ("Sale Proceeds").

[10] Pursuant to Article III of the St. Rose Plan, the Sale Proceeds were to be distributed to Lenders up to the allowed amount of its claim. After the close of the sale, those proceeds were distributed to Lenders over the objection of BB&T. See Motion to Return Funds to Debtor that were Improperly Disbursed under the Chapter 11 Plan, filed April 28, 2014 (St. Rose ECF No. 381); Opposition to Motion to Return Funds, etc., filed May 21, 2014 (St. Rose ECF No. 389). The motion was withdrawn by BB&T upon the agreement of counsel that Lenders would not disburse the funds absent a confirmed Chapter 11 plan.

[11] The Creditor Group consists of various individuals and related entities who filed proofs of claim in the Lenders bankruptcy proceeding and who are all represented by the same counsel. Under FRBP 2019(b) and FRBP 2019(d), counsel filed the disclosures of information required by FRBP 2019(c). (Lenders ECF Nos. 263, 268, and 282).

[12] At that hearing, BB&T conceded that POC 29-1 had been superseded by POC 43-1, and therefore, POC 29-1 should be treated as withdrawn.

On June 12, 2014, the Creditor Group filed an objection to Commonwealth's POC 30-1. (Lenders ECF No. 384). Commonwealth filed a response (Lenders ECF No. 401) and the Creditor Group filed a reply. (Lenders ECF No. 415). The matter was heard on August 6, 2014.

On August 7, 2014, the USDC entered an order affirming the St. Rose Confirmation Order. (St. Rose ECF No. 446). BB&T and Commonwealth appealed that USDC order to the Ninth Circuit.

On August 14, 2014, an order was entered sustaining the Creditor Group's objection to Commonwealth's POC 30-1. (Lenders ECF NO. 447). On August 26, 2014, Commonwealth appealed that order (Lenders ECF No. 454) and that appeal is currently pending in the USDC as Case No. 14-cv-01394-JAD.[13]

On October 27 and 28, 2014, as well as November 17, 18 and 21, 2014, an evidentiary hearing on the Consolidation Motion was conducted in compliance with the Remand Order. On January 26, 2015, closing arguments were presented and the Consolidation Motion was taken under submission.

On November 5, 2015, the Ninth Circuit affirmed the USDC's order affirming confirmation of the St. Rose Plan. (St. Rose ECF No. 577). No further appeals were taken with respect to the confirmed St. Rose Plan.[14]

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[13] No objection to Commonwealth's POC 31-1 has been filed and the claim, based on the assignment of the judgment from Murdock and Keach, is deemed allowed under Section 502(a).

[14] In objecting to confirmation of the St. Rose Plan, BB&T successfully argued that Lenders is an affiliate of St. Rose under Section 101(2) and therefore an insider of St. Rose under Section 101(31)(E). See Memorandum Decision on Confirmation of First Amended Liquidating Plan of Reorganization for R&S St. Rose, LLC, under Chapter 11 of the Bankruptcy Code, entered November 8, 2013 (St. Rose ECF No. 290), at 14:12-20. BB&T alternatively argued that Lenders is a "non-statutory" insider of St. Rose. However, the court rejected BB&T's alternative argument, concluding as follows:

> Because the State Court found that the Debtor and Lenders are separate and independent entities, this court cannot conclude that Lenders had such a degree of control that would render the $12,000,000 loan not arms length. It is readily apparent that events subsequent to the transaction improved Lenders' lien position

On March 15, 2016, an order was entered denying the Consolidation Motion (Lenders ECF No. 751), accompanied by a Memorandum Decision ("Consolidation Decision"). (Lenders ECF No. 750). The Consolidation Order was appealed to the USDC. That appeal is currently pending.

On April 18, 2016, Lenders filed an amended Disclosure Statement (Lenders ECF No. 793) along with its proposed Third Amended Chapter 11 Plan of Liquidation ("Lenders Plan"). (Lenders ECF No. 794).[15] On May 4, 2016, Commonwealth filed an objection to the amended Disclosure Statement. (Lenders ECF No. 812). On the same date, BB&T filed a separate objection to the amended Disclosure Statement. (Lenders ECF No. 815).

On June 1, 2016, an order was entered approving Lenders' amended Disclosure Statement subject to certain revisions ("Disclosure Statement Approval Order"). (Lenders ECF No. 839). On June 10, 2016, Lenders filed a final version of the Disclosure Statement that included the revisions required by the court ("Lenders Disclosure Statement"). (Lenders ECF No. 846).

On June 17, 2016, an order was entered scheduling a hearing on confirmation of Lenders' proposed Plan to commence on November 7, 2016. (Lenders ECF No. 849). Trial on the

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> with respect to the Property, but the responsibility for those events appears to lie elsewhere. Moreover, neither BB&T or CLT offered evidence with respect to this issue at the plan confirmation hearing, nor did they seek to examine the Debtor's principal on the issue even though the principal was present at the hearing. Under these circumstances, BB&T and CLT have failed to demonstrate that Lenders is a non-statutory insider of the Debtor.

Id. at 20:10-18 (emphasis added).

[15] Lenders Plan will be implemented by the creation of a liquidation trust ("Liquidation Trust") that will distribute the Sale Proceeds and complete any existing litigation. See Lenders Plan, Article V. From the Sale Proceeds, $400,000 will be allocated to the Liquidation Trust as a "litigation reserve" to pursue or defend any claims on behalf of or against the bankruptcy estate, including any appeals. Id., Article V.A.1., at 32:22 to 33:26. Attached as Exhibit "A" to the Lenders Plan is a copy of the form of R&S St. Rose Lenders, LLC Liquidation Trust Agreement ("LTA") that will take effect on the effective date of the Lenders Plan ("Plan Effective Date").

seventh cause of action in the BB&T Adversary, i.e., BB&T's objection to the amount of Lenders' claim, see note 5, supra, also was scheduled to be held on the same date as the plan confirmation hearing. Accordingly, a concurrent scheduling order was entered in the BB&T Adversary. (AECF No. 76). The scheduling orders also established October 26, 2016, as the date for a pretrial conference to be conducted and deadlines for trial statements and any motions in limine to be filed.

On October 17, 2016, BB&T filed an objection to confirmation of the Lenders Plan ("BB&T Plan Objection"). (Lenders ECF No. 874). On the same date, Commonwealth filed its objection ("Commonwealth Plan Objection"). (Lenders ECF No. 874).

On October 18, 2016, a joint trial statement was filed on behalf of BB&T and Commonwealth in connection with confirmation of the Lenders Plan. ("BB&T Trial Statement"). (Lenders ECF No. 876). On the same date, a trial statement was filed by Lenders ("Lenders Trial Statement"). (Lenders ECF No. 877). The trial statements included lists of witnesses that the parties intended to call at trial.

On October 28, 2016, Lenders filed an omnibus reply to the BB&T and Commonwealth plan confirmation objections ("Omnibus Reply"). (Lenders ECF No. 919). Joinders in that reply were filed by the Creditor Group and RSIG. (Lenders ECF Nos. 923 and 940).[16]

On November 4, 2016, a Declaration of Nedda Ghandi, Esq. Certifying Voting on and Tabulation of Ballots Accepting and Rejecting the Debtor's Plan of Liquidation ("Ballot Tabulation") was filed on behalf of Lenders. (Lenders ECF No. 951).

On November 6, 2016, Lenders filed an amended Declaration of R. Phillip Nourafchan

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[16] On November 1, 2016, Lenders filed a "clean" version of its proposed plan, i.e., that does not include any "redline" highlights of the text. (Lenders ECF No. 941). Although the clean version appears to be identical in all substantive respects to the redline version filed on April 18, 2016, there are slight differences in the formatting of the latter document that slightly alters the pagination. In this Memorandum Decision, the court will refer to the page and line numbers of the redline version.

("Amended Nourafchan Declaration") in support of plan confirmation. (Lenders ECF No. 953). On November 7, 2016, Lenders filed a separate Declaration of R. Phillip Nourafchan ("Second Nourafchan Declaration") in connection with the amount of Lenders' claim. (Lenders ECF No. 954).

On November 7, 2016, RSIG filed a request to take judicial notice of a State Court complaint styled as Branch Banking & Trust Company v. Douglas D. Gerrard, Esq., etc., et al., Case No. A-16-744561-C, filed October 5, 2016 ("RSIG Judicial Notice Request"). (Lenders ECF No. 955). At the hearing, BB&T had no objection to the request.

On November 11, 2016, BB&T and Commonwealth filed a joint objection to the Amended Nourafchan Declaration ("Nourafchan Objection"). (Lenders ECF No. 971).

On December 6, 2016, a post-trial brief in support of plan confirmation was filed by Lenders ("Lenders Closing Brief"). (Lenders ECF No. 988).[17] On the same date, a joint closing brief in support of their objection to plan confirmation was submitted by BB&T and Commonwealth ("BB&T Closing Brief"). (Lenders ECF No. 990).

THE EVIDENTIARY RECORD

The hearing on plan confirmation and the trial of the Adversary Proceeding was held on the same date. Prior to commencement of the hearing, counsel stipulated that the joint exhibits that were admitted into evidence at the Consolidation Trial also would be admitted into evidence. Counsel also stipulated that transcripts of the witness testimony presented at the Consolidation Trial also would be admitted into evidence. Counsel further stipulated that certain joint exhibits beyond those offered at the Consolidation Trial also would be admitted into evidence.[18] Finally, counsel stipulated that their respective expert witnesses, Greg A. McKinnon

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[17] Joinders to the Lenders Closing Brief were filed on behalf of the Creditor Group (Lenders ECF No. 992), as well as on behalf of RSIG. (Lenders ECF No. 993).

[18] In this Memorandum Decision, all references to "JE" are to the joint exhibits admitted into evidence in connection with this proceeding; multiple joint exhibits are referred to as "JES."

for BB&T and Commonwealth, and Thomas Neches for Lenders, are qualified to provide expert testimony in connection with the amount of Lenders' claim.[19]

The extensive findings of fact and conclusions of law set forth in the Consolidation Decision are incorporated by reference in the instant Memorandum Decision. The exhibits admitted into evidence at the Consolidation Trial and the testimony of the witnesses were all considered by the court. The findings and conclusions set forth in the Consolidation Decision are the subject of a pending appeal and cannot be disturbed by this court.

The additional evidence offered in connection with confirmation of the Lenders Plan consists primarily of the live testimony of Lenders' surviving principal, Nourafchan, as well as matters appearing on the court's docket for which the court may take judicial notice.

DISCUSSION

Lenders' primary asset now consists of its interest in the Sale Proceeds. Those proceeds are held by Lenders and can be distributed in this Chapter 11 proceeding only if a plan is confirmed. Only Lenders has filed a proposed Chapter 11 plan throughout these proceedings.

All of the joint exhibits were provided to the court in digital form and were available in hard copies as well.

[19] Because the Amended Nourafchan Declaration was filed the day before the trial, and the Second Nourafchan was filed the day of trial, counsel for the respective parties stipulated that Commonwealth and BB&T could submit written objections, if any, to the declarations after completion of the trial. On November 11, 2016, Commonwealth and BB&T jointly filed objections to the Amended Nourafchan Declaration in connection with confirmation of the Lenders' Plan (Lenders ECF No. 971), as well as the Second Nourafchan Declaration in connection with the amount of Lenders' claim (Lenders ECF No. 972). The objections pertaining to the Amended Nourafchan Declaration are addressed separately in the court's memorandum decision on plan confirmation. As to the Second Nourafchan Declaration, the objection to Paragraph 5 is overruled because it expresses the witness's knowledge as of August 26, 2005, which is not inconsistent with his lack of personal knowledge in Paragraph 7 of the specific receipt and use of funds after August 26, 2005. Likewise, the objection to Paragraph 6 is overruled because the witness's awareness of the general receipt and use of funds after August 26, 2005, is not inconsistent with his lack of the specific knowledge that was held by Saiid Forouzan Rad.

Under the proposed Chapter 11 plan, Lenders' creditors and interest holders are divided into three separate classes. Class 1 consists of the unsecured claims of various individuals and entities that received promissory notes from Lenders. See Lenders Disclosure Statement, Exhibit "H." Class 1 will receive $10,900,000 out of the Sale Proceeds and each claimant is expected to receive a pro rata distribution of approximately 41.5 percent of the allowed amount of their claims. See Lenders Plan, Article III.B.4., at 24:5-18.[20] Class 2 consists of two subclasses. Class 2(a) consists of the unsecured claims of Commonwealth under its POC 31-1 in the undisputed amount of $1,175,905.44 and David J. Merrill ("Merrill") in the undisputed amount of $23,000.[21] See Lenders Disclosure Statement, Exhibit "I." Class 2(a) will receive $443,000 out of the Sale Proceeds and each claimant is expected to receive a pro rata distribution of approximately 37 percent of the allowed amount of their claims. See Lenders Plan, Article III.B.5., at 25:24 to 26:7. Class 2(b) consists of the disputed claim of BB&T in the amount of $77,079,414.94.[22] See Lenders Disclosure Statement, Exhibit "I." Class 2(b) is to receive a pro

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[20] The 41.5 percent estimate appears to be based on the total amount of the claims of individual lenders as set forth in Schedule "H" ($26,294,950.24) and the $10,900,000 in Sale Proceeds allocated to Class 1. If BB&T's Class 2(b) claim is allowed as unsecured for the amount of POC 43-1, i.e., $38,539,707.47, and that figure is added to the total amount in Schedule "H," the combined amount would be $64,834,657.71. Because the amount of the Sale Proceeds allocated to Class 1 would not change, the pro rata distribution estimate decreases to 16.8 percent.

[21] There is no dispute that Merrill represented Lenders in the State Court Action by which judgment was obtained by Murdock and Keach. See Declaration of David J. Merrill in Support of Application to Employ David J. Merrill, P.C., as Special Counsel for Debtor and Debtor-in-Possession at ¶ 3.a. (Lenders ECF No. 15). Merrill was a creditor of Lenders as of the bankruptcy petition date. Id. at ¶ 8. Merrill was listed in Lenders' unsecured creditor Schedule "F" as having a claim in the amount of $23,000. (Lenders ECF No. 1). The claim was not listed as disputed, contingent, or unliquidated. As a result, Merrill was not required to file a proof of claim in the Lenders Chapter 11 proceeding. See Fed.R.Bankr.P. 3003(b)(1).

[22] The $77,079,414.94 figure appears to be the combined amount of BB&T's POC 29-1 and 43-1, even though BB&T previously conceded that POC 29-1 was superseded by POC 43-1 and, therefore, should be treated as withdrawn. See discussion at note 12, supra. The correct amount of BB&T's unsecured claim, if allowed, would be $38,539,707.47. See BB&T Plan

rata distribution as part of Class 1 unsecured claims only if its claim is allowed by a final court order.[23] See Lenders Plan, Article III.B.5., at 26:16-23.[24] Class 3 consists of Forouzan and RPN, as the only two members of the Lenders limited liability company ("Equity Holders"). Id., Article III.B.6., at 27:3-7. The Lenders Plan designates each class as impaired and therefore entitled to vote on whether to accept or reject plan treatment. Id., Article III.C.2.

According to the Ballot Tabulation, Lenders received 39 ballots. In Class 1, 36 ballots were cast and all 36 ballots accepted the Lenders Plan. In Class 2(a), 2 ballots were cast, with Merrill accepting and Commonwealth rejecting the proposed Plan. In Class 2(b), one ballot was cast by BB&T rejecting the proposed Plan. In Class 3, no ballots were cast, but the class was deemed to reject the proposed Plan pursuant to Section 1126(g).

In view of the acceptance by Class 1, Lenders maintains that it has met all of the applicable requirements under Section 1129(a), including Section 1129(a)(10),[25] except with respect to Section 1129(a)(8). Lenders, therefore, proposes to "cram down" the proposed plan

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Objection at 9 n.5.

[23] No additional amounts from the Sale Proceeds will be distributed to Class 2(b). Thus, the total amount distributed from the Sale Proceeds to the allowed unsecured claims in Classes 1 and 2(a) is $11,343,000, after deducting estimated administrative expenses including creation of the litigation reserve fund for the Liquidation Trust. See Lenders Plan, Article V.A., at 32:15-20.

[24] The current appeal before the Ninth Circuit appears limited to whether the outcome of the State Court Action renders BB&T's claims against Lenders under theories of fraudulent misrepresentation and civil conspiracy, incorporated in POC 43-1, unenforceable under Section 502(b)(1). If res judicata principles cannot be applied to the outcome of the State Court Action, then any further objection to BB&T's claim likely would require another evidentiary hearing before the bankruptcy court. In the event a final order is ever entered allowing BB&T's POC 43-1, and BB&T's unsecured claim receives a pro rata distribution as part of Class 1, the distribution percentage to all claimants in Class 1 would fall to approximately 16.8 percent. See note 20, supra. BB&T's portion of the $10,900,000 distributed to Class 1 would be approximately $6,474,670.

[25] This provision requires that in the event that a proposed Chapter 11 plan includes impaired classes, at least one impaired class has voted to accept the plan "determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10).

on non-accepting Classes 2(a) and 2(b) under Section 1129(b), over the objections of Commonwealth and BB&T.

The confirmation objections raised by Commonwealth and BB&T are based on Sections 1129(a)(1, 2, 3, 5, 8, and 10), as well as Section 1129(b)(2). Because Commonwealth and BB&T have rejected treatment of their claims, the Lenders Plan can be confirmed only through cramdown under Section 1129(b)(2). Under Section 1129(b), cramdown is available only if all of the requirements under Section 1129(a), except for 1129(a)(8), are met.

The court having considered the objections raised and the record in these Chapter 11 proceedings, together with the written and oral arguments and representations of counsel, concludes that confirmation of the Lenders Plan is appropriate, subject to the conditions discussed below.

1. Compliance with Section 1129(a)(10).

As an initial matter, the court is persuaded that Lenders has met the requirements of Section 1129(a)(10). That provision specifies as follows: "If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10) (emphasis added). Under Section 1126(c), a "class of claims has accepted a plan if such plan has been accepted by creditors, **other than any entity designated under subsection (e) of this section**, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, **other than any entity designated under subsection (e) of this section**, that have accepted or rejected the plan." 11 U.S.C. § 1126(c) (bolding and underscoring added). There is no dispute that Class 2(a) and Class 2(b) do not accept the Lenders Plan as a result of the ballots cast by Commonwealth and BB&T. As Class 3 is deemed to reject the plan under Section 1126(g), the only way for Lenders to have an accepting impaired class required by Section 1129(a)(10), is if Class 1 accepts the proposed plan.

Class 1 provides for individuals who received promissory notes from Lenders to receive

payments from the Sale Proceeds equal to 41.5 percent of the allowed amount of their unsecured claims "on the Effective Date, **or as otherwise provided in the Confirmation Order** . . . " See Lenders Plan, Article III.B.4., at 24:5-6 (emphasis added). This treatment alters each individual lender's legal rights under the promissory notes within the meaning of Section 1124(1).[26] No more is required for the claims of the individual lenders to be impaired and for their acceptance to satisfy Section 1129(a)(10).

Because all of the ballots cast in Class 1 accept the proposed Plan, both the dollar amount and majority in number requirements of Section 1126(c) have been met. Because Section 1129(a)(10) specifies that impaired class acceptance requirement must be "determined without including any acceptance of the plan by any insider," however, Commonwealth and BB&T assert that the presence of insiders who cast ballots in Class 1 somehow negates the class acceptance by the non-insiders in Class 1. See BB&T Closing Brief at 16:13 to 20:4. No authority is cited for this proposition.

Of the 36 ballots cast in Class 1, Commonwealth and BB&T have alleged that eight of them are from parties who might be characterized as "insiders" of Lenders: Romyar Nourafchan, Poopak Nourafchan, Afagh Nourafchan, the R. Phillip and Afagh Nourafchan Family Trust, Houshang Forouzan, RSIG, Zomco, and Forouzan Partnership-Mitra. See BB&T Closing Brief at 16-17, 18, and 18-19.[27] Even if the eight accepting ballots from those asserted insiders are not included, the remaining twenty-eight accepting ballots from non-insiders are sufficient to meet

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[26] In this circuit, any alteration of the claimant's rights, including an enhancement of those rights, constitutes impairment under Section 1124(1). See In re L&J Anaheim Assocs., 995 F.2d 940, 942-43 (9th Cir. 1993).

[27] At trial, Nourafchan testified that he believed Zomco is owned or controlled by a relative of Rad. Nourafchan had no knowledge of whether Forouzan Partnership - Mitra is controlled by Rad's estate. In his testimony, McKinnon suggested that Forouzan Partnership - Mitra is an insider of Lenders.

the requirements of Section 1126(c).[28]

2. Compliance with Section 1129(a)(1).

Section 1129(a)(1) requires a determination that the proposed plan "comply with the applicable provisions of this title." This provision generally concerns whether the proposed plan contains provisions required or authorized by Section 1123 and that the classifications included in the proposed plan comply with Section 1122. See 7 COLLIER ON BANKRUPTCY, ¶ 1129.02[1] (Alan N. Resnick & Henry J. Sommer, eds.,16th ed. 2016). Commonwealth and BB&T maintain that the Lenders Plan does not comply with the classification provisions of Section 1122 and that the Lenders Plan also discharges the obligations of non-debtor parties in violation of Section 524(e).

a. Classification.

BB&T objects to the treatment of its unsecured claim in Class 2(b) rather than as an unsecured claim in Class 1. See BB&T Plan Objection at 9:5-23. It argues that its unsecured claim is substantially similar to the individual lenders' claims in Class 1 within the meaning of Section 1122(a). It therefore maintains that its claim should be included in Class 1. If so, it presumably argues that its claim of $38,539,707.47 might prevent Class 1 from accepting plan treatment.

Lenders responds that BB&T's unsecured claim is properly included in Class 2(b),

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[28] Only impaired classes get to vote on a proposed plan. See 11 U.S.C. § 1126(f). Only ballots that affirmatively accept or reject plan treatment are counted under Section 1126(c). See generally 7 COLLIER ON BANKRUPTCY, ¶ 1126.04 (Alan N. Resnick and Henry J. Sommer, eds., 16th ed. 2016). If no ballots are cast in an impaired class, the class is deemed to reject the plan. See In re M. Long Arabians, 103 B.R. 211, 215 (B.A.P. 9th Cir. 1989). For some reason, BB&T argues that all of the individual lenders listed in Schedule "H" to Lenders Disclosure Statement somehow determine acceptance by Class 1. See BB&T Plan Objection at 15:1 to 18:4. BB&T's argument, however, confuses the claimants who are eligible to vote with the claimants in the class that actually have accepted or rejected the proposed plan. Schedule "H" lists 55 claimants having substantially similar claims treated under Class 1. According to the Ballot Tabulation, 36 ballots were received, all of them accepting plan treatment. Only eligible claimants that "have accepted" are counted towards the requirements under Section 1126(c).

separate from the unsecured individual lenders in Class 1, for the simple reason that BB&T never loaned any funds to Lenders and does not have a promissory note from Lenders. See Omnibus Reply at 4:33 to 5:8. Lenders argues that BB&T had a secured claim against St. Rose based on the Construction Loan issued by Colonial Bank, but BB&T's lien against the Sale Proceeds is junior to the secured interest of Lenders. Id. Moreover, Lenders maintains that it does not dispute the claims in Class 1 based on the promissory notes issued by Lenders, while it does dispute BB&T's claim of priority status. Id. at 4:33 to 5:2.

The court agrees that BB&T's claim is not substantially similar because it never received a promissory note from Lenders at any time, and BB&T's threshold basis for any claim at all is the promissory note that Colonial Bank received from St. Rose, rather than Lenders. The court already determined that Colonial Bank treated St. Rose and Lenders as separate economic units, see Consolidation Decision at 68:2-19, and BB&T, as successor in interest to Colonial Bank, is bound by that determination. More important, BB&T's POC 43-1 is based on theories of fraudulent misrepresentation and civil conspiracy, see discussion at 4-5 and 13 n.24, supra, rather than the enforcement of specific promissory notes issued by Lenders. Under these circumstances, inclusion of BB&T's claim in the same class as individual lenders who received promissory notes from Lenders actually would violate the substantial similarity requirement of Section 1122(a).[29]

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[29] Lenders alternatively argues that BB&T's claim is distinct because it has other sources by which it could recover its losses. See Omnibus Reply at 5:9-21. In connection with the Consolidation Motion, the court concluded that possibility of alternative sources of recovery for any of the claimants was immaterial to whether substantive consolidation is appropriate. See Consolidation Decision at 75:2-4. It is unnecessary to consider such sources, if any, because BB&T's theory of liability is completely different from the individual lenders' claims in Class 1. Nourafchan offered written testimony that BB&T has alternative sources of recovery that would also benefit Commonwealth. See Amended Nourafchan Declaration at ¶¶ 9 and 12. BB&T and Commonwealth objected to that testimony based on lack of personal knowledge and hearsay. See Nourafchan Objection at 2-3. Under the circumstances, the court will sustain those objections on the additional ground of lack of relevance.

Alternatively, BB&T argues that all of the individual lenders in Class 1 are not substantially similar to each other because some of them provided funds prior to St. Rose's acquisition of the Property while others provided funds after the acquisition. See BB&T Closing Brief at 6:23 to 8:8. BB&T maintains that at least eight of the claimants in Class 1 did not provide funds to purchase the Property.[30] Id. at 7:25-26. This distinction, however, is immaterial to the nature of the individual lenders' claims against Lenders because title to the Property was acquired by St. Rose, and none of the individual lenders claims against Lenders have ever been secured.

Moreover, although the identity of the individuals included in Class 1 has been known to BB&T and Commonwealth well before the plan confirmation hearing, see Lenders Disclosure Statement, Exhibit "H," no motion to designate the claims of the post-acquisition individual lenders was ever filed.[31] As relevant to the instant proceeding, Section 1126(e) provides:

> On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, **or** was not solicited or procured in good faith or in accordance with the provisions of this title.

11 U.S.C. § 1126(e) (emphasis added). Section 1126(e) thus contains two distinct grounds for designating, i.e., disqualifying, a creditor's vote: if it was not cast by the voter in good faith, or if it was not "solicited or procured" by the plan proponent in good faith. See Figter Ltd. v.

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[30] BB&T separately suggests that the ballots cast by individual lenders treated as insiders of Lenders should not be counted towards class acceptance. See discussion at 15-16 & n.28, supra. BB&T also seems to suggest that the ballots cast by individual lenders that received promissory notes from Lenders after the Property was acquired by St. Rose also should not be counted towards Class 1 acceptance. If the remaining twenty-eight non-insider ballots are reduced by the ten other non-insider claimants who received promissory notes after the purchase, there are still eighteen claimants who cast ballots accepting Class 1. Thus, removing the ballots of both insider claimants and post-acquisition claimants does not change the outcome: acceptance by Class 1 still exists under Section 1126(c).

[31] At the Consolidation Trial, more than seventy-five promissory notes issued by Lenders to individual lenders were admitted into evidence, dated as late as June 19, 2007. See Consolidation Decision at 58:1 to 59:8.

Teachers Ins. and Annuity Ass'n of America (In re Figter Ltd.), 118 F.3d 635, 638 (9th Cir.), cert. denied, 522 U.S. 996 (1997). The first ground focuses on the voter; the second ground focuses on the plan proponent. The burden on the objecting party to sustain a designation request is heavy. Bankruptcy courts should employ § 1126(e) designation sparingly, as "the exception, not the rule." In re Adelphia Communications Corp., 359 B.R. 54, 61 (Bankr. S.D. N.Y.2006).

Commonwealth and BB&T had ample opportunity to seek designation of the votes of the individual lenders who obtained promissory notes from Lenders after the Property was acquired. But they did nothing. Having failed to seek designation of those ballots, Commonwealth and BB&T now seek to disenfranchise claimants who received promissory notes from Lenders at different times. It is clear, however, that the temporal considerations have no impact on the enforceability of each promissory note under applicable nonbankruptcy law, i.e., the notes either evidence a promise to pay or they do not. All of the promissory notes held by the individual lenders are based on amounts that indisputably were loaned by each payee. Thus, including all of the individual holders of promissory notes from Lenders in Class 1 does not violate the substantial similarity requirement of Section 1122(a).

In connection with its objection to cramdown under Section 1129(b), however, Commonwealth also argues that the inclusion of its unsecured claim in Class 2(a), rather than Class 1, is unfairly discriminatory. See Commonwealth Plan Objection at 2:4-10. Commonwealth asserts that its unsecured claim is based on the assignment of the Murdock and Keach judgment on their unsecured promissory notes from Lenders, and therefore, is substantially similar to the individual lender claims in Class 1.

In response, Lenders argues, *inter alia*, that the judgment Commonwealth received from Murdock and Keach included default interest and other amounts dissimilar from the individual lenders in Class 1. See Lenders Omnibus Reply at 6:17. Lenders maintains that this dissimilarity warrants separate classification of Commonwealth's claim.

Lenders' argument is factually incorrect. Class 1 also includes the unsecured claim of individual lender George Nyman ("Nyman"). Nyman is included among the individual lenders accepting treatment in Class 1 based on his ballot, see Ballot Tabulation at 3:16, and his proof of claim number 17-2 in the unsecured amount of $538,219.18. (JE 370). Attached to Nyman's proof of claim is a copy of an "Order on Plaintiff's Motion for Partial Summary Judgment" dated July 28, 2009, entered by the State Court in his lawsuit styled as George Nyman v. R&S St. Rose Lenders, LLC, et al., Case No. A583200. That judgment awards Nyman the amount of $300,000 based on the promissory note he received from Lenders, and also provides that "Interest will continue to accrue at the default rate of 25% per annum until the judgment is paid in full." Id. at 3:20-21. In other words, Nyman's claim in Class 1 also is based on a judgment that includes an award of default interest. Thus, it appears that the inclusion of default interest or even the existence of a judgment is not a valid distinction between the unsecured claims in Class 1 and Commonwealth's unsecured claim in Class 2(a).

Moreover, if the inclusion of default interest and the existence of a prepetition judgment makes Commonwealth's claim dissimilar from the individual lenders claims in Class 1, the same differences would render Commonwealth's claim dissimilar from the only other claim in Class 2(a), i.e., the Merrill claim for prepetition legal services. No argument or evidence has been presented that Merrill's claim includes default interest under a promissory note or that it is based on a prepetition judgment. Thus, if Lenders' argument is correct, inclusion of the Commonwealth claim and the Merrill claim in Class 2(a) would violate Section 1122(a).[32]

Lenders further argues, however, that Commonwealth's claim may be separately classified because Commonwealth has alternative sources of recovery for its unsecured claim.

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[32] Under the proposed plan, Class 1 is described as the "Lender Class Claims" while all of Class 2 is described as "General Unsecured Claims." See Lenders Plan, Article III.B.4. and 5. For reasons discussed, Commonwealth qualifies as part of the "lender" class, while only Merrill and BB&T qualify as non-lender, general unsecured claims.

See Omnibus Reply at 6:8-12, citing Wells Fargo Bank, N.A. v. Loop 76, LLC (In re Loop 76, LLC), 465 B.R. 525, 540-41 (B.A.P. 9th Cir. 2012), aff'd, 578 Fed.Appx. 644 (9th Cir. 2014). Prior to the hearing in this matter, BB&T commenced a professional negligence action against the law firm that represented BB&T in the State Court Action. See Exhibit "A" to RSIG Judicial Notice Request. Lenders apparently maintains that a recovery by BB&T in that action will reduce Commonwealth's exposure on any claim of damages for loss of priority as a result of the judgment in the State Court Action. See Omnibus Reply at 6:8-12. The assumption underlying the latest lawsuit appears to be that if the State Court had determined Colonial Bank's deed of trust to have priority over Lenders in the original State Court Action, then BB&T, as the successor in interest to Colonial Bank, could have foreclosed because St. Rose was in default on the Construction Loan. If BB&T is successful in the professional negligence lawsuit against its former counsel, Lenders apparently argues that BB&T's damage award would be equivalent to Commonwealth's exposure under the title policy issued on the Construction Loan.

The viability of this alternative source of recovery is strained at best. BB&T's latest complaint apparently asserts that due to the negligence of its trial counsel, the State Court Action was dismissed as to BB&T, resulting in Lenders asserting its deed of trust in priority over BB&T. The problem, however, is that while the State Court Action was dismissed due to BB&T's failure to prove that it was the assignee of Colonial Bank rights under the Construction Loan, the other findings of fact and conclusions of law entered by the State Court suggest that a judgment in favor of Lenders would have resulted on the merits in any event. The State Court heard all of the evidence during the course of a ten-day trial and entered findings in favor of Lenders on the priority of its deed of trust. The Nevada Supreme Court did not vacate those findings. It therefore appears that BB&T will have difficulty establishing that the negligence of its counsel was the proximate cause of the alleged injury, rather than the failure of the title company.

As a further consequence, Commonwealth's problem is that its exposure under the title

policy may be entirely unaffected by the outcome of BB&T's latest action against its former counsel. While alternative sources of recovery may constitute a sufficient basis to separately classify otherwise similar claims, there must be some indication that the alternative source of recovery is viable. See, e.g., In re Reid Park Properties Ltd. Liability Company, 2012 WL 2934001, at *2 (Bankr.D.Ariz. July 18, 2012) ("Unlike the facts of *In re Loop 76...*, here, the Guarantor is insolvent and a individual chapter 11 debtor...Accordingly, there is no basis to assume that [the two objecting creditors] have another viable source of repayment for their unsecured claims."). The actual record of the prior State Court Action suggests the contrary.

Under these circumstances, the court agrees with Commonwealth that its unsecured claim in Class 2(a) otherwise must be included in Class 1.[33] Inclusion of Commonwealth's unsecured claim in Class 1, however, does not change class acceptance under Section 1126(c). Even if the ballots cast by insiders and post-acquisition individual lenders are not counted, and Commonwealth's rejecting ballot is counted in Class 1, the two-thirds in dollar amount and majority in number requirements under Section 1126(c) are still met.[34]

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[33] As previously discussed at note 20, the effect of including BB&T's claim in Class 1 would reduce pro rata distributions from 41.5 percent to 16.8 percent. If Commonwealth's unsecured claim also is included in Class 1, the combined amount of the individual lender claims set forth in Schedule "H" ($26,294,950.24), the amount of BB&T's claim set forth in POC 43-1 ($38,539,707.47), and Commonwealth's claim set forth in POC 31-1 ($1,175,905.44) would be $66,010,562.05. Because the amount of the Sale Proceeds allocated to Class 1 ($10,900,000) would not change, the pro rata distribution is reduced to 16.5 percent. As previously discussed at note 23, BB&T's pro rata portion would have been approximately $6,474,670. With the inclusion of Commonwealth's claim in Class 1, BB&T's pro rata portion would be approximately $6,359,052.

[34] According to the Ballot Tabulation, 36 ballots were cast in Class 1. All of the ballots accept plan treatment. BB&T and Commonwealth asserted that the following eight individuals and entities are insiders of Lenders: Romyar Nourafchan, Poopak Nourafchan, Afagh Nourafchan, R. Phillip & Afagh Nourafchan Family Trust, Houshang Forouzan, Forouzan Partnership-Mitra, RSIG, and Zomco. According to the record, all or some of the promissory notes of the following ten non-insider individuals and entities were dated after September 1, 2005, when the promissory notes were dated for the acquisition lenders: Saeed Sassooni, Ebrahim Noorani, Vida Hamadani, Sharareh Makhani, Rafee Halelouyan, Yehuda Ohebsion,

Therefore, the Lenders Plan complies with Section 1129(a)(1) only on the condition that Commonwealth's claim based on the Murdock and Keach judgment be included amongst the other Class 1 lender claims.[35]

b. Discharge of Non-Debtors.

Section 524(a) addresses the effect of a discharge obtained through bankruptcy: it "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor . . . " 11 U.S.C. § 524(a)(2) (emphasis added). Section 524(e) further provides in pertinent part that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e).

Article XI.B(b). of the Lenders Plan provides that "UPON THE EFFECTIVE DATE, ALL PERSONS AND ENTITIES SHALL BE PERMANENTLY ENJOINED BY THE PLAN FROM (i) COMMENCING OR CONTINUING ANY ACTION, EMPLOYING ANY PROCESS, ASSERTING OR UNDERTAKING AN ACT TO COLLECT, RECOVER, OR OFFSET, DIRECTLY OR INDIRECTLY, ANY CLAIM, RIGHTS, CAUSES OF ACTION, LIABILITIES, OR INTERESTS IN OR AGAINST ANY PROPERTY DISTRIBUTED OR TO BE DISTRIBUTED UNDER THE PLAN, OR VESTED IN THE DEBTOR, BASED UPON

Fashandi & Associates, Moulouk Forouzan, Double E Family LLC, and Kayvan Setareh. The remaining 18 individuals and entities were not insiders, and the total amount of their claims for funds loaned to purchase the Property was $4,171,940.40: Barry D. Briskin, Mehrdad Noorani, Shirley Harris Trust, Steven Harris, Merle Harris, Babs Kaufman, Julie Harris, George Nyman, Shahnaz Sefaradi, Allan G. Ziegelman, Joseph Safaradi, Mehrdad Danialifar, Douriz Saadnia, Bradley Abeson, Iasabelle Ziegelman, Edith Briskin, Shirley K. Schlafer Foundation, and Jeffrey Harris. Inclusion of Commonwealth's rejecting ballot in the amount of $1,175,905.44 would change the total dollar amount of votes cast in Class 1 to $5,347,879.84. The percentage dollar amount accepting would be at least 78 percent, i.e., greater than two-thirds. The number of accepting ballots would be eighteen (18) while the number of rejecting ballots would be one (1).

[35] Because Merrill does not object to plan treatment and the Merrill claim cannot be included in Class 1, it should remain in Class 2(a) and receive the distribution provided.

ANY ACT, OMISSION, TRANSACTION, OR OTHER ACTIVITY THAT OCCURRED BEFORE THE EFFECTIVE DATE . . . " Lenders Plan at 53:2-14 (emphasis added).

BB&T argues that the permanent injunction provided by the Lenders Plan violates Section 524(e) by extending a bankruptcy discharge to parties other than Lenders. See BB&T Plan Objection at 10:1 to 11:4; BB&T Closing Brief at 9:20 to 12:17. This is an unusual argument to make if only because not even Lenders is entitled to a discharge notwithstanding the discharge language included in the plan. The Lenders Plan itself is titled as a "liquidating plan" and provides for the creation of a liquidation trust that will distribute the Sale Proceeds and complete any existing litigation. Article XI.A. of the Lenders Plan provides for Lenders to receive a "DISCHARGE AND RELEASE OF CLAIMS AND EQUITY INTERESTS OF ANY NATURE WHATSOEVER AGAINST THE DEBTOR," see Lenders Plan at 50:19-21, even though Nourafchan attests that "after the Effective Date of the Plan, the Debtor will be liquidated and its assets transferred to a Liquidating Trust, and thereafter the Debtor will not be operating any business . . . " Amended Nourafchan Declaration at ¶ 13 (emphasis added).[36]

The effect of confirming a Chapter 11 plan is specified under Section 1141. Section 1141(d)(3) expressly provides that "confirmation of a plan does not discharge a debtor if - (A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under 727(a) of this title if the case were a case under chapter 7 of this title." 11 U.S.C. § 1141(d)(3). In this instance, the Lenders Plan checks all of the boxes under Section 1141(d)(3): all of its assets are being liquidated through the Liquidating Trust, it

[36] Article V.C. of Lenders Plan provides that following the effective date of the plan, "Debtor shall manage its own affairs. RPN, LLC . . . . and Forouzan, Inc., . . . will continued to each hold a 50% interest in the reorganized Debtor until the Liquidation Trust Trustee is appointed, upon which appointment the equity interests will be immediately released." Lenders Plan at 36:14-19. At trial, Nourafchan could not reconcile this provision with the language in his declaration attesting that "no one will be managing the Debtor" after the effective date and transfer of assets to the Liquidating Trust. See Amended Nourafchan Declaration at ¶ 13.

will not be operating any business in the future, and it is a non-individual that is barred from receiving a Chapter 7 discharge by Section 727(a)(1). Lenders simply is not entitled to receive a discharge by confirming its plan, and the discharge language in Article XI.A., clearly must be stricken. But the language of Article XI. B(b). of the Lenders Plan also is flawed.

The language of XI. B(b). applies only to the pursuit of actions against the property distributed under the plan, i.e., the Sale Proceeds, rather than claims for personal liability against the recipients of such property. It is not clear to the court, however, what purpose this serves. Distributions from a bankruptcy estate ordinarily are not subject to additional protections not otherwise available under nonbankruptcy law. The permanent injunction proposed by Lenders appears to be the equivalent of an exemption from execution on any Sale Proceeds distributed to a creditor if that creditor could be subject to any claim that arises before the effective date of the Lenders Plan. For example, if any one of the unsecured claimants in Class 1 causes injury to another claimant before the effective date, the permanent injunction would bar execution of any judgment against any distribution received by the defendant claimant under the Plan. While the permanent injunction presumably would not apply to any parties who have not received notice, the language of Article XI. B(b). is not limited to parties having notice. Moreover, the permanent injunction against execution on the plan distributions is not limited to claims related to or even connected to the subject of this bankruptcy proceeding. While Article XI. B(b). does not run afoul of Section 524(e), Lenders has not demonstrated that the permanent injunction is "necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. § 105(a). That language also must be stricken.

3. Compliance with Section 1129(a)(2).

Section 1129(a)(2) requires a determination that the "proponent of the plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). The leading commentator has observed as follows:

> The legislative history of the Section indicates that Congress was

> concerned "that the proponent of the plan must comply with the applicable provisions of title 11, such as . . . disclosure and solicitation requirements of sections 1125 and 1126."

7 COLLIER ON BANKRUPTCY, supra, ¶ 1129.02[2], quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977). See also In re Idearc, Inc., 423 B.R. 138, 163 (Bankr. N.D. Tex. 2009); In re Sierra-Cal, 210 B.R. 168, 176 (Bankr. E.D. Cal. 1997). Section 1125 requires the disclosure statement to provide "adequate information" to parties in interest to enable them to make an "informed judgment about the plan." 11 U.S.C. § 1125(a)(1).[37] Adequate information is "a flexible concept that permits the degree of disclosure to be tailored to the particular situation." In re VDG Chicken, LLC, 2011 WL 3299089 at *4 (B.A.P. 9th Cir. 2011), citing Official Com. of Unsecured Creditors v. Michelson (In re Michelson), 141 B.R. 715, 718–19 (Bankr. E.D. Cal. 1992). However, at an "irreducible minimum," a disclosure statement must provide information about the plan and how its provisions will be effected. See Michelson, 141 B.R. at 718.

BB&T argues that the future management of Lenders has not been adequately disclosed. See BB&T Plan Objection at 11:14-18; BB&T Trial Statement at 8:11-15. In this instance, the Lenders Plan provides for the creation of a Liquidation Trust that will distribute the Sale Proceeds and complete the outgoing litigation, primarily appeals, concerning Commonwealth and BB&T. The trustee of the Liquidation Trust has been identified as Brian Shapiro, an experienced bankruptcy attorney who also serves as a panel Chapter 7 trustee in this judicial district. See Lenders Disclosure Statement at VII.A.1. a. Because the discharge language in the proposed plan implies that Lenders will not cease business operations, however, BB&T correctly argues that the plan proponent must disclose the "identity and affiliations of any individual

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[37] Section 1125(a)(1) provides in part that "'adequate information' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, . . ."

proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor. . .” 11 U.S.C. § 1129(a)(5)(i).

At the hearing, Nourafchan testified that RPN, of which he is the manager, would continue to manage Lenders after plan confirmation, if there was anything to manage. As more fully explained below, however, under the terms of the Lenders Plan and the LTA, there will be nothing for Lenders to manage inasmuch as the Liquidation Trust and the appointment of the Liquidation Trustee will occur on the Effective Date of the Plan. See discussion at 32-33, infra. No additional disclosure is required as to the future management of Lenders.

4. Compliance with Section 1129(a)(3).

Section 1129(a)(3) states that “[t]he plan has been proposed in good faith and not by any means forbidden by law.” 11 U.S.C. § 1129(a)(3). Section 1129(a)(3) does not define good faith.[38] See Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F.3d 1070, 1074 (9th Cir. 2002), cert. denied, 538 U.S. 1035 (2003); Beal Bank USA v. Windmill Durango Office, LLC (In re Windmill Durango Office, LLC), 481 B.R. 51, 68 (B.A.P. 9th Cir. 2012). A plan is proposed in good faith where it achieves a result consistent with the objectives and purposes of the Code. See Sylmar Plaza, 314 F.3d at 1074; Windmill Durango, 481 B.R. at 68. “Good faith” under Section 1129(a)(3) is determined on a case-by-case basis, taking into account the totality of the circumstances of the case. See Sylmar Plaza, 314 F.3d at 1074-75; Windmill Durango, 481 B.R. at 68. A proposed Chapter 11 plan “must deal with creditors in a fundamentally fair manner.” In re Marshall, 298 B.R. 670, 676 (Bankr. C.D. Cal. 2003).

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[38] A legal distinction exists “between the good faith that is a prerequisite to filing a Chapter 11 petition and the good faith that is required to confirm a plan of reorganization.” Pac. First Bank v. Boulders on the River, Inc. (In re Boulders on the River, Inc.), 164 B.R. 99, 103 (B.A.P. 9th Cir. 1994); In re Stolrow’s Inc., 84 B.R. 167, 171 (B.A.P. 9th Cir. 1988). Under Section 1112(b), a Chapter 11 petition may be dismissed for cause “if it appears that the petition was filed in bad faith.” Id. at 170. “Bad faith exists if there is no realistic possibility of reorganization and the debtor seeks merely to delay or frustrate efforts of secured creditors.” Boulders on the River, 164 B.R. at 103.

BB&T argues that the proposed Plan is not proposed in good faith because allowing later individual lenders to substitute for earlier individual lenders was akin to a "Ponzi scheme" operated by Lenders. See BB&T Plan Objection at 12:26 to 13:18; BB&T Closing Brief at 14:10 to 15:4. A so-called Ponzi scheme is "an arrangement whereby an enterprise makes payments to investors from the proceeds of a later investment rather than from profits of the underlying business venture, as the investors expected. The fraud consists of transferring proceeds received from the new investors to previous investors, thereby giving other investors the impression that a legitimate profit making business opportunity exists, where in fact no such opportunity exists." Hayes v. Palm Seedlings Partners-A (In re Agricultural Research and Technology Group), 916 F.2d 528, 531 (9th Cir. 1990), citing Cunningham v. Brown, 265 U.S. 1 (1924).

In the instant case, however, no Ponzi-like arrangement ever existed because the individual lenders were lending funds to facilitate the purchase of the Property, rather than investing in a business. None of the individual lenders who testified at the Consolidation Trial suggested that they were investing in the business of either St. Rose or Lenders. Moreover, Rad specifically testified that when individuals were solicited to invest in specific real estate projects, a separate limited liability company would be formed and the individuals would receive membership shares. See Consolidation Decision at 16:12-14. No evidence was presented that membership shares in St. Rose or Lenders were ever issued to the individual lenders. With respect to the St. Rose project, Rad also testified that individuals were informed that they would be lending money to purchase real estate rather than investing in real estate. Id. at 17:6-7. None of the individuals who testified at the Consolidation Trial suggested that Rad or anyone else had represented that they were investing in the Property. Finally, no evidence was presented that the

individual lenders received anything from Lenders other than the promissory notes.[39]

The court has considered the arguments of BB&T as well as Commonwealth in reviewing the totality of the circumstances in this case. The proposed Plan provides for the liquidation of all of Lenders' assets and does not contemplate continued operations.

The court also has considered the written testimony of Nourafchan in which he attests, albeit in a conclusory fashion, that the Lenders Plan has been proposed in good faith. See Amended Nourafchan Declaration at ¶ 7. Under FRBP 3020(b)(2), the court may determine that a plan is proposed in good faith without taking evidence on the issue if no objection is filed. Here, both BB&T and Commonwealth have objected, but neither chose at the plan confirmation hearing to examine Nourafchan on issue of good faith. As a result, the Amended Nourafchan Declaration is the only direct evidence before the court on the issue.

In view of the foregoing, the court concludes that the proposed Plan permits the orderly liquidation of Lenders' assets while preserving the previously determined lien priorities of its creditors. This is fully consistent with the objectives of the Bankruptcy Code and visits no unfairness upon the dissenting creditors. Based on all of the circumstances discussed above,

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[39] In a bankruptcy proceeding the beneficiaries of a Ponzi scheme typically are pursued through the avoiding powers for fraudulent transfers under Section 548(a)(1) or under Section 544 that incorporates the fraudulent transfer provisions of applicable state law. See, e.g., Neilson v. Johnson (In re Slatkin), 525 F.3d 805, 809 (9th Cir. 2008). Under Section 546(a), the deadline to bring an avoidance action under Section 548 and Section 544 (incorporating state law), is the earlier of two years after the bankruptcy is commenced or the time the case is closed or dismissed. See 11 U.S.C. § 546(a)(1 and 2). A creditor or other party in interest can pursue such an action on behalf of the bankruptcy estate upon seeking and obtaining permission from the court. See Biltmore Assocs., LLC v. Twin City Fire Ins. Co. (In re Visitalk), 572 F.3d 663, 674 n.41 (9th Cir. 2009).

In the instant proceedings, the two-year deadline to bring the avoidance action expired on April 4, 2013. The record indicates that neither BB&T, nor Commonwealth, ever sought authorization to pursue an avoidance action under either Section 548 or 544 to challenge the substitute loans as being the result of an alleged Ponzi scheme. It is too late to do so now. Under these circumstances, BB&T's objection to inclusion of the substitute loans in the calculation of the balance owed on the St. Rose Note is without merit.

including the uncontroverted testimony of Lenders' principal, the court also finds that Lenders Plan is proposed in good faith within the meaning of Section 1129(a)(3).

5. Compliance with Section 1129(a)(5).

As previously discussed, Section 1129(a)(5) requires the identity and affiliations of any post-confirmation directors and officers of the debtor to be disclosed. In addition to the identity, compensation of any insiders acting in such a capacity also must be disclosed. See 11 U.S.C. § 1129(a)(5)(B). Here, the trustee of the Liquidating Trust has been identified as Brian Shapiro and his compensation has been disclosed at $450.00 per hour. If there is any postconfirmation management of Lenders at all, any such management would be by RPN, see Lenders Disclosure Statement, Article VII. C., and no compensation will be paid. See Amended Nourafchan Declaration at ¶ 13. Because the Liquidation Trust is formed and the Liquidation Trustee is appointed simultaneously with the Effective Date of the Lenders Plan, however, there will be no postconfirmation management of Lenders. See discussion at 32-33, infra. Section 1129(a)(5) has been met.

6. Compliance with Section 1129(a)(8).

Section 1129(a)(8) requires that each class set forth in a proposed plan must either accept the proposed plan or must not be impaired under the plan. See 11 U.S.C. § 1129(a)(8). In this proceeding, all classes under the plan are impaired, but only Class 1 has accepted. The requirements of Section 1129(a)(8), therefore, have not been met.

7. Compliance with Section 1129(b)(2).

Section 1129(b) permits plan confirmation even if all impaired classes do not accept under Section 1129(a)(8) as long as one impaired class has accepted in compliance with Section 1129(a)(10). Section 1129(b) also requires a determination that "the plan does not discriminate unfairly" and that the plan is "fair and equitable" with respect to non-accepting classes. 11 U.S.C. § 1129(b)(1).

Commonwealth and BB&T have filed proofs of claim in non-priority, unsecured

amounts.[40] Both have rejected plan treatment in their respective Classes 2(a) and 2(b), and both object to confirmation of the Lenders Plan.

a. Commonwealth.

As previously discussed, Commonwealth maintains that the treatment of its unsecured claim in Class 2(a), instead of Class 1, is unfairly discriminatory under Section 1129(b), because its claim is substantially similar to the Class 1 claims. The court agrees that Commonwealth's unsecured claim is substantially similar to the individual lender claims in Class 1 and will require that Commonwealth's Class 2(a) be treated in accordance with Class 1 claims as a condition to plan confirmation. Any unfair discrimination under Section 1129(b) would no longer exist.

b. BB&T.

BB&T does not argue that Lenders Plan unfairly discriminates in the treatment of its unsecured claim. Rather, it maintains that the plan violates the "absolute priority rule"[41] and,

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[40] As previously discussed, the Creditor Group's objection to BB&T's POC 43-1was sustained by the bankruptcy court, but the bankruptcy court's order was reversed by the USDC. The USDC's decision, however, is on appeal to the Ninth Circuit. See discussion at 6, supra. Additionally, the Creditor Group's objection to Commonwealth's POC 30-1 was sustained by the bankruptcy court, and that order currently is on appeal to the USDC. See discussion at 7, supra.

[41] A simple statement of the absolute priority rule is that owners of a reorganizing entity cannot retain their ownership unless objecting unsecured creditors are paid in full. See In re Perez, 30 F.3d 1209, 1214 (9th Cir. 1994) ("because claims of equity holders are always junior to claims of creditors, this means that a bankruptcy court may not approve a plan that gives the debtor any interest in the reorganized estate unless the plan provides for full payment of claims of creditors in the objecting class."). This principle is reflected by the language of Section 1129(b)(2)(B)(i) and also is captured in the general bankruptcy distribution scheme set forth in Section 726(a). Case law recognizes, however, that owners may retain their interest, however, if they contribute "new value" in the form of money or money's worth equal to the value of the interest that is retained. See generally Case v. L.A. Lumber Prods. Co., 308 U.S. 106, 118 (1939). While the Supreme Court has not determined the validity of this "new value corollary" to the absolute priority rule, it has stated that it is tempered by concepts of marketing and exclusivity. See Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle Street Partnership, 526 U.S. 434, 458 (1999).

therefore, is not "fair and equitable" within the meaning of Section 1129(b)(2)(B). See BB&T Plan Objection at 19:19:7-21; BB&T Trial Statement at 10:25 to 11:15.[42]

Section 1129(b)(2)(B) sets forth two examples of fair and equitable treatment of unsecured creditors. In pertinent part, it requires either that:

> (i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior claim or interest any property . . .

11 U.S.C. § 1129(b)(2)(B) (emphasis added). As the holder of an unsecured claim in Class 2(b), BB&T argues that the Plan is not fair and equitable because its unsecured claim is not being paid in full under Section 1129(a)(2)(B)(i), and the proposed plan can be confirmed only if it meets the requirements of Section 1129(b)(2)(B)(ii). Because the Equity Holders (Forouzan and RPN) allegedly retain their interests in Lenders under Class 3, BB&T argues that the proposed Plan violates the absolute priority rule codified by Section 1129(b)(2)(B)(ii). See BB&T Plan Objection at 19:7 to 20:2.

It is undisputed that holders of unsecured claims in Class 2 , as well as Class 1, will not be paid in full. It also is undisputed that under Class 3, Equity Holders retain their equity interests in Lenders until they are "released." See Lenders Plan, Article III.B.6., at 27:8-10. But when are those equity interests released?

Under Article 4., Section 4.2(c) of the LTA, distributions under the Lenders Plan are made by the Liquidation Trustee. Under Article 2., Section 2.2., the Liquidation Trust is established on the Effective Date of the Lenders Plan. Under Article 6., Section 6.1., the

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[42] Although the Trial Statement is filed jointly by BB&T and Commonwealth, only BB&T argues that the Lenders Plan violates the absolute priority rule. In the closing brief filed jointly by BB&T and Commonwealth, neither of them further argue that the plan violates the absolute priority rule.

Liquidation Trustee is appointed on the Effective Date of the Lenders Plan.

Under Article II.A.1., 35., of the Lenders Plan, the Effective Date of the plan means "the first Business Day on which the conditions specified in Article XII of the Disclosure Statement have been satisfied in full or waived."[43] Those conditions are straightforward: (1) a plan confirmation order must be entered, (2) the required funds must be turned over to the "Distribution Agent" under the plan, and (3) any United States Trustee's fees must be current. See Lenders Disclosure Statement, Article XII.A., at 68:24 to 69:5; Lenders Plan, Article IX A., at 47:4-12. Inasmuch as all of the Sale Proceeds are currently held by Lenders and the fees of the United States Trust are current, see Monthly Operating Report ending October 2016 (Lenders ECF No. 979), the Lenders Plan will become effective, the Liquidation Trust will be established, and the Liquidation Trustee will be appointed, immediately when, and only when, all of the conditions are met.

Because appointment of the Liquidation Trustee and the Effective Date of the Plan may only occur simultaneously, the Equity Holders in Class 3 retain none of their interests in Lenders and receive no property under the proposed plan. Thus, the interests of the Equity Holders are "released" as soon as the Lenders Plan is effective. Under these circumstances, no violation of the absolute priority rule can occur, and Section 1129(b)(2)(B)(ii) is satisfied.

Cramdown over the objections of Commonwealth and BB&T, therefore, is permissible.

8. Compliance with Section 1129(a) and Section 1129(b).

The court has independently reviewed the proposed Lenders Plan to determine whether it satisfies the remaining requirements for confirmation. See In re Ambanc La Mesa Ltd. P'ship, 115 F.3d 650, 653 (9th Cir. 1997); In re Rand, 2010 WL 6259960 at *6 (B.A.P. 9th Cir. 2010); In re Las Vegas Monorail Co., 462 B.R. 795, 798 (Bankr. D. Nev. 2011). Having addressed the

[43] It is not clear to the court why this definition refers to the Lenders Disclosure Statement when the same conditions are set forth in Article IX.A. of the Lenders Plan.

specific objections raised by BB&T and Commonwealth, the court turns to the remaining requirements for confirmation under Section 1129(a).

Section 1129(a)(4) has been met because court approval of payments for professional services is required. See Lenders Plan, Article II.B.1.

Section 1129(a)(6) does not apply as Lenders is not subject to rate regulation in the operation of its business which, under the confirmed plan, will cease operations.

Section 1129(a)(7) has been met because the creditors in all three impaired unsecured classes will receive no less than what they would receive or retain in a Chapter 7 liquidation.

Section 1129(a)(11) has been satisfied because the Lenders Plan proposes the liquidation of all of Lenders assets.

Section 1129(a)(12) has been met as the Lenders Plan provides for payment of all statutory fees. See Lenders Plan, Article III.A.1., and XII.N. Lenders' latest MOR reflects that it has made $33,329 in payments for United States Trustee fees through October 2016.

Section 1129(a)(13) does not apply as Lenders has no employees for whom retiree benefits would be paid.

Section 1129(a)(14) does not apply as Lenders is not under a court order to pay a domestic support obligation on behalf of any party.

Section 1129(a)(15) does not apply as Lenders is not an individual.

Section 1129(a)(16) does not apply as Lenders is not a nonprofit entity.[44]

CONCLUSION

In light of the foregoing, the court will confirm Lenders proposed Third Amended Plan on the condition that the unsecured claim of Commonwealth is included in Class 1, and that the discharge provision in Article XI.A. as well as permanent injunction provision in Article XI. B(b)., are stricken. Additionally, the Liquidation Trust may distribute to Class 1 any

[44] See 7 COLLIER ON BANKRUPTCY, supra, ¶ 1129.02[16].

undistributed portion of the Sale Proceeds allocated to claims in Class 2(a). Additionally, the Liquidation Trust will be permitted to proceed with Class 1 distributions, but must withhold the amount of $6,359,052,[45] until further order of the court.

A separate order has been entered concurrently herewith.

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[45] This figure is the approximate amount that would be distributed to BB&T on a pro rata basis if its POC 43-1 is allowed, and Commonwealth's POC 31-1 also is included in Class 1. See discussion at note 33, supra.