



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
April 24, 2017

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

\* \* \* \* \*

In re:	)	Case No.: 11-14973-MKN
	)	Chapter 11
R & S ST. ROSE LENDERS, LLC,	)	
	)	Date: May 18, 2016
Debtor.	)	Time: 11:00 a.m.

**ORDER ON COMMONWEALTH LAND TITLE INSURANCE COMPANY’S JOINT OBJECTION TO PROOF OF CLAIM NOS. 2, 6, 7, 8, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 32, 33, 34, 37, 38, 39, 40, 41, 42, 44, 45, 47, 48, 52, 57, 58, 59, 60, 61, 62, and 63<sup>1</sup>**

On May 18, 2016, the court heard the Joint Objection to Proof of Claim Nos. 2, 6, 7, 8, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 32, 33, 34, 37, 38, 39, 40, 41, 42, 44, 45, 47, 48, 52, 57, 58, 59, 60, 61, 62, and 63 (“Joint Claim Objection”), brought by Commonwealth Land Title Insurance Company (“Commonwealth”). The appearances of counsel were noted on the record. After oral arguments were presented, the matter was taken under submission.

**BACKGROUND**

On April 4, 2011, R & S St. Rose Lenders, LLC (“Lenders”) filed a voluntary Chapter 11 petition for reorganization. Lenders’s real property Schedule “A” lists no real property assets, and its personal property Schedule “B” lists two checking accounts totaling \$574.38, a claim in

<sup>1</sup> In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case, as well as the minute entries of the clerk, as they appear on the docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “NRS” are to provisions of the Nevada Revised Statutes. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure.

1 the amount of \$12 million against “R & S St Rose, LLC,” and a “judgment against BB&T”<sup>2</sup> in  
2 the amount of \$41,000.00. (Lenders ECF No. 1).

3 On the same date, R & S St. Rose, LLC (“St. Rose”) filed a voluntary Chapter 11  
4 petition, denominated Case No. 11-14974-MKN. St. Rose’s real property Schedule “A” lists a  
5 fee simple interest in approximately 38 acres of raw land located at “St. Rose Parkway and  
6 Jeffries” in Henderson, Nevada, having Assessor Parcel Nos. 177-26-814-001, 177-26-701-019,  
7 177-26-801-011, and 177-26-801-016 (“the Property”). (St. Rose ECF No. 1). St. Rose’s  
8 personal property Schedule “B” lists only a checking account having a balance of \$1,500.00. Id.

9 BB&T and Commonwealth are the most active creditors in both Chapter 11 proceedings.  
10 Long before the commencement of these Chapter 11 proceedings, Lenders, St. Rose, BB&T (and  
11 its predecessor in interest Colonial Bank), Commonwealth, and others, have actively litigated  
12 numerous issues in the Eighth Judicial District Court, Clark County, Nevada (“State Court”),<sup>3</sup>  
13 including whether Lenders or BB&T has a priority lien against the Property<sup>4</sup> to secure payment  
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15 <sup>2</sup> “BB&T” stands for Branch Banking and Trust Company.

16 <sup>3</sup> BB&T and Commonwealth filed a motion to substantively consolidate the two Chapter  
17 11 estates (“Consolidation Motion”). (Lenders ECF No. 135; St. Rose ECF No. 116). The effect  
18 of substantive consolidation would be to merge the assets and liabilities of Lenders and St. Rose,  
19 thereby extinguishing Lenders’ claim against St. Rose based on the St. Rose Note. Because any  
20 lien in favor of Lenders would not attach to a separate debt, no priority dispute would remain and  
21 BB&T would assert a senior lien against any proceeds from any sale of the Property. On  
22 September 4, 2012, this court entered an initial order denying the Consolidation Motion.  
(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.  
(Lenders ECF No. 312; St. Rose ECF No. 378).

23 On remand, an evidentiary hearing on the Consolidation Motion was conducted over five,  
24 non-consecutive days in late 2014 and early 2015, including the live, video, or written testimony  
25 of 21 witnesses, as well as the offer of more than 600 exhibits into evidence (“Consolidation  
26 Trial”). On March 15, 2016, the court entered an order denying substantive consolidation  
27 (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.

28 <sup>4</sup> 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

1 of their respective claims. BB&T also commenced Adversary Proceeding No. 13-1182 against  
2 St. Rose and Lenders (“BB&T Adversary”) by asserting in its Adversary Complaint many of the  
3 same legal theories that were pled before the State Court.

4 From May 16, 2011, through September 14, 2011, a separate proof of claim (“POC”) was  
5 filed by creditors Saeed Sassooni (POC-2), Mehrdad Noorani (POC-6), Mehrdad Noorani (POC-  
6 7), Ebrahim Noorani (POC-8), George Nyman,(POC-17), George Nyman, (Amended POC 17-2  
7 filed on August 3, 2011), Romyar Nourafchan (POC-18), Fashandi & Associates, (POC-19), Iraj  
8 Jourabchi, (POC-20), Vida Hamadani (POC-21), Poopak Nourafchan (POC-22), Afagh  
9 Nourafchan (POC-23), David Setareh (POC-24), R. Phillip & Agagh Nourafchan Family Trust,  
10 (POC-25), Sharareh Makhani (POC-26), Houshang Forouzan (POC-27), Mitra Forouzan (POC-  
11 28), Rafee Halelouyan (POC-32), Yehuda Ohebsion (POC-33), Shahnaz Sefaradi (POC-34), Dr.  
12 Rahmat Ollah Raffi (POC-37), Joseph Safaradi (POC-38), Shahram Rahimi (POC-39), Fashandi  
13 & Associates (POC-40), Mehrdad Danialifar (POC-41), Moulouk Forouzan (POC-42), David  
14 Saadnia (POC-44), Douriz Saadnia (POC-45), Bradley Abeson (POC-47), Majid Tabibzadeh, c/o  
15 \_\_\_\_\_

16 obtained a separate loan to fund the purchase. The separate loan was funded through monies  
17 borrowed from Robert E. Murdock (“Murdock”) and Eckley M. Keach (“Keach”), as well as  
18 other individual lenders. The separate loan was made to St. Rose by Lenders and was secured by  
19 a deed of trust against the Property. Thereafter, in 2007, Colonial Bank made a construction  
20 loan to St. Rose (“Construction Loan”) that was to be secured by a deed of trust against the  
21 Property. Shortly thereafter, a dispute arose between Colonial Bank and Lenders as to the  
22 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.

23 On June 23, 2010, the State Court entered Findings of Fact and Conclusions of Law  
24 (“State Court FFCL”) after ten days of trial held between January 8, 2010 and April 14, 2010.  
25 Id. On July 13, 2010, the State Court entered a judgment, against Lenders only, in favor of  
26 Murdock in the amount of \$166,741.83 and in favor of Keach in the amount of \$1,009,163.61,  
27 resulting in a total judgment of \$1,175,905.44 (“Judgment”). On November 5, 2010, a separate,  
28 final judgment was entered disposing of all of the claims in the State Court Action. On March  
30, 2011, Murdock and Keach assigned their rights under the Judgment to Commonwealth. The  
dispute wound its way through the courts of the State of Nevada and the judgment in the State  
Court Action 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 and Trust Co. v. R&S St. Rose Lenders, LLC, 135 S.Ct. 85 (2014).

1 R & S Investment Group (POC-48), Iraj Jourabchi (POC-52), Isabelle Ziegelman, Deceased  
2 (POC-57), Jeffrey Novick (POC-58), Edith Briskin (POC-59), Shirley K. Schlafer Foundation  
3 (POC-60), Jeffrey Harris (POC-61), Zomco, Inc. (POC-62), Kayvan Setareh (POC-63), Kayvan  
4 Setareh (Amended POC 63-2 filed September 14, 2011).<sup>5</sup>

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

7 On November 8, 2013, in the St. Rose Chapter 11 proceeding, an order was entered on  
8 confirmation of the St. Rose Plan (“St. Rose Confirmation Order”). (St. Rose ECF No. 291). On  
9 November 21, 2013, in the St. Rose proceeding, an order was entered approving a sale of the  
10 subject Property in accordance with the confirmed St. Rose Plan (“Sale Order”). (St. Rose ECF  
11 No. 302).<sup>6</sup> BB&T and Commonwealth appealed the St. Rose Confirmation Order to the USDC.  
12 (St. Rose ECF Nos. 306 and 312).<sup>7</sup>

13 On November 20, 2013, Commonwealth filed the instant Joint Claim Objection,  
14 supported by the supporting Declaration of Scott E. Gizer (“Gizer Declaration”)<sup>8</sup> attached  
15

16  
17 <sup>5</sup> On July 26, 2011, Commonwealth filed proof of claim number 30-1 (“POC 30-1”) in  
18 the Lenders proceeding. POC 30-1 is an unsecured, nonpriority claim in an amount to be  
19 determined. On the same date, Commonwealth filed proof of claim number 31-1, in the  
20 unsecured, nonpriority amount of \$1,175,905.44, based on the assignment of Judgment in the  
21 State Court Action against Lenders in favor of Murdock and Keach.

22 <sup>6</sup> Under the Sale Order, the Property was sold for the purchase price of \$13,500,000, with  
23 the liens in favor of Lenders and Colonial Bank attaching to the proceeds of sale (“Sale  
24 Proceeds”).

25 <sup>7</sup> Pursuant to Article III of the St. Rose Plan, the Sale Proceeds were to be distributed to  
26 Lenders up to the allowed amount of its claim. After the close of the sale, those proceeds were  
27 distributed to Lenders over the objection of BB&T. See Motion to Return Funds to Debtor that  
28 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.

<sup>8</sup> The Gizer Declaration includes numerous exhibits, consisting of the cover pages of each  
proof of claim that is the subject of the Joint Objection, as well as portions of the transcripts of  
various examinations taken of Rad and Teresa Cargill pursuant to FRBP 2004(a).

1 thereto. (Lenders ECF No. 264 ).<sup>9</sup>

2 On May 7, 2014, an opposition was filed to the Joint Claim Objection (“Response”) by a  
3 number of creditors, including claimants, who are represented by the same law firm (“Creditor  
4 Group”). (Lenders ECF No. 339).

5 On May 14, 2014, Commonwealth filed a reply (“Reply”). (Lenders ECF No. 345).

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

9 On October 15, 2014, the court heard Commonwealth’s objection to the proof of claim  
10 that was filed in the Lenders proceeding by Majid Tabibzadeh (“Majid”). (Lenders ECF No.  
11 422). The matter was briefed, argued, and taken under submission.

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

15 On March 15, 2016, an order was entered sustaining Commonwealth’s objection and  
16 disallowing the proof of claim submitted by Majid. (Lenders ECF No. 753).

17 On April 18, 2016, Lenders filed an amended Disclosure Statement along with its  
18 proposed Third Amended Chapter 11 Plan (“Lenders Plan”). (Lenders ECF Nos. 793 and 794).  
19 On May 4, 2016, Commonwealth filed an objection to the Disclosure Statement. (Lenders ECF  
20 No. 812). On the same date, BB&T filed a separate objection to the Disclosure Statement.  
21 (Lenders ECF No. 815).

22 On April 19, 2016, notice was given that the hearing on the Joint Objection would be  
23 held on May 18, 2016. (Lenders ECF No. 797).

## 24 **DISCUSSION**

25 Section 502(a) provides, in pertinent part, that when a proof of claim is filed, the claim  
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27 <sup>9</sup> A hearing on the Joint Objection initially was scheduled for January 8, 2014, but was  
28 continued on multiple occasions by agreement of the parties. (Lenders ECF Nos. 275, 286, 295,  
and 310).

1 “is deemed allowed unless a party in interest . . . objects.” Section 502(b) provides, in pertinent  
2 part, that an objection to a claim must be presented through a noticed hearing, and the court shall  
3 allow the claim “except to the extent that . . . such claim is unenforceable against the debtor and  
4 property of the debtor, under any agreement or applicable law for a reason other than because  
5 such claim is contingent or unmatured.” 11 U.S.C. § 502(b)(1).

6 FRBP 3001(d) expressly provides that if “a security interest in property of the debtor is  
7 claimed, the proof of claim shall be accompanied by evidence that the security interest has been  
8 perfected.”

9 Commonwealth argues that the proofs of claim cannot be allowed as secured claims  
10 because they are not accompanied by evidence that a security interest has been perfected. See  
11 Joint Objection at 4:2-24. Commonwealth does not object, however, to allowance of the full  
12 amount of the proofs of claim on an unsecured, non-priority basis. Id. at 5:4-6.

13 In opposition, the Creditor Group asserts that the various claimants possibly may have a  
14 security interest in the money received under Lenders’ deed of trust against the Property, see  
15 Response at 4:23 to 5:15, or that the claimants may have a constructive trust on the funds they  
16 loaned to the Lenders encompassed by the promissory notes received from Lenders. Id. at 5:16  
17 to 6:16. In light of these possibilities, the Creditor Group argues that an evidentiary hearing is  
18 appropriate.

19 Commonwealth’s reply is straightforward: (1) there is no basis for a security interest in  
20 the proceeds of Lenders’ deed of trust against the Property, see Reply at 2:15 to 3:17, and (2) a  
21 constructive trust remedy does not confer secured status. Id. at 4:5-15.

22 The court having considered the record, together with the written and oral arguments of  
23 counsel, concludes that the Joint Claim Objection has overcome the prima facie validity of the  
24 proofs of claim.

25 First, the documents attached to the proofs of claim do not evidence the existence of a  
26 lien against any real property of Lenders inasmuch as there is no dispute that Lenders does not  
27 and has not ever owned any real property.

28 Second, the documents attached to the proofs of claim do not evidence a lien or any

1 security interest in the deed of trust that Lenders has against the Property securing the St. Rose  
2 Note.

3 Third, the documents attached to the proofs of claim do not evidence the existence of an  
4 assignment of Lenders' rights in the deed of trust against the Property securing the St. Rose  
5 Note.

6 Fourth, the documents attached to the proofs of claim do not evidence that a separate  
7 security agreement was entered between Lenders and the claimant granting a security interest in  
8 the proceeds of the St. Rose Note, nor in any bank accounts in which Lenders held such  
9 proceeds.

10 Fifth, the documents attached to the proofs of claim do not evidence that a financing  
11 statement or similar document was filed or recorded evidencing that Lenders granted a security  
12 interest in the proceeds of the St. Rose Note to any claimant.

13 Sixth, the documents attached to the proofs of claim do not evidence that any of the  
14 claimants are in actual or constructive possession of any cash proceeds of the St. Rose Note.<sup>10</sup>

15 Seventh, the documents attached to the proofs of claim do not evidence that a  
16 constructive trust on the funds evidenced by the promissory notes from Lenders, or the proceeds  
17 of the St. Rose Note, was ever imposed by a court of competent jurisdiction prior to the  
18 commencement of the Lenders bankruptcy proceeding.

19 Eighth, the documents attached to the proofs of claim do not evidence that a constructive  
20 trust on the funds evidenced by the promissory notes from Lenders, or the proceeds of the St.  
21 Rose Note, was ever imposed by a court of competent jurisdiction after the commencement of  
22 the Lenders bankruptcy proceeding.<sup>11</sup>

23 The Creditor Group's opposition to the Joint Objection is not accompanied by any  
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25 <sup>10</sup> A security interest in cash typically can be perfected only by possession. See NRS  
26 104.9312(2)(c).

27 <sup>11</sup> A constructive trust remedy generally is not imposed after commencement of a  
28 bankruptcy case because it results in the preferential treatment of the creditor that is afforded the  
remedy. See Torres v. Eastlick (In re North American Coing & Currency, Ltd.), 767 F.2d 1573,  
1575 (9th Cir. 1985).

1 evidence from any claimant - through declarations, affidavits, security agreements, assignments,  
2 or otherwise - supporting the existence of a lien against the deed of trust securing the St. Rose  
3 Note, nor a lien against the proceeds of payments on the St. Rose Note. Under these  
4 circumstances, an evidentiary hearing is not required.

5 Inasmuch as Commonwealth does not dispute that the promissory notes from Lenders  
6 that are attached to each proof of claim are sufficient evidence of unsecured, non-priority claims  
7 against Lenders, the amounts asserted in each claim will be allowed on an unsecured basis.

8 **IT IS THEREFORE ORDERED** that Commonwealth Land Title Insurance Company's  
9 Joint Objection to Proof of Claim Nos. 2, 6, 7, 8, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28,  
10 32, 33, 34, 37, 38, 39, 40, 41, 42, 44, 45, 47, 48, 52, 57, 58, 59, 60, 61, 62, and 63, Docket  
11 No. 264, be, and the same hereby is, **SUSTAINED IN PART AND OVERRULED IN PART.**

12 **IT IS FURTHER ORDERED** that Proof of Claim Nos. 2, 6, 7, 8, 17, 18, 19, 20, 21, 22,  
13 23, 24, 25, 26, 27, 28, 32, 33, 34, 37, 38, 39, 40, 41, 42, 44, 45, 47, 48, 52, 57, 58, 59, 60, 61, 62,  
14 and 63, be, and the same hereby are, **DISALLOWED** as secured claims under 11 U.S.C. §  
15 506(a)(1).

16 **IT IS FURTHER ORDERED** that Proof of Claim Nos. 2, 6, 7, 8, 17, 18, 19, 20, 21, 22,  
17 23, 24, 25, 26, 27, 28, 32, 33, 34, 37, 38, 39, 40, 41, 42, 44, 45, 47, 48, 52, 57, 58, 59, 60, 61, 62,  
18 and 63, be, and the same hereby are, **ALLOWED** as non-priority, unsecured claims under 11  
19 U.S.C. § 506(a)(1).

20 Copies sent to all parties via BNC and via CM/ECF ELECTRONIC FILING

21 Copies sent via BNC to:

22	SAEED SASSOONI	EBRAHIM NOORANI	FASHANDI & ASSOCIATES
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17	SHARAREH MAKHANI ATTN: BANKRUPTCY DEPT/ MANAGING AGENT PO BOX 241334 LOS ANGELES, CA 90024	FASHANDI & ASSOC C/O TONY FASHANDI 9320 CHESAPEAKE DRIVE #102 SAN DIEGO, CA 92123	EDITH BRISKIN ATTN: BANKRUPTCY DEPT/ MANAGING AGENT 1465 CLARENDON RD JEDDO, MI 48032-2604
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