Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
April 24, 2017

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	Case No.: 11-14974-MKN
R & S ST. ROSE, LLC,	Chapter 11
Debtor.	
BRANCH BANKING AND TRUST COMPANY SUCCESSOR IN INTEREST TO FDIC AS RECEIVER OF COLONIAL BANK, N.A.,	Adv. Proc. No.: 13-01182-MKN
Plaintiff,	Date: December 19, 2016
v.	Time: 9:30 a.m.
R & S ST. ROSE, LLC, a Nevada limited liability company; R & S ST. ROSE LENDERS, LLC, a Nevada limited liability company,	
Defendants.	

MEMORANDUM DECISION AFTER TRIAL[1]

[1] In this Memorandum Decision, all references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "NRS" are to provision of the Nevada Revised Statutes. All references to "ECF No." are to the numbers assigned to the documents filed in the relevant bankruptcy case as they appear on the dockets maintained by the clerk of the court. All references to "AECF No." are to the numbers assigned to the documents filed in any relevant adversary proceeding. Documents filed in other bankruptcy cases or adversary proceedings will be identified similarly. All references to "FRBP" are to the Federal

On November 7, 2016, a trial was conducted in the above-captioned adversary proceeding. 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.

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 consisted of its claim in the scheduled amount of $12 million against St. Rose.

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").[2]

Branch Banking and Trust Company ("BB&T") and Commonwealth Land Title

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Rules of Bankruptcy Procedure. All references to "FRCP" are to the Federal Rules of Civil Procedure.

[2] 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 attorney's fees, and further provides for the award of reasonable attorney's fees in any suit or action to enforce the St. Rose Note.

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"),[3] including whether Lenders or BB&T has a priority lien against the Property[4] to

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[3] 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). In remanding the matter for further proceedings, the USDC specifically observed: "Having reviewed the record, the bankruptcy court's characterization of the Debtors' as 'sloppy' is, at best, an understatement. The record is sparse as to any effort, prior to 2008, undertaken by the Debtors' members, or the owners of those members, to treat the Debtors as distinct entities. Rebecca Daniels, an employee of R&S Investment since October 2005, who acted as accountant for the various R&S related entities, was not aware of Lenders until September 2008, when she created its books and records." Remand Order at 2 n.1.

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.

[4] 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

secure payment of their respective claims.[5] BB&T also commenced the above-captioned Adversary Proceeding against St. Rose and Lenders ("BB&T Adversary")[6] by asserting in its Adversary Complaint many of the same legal theories that were pled before the State Court.[7]

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.

[5] 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. 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. 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 the Lenders' POC in the St. Rose bankruptcy proceeding ("BB&T Claim Objection"). (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." (St. Rose ECF No. 577).

[6] Commonwealth is not a named party in the BB&T Adversary.

[7] 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

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 No. 302).[8] BB&T and Commonwealth appealed the St. Rose Confirmation Order to the USDC. (St. Rose ECF Nos. 306 and 312).[9]

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 October 15, 2014, the court heard Commonwealth's objection to the proof of claim that was filed in the Lenders proceeding by Majid Tabibzadeh ("Majid"). (Lenders ECF No. 422). The matter was briefed, argued, and 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

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$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 5, supra.

[8] 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").

[9] 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.

respect to the confirmed St. Rose Plan.[10]

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

On April 18, 2016, Lenders filed an amended Disclosure Statement along with its proposed Third Amended Chapter 11 Plan ("Plan"). (Lenders ECF Nos. 793 and 794). On May 4, 2016, Commonwealth filed an objection to the Disclosure Statement. (Lenders ECF No. 812). On the same date, BB&T filed a separate objection to the 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 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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[10] 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 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.

Memorandum Decision at 20:10-18 (emphasis added).

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 18, 2016, a joint trial statement was filed on behalf of BB&T and Commonwealth in the BB&T Adversary ("BB&T Trial Statement"). (AECF No. 85). On the same date, a trial statement was filed by Lenders ("Lenders Trial Statement"). (AECF No. 86). The trial statements included lists of witnesses that the parties intended to call at trial.

On October 20, 2016, BB&T and Commonwealth jointly filed a Motion to Exclude certain portions of the expert testimony and expert report offered by Lenders and St. Rose. (AECF No. 88).

On October 20, 2016, Lenders filed a Motion in Limine seeking to preclude Commonwealth and BB&T from introducing testimony and evidence disputing the validity of the Promissory Note between St. Rose and Lenders. (AECF No. 90).

On October 25, 2016, a joint opposition to the Motion in Limine was filed by Commonwealth and BB&T. (AECF No. 95). On the same date, opposition to the Motion to Exclude was filed by Lenders. (AECF No. 97).

On October 31, 2016, an order was entered denying the Motion to Exclude. (AECF No. 100). On the same date, an order was entered granting in part and denying in part the Motion in Limine. (AECF No. 101).

On November 6, 2016, Lenders filed an amended Declaration of R. Phillip Nourafchan ("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 December 6, 2016, a post-trial brief was filed by Lenders ("Lenders Post-Trial Brief"). (Lenders ECF No. 989). On the same date, a joint closing brief was submitted by BB&T and Commonwealth ("BB&T Closing Brief"). (Lenders ECF No. 991).

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.[11] Finally, counsel stipulated that their respective expert witnesses, Greg A. McKinnon ("McKinnon") for BB&T and Commonwealth, and Thomas Neches ("Neches") for Lenders, are qualified to provide expert testimony in connection with the amount of Lenders' claim in the St. Rose proceeding.[12]

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

[12] Because the Amended Nourafchan Declaration was filed the day before the trial, and the Second Nourafchan Declaration 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

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 the instant adversary proceeding and claim objection consists primarily of the expert reports, amended exhibits, and documents, as well as the live expert witness testimony offered by Lenders on one hand, and BB&T and Commonwealth on the other hand. Additionally, the live witness testimony of Lenders' surviving principal, Nourafchan, also was presented.

DISCUSSION

The history of the many disputes between these parties is well known and is adequately set forth in the Consolidation Decision. Related litigation between the parties in other forums also exists and need not be described here. See, e.g., Branch Banking and Trust Company v. The Estate of Saiid Forouzan Rad, etc., et al., Case No. 2:14-cv-01947-APG-PAL, Judgment, entered October 13, 2016. (JE 717).

There is no dispute that the State Court previously determined that Lenders loaned $12,000,000 to St. Rose to purchase the Property.[13] On November 10, 2010, a Final Judgment

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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.

[13] In connection with the Consolidation Motion, the USDC reversed and remanded the bankruptcy court's original decision, finding that this court "erred in adopting the state court's findings of fact." See Order, at 5:15-16, consolidated Case Nos. 2:12-cv-01615-LDG (GWF), 2:12-cv-01617-LDG (GWF), 2:12-cv-01647-LDG (GWF), and 2:12-cv-01667-LDG (GWF), filed March 27, 2014. (St. Rose ECF No. 378). The USDC directed this court to determine the Consolidation Motion "without reliance on or reference to the state court order." Id. at 5:18. As directed by the USDC, the Consolidation Decision entered after remand does not rely in any respect on the State Court FFCL.

was filed in the State Court Action. (JES 723). That Final Judgment awards, inter alia, $166,741.83 in favor of Murdock against Lenders, and an additional $1,009,163.61 in favor of Keach against Lenders, both on claims for breach of the promissory notes issued by Lenders. The Final Judgment references the State Court FFCL that was entered on June 23, 2010 (JES 221). Those findings of fact and conclusions of law were extensive and included findings, inter alia, that ". . . Rad and Nourafchan (individually, and in their representative capacities) **signed a promissory note in favor of R&S Lenders for $12,000,000.00** (the "R&S Lenders Note") as well as a second position deed of trust in that amount that recorded on September 16, 2006 as document No. 02881 in Book 20050916 of the Official Records, Clark County, Nevada (the "R&S Lenders DOT")," and that "Rad, Nourafchan, and/or their agents raised **the $12,000,000 that R&S Lenders loaned to R&S to purchase the Property** by soliciting private investors that included, among others, family members, friends, acquaintances, including Murdock and Keach (collectively referred to as 'investors'). . . ." See State Court FFCL at ¶¶ 17 and 19 (Emphasis added). The Final Judgment also references the prior judgment in favor of Murdock and Keach entered on July 13, 2010, that resolved all remaining claims alleged by Murdock and Keach against Lenders in the State Court Action.[14]

[14] A copy of the July 13, 2010 judgment by the State Court is attached to Proof of Claim 31-1, filed by Commonwealth in the Lenders proceeding on July 26, 2011. That judgment in favor of Murdock and Keach expressly states that "This Judgment fully and finally resolves all remaining claims brought by the Plaintiffs against Defendant R & S St. Rose Lenders, and its entry constitutes the entry of final judgment against Defendant R & S St. Rose Lenders for all purposes." That judgment is attached to Commonwealth's proof of claim because the rights under the judgment were subsequently assigned by Murdock and Keach to Commonwealth. A copy of the assignment, dated March 30, 2011, also is attached to that proof of claim. That assignment was obtained by Commonwealth pursuant to a purchase agreement with Murdock and Keach dated March 30, 2011. (JE 189). That purchase agreement indicates that Commonwealth paid Murdock and Keach $950,000 for their rights under the judgment, and also agreed to pay any additional amounts beyond $950,000, actually recovered from Lenders, up to the full amount of the judgment plus accrued interest. Because the most that would ever be paid on the claim is the full amount of the judgment on which it is based, it appears that Commonwealth acquired the judgment solely to establish standing as a creditor in the Lenders

This bankruptcy court previously sustained an objection to the proof of claim filed by BB&T in the Lenders proceeding, based on the State Court FFCL. Because the State Court also found that no misrepresentations had been made to BB&T's predecessor (Colonial Bank), the bankruptcy court concluded, inter alia, that BB&T was precluded from asserting fraudulent misrepresentation and conspiracy theories in its proof of claim. BB&T appealed this court's order sustaining the objection to its proof of claim. On appeal, the USDC reversed, concluding that the State Court lacked jurisdiction to enter its findings because BB&T had failed to prove it had standing. For that reason, the USDC also concluded that this bankruptcy court erred in giving issue preclusive effect to the State Court FFCL. See Order dated March 30, 2015, Case No. 2:14-cv-00926-GMN (D. Nev.). (Lenders ECF No. 639).[15]

As to Murdock and Keach, however, there is no question that they had standing to pursue all of their claims against Lenders in the State Court Action and that Murdock and Keach, in fact, prevailed on their breach of contract claims. Because the State Court specifically found that $12,000,000 had been loaned by Lenders to St. Rose to purchase the Property and that those funds had been solicited from Murdock and Keach (and others), it appears that Commonwealth, as successor in interest to Murdock and Keach, would be barred by principles of issue preclusion from disputing whether Lenders in fact loaned $12,000,000 to St. Rose. Inasmuch as the USDC Remand Order addresses issue preclusion solely as it pertains to BB&T, there is no reason why the State Court FFCL would not apply to Commonwealth.[16]

Notwithstanding the State Court findings and conclusions, this court has independently

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bankruptcy proceeding.

[15] That decision by the USDC has been appealed to the Ninth Circuit Court of Appeals.

[16] Even though Commonwealth is not a party to the BB&T Adversary, see note 6, supra, and is not a party to the objection to Lenders' claim, see note 5, supra, Commonwealth and BB&T filed a joint trial statement (AECF No. 85) as well as a joint closing brief. (Lenders ECF No. 991). It does not appear, however, that Lenders has ever objected to Commonwealth's participation in this proceeding.

examined the record presented to determine whether a balance is owed on the St. Rose Note and, if so, the proper amount. Based on that examination, the court concludes that the St. Rose Note was funded by Lenders through loans obtained from individual lenders. The court also concludes that Lenders was owed a principal balance of $9,025,000 as of April 4, 2011, plus accrued interest in the amount of $3,325,660. Under the terms of the St. Rose Note, an additional $476,250 was owed in late fees, bringing the total amount owed to $13,326,910, as of the bankruptcy petition date.

1. Funding of the St. Rose Note by Lenders.

The uncontradicted record establishes that the St. Rose Note was funded by Lenders. First, there is no dispute that Lenders was formed on or about August 2, 2005, when its articles of organization were filed with the Nevada Secretary of State. (JE 1). There is no dispute that the operating agreement for Lenders became effective on that date. (JE 2). There is no dispute that on August 3, 2005, a limited liability charter for Lenders was issued by the Nevada Secretary of State. (JE 203). There is no dispute that an employer identification number was obtained by Lenders from the Internal Revenue Service on or about August 10, 2005. (JE 208). There is no dispute that the managers of Lenders are Forouzan, Inc. and RPN, LLC.[17] There is no dispute that Saiid Forouzan Rad ("Rad") was the president of Forouzan, Inc. and that R. Phillip Nourafchan ("Nourafchan") is the managing member of RPN. There is no dispute that RPN is the managing member of St. Rose. There is no dispute that the St. Rose Note in the face amount of $12,000,000 was dated August 23, 2005. (JE 3). There is no dispute that a deed of trust against the Property, dated August 23, 2005, was executed by St. Rose in favor of Lenders,

[17] There was some question as to whether Merle Harris was intended to be a member or manager of Lenders, see Consolidation Decision at 19:21-27, but Merle Harris never testified as to his status with Lenders. Id. at 35:3 to 36:21. An initial list of managers or members of Lenders was filed with the Nevada Secretary of State on August 2, 2005 (JE 202), but a certificate of correction to the articles of organization was filed on March 3, 2009 (JE 172). The annual list of managers or members of Lenders filed on October 13, 2009, reflects Forouzan, Inc. and RPN as the only managing members. (JE 223).

to secure payment of the St. Rose Note. (JE 4). There is no dispute that the deed of trust secures the payment of additional sums advanced to St. Rose by Lenders. There is no dispute that the sale of the Property to St. Rose was completed on August 25, 2005 (JE 214), and the deed of trust in favor of Lenders was recorded on September 16, 2005. Under these circumstances, no suggestion can be made that Lenders was not in existence at the time of the transactions that resulted in the creation of the St. Rose Note.

Second, there is no dispute that funds received from individual lenders were used to purchase the Property. There is no dispute that funds from individual lenders were deposited directly to escrow or provided through checks made payable to St. Rose, RSIG or Rad and Nourafchan. There is no dispute that all of the individual lenders, excluding Majid, received promissory notes from Lenders equal to the amount of their funds that were used to purchase the Property. There is no dispute that all of the promissory notes were dated at the time or soon after the funds received from the individual lenders were used to purchase the Property. There is no dispute that none of the individual lenders, including Majid, received a promissory note from St. Rose equal to the amount of their funds used to purchase the Property. There is no dispute that none of the individual lenders, including Majid, received a specific deed of trust from St. Rose securing repayment of the amount of their funds used to purchase the Property. Under these circumstances, no suggestion can be made that the individual lenders have enforceable contracts with St. Rose, instead of Lenders, for repayment of the funds used by St. Rose to purchase the Property.[18]

Third, there is no dispute that after the Property was purchased, additional funds from individual lenders were received through checks made payable to St. Rose, RSIG or Rad and

[18] Except for George Nyman, none of the individual lenders filed proofs of claim in the St. Rose bankruptcy proceeding. Even the amended proof of claim submitted by George Nyman on August 3, 2011, however, is accompanied by a State Court order granting partial summary judgment for breach of contract only as to Lenders, rather than St. Rose.

Nourafchan.[19] There is no dispute that all of these individual lenders received promissory notes from Lenders equal to the amount of their funds that were provided after the purchase of the Property. There is no dispute that all of the promissory notes were dated at the time or soon after the funds were received from the individual lenders. There is no dispute that none of these individual lenders received a promissory note from St. Rose equal to the amount of their funds provided after the purchase of the Property. Under these circumstances, no suggestion can be made that the individual lenders have enforceable contracts with St. Rose, instead of Lenders, for repayment of the funds provided after the purchase of the Property.

Finally, there is the uncontradicted testimony of Nourafchan that as of August 26, 2005, Lenders had advanced $10,300,000 to St. Rose to acquire the Property. See Second Nourafchan Declaration at ¶ 5.[20] BB&T and Commonwealth objected to this testimony, but the objections have been overruled. See discussion at 8 n.12. Nourafchan was present at the trial and could have been cross-examined, but he was not.[21] Under these circumstances, Nourafchan's

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[19] Only two checks were made payable to Lenders. See Consolidation Decision at 65:19-20 & n. 79.

[20] In addition to being cross-examined, Nourafchan could have been called by BB&T and Commonwealth, as part of BB&T's case in chief, for direct examination on his knowledge of the funding of the St. Rose Note and the current balance owed. Moreover, no percipient witness from any other party connected to the sale transaction was called to dispute the accuracy or truthfulness of Nourafchan's testimony: no representative of the seller of the Property, no agent or broker involved in the sale, no escrow officer, no employee of Colonial Bank, and none of the individual lenders whose funds were used to complete the sale.

[21] In connection with confirmation of the St. Rose Plan, BB&T and Commonwealth argued that Lenders is a "non-statutory insider" of St. Rose. At the evidentiary hearing on confirmation of the St. Rose Plan, BB&T and Commonwealth could have examined Rad as to whether Lenders had such a degree of control over St. Rose to conclude that the St. Rose Note was not an arms length transaction. But Rad was never cross-examined on the very issue raised by BB&T and Commonwealth. See discussion at note 10, supra. In the present matter, BB&T and Commonwealth likewise could have examined Nourafchan as to his personal knowledge of the funds provided by individual lenders and the aggregate amounts obtained to acquire the Property. Because Nourafchan himself, as well as various family members, were also individual lenders, see Consolidation Decision at 29:13-25, 32:19 to 33:12, and 38:19 to 39:6, he apparently

uncontradicted testimony constitutes sufficient evidence, i.e., a preponderance, to establish that Lenders funded the St. Rose Note.

Based on the foregoing, including the terms of the St. Rose Note and each of the promissory notes payable by Lenders to the individual lenders, the preponderance of the evidence establishes that St. Rose intended to borrow funds from Lenders to acquire the Property, and that Lenders intended to borrow funds from the individual lenders to fund the St. Rose Note. The preponderance of the evidence also establishes that the individual lenders did loan funds to Lenders that were used to fund the purchase of the Property. These conclusions also are based on the expert testimony which, in turn, has assisted the court in determining the balance owed on the St. Rose Note as of the bankruptcy petition date.

2. The Balance Owed on the St. Rose Note.

No one disputes that the management of financial affairs of St. Rose and Lenders was inadequate. In connection with the Consolidation Motion, this court originally concluded that St. Rose and Lenders "were initially sloppy by depositing the Investment funds into R&S's account and listing the funds in R&S's tax returns," and the USDC was highly critical of that description as merely "sloppy" when it reversed this court's initial ruling on the Consolidation Motion. See discussion at note 3, supra. Notwithstanding its disagreement with this court's understated description, however, the USDC concurred with this court that BB&T and Commonwealth had failed to establish that "the Debtors' affairs are so grossly entangled with one another that disentangling is either impossible or necessary to minimize the realization of net assets available to creditors." Remand Order at 7:13-16. In determining the amount of Lenders' claim against St. Rose, the expert testimony presented by the parties bears that conclusion out.

The McKinnon Report.

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had personal knowledge to testify as to at least a portion of the funds provided by Lenders under the St. Rose Note.

McKinnon prepared a report dated August 26, 2016 ("McKinnon Report"). (JE 700). McKinnon states in his report that he is a forensic accountant who was hired by Commonwealth and BB&T to analyze the accounting transactions related to the St. Rose Note and promissory notes issued by Lenders to various individual lenders. Attached as Exhibit "B" to the McKinnon Report is a list of documents that McKinnon considered and relied upon, including the Consolidation Decision, and transcripts of the 2004 examination[22] and deposition testimony of Rad, Nourafchan, Teresa Cargill ("Cargill"),[23] and Michael Broida ("Broida").[24] In reaching his opinions, McKinnon testified that he reviewed the St. Rose Note (JE 3), the St. Rose general ledger (JE 381), the escrow closing statement for the acquisition of the Property, the 2005, 2006, 2007, and 2008 federal tax returns for both St. Rose and Lenders,[25] and certain bank statements.

In his report, McKinnon concluded that "there is no accounting evidence of proceeds advanced by Lenders to St. Rose under the St. Rose Note at any point in time. Therefore, the accounting balance of the St. Rose Note is zero." McKinnon Report at 5. Importantly, McKinnon went on to conclude as follows:

> What did occur from an accounting perspective was that from August 8, 2005 to September 2, 2008, St. Rose's accounting records show transactions related to

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[22] A 2004 examination may be taken under FRBP 2004(a), if the subject of the examination has, inter alia, information concerning the financial affairs of the debtor. The witness is questioned under oath and the examination is the equivalent of a deposition.

[23] Cargill was employed as an office manager and bookkeeper for RSIG and provided similar services to St. Rose and Lenders. See Consolidation Decision at 41:20 to 45:8.

[24] Broida is an accountant whose firm was involved in preparing tax returns for Lenders some time beginning in 2009. See Consolidation Decision at 51:6-24.

[25] The tax returns reviewed by McKinnon may have been obtained from the exhibits used at the deposition of Broida. Copies of all or portions of unsigned tax returns for St. Rose and Lenders for the 2006, 2007, 2008, and 2009 tax years were admitted as joint exhibits 591 and 593. Unsigned copies of the St. Rose tax returns for 2005, 2006, 2007, and 2008 were admitted into evidence as joint exhibits 413, 414, 415, and 416. Unsigned copies of the Lenders tax returns for 2005, 2006, 2007, and 2008 were admitted into evidence as joint exhibits 207, 206, 205, and 204.

> apparent Individual Lenders' promissory notes from Lenders including:
>
> - Proceeds of $10,625,000 associated with the original purchase of Land at August 25, 2005 and payment of points to certain Individual Lenders on September 6, 2005;
> - Additional proceeds of $12,001,100;
> - Principal payments of $4,000,000;
> - Payment of points (loan fees) of $270,500; and
> - Interest payments of $5,665,430.
>
> Importantly, interest payments to the Individual Lenders related to their promissory notes from Lenders were reported annually to the IRS on Form 1099-INT by St. Rose, apparently using St. Rose's taxpayer identification number, not Lenders. Indeed, there are no 1099-INTS for interest related to the St. Rose Note from St. Rose to Lenders.
>
> Based on the forgoing (sic), the principal balance of the Individual Lenders' notes is $18,676,100. This amount exceeds the St. Rose Note principal amount of $12,000,000 by $6,677,100, and $8,051,100 over the proceeds received from Individual Lenders to acquire the land in August 2008 (sic). Based on my review of the St. Rose general ledger these additional funds were used to fund pay-offs of certain Individual Lender's notes, pay interest to Individual Lenders beyond the one-year expected term of the St. Rose Note, pay interest to Colonial Bank, and to pay other expenditures.

McKinnon Report at 5-6 (footnotes omitted; emphasis added).

Alternatively, McKinnon concluded in his report that on the St. Rose Note, there was a total principal balance owed of $7,125,000, as well as interest in the amount of $2,487,699 as of the bankruptcy petition date (April 4, 2011), for an aggregate amount of $9,612,699. See McKinnon Report at 8.[26] At trial, McKinnon testified that the principal balance should be

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[26] Schedule 1 to the McKinnon Report includes all of the individual lender proceeds, according to the St. Rose general ledger, that were used to acquire the Property. The total on Schedule 1 is $10,625,000. Schedule 2 to the McKinnon Report includes all individual lender activities, e.g., funds received, principal payments made, and interest payments made, both before and after the Property was acquired, according to the St. Rose general ledger. The total loan proceeds received from individual lenders on Schedule 2 is $22,676,100. The difference between the total individual lender loan proceeds in Schedule 1 and the total individual lender loan proceeds in Schedule 2 is $12,051,100, rather than the $12,001,100 figure appearing on page 5 of the McKinnon Report. Schedule 3 to the McKinnon Report sets forth the amount of the loan proceeds used to acquire the Property, the principal payments made on those proceeds, and the interest payments made on those proceeds, to arrive at a principal and interest balance owed as of the bankruptcy petition date. Although Schedule 2 includes all funds received from individual lenders, all principal payments made, and all interest payments made, none of the activities occurring after the Property was acquired apparently were used in calculating the

reduced by $500,000 to $6,625,000, presumably based on the disallowance of the Majid proof of claim,[27] with a corresponding reduction in the accrued interest to $2,313,000. Thus, at trial, McKinnon concluded that the amount of principal and interest owed on the St. Rose Note, if at all, was $8,923.123 as of the bankruptcy petition date.

Finally, McKinnon expressed in his report that Lenders' tax returns for 2005, 2006, and 2007 are inaccurate and "provide no meaningful accounting information on the balance of the St. Rose Note." McKinnon Report at 9-10.

The Neches Report.

Neches prepared a rebuttal report dated September 26, 2016 ("Neches Report"). (JE 711). Neches testified that he also is a forensic accountant who was hired by Lenders to review the opinions expressed in the McKinnon Report. In reaching his own opinions, Neches testified that he reviewed all of the materials relied upon by McKinnon, copies of the promissory notes from Lenders to the various individual lenders, the court's Consolidation Decision, and the Quick Books files for both St. Rose and Lenders.

In his rebuttal report, Neches concluded that the St. Rose Note originally had been funded in the amount of $10,300,000 and that those funds had been used to acquire the Property. He stated that he reached that determination by reviewing:

1. The Buyer/Borrower Final Statement for the purchase, attached hereto as Exhibit D,
2. The trial testimony of Saiid Forouzan Rad, as summarized in the

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balance of the St. Rose Note as of the petition date.

[27] That proof of claim (JE 315) includes a copy of a promissory note in Majid's favor, dated August 19, 2005, in the amount of $500,000, from Rad and Nourafchan, rather than Lenders. (JE 387). Majid testified that he understood he was loaning money to Lenders, but acknowledged that he received interest payments and 1099-INTs from St. Rose. See Consolidation Decision at 39:26 to 40:6. In connection with the instant matter, copies of various 1099-INTs issued by St. Rose were admitted as joint exhibits 301, 317, 421, 422, and 423. Those copies include only one 1099-INT issued to Majid in 2005 in the amount of $6,833.37. (JES 317 and 423).

Memorandum of Decision on Motion for Substantive Consolidation in this proceeding, and

3. The St. Rose Quickbooks file (see Exhibit L for a printout of the relevant accounts in St. Roses general ledger I relied upon in my analysis; see Exhibit E for a printout of selected journal entries showing deposits by individual lenders used to fund the St. Rose Note totaling $10,300,000 (the reference numbers in Exhibit E correspond to the journal entry reference number in Exhibit L).

Neches Report at 5 (emphasis added). He prefaced that conclusion by stating:

> St. Rose and Lenders did not maintain their accounting records regarding the St. Rose Note in accordance with Generally Accepted Accounting Principles. The accounting records do not show loans from individual lenders being deposited into a Lenders bank account and then being transferred to St. Rose. Instead, the records show individual loans being recorded in St. Rose's general ledger and deposited into St. Rose's bank account. The obligations owed by St. Rose to the individual lenders were not reclassified to be obligations owed by Lenders until September 2, 2008.
>
> It flies in the face of business reality, however, to conclude that therefore no proceeds were advanced by Lenders to St. Rose under the St. Rose Note. More important, this notion is contradicted by rulings by the Court in this proceeding that "the individual lenders provided funds that were used by St. Rose to acquire the Property in August 2005," and "the St. Rose Note encompasses funds provided by the individual lenders to acquire the Property."

Neches Report at four (footnotes omitted; emphasis added).

Neches also addressed the funds received from individual lenders after the Property was purchased:

> After the Property was acquired on 8/29/2005 using $10,300,000 of funds provided by individual lenders, the individual lenders occasionally requested and received the return of the funds they had loaned. They also continued to provide funds that were used to make interest payments on the various promissory notes, to pay property taxes and admnistrative expenses, and to substitute individual lenders.
>
> ***
>
> In Exhibit H, I determined that the current balance on loans used to fund the acquisition of the Property is $9,525,000. In this calculation, I included:
>
> - Individual lender proceeds used to acquire the property (see Exhibit F), and
> - Subsequent individual lender loans made to substitute one lender for another.
>
> Including these subsequent loans is the primary way in which my analysis differs from McKinnon's, who excluded consideration of all individual lender loans after 9/1/2005.

Neches Report at 6-7 (footnotes omitted; emphasis added).

Neches concluded that there is a principal balance of $9,525,000 owed on the St. Rose Note as of the Chapter 11 petition date (April 4, 2011), as well as accrued interest in the amount of $3,325,660. In addition to those sums, Neches concluded that there are late fees owed in the amount of $476,250, bringing the total amount owed on the St. Rose Note to $13,326,910, as of the bankruptcy petition date. See Neches Report at 7. At trial, Neches also testified that the principal balance as of the petition date should be reduced by $500,000 to $9,025,000, again presumably based on the disallowance of the Majid proof of claim. He also testified that interest accrued through the trial date (November 7, 2016), was $9,967,158. Thus, at trial, McKinnon concluded that the amount of principal and interest owed on the St. Rose Note as of trial was $18,992,158, plus additional late fees in the amount of $451,250.[28] (JE 733).[29]

Reconciliation of the Expert Testimony.

Both experts agree that, according to the accounting records, the individual lenders provided either $10,300,000 or $10,625,000 toward the purchase of the Property. Both experts agree that, according to the accounting records, the funds used to purchase the Property, the additional amounts subsequently received from the individual lenders, the principal payments made to the individual lenders, the loan fees paid to individual investors, and the interest payments made to individual investors, all relate to the promissory notes executed by Lenders in favor of the individual lenders. This accounting perspective is consistent with the court's prior conclusion that the St. Rose Note was funded by Lenders.[30]

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[28] Neches prepared a revised Schedule "H" to his report reflecting a reduction of $500,000 that was received from Majid and used to purchase the Property, but for which a promissory note was issued by Rad and Nourafchan, rather than Lenders.

[29] After Neches concluded his live testimony, neither BB&T nor Commonwealth called McKinnon in rebuttal.

[30] Both experts agree that the 2005, 2006, and 2007 tax returns do not provide meaningful information as to the balance owed on the St. Rose Note. The court is uncertain why McKinnon focused on the tax returns for 2005, 2006, and 2007. Even the McKinnon Report acknowledged

Both experts also agree that after the Property was purchased, the principal amount of certain loans were repaid to certain individual lenders. The experts disagree, however, on whether additional funds were received from individual lenders that substituted for the principal repayments made to other individuals, i.e., whether individual lenders "swapped" positions with other lenders.[31] In his report, McKinnon reflected the repayments of principal and the receipt of additional loan proceeds in Schedule 2, but he testified that there is no accounting basis to conclude that the additional loan proceeds substituted for the repayments of principal. In contrast, Neches concluded in his report that a substitution of lenders is shown by the time proximity between the repayment of principal to one individual lender and the receipt of additional loan proceeds from another individual lender. See Neches Report at 7.[32] Because the repayments of principal to some of the individual lenders were substituted by additional proceeds from other individual lenders, Neches concluded that the unpaid principal balance of the St. Rose Note, as of the petition date, was $9,025,000 rather than the $6,625,000 amount suggested by McKinnon.

That individual lenders whose loans were used to fund the St. Rose Note were later substituted by other individual lenders is supported by the percipient witness testimony. Rad previously testified that such substitutions occurred, and he was subject to cross-examination.

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in Schedule 2 that loan proceeds were being received through August 2008. No one disputes that interest payments to individual lenders ceased in August or September 2008. See Consolidation Decision at 44:13-14.

[31] BB&T and Commonwealth maintain that the promissory notes from earlier individual lenders were negotiable instruments under NRS 104.3101, et seq., and were not negotiated or transferred to the substitute individual lenders. See BB&T Closing Brief at 18:16 to 19:20. Negotiation or transfer of the prior promissory notes was unnecessary, however, because there is no dispute that the subsequent individual lenders received separate promissory notes from Lenders.

[32] These specific dates of repayment of principal from individual lenders and the receipt of additional loans from other lenders, according to the accounting records, are reflected in Exhibit H to the Neches Report.

See Consolidation Decision at 21:7-9. During the instant trial, Nourafchan testified without contradiction that after St. Rose acquired the Property, Lenders received additional funds from individual lenders that "facilitated the substitution of certain individual lenders to new lenders who wished to earn interest from the Debtor." Second Nourafchan Declaration at ¶ 6. Nourafchan was present at trial and could have been cross-examined regarding the substitution of individual lender funds, but he was not.[33] Under these circumstances, Nourafchan's uncontradicted testimony constitutes sufficient evidence, i.e., a preponderance, to establish that after the Property was acquired, certain individual lenders' funds to acquire the Property were substituted by funds received from other individual lenders. Therefore, these substitute funds were properly included in Neches' analysis of the balance owed on the St. Rose Note.[34]

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[33] No witness was called to dispute the accuracy or truthfulness of Nourafchan's testimony: none of the individual lenders whose principal was repaid, none of the individual lenders who provided substitute funds, and none of the bookkeepers or accountants for St. Rose or Lenders.

[34] BB&T and Commonwealth maintain that the substitution of individual lenders for prior individual lenders was the equivalent of a "Ponzi scheme" that should not be countenanced by the court. See BB&T Trial Statement at 5:26 to 6:15; BB&T Closing Brief at 12:9-22. They argue that inclusion of the later funds from substitute individuals as part of the balance owed on the St. Rose Note would reward the later individuals for participating in a Ponzi scheme. See BB&T Closing Brief at 12:23 to 18:14.

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 such arrangement ever existed because the individual lenders were loaning 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,

Neches originally concluded that as of the petition date, there is a principal balance of $9,525,000, accrued interest in the amount of $3,325,660, and late fees in the amount of $476,250, bringing the total amount owed on the St. Rose Note to $13,326,910. The calculation was reflected in Exhibit H attached to the Neches Report. The Property securing the St. Rose Note was sold for $13,500,000, see note 8, supra, and the Sale Proceeds are currently held in trust by Lenders. See note 9, supra. Neches later revised Exhibit H to exclude the funds received from Majid, but for some reason he recalculated the interest on the St. Rose Note through the date of trial (November 7, 2016) rather than the petition date (April 4, 2011). His apparent reason for doing so is that the $13,500,000 in Sale Proceeds has been used by Lenders to establish the value of the Property and the allowed amount of its secured claim under Section

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Rad 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.

Additionally, the existence of a Ponzi scheme was never alleged in the Adversary Complaint nor were the individuals allegedly rewarded for participating in a Ponzi scheme named in the Adversary Complaint. Likewise, the existence of a Ponzi scheme was never alleged in BB&T's objection to Lenders' POC, nor did BB&T serve notice of the BB&T Claim Objection on all of the creditors of St. Rose nor the individual lenders. (St. Rose ECF No. 262). More important, 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 BB&T and Commonwealth never 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.

506(b). As Section 506(b) permits an oversecured creditor to seek allowances of interest and any reasonable fees, costs and charges permitted by the parties' agreement, Neches' revised Exhibit H includes an increase of $6,641,498 of interest and a decrease of $25,000 in late fees.[35]

Because the accruing interest on the St. Rose Note likely exceeded the amount of the Sale Proceeds shortly after the Property was sold, Lenders' status as an oversecured creditor under Section 506(b) presumably was short-lived. It is clear that an undersecured creditor cannot receive interest on the unsecured portion of its debt because Section 502(b) disallows claims for unmatured interest. See United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 380 (1988). Interest continued to accrue on the St. Rose Note, but the accrual of that interest is impermissible once the claim is no longer oversecured.[36]

Under these circumstances, the court limits its determination to the amount of the St. Rose Note as of the petition date.

CONCLUSION

In light of the foregoing, judgment will be entered on the seventh cause of action determining the amount owed on the St. Rose Note to be $13,326,910 as of April 4, 2011. A separate judgment has been entered contemporaneously herewith.

Additionally, a separate order will be entered overruling BB&T's objection to Lenders' POC consistent with this memorandum decision.

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[35] The late fees apparently were reduced because the principal balance had decreased by $500,000.

[36] Lenders maintains that interest on the St. Rose Note continues to accrue through the date of trial. See Lenders Post-Trial Brief at 17:23-27, citing In re Hoopai, 581 F.3d 1090, 1099-1101 (9th Cir. 2009). Lenders' reliance on Hoopai, however, is misplaced. Hoopai addressed the allowance of attorneys' fees incurred by an oversecured creditor under Section 506(b) rather than the allowance of interest that continues to accrue merely by the passage of time. More important, it appears that the creditor in Hoopai was at all times oversecured because the underlying property had been sold for an amount in excess of its secured claim, and the amount of its requested attorneys fees did not exceed the excess sale proceeds. 581 F.3d at 1093-94.

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