

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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In re:  
R&S ST. ROSE, LLC,  
  
Debtor,

Case No. 2:17-cv-01322-MMD

ORDER

Bankruptcy Case No.: 11-14973-MKN  
Chapter 11

BRANCH BANKING AND TRUST  
COMPANY,  
  
Appellant,

v.

R & S ST. ROSE LENDERS, LLC; R & S  
ST. ROSE, LLC; R & S INVESTMENT  
GROUP, LLC; COMMONWEALTH LAND  
TITLE INSURANCE COMPANY; THE  
CREDITOR GROUP; and THE U.S.  
TRUSTEE,

Appellees.

**I. SUMMARY**

Branch Banking and Trust Company, as successor in interest to the Federal Deposit Insurance Corporation (FDIC) as receiver for Colonial Bank N.A. ("BB&T"), appeals the Bankruptcy Court's confirmation of R&S St. Rose Lenders' ("Lenders") Third Amended Chapter 11 Plan of Liquidation ("Plan") in Lenders' Chapter 11 bankruptcy proceedings. BB&T's argument here is essentially that Lenders' confirmed Plan does not meet the "good faith" standard of the Bankruptcy Code because it rewards (or constitutes) a "Ponzi scheme" and achieves a result that is fundamentally unfair and inconsistent with the objectives and purposes of the Bankruptcy Code. (ECF No. 14.) Having considered

1 the parties' arguments and the record, this Court will affirm the confirmation of Lenders'  
2 Plan.

## 3 **II. BACKGROUND**

4 The underlying facts of this case largely overlap with the facts in the Chapter 11  
5 bankruptcy case filed by R&S St. Rose, LLC ("Rose") (bankruptcy case no. 11-14974-  
6 MKN) ("Rose Bankruptcy Case"). The overlapping factual details may be found on the  
7 Court's docket at ECF No. 108 in case no. 2:17-cv-1251-MMD.

8 On April 28, 2017, the Bankruptcy Court entered its Order on Confirmation of  
9 Debtor's Third Amended Plan of Liquidation ("Plan Confirmation Order") wherein it  
10 confirmed Lenders' Plan. (ECF No. 15 at 7–8.) In that order, the Bankruptcy Court  
11 directed that \$6,359,052 be held back from distribution to Class 1 to protect BB&T's  
12 estimated pro rata distribution in the event BB&T's claim, then on appeal,<sup>1</sup> is ultimately  
13 allowed. (*Id.*; *id.* at 22 n.24.)

14 BB&T's appeal is timely, and the Court has jurisdiction under 28 U.S.C. §  
15 158(a)(1).

## 16 **III. LEGAL STANDARD**

17 This Court reviews "the bankruptcy court's conclusions of law *de novo* and its  
18 findings of fact for clear error." *In re Bonham*, 229 F.3d 750, 762 (9th Cir. 2000). The  
19 bankruptcy court's factual findings are clearly erroneous only if the findings "leave the  
20 definite and firm conviction" that the bankruptcy court made a mistake. *In re Rains*, 428  
21 F.3d 893, 900 (9th Cir. 2005). "A bankruptcy court abuses its discretion if it applies the  
22 law incorrectly or if it rests its decision on a clearly erroneous finding of a material fact."  
23 *In re Brotby*, 303 B.R. 177, 184 (B.A.P. 9th Cir. 2003); *see also In re Plyam*, 530 B.R.  
24 456, 461 (B.A.P. 9th Cir. 2015) ("A bankruptcy court abuses its discretion if it applies the  
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26 <sup>1</sup>BB&T's claim stems from the same misrepresentation and civil conspiracy claims  
27 noted in 2:17-cv-1251-MMD that the state trial court did not decide and which this Court  
28 concluded was not precluded and the Ninth Circuit Court has since affirmed that decision  
(see ECF No. 15 at 22 n.24). *Branch Banking and Trust Co. v. Creditor Grp.*, No. 2:14-  
cv-00926-GMN, 2015 WL 1470692 (D. Nev. Mar. 2015); *In re R&S St. Rose Lenders*,  
LLC, 748 F. App'x 753 (9th Cir. 2018).

1 wrong legal standard, misapplies the correct legal standard, or if its factual findings are  
2 illogical, implausible, or without support in inferences that may be drawn from the facts in  
3 the record.”).

4 The Court may affirm the bankruptcy court’s decision “on any ground fairly  
5 supported by the record.” *In re Warren*, 568 F.3d 1113, 1116 (9th Cir. 2009). In addition,  
6 the Court need not address arguments not raised in the trial court but “may do so to (1)  
7 prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2)  
8 when a change of law during the pendency of the appeal raises a new issue, or (3) when  
9 the issue is purely one of law.” *In re Lakhany*, 538 B.R. 555, 560 (B.A.P. 9th Cir. 2015).

#### 10 **IV. DISCUSSION<sup>2</sup>**

11 BB&T contends that Lenders’ confirmed Plan is lacking in good faith under 11  
12 U.S.C. § 1129(a)(3) because (1) it endorses a Ponzi scheme and the Bankruptcy Court  
13 erred in finding otherwise and (2) its distribution scheme is unfair to BB&T. (ECF No. 14.)  
14 The Court first explains the framework for its good faith analysis and then address each  
15 of BB&T’s arguments in turn.

16 Section 1129(a)(3) requires that the plan be proposed “in good faith and not by  
17 any means forbidden by law.” By its definition, good faith means honesty in belief or  
18 purpose, faithfulness to one’s duty or obligation, observance of reasonable commercial  
19 standards of fair dealing, and the absence of intent to defraud or to seek unconscionable  
20 advantage. Black’s Law Dictionary (10th ed. 2009). As a general rule, a Chapter 11 plan  
21 is proposed in good faith where it achieves “a result consistent with the objectives and  
22 purposes” of the Bankruptcy Code and exhibits “fundamental fairness” in dealing with  
23 creditors. *Marshall v. Marshall (In re Marshall)*, 721 F.3d 1032, 1046 (9th Cir. 2013);  
24 *Jorgensen v. Fed. Land Bank of Spokane (In re Jorgensen)*, 66 B.R. 104, 108–09 (9th  
25 Cir. BAP 1986). In making a good faith determination a court considers the totality of the  
26 circumstances surrounding the plan. *In re Stolrow’s Inc.*, 84 B.R. 167, 172 (B.A.P. 9th Cir.

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28 <sup>2</sup>To the extent that BB&T attempts to relitigate issues not directly concerning plan  
confirmation (such as the consolidation of the Rose and Lenders’ bankruptcy cases or  
lien priority), the Court does not address them.

1 1988). A finding of good faith “will not be overturned unless the opponent of the plan can  
2 show that the finding was clearly erroneous.” *Id.* (citations omitted).

3 **A. Whether Lenders’ Plan of Liquidation Endorses a Ponzi Scheme**

4 In response to BB&T’s Ponzi scheme contention, Lenders raise a threshold  
5 issue—arguing that BB&T’s allegation of a Ponzi scheme is time-barred because such  
6 allegation should have been raised in an avoidance action under Chapter 5 of the  
7 Bankruptcy Code, 11 U.S.C. § 544, 546–48. (ECF No. 43 at 16.) BB&T fails to address  
8 the timeliness issue in either its opening or answering briefs. Moreover, in the other case  
9 noted above—2:17-cv-1251-MMD—this Court declined to address the issue of timeliness  
10 regarding the same allegation because Lenders did not argue the issue there and  
11 because the Court found that the Bankruptcy Court’s conclusion on the merits was  
12 otherwise sound. The Court will do likewise here.

13 Ultimately, the Court also adopts its finding regarding the merits of the Ponzi  
14 scheme as provided in 2:17-cv-1251-MMD. That is, the Court agrees with the Bankruptcy  
15 Court that BB&T fails to produce sufficient evidence to support a finding that Lenders  
16 engaged in a Ponzi scheme.<sup>3</sup> Because the Court has reached this conclusion, the Court  
17 accordingly finds that BB&T fails to establish fraudulent intent to support a conclusion that  
18 Lenders’ Plan did not meet the good faith standard under the Bankruptcy Code.

19 **B. Fairness of the Plan’s Distribution Scheme**

20 The Court also finds that the plan distribution scheme which holds back a pro rata  
21 share for BB&T in the event its misrepresentation and civil conspiracy claims are  
22 ultimately successful is not unduly unfair to BB&T (or any other creditor who may not be  
23 repaid as a result of Lenders filing bankruptcy).

24 “[T]hat a creditor’s contractual rights are adversely affected does not by itself  
25 warrant a bad faith finding.” *In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1075 (9th Cir. 2002).

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27 <sup>3</sup>BB&T relies on the allegation of a Ponzi scheme to support the application of the  
28 Ponzi presumption—presuming fraudulent intent and thus lack of good faith. See, e.g., *In re Int’l Mfg. Grp., Inc.*, 538 B.R. 22, 31 (E.D. Cal. 2015) (explaining that the Ponzi presumption comes into play with respects to intent).

1 “In enacting the Bankruptcy Code, Congress made a determination that an eligible debtor  
2 should have the opportunity to avail itself of a number of Code provisions which adversely  
3 alter creditors’ contractual and nonbankruptcy rights.” *Id.* (quotation omitted). “A plan of  
4 liquidation is allowed in §§ 1123(a)(5)(D) and (b)(4) and can be proposed in good faith”  
5 and “[t]he bankruptcy judge is in the best position to assess the good faith of the parties.”  
6 *In re Jorgensen*, 66 B.R. at 108–09 (citations omitted). The “preponderance of the  
7 evidence is the appropriate standard of proof in confirming a plan under §§ 1129(a) &  
8 (b).” *In re Arnold & Baker Farms*, 177 B.R. 648, 655 (B.A.P. 9th Cir. 1994), *aff’d*, 85 F.3d  
9 1415 (9th Cir. 1996).

10 Relevant to the issue of good faith, R. Phillip Nourafchan, manager of Lenders’  
11 principal, testified at trial—by declaration:<sup>4</sup>

12 ¶ 7. The Debtor proposed the Plan in good faith and not by any means  
13 forbidden by law. Consistent with the overriding purpose of Chapter 11 of  
14 the Bankruptcy Code, I believe the Plan distributes the proceeds from the  
15 Property in good faith, in a fair and equitable manner, and enables holders  
16 of claims to realize the highest possible recoveries under the circumstances  
17 of the Debtor’s Chapter 11 case. In fact, the Debtor was organized for the  
sole purpose of holding a deed of trust and later distribution of the proceeds  
of that deed of trust to its creditors. Accordingly, I believe that the payment  
of the proceeds proposed in the Debtor’s Plan is proposed in good faith,  
feasible, fair and equitable.

18 (ECF No. 44 at 3–4, ¶ 7.) BB&T contends that a finding of good faith is nonetheless  
19 undermined by other testimony by Nourafchan that Lenders would not pursue fraudulent  
20 transfer actions or other avoidance actions against purported Ponzi scheme winners (*e.g.*,  
21 ECF No. 47 at 15). (ECF No. 22 at 179:14–20.) To the extent such an argument is not  
22 already nullified by the finding that BB&T presents insufficient evidence of a Ponzi  
23 scheme, Lenders provides that any action for fraudulent transfer or avoidance would be  
24 transferred to the liquidating trustee, Brian D. Shapiro. (ECF No. 43 at 32–33 (citing  
25 *///*

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27 <sup>4</sup>It is undisputed that the parties agreed that Nourafchan’s testimony could be  
28 presented through his amended declaration in support of Lenders’ Plan confirmation  
(ECF No. 44). (ECF No. 43 at 31 (stating the agreement which is not refuted by BB&T).)

1 Nourafchan's declaration and testimony at ECF No. 44 at 4, ¶ 8, and ECF No. 22 at  
2 184).<sup>5</sup>

3 The evidence does not support a conclusion that the Bankruptcy Court clearly  
4 erred in finding the Plan consistent with the objectives and purposes of the Bankruptcy  
5 Code—specifically to distribute proceeds in a manner that is fundamentally fair.  
6 Accordingly, the Court affirms the Bankruptcy Court's confirmation of Lenders' Plan.

7 **V. CONCLUSION**

8 The Court notes that the parties made several arguments and cited to several  
9 cases not discussed above. The Court has reviewed these arguments and cases and  
10 determines that they do not warrant discussion as they do not affect this appeal.

11 It is therefore ordered that the Bankruptcy Court's Plan Confirmation Order is  
12 affirmed.

13 The Clerk of Court is directed to enter judgment in accordance with this order and  
14 close this case.

15 DATED THIS 30<sup>th</sup> day of September 2019.

16 

17 MIRANDA M. DU  
18 CHIEF UNITED STATES DISTRICT JUDGE  
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24 <sup>5</sup>The latter citation provides testimony by Nourafchan that upon liquidation all funds  
25 would be transferred to the liquidating trustee. Further BB&T concedes that the trustee is  
26 authorized to bring any claims for fraudulent transfer or avoidance (ECF No. 47 at 15).  
27 See *In re Lucas Dallas, Inc.*, 185 B.R. 801, 804 (9th Cir. BAP 1995) ("The trustee is  
28 authorized to prosecute state law fraudulent transfer actions under section 544(b)."); see  
also *In re Curry and Sorensen, Inc.*, 57 B.R. 824, 828 (9th Cir. BAP 1986) ("The exclusive  
power to commence avoidance actions vested in trustees and debtors-in-possession is  
permissive rather than mandatory and the exercise of this power can only be reviewed  
for abuse of discretion."). Notably, in his declaration, Nourafchan relayed that the  
liquidating trustee has "no connections with [Lenders], its principals, it affiliates or its  
creditors." (ECF No. 44 at 4, ¶ 8.)