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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re DENNIS EKSTROM,

Debtor.

Chapter 11

Case No. 08-07750-SSC

(Not for Publication- Electronic Docketing
ONLY)

MEMORANDUM DECISION RE
CONTESTED HEARING ON
CONFIRMATION OF THE DEBTOR'S
PLAN

I. PRELIMINARY STATEMENT

This Court completed a contested hearing on confirmation of the Debtor's Plan of Reorganization on October 26, 2009. After the close of evidence, the Debtor filed a Revised Stipulation with the Internal Revenue Service ("IRS") on November 6, 2009.¹ The parties filed post-trial memoranda of law on November 25, 2009, at which point this matter was deemed under advisement.

In this Memorandum Decision, the Court has set forth its findings of fact and conclusions of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure. The issues addressed herein constitute a core proceeding over which this Court has jurisdiction. 28 U.S.C. §§ 1334(b) and 157(b) (West 2009).

1. Docket Entry No. 232.

1 II. UNCONTESTED FACTS

2 1. The Debtor filed a voluntary petition under Chapter 11 of the United States
3 Bankruptcy Code on June 26, 2008 (the "Petition Date") initiating the above-captioned case in
4 this Court.²

5 2. On June 17, 2005, FL Receivables obtained a Judgment in Oklahoma state
6 court against the Debtor and his partner, Reza Ghaanati. This Judgment is also against Alden,
7 Inc., Newden, Inc., Rezden, Inc., Denden, Inc. and Kayden, Inc. (collectively, the "FL Judgment
8 Entities") that operated certain Denny's restaurants in Oklahoma and Missouri. This Judgment
9 was in the aggregate principal amount of \$4,076,612.96.

10 3. FL Receivables has filed a proof of claim in this case asserting that, as of the
11 Petition Date, the outstanding amount due under the Judgment was at least \$4,336,410.36.

12 4. On July 16, 2008, the Internal Revenue Service ("IRS") filed a proof of claim
13 in this case in the total amount of \$802,613.02. Of this amount, IRS claimed \$443,416.48 was a
14 priority unsecured claim under Bankruptcy Code § 507(a)(8) and \$359,196.54 was secured.

15 5. On July 21, 2008, the Oklahoma Tax Commission ("OTC") filed a proof of
16 claim in the total amount of \$337,330.18, of which the taxing authority claimed \$289,513.42 was
17 a priority unsecured claim.

18 6. The Debtor's residence is located at 12197 East Poinsettia Drive, Scottsdale,
19 AZ (the "Residence"). The Residence is subject to two mortgages. The first mortgage is held by
20 Amtrust Bank; and as of the Petition Date, the sum of \$625,674.09 was due and owing on the
21 Amtrust Bank mortgage. The second mortgage is held by Countrywide; and as of the Petition
22 Date, the sum of \$200,000 was due and owing on the Countrywide mortgage.

23 7. In his Schedule C, the Debtor has claimed a homestead exemption in the
24 Residence under A.R.S. § 33-1101A in the amount of \$150,000. There has not been any
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26 **2.** The Bankruptcy Abuse Prevention And Consumer Protection Act of 2005
27 ("BAPCPA")(Pub.L.No. 109-8, §1501(b)(1), 119 Stat. 23, 216) is applicable to this case.

1 objection to this claimed exemption.

2 8. The Debtor claims an equitable interest in a single family residence located at
3 5906 Arroyo Way in Pine, AZ (the "Pine House"). Legal title to the Pine House is held by the
4 Ekstrom Family Limited Partnership. The Pine House is subject to two mortgages. The first
5 mortgage is held by First Magnus Financial; and as of the Petition Date, the sum of \$117,705.06
6 was due and owing on the First Magnus/Countrywide mortgage. The second mortgage is held
7 by Wells Fargo; and as of the Petition Date, the sum of \$69,859.49 was due and owing on the
8 Wells Fargo mortgage.

9 9. The Ekstrom Family Limited Partnership was formed in 2003. At the time it
10 was formed, the Debtor received a 49.5 percent limited partnership interest in this partnership.
11 The Debtor's wife also received a 49.5 percent limited partnership interest. The Debtor
12 transferred his limited partnership interest to the Dennis Ekstrom Living Trust.

13 10. A 1 percent general partnership interest in the Ekstrom Family Limited
14 Partnership is held by Standard Management LLC, an Arizona limited liability company. The
15 Debtor's wife is the sole member and manager of Standard Management LLC.

16 11. The Debtor claims a equitable interest in a residence/bed and breakfast
17 located at 189 E. Main Street in Lava Hot Springs, ID (the "Idaho Property"). Legal title to the
18 Idaho Property is held by EZ Livin' Inn, LLC, an Idaho limited liability company. The Idaho
19 Property is subject to two mortgages held by Ireland Bank. As of the Petition Date, the sum of
20 \$97,464.47 was due and owing on the first mortgage. As of the Petition Date, the sum of
21 \$38,318.97 was due and owing on the second mortgage.

22 12. The membership interests in EZ Livin' Inn LLC were originally held by the
23 Debtor, his wife and Standard Management, LLC. The Debtor's membership interest was
24 conveyed to the Ekstrom Family Limited Partnership. The Debtor's interest in the Ekstrom
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1 Family Limited Partnership was contributed to the Dennis Ekstrom Living Trust.³

2 13. On his Schedule B, the Debtor lists the value of his interest in the EZ Livin'
3 Inn LLC at "0.00."⁴

4 14. The Debtor claims an equitable interest in a residential property located at
5 10870 E. Yucca in Scottsdale, AZ (the "Yucca Property"). Legal title to the Yucca Property is
6 held by the Ekstrom Family Limited Partnership. The Yucca Property is subject to a mortgage
7 held by Wells Fargo. As of the Petition Date, the sum of \$137,997.97 was due and owing on the
8 Wells Fargo mortgage.

9 15. In his Schedule B, the Debtor claims to own a life insurance policy with ING.
10 In his Schedule C, the Debtor claimed the proceeds of this policy were exempt under A.R.S. §
11 20-2231. There has not been any objection to this claimed exemption.

12 16. In his Schedule B, the Debtor claims to own a 401k plan through Merrill
13 Lynch. In his Schedule C, the Debtor has claimed his 401k plan as exempt under A.R.S. §
14 33-1126B. There has not been any objection to this claimed exemption.

15 17. In his Schedule B, the Debtor lists his interests in the FL Judgment Entities.
16 The Debtor's interest in the FL Judgment Entities has no value.

17 18. In his Schedule B, the Debtor lists a 50 percent in DR Property Investments
18 LLC. This interest is held by the Ekstrom Family Limited Partnership. This 50 percent interest
19 in DR Properties LLC has no value.⁵

20 19. In his Schedule B, the Debtor lists a 10 percent shareholder interest in QK,
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22 **3.** See October 26, 2009 Trial Transcript at 130. The Court has rephrased what the
23 parties placed in the Amended Joint Pretrial Statement, Docket Entry No. 219, at 2, ¶12, to have
24 it be consistent with the evidence presented.

25 **4.** See Amended Schedule B, Docket Entry No. 53. Also Exhibit No. S.

26 **5.** This parties' agreed upon fact is not consistent with the Debtor's Schedules. The
27 name of the entity is apparently DR Properties LLC, Oklahoma. See Schedule B, Docket Entry
28 No. 18 and Amended Schedule B, Docket Entry No. 53.

1 New Mex, Inc. This shareholder interest has no value.

2 20. The Court concludes that the Finding of Fact, which states “In his Schedule B,
3 the Debtor lists a 10 percent ownership interest in DRD Properties LLC, New Mexico. The
4 Debtor has valued this ownership interest at \$8,000 on his Schedule B.” is in error. The Debtor’s
5 Schedule B states instead that he has a 10 percent ownership interest in “DRD Properties, New
6 Mexico,” which owns and operates a Del Taco restaurant on a piece of real property in New
7 Mexico, and which ownership interest the Debtor believes has a value of \$8,000.

8 21. In his Schedule B, the Debtor lists a 50 percent ownership interest in 635
9 LLC. This ownership interest is held by the Ekstrom Family Limited Partnership. This
10 ownership interest has no value.

11 22. In his Schedule B, the Debtor lists a 33 percent ownership interest in DRD
12 Northwest LLC. Debtor valued his ownership interest at \$150,000 on his Schedule B.

13 23. The Debtor owns a 50 percent interest in 9.5 acres of vacant land in Pauls
14 Valley, OK. On his Schedule A, the Debtor has valued his interest in this property at \$100,000.
15 This property is fully encumbered by a lien held by FL Receivables and has no equity.

16 24. On April 1, 2003, the Debtor executed a Promissory Note payable to QK, Inc.
17 in the principal amount of \$137,000 with interest accruing at the rate of 9 percent per annum.
18 According to the terms of the Promissory Note, the principal and all accrued, but unpaid, interest
19 is due within 30 days after written demand by QK, Inc.

20 25. To secure his obligations under the April 1, 2003 Promissory Note, the Debtor
21 executed a Security Agreement, also dated April 1, 2003, granting QK, Inc. a security interest in
22 the Debtor’s ownership interests in QK, New Mex, Inc. and DRD Property Investments LLC.⁶

23 26. On January 27, 2006, the Debtor executed an Amendment to the April 1, 2003
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25 **6.** Also see Exhibits M and N. However, the Debtor does not list, nor value, DRD
26 Property Investments LLC on his original or Amended Schedules, nor did he testify as to said
27 entity at trial. It is unclear if this entity still exists. The Court will not take a leap of faith that
28 “DRD Properties, New Mexico” is the same entity as “DRD Property Investments LLC.”

1 Security Agreement. In this Amendment, the Debtor granted QK, Inc. a security interest in his
2 ownership interest in DRD Northwest LLC. According to the Amendment, this security interest
3 was given to further secure the Debtor's obligations under the April 1, 2003 Note, as well as to
4 secure repayment of certain additional advances made by QK, Inc. to the Debtor after the Note
5 was executed.

6 27. Other than the collateral described in the Security Agreement and the
7 Amendment, there is no other collateral securing the Debtor's debt to QK, Inc.

8 28. QK, Inc. filed a UCC financing statement with the Arizona Secretary of State
9 on February 2, 2006. The collateral described in this financing statement is (a) the Debtor's
10 shares of stock in QK, New Mex, Inc., (b) the Debtor's interest in DRD Property Investments
11 LLC, and (c) the Debtor's interest in DRD Northwest LLC.

12 29. On January 26, 2009, the Debtor filed an objection to the IRS proof of claim
13 [dkt. 75].

14 30. On February 12, 2009, the Debtor filed an objection to the OTC proof of
15 claim [dkt. 85]. That objection has not been withdrawn or ruled upon by the Court.

16 31. On February 9, 2009, the IRS filed an amended proof of claim. In this
17 amended claim, the IRS asserts a total claim of \$770,181.65. Of this amount, the IRS claims
18 \$406,718.15 is a priority unsecured claim, and \$359,196.54 is a secured claim.

19 32. On February 26, 2009, the OTC filed an amended proof of claim. In this
20 amended claim, the OTC asserted a total claim of \$214,951.03, of which \$173,293.53 is
21 potentially a priority unsecured claim.

22 33. On April 1, 2009, the Debtor filed his "Debtor's Amended Plan of
23 Reorganization Dated April 1, 2009" (the "April 1 Plan").⁷

24 34. On April 2, 2009, the Court entered its Order approving the Debtor's
25 disclosure statement and fixing May 5, 2009 as the last date for filing written acceptances or

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27 7. Docket Entry No. 114.

1 rejections of the April 1 Plan.⁸

2 35. On May 5, 2009, FL Receivables timely filed two ballots rejecting the April 1
3 Plan in Classes 2.I and 3.B.

4 36. On May 5, 2009, FL Receivables timely filed its “Objection to Plan of
5 Reorganization” (the “Original Objection”) to the April 1 Plan.⁹

6 37. Votes were received in Classes 2.C, 2.E, 2.F, 2.I, 3.A and 3.B. Classes 2.C
7 (Countrywide secured claim), 2.I (FL Receivables secured claim), 3.A (unsecured creditors other
8 than FL Receivables) and 3.B (FL Receivables unsecured claim) voted to reject the April 1 Plan.
9 Classes 2.E and 2.F, representing Ireland Bank’s secured claims, voted to accept
10 the April 1 Plan.

11 38. No ballot was received from the IRS on its secured claim in Class 2.J.

12 39. On May 19, 2009, the Debtor filed with the Court a “Stipulation Regarding
13 Treatment of IRS Tax Claims” between the Debtor and the IRS (the “IRS Claim Stipulation”).
14 The IRS agreed to accept the treatment of its claims under the plan as set forth in the IRS Claim
15 Stipulation.¹⁰ This Stipulation also contains a motion requesting approval of the Stipulation.

16 40. On May 21, 2009, the Debtor filed with the Court “Stipulation for Adequate
17 Protection Payments and Plan Treatment” between the Debtor, Ireland Bank and EZ Livin’ Inn
18 LLC (the “Bank Stipulation”).¹¹ The Stipulation of the parties sets forth the terms regarding the
19 payment of Ireland Bank’s claims and is incorporated into the Plan.

20 41. The Debtor made payments out of his DIP account to Ireland Bank in July
21 2008, October 2008, November 2008 and April 2009.

23 **8.** Docket Entry No. 122.

24 **9.** Docket Entry No. 132.

25 **10.** Docket Entry No. 152.

26 **11.** Docket Entry No. 154.

1 42. The Debtor never sought or obtained authority from the Court to make these
2 payments to Ireland Bank.

3 43. Ireland Bank filed a secured Proof of Claim on August 8, 2008 in the amount
4 of \$97,464.47, plus accrued interest, costs and fees asserting a first lien security interest in
5 certain real property located in Lava Hot Springs, Idaho (the "Idaho Property") pursuant to a
6 Real Estate Deed of Trust and an Assignment of Leases and Rents, jointly recorded on
7 November 3, 2004 in the official records of the Bannock County Recorder, Bannock County,
8 Idaho.

9 44. Ireland Bank filed a secured Proof of Claim on August 8, 2008 in the amount
10 of \$38,318.97, plus accrued interest, costs and fees asserting a second lien security interest in
11 certain real property located in Lava Hot Springs, Idaho (the "Idaho Property") pursuant to a
12 Real Estate Deed of Trust and an Assignment of Leases and Rents, jointly recorded on
13 November 3, 2004 in the official records of the Bannock County Recorder, Bannock County,
14 Idaho.

15 45. On June 8, 2009, the Debtor filed his "Debtor's Amended Plan of
16 Reorganization Dated June 8, 2009" (the "Plan").¹²

17 46. On June 25, 2009, FL Receivables timely filed its "Objection to Plan of
18 Reorganization" (the "Supplemental Objection") to the Plan.¹³

19 47. On August 21, 2009, the Debtor filed a "Stipulation Regarding Treatment of
20 First Magnus/Countrywide Claim (Class 2.C)".¹⁴

21 48. The Debtor filed a "Motion to Accept Late Filed Ballot of QK, Inc. and Take
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24 **12.** Docket Entry No. 163.

25 **13.** Docket Entry No. 170.

26 **14.** Docket Entry No. 196.

1 Notice of the IRS Acceptance of the Plan” on August 24, 2009.¹⁵

2 49. On October 23, 2009, the Debtor filed a “Motion for Approval of Stipulation
3 Resolving Certain Disputes with the Oklahoma Tax Commission” (“OTC Stipulation”).¹⁶

4 50. On November 6, 2009, the IRS filed a “Revised Stipulation Regarding
5 Treatment of IRS Tax Claims” (the “Revised IRS Stipulation”).¹⁷ However, this Stipulation was
6 filed with the Court after the conclusion of the presentation of evidence at the contested
7 confirmation hearing.

8 III. ADDITIONAL FACTUAL FINDINGS

9 The Debtor has been in the restaurant business for a “lifetime,” and although
10 certain restaurants in Oklahoma, in which he held ownership interests, have been closed, the
11 Debtor continues to be employed by, or have ownership interests in, various entities which are in
12 the restaurant field.¹⁸

13 The Debtor expressed his opinion, as an owner or an individual with an
14 ownership interest, as to the value of certain entities listed on his Schedules filed with the
15 Bankruptcy Court. FL Receivables presented no controverting evidence on the valuation issues,
16 relying instead on whether the Debtor was a credible witness.

17 As to DRD Northwest LLC, the Debtor testified that he held a 33 percent
18 ownership interest therein.¹⁹ Initially the Debtor called Doug Koch to testify as to the value of
19 an ownership interest in DRD Northwest. Mr. Koch is a one-third owner in the entity, along

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21 **15.** Docket Entry No. 201.

22 **16.** Docket Entry No. 222.

23 **17.** Docket Entry No. 232.

24 **18.** For instance, DRD Northwest operates eight restaurants in the Portland, Oregon area.
25 The Debtor still retains a 33 percent interest in this entity. The Debtor is still employed by QK,
Inc., which provides, inter alia, “administrative services” to DRD Northwest.

26 **19.** October 26, 2009 Trial Transcript at 101; also see Uncontested Factual Finding No.
27 22, above.

1 same as real value. But I just knew we had to put something down there [on the Schedules],
2 because it's not valueless. Even though it may be because debts exceed the value of the
3 company."²⁵ The Debtor presented no other evidence, such as a profit and loss statement, a
4 statement of accounts or accounts receivable and aging thereof, an accounts payable ledger, or
5 cash flow projections, for the Court to determine the value of DRD Northwest. Therefore, the
6 Court concludes that DRD Northwest has a nominal value of \$1.

7 The Debtor received numerous advances from QK, Inc., his employer, over a
8 period of time. On April 1, 2003, the Debtor agreed to repay these advances, on demand, and
9 executed a promissory note ("Note") as evidence thereof.²⁶ The Debtor provided security for the
10 repayment of the Note.²⁷ A financing statement was filed to perfect QK, Inc.'s security interest
11 in certain shares of the Debtor's stock and other ownership interests in QK New Mexico, Inc;
12 DRD Property Investments LLC; and DRD Northwest LLC.²⁸

13 The IRS filed tax liens, in Maricopa and Gila Counties, for the payroll obligations
14 of the Debtor concerning the operations of Alden, Inc. During the course of this Chapter 11
15 proceeding, the Debtor has entered into various stipulations with the IRS to resolve payment of
16 the secured, priority, and unsecured obligations of the IRS. As noted previously, on May 19,
17 2009, the Debtor entered into the IRS Claim Stipulation, which provided for the treatment of the
18 IRS claim under the Debtor's Plan. Post-confirmation, the Debtor entered into a Revised IRS
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21 **25.** *Id.* at 205, Lines 18-23.

22 **26.** Exhibit M.

23 **27.** On April 1, 2003, the Debtor pledged all of his shares in QK New Mexico, Inc. and
24 DRD Property Investments LLC as security for repayment of the Note. Exhibit N. The Debtor
25 also pledged his interest in DRD Northwest LLC as security for repayment of the Note. Exhibit
26 O.

26 **28.** Exhibit P. Again, the Court cannot find any credible evidence that DRD Property
27 Investments LLC existed or continues to exist. *See* Findings of Fact Nos. 20 and 25. The Debtor
28 valued an entity named DRD Properties, New Mexico on his Schedule B.

1 Stipulation, clarifying the treatment of the IRS obligations.²⁹ Neither Stipulation provides for the
2 IRS' acceptance of the Debtor's plan of reorganization, as amended. Both Stipulations provide
3 for the Debtor's Withdrawal of his Objection to the IRS proof of claim.

4 Pursuant to the Debtor's stipulation with the IRS, the IRS has agreed to an
5 allowed pre-petition claim in the amount of \$770,181.65. Of said amount, the IRS has an
6 allowed secured claim in the amount of \$359,196.54; an unsecured priority claim in the amount
7 of \$406,718.15; and a general unsecured claim in the amount of \$4,266.96.³⁰ Under the Plan, the
8 Debtor will liquidate his life insurance policy and his 401K to fund the Plan. Of the resulting
9 funds, 84 percent will be utilized to pay the IRS' secured claim. In addition, funds obtained from
10 Reza Ghaanati, in the amount of \$62,250, will be applied to the IRS' unsecured priority claim.
11 Moreover, the Yucca Property and Pine House will be liquidated, with a portion of the proceeds
12 being applied to the IRS' secured claim. The stipulation with the IRS also set forth a payment
13 regimen under which the Debtor will make monthly payments of \$3,000 for the first 12 months
14 of the Plan which will be applied in the reduction of a number of claims, including the claim of
15 the IRS, with the monthly payments to increase over time.³¹

16 Pursuant to the stipulation the Debtor has entered into with the OTC, the OTC has
17 agreed to an allowed pre-petition tax claim in the dramatically reduced amount of \$40,000,
18 which accrues interest at the rate of 5 percent per annum.³² An original proof of claim was filed
19 on July 21, 2008, in the amount of \$337,330.18. Subsequent amendments to the claim have
20 reduced the amount from \$214,951.03, on February 26, 2009, to \$115,898.45 on October 12,
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22 **29.** See Uncontested Facts No. 39 and 50.

23 **30.** See Docket Entry Nos. 152 ("IRS Claim Stipulation") and 232 ("Revised IRS
24 Stipulation").

25 **31.** The Debtor committed to making monthly payments of \$4,050 for months 13
26 through 36, and \$3,700 for months 36 through 60.

27 **32.** See Docket Entry No. 222.

1 2009, to the current amount of \$40,000. Under the Plan, the OTC will receive the full payment
2 of its allowed pre-petition claim.

3 The Debtor presented evidence as to the feasibility of his plan, which FL
4 Receivables did not controvert through other witnesses or exhibits. The Debtor testified that he
5 received wages from QK Inc., which would assist in the payment of his creditors.³³ On August
6 20, 2009, QK, Inc. filed a ballot, for Class 2H, accepting the Debtor's plan of reorganization.³⁴

7 The Debtor estimated, through the sale or liquidation of property, that he could
8 pay the minimum amount of \$2,500 per month and the maximum amount of \$4,050 per month to
9 his creditors during the term of his plan.³⁵ To make the payments, as required, the Debtor's
10 spouse agreed to devote her social security payments to ensure the Debtor had sufficient cash on
11 hand.

12 The Debtor also proposed to sell the Yucca property in Scottsdale and the Pine
13 property. Although the Yucca and Pine properties were held by the Ekstrom Family Limited
14 Partnership, with the Debtor's interest therein having been transferred to a revocable trust,³⁶ the
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17 **33.** Exhibit Q. In 2008, the Debtor received per annum wages of \$173,215.82.

18 **34.** Exhibit CC. The ballot was filed just prior to the contested confirmation hearing on
19 August 26, 2009. The amount of the claim listed on the ballot was \$244,217.00.

20 **35.** Exhibit C. This Exhibit contains a detailed cash flow statement as to the payments to
21 be made to creditors based upon the available funds of the Debtor. Also, see specifically the
22 Revised IRS Stipulation, Docket Entry No. 232, which outlines the Debtor's payment schedule,
23 with the Debtor devoting (1) \$3,000 per month, for months 1 through 12 of the plan, (2) \$4,050
24 per month for months 13 through 36 of the plan, and (3) \$3,700 per month for months 32 through
25 60 to pay Debtor's counsel, the Arizona Department of Revenue, the IRS, and the OTC, *pro*
26 *rata*, with the IRS agreeing to defer payment of its claim, if necessary, to ensure that the Arizona
27 Department of Revenue and the OTC are paid in full.

28 **36.** October 26, 2009 Trial Transcript at 41. The Debtor testified that he had no will, and
his limited partnership interest was transferred to his revocable trust for estate planning
purposes. The Debtor concedes that his revocable trust is an asset of this bankruptcy estate;
hence, the liquidation of trust assets to pay his creditors.

1 Debtor estimated that the Pine property had potential equity of \$70,000,³⁷ and the Yucca
2 Property, in Scottsdale, had potential equity of \$110,000.³⁸ The Debtor also intended to sell the
3 Idaho property owned by the E-Z Livin' Inn LLC, which was owned by the Ekstrom Family
4 Limited Partnership, with his interest having been transferred to his revocable trust. He
5 estimated that there was about \$40,000 equity in the property owned by the E-Z Livin' Inn.³⁹

6 As noted previously, concerning the issue of feasibility, the Debtor testified that
7 he would liquidate his 401K, normally property which is considered exempt from levy or
8 liquidation by creditors of the bankruptcy estate, to pay approximately \$172,000 to his creditors,
9 principally the IRS.⁴⁰ The Debtor stated that he would use the cash surrender value of his life
10 insurance policy for plan purposes. Reza Ghanatti testified that he would provide the Debtor
11 with \$62,250 for plan confirmation purposes. Based upon the foregoing, the Debtor estimated
12 that \$100,000 to \$350,000 would be paid to the IRS over time, with any unpaid debt still due and
13 owing to the IRS to be deemed nondischargeable at the end of the plan's term, and the aggregate
14 amount of between \$400,000 to \$750,000 to be paid to his creditors during the term of his
15 plan.⁴¹ To ensure feasibility, the Debtor stated that he would have the sum of \$150,000 available
16 to commence making payments to his creditors upon the effective date of the plan.

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18 **37.** October 26, 2009 Trial Transcript at 39-40. The Debtor listed the Pine property with
19 \$70,000 in equity on his Schedules. See Exhibit R, Schedule A. He felt the equity had remained
20 the same on this property.

21 **38.** October 26, 2009 Trial Transcript at 40. The Debtor listed the Yucca Property with a
22 value of \$260,000 on his Schedule A, Exhibit R. However, he testified that he believed that the
23 value of the home had declined by \$10,000 to \$250,000, , also causing his equity therein to
24 decline by the same amount.

25 **39.** October 26, 2009 Trial Transcript at 39-40. E-Z Livin' Inn owns property in Lava
26 Hot Springs, Idaho, which consists of rental units. Initially there was about \$42,000 in equity in
27 the property, but he thinks that equity may have declined by \$5,000 to \$10,000.

28 **40.** Exhibit C. The actual distribution may be somewhat less depending on whether the
Debtor requests that taxes for such a distribution be withheld.

41. Exhibit C; also see Revised IRS Stipulation, Docket Entry No. 232.

- 1
- 2 1. Whether the Plan has been proposed in good faith as required by Bankruptcy
- 3 Code § 1129(a)(3).
- 4 2. Whether the Debtor has unfairly discriminated against FL Receivables
- 5 under § 1129(b).
- 6 3. Whether Ireland Bank is a creditor of the Debtor and able to vote for the Plan.
- 7 4. Whether the Plan has been accepted by at least one impaired class as required
- 8 by Bankruptcy Code § 1129(a)(10).
- 9 5. Whether the Plan is feasible pursuant to § 1129(a)(11).

10 V. DISCUSSION

- 11 1. Whether the Plan has been proposed in good faith as required by Bankruptcy
- 12 Code § 1129(a)(3).

13 A Chapter 11 debtor has the burden of proving that its proposed plan satisfies
14 statutory confirmation requirements. 11 U.S.C. § 1129(a); In re Arnold and Baker Farms, 177
15 B.R. 648 (9th Cir. BAP 1994); In re Marshall, 298 B.R. 670 (Bankr.C.D.Cal. 2003). A chapter 11
16 plan is proposed in good faith when it achieves a result consistent with the objectives and
17 purposes of the Bankruptcy Code. In re Sylmar Plaza, L.P., 314 F.3d 1070, 1074 (9th Cir. 2002);
18 In re Arnold and Baker Farms, 177 B.R. 648 (9th Cir. BAP 1994). In determining whether a
19 debtor has acted in good faith in proposing a reorganization plan, the court must take into
20 account the totality of the debtor's circumstances. In re Jorgensen, 66 B.R. 104, 108-09 (9th Cir.
21 BAP 1986).

22 The Debtor has met the good faith requirement under section 1129(a)(3). The
23 testimony and facts reflect that the Debtor sought bankruptcy protection, in part, because of his
24 inability to pay a judgment in excess of \$4 million obtained by FL Receivables in 2005.
25 However, the Debtor also incurred sizeable obligations due and owing to the IRS and the OTC,
26 which necessitated his seeking some type of bankruptcy protection. In 2008, the IRS filed a
27 proof of claim in the aggregate amount of \$802,613.02, and the OTC filed a proof of claim in the

1 aggregate amount of \$337,330.18. During the course of these reorganization proceedings, the
2 Debtor was able to enter into a viable resolution of the IRS and OTC claims.

3 The Court must also consider that the Debtor is an individual, and the
4 requirements for confirmation of a plan are different as a result of the changes brought about by
5 the amendments to the Bankruptcy Code.⁴⁵ In this matter, the Debtor is devoting all of his
6 exempt and non-exempt property to the payment of his creditors. His wife has agreed, as well,
7 to devote her social security payments to the funding necessary for the plan. Finally, the Debtor
8 has obtained funding from a third party, Mr. Ghanatti, to assist him.

9 In reviewing the requirements pertaining to an individual, if an unsecured creditor
10 objects to confirmation, a debtor may confirm a plan over that creditor's objection if the debtor
11 complies with 11 U.S.C. §1129(a)(15). Presumably if a debtor meets the requirements of
12 Section 1129(a)(15), the debtor has met the statutory confirmation requirements that are
13 consistent with the objectives and purposes of the Bankruptcy Code, and the Court should
14 overrule the good faith objection. In turn, Section 1129(a)(15) relies on Section 1325(b)(2) to
15 determine if the debtor has, indeed, devoted all of his disposable income to the payment of his
16 creditors.⁴⁶ After a review of the evidence, the Court concludes that the Debtor has met the
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18 **45.** This case was filed after October 17, 2005. Therefore, BAPCPA is applicable.

19 **46.** 11 U.S.C. §1325(b)(2) (West 2009) provides as follows:

20 For purposes of this subsection, the term “disposable income” means current monthly income
21 received by the debtor (other than child support payments, foster care payments, or disability
22 payments for a dependent child made in accordance with applicable nonbankruptcy law to the
23 extent reasonably necessary to be expended for such child) less amounts reasonably necessary to
be expended--

24 (A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a
25 domestic support obligation, that first becomes payable after the date the petition is filed;
26 and

27 (ii) for charitable contributions (that meet the definition of “charitable
28

1 requirements of Sections 1129(a)(15) and 1325(b)2).

2 The Debtor has outlined the amounts that are reasonably necessary for the
3 maintenance or support of himself and his wife, and has agreed to devote any surplus to the
4 payment of his creditors. He has also agreed to liquidate his exempt and non-exempt property to
5 increase the distribution to his creditors. In this case, FL Receivables, the only objecting
6 creditor, is a general unsecured creditor of the Debtor. In reviewing the evidence presented, the
7 Court concludes that the value of the property to be distributed by the Debtor under his plan is
8 all of his projected disposable income that he will receive during the course of his 60-month plan
9 Although FL Receivables attempts to portray the Debtor as being vindictive as to it, with the
10 Debtor filing his bankruptcy petition after FL Receivables obtained a judgment against the
11 Debtor in excess of \$4 million, the Court concludes that the Debtor has filed his petition in good
12 faith because of the sizeable tax obligations that he needs to resolve. The Debtor has proposed a
13 plan which essentially proposes to distribute or liquidate everything that he owns of any value to
14 pay his creditors. As noted, the Debtor has devoted all of his disposable income to the payment
15 of his creditors over 60 months.

16 The Court concludes that the Debtor has worked to achieve the objectives which
17 are consistent with the Bankruptcy Code. The Debtor negotiated with all of his creditors, and
18 presented a plan with the near-unanimous consent of his creditors.⁴⁷ The good faith evaluation
19 must be made on a case by case basis. In re Marshall, 298 B.R. 670 (Bankr.C.D.Cal. 2003). The

20
21 contribution” under section 548(d)(3) to a qualified religious or charitable entity
22 or organization (as defined in section 548(d)(4)) in an amount not to exceed 15
23 percent of gross income of the debtor for the year in which the contributions are
24 made; and

24 (B) if the debtor is engaged in business, for the payment of expenditures necessary for the
25 continuation, preservation, and operation of such business.

26 **47.** The general unsecured creditor class, along with FL Receivables, have rejected the
27 Debtor’s plan of reorganization. However, such a result is natural, given that the Debtor
28 proposes to pay general unsecured creditors nothing under his plan.

1 Court sees no basis, in law or fact, to conclude that the Debtor is not acting in good faith. The
2 Court concludes that the Debtor has proposed his plan in good faith and not by any means
3 forbidden by law. Therefore, the Court finds that the provisions of Section 1129(a)(3) have been
4 met, and the Objection of FL Receivables on this point is overruled.

5
6 2. Whether the Debtor unfairly discriminates against FL Receivables
7 in contravention of the requirements under Bankruptcy Code § 1129(b)(1).

8 FL Receivables assets, as a separate issue, that the Debtor's Plan unfairly
9 discriminates against FL Receivables' Claim and that confirmation should be denied under
10 Section 1129(b)(1). The Court disagrees. First, as reflected hereinafter, the Court intends to
11 disallow the votes of Ireland Bank, as a creditor with a secured claim against the Debtor, and has
12 placed the Bank in the same class with FL Receivables. As such, although Ireland Bank may be
13 paid from its collateral, including the rents obtained from the Idaho property, Ireland Bank must
14 be paid as any other general unsecured creditor of this estate. Second, the Court has set forth
15 below its determination that QK, Inc. has an allowed secured claim as to this Debtor. The Court
16 is unable to place a precise value on the value of QK, Inc.'s collateral. However, the Court has
17 reviewed the underlying documentation concerning the claim and concludes that QK, Inc.
18 obtained a perfected security interest on several entities in which the Debtor has an interest.
19 Under 11 U.S.C. §1122(a), a debtor may place a claim or an interest in a particular class only if
20 the claim "is substantially similar to the other claims. . .of such class." Because QK, Inc has an
21 allowed secured claim, and FL Receivables has a general unsecured claim, the Court concludes
22 that the Debtor was correct in placing them in separate classes. In re EBP, Inc., 172 B.R. 241
23 (Bankr.N.D.Ohio 1994). Once placed in separate classes, the Debtor may treat the claims
24 differently. It is not unfair discrimination, under Section 1129(b), to discriminate, or treat
25 differently, a creditor with a secured claim from a creditor which has a general unsecured claim.
26 In fact, the statute requires it. The Court concludes, based upon the facts of this case, that the
27 Debtor has not unfairly discriminated in its treatment of the FL Receivables claim vis a vis the

1 claim of QK, Inc. The objection of FL Receivables on this point is overruled.

2
3 3. Whether Ireland Bank is a creditor of the Debtor and able to vote for the Plan.

4 FL Receivables argues that the Court should disregard the vote cast by Ireland
5 Bank in favor of the Plan. The Debtor has placed Ireland Bank in Classes 2.E and 2.F. Class
6 2.E. consists of the claim of Ireland Bank for the first mortgage on the Idaho Property. Class
7 2.F. consists of the claim of Ireland Bank for the second mortgage on Idaho Property. FL
8 Receivables asserts that Ireland Bank is not a secured creditor of this Debtor; therefore, the Bank
9 may not have a secured claim or any deficiency claim resulting from the value of the collateral
10 being less than the debt owing. While Ireland Bank’s obligations are secured by two deeds of
11 trust against the Idaho property,⁴⁸ it is EZ Livin’ Inn LLC, a non-debtor, that is the owner of the
12 Idaho property. EZ Livin’ Inn LLC has pledged or hypothecated its property in support of the
13 Debtor’s obligations to Ireland Bank. Since the property securing Ireland Bank’s debt is not
14 property of the bankruptcy estate, Ireland Bank does not have a secured claim, or any type of
15 deficiency claim, for purposes of the Debtor’s plan.⁴⁹ As such, FL Receivables argues that
16 Ireland Bank has improperly cast two ballots in favor of the Debtor’s plan.

17 The Debtor argues that Ireland Bank is a secured creditor of the estate. The basis
18 of his argument is that even though EZ Livin’ Inn, LLC holds legal title to the property, since he
19 personally borrowed the funds from Ireland Bank, made all payments on the debt, and holds a
20 100 percent interest in EZ Livin’ Inn LLC, the Debtor’s “equitable interest” is sufficient to
21 render Ireland Bank a secured creditor for purposes of the Plan. The Court disagrees.

22 It is undisputed that title to the property is vested in EZ Livin’ Inn, LLC. The
23 membership interests in EZ Livin’ Inn, LLC are held by the Debtor, his wife and Standard
24

25 **48.** As of the Petition Date, the sum of \$97,464.47 was due and owing on the first deed
26 of trust, and the sum of \$38,318.97 was due and owing on the second deed of trust.

27 **49.** See 11 U.S.C. §506(a).

1 Management, LLC.⁵⁰ The EZ Livin’ Inn, LLC is owned by the Ekstrom Family Limited
2 Partnership.⁵¹ The Debtor holds a 49.5 percent limited partnership interest in the partnership.⁵²
3 The Debtor’s wife also holds a 49.5 percent limited partnership interest. A 1 percent general
4 partnership interest in the Ekstrom Family Limited Partnership is held by Standard Management
5 LLC.⁵³ The Debtor’s interest in the Ekstrom Family Limited Partnership was contributed to the
6 Dennis Ekstrom Living Trust. The Debtor is essentially requesting that the Court disregard
7 several legal entities to determine that Ireland Bank is a secured creditor of the Debtor.

8 There is little precedent on the issue. However, the recent case of In re Hecker,
9 414 B.R 499 (Bankr. D. Minn. 2009) is instructive on the utilization of corporate veil piercing
10 done for the purpose of allowing a debtor to claim personal ownership in certain property titled
11 in the name of a corporate entity. In Hecker, utilizing the doctrine of “reverse piercing of the
12 corporate veil,” the debtor sought a homestead exemption, under Minnesota law, in certain real
13 property owned by a limited liability company that was wholly owned by a second limited
14 liability company, of which the debtor held a majority interest. Id. at 502.⁵⁴ The debtor in
15 Hecker requested that the court disregard corporate formalities. The Court found that the debtor
16 failed to met the two-prong test applied in traditional veil piercing cases in Minnesota.
17 Moreover, the Court pointed out that the debtor, as an experienced businessman, had enjoyed
18 the benefits of limited liability protection for many years, and had the means to purchase a

19
20 **50.** See Docket Entry No. 219; Amended Pre-Trial Statement, p. 3, Line 12.

21 **51.** See Id.

22 **52.** See Docket Entry No. 219; Amended Pre-Trial Statement, p. 3, Line 9.

23 **53.** See Docket Entry No. 219; Amended Pre-Trial Statement, p. 3, Line 10.

24 **54.** The Court described the debtor’s actions as “reverse piercing of the corporate veil.”
25 Normally a creditor seeks to pierce the corporate veil to bring in the assets and liabilities of the
26 corporation as if they were the assets and liabilities of the individual debtor. Presumably the
27 Court referred to the concept as “reverse piercing of the corporate veil,” because the debtor who
28 created the corporate entity was the party requesting that the entity be disregarded.

1 homestead in his own name, but chose not to so proceed. Therefore, in addition to not meeting
2 the test for veil piercing, the Court concluded that the equities of the case also did not support
3 the reverse piercing requested by the debtor. Id. at 507. The Court concluded that allowing the
4 debtor to disregard the corporate formalities he created would have been an abuse of the remedy.

5 Here, we also have an experienced businessman who created numerous limited
6 liability companies. The Debtor has created such entities for estate planning purposes, but the
7 Debtor's requested relief is similar to veil piercing; that is, the Debtor wishes to shield certain
8 assets from the reach of creditors. The Debtor has enjoyed the benefits of limited liability, and
9 must now accept the consequences of such estate planning. Moreover, the Debtor never filed a
10 Motion for Substantive Consolidation. Had he done so, all of the assets and liabilities of the
11 non-debtor entities, such as EZ Livin' Inn LLC, could have potentially been merged into one
12 bankruptcy estate for fair and equitable distribution of the Debtor's collective assets in payment
13 of all of his obligations. On this record, however, the Court sees no basis to create the remedy of
14 substantive consolidation or veil piercing without appropriate notice, hearing, and a
15 consideration of the matter on the merits.

16 The Debtor does cite the Court to In re Farnsworth, 384 B.R. 842 (Bankr. D. Ariz.
17 2008) for the proposition that Ireland Bank has an equitable lien on the property chargeable
18 against the Debtor. In Farnsworth, the Chapter 13 debtor claimed a homestead exemption in real
19 property that she had purchased pre-petition, in her name only, using \$10,000 of a her ex-
20 fiancée's money and \$3,000 of her own money as the down payment. After the parties ended
21 their relationship, the ex-fiancée was locked out, he initiated a lawsuit in the Superior Court, and
22 he recorded a notice of lis pendens on the real property. The Superior Court granted him an
23 equitable lien for \$10,000 and the right to foreclose the lien. Before the order was reduced to
24 final judgment, the debtor filed her bankruptcy case. However, the Farnsworth decision is
25 inapposite. First, the State Court had already concluded the nature of the ex-fiancée's interest in
26 the real property prior to the debtor filing her bankruptcy petition. It was only the ministerial act

1 of the entry of the judgment that had not been effectuated. It was appropriate for the Bankruptcy
2 Court to give effect to the State Court’s ruling on the merits. This Court is not presented with a
3 similar ruling from a state court. Second, the facts in Farnsworth reflect that the ex-fiancee
4 provided the debtor with his funds for the specific purpose of acquiring an interest in real
5 property. When the debtor did not provide him with the agreed-upon interest or repay his funds,
6 the Court fashioned a remedy to provide, in equity, what the ex-fiancee should have received.
7 In this case, the Debtor borrowed funds from Ireland Bank, and Ireland Bank received the
8 bargained-for security to repay the Debtor’s obligation by having a third party, EZ Livin’ Inn
9 LLC, separately hypothecate its property as collateral for the Debtor’s obligations. There is no
10 remedy that this Court need fashion, in equity, to provide relief to Ireland Bank. Ireland Bank
11 has a valid lien on the Idaho property; however, the Idaho property is not property of this
12 bankruptcy estate.

13 Section 506(a) provides, in pertinent part, that a creditor has “a secured claim to
14 the extent of the value of such creditor’s interest in the estate’s interest in such property. . . and is
15 an unsecured claim to the extent that the value of such creditor’s interest . . . is less than the
16 amount of such allowed claim.” 11 U.S.C. §506(a)(West 2009). The purpose of this Section is
17 to determine to what extent a creditor is secured, and if the creditor will not be paid in full from
18 its collateral, to what extent it has an unsecured or deficiency claim. However, the first step in
19 the analysis must be that the debtor has an interest in the property to which the creditor’s claim
20 attaches. If the debtor has no legal or equitable interest in the property, the creditor must be
21 considered unsecured, vis-a-vis the debtor. Of course, if the creditor is able to liquidate its
22 collateral, apart from the bankruptcy proceedings, that may affect the amount of the unsecured
23 claim that the creditor pursues in the bankruptcy proceedings.⁵⁵ However, the nature of the claim
24 as an unsecured claim of the debtor does not change.

25
26 **55.** In some cases, when a non-debtor third party has pledged its assets in support of a
27 debtor’s obligations, the debtor or a creditor of the debtor may request that the creditor with
28 collateral “marshal its assets” to pay down the creditor’s claim.

1 The Court concludes that Ireland Bank is a general unsecured creditor of the
2 Debtor, but it has been improperly classified, in the Debtor's Plan, as a secured creditor. As
3 such, the ballots of Ireland Bank, as an impaired secured creditor, in two separate classes, must
4 be rejected. Because the Debtor does not own the Idaho property, the property cannot give rise to
5 a secured claim for Ireland Bank. Ireland Bank is an unsecured creditor of the Debtor, because
6 the facts reflect that the Debtor has executed a promissory note to repay an obligation that he
7 owes to the Bank. Accordingly, Ireland Bank is an unsecured creditor of the Debtor, and cannot
8 be separately classified from other unsecured claims for voting purposes. Because FL
9 Receivables has the largest claim, by dollar amount, in the general unsecured creditor class, the
10 placement of Ireland Bank into said class does not change the rejection of the general unsecured
11 creditor class of the Debtor's Plan. Ireland Bank's votes in Classes 2.E. and 2.F will not count in
12 determining whether the Debtor's Plan has been accepted by an impaired class. The Objection
13 of FL Receivables, as to this issue, is sustained.

14
15 4. Whether the Plan has been accepted by at least one impaired class as required
16 by Bankruptcy Code § 1129(a)(10).

17 The Debtor has identified three classes he believes are impaired under the Plan:
18 Ireland Bank's secured claims (Classes 2.E and 2.F), the IRS secured claim (Class 2.J) and QK
19 Inc.'s secured claim (Class 2.H). Although Ireland Bank is the only class of the three to have
20 submitted a timely ballot, the Debtor argues that all three accepted the Plan. The Court has
21 already determined that Ireland Bank's claims are not secured claims for purposes of this Plan.
22 With respect to the two remaining classes, the IRS never submitted a formal ballot on the Plan
23 and QK, Inc. did submit a ballot, albeit, three months late on August 24, 2009.⁵⁶ The Court has
24 set forth below its analysis as to whether the IRS or QK, Inc. is an impaired consenting class.

25 A. The IRS Claim

26
27

28 **56.** See Docket Entry No. 201.

1 FL Receivables argues that the IRS claim in Class 2.J is not an accepting secured
2 claim. The IRS filed a proof of claim on July 16, 2008. The Debtor objected to the IRS proof of
3 claim on January 26, 2009. 11 U.S.C. §§ 501 and 502 (West 2009). FL Receivables argues that
4 the Debtor's Objection was never withdrawn nor ruled upon prior to the contested confirmation
5 hearing,⁵⁷ and that the Court never temporarily allowed the IRS claim for voting purposes.
6 Based on the foregoing, FL Receivables contends that the IRS does not have an allowed claim,
7 and is not eligible to vote to accept the Plan. 11 U.S.C. § 1126; Bankr. R. 3018(a).

8 Section 1126(a) provides that a holder of a claim allowed under Section 502 may
9 accept or reject a plan. Section 502(a) indicates that a claim is deemed allowed unless a debtor
10 objects. A creditor which has a claim to which an objection has been interposed, therefore, is not
11 allowed to vote on the plan unless the objection is adjudicated prior to plan voting or a
12 mechanism, such as temporary allowance, has been provided to the claimant. In re Stone Hedge
13 Properties, 191 B.R. 59 (Bankr. M.D. Pa. 1995). Until a party is deemed to have an allowed
14 claim, or actually has an allowed claim, it has no right to accept or reject a Chapter 11 plan. In re
15 M. Long Arabians, 103 B.R. 211 (9th BAP 1989). Whether to temporarily allow a claim, for
16 voting purposes on proposed Chapter 11 plan, is left to the bankruptcy court's discretion. In re
17 Armstrong, 294 B.R. 344 (10th Cir. 2003). In this case, in the May 2009 Stipulation, the Debtor
18 withdrew his objection to the IRS proof of claim. The withdrawal of the Objection to the IRS
19 proof of claim by the Debtor was prior to the Debtor's filing an Amended Plan and prior to the
20 contested hearing on confirmation. Thus, the Court concludes that at the time of the October
21 2009 contested hearing on confirmation, there was no pending Objection on the IRS proof of
22

23 **57.** A hearing was scheduled on the Objection to the IRS proof of claim for March 24,
24 2009. However, the hearing was vacated at the request of counsel, at a hearing held on March
25 10, 2009 due to the Objection not being properly served on the Department of Justice. The IRS
26 Claim Stipulation was filed on May 19, 2009. The Amended Plan was filed on June 8, 2009. A
27 Motion to Accept Late Filed Ballots of QK, Inc. and Take Notice of IRS Acceptance of the Plan
was filed on August 24, 2009. On November 6, 2009, after the close of evidence, the Debtor
filed a Revised IRS Stipulation.

1 claim, and the IRS could have voted on the Debtor's Plan.

2 However, even assuming that the IRS could vote on the Debtor's Plan, FL
3 Receivables presents a second cogent argument. The IRS also failed to submit a ballot by the
4 May 5, 2009 deadline or at any other time prior to the contested confirmation hearing.
5 Bankruptcy Rule 3017(c) states that on or before approval of the disclosure statement, the clerk
6 of the court must fix the time for objecting to or accepting the plan of reorganization and fix the
7 date for the confirmation hearing. These dates will be noticed out to creditors and interested
8 parties when the debtor or the plan proponent files the plan and the disclosure statement. Once
9 the date for filing an acceptance or rejection of the plan has been fixed, a creditor must accept or
10 reject the plan within this time limit, or move the court to permit late filing where failure to file
11 timely was the result of excusable neglect. In re Paul, 101 B.R. 228 (Bankr. S.D. Cal. 1989).

12 In this case, the deadline to submit a ballot was May 5, 2009. Rather than
13 acknowledge that the IRS did not submit a timely ballot, the Debtor argues that the IRS Claim
14 Stipulation, filed on May 19, 2009, serves as the "ballot" for purposes of accepting the Plan.
15 First, the IRS Claim Stipulation was filed after the deadline of May 5. Second, there is nothing
16 in the Stipulation which would qualify as the requisite acceptance or rejection of a plan.
17 According to the mandates of Bankruptcy Rule 3018(c), the acceptance or rejection of a plan of
18 reorganization must: 1) be in writing; 2) be signed by the creditor, equity security holder or agent
19 filing same; 3) identify the plan to be accepted or rejected; and 4) conform to the appropriate
20 Official Form. According to the Debtor, the IRS Claim Stipulation is a writing, signed by the
21 IRS' counsel, indicates the class treatment, the amount of the claim, and the IRS' acceptance of
22 the Plan; nothing more is required. The Court disagrees. The appropriate official form, Official
23 Form 14⁵⁸, is used as a ballot for accepting or rejecting a plan of reorganization. The instructions
24 on the ballot explicitly state that "A PERSON ENTITLED TO VOTE ON THE PLAN MUST
25 COMPLETE AND RETURN THE BALLOT IN ORDER TO HAVE THE VOTE COUNT."

26
27 **58.** Official Form 14: (Revised 12/03).
28

1 The instructions to the ballot provide the following specific directions:

2
3 Only the applicable language from the alternatives shown on the Official Form should be
4 included in the ballot, but the ballot may be modified to the particular requirements of the
5 case. See Fed. R. Bankr. P. 9009. The form is designed to be customized by the
6 proponent so that each class of creditor, debt security holder, or equity security holder
7 under the plan will receive a ballot that only applies to that class. Official Form 14,
8 Section III, Line 1.

9 The directions set forth what must be provided in the ballot to “conform” to the Official form.⁵⁹

10 For example, Line 8 of Section III of the instructions states that the “proponent should indicate
11 on the second line [of the ballot] whether the disclosure statement was approved or conditionally
12 approved by the court.” The IRS Claim Stipulation does not contain this language. The person or
13 entity voting on the plan should explicitly state, by checking a box, whether it “Accepts the
14 Plan” or “Rejects the Plan.” A review of the IRS Claim Stipulation does not contain any
15 information as to whether the IRS accepts or rejects the Plan. These variances are significant
16 enough that the Court is unable to conclude that the Stipulation “conforms” to the appropriate
17 Official Form pursuant to Bankruptcy Rule 3018(c). The process by which creditors vote on a
18 plan of confirmation is governed by rules designed to insure the integrity and manageability of
19 the voting process. Bakes v. Official Committee of Unsecured Creditors, 359 B.R. 831 (S.D. Fla.
20 2007).

21 Here, the IRS Claim Stipulation was filed on May 19, 2009. Pursuant to the Order
22 approving the disclosure statement, May 5, 2009 was set as the deadline by which to accept or
23 reject the April 1 plan. As such, the IRS Claim Stipulation was filed two weeks after the
24 deadline, and even then a ballot was not submitted. An Amended Plan was filed on June 8, 2009.
25 Then on August 24, 2009, the Debtor filed a Motion to Accept Late Filed Ballots of QK, Inc. and
26 Take Notice of IRS Acceptance of the Plan, but no ballot was submitted by the IRS. At the
27 contested confirmation hearing on October 26, 2009, counsel for the IRS stated that it was in

28 **59.** See Official Form, Section III, Lines 6-18.

1 support of the Debtor's Plan, but did not request that a late filed ballot be considered by the
2 Court. On November 6, 2009, after the close of evidence at the contested confirmation hearing,
3 the Debtor filed a Revised IRS Stipulation, which also did not contain or incorporate a late filed
4 ballot.

5 The Debtor and the IRS negotiated over a prolonged period of time to
6 memorialize the treatment of the IRS claim, yet failed, time after time, to submit a ballot as
7 required by Bankruptcy Rule 3018(c). The Court concludes, based upon the facts of this case,
8 that the IRS never provided a ballot to accept or reject the Debtor's Plan and may not be counted
9 as an impaired consenting class to the Debtor's Plan. The FL Receivables' Objection on this
10 point is sustained.

11
12 B. The QK, Inc. Claim

13 The last remaining impaired claim which may be considered to determine whether
14 the Debtor has an impaired consenting class is the QK, Inc. claim, in Class 2.H. QK, Inc. filed
15 its ballot on August 24, 2009, after the deadline of May 5, 2009. FL Receivables argues that
16 QK, Inc. is not an accepting secured claim. The parties have stipulated that QK, Inc.'s claim is
17 secured by a security interest in the Debtor's ownership stake in three entities: (a) a 10 percent
18 interest in QK New Mex, Inc., (b) a 10 percent interest in DRD Property Investments LLC and
19 (c) a one-third interest in DRD Northwest, LLC. There is no other collateral for this claim. As
20 noted previously in the factual discussion, the Court is unable to determine the existence of DRD
21 Property Investments, LLC.⁶⁰

22 The gist of FL Receivables' argument is that in order to be a secured creditor,
23 QK, Inc. must have a lien against estate property that has some value, and in this case, the
24 Debtor's interest in the three entities has no value. 11 U.S.C. § 506(a)(West 2009). The parties
25

26 **60.** See Findings of Fact Nos. 20 and 25. The Debtor only listed DRD Properties, New
27 Mexico, on his Schedule B, with a value of \$8,000.

1 have stipulated that the Debtor's ownership interest in QK New Mex, Inc. has no value. The
2 Debtor valued his interest in DRD Properties, New Mexico, at \$8,000 on his Schedule B, but this
3 interest does not serve as collateral for the QK, Inc. obligation. As to DRD Property Investments
4 LLC, there is no credible evidence in the record as to its value. Therefore, the Court must value
5 that interest as zero for purposes of this decision.

6 Thus, the only interest that remains is the Debtor's interest in DRD Northwest,
7 LLC. The Debtor valued his one-third interest in DRD Northwest, LLC at \$150,000 on his
8 Schedules. At trial, the Debtor was able to present little credible evidence as to the value of this
9 interest. As argued by FL Receivables, DRD Northwest, LLC is a closely-held company, and
10 the Debtor holds only a minority interest in the Company. There is no recognizable market for
11 this minority interest. The Company's balance-sheet reflects that it is insolvent. The Debtor's
12 interest has a de minimus value of \$10,000. However, QK, Inc. does have collateral as security
13 for the repayment of its indebtedness. Moreover, there is no prohibition for a creditor to assert a
14 secured claim and be paid as a secured creditor even though its collateral has little or no value.
15 11 U.S.C. §506(West 2009). The payment of QK, Inc. may need to be altered, pursuant to the
16 Plan, but the Debtor may still consider the claim as secured for purposes of voting on his Plan.

17
18 Unlike the IRS, QK, Inc. did file a ballot, albeit over three months late on August
19 24, 2009. QK, Inc., also unlike the IRS, did file a Motion with the Court to allow the late filed
20 ballot. In its Motion, QK, Inc. states that it did not have bankruptcy counsel through the initial
21 stages of the bankruptcy process, and did not retain counsel until the principals were noticed for
22 their depositions in August 2009.⁶¹ QK, Inc. provides no other justification for its late filed
23 ballot. The Court also notes that the Debtor did file an amendment to his Plan, and the hearing
24 on confirmation was continued, as a contested confirmation hearing, to October 2009. It is
25 difficult, on this record, to find any prejudice to any creditor as a result of QK, Inc.'s actions.

26
27 **61.** See Docket Entry No. 201.

1 Some courts have held that a late ballot cannot be counted unless the Court, on
2 Motion and after finding excusable neglect, extends the time for voting. See, e.g., Hanson v.
3 First Bank of South Dakota, N.A., 828 F.2d 1310, 1314 (8th Cir.1987); In re Global Ocean
4 Carriers Ltd., 251 B.R. 31 (Bankr. D. Del. 2000). Other courts, however, have been more liberal
5 in allowing late ballots. See, e.g., In re Rhead, 179 B.R. 169, 177 (Bankr.D.Ariz.1995); In re
6 Paul, 101 B.R. 228 (Bankr. S.D. Cal. 1989).

7 Pursuant to Rule 9006(b), "the court for cause shown may at any time in its
8 discretion . . . order the period enlarged if the request therefor is made before the expiration of
9 the period originally prescribed." As the Rule itself makes explicit, enlargement of time rests
10 within the Court's discretion. Jenkins v. Commonwealth Land Title Ins. Co., 95 F.3d 791 (9th
11 Cir. 1996). Bankruptcy Rule 9006 provides that the deadline for accepting or rejecting a plan
12 may be extended "for cause shown" if a "request" is made "before the expiration of the period
13 originally prescribed." Bankr. R. 9006(b); Pioneer Inv. Services Co. v. Brunswick Associates
14 Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993). In reviewing a claim of excusable
15 neglect, courts should consider "(1) the danger of prejudice to the non-moving party, (2) the
16 length of delay and its potential impact on judicial proceedings, (3) the reason for the delay,
17 including whether it was within the reasonable control of the movant, and (4) whether the
18 moving party's conduct was in good faith." Los Altos El Granada Investors v. City of Capitola,
19 583 F.3d 674, 683 (9th Cir. 2009).

20 In the case of In re Rhead, 179 B.R. 169 (Bankr. D.Ariz. 1995), the Maricopa
21 County Treasurer and debtor agreed on the day the ballots were due (July 5th) concerning plan
22 modifications to provide certain treatment on the County's tax claim. The agreement was
23 memorialized the following day, on July 6, with the ballot being executed the day after that on
24 July 7. Everything transpired within a quick 3-day period. In the decision of In re Rhead, the
25 Court held that the existence of the July 4 holiday, which resulted in the casting of the ballot a
26 couple of days late, was sufficient to find "excusable neglect" to justify the extension of the
27

1 voting deadline. Moreover, the Court held that no specific motion needed to be filed requesting
2 the extension in light of the modified plan and amended ballot report, along with the argument of
3 counsel at a hearing. These were deemed sufficient to qualify as a “motion” as required by
4 Bankruptcy Rule 9006.

5 In another case, In re Paul, 101 B.R. 228 (Bankr S.D. Cal 1989), the Court held
6 that the creditors' ballots rejecting a proposed Chapter 11 plan, which were filed late but prior to
7 the confirmation hearing, would be counted where the late filing caused neither delay nor
8 prejudice to the debtor and there was no evidence that creditors were acting in bad faith. Id. In
9 the Paul decision, the ballots were due on October 6, 1988. One creditor, the IRS, mailed its
10 ballot to the wrong address, and it was not received at the correct address until October 12.
11 Another creditor hand-delivered their ballot to the debtor on October 11. The debtor
12 acknowledged receipt of both late ballots in its ballot summary. Since there were no other issues,
13 and no delay or prejudice to the debtor as a result of the late ballots, the Court concluded that the
14 creditors had sufficiently established excusable neglect under Bankruptcy Rule 9006. As in the
15 Rhead decision, the issue of the late filed ballots was remedied within a couple of days of the bar
16 date.

17 In this case, the Debtor set May 5, 2009, as the date certain for creditors to file
18 their ballots accepting or rejecting the Plan. The Debtor continued to negotiate with the IRS and
19 the OTC to resolve the concerns of the taxing authorities to the Debtor’s Plan. The Debtor filed
20 an amendment to his Plan on June 8, 2009. An initial contested confirmation hearing needed to
21 be continued to October 26, 2009, because the Debtor was unable to prove feasibility until he
22 had resolved the OTC claim amount. Ultimately the Debtor filed an OTC Stipulation prior to the
23 October 26, 2009 confirmation hearing. Although the ballot of QK,Inc. was filed substantially
24 after the May 5, 2009 date, the principals of the entity did not realize that they had the
25 opportunity to cast a ballot until the noticing of their depositions, which prompted them to retain
26 counsel. Ultimately the Debtor obtained the near unanimous consent of his creditors to his Plan.

1 FL Receivables, with its general unsecured claim and the sole objector to confirmation, being the
2 notable exception. Given these facts, the Court will allow the late filed ballot of QK, Inc. The
3 Court concludes that the Debtor has an impaired consenting class to his Plan, with the Objection
4 of FL Receivables on this point being overruled.

5
6 5. Whether the Plan is feasible pursuant to § 1129(a)(11).

7 FL Receivables relies on Section 1129(a)(11) to support its position that the
8 Debtor's Plan is not feasible. The Court has already discussed, supra, the different confirmation
9 standards that apply to an individual. Although Section 1129(a)(11) has not been eliminated
10 from consideration when an individual debtor wishes to confirm a plan, Section 1129(a)(15)
11 specifically describes what burden of proof an individual debtor must meet to obtain
12 confirmation of a plan when an allowed unsecured claim objects to confirmation. The Court has
13 already concluded that, from an evidentiary standpoint, the Debtor has met his burden of proof
14 under Section 1129(a)(15). Thus, is there a reason for this Court to conclude that the Debtor
15 somehow has not met the burden of Section 1129(a)(11)?

16 The Debtor proposes to liquidate his exempt and non-exempt property and to
17 devote his wages and the social security of his wife to his Plan payments. In essence, the Debtor
18 proposes a plan of liquidation. This is permissible under Section 1129(a)(11). Although FL
19 Receivables ruminates over a variety of reasons as why the Plan is not feasible, the reality is that
20 it is as feasible as any plan proposed by an individual. There are no guarantees, but this Debtor
21 proposes to liquidate substantially all of his assets to pay his creditors over a number of years.
22 Unfortunately, he has incurred substantial tax obligations which will necessitate that most of his
23 Plan payments will be made to reduce those claims. However, such a proposal to reduce
24 dramatically or eliminate tax obligations, through the liquidation of assets and the use of wages,
25 is feasible.

26 As to the concerns of FL Receivables that the Debtor is unable to pay off the
27

1 priority claim of the OTC within the period prescribed by the Bankruptcy Code, the Debtor has
2 presented evidence at the October 26, 2009 hearing that the OTC claim has been reduced to only
3 the sum of \$40,000 and that it may be paid in full, since the IRS has agreed to defer certain
4 payments on its claim. As to the concern that the Debtor has not carried his burden of proof to
5 demonstrate that he is able to make the monthly payments proposed in the Plan, the Court
6 concludes that the Debtor has provided sufficient evidence concerning the liquidation of exempt
7 and non-exempt assets that it is reasonably likely that the Debtor will be able to make the
8 payments as proposed. Moreover, the specific provisions of Section 1129(a)(15) indicate that
9 the Debtor may always modify his Plan postconfirmation, if necessary, to make only those
10 payments that are usually required for an individual debtor. Again, if the Debtor makes the
11 payments as required under Section 1129(a)(15), and makes the payments as required under his
12 proposed Plan, which is a liquidating plan, the Debtor has met the separate requirement of
13 Section 1129(a)(11). Finally, as to the concern of FL Receivables that Mr. Ghaanati will not
14 make a \$75,000 cash contribution to the Plan, the Court concludes that sufficient evidence has
15 been presented that Mr. Ghaanati will make the requisite payment. At trial, Mr. Ghaanati
16 testified that he would use funds from his 401K account to make the requisite contribution. He
17 also clarified that he intended to contribute roughly \$62,250 toward confirmation, which he
18 believed was the actual net amount to be paid, since he needed to withhold a certain amount
19 from the \$75,000 to pay his required tax obligation for the distribution.

20 As noted, the Debtor is not required to rely on third-party funding to confirm his
21 Plan. In this case, the Debtor has chosen to do so to ensure that the taxing authorities are paid in
22 a timely manner. The Court concludes that Mr. Ghaanati was a credible witness and that his
23 cash contribution will allow the Debtor to confirm a feasible Plan. Based upon the foregoing,
24 the Court concludes that the Debtor's Plan does meet the requirements of Section 1129(a)(11),
25 and the Debtor has met his burden of proof thereunder. The Objection of FL Receivables is
26 overruled as to Section 1129(a)(11).

1 VI. CONCLUSION

2 FL Receivables, a general unsecured creditor of this individual Debtor, interposed
3 the only objection to the confirmation of the Debtor's Plan. The Court has reviewed and
4 considered the evidence presented by the parties at a contested confirmation hearing, as well as
5 the cited legal authorities. Although the Court has sustained, in part, the FL Receivables
6 Objection, the Court concludes that a portion of the Objection must be overruled. What has been
7 overruled, in the FL Receivables' Objection, allows the Debtor to confirm his Plan. The Court
8 concludes, as a matter of fact and law, that the Debtor has carried his burden of proof and that
9 his Plan should be, and will be, confirmed. The Debtor shall present an order of confirmation
10 that is consistent with this decision.

11 DATED this 23rd day of March, 2010.

12
13
14 

15
16 Honorable Sarah Sharer Curley
17 United States Bankruptcy Judge

18 BNC to NOTICE