

UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

In Re:

**GABLES MANAGEMENT,
LLC,**

Debtor.

**Bankruptcy Case
No. 10-42241-JDP**

MEMORANDUM OF DECISION

Appearances:

Joseph M. Meier, COSHO HUMPHREY, LLP, Boise, Idaho, Attorney
for Trustee.

Craig W. Christensen, CRAIG W. CHRISTENSEN, CHTD.,
Pocatello, Idaho, for Creditors.

I.

Introduction

Creditors Ernie and Patricia Geiger and June Geiger (“Ernie”,
“Patricia” and “June” individually¹; collectively “Creditors”) filed claims in

¹ We refer to creditors by first names for clarity; no disrespect is intended.

this chapter 11² case. The chapter 11 trustee, R. Wayne Klein (“Trustee”) objected to the claims. Exs. 200-01, 206-07; Dkt. Nos. 237-38. Creditors responded to Trustee’s objections, Dkt. Nos. 261-64, and on April 11, 2012, the Court conducted a hearing. At the hearing, exhibits and testimony were submitted by the parties, and thereafter, the issues were taken under advisement.

The Court has considered the submissions of the parties, the testimony presented, the arguments of counsel, as well as the applicable law. This Memorandum constitutes the Court’s findings and conclusions, and resolves the issues raised by Trustee’s objections. Fed. R. Bankr. P. 7052; 9014.

II. *Facts*

In November 2007, June established her residence at Gables of Pocatello, a company solely owned and operated by Debtor, Gables

² Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 – 1532, all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001 – 9037, and all “Civil Rule” references are to the Federal Rules of Civil Procedure.

Management, LLC. Gables of Pocatello is an assisted living facility which provides residents various levels of care depending upon their needs.

While visiting June, her son, Ernie, and his wife, Patricia, would often see a man at the facility named Keith Rasmussen (“Rasmussen”) who introduced himself as the owner of Gables of Pocatello.³

In February 2009, Rasmussen called Ernie and Patricia and asked if they were interested in making a loan. He explained that an investor in Gables of Pocatello wished to have his investment money returned, and Rasmussen told Ernie and Patricia that he wanted to replace that investment with other investments in smaller increments, so that it would be easier to return invested funds in the future, should he be requested to do so. Rasmussen told Ernie and Patricia that he would retain their money

³ In addition to Gables of Pocatello, Rasmussen apparently owned the equity in and operated Gables of Ammon, Gables Special Needs, Country Gables, Gables of Shelley, and Gables of Blackfoot. Ex. 209. Gables of Preston and Gables of Rigby were also proposed. *Id.* It is unclear on this record whether ground was ever broken on the construction of those facilities. Some of those facilities were built and subsequently sold to others. At all times relevant, Gables of Pocatello was owned and operated by Debtor. It is unclear whether Rasmussen was the sole owner of Debtor.

for no more than three years, that he would not touch the principal, and that he would pay them interest at the rate of 16% per annum. Rasmussen also agreed to execute a Promissory Note (“Note”) and a Deed of Trust (“DOT”) in favor of Ernie and Patricia to ensure that their money was safe.

Creditors agreed to provide funds to Rasmussen in response to his offer. Ernie and Patricia gave \$25,000 to Rasmussen on February 10, 2009. With Ernie and Patricia’s blessing, June also gave Rasmussen \$25,000 on February 24, 2009, with Ernie signing some of the documents in her behalf via a power of attorney.⁴ Exs. 201, 210. The money was given to Rasmussen in the form of checks, each made payable to Gables Management.⁵ *Id.* It is undisputed that these funds were actually received

⁴ Interestingly, the only power of attorney in the record is the Health Care Durable Power of Attorney of June Geiger, which does not purport to give Ernie any power to make financial decisions or execute any documents except those related to June’s health care. This issue has not been raised by the parties, and the Court will not take it up *sua sponte*.

⁵ June gave Debtor \$25,000 via one cashier’s check, Ex. 201, while Ernie and Patricia’s money was received in two separate checks totaling \$25,000, Ex.

by Debtor, and not by Rasmussen in his individual capacity.

In consideration of these transfers, each month, from March 2009 through October 2010, June was given a \$333.33 credit on her monthly rent by Debtor. Exs. 202-03. Ernie and Patricia also received \$333.33 checks from March 2009 through June 2009, but then the parties' agreed-upon arrangement began to falter. Ex. 212. The checks began to either arrive late, or sometimes not at all, after which the payments would get back on track for a few months, only for new payment issues to again arise. *Id.* The last payment check Ernie and Patricia received was in November, 2010. *Id.*

On September 6, 2010, Ernie and Patricia wrote Rasmussen a letter by which they formally requested the return of both the \$25,000 they had given him, as well as June's \$25,000. Ex. 213. It also appears that, at about that time, Creditors consulted an attorney, Mr. Holmes, about June's money. Mr. Holmes sent Rasmussen a letter regarding June's money, and

210. Trustee testified that all the checks received from Creditors were deposited into two separate accounts belonging to Debtor. *See* Ex. 104.

Rasmussen replied to that letter on November 1, 2010, using Debtor's letterhead. Ex. 205. In the letter, Rasmussen explained Debtor's financial difficulties, and proposed that the interest rate governing the transaction be reduced from sixteen percent to eight percent. *Id.* He also proposed to reduce June's rent to \$2,000 per month, and to thereupon apply a credit of \$1,220 to interest and principle payments. *Id.* Attached to the letter was an amortization schedule. *Id.* While not completely clear from the record, it appears that Creditors agreed to this arrangement for payment of June's obligation, because in both November and December 2010, June was given a \$1,220 credit against her rent. Ex. 203.

Creditors received another letter from Debtor dated October 29, 2010. Ex. 214. This lengthy letter outlines in some detail Debtor's financial woes as well as its plans for the future, and assures its "investors" that the goal is to ensure that they receive all of their principal and interest. *Id.*

On December 18, 2010, Debtor filed a chapter 11 petition. On schedule F, Debtor listed Ernie Geiger as a creditor holding an unsecured,

nonpriority claim in the amount of \$25,000 for a “loan.” Dkt. No. 39. It is unclear whether Ernie Geiger is listed as a creditor for the \$25,000 that he and Patricia gave to Debtor, or as June’s representative under the power of attorney regarding her transaction with Debtor. Regardless, only one of the two \$25,000 transactions between Creditors and Rasmussen is listed in Debtor’s schedules.

Creditors filed proofs of claim in Debtor’s bankruptcy case. Claims Regis. Nos. 34, 35.⁶ Creditors listed the basis for both claims as “investment.” Dkt. Nos. 200-01; 206-07. Trustee objected to the claims. Dkt. Nos. 237-38.

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III. ***The Transactions***

⁶ The original proofs of claim were filed on April 13, 2011, and were amended on April 28, 2011. The amendments added supporting documentation. Subsequent to the hearing on Trustee’s objection, Trustee and Creditors filed a stipulation regarding the correct amounts claimed by each of the Creditors. Dkt. No. 355. Ernie and Patricia’s claim is in the amount of \$25,333.33; June’s claim is for \$22,886.31. *Id.*

To resolve the issues raised by Trustee's objection, it is necessary to consider the documentation used by the parties in these transactions.

As described below, Creditors were given a "packet" of documents to sign to effect each of the transactions.

A. Ernie and Patricia

1. Investor Contract

Ernie and Patricia's packet included a document on Gables letterhead entitled "Gables Management Investor Contract" ("Investor Contract"). Dkt. Nos. 206-07. In the Investor Contract, Ernie and Patricia are referred to as "Investor;" Rasmussen signed this document as the "Owner."⁷ *Id.* The Investor Contract was executed on February 12, 2009, and indicates that the "amount of investment" was \$25,000. *Id.* According to its terms, the Investors could withdraw their "investment" at the end of three years, at which time they would realize a 16% annual return on their

⁷ Ernie and Patricia's Investor Contract bears Patricia's signature, although it appears Rasmussen inadvertently signed on the "Investor" line, Exs. 206-07.

investment. *Id.* Ernie and Patricia’s Investor Contract does not provide for the interest payments of \$333.33 per month, but rather provides that, beginning in the fourth year, a “monthly net dividend shall be dispersed to investor every six months” Exs. 206-07.

The Investor Contract also indicates that upon withdrawal of their funds, Ernie and Patricia would be given a form that “will act as an investor notification, and will show the Internal Revenue Service (IRS) that a taxable distribution has been performed.” *Id.* Finally, Ernie and Patricia’s Investor Contract provides that “[i]f the building is sold or refinanced the investor has the option to be cashed out.” *Id.*

2. Promissory Note

The packet of forms Ernie and Patricia received also included a promissory note, executed on February 12, 2009, by “Keith Rasmussen” as the “Borrower” listing his personal address. Ex. 207. Debtor is not mentioned anywhere on the Note, and the Note does not appear on Gables letterhead. *Id.* The Note promises to pay monthly installments of \$333.33

to Ernie and Patricia, and that if not paid off earlier, then the Note “is due and payable in full on “3 Third [sic] year anniversary date”. *Id.*

3. Deed of Trust

Ernest and Patricia’s packet also contained the first page of a preprinted Deed of Trust, dated February 12, 2009. Ex. 208. The DOT was not on Gables letterhead, and lists Keith Rasmussen as grantor, and Patricia and Ernie Geiger as beneficiaries. *Id.* The DOT purports to grant Ernie and Patricia an interest in the property located at 2805 S. Grant, Debtor’s assisted living facility, located in Pocatello, Bannock County. *Id.* However, the legal description contained in the DOT is for property located in Bingham County. *Id.* As noted, the DOT is incomplete, shows no signatures, and was never recorded.

B. June’s Transaction

1. Investor Contract

June’s packet also included a document entitled “Gables Management Investor Contract,” and, like the other one, appears on

Gables letterhead. Dkt. Nos. 206-07. It is dated and signed on February 24, 2009, and indicates that the “amount of investment” is \$25,000. *Id.* The contract parties are Keith Rasmussen as “owner,” and Ernie Geiger, presumably in his capacity as one with power of attorney for his mother, June. *Id.*

For the most part, this contract is identical in substance to that executed by Ernie and Patricia. However, June’s contract provides that she, as the “Investor,” will receive “monthly interest payments” of \$333.33 in the form of reduced rent payments for her rent at Gables of Pocatello. Ex. 201.

2. Promissory Note

The Note executed by “Keith R. Rasmussen” and Ernie Geiger is, in substance, the same in form as that given to Ernie and Patricia.

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3. Deed of Trust

Patricia testified that June’s packet of documents also included a

DOT, but a copy of that document was not submitted to the Court. It also was apparently incomplete and not recorded.

4. Investment Agreement

The hearing record included one additional document executed between Ernie and Keith Rasmussen in connection with June's transaction, entitled "June Geiger Investment Agreement" ("Investment Agreement"). Ex. 201. The Investment Agreement recites that June had made a \$25,000 investment at sixteen percent interest, totaling \$333.33 in monthly interest. *Id.* The Investment Agreement references the fact that it is "[s]ecured only with a Promissory Note to Ernie Geiger," and provides that the interest is to be deducted from June's rent, and will show up in her monthly statements as a reduction in paid up rent. *Id.* The Investor Agreement specifies that, in the event of June's death, her interest should be paid to Ernie Geiger. *Id.*

IV. *Analysis and Disposition*

Trustee's objections to Creditors' claims argue that the documents

evidencing the transactions with Ernie and Patricia, and with June, all obligate that they be repaid by Rasmussen in his individual capacity, and not by the Debtor. At the hearing, after considering the evidence, the Court announced its tentative belief that the transactions were more likely transactions between Creditors and Debtor, and not with Rasmussen in his individual capacity. It is clear that Rasmussen represented himself to Creditors as the owner of Debtor, and that many of the transaction documents were set out on Gables letterhead, although some documents also appear to evidence agreements between Creditors and Rasmussen individually. It is also undisputed that Creditors' money was paid to and utilized by Debtor, that the rent credits given to June came from Debtor, and that the payment checks given to Patricia and Ernie were written from Debtor's bank accounts.⁸ All things considered, and contrary to Trustee's assertion, this evidence adequately demonstrates that Debtor was

⁸ Interestingly, some of the checks to Patricia and Ernie were written on a Gables of Pocatello account, some were from Gables Management, and some from the Gables Management payroll account. *See Ex. 212.*

obligated, perhaps along with Rasmussen, to repay Creditors.

However, this conclusion does not end the inquiry. Trustee also argues that whether the claims should be allowed in the bankruptcy case depends upon the nature of the obligations owed by Debtor to Creditors. Simply put, according to Trustee, the Court must determine whether Creditor's transactions with Debtor were loans or investments. This characterization is important, because the treatment of such obligations is different in the context of a bankruptcy case. If the obligations are loans, Creditors hold unsecured claims; if the transactions were "investments," Creditors may hold equity securities, and their right to share in distributions in the bankruptcy case may be subordinate to that of creditors.

A. The Transaction Documents

The Court's determination of the meaning of the documents executed between Rasmussen/Debtor and Creditors is controlled by state law. *NetBank, FSB v. Kipperman (In re Commercial Money Ctr., Inc.)*, 350 B.R.

465, 481 (9th Cir. BAP 2006).

The financial transaction documents before the Court are, on their face, equivocal at best, and do not adequately demonstrate whether Creditors' transactions with Debtor were loans or investments. On the one hand, Creditors signed what were labeled "Investor" contracts, and speak in terms seemingly describing something other than a loan of money, *i.e.*, investments, dividends and disbursements. Moreover, Ernie also entered into an "Investment Agreement" via the power of attorney for June.

On the other hand, Rasmussen signed two personal Notes to evidence the transactions, and the terms of June's deal were later amended via a letter, to which an amortization schedule was attached. A DOT given to Creditors was also apparently executed, although never recorded, in order to secure the Note. Finally, there is nothing in the documents which suggests Creditors were to acquire any ownership interest in Debtor.

B. Parol Evidence

When parties reduce their agreement to a writing, and intend that

document to be a final statement of the terms of their agreement, the parol evidence rule provides that evidence of any prior or contemporaneous agreements or understandings between the parties which relate to the same subject matter is not admissible to vary, contradict, or enlarge the terms of the written contract. *Simons v. Simons*, 11 P.3d 20, 24 (Idaho 2000) (citing *Tusch Enterprises v. Coffin*, 740 P.2d 1022, 1029 (Idaho 1987)). Parol evidence may, however, be considered to aid the court in determining the intent of the drafter of a document if an ambiguity exists. *Simons*, 11 P.3d at 24 (citing *Matter of Estate of Kirk*, 907 P.2d 794 (Idaho 1995)). However, “[i]f a contract's terms are clear and unambiguous, the contract's meaning and legal effect are questions of law to be determined from the plain meaning of its own words.” *Bream v. Benscoter*, 79 P.3d 723, 726 (Idaho 2003) (citing *Albee v. Judy*, 31 P.3d 248 (2001)). Here, the documents could support both a conclusion that Creditors loaned money to Debtor, or one that they invested money with Debtor. As such, the Court is comfortable resorting to parol evidence to determine the parties’ intent.

Regrettably, the extrinsic evidence given to the Court does not clearly resolve the ambiguity. Viewed one way, the record shows that the parties considered the transaction to be a loan. For example, for tax purposes, Debtor generated and sent Ernie a 1099-INT form, indicating that \$6,999.33 was paid to Ernie Geiger as interest in 2010. Presumably, had Debtor considered the \$333.33 payments to be dividends, Debtor likely would have sent Ernie a 1099-DIV form. In addition, some of the check stubs for those same payments denote "Loans Payable." Patricia also testified that Creditors never believed they were acquiring an equity interest in the Debtor via these transactions. Finally, Debtor listed the obligation to Ernie Geiger on its Schedule F in the amount of \$25,000 for a "loan."

There is also considerable evidence to show Creditors' were investing in Debtors' business. Creditors identified the transactions as an "investment" on their proofs of claim, and referred to them as investments several times in their September 6, 2010, letter to Debtor. Rasmussen

echoed this characterization when he referred to Creditors as investors in his letter of October 29, 2010.

There was other evidence given to the Court that was completely equivocal on its face. For example, June's rent invoices describe the \$333.33 credit she received each month as an "investment interest credit." Additionally, the pages detailing the financial breakdown of Gables Management, LLC and Gables of Pocatello are in the nature of a report to existing and potential investors, yet could easily be offered to a bank or other lender to support a request for a loan. Debtor's accounting records, at least what there are of them, detail the \$333.33 credits for June's rent as an "investment," yet denote the expense as an "interest expense." Finally, Patricia testified that she believes the terms "investment" and "loan" are interchangeable.

C. Idaho Law

The law provides some help to the Court. *Black's Law Dictionary* defines a "loan" as:

1. An act of lending; a grant of something for temporary use. 2. A thing lent for the borrower's temporary use; esp., a sum of money lent at interest.

Black's Law Dictionary 1019 (9th ed. 2009). And the Idaho Credit Code defines "loan," in pertinent part:

"Loan" means, except as provided in paragraph (b) of this subsection:

(1) The creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third person for the account of the debtor[.]

Idaho Code § 28-41-301(23). The transactions between Creditors and Debtor would comfortably fall within the definition of a loan under both the Idaho Credit Code and *Black's*.

However, under the Idaho Uniform Security Act, a "security" is defined as:

a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral-trust certificate;

preorganization certificate or
subscription; transferable share;
investment contract

Idaho Code § 30-14-102(28) (emphasis added). This act specifically
includes as an “investment contract”:

[A]n investment in a common enterprise with the
expectation of profits to be derived primarily
from the efforts of a person other than the
investor. “Common enterprise” means an
enterprise in which the fortunes of the investor
are interwoven with those of either the person
offering the investment, a third party, or other
investors

Idaho Code § 30-14-102(28)(d).

To this mix of statutes and definitions is added the guidance from the
United States Supreme Court in two cases, *S.E.C. v. W.J. Howey Co.*, 328
U.S. 293 (1946), and *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975).

The legal analysis in those cases have been combined to create the so-
called *Howey-Forman* test to identify the existence of an investment
contract. *State v. Gertsch*, 49 P.3d 392, 396 (Idaho 2002). The Idaho
Supreme Court has adopted the *Howey-Forman* test to characterize

transactions under the Idaho Securities Act. *Id.* (citing *State Dept. of Fin. v. Resource Serv. Co. Inc.*, 950 P.2d 249, 254 (Idaho 1997)).

The *Howey* case made clear that the definition of a security was purposefully broad so as “to meet the countless and variable schemes devised by those who seek the use of money of others on the promise of profits.” 328 U.S. at 299. The test has three prongs to show the existence of an investment contract: 1) an investment of money, 2) a common enterprise, and 3) a reasonable expectation of profits to be derived from the entrepreneurial or management efforts of others. *Howey*, 328 U.S. at 298-99; *Forman*, 421 U.S. at 852; *Gertsch*, 49 P.3d at 396.

As for the first prong, the *Resource Serv. Co.* case explains that an “‘investment’ typically involves parting with money for the purpose and in the reasonable expectation of making a profit.” 950 P.2d at 254. This prong is clearly met here, as Creditors gave Debtor \$50,000, and undisputably expected to receive interest payments of sixteen percent per annum, along with repayment of their principal after three years.

The second prong concerns whether a “common enterprise” exists. In order to determine this, courts have looked to whether there is “horizontal commonality” or “vertical commonality.” *Gertsch*, 49 P.3d at 397. Horizontal commonality involves the “situation where each individual investor’s fortune is tied to the fortunes of the other investors by the pooling of assets, often combined with the pro-rata distribution of profits. *Id.* (citing *S.E.C. v. R.G. Reynolds Enters., Inc.*, 952 F.2d 1125, 1134 (9th Cir. 1991)). On the other hand, vertical commonality “depends upon the relationship between each individual investor and the promoter and occurs where ‘the fortunes of the investor are interwoven with and dependent on the efforts and success of those seeking the investment or of third parties.’” *Id.* (quoting *S.E.C. v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1199 (11th Cir. 1999)).

This second prong is also met under these facts. Horizontal commonality is present because the success of Debtor’s business was dependent upon its ability to raise a sufficient amount of invested funds to

operate. Vertical commonality is also present. Creditors gave their money to Debtor and at that point relinquished control over it. In other words, thereafter, their fortunes were dependent on the efforts and success of those seeking the investment – Debtor and Rasmussen, as well as third parties – the economy, willingness of banks to lend to Debtor, and overall desire for facilities like Gables.

Creditors also held a reasonable expectation of profits to be derived from the entrepreneurial or management efforts of others. This prong of the *Howey-Forman* test anticipates profits generally defined as either “capital appreciation resulting from the development of the initial investment . . . or a participation in earnings resulting from the use of investors’ funds.” *Forman*, 421 U.S. at 852. However, it is under this prong that the present transactions at issue begin to falter. It does not appear that Creditors could expect either capital appreciation or participation in earnings generated by Debtor. Instead, Creditors were promised a return of their full investment after receiving three years’ worth of fixed interest

payments, or they could leave their funds with Debtor and continue to receive disbursements, but they would be paid out every six months. In essence, Creditors could continue to receive interest payments at the rate of sixteen percent on the full \$25,000 for as long as they chose, but under their deals with Debtor, Creditors' principal investment would not grow.⁹

In addition, while transactions resembling loans have been held to be investment contracts, such appears to be more likely when the interest rates are extremely high. *See Gertsch*, 49 P.3d at 399 (“Although the promise of a fixed rate of return could preclude a finding of an investment in some circumstances, the extremely high rate promised by Gertsch – the equivalent of one hundred percent annually in some cases – demonstrates that these transactions were something more than loans or savings account deposits.”) In this case, while the interest rate payable to Creditors was certainly above-market, considering the private nature of their dealings, the Court can not characterize those rates as extreme.

⁹ Sixteen percent interest on \$25,000 yields an annual interest payment of \$4,000, or \$333.33 per month. $\$25,000 \times .16 = \$4,000 \div 12 = \$333.33$.

While it is a close call, ultimately, the evidence submitted shows the Creditors' transactions seem to better fit the definition of loans than investments. In one instance, Debtor also characterized the transaction as a loan in its Schedule F. Patricia testified that she never believed the monies given to Debtor were to be anything other than loans. While the proof is quite equivocal, all things considered, the Court finds that the parties intended the transactions at issue to be loans rather than investments. The transactions are therefore properly treated as debts in the bankruptcy case.

V.
Conclusion

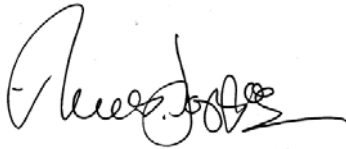
Trustee's objection to Creditors' proofs of claim will be denied by separate order. Without regard to whether Rasmussen was liable for repayments of the obligations, the Court concludes Debtor was responsible to repay the amounts advanced by Creditors, including interest.

Additionally, the Court finds that the parties intended these transactions to be loans, not investments. As a result, the Court concludes that

Trustee's objections should be denied, and Creditors' claims should be allowed.

A separate order will be entered.

Dated: May 21, 2012



Honorable Jim D. Pappas
United States Bankruptcy Judge