UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 10-15099
	)	
KIEBLER RECREATION, LLC,	)	Chapter 7
	)	
Debtor.	)	Chief Judge Pat E. Morgenstern-Clarren
	)	
	)	
DAVID O. SIMON, TRUSTEE,	)	Adversary Proceeding No. 12-1138
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
JGM ASSOCIATES, LP,	)	**MEMORANDUM OF OPINION**
	)	
Defendant.	)	

Kiebler Recreation, LLC made four payments to defendant JGM Associates, LP (JGM) during the 90 days before Kiebler filed its bankruptcy case. The plaintiff chapter 7 trustee asserts that the payments are preferences which he can avoid and recover for the estate. He also asks that JGM's claim be disallowed. JGM's position is that the ordinary course of business exception is a complete defense to this action. The parties stipulated to the relevant facts. For the reasons stated below, judgment will be entered in favor of the plaintiff.

I. JURISDICTION

This court has jurisdiction under 28 U.S.C. 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B) and (F) and it is within the court's constitutional

authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 131 S.Ct. 2594 (2011). The parties acknowledge all of that by stipulation.[1]

II. THE FACTS

The parties submitted the matter for decision on stipulated facts, the depositions of John Maurer and Paul Kiebler, IV (together with exhibits attached to those depositions), and documents attached to the parties' Joint Statement and Supplement. These are the filed stipulations:[2]

A. PROCEDURE OF MAIN BANKRUPTCY:

1. Kiebler Recreation, LLC (the "**Debtor**") commenced this case by the filing of a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on May 26, 2010 (the "**Petition Date**").

2. The Debtor is a New York limited liability company that, prior to ceasing business activity at some point after the Petition Date, operated a recreational and tourist property in Chautauqua County, New York, known as Peek n Peak Resort (the "**Resort**").

3. On June 8, 2011, the United States Trustee reported the selection of David O. Simon as Chapter 11 Trustee. The Trustee filed documents accepting the appointment on June 14, 2011.

4. On April 5, 2012, the Trustee filed a Motion to Convert the case from a case under Chapter 11 to one under Chapter 7.

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[1] *See* docket 28 at ¶A.1. The stipulations have been renumbered here for ease of understanding.

[2] *See* docket 28 and 34.

5. On May 15, 2012, the Court entered an Order converting the case from a case under Chapter 11 to one under Chapter 7.

6. Mr. Simon is the duly authorized and acting Chapter 7 trustee.

7. Plaintiff has standing on behalf of the Debtor's estate to bring claims against third parties under Chapter 5 of the Bankruptcy Code to avoid and recover preferences, including the claims he has asserted against JGM.

B. JGM AND ITS AFFILIATES

8. JGM is a New York limited partnership with its primary place of business at 3590 Jeffrey Boulevard, Buffalo, NY 14209 (the "**Premises**"). John L. Maurer ("**Mr. Maurer**") owns 49.5% of JGM; Gail Maurer ("**Mrs. Maurer**") owns 49.5% of JGM; and Belso, Inc. ("**Belso**") is the general partner of JGM and owns 1%.

9. Belso is a New York corporation with its primary place of business at the Premises. Mr. Maurer owns 50% of Belso, and Mrs. Maurer owns 50% of Belso.

10. Sotek, Inc. ("**Sotek**") is a Delaware corporation with its primary place of business at the Premises. Mr. Maurer owns 75% of Sotek, and each of his two sons own 12.5% of Sotek. Sotek is in the manufacturing industry.

11. Belrix Industries, Inc. ("**Belrix**") is a Delaware corporation with its primary place of business at the Premises. Mrs. Maurer owns 75% of Belrix, and each of her two sons own 12.5% of Belrix. Belrix is in the manufacturing industry.

12. Every day, Key Bank NA sweeps all of the daily funds of Sotek and Belrix into Sotek's operating account. The interest from the swept funds is allocated 60% to Sotek, 20% to Belrix, and 20% to JGM.

13. In the event that JGM has a bill to pay, the money would come out of JGM's funds within Sotek's operating account.

14. Belso is empowered within its certificate of incorporation to "purchase, receive, take by grant, lease own, hold, improve, employ, pledge, mortgage or otherwise encumber use or otherwise acquire and deal in and with real and personal property or interest therein wherever situated."

15. Similarly, JGM's limited partnership agreement states that the character of JGM's business:

> [S]hall be to acquire, own, hold, manage, lease, invest in, develop, subdivide, improve, mortgage, operate, transfer, sell, exchange, and otherwise deal in and with real property, or any interest therein, wherever situated, including but not limited to, real property located in Hamburg, New York. [JGM] may engage in any activities that are reasonable, necessary or appropriate in connection with the foregoing to promote the interests of the Partnership or enhance the value of its property.

16. JGM owns approximately 13 acres of land located at the Premises. There are several manufacturing buildings on the Premises.

17. From 2000 until 2007, JGM owned real property located at 8409 Highlands at the Resort.

18. From 2007 until present, JGM has owned real property located at 8514 Ridgeview at the Resort (the "**Resort Property**").

19. Both the real property located at 8409 Highlands and the Resort Property are independent of the Debtor.

20. JGM leases the manufacturing buildings on the Premises to Sotek and Belrix, and collects the rent resulting from those leases on a monthly basis.

21. JGM leases the Resort Property to third parties and collects the rent resulting from those leases.

22. The Premises and the Resort Property comprise the totality of JGM's real estate holdings.

23. The total value of all real property owned by JGM is estimated to be between $2.5 million and $3 million.

24. JGM derives almost all of its revenues from the leases of the Premises and the Resort Property.

25. From time to time, JGM made unsecured loans for purposes other than investing in real property.

26. Between 2005 and 2008, JGM lent monies to Sotek so that Sotek could purchase machinery. The amount of each loan from JGM to Sotek is estimated to have been between $250,000 and $350,000 (the "**Sotek Loans**").

27. The Sotek Loans were made on an unsecured basis.

28. Sotek repaid each of the Sotek Loans in unequal installment payments.

C. JGM'S RELATIONSHIP WITH THE DEBTOR PRIOR TO 2009:

29. Prior to May 2007, JGM had never loaned money to the Debtor.

30. In 2007, the Debtor approached JGM about investing in a real estate development project originally known as "Kiebler Village," and then known as "Stoney Creek" (the "**Stoney**

Creek Project”). Through the Stoney Creek Project, the Debtor sought to build 40 condominiums at the Resort.

31. JGM agreed to lend the Debtor $100,000 for use in completing the Stoney Creek Project according to the terms of a certain “LOAN AGREEMENT” (the “**May 2007 Agreement**”) and “DEMAND PROMISSORY NOTE” (the “**May 2007 Note**” and, together with the May 2007 Agreement, the “**2007 Loan**”) each dated May 30, 2007. The Debtor drafted all the documents underlying the 2007 Loan. The Debtor and JGM each executed the May 2007 Agreement. The Debtor executed and delivered to JGM the May 2007 Note.

32. JGM issued a check to the Debtor in the amount of $100,000 on June 1, 2007 according to the terms of the 2007 Loan. The funds for the June 1, 2007 check came from JGM.

33. In April 2008, JGM agreed to lend a second $100,000 to the Debtor for a real estate development project known as Camelot II (the “**Camelot II Project**”) according to the terms of certain “LOAN AGREEMENT” (the “**April 2008 Agreement**”) and “DEMAND PROMISSORY NOTE” (the “**April 2008 Note**” and, together with the April 2008 Agreement, the “**2008 Loan**”) each dated April 21, 2008. Through the Camelot II Project, the Debtor sought to develop an additional 72 condominiums at the Resort.

34. The Debtor also drafted all of the documents underlying the 2008 Loan. JGM and the Debtor each executed the April 2008 Agreement. The Debtor executed and delivered to JGM the April 2008 Note.

35. On April 21, 2008, JGM issued a check to the Debtor in the amount of $100,000 according to the terms of the 2008 Loan. The funds for the April 21, 2008 check came from JGM.

12-01138-pmc Doc 42 FILED 02/28/13 ENTERED 02/28/13 10:09:27 Page 6 of 19

36. The Debtor incurred the 2007 Loan and the 2008 Loan (collectively, the "**Loans**") in the ordinary course of its business or financial affairs.

D. THE AFFIDAVIT OF CONFESSION OF JUDGMENT

37. According to the terms of the Loans, JGM had the right to demand payment in full from the Debtor at anytime. After JGM issued a written demand for payment, the Debtor had to make payment in full plus interest within 90 days of the called Loan.

38. On November 18, 2008, JGM demanded from the Debtor payment in full plus interest on both Loans. JGM also made phone calls to the Debtor in February 2009 concerning payment of the Loans.

39. Despite requesting repayment in November and making the phones calls in February of 2009, the Debtor did not repay the Loans, either in full or in part.

40. After making the February 2009 phone calls, JGM did not again breach the topic of repayment until late spring or early summer of 2009.

41. JGM never initiated any formal legal proceedings against the Debtor seeking repayment.

42. In the late spring or early summer of 2009, Mr. Maurer spoke with JGM's counsel, Hodgson Russ, LP ("**Hodgson Russ**") about the repayment of the Loans.

43. On June 22, 2009, the Debtor sent JGM two letters outlining suggested payment plans for the Loans. In the letters, the Debtor suggested that the Debtor pay JGM large lump-sum principal payments in February 2010 and 2011. The Debtor also suggested that the Debtor pay JGM monthly interest payments at the rates outlined in the Loans.

44. On July 7, 2009, JGM and the Debtor engaged in negotiations over the final repayment terms of the Loans.

45. On July 9, 2009, the Debtor executed an affidavit of confession of judgment (the "**Affidavit**") for repayment of the Loans. The negotiated schedule of payments to be made by the Debtor to JGM was annexed to the Affidavit as Exhibit B (the "**Schedule**").

46. On July 9, 2009, the Debtor executed the Affidavit (the "**Affidavit Sign Date**").

47. After the Affidavit Sign Date, the Debtor and JGM had no further substantive communications with each other concerning the Affidavit or the Loans. At no point prior to the Petition Date did JGM call the Debtor, send invoices, or engage in any activity to force payment in accordance with the Affidavit and Schedule.

48. JGM never executed on the Affidavit.

E. THE DEBTOR'S TRANSFERS TO JGM:

49. Beginning with the first required payment, the Debtor made each of the payments required by the Affidavit until the Petition Date.

50. Prior to the Petition Date, and pursuant to the terms of the Affidavit and Schedule, the Debtor made twelve (12) payments to JGM.

51. All of the Debtor's payments to JGM were made by check mailed to JGM.

52. All of the Debtor's payments to JGM were made pursuant to the terms of the Affidavit and Schedule.

53. All of the Debtor's payments to JGM occurred within days of their respective due dates under the Affidavit and Schedule.

54. Four of the Debtor's payments to JGM occurred during the 90 days before the Petition Date—the period between February 25, 2010 and May 26, 2010 (the "**Preference Period**").

55. During the Preference Period, JGM received four (4) checks from the Debtor, totaling $116,767.65, described in the below chart:

Check #	**Check Date**	**Check Amount**
27157	2/26/2010	$114,101.00
27244	3/8/2010	$1,333.33
27483	4/6/2010	$666.66
27697	5/17/2010	$666.66

56. Although the payments listed above were made during the Preference Period, the payments, like every payment made by the Debtor to JGM, were made by check, according to the terms of the Affidavit and Schedule.

57. All transfers from the Debtor to JGM during the Preference Period were made for the benefit of JGM.

58. All transfers from the Debtor to JGM during the Preference Period were for or on account of an antecedent debt owed by the Debtor before such transfer was made.

59. By operation of the Bankruptcy Code, all transfers from the Debtor to JGM during the Preference Period are presumed to have been made while the Debtor was insolvent.

60. All transfers made from the Debtor to JGM during the Preference Period allowed JGM to receive more than JGM would have received if: (A) The case were a case under Chapter 7 of the Bankruptcy Code; (B) The transfers had not been made, and; (C) JGM received payment of such debt to the extent provided by the provisions of the Bankruptcy Code.

F. JGM'S LOAN HISTORY

61. Other than the Loans to the Debtor, JGM has only loaned money to Sotek. Those loans were between 2005 and 2008.

62. Other than the Loans to the Debtor, JGM has never loaned money to any entity for the development of housing, condominiums, or real property.

63. Other than the Loans to the Debtor, JGM has not made any other loans to the Debtor.

64. Other than the Affidavit, no party that has borrowed money from JGM has issued an affidavit for confession of judgment in favor of JGM.

65. Other than the Affidavit, JGM has never, as a creditor, restructured a debt.

66. JGM has not had any other occasion to restructure a borrower's obligations because the Debtor is the only party ever to have defaulted on its obligations to JGM.

G. OTHER INVESTORS IN THE DEBTOR'S REAL ESTATE DEVELOPMENT PROJECTS

67. The Debtor attempted to finance the Stoney Creek Project and the Camelot II Project with investments from individuals, banks, and high net worth companies.

68. According to the Debtor's former president, Paul Kiebler, IV ("**Mr. Kiebler**"), the Debtor had obtained one loan from the Northwest Savings Bank for the Stoney Creek Project. Mr. Kiebler did not recall if any other bank had loaned money for the Stoney Creek Project. Mr. Kiebler stated that the Debtor had unsuccessfully attempted to obtain a loan from a "large construction company" for the Stoney Creek Project. Although he did not recall the specific number, Mr. Kiebler stated that "more than five", but "less than twenty," individuals had loaned varying amounts for the Stoney Creek Project. Mr. Kieber did not remember the exact amount,

but he believed that the Debtor, in total, had borrowed more than $1 million, but less than $5 million, for the Stoney Creek Project.

69. For the Camelot II Project, Mr. Kiebler stated that the Debtor had been unable to obtain any loans from banks or the "large construction company." Mr. Kiebler stated that he did not remember how many private individuals made loans to the Debtor for the Camelot II Project. He stated that he believed the Debtor had borrowed less than $1 million for the Camelot II Project.

70. Thomas and Rose Corrigan (the "**Corrigans**") are individuals who had invested in the Stoney Creek Project.

71. On May 10, 2007, the Corrigans and the Debtor entered into a loan agreement whereby the Corrigans would provide the Debtor with $100,000 for the Stoney Creek Project, and the Debtor would execute a $100,000 promissory note for the Corrigans (the "**Corrigan Note**"). The Debtor signed the Corrigan Note on May 10, 2007.

72. In November and December 2008, the Corrigans demanded that the Debtor pay the Corrigan Note in full, plus interest.

73. On September 25, 2009, the Debtor and the Corrigans entered into a settlement agreement (the "**Corrigan Agreement**") for the repayment of the Corrigan Note. Under the terms of the Corrigan Agreement, the Debtor would pay the Corrigans $122,500 for the principal and interest owed under the Corrigan Note. The Debtor's payments to the Corrigans would be as follows: $7,500 per month for October and November 2009; $15,000 per month for December 2009, and January and February 2010; $7,500 per month for March, April, and May 2010, and; $13,333 per month for June, July, and August 2010.

74. During the Preference Period, the Corrigans issued two invoices to the Debtor. The first invoice requested $7,500 for the "March 2010 Payment Per Settlement Agreement Payment Schedule, Due Date: 3/1/10." The second invoice requested $7,500 for the "April 2010 Payment Per Settlement Agreement Payment Schedule, Due Date: 4/1/10."

75. The Debtor issued two checks to the Corrigans during the Preference Period: one for $7,500 on March 8, 2010, and one for $7,500 on April 6, 2010.

76. On June 13, 2012, the Trustee brought a preference action against the Corrigans for these two transfers: *David O. Simon, Trustee v. Corrigan*, Adv. Pro. No. 12-01164. The Corrigan adversary proceeding is currently pending before this Court.[3]

77. Although an affidavit of confession of judgment had been drafted for the benefit of the Corrigans (the "**Corrigan Judgment**"), it was never signed by the Debtor. Further, Mr. Kiebler stated that he did not know who had drafted the unsigned Corrigan Judgment.

78. The Corrigan Judgment is very similar to the Affidavit. Other than the fact that the Corrigan Judgment was never signed by the Debtor, the only differences between the Corrigan Judgment and the Affidavit are: (i) the location where the Corrigan Judgment could be entered, and (ii) the specific details surrounding the Corrigans' loan to the Debtor.

79. The payment structure contained in the Corrigan Agreement contains less fluctuation in the amount of the required monthly payments when compared to the Affidavit and Schedule.

80. Hodgson Russ did not draft the Corrigan Judgment.

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[3] The trustee has requested authority to compromise the proceeding. *See* Case No. 10-15099, docket 973.

Additionally, the court notes that JGM filed two unsecured claims, each in the amount of $114,101.00. *See* Claims Register (Claim Nos. 114-1 and 238-1).

III. DISCUSSION

Under Bankruptcy Code § 547(b), the trustee may avoid a preferential transfer of a debtor's interest in property under these circumstances:

> (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property –
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made–
>
> > (A) on or within 90 days before the date of the filing of the petition;. . . and
>
> (5) that enables such creditor to receive more than such creditor would receive if–
>
> > (A) the case were a case under chapter 7 of this title;
> >
> > (B) the transfer had not been made; and
> >
> > (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The trustee has the burden of proof. 11 U.S.C. § 547(g). If the trustee meets this burden, the trustee may recover the transferred property or its value from the initial transferee. 11 U.S.C. § 550 (a)(1). Additionally, the transferee's claim may be disallowed unless it has turned over the preferential transfer or its value. 11 U.S.C. § 502 (d).

If the transferee asserts an affirmative defense, that transferee must prove it by a preponderance of the evidence. 11 U.S.C. § 547(g); *Luper v. Columbia Gas of Ohio, Inc. (In re Carled, Inc.)*, 91 F.3d 811, 813 (6th Cir. 1996).

The stipulated facts establish that the four transfers totaling $116,767.65 made within 90 days of the chapter 11 filing are preferential transfers under § 547(b).[4] The question for decision is whether JGM has met its burden of proving that the transfers are protected under § 547(c)(2), the ordinary course of business defense.

Section 547(c)(2) states that the trustee may not avoid a transfer:

> (2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was –
>
> (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
>
> (B) made according to ordinary business terms[.]

11 U.S.C. § 547(c)(2). Congress enacted this exception "'to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy.'" *In re Carled, Inc.*, 91 F.3d at 815 (quoting S.Rep. No. 989, 95th Cong., 2d Sess. 88, reprinted in 1978 U.S.C.C.A.N. 5787, 5874).

[4] Renumbered stipulations 57, 58, 59, and 60. JGM does not concede this conclusion, but neither does it argue for a different result.

A party can prevail by proving either the subjective component (found in § 547(c)(2)(A)) or the objective component (found in § 547(c)(2)(B)).[5] JGM relies on the subjective component, which requires examining the ordinary course of business between the debtor and the transferee.[6] To establish this defense, JGM must show two things: (1) that the debtor incurred the underlying debt in the ordinary course of business between the debtor and JGM; and (2) that the debtor made the payments in the ordinary course of business between the debtor and JGM.

The first issue is whether the debtor incurred the debt in the ordinary course of business between the debtor and JGM. The Bankruptcy Code does not define "ordinary course of business," leaving it to courts to interpret the term. Courts uniformly hold that the analysis is "peculiarly factual." *Gosch v. Burns (In re Finn)*, 909 F.2d 903, 907 (6th Cir 1990) (citing *Waldschmidt v. Ranier (In re Fulghum Constr. Corp.)*, 872 F.2d 739, 743 (6th Cir. 1989)). In making this determination, the court "does not look to the actual transfers, but instead looks to when the debt was created and then whether the debt was created in the ordinary course." *Baumgartner-Novak v. Eckman (In re Eckman)*, 447 B.R. 546, 550 (Bankr. N.D. Ohio). Factors to be considered may include: the history of the parties' dealings with each other, timing, the amount at issue, and the circumstances of the transaction. *Brown v. Shell Canada Ltd. (In re Tenn. Chem. Co.)*, 112 F.3d 234, 237 (6th Cir. 1997) (citing *Yurika Foods Corp. v. United Parcel Serv. (In re Yurika Foods Corp.)*, 888 F.2d 42, 45 (6th Cir. 1989)). A debt is not incurred in the

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[5] The prior version of § 547(c)(2) required proof of both the subjective and objective components. *See Stevenson v. Leonard A. Turowski & Son Funeral Home, Inc. (In re Nowlen)*, 452 B.R. 619, 621 (Bankr. E.D. Mich. 2011) (noting that BAPCPA amended this requirement in 2005).

[6] Docket 30 at 12.

ordinary course of business "if creation of the debt is atypical, fraudulent, or not consistent with an arm's-length commercial transaction." *Speco Corp. v. Canton Drop Forge, Inc. (In re Speco Corp.)*, 218 B.R. 390, 398 (Bankr. S.D. Ohio 1998).

Both long-term and short-term debt may qualify for the § 547(c)(2) exception. *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991). Either type of debt can be ordinary "for purposes of § 547(c)(2) if it is 'consistent with the course of dealings between the parties.'" *In re Finn*, 909 F.2d at 907 (quoting *In re Fulghum Constr. Corp.*, 872 F.2d at 743). The focus of the "inquiry must be directed to an analysis of the business practices which were unique to the particular parties under consideration and not to the practices which generally prevailed in the industry of the parties." *In re Fulghum Constr. Corp.,* 872 F.2d at 743. However, the parties need not have a long-standing relationship–even an isolated transaction by a debtor may be ordinary course. *In re Finn*, 909 F.2d at 908. "This rule holds where the transaction would not be out of the ordinary for a person in the borrower's position." *Id.* However, what is ordinary for the transferee must also be considered in first-time transactions. *See Wood v. Stratos Prod. Dev., LLC (In re Ahaza Sys., Inc.,* 482 F.3d 1118, 1126 (9th Cir. 2007) (noting that in a first-time transaction, the transaction must be typical compared to both parties' past dealings with similarly-situated parties); *Shubert v. Mull (In re Frey Mech. Grp., Inc.)*, 446 B.R. 208, 216 (Bankr. E.D. Pa. 2011) (distinguishing first-time transactions with an existing lending institution from transactions where the transferee is not engaged in the business of lending); *see also In re Finn*, 909 F.2d at 906 n. 5 (stating that it was undisputed that the loan was incurred in the ordinary course of the transferee's business and in accordance with ordinary business terms); *In re Speco Corp.*, 218

B.R. at 398 (noting that the normality of the debt incurred in relation to each party's general business operations must be considered).

While the trustee stipulated that the debtor incurred the debt in the ordinary course of its business, he denies that JGM entered into the transaction in the ordinary course of *JGM's* business. He argues that JGM is essentially a rental and leasing company that exists to own and lease rental property, as well as to lease manufacturing facilities to its sister companies. Because of this, JGM's loans to the debtor were neither routine not typical. JGM, on the other hand, contends that the loans were made in accordance with its business purpose, were consistent with its business activities, and were made in the ordinary course of its business.

Because the debtor and JGM did not have a long history of dealings before JGM made the two loans, the court must focus on whether it was ordinary for JGM to make these loans in the course of its business. The stipulated facts show that the loans were far from ordinary. JGM's business was essentially owning and leasing real property; it was not in the business of loaning money. Before JGM loaned these funds to the debtor, JGM had never made an unsecured loan for the purpose of investing in real property and had only made loans to related third-parties.

It is true, as JGM points out, that JGM's governing documents permitted it to make these loans. That shows that the loans did not run afoul of JGM's business purpose, but it does not prove that JGM engaged in making secured loans to outside parties in the ordinary course of JGM's business. JGM argues additionally that the notes gave it discretion under certain circumstances to convert the loans to equity which, in JGM's view, would bring the transaction within the ordinary course of JGM's business of owning real estate. There is no evidence,

however, that JGM made the loans for the purpose of taking an equity position in the developments, or that it would have been in the ordinary course of JGM's business to make such a loan. Loaning money to an unrelated third party to purchase real estate is, after all, not necessarily the same business as the business of owning real estate. JGM failed to prove this prong of its ordinary course defense.

Neither did JGM prove that the debtor made the payments in the ordinary course of business. This is also a fact intensive issue. *In re Fulghum Constr. Corp.*, 872 F.2d at 743.[7] "In considering which transactions are ordinary, courts examine several factors, including timing, the amount and manner a transaction was paid and the circumstances under which the transfer was made." *In re Yurika Foods Corp.*, 888 F.2d 45 (citation omitted). Where the parties have only limited dealings before the challenged transfers, it is particularly important to focus on whether the parties complied with the terms of their contract. After all, those terms constitute the "most informative evidence" of the ordinariness of the transaction from the perspective of the parties. *Carrier Corp. v. Buckley (In re Globe Mfg. Corp.)*, 567 F.3d 1291, 1298 (11th Cir. 2009) (citing *Logan v. Basic Distrib. Corp. (In re Fred Hawes Org., Inc.)*, 957 F.2d 239, 245 (6th Cir. 1992)); *see also Kleven v. Household Bank F.S.B.*, 334 F.3d 638, 643 (7th Cir. 2003) ("In the absence of modifying behavior, we see no reason why we should not look to the terms of the parties' agreement in order to determine their ordinary course of business."); *In re Nowlen*, 452 B.R. at 622 (stating that where the debtor and the transferee do not have a prior relationship

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[7] In reaching this conclusion, the court need not address the trustee's argument that the payments should be treated as "*per se*" outside of the ordinary course of the debtor's and JGM's business, but notes that "such treatment appears to be at odds with Sixth Circuit precedent stating that the ordinary course determination is a factual one.

"compliance with the terms of the parties' contract is of the utmost importance"); *Jahn v. Genesis Merch. Partners, LP (In re U.S. Ins. Grp., LLC)*, 451 B.R. 437, 444-45 (Bankr. E.D. Tenn. 2011) (noting that while a limited prior relationship does not preclude the "ordinary course" exception "it will make compliance with the terms of the contract more important, since such terms constitute the best evidence of "ordinariness" from the parties' perspective").

Here, the loan terms specified that the debtor would pay the note in full on "demand," defined as within 90 days after JGM demanded repayment. The stipulated facts show that JGM demanded payment, but the debtor did not comply. Instead, some time later the parties renegotiated the repayment terms, including an affidavit of confession of judgment, and the debtor made payments under the new terms. Those belated payments were not made in the ordinary course of the business of the debtor and JGM. JGM did not, therefore, prove the second prong of its ordinary course defense.

IV. CONCLUSION

For the reasons stated, the court will enter judgment on the complaint in favor of the plaintiff trustee avoiding the preferential transfers, authorizing recovery in the amount of $116,767.65, and disallowing JGM's claims.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 10-15099
	)	
KIEBLER RECREATION, LLC,	)	Chapter 7
	)	
Debtor.	)	Chief Judge Pat E. Morgenstern-Clarren
	)	
	)	
DAVID O. SIMON, TRUSTEE,	)	Adversary Proceeding No. 12-1138
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
JGM ASSOCIATES, LP,	)	**JUDGMENT**
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion filed this same date, judgment on the complaint is entered in favor of the plaintiff in the amount of $116,767.65. Additionally, the defendant's claims in the chapter 7 case (Claim Nos. 114-1 and 238-1) are disallowed.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge