IT IS SO ORDERED.

Dated: June 21, 2023

C. Kathryn Preston
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	:	
EVERGREEN SITE HOLDINGS, INC.,	:	Case No. 22-52799 Chapter 11, Subchapter V
Debtor.	:	Judge Preston

OPINION AND ORDER ON OBJECTION OF KARRY GEMMELL TO DEBTOR'S ELECTION UNDER SUBCHAPTER V OF CHAPTER 11 OF THE BANKRUPTCY CODE (DOC. #48)

Karry Gemmell ("Gemmell"), a creditor in this Chapter 11 case, filed an objection (the "Objection") to the election of Evergreen Site Holdings, Inc. ("Debtor") to proceed under Subchapter V of Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1181 – 1195 ("Subchapter V") (Doc. #48). The basis for the Objection is that Debtor is excluded from being a Subchapter V debtor under § 1182(1)(A) because Debtor's only activity is allegedly that of owning a single

asset real estate (sometimes referred to as "SARE"). Responses were filed by Debtor (Doc. #71), Matthew T. Schaeffer, the Subchapter V Trustee (the "Trustee") (Doc. #72), and Timber View Properties, Inc. ("Timber View") (Doc. #75). The Court conducted a hearing on the Objection and took the matter under advisement.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and Amended General Order 05-02 entered by the United States District Court for the Southern District of Ohio, referring all bankruptcy matters to this Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

Based upon the arguments presented and the evidence submitted at the hearing, the Court makes the following findings of fact and conclusions of law.

I. Findings of Fact

The facts relevant to resolving this Objection are largely without dispute and may be summarized as follows:

Debtor is the owner of two adjoining parcels of real estate of approximately 142 acres located on State Route 664 South, Logan, Ohio. The northern parcel (the "Eighty Acre Parcel") consists of some 81.36 acres. The southern parcel (the "Sixty Acre Parcel") consists of some 60.6 acres (collectively the "Properties"). Debtor acquired the Properties from M&T Property Investments, Ltd. ("M&T") in 2019. M&T had financed the Properties through The Citizens Bank of Logan, and granted mortgages on the Properties, dated December 2, 2004 (recorded December 13, 2004) and December 13, 2005 (recorded December 16, 2005). The Citizens Bank assigned the mortgages to Timber View by assignments recorded on July 1, 2015.

During the time M&T owned the Properties, M&T leased part of the Properties to Hocking Peaks Park, LLC and subsequently to Hocking Peaks Adventure Park, LLC. One or

both of these businesses constructed and operated an adventure park and zipline business. Gemmel and Mark Anthony ("Anthony") owned the membership interests in Hocking Peaks Park, LLC. In 2013, Gemmell brought a "business divorce" action against Anthony, M&T, Hocking Peaks Adventure Park, LLC, and other parties in the Hocking County Court of Common Pleas (the "Trial Court"), Case No. 13CV0046 (the "State Court Action").

On or about June 13, 2014, the Trial Court appointed Reg Martin ("Martin") as the receiver (the "Receiver") for Hocking Peaks Adventure Park, LLC in the State Court Action (the "Receiver Order"). The Receiver Order did not appoint Martin as a receiver for the Properties or any other real estate, but solely for the business of Hocking Peaks Adventure Park, LLC. The day after his appointment, the Receiver closed the zipline business and discharged all employees. During his tenure, the Receiver never reopened the zipline business.

On March 21, 2018, the Trial Court rendered a judgment against M&T and others in the State Court Action, awarding Gemmell damages and awarding the Receiver fees and administrative costs (the "2018 Judgment"). Inasmuch as Debtor was not a party to the State Court Action, the 2018 Judgment did not impose any relief against Debtor. Within days of entry of the 2018 Judgment, Gemmell had the Hocking County Clerk of Courts issue a certificate of judgment against M&T (the "2018 Gemmell Judgment Lien"). About a month later, Martin had the Hocking County Clerk of Courts issue a certificate of judgment against M&T, among others (the "2018 Martin Judgment Lien"). At the time of entry of the 2018 Judgment, and issuance of the 2018 Gemmell Judgment Lien and the 2018 Martin Judgment Lien, M&T still owned the Properties.

M&T and others appealed the 2018 Judgment. On February 5, 2019, the Appellate Court entered a Decision and Judgment Entry (the "Appellate Decision") dismissing the appeal for lack

of a final appealable order. Debtor acquired the Properties from M&T on August 7, 2019, subject to the mortgages granted by M&T.

As a result of the Appellate Decision, the Trial Court rendered a Judgment Entry in the State Court Action on August 29, 2019, which judgment was a final appealable order (the "Final Judgment"). Shortly after entry of the Final Judgment, Gemmell and Martin each obtained another certificate of judgment against M&T dated in September 2019. At the time that the Final Judgment was entered and these later certificates of judgment were issued, M&T no longer owned the Properties.[1] (These certificates of judgment are not at issue in determining whether Debtor is eligible to proceed under Subchapter V.)

At the time of Debtor's acquisition of the Properties in 2019, there was no active commercial use of the Property. Remnants of the abandoned adventure park and zipline business (which had been closed since June 2014) remained on portions of the Properties. On or about May 1, 2020, Debtor entered into a lease with Eventuresencore, Inc. ("Eventuresencore"), which permitted Eventuresencore to operate a new adventure park and zipline business on specific areas of the Properties. To date, Eventuresencore has operated the zipline and a frisbee golf course on the Eighty Acre Parcel only. Eventuresencore was operating the zipline on the petition date, but later ceased operation for the 2022 season. Debtor asserts that Eventuresencore is in default of the lease.

On January 22, 2021, Gemmell initiated a foreclosure action against Debtor and the Properties in the Trial Court, Case No. 21 CV 0004 (the "Foreclosure Action") seeking to foreclose the 2018 Gemmell Judgment Lien. Gemmell named Martin as a defendant in the

[1]Inasmuch as the Final Judgment did not render any judgment against Debtor and the certificates of judgment did not identify Debtor as a judgment debtor, Martin's and Gemmell's 2019 certificates of judgment could not have resulted in judgment liens attaching to the Properties.

Foreclosure Action. Martin filed an answer and cross claim asserting that the 2018 Martin Judgment Lien was also a valid lien on the Property. Gemmell also named Timber View a defendant inasmuch as it held the two mortgages on the Properties.

On March 3, 2022, the Trial Court issued a partial summary judgment on motion of Gemmell, concluding that the 2018 Gemmell Judgment Lien created a valid lien upon the Properties in March 2018. On March 18, 2022, the Trial Court granted another partial summary judgment upon motion of Martin, concluding that the 2018 Martin Judgment Lien created a valid lien on the Properties in April 2018. Each judgment foreclosed the subject lien and ordered the sale of the Properties. In each judgment, the Trial Court observed that it "will determine the priority" of all of the liens. However, the Trial Court has not yet made any such determinations.

On March 28, 2022, the Trial Court entered a Judgment Entry and Decree in Foreclosure (the "Foreclosure Decree") in the Foreclosure Action. The county sheriff proceeded with a foreclosure sale on August 19, 2022. Pursuant to Ohio foreclosure procedure, the Trial Court scheduled a hearing for September 23, 2022, to confirm the sale. Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code on September 22, 2022, the day before the scheduled hearing to confirm the sale. Upon commencement of this case, the automatic stay intervened, stalling further proceedings in the Foreclosure Action.

In its petition, Debtor stated that it is a small business debtor as defined by 11 U.S.C. §101(51D) and chose to proceed under Subchapter V of Chapter 11 (the "Election"). Under Interim Federal Rule of Bankruptcy Procedure 1020, "[t]he status of the case as a small business case or a case under subchapter V of chapter 11 shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the

debtor's statement is incorrect." *See* General Order No. 34-3 (Aug. 4, 2022) (adopting Interim Rule 1020 as a local rule).

On November 18, 2022, Gemmell timely filed an objection (the "Objection") to Debtor's election to proceed under Subchapter V. The basis for the Objection is that Debtor's primary activity, if not its only activity, is the business of owning single asset real estate.

Situated on the Eighty Acre Parcel are a small mobile home park, a residential single-family home with an adjoining pole barn, a mobile home now used as an office, and the zipline course. Three residential mobile homes are located on leased lots in the mobile home park; the mobile homes are owned by the tenants who pay rent for the lots. Dylan Anthony, the son of Anthony, occupies the single family residence. Anthony holds title to the mobile home office and Eventuresencore uses the office. A large portion of the Sixty Acre Parcel consists of vacant land, except for a paintball course used by a prior tenant. Eventuresencore has never used the paintball course. The Sixty Acre Parcel also has a start tower for a mega zipline that would end on the Eighty Acre Parcel, but neither the tower nor the mega zipline has ever been operational.

II. Arguments of the Parties

Gemmell argues that Debtor has no business operations apart from being a landlord for the owner-occupiers of the mobile homes, Dylan Anthony, and Eventuresencore. While the mobile homes, the single-family residence, and the mobile home office all lie within the Eighty Acre Parcel, Gemmell maintains that Eventuresencore is permitted under its lease with Debtor to operate the paintball course located on the Sixty Acre Parcel, as well as encroach upon the Sixty Acre Parcel for its zipline operation. Gemmel also cites to Debtor's testimony at the § 341 meeting of creditors that at one time a previous business tenant began constructing a new zipline on the Sixty Acre Parcel and that there are still structures located on the Sixty Acre Parcel from

this construction. In Gemmell's view, Debtor has treated and continues to treat the two adjacent parcels as a single property. Gemmell further points out that Debtor acquired both parcels in a single transaction from the same entity (M&T) and without any consideration other than Debtor's assumption of the mortgages. The Foreclosure Action was commenced as to both parcels, the Foreclosure Decree ordered the sheriff to market the parcels as a single property, and both parcels were sold at the foreclosure sale in a single transaction.

Gemmell asserts that the mobile home residences and the single family home being situated on the Eighty Acre Parcel do not preclude the Properties from being a SARE. The Eighty Acre Parcel is the only parcel that is used for residential purposes, but it is also used for commercial purposes, a fact that takes the Properties outside the residential property exception for a property to be designated SARE, found in 11 U.S.C. §101(51B). Gemmell further contends that even if the Eighty Acre Parcel could constitute residential real property, the Sixty Acre Parcel would also have to be residential property (which it is not) to fall within the exception. Last, Gemmell claims that there are four residences on the Property — three owner-occupied mobile homes and the home occupied by Dylan Anthony — which is one more than the statutory maximum to qualify for the exception.

Gemmell also argues that the remaining two factors for determining whether the Properties constitute a SARE are satisfied. In Gemmell's view, the Properties generate all of Debtor's gross income. The only income that Debtor generates is rental income from the tenants occupying the Properties. Debtor has no employees and its ongoing business expenses consist solely of real estate taxes, debt service obligations to Timber View, and its legal fees. Based on these alleged facts, Gemmell concludes that the primary activity of Debtor is the business of

owning single asset real estate, and, therefore, it does not qualify to be a debtor in a Subchapter V case.

Debtor denies that its primary business activity is SARE. In its view, SARE means either raw land or a building or buildings that are intended to be income producing, neither of which applies here. Debtor points out that to be a SARE debtor, (1) a debtor's real property must constitute a single property or project (other than residential property with fewer than four residential units); (2) the real property must generate substantially all of the debtor's gross income; and (3) the debtor must not engage in any substantial business apart from the business of operating the real property and activities incidental thereto. If any of these prongs is not met, Debtor is not a SARE debtor.

Debtor contends that it does not meet the definition of a SARE debtor because it owns more than one property and the Properties are separate and distinct, having two different parcel identification numbers and two different use codes assigned by the county auditor. M&T conveyed the Properties to Debtor in separate conveyances, and the Properties are subject to two separate mortgages. Moreover, there are at least two separate uses currently ongoing with respect to the Eighty Acre Parcel, and Debtor envisions future projects and development of the Properties. Debtor argues that an element of commonality is required that is not present here.

Debtor also disputes Gemmell's contention that there is commonality of purpose because Debtor is acting only as a landlord with respect to the Properties. Debtor distinguishes its rights and duties as a commercial landlord (the Eventuresencore lease) from its rights and duties as a residential landlord. Commercial leases are governed by Ohio Rev. Code § 1301, *et seq*., under

which landlords have certain rights not available to residential landlords.[2] Residential leases are governed by Ohio Rev. Code § 5321, *et seq*., and offer many legal protections to residential tenants that are inapplicable to commercial leases. Debtor asserts that it acts as a landlord in separate and distinct ways, and that the activities of Eventuresencore and the mobile home tenants are not the same. In Debtor's view, there is no commonality of purpose between the two types of leases, and its activities are, therefore, not a single project.

Debtor further contends that the Properties present potential for additional projects and other income producing endeavors. For all of these reasons, Debtor argues that the SARE test fails and that it is entitled to remain a Subchapter V debtor.

The Trustee supports Debtor's eligibility to continue as a Subchapter V debtor. The Trustee observed that on the petition date, the zipline adventure course was operated by Eventuresencore on the Eighty Acre Parcel pursuant to a lease. The Trustee pointed out that the zipline course and the owner-occupied mobile home rentals are not commercially connected and have different purposes. The mobile home rentals are not used to increase the revenues of the zipline and vice versa. Thus, there have been two recent and simultaneous uses of the Properties: (1) long-term residential rentals and (2) a lease to a zipline business. He acknowledges that a mixed-use property may be classified as a SARE, but notes that such a designation is usually limited to planned developments. The Trustee argues that in this case there is no evidence that Debtor has a planned development for the Properties; rather, it appears that the past development of the Properties has been haphazard.

[2]For example, a commercial landlord may have the right to lock out a tenant without judicial proceedings. Not so for a residential landlord.

Last, the Trustee opined on the question of whether Debtor conducts any substantial business on the Properties other than the business of operating the real property and activities incidental thereto. The absence of any such other business implies that a debtor may be a SARE debtor. The Trustee argues, however, that because of the various state court litigation, Debtor has been unable to conduct its own business operations. The Trustee agrees that Debtor should continue to proceed as a Subchapter V debtor.

Timber View also supports Debtor's eligibility to remain a Subchapter V debtor. Timber View initially challenged Gemmell's standing to raise the Objection. This argument is based on the timing of the judgments entered by the Trial Court. When Gemmell first obtained the 2018 Judgment and the 2018 Gemmell Judgment Lien, the Properties were owned by M&T. On appeal, the Court of Appeals found that 2018 Judgment was not a final appealable order. By the time the Trial Court entered a final appealable order, M&T no longer owned the Properties. Timber View points out that the 2019 judgment liens cannot, as a matter of Ohio law, attach to the Properties because at the time of the judgment, Debtor was the owner. In Timber View's opinion, Gemmell not having a judgment lien on the Properties and no judgment against Debtor necessarily means that Gemmell is not a creditor in these proceedings and therefore, has no standing to object to Debtor's election to proceed as a Subchapter V debtor.

Timber View devoted the remainder of its response to the question of whether the Properties meet the single property or single project qualification to be SARE. Timber View conceded that the Properties are contiguous, but denied that Debtor's uses of the Properties are pursuant to a common plan or as a single project. Timber View identified four independent uses of the Properties on the petition date and maintains that these uses are distinct, have not been combined, and do not denote a single project. Timber View denied that there are any operational

connections between the mobile home lot rental and the zipline business, between the single-family residence and the zipline business, or between the mobile home lot rentals and the single-family residence. Timber View further observed that the Sixty Acre Parcel, consisting of vacant land, is not being used currently for any particular purpose. In addition to the lack of a common usage, Timber View pointed out that each of the parcels is encumbered by a separate and independent mortgage originated nearly a year apart, and that the mortgages were not originated at the same time for the funding of a single project for the Properties.

Moreover, Timber View submitted that the Properties do not constitute a SARE property because they have only one single-family residence. In contrast to Gemmell's contention that the Eighty Acre Parcel has precisely four units (the single-family residence plus the three mobile homes), Timber View excludes the mobile homes because under Ohio law they are personal property owned by the tenants and the leased lots are not residential units for purposes of 11 U.S.C. § 101(51B).

III. Analysis

A. Gemmell Has Standing to Object to Debtor's Subchapter V Election.

Standing is a threshold issue. Timber View asserts that Gemmell does not have standing because the 2018 Gemmell Judgment Lien is invalid as being based on a nonfinal judgment, and he did not acquire a lien on the Properties after entry of the Final Judgment. Therefore, says Timber View, Gemmell has no claim against Debtor or any interest in the Properties. The Court in *Junk v. Citimortgage, Inc. (In re Junk)*, 512 B.R. 584, 605-06 (Bankr. S.D.Ohio 2014) addressed the issue of contested standing. In *Junk*, the debtors contested the lien of their home mortgage holder. Before their bankruptcy proceeding, the debtors had been involved in long and torturous litigation with the mortgage holder, as have the parties in this case with respect to the

judgment lien holders. In deciding a motion for relief from the automatic stay, the debtors in *Junk* raised standing of the mortgage holder, based on their theory that the mortgage holder did not have a valid lien on the debtors' home. This Court cannot say it better than the Court did in *Junk*:

> Section 362(d)(1) permits relief from stay to be requested by a "party in interest." 11 U.S.C. § 362(d)(1). A creditor of the debtor is a party in interest in a Chapter 11 case. *See* 11 U.S.C. § 1109(b). The term creditor includes an entity holding a prepetition "claim against the debtor[,]" 11 U.S.C. § 101(10)(A), and a "'claim against the debtor' includes [a] claim against property of the debtor[.]"' 11 U.S.C. § 102(2).
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> . . .
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> In addition, the term claim means both "right to payment" and "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment," in both instances whether or not such right is disputed or undisputed. 11 U.S.C. § 101(5)(A) and (B). The "right to foreclose on the mortgage can be viewed as a 'right to an equitable remedy' for the debtor's default on the underlying obligation." *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991) The Junks have objected to CitiMortgage's claim, including its right to foreclose. But because the term "claim" includes a right to payment or right to an equitable remedy whether or not such right is disputed, courts have held that a claim confers creditor status on the claimant despite the disputed nature of the claim. *See Johnston v. Jem Dev. Co. (In re Johnston)*, 149 B.R. 158, 161 (9th Cir. BAP 1992) ("[T]he purchasers are creditors pursuant to § 101(10)(A) because they are holders of a right to payment. This right, although in dispute, is nevertheless a claim. Accordingly, the holder of this claim is a creditor of the debtor.")."

Junk v. Citimortgage, Inc. (In re Junk), 512 B.R. 584, 605-06 (Bankr. S.D. Ohio 2014).

Clearly, Gemmell, having asserted a lien on the Properties, bolstered by orders of the Trial Court, has standing to ply his Objection.[3]

B. Burden of Proof

[3]The claims register in this case includes two timely proofs of claim filed by Gemmell. *See* Claim 6-1 and Claim 7-1. To date, no party in interest has objected to these claims. Until such time as an objection is filed, the claims are deemed allowed under 11 U.S.C. §502(a). As a creditor, Gemmell clearly has standing to object to Debtor's election to proceed under Subchapter V.

The Bankruptcy Code and Rules are silent as to who has the burden of proof on the issue of a debtor's eligibility to proceed under Subchapter V when an objection is filed. *NetJets Aviation, Inc. v. RS Air, LLC (In re RS Air, LLC)*, 638 B.R. 403, 413 (B.A.P. 9th Cir. 2022). The parties in this case disagree as to whether Debtor or Gemmell has the burden, and courts are divided on the issue. The majority of courts have placed the burden on the debtor. *See Phenomenon Mktg. & Ent., LLC*, No. 2:22-bk-10132-ER, 2022 WL 1262001, at *1 (Bankr. C.D. Cal. Apr. 28, 2022) (citing *In re Rickerson*, 636 B.R. 416, 422 (Bankr. W.D. Pa. 2021); *In re Blue*, 630 B.R. 179, 187 (Bankr. M.D.N.C. 2021); *In re Offer Space, LLC*, 629 B.R. 299, 304 (Bankr. D. Utah 2021); *In re Port Arthur Steam Energy, L.P.*, 629 B.R. 233, 235; *In re Sullivan*, 626 B.R. 326, 330 (Bankr. D. Colo. 2021); *In re Ikalowych*, 629 B.R. 261, 275 (Bankr. D. Colo. 2021). The reasoning behind putting the burden on the debtor is the many advantages Subchapter V offers over a traditional Chapter 11 case.[4]

Several other courts, however, have placed the burden on the objecting creditor, as the moving party. *In re Yishlam,* Inc., 495 B.R. 328, 330 – 331 (Bankr. S.D. Tex. 2013) ("The burden of proving that the properties are subject to the SARE provisions of the Bankruptcy Code is on the moving party . . . by a preponderance of the evidence."); *In re Body Transit, Inc.*, 613 B.R. 400, 409 n.15 (Bankr. E.D. Pa. 2020) (the objecting party is the *de facto* moving party and, absent a contrary provision in the Bankruptcy Code or the Bankruptcy Rules, the movant bears the burden of proof when requesting relief from the court); *In re Alvion Properties, Inc.*, 538 B.R. 527, 532 (Bankr. S.D. Ill. 2015) (moving party bears burden of proving by a preponderance of the evidence that a debtor is subject to the SARE provisions of the Bankruptcy Code); *In re*

[4]Advantages include the lack of a requirement for a disclosure statement, the ability to obtain a discharge on the plan effective date, and the inapplicability of the absolute priority rule. *NetJets*, 638 B.R. at 414; *Phenomenon*, 2022 WL 1262001 at *2; *Sullivan*, 626 B.R. at 330.

Caribbean Motel Corp., No. 21-01831 (EAG), 2022 WL 50401, at *3 (Bankr. D.P.R. Jan. 5, 2022) (same); *In re 218 Jackson LLC*, No. 6:21-bk-00983-LVV, 2021 Bankr. LEXIS 2284, at *4, 2021 WL 3669371, at *2 (Bankr. M.D. Fla. Jun. 3, 2021) (same).

The Court finds the majority view to be more persuasive. Moreover, this view is consistent with long-standing case law in this district that the debtor has the burden of proof in establishing eligibility to seek relief under various chapters of the Bankruptcy Code. *See In re Visicon Shareholders Trust*, 478 B.R. 292, 307 (Bankr. S.D. Ohio 2012) (burden is on debtor to demonstrate eligibility for Chapter 11); *In re Snyder*, 99 B.R. 374, 377 (Bankr. S.D. Ohio 1989) (debtors have burden of establishing their right to relief under Chapter 12). Accordingly, the Court concludes that Debtor bears the burden of establishing its eligibility to proceed under Subchapter V of Chapter 11.

C. Eligibility for Subchapter V

The Court must begin its analysis with the Small Business Reorganization Act of 2019 (the "SBRA"), Pub. L. No. 116-54, 133 Stat. 1079 (2019). The SBRA created a new Subchapter V of Chapter 11 which broadened the relief available to small businesses and streamlined the existing reorganization processes to improve the ability of small businesses to reorganize and remain in business. *In re Blue*, 630 B.R. 179, 186 (Bankr. M.D.N.C. 2021) (citations omitted). A debtor who elects to proceed under Subchapter V must meet the definition set forth in §1182 of the Bankruptcy Code as

> a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and *excluding a person whose primary activity is the business of owning single asset real estate*) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of filing of the petition or the date of the order for relief in an amount not more than $7,500,000 (excluding debts owed to 1 or more affiliates or insiders) not less than

> 50 percent of which arose from the commercial or business activities of the debtor . . . .

11 U.S.C. § 1182(1)(A) (emphasis added).

There are four separate requirements to be eligible to proceed as a Subchapter V debtor: (1) the debtor must be a person, (2) the debtor's aggregate debt as of the petition date must not exceed $7,500,000, (3) the debtor must be engaged in commercial or business activities, and (4) at least 50% of the debtor's debt must have arisen from the debtor's commercial or business activities. *In re Ikalowych*, 629 B.R 261, 275-276 (Bankr. D. Colo. 2021). The Objection does not deny that Debtor is a person,[5] that Debtor is engaged in commercial or business activities, that Debtor's aggregate debt as of the petition date was less than $7,500,000, or that 50% of such debt arose from Debtor's commercial or business activities. Rather, the Objection is limited to whether Debtor's primary activity is the business of owning single asset real estate which, if so, would make Debtor ineligible for relief under Subchapter V of Chapter 11.

D. Elements of a SARE Debtor

Single asset real estate is defined in 11 U.S.C. § 101 as:

> real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.

11 U.S.C. §101(51B). Three requirements are contained in this statutory definition: (1) the debtor must have real property comprising a single property or a single project (other than a residential real property with fewer than four residential units); (2) the single property or project

[5]Under 11 U.S.C. § 101(41), "[t]he term 'person' includes individual, partnership, and corporation, but does not include governmental unit[.]"

must generate substantially all of the debtor's gross income; and (3) there must be no substantial business conducted on the property other than the business of operating the real property and activities incidental thereto.[6] *In re Scotia Pacific Co.*, 508 F.3d 214, 220 (5th Cir. 2007). All three requirements to be SARE must be met for a debtor to be deemed a SARE debtor. *Id.* If any prong is not met, the debtor is not a SARE debtor. *Id.*

The parties do not dispute that Debtor generates substantially all of its gross income from the Properties. Two issues must be decided: whether the Properties constitute a single project (other than residential real estate with fewer than four residential units) and whether Debtor conducts substantial business on the Properties other than the business of operating real property.

(1) Whether the Properties Comprise a Single Project

Because there are two parcels of real estate in this case, the question can be narrowed to the issue of whether the Properties, collectively, comprise a "single project" as that term is used in § 101(51B) of the Bankruptcy Code. *In re The McGreals*, 201 B.R. 736, 741 (Bankr. E.D. Pa. 1996). The meaning of that term is unclear from the statute and its legislative history. *Id.* at 741–742. For two or more properties to constitute a single project, "the properties must be linked together in some fashion in a common plan or scheme involving their use." *Id.* at 742. Interpreting the term "'single project' to require an element of commonality in the use of multiple properties is consistent with the commonly accepted meanings of the component words 'single' and 'project'." *Id.* at 742 n.7 (citation omitted). "The mere fact of common ownership, or even a common border, will not suffice." *Id.* at 742-743. "The 'common plan or scheme' must govern the present use of all the properties." *In re Hassen Imports P'ship,* 466 B.R. 492, 507

[6]A fourth qualification is that the debtor is not a family farmer. *See In re Hassen Imports P'ship*, 466 B.R. 492, 507(Bankr. C.D. Cal. 2012). Debtor is not a family farmer, so this factor is not relevant to the Court's analysis.

(C.D. Cal. 2012) (citation omitted). Examples of commonality in the use of multiple properties include apartment complexes, office buildings, shopping centers, and large resorts. *Compare In re Vargas Realty Enters., Inc.*, No. 09-10402, 2009 WL 2929258 (Bankr. S.D.N.Y. Jul. 23, 2009) (residential apartment building was SARE) and *In re Webb Mtn, LLC*, No. 07-32016, 2008 WL 656271 (Bankr. E.D. Tenn. Mar. 6, 2008) (undeveloped land intended to be used as a golf resort and spa was a SARE) *with In re The McGreals*, 201 B.R. 736, 742 – 43 (Bankr. E.D. Pa. 1996) (two parcels of real estate sharing a common border where one parcel was rented and the other was vacant land did not constitute SARE).

Determining whether multiple properties comprise a single project is a factual inquiry. *In re 218 Jackson LLC*, No. 6:21-bk-00983-LVV, 2021 WL 3669371, *3 (Bankr. M.D. Fla. June 2, 2021); *Hassen Imports*, 466 B.R. at 507. In making this factual inquiry,

> courts have considered a number of factors, including: (1) the use of the properties; (2) the circumstances surrounding the acquisition of the properties, including the time of the acquisition and the funds used to acquire the properties; (3) the location of the properties and proximity of the properties to one another; and (4) any plans for future development, sale or abandonment of the properties.

Id. See also The McGreals, 201 B.R. at 743 (considering similar factors). "Use of the properties, however, is the *sine qua non* of a single project determination . . . Where the properties are not *presently* used together in a common scheme, a single project cannot exist and the remaining factors . . . become irrelevant." *Hassen Imports*, 466 B.R. at 508 (citations omitted) (emphasis added).

Gemmell posits that the common plan or scheme in this case is Debtor acting solely as a landlord for Eventuresencore's operation of the zipline, the single-family residence rental, and the three mobile home lot rentals. All of these activities, however, have taken place on the Eighty Acre Parcel, and not the Sixty Acre Parcel. Gemmel's claims that Eventuresencore might

use a portion of the Sixty Acre Parcel for the zipline is irrelevant because it has never done so and may never do so, particularly if Debtor avoids or terminates the lease with Eventuresencore.[7] It is undisputed that the only active zipline course, as of the date of the petition, was operated wholly within the Eighty Acre Parcel. The fact that Eventuresencore lease might allow Eventuresencore to encroach upon the Sixty Acre Parcel and that there are structures on the Sixty Acre Parcel that might allow for such use do not change the result here. Gemmel's allegation that Eventuresencore has the right to operate the paintball course on the Sixty Acre Parcel is also irrelevant where it is undisputed that Eventuresencore has at no time exercised that right.

Moreover, the Hocking County Auditor has assigned different use codes for each parcel.[8] The Eighty Acre Parcel has a major use code employed to denote lodges and amusement parks while the Sixty Acre Parcel has a major use code pertaining to vacant land. There have been two recent and simultaneous uses of the Eighty Acre Parcel: (1) long-term residential rentals and (2) the zipline business. Although courts have held that "mixed-use" properties can be classified as a SARE, this treatment has been limited to planned developments. *See In re RIM Dev., LLC*, No. 10-10132, 2010 Bankr. LEXIS 1303, 2010 WL 1643787 at *3 (Bankr. D. Kan. Apr. 21, 2010) (mixed use development of town homes and commercial lots was a SARE); *In re Webb MTN, LLC*, No. 07-32016, 2008 Bankr. LEXIS, 2008 WL 656271 at *5 (E.D. Tenn. Mar. 6, 2008). The Properties clearly are not a planned development; the residential rentals are completely disconnected from the zipline business and neither use supports the other. Significantly, the

[7]Debtor asserts that Eventuresencore is in default of the lease.

[8]Ohio Rev. Code §5713.041 requires county auditors to classify each parcel of real property in the county according to the principal current use of the property, except that vacant lots or unimproved tracts of land are to be classified according to their location and their highest and best probable use.

Sixty Acre Parcel, consisting of vacant land, is not presently being used at all. This fact precludes a finding that the Properties are a single project when the Eighty Acre Parcel is being used for various purposes. The Court can only conclude that Debtor owns two parcels that are being used for two different purposes.

For these reasons, the Court concludes that Debtor has proven by a preponderance of the evidence that the Properties do not constitute SARE because they are not being used together in a common scheme. Given this finding, the Court need not consider Debtor's argument concerning the differing rights and obligations under commercial versus residential leases, Timber View's argument that the mobile homes are personal property under Ohio law and that the mobile home lots are not residential units for purposes of 11 U.S.C. § 101(51B), and Gemmell's argument that the residential exception to SARE does not apply here.

(2) Whether Debtor Conducts Substantial Business on the Properties other than the Business of Operating Real Estate

Because all three elements must be satisfied for a debtor to be designated as a SARE debtor, the finding that the Properties are not being used together in a common scheme is dispositive of whether Debtor is eligible to proceed under Subchapter V of Chapter 11. Nevertheless, the Court will consider the remaining factual dispute whether Debtor conducts substantial business on the Properties other than the business of operating real estate. Here, the Court is persuaded by Debtor's and the Subchapter V Trustee's point that Debtor has not had an opportunity to conduct business operations of its own as the result of the litigation in the state courts of Ohio. Debtor has stated its intent to investigate operating the zipline business directly rather than simply leasing a portion of the Properties to another entity that would operate the zipline. In this regard, Debtor presented evidence that Eventuresencore is in default of its lease

with Debtor and that Debtor is, therefore, entitled to terminate the lease. Under those circumstances, Debtor could begin its own zipline operation. Debtor is also investigating a number of other income-producing activities, among them oil and gas leases, timber sales, special events, developing cabin rentals, expanding mobile home rental sites, and possibly other home sites. Debtor has been unable to further initiate any other opportunities due to pending litigation. Given the constraints on Debtor's use of the Properties since it acquired them and its stated intentions regarding future use of the Properties, if and when it is able to do so, the Court finds itself in agreement with the Subchapter V Trustee that Debtor should be given a reasonable opportunity to formulate its intentions. Accordingly, the Court finds there is sufficient evidence that Debtor will likely conduct substantial business on the Properties other than simply leasing the Properties and collecting rent.

V. Conclusion

The Court has found that (1) Gemmell has standing to object to Debtor's election to proceed as a Subchapter V debtor; (2) that Debtor has the burden of proving by a preponderance of the evidence its eligibility to be a Subchapter V debtor; (3) that Debtor showed that the Properties do not constitute a single project; and (4) that Debtor demonstrated that it is likely to conduct substantial business on the Properties in the future other than simply leasing them and collecting rents. Based on these findings, the Court concludes that Debtor is eligible to proceed under Subchapter V of Chapter 11 of the Bankruptcy Code. Accordingly, it is

ORDERED and ADJUDGED that the *Objection of Karry Gemmell to Debtor's Election under Subchapter V of Chapter 11* (Doc. #48) is OVERRULED.

IT IS SO ORDERED.

COPIES TO:

All Filing Parties