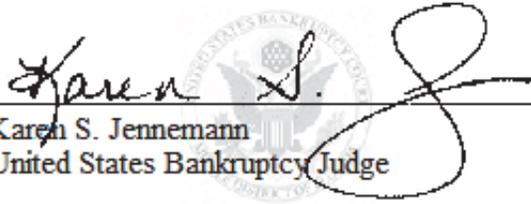


ORDERED.

Dated: July 10, 2020



Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re)	Case No. 6:20-bk-01346-KSJ
)	Chapter 11
Ellingsworth Residential Community)	
Association, Inc.,)	
)	
Debtor.)	
)	
)	

**ORDER OVERRULING ALICE GUAN’S OBJECTION
TO DEBTOR’S ELIGIBILITY UNDER SUBCHAPTER V**

An unsecured creditor, Alice Guan (“Guan”), contends the Debtor cannot proceed in this Subchapter V Chapter 11 case because, as a non-profit community association, it does not engage in commercial or business activities and, therefore, is not an eligible debtor.¹ I will overrule the objection concluding the Debtor engages in commercial or business activities and otherwise fits the definition of a small business debtor as defined in 11 U.S.C. § 101(51D)(A).² Debtor can proceed with this Subchapter V Chapter 11 case.

¹ Doc. No. 51. Debtor filed a Memorandum in Opposition. Doc. No. 61. Debtor is a non-profit incorporated in the State of Florida. Debtor operates a Homeowners Association and its primary source of income is derived from the dues and assessments from its eighty homeowners. Doc. No. 14.

² All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 *et. seq.*

The Small Business Reorganization Act (“SBRA”), enacted in August 2019, became effective on February 19, 2020.³ It is commonly called Subchapter V because all of its provisions are contained in Subchapter V of Chapter 11 of the Bankruptcy Code.⁴ The new law was enacted to help small businesses reorganize by streamlining the cumbersome and often expensive process of a typical Chapter 11 reorganization case.⁵ The statutory hope is that by encouraging small business reorganizations more creditors will receive greater distributions and more small businesses will survive and prosper.

Many of the new procedures allow for a quick confirmation of a plan of reorganization. No disclosure statement is required.⁶ Strict timelines require parties to quickly move the case forward. And, by abrogating the “absolute priority rule”⁷ as to *unsecured* creditors, debtors may confirm a plan without creditor support and still retain property, even though unsecured creditors, such as Guan, are not paid in full.⁸

Debtor filed this Chapter 11 case under Subchapter V on March 3, 2020.⁹ In her Objection, Guan argues that, because the Debtor, a non-profit business, has no commercial activities, it is not eligible to file a Chapter 11 case under Subchapter V. Section 1182(1) of the Bankruptcy Code limits those who can file a Subchapter V case to a “small business debtor.” In turn, § 101(51D)(A) of the Bankruptcy Code defines a small business debtor as:

[A] person engaged in *commercial or business activities*...that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition...in an amount not more \$2,725,625 [.]¹⁰

³ Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (2019).

⁴ §§1181 – 1195 of the Bankruptcy Code.

⁵ *In re Ventura*, 615 B.R. 1, 12 (Bankr. E.D. N.Y. 2020).

⁶ See § 1181(b) of the Bankruptcy Code.

⁷ § 1129(b)(2)(B) of the Bankruptcy Code.

⁸ § 1191(b),(c) of the Bankruptcy Code.

⁹ Doc. No. 1.

¹⁰ 11 U.S.C. § 101(51D)(A); emphasis added. The Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, enacted on March 27, 2020, temporarily increased the debt limit in to \$7,500,000. Here, this increase, even if applicable, is not relevant because the debts do not exceed \$2.7 million.

So, the crux is whether a non-profit community association—the Debtor—conducts sufficient “commercial or business activities” to qualify as a small business debtor. No statutory definition of “commercial or business activities” exists. And, legislative history to discern congressional intent is sparse.¹¹ Statutory interpretation asks courts to presume the legislature “says in a statute what it means and means in a statute what it says there.”¹² And, if the plain language of the statute is unambiguous, the court’s inquiry ends.¹³

Here, the Court finds the statute clear and unambiguous. Any corporation that conducts “commercial or business activities” is a small business debtor. No profit motive is required. The only statutory exclusion is a person whose primary business is owning a single parcel of real estate, which does not apply. The plain and unambiguous language of § 101(51D)(A) indicates a small business debtor may engage in a very inclusive range of commercial or business activities. The Court will presume the statute means exactly what it says. Other courts also have interpreted §101(51D)(A) broadly.¹⁴

Congress could have chosen different terms or added other exclusions when drafting the SBRA but instead chose very broad language. Any person who conducts a business or commercial enterprise is a small business debtor. Perhaps, one can contrast this definition against the term “consumer debt,” defined as “debt incurred by an individual primarily for a personal, family, or household purpose.”¹⁵ This definition reveals that commercial or business activities consist of any activities **not** of a personal, family, or household nature connected with business operations.¹⁶

¹¹ *In re Wright*, 2020 WL 2193240 at *3 (Bankr. D. S.C. 2020).

¹² *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

¹³ *Id.* at 254.

¹⁴ *See In re Wright*, 2020 WL 2193240 at *3 (Bankr. D. S.C. 2020)(holding that debtor was engaged in commercial or business activities by addressing residual business debt); *In re Ventura*, 615 B.R. 1,22 (holding that debtor was engaged in commercial or business activities by operating a bed and breakfast in her home).

¹⁵ 11 U.S.C. 101(8).

¹⁶ *See In re Ventura*, 615 B.R. at 18-19 (Bankr. E.D. N.Y. 2020).

Debtor engages in several commercial or business activities that fit this broad categorization. It contracts for goods and services and hires managers, lawyers, and other professionals. It oversees the common area property at the project, engaging landscaping help and maintenance professionals. It files regular tax returns and lists business income. It is registered with the State of Florida as a corporation.¹⁷ It has a board of directors who make decisions. And, it collects regular and special assessments from its homeowners. These activities constitute business and commercial activities, not debts for personal, family, or household purposes.

Guan argues the Debtor does not engage in any “commercial or business activities” because the Debtor lacks a profit motive and that § 101(51D)(A) is ambiguous relying on dissimilar language in two other sections of the Bankruptcy Code—§ 303(a) and § 1112(c).¹⁸ Both sections include this phrase: “a moneyed, business, or commercial corporation.” Section 303(a) prohibits filing an involuntary bankruptcy against (among others) any corporation that is “not a moneyed, business, or commercial corporation.” Section 1112(c) similarly limits the court’s ability to convert to Chapter 7 a Chapter 11 case of a corporation that is “not a moneyed, business, or commercial corporation.” This phrase aptly defines the **type of corporation** protected from an involuntary bankruptcy or forced conversion to a liquidating Chapter 7 case. And, at least one court has held that non-profit corporations cannot be forced into Chapter 7.¹⁹

¹⁷ See Doc. Nos. 15 and 21.

¹⁸ § 303(a) provides an “involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a *moneyed, business, or commercial corporation*, that may be a debtor under the chapter under which such a case is commenced.” § 1112(c) provides “[t]he Court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a *moneyed, business, or commercial corporation*, unless the debtor requests such conversion.”

¹⁹ See *In re Mandalay Shores Assoc.*, 22 B.R. 202 (Bankr. M.D. Fla. 1982). The Bankruptcy Court for the Middle District of Florida surveyed existing case law to interpret the phrase “not a moneyed, business, or commercial corporation” in the context of § 1112(c). The Court found a non-profit, organized for the singular purpose of acquiring an apartment house, is included in the exception within § 1112(c) because it has no profit related motive and does not distribute any of its income to its members.

However, the phrase does not define the **actual activities** conducted by a corporation or limits a non-profit corporation from being a small business. Comparing the two phases is like comparing apples to oranges; they simply have different uses and meanings. Any corporation that conducts any “commercial or business activity” can be a small business debtor, whether they operate for profit or not. And, there are numerous examples of non-profit corporations filing Chapter 11 prior to the enactment of the SBRA.²⁰ That litigants cannot *forcibly* convert non-profit corporations into Chapter 7 or an involuntary bankruptcy does not preclude non-profit corporations from *voluntarily* filing a Subchapter V Chapter 11 case or qualifying as a small business debtor under SBRA.

Guan incorrectly interprets § 101(51D)(A) to circumvent provisions of the SBRA that will limit her recovery, such as elimination of the absolute priority rule.²¹ Guan understandably is unhappy with the new provisions of Subchapter V. They may limit how much she receives on her claim. Her dissatisfaction is not justification, however, to limit the otherwise broad, unambiguous definition of who qualifies as a small business debtor under § 101(51D)(A). Just because Guan does not like the new law does not make the Debtor ineligible for relief under Subchapter V.

Accordingly, it is

ORDERED:

1. Guan’s Objection (Doc. No. 51) is **OVERRULED**.

²⁰ See *In re Charles Street African Methodist Episcopal Church of Boston*, 478 B.R. 73 (Bankr. D. Mass. 2012)(non-profit religious corporation Chapter 11 debtor); *In re National Heritage Foundation, Inc.*, 478 B.R. 216 (Bankr. E.D. Va. 2012)(non-profit public charity Chapter 11 debtor); *In re Delta Transitional Home*, 399 B.R. 654 (Bankr. E.D. Ark. 2009) (non-profit corporation Chapter 11 debtor); *In re Pleasantview Swimming Pool Ass’n, Inc.*, 2007 WL 1063014 (Bankr. D. Md. 2007)(non-profit operating neighborhood swimming pool Chapter 11 debtor); *In re S.A.B.T.C. Townhouse Ass’n, Inc.*, 152 B.R. 1005 (Bankr. M.D. Fla. 1993)(non-profit homeowners’ association Chapter 11 debtor); *In re Titusville Country Club*, 128 B.R. 396 (Bankr. W.D. Pa. 1991)(non-profit country club Chapter 11 debtor).

²¹ See 11 U.S.C. 1181(a).

2. Debtor qualifies as a small business debtor and is eligible to proceed with this Subchapter V Chapter 11 case.

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Attorney Justin M. Luna is directed to serve a copy of this Order on interested parties who are non-CM/ECF users and file a proof of service within 3 days of entry of the Order.