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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 IN RE THE SOURCE HOTEL, LLC,  
12 Debtor,

Case Nos. 8:21-cv-00824-FLA  
8:21-bk-10525-ES

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15 SHADY BIRD LENDING, LLC,  
16 Appellant,

**ORDER REVERSING  
BANKRUPTCY COURT'S ORDER  
AND REMANDING FOR FURTHER  
PROCEEDINGS**

17 v.

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19 THE SOURCE HOTEL, LLC,  
20 Appellee.  
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1 **RULING**

2 Before the court is Shady Bird Lending, LLC’s (“Shady Bird” or “Appellant”) appeal of the Order of the United States Bankruptcy Court, Central District of California, Santa Ana Division (the “Bankruptcy Court”), entered on April 28, 2021, denying Appellant’s Motion for Order Designating Chapter 11 Case as Single Asset Real Estate Case Pursuant to 11 U.S.C. §§ 101(51B) and 362(d)(3) (“Order”).

7 Shady Bird submitted its Opening Brief on June 25, 2021. Dkt. 16 (“OB”). On 8 July 26, 2021, The Source Hotel, LLC (“The Source Hotel” or “Appellee”), submitted 9 its Answering Brief. Dkt. 19 (“AB”). Shady Bird filed a Reply Brief on August 9, 10 2021. Dkt. 21 (“RB”). The court finds this matter appropriate for resolution without 11 oral argument. *See* Fed. R. Civ. P. 78(b); Local Rule 7-15. For the reasons set forth 12 below, the Bankruptcy Court’s Order is REVERSED, and the action is REMANDED 13 to the Bankruptcy Court for further proceedings.

14 **BACKGROUND**

15 On February 26, 2021, The Source Hotel filed a voluntary petition under 16 chapter 11 of the Bankruptcy Code. Dkt. 17 (Excerpts of Records Volume I, “EOR 17 Vol. I”) at 0001-04. Since 2014, The Source Hotel has been developing a hotel with 18 178 rooms, conference rooms, an executive lounge, fitness center, restaurant, bars, 19 and cleaning services (the “Hotel”). Dkt. 18-1 (Excerpts of Records Volume III, 20 “EOR Vol. III”) at 0898. To finance construction of the Hotel, The Source Hotel 21 obtained a \$29.5 million construction loan (the “Loan”) from Evertrust Bank 22 (“Evertrust”) as well as EB-5 investments totaling \$35.5 million. *Id.* Construction 23 began in 2016. *Id.* According to Appellee, as of October 2019, construction of the 24 Hotel was approximately 85% complete, and approximately 15% of the Hotel 25 construction remains outstanding. *Id.* at 0899. In addition to developing the Hotel, 26 The Source Hotel intends to operate the Hotel and its related businesses, including the 27 restaurant and bars on the Hotel property. *Id.*

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1 The original maturity date for the Loan was December 1, 2017, but was  
2 extended to November 1, 2019, pursuant to written extension agreements. *Id.* In late  
3 2019, Evertrust refused to issue the remaining \$4 million of the Loan, claiming a cost  
4 overrun on the construction of the Hotel. *Id.* at 0900. As a result of Evertrust’s  
5 refusal to provide the final \$4 million of the Loan, The Source Hotel ceased  
6 construction activities on the Hotel. *Id.* Evertrust and The Source Hotel engaged in  
7 forbearance negotiations, but they were ultimately unsuccessful in reaching a formal  
8 resolution. *Id.* at 0901. In December 2020, Shady Bird purchased Evertrust Bank’s  
9 interests in the Loan. *Id.*

10 On February 8, 2021, Shady Bird filed a complaint against The Source Hotel in  
11 Orange County Superior Court (“Superior Court”) for (i) specific performance and  
12 appointment of a receiver, and (ii) waste, thereby commencing the Superior Court  
13 action bearing case number 30-2021-01183489-CU-OR-CJC (the “State Court  
14 Action”). *Id.* at 0902. Shady Bird took steps to foreclose on the Hotel immediately  
15 and issued a Notice of a Trustee’s Sale for the Hotel to be held on March 1, 2021. *Id.*  
16 On February 17, 2021, the Superior Court entered an order in the State Court Action  
17 appointing a Receiver to, among other things, take possession of the Hotel and all  
18 goods, furniture, fixtures, and equipment attached and/or related to the Hotel. *Id.* As  
19 a result of the foregoing, The Source Hotel sought Chapter 11 bankruptcy protection.  
20 *Id.*

21 In its voluntary petition, The Source Hotel did not designate itself as “single  
22 asset real estate.” EOR Vol. I at 0002, ¶ 7. On March 25, 2021, Shady Bird filed a  
23 Motion for Order Designating Chapter 11 Case as Single Asset Real Estate Case  
24 Pursuant to 11 U.S.C. §§ 101(51B) and 362(d)(3) (“SARE Motion”). Dkt. 18  
25 (Excerpts of Records Volume II, “EOR Vol. II”) at 0539-692. The Bankruptcy Court  
26 held a hearing on April 15, 2021, during which it explained its reasoning for finding  
27 that the Hotel did not qualify as “single asset real estate.” Dkt. 18-4 (Excerpts of  
28 Records Volume VI, “EOR Vol. VI”) at 1647-62. On April 28, 2021, the Bankruptcy

1 Court issued its Order denying Shady Bird’s SARE Motion, and this appeal followed.  
2 *Id.* at 1637-38.

3 The issues presented on appeal are whether the Bankruptcy Court erred in its  
4 interpretation of 11 U.S.C. § 101(51B) (“§ 101(51B)”) and its finding that The Source  
5 Hotel did not satisfy the test for a single asset real estate case pursuant to § 101(51B).  
6 OB 8.

### 7 STANDARD OF REVIEW

8 When acting in its appellate capacity under 28 U.S.C. § 158(c)(1), the district  
9 court reviews legal conclusions de novo and factual conclusions for clear error. *In re*  
10 *Olshan*, 356 F.3d 1078, 1083 (9th Cir. 2004). De novo review requires this court to  
11 “consider a matter anew, as if it has not been heard before, and as if no decision had  
12 been rendered previously.” *In re Smith*, 435 B.R. 637, 643 (B.A.P. 9th Cir. 2010).  
13 Clear error review, in contrast, is “highly deferential” and reversal is proper if the  
14 court has “a definite and firm conviction that a mistake has been committed....” *In re*  
15 *Sussex*, 781 F.3d 1065, 1071 (9th Cir. 2015).

16 Mixed questions of law and fact are those which require the court to apply an  
17 established set of facts to an undisputed rule of law. *U.S. Bank Nat’l Ass’n ex rel.*  
18 *CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966  
19 (2018). “[T]he standard of review for a mixed question all depends—on whether  
20 answering it entails primarily legal or factual work.” *Id.* at 967. When the question  
21 involves primarily legal principles, the court should review the lower decision de  
22 novo. *See id.* When the question involves primarily factual issues “compelling [the  
23 court] to marshal and weigh evidence,” the court must review for clear error. *See id.*

24 As discussed below, the court finds that this appeal primarily involves a review  
25 of the Bankruptcy Court’s statutory interpretation of § 101(51B), which calls for a  
26 legal determination. The court, therefore, reviews the Bankruptcy Court’s Order  
27 denying Shady Bird’s SARE Motion de novo.

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## DISCUSSION

### **I. Legal Standard**

The Bankruptcy Code defines “single asset real estate” as:

[R]eal 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). The Ninth Circuit has recognized that real property must meet three elements to qualify as “single asset real estate” under this definition: (1) the property is “a single property or project, other than residential real property with fewer than 4 residential units”;<sup>1</sup> (2) “the property generates substantially all of the gross income of a debtor who is not a family farmer”; and (3) “no substantial business is being conducted by a debtor [on the property] other than the business of operating the real property and activities incidental thereto.” *In re Meruelo Maddux Props., Inc.*, 667 F.3d 1072, 1076 (9th Cir. 2012) (quotation marks omitted).

11 U.S.C. §§ 101(51B) and 362(d)(3) (“§ 362(d)(3)”) were enacted as part of the Bankruptcy Reform Act of 1994 (“BRA”). *In re CBJ Dev., Inc.*, 202 B.R. 467, 470 (B.A.P. 9th Cir. 1996). “The purpose of a single asset real estate determination is to allow for relief from the automatic stay under 11 U.S.C. § 362(d).” *Meruelo Maddux*, 667 F.3d at 1075. The movant bears the burden of demonstrating that a property constitutes single asset real estate. *In re Hassen Imports P’ship*, 466 B.R. 492, 507 (Bankr. C.D. Cal. 2012); *see also In re Meeks*, 349 B.R. 19, 21 (Bankr. E.D. Cal. 2006).

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<sup>1</sup> The Parties do not dispute that the Hotel development is a single project that is not residential real property with fewer than four residential units, and thus, satisfies the first element of § 101(51B). The court, therefore, will limit its analysis to the second and third elements of the statutory definition in the discussion below.

1 To determine whether property qualifies as “single asset real estate”, courts first  
2 look to the plain language of the statute. *See Meruelo Maddux*, 667 F.3d at 1076.  
3 “Where the statute’s language is plain, the sole function of the courts is to enforce it  
4 according to its terms, for courts must presume that a legislature says in a statute what  
5 it means and means in a statute what it says there.” *Id.* (quoting *Int’l Ass’n of*  
6 *Machinists & Aerospace Workers v. BF Goodrich Aerospace Aerostructures Grp.*,  
7 387 F.3d 1046, 1051 (9th Cir. 2004)). To the extent that either § 101(51B) or  
8 § 362(d)(3) is ambiguous, however, courts look to pre-1994 BRA single asset cases  
9 for guidance.<sup>2</sup> After reviewing such prior opinions, courts have recognized that the  
10 term “single asset real estate” was a “well-known and often used colloquialism[]  
11 which essentially refer[s] to real estate entities attempting to cling to ownership of real  
12 property in a depressed market ... rather than businesses involving manufacturing,  
13 sales or services.” *In re CBJ*, 202 B.R. at 471 (citing *In re Philmont Dev. Co.*, 181  
14 B.R. 220, 223 (Bankr. E.D. Pa. 1995)).

15 This framework guides the court’s analysis of the real property at issue here.

## 16 **II. Analysis**

### 17 **A. Property Which Generates Substantially All of The Gross Income of** 18 **a Debtor**

19 The second element of the definition of “single asset real estate” requires the  
20 property to “generate[] substantially all of the gross income of a debtor.” 11 U.S.C. §  
21 101(51B). Although there is some dispute as to the degree to which the Hotel  
22 development has been completed, there is no dispute that the Hotel is incomplete and  
23 not producing income at present.

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25 <sup>2</sup> It is well established that “where Congress uses terms that have accumulated settled  
26 meaning under the common law, a court should infer, unless the statute otherwise  
27 dictates, that Congress meant to incorporate the established meaning of these terms.”  
28 *In re CBJ*, 202 B.R. at 471 (citing *Field v. Mans*, 516 U.S. 59, 69 (1995) & *In re*  
*Oceanside Mission Assocs.*, 192 B.R. 232, 236 (Bankr. S.D. Cal. 1996)).

1 During its hearing on Shady Bird’s SARE Motion, the Bankruptcy Court  
2 interpreted the second element to mean that § 101(51B) as drafted does not include  
3 property that produces no income. EOR Vol. VI at 1651. Recognizing that its  
4 interpretation of § 101(51B) was contrary to the view of most other courts and that it  
5 “may be the only minority view,” *id.*, the Bankruptcy Court stated that it respectfully  
6 disagreed with the rulings by other courts because it did not believe the analysis in  
7 those cases was supported by the language of the statute itself, *id.* at 1661-63. As the  
8 Bankruptcy Court explained, it “personally [did] not believe that [§] 101(51B) as  
9 drafted includes a property that produces no income,” as “it is a legal fiction to say  
10 that even a property that has no income meets the requirement of [§] 101(51B)  
11 because it’s a single property for which there is no income.” EOR Vol. VI at 1651.<sup>3</sup>

12 Upon review of the transcript of the April 15, 2021 hearing, the Parties’ briefing  
13 and supporting evidence, and relevant case law, this court agrees with the view  
14 articulated by the majority of courts that have addressed this issue and holds that  
15 property that does not produce income may qualify as “single asset real estate” under  
16 § 101(51B). *See, e.g., In re Webb MTN, LLC*, Case No. 3:07-bk-32016, 2008 WL  
17 656271, at \*4 (Bankr. E.D. Tenn. Mar. 6, 2008) (finding largely undeveloped land  
18 which generated no income was “single asset real estate”); *In re Kinard*, Case No.  
19 2:01-bk-03621-JW, 2001 WL 1806039, at \*5 (Bankr. D.S.C. Nov. 16, 2001)  
20 (collecting cases and concluding “that Congress did not intend to exclude from the  
21 definition of single asset real estate undeveloped or vacant land currently generating  
22 no income for debtors, particularly where the only prospect for the funding of a plan  
23 of reorganization is through the leasing of that property in order to obtain time to sell

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25 <sup>3</sup> At the hearing, the Bankruptcy Court suggested Shady Bird appeal this issue if it  
26 wanted greater clarity on the law, stating: “If there’s an appeal ..., hopefully it will go  
27 all the way up to the Ninth Circuit. ... [T]he Ninth Circuit or the BAP or a district  
28 court can say, Judge Smith, you’ve got it wrong or you’ve got it right. But all I can do  
is rule based on my interpretation of [§] 101(51B) and in my view this case isn’t it and  
so the motion will be denied.” EOR Vol. VI at 1664.



1 the property at a speculated appreciated value”); *In re Pensignorkay, Inc.*, 204 B.R.  
2 676, 682 (Bankr. E.D. Pa. 1997) (finding “the fact that the real property is currently  
3 undeveloped and not generating any income ... is of little consequence for purposes of  
4 the inquiry here, since the Court is satisfied that Congress did not intend to excuse  
5 from compliance with the revised statute the class of debtors who hold undeveloped  
6 tracts of land for future development”); *In re Oceanside*, 192 B.R. at 236 (finding  
7 “‘single asset real estate’ includes undeveloped real property which generates no  
8 income”); *In re Kkemko, Inc.*, 181 B.R. 47, 51 (Bankr. S.D. Ohio 1995) (recognizing  
9 that in the bankruptcy context, common usage of “single asset real estate” “meant a  
10 building or buildings which were intended to be income producing, or raw land”).

11 In *In re Oceanside*, 192 B.R. at 234, the bankruptcy court undertook a detailed  
12 analysis of whether § 101(51B) was intended to “exclude debtors that own  
13 undeveloped land that generates no income.” The court found that the language of the  
14 statute was ambiguous. This court agrees § 101(51B) is ambiguous with respect to  
15 undeveloped or partially developed real property, as demonstrated by the fact that  
16 reasonable courts, like the Bankruptcy Court here, have disagreed about whether such  
17 property “generates substantially all of the gross income” of a debtor who has no  
18 income. This court, therefore, looks to the statutory scheme and legislative history for  
19 guidance. Here, as well, the court finds the reasoning of *In re Oceanside* to be  
20 persuasive:

21 Reading the first, or “gross income,” clause to include raw land that  
22 generates no income is awkward but possible. If the debtor has no  
23 income, then substantially all of its income could be said to be  
24 generated by the property; i.e., substantially all of nothing is nothing.  
25 In addition to the awkwardness, this interpretation seems to render the  
26 second clause, “and on which no substantial business is being  
27 conducted by a debtor other than the business of operating the real  
28 property,” superfluous. If the debtor has no “gross income”, then the  
debtor is obviously not conducting “substantial business” on the  
property, or anywhere else for that matter. Conversely, a debtor  
operating a substantial business would not derive substantially all of  
its income from the property and would thus be excluded under either



1 clause. It is well settled that statutes are to be interpreted so as to  
2 avoid rendering any portion superfluous. [Citations.] Thus, one  
3 might conclude that the two clauses are designed to exclude different  
4 types of property: the “gross income” clause to exclude property  
5 which generates no income and the “substantial business” clause to  
6 exclude restaurants, hotels, and the like. There are, however,  
7 problems with this interpretation.

8 Interpreting the statute to exclude raw land does not appear to serve  
9 the purpose of the statutory scheme. Sections 101(51B) and 362(d)(3)  
10 are designed to require debtors with “single asset real estate” to act in  
11 an expedited fashion. [Citations.] The consequence of not acting  
12 quickly is that the automatic stay may be lifted without further ado.  
13 [Citation.] There is no apparent purpose for Congress to have  
14 excused debtors who own only raw land from this expedited program:  
15 If a debtor who owns an apartment complex is forced to act quickly  
16 why not a debtor who owns raw land? Legislative enactments are not  
17 to be construed as establishing statutory schemes that defeat the  
18 purpose of the statutes. [Citation.] Rather, appropriate statutory  
19 construction favors the more reasonable result. [Citation.]

20 *Id.* at 234-35 (emphasis omitted).

21 The *In re Oceanside* court further noted that Congress provided a “Section-By-  
22 Section Description” with the BRA, in which it paraphrased the definition of “single  
23 asset real estate”:

24 Section 218. Single asset real estate

25 This section will add a new definition to the Code for “single asset  
26 real estate,” meaning real property ... which generates  
27 substantially all of the gross income of the debtor and has  
28 aggregate noncontingent, liquidated secured debts in an amount up  
to \$ 4 million.

29 *Id.* at 235 (citing H.R. Rep. No. 835, 103d Cong., 2d Sess. (1994) at 10768). As  
30 Congress did not include language matching the “substantial business” clause in  
31 describing the scope of “single asset real estate,” the *In re Oceanside* court held that  
32 Congress did not intend it to be a separate requirement and that both the “gross  
33 income” and the “substantial business” clauses were meant to include debtors with  
34 income generating operations beyond the real property. *Id.*

1            *In re Oceanside* additionally noted that other legislative history demonstrated  
2 that “single asset real estate” was to be “limited to investment property of the debtor,”  
3 which would include raw, undeveloped land. *Id.* The court further recognized that its  
4 holding was consistent with the pre-1994 BRA colloquial use of the phrase “single  
5 asset real estate,” in which the phrase was applied to raw, undeveloped land. *Id.* at  
6 236 (collecting cases);<sup>4</sup> *see also CBJ*, 202 B.R. at 470-71. Based on the statutory  
7 purpose of § 101(51B), legislative history, and the use of the term in prior case law, *In*  
8 *re Oceanside* concluded that “‘single asset real estate’ includes undeveloped real  
9 property which generates no income.” This court agrees with this analysis.

10            At the hearing on the SARE Motion, the Bankruptcy Court did not identify any  
11 legal authority to support its conclusion that the statute excludes property that  
12 produces no income and appears to have held that the statutory language is not  
13 ambiguous.<sup>5</sup> *See* EOR Vol. VI at 1651. The Source Hotel, likewise, does not identify  
14 any legal authority supporting the Bankruptcy Court’s interpretation of § 101(51B).  
15 *See* AB 14-24. The Source Hotel, instead, argues that the Hotel should not be  
16 considered “single asset real estate” because The Source Hotel “has spent an  
17 extraordinary amount of money, time, and resources during the last several years  
18 developing and constructing the Hotel, and commenced its Chapter 11 bankruptcy  
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21 <sup>4</sup> As *In re Oceanside*, 192 B.R. at 236, explained: “If Congress intended to exclude  
22 raw land from the definition they would have done so specifically or at least explained  
23 in the comments that the definition was meant to exclude raw land. Without such an  
24 express exclusion this court does not believe that Congress meant for ‘single asset real  
25 estate’ to mean less than it did before the sections were enacted.”

26 <sup>5</sup> Although the Bankruptcy Court did not expressly state that it found the statutory  
27 language to be unambiguous, in light of the statutory purpose of § 101(51B), the  
28 legislative history, and the use of the term “single asset” in prior case law, the  
Bankruptcy Court’s reasonable interpretation of the statutory language would only  
control over the reasonable interpretation of the majority view if it found the language  
of the statute to be unambiguous. *See In re CBJ*, 202 B.R. at 471; *In re Oceanside*,  
192 B.R. at 235-36.

1 case to save the Hotel from foreclosure and preserve the equity in the Hotel for the  
2 benefit of all creditors, to obtain a ‘breathing spell’ to obtain financing to perform the  
3 remaining 15% construction work required to complete the Hotel, and to be afforded a  
4 reasonable opportunity to restructure its financial affairs and repay its debts in an  
5 orderly fashion.” AB 22.

6 The Source Hotel cites *In re Kkemko*, 181 B.R. at 49, to note that:

7 [I]n enacting §§ 101(51B) and 362(d)(3), providing for extraordinary  
8 expedition in single asset real estate cases, Congress was motivated  
9 by a desire to accord relief in a particular familiar bankruptcy  
10 situation. That situation is where the owner of an encumbered  
11 building is attempting to avert loss of his building to his major lender  
12 who is grossly undersecured, and where there is no real hope that the  
13 owner can come forth with a viable confirmable Chapter 11 plan.

14 AB 23. According to The Source Hotel, the circumstances here are not analogous to  
15 those in *In re Kkemko* because “there is substantial equity in the Hotel and Shady Bird  
16 is far from undersecured.” *Id.* The Source Hotel, however, does not identify any legal  
17 authority that holds that the lender’s degree of security in the property at issue is a  
18 factor to be considered in making a single asset real estate determination. *See id.*  
19 Under the language of § 101(51B) and *Meruelo Maddux*, 667 F.3d at 1076, it is not.

20 Furthermore, while The Source Hotel contends “there is more than a reasonable  
21 possibility of a successful reorganization in the Debtor’s case, and the Debtor should  
22 be provided an adequate and fair opportunity to effectuate such a reorganization,” that  
23 is an argument it can raise under § 362(d)(3)(A) in response to a determination that  
24 the Hotel is “single asset real property.” *See* 11 U.S.C. § 362(d)(3)(A) (recognizing  
25 relief from a stay is not to be granted if, within the time specified, “the debtor has filed  
26 a plan of reorganization that has a reasonable possibility of being confirmed within a  
27 reasonable time”). The fact that The Source Hotel appears to believe that additional  
28 time is necessary for conditions to change to allow it to obtain post-petition financing  
to complete the construction of the Hotel and begin operation, suggests that the Hotel,  
in its current, incomplete state, has essentially become investment property of The

1 Source Hotel that is little different from raw, undeveloped land. *See In re Humble*  
2 *Place Joint Venture*, 936 F.2d 814, 817 (5th Cir. 1991) (pre-1994 BRA case finding  
3 partially developed land, which the court referred to as “raw land,” was not entitled to  
4 Chapter 11 protection while awaiting changes in market conditions”).

5 Accordingly, the court adopts the majority view expressed by other courts that  
6 the statutory definition of “single asset real estate” includes property which generates  
7 no income. Applying this legal conclusion to the case at hand, there is no dispute that  
8 the Hotel, in its current state, is not producing any income and that The Source Hotel  
9 is not earning any gross income. *See* AB 5-6, 19-23. Thus, the Hotel meets the  
10 second element to qualify as “single asset real estate” under § 101(51B). *See Meruelo*  
11 *Maddux*, 667 F.3d at 1076.

#### 12 **B. No Substantial Business Being Conducted**

13 The third element for real property to qualify as “single asset real estate” is that  
14 “no substantial business is being conducted by a debtor [on the property] other than  
15 the business of operating the real property and activities incidental thereto.” *Meruelo*  
16 *Maddux*, 667 F.3d at 1076.

17 The Bankruptcy Court also denied Shady Bird’s SARE Motion under the third  
18 element of § 101(51B), holding that the Hotel did not qualify as “single asset real  
19 estate,” even if the Bankruptcy Court were to assume that the majority view on the  
20 second element were correct. EOR Vol. VI at 1661 at 1661-63. As the Bankruptcy  
21 Court explained: “if we are going to engage in a legal fiction that this property is an  
22 income producing property within the meaning of [§] 101(51B) ... we have to look at  
23 the intent for which the property has been constructed, even partially so.” *Id.* at 1652.

24 Because the Parties had not presented “any evidence to the contrary that the  
25 intent [was] for there to be or the plans include[d] a restaurant, a bar, laundry services  
26 and other [types of businesses],” which courts have held prevents a finding that “no  
27 substantial business is being conducted by a debtor other than the business of  
28 operating the real property and activities incidental thereto,” in other cases involving

1 hotels, the Bankruptcy Court held that the Hotel did not satisfy the third element of  
2 the definition. *Id.*

3 The Source Hotel argues the court should look to the current condition of the  
4 Hotel rather than The Source Hotel's intent in considering the third element of the  
5 definition, and that, as it stands, there is no substantial business being conducted on  
6 the property. OB 19-25. The Source Hotel requests this court affirm the Bankruptcy  
7 Court's holding and find that the Hotel does not qualify as "single asset real estate"  
8 based on the intent for which it has been partially constructed. AB 21-22.

9 In *In re CBJ*, 202 B.R. at 473, the Bankruptcy Appellate Panel ("BAP")  
10 considered whether a non-operational hotel was "single asset real estate." There, the  
11 bankruptcy court held that a hotel did not qualify as "single asset real estate" because  
12 a gift shop, a restaurant, and a bar located on the property constituted substantial other  
13 business. *Id.* at 472. The creditor appealed the decision, arguing that the hotel  
14 qualified as "single asset real estate" because all of the debtor's other businesses were  
15 closed at the time the SARE Motion was heard. *Id.* at 472-73.

16 The BAP recognized that "[t]he use of the present tense by Congress in  
17 § 101(51B) suggests that only current activities may be considered in determining  
18 whether the debtor is conducting substantial business activities other than the  
19 operation of the property. Any other conclusion would allow all debtors with  
20 unrented commercial space to evade § 362(d)(3) by simply declaring an intention to  
21 start a business." *Id.* at 473. Nevertheless, the BAP found that the hotel was not  
22 "single asset real estate" because the debtor had operated the other businesses shortly  
23 before filing its petition for bankruptcy relief, the other businesses were only closed  
24 for renovations which were being carried out promptly, and the debtor's investors had  
25 invested a substantial amount of money into the renovations. *Id.*

26 This court agrees with *In re CBJ, id.*, that Congress' use of the present tense in  
27 the statute, i.e., "is being conducted", requires the court to evaluate the current  
28 business activities of a property or project rather than the intentions of the parties. As

1 recognized in *In re Charterhouse*, “[i]n deciding whether property constitutes ‘single  
2 asset real estate,’ the Court must look to current facts, not to those existing in the past,  
3 nor to Debtor’s aborted plans for the future.” *In re Charterhouse Boise Downtown*  
4 *Props., LLC*, Case No. 1:07-01199-JDP, 2008 WL 4735264, at \*2 (Bankr. D. Idaho  
5 Oct. 24, 2008) (finding that “an unfinished, high-rise commercial building, and the  
6 corner on which it is located” was “single asset real estate”).

7 Here, it is undisputed that The Source Hotel is not currently conducting any  
8 business related to the Hotel outside of activities related to its construction and  
9 development. The evidence in the record shows that all construction on the Hotel has  
10 been on hold since “late 2019,” when Evertrust refused to issue the remaining \$4  
11 million of the Loan, and that The Source Hotel has been unable to secure additional  
12 financing as of the filing of its Answering Brief. *See* AB 6-13; EOR Vol. III at 0900.  
13 Unlike the hotel in *CBJ*, where the associated restaurant and bar were previously  
14 operational and only under temporary renovation, the Hotel and associated other  
15 businesses here have never been in operation and remain purely within the realm of  
16 The Source Hotel’s intent to conduct future business. Such intent does not constitute  
17 “substantial business ... being conducted by [The Source Hotel] other than the  
18 business of operating the real property and activities incidental thereto.” *See Meruelo*  
19 *Maddux*, 667 F.3d at 1076.

20 The Source Hotel argues there is no question that, if the Hotel were completed  
21 and operating, it would not constitute “single asset real estate” within the definition of  
22 § 101(51B). AB 15. Courts have recognized that normally, “[t]he active nature of a  
23 hotel business inherently gives the hotel a better chance of reorganizing; there are  
24 more business activities and thus more opportunities to cut costs.” *In re Iowa Hotel*  
25 *Invs., LLC*, 464 B.R. 848, 853 (Bankr. N.D. Iowa 2011) (emphasis added). However,  
26 where a hotel remains in development, it is not active and the same rationale does not  
27 apply. *See In re Charterhouse*, 181 B.R. at \*2 (holding unfinished high-rise  
28 commercial building was “single asset real estate”). Thus, the fact that courts have

1 held that operating businesses can prevent a hotel from being “single asset real estate”  
2 is inapposite here.


3 For these reasons, the court finds no substantial business is being conducted at  
4 the Hotel other than the business of operating the real property and activities  
5 incidental thereto, and that the third element of 11 U.S.C. § 101(51B) is met. Having  
6 found that the Hotel falls within the definition of “single asset real estate” under 11  
7 U.S.C. § 101(51B), the court finds that the Bankruptcy Court erred when it denied  
8 Shady Bird’s SARE Motion.

9 **CONCLUSION**

10 For the foregoing reasons, the court REVERSES the Bankruptcy Court’s Order  
11 Denying the Motion of Shady Bird Lending, LLC for Order Designating Chapter 11  
12 Case as Single Asset Real Estate Case Pursuant to 11 U.S.C. §§ 101(51B) and  
13 362(d)(3) and REMANDS the action to the Bankruptcy Court for further proceedings  
14 consistent with this ruling.

15  
16 IT IS SO ORDERED.

17  
18 Dated: June 8, 2022

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21 \_\_\_\_\_  
22 FERNANDO L. AENLLE-ROCHA  
23 United States District Judge  
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