

# **EXHIBIT B**

**UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	)	Chapter 11
	)	
LOMBARD PUBLIC FACILITIES	)	Case No. 17-22517
CORPORATION,	)	
Debtor.	)	Hon. Jacqueline P. Cox

**MOTION FOR LEAVE TO APPEAL FROM ORDER  
DENYING MOTION TO DISMISS**

Pursuant to 28 U.S.C. § 158(a)(3) and Fed. R. Bankr. P. 8004, Lord Abbett Municipal Income Fund, Inc. – Lord Abbett High Yield Municipal Bond Fund (“Lord Abbett”) hereby requests leave to appeal from the *Order Denying Motion To Dismiss* [Bankr. ECF No. 259] (the “Order”)<sup>1</sup> entered by the bankruptcy court on December 6, 2017. In support of this motion, Lord Abbett respectfully represents as follows:

**I. INTRODUCTION**

1. Lord Abbett requests leave to take an interlocutory appeal from the Order on the discrete legal question of whether an Illinois public-facilities corporation is a governmental unit as defined by § 101(27) of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”). If the answer to this question is yes, then the debtor in the above-captioned bankruptcy case (the “Debtor” or the “LPFC”) is ineligible for chapter 11 bankruptcy relief as a threshold matter, and its Bankruptcy Case must be dismissed.

2. Generally, an entity is eligible for chapter 11 bankruptcy relief under the Bankruptcy Code if it is a “person.” *See* 11 U.S.C. § 109(d). However, the Bankruptcy Code

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<sup>1</sup> A copy of the Order is attached hereto as Exhibit 1. A copy of the *Amended Memorandum Opinion* [Bankr. ECF No. 268] (the “Opinion” or “Op.”) entered in connection with the Order is attached hereto as Exhibit 2. References to “Bankr. ECF No.” refer to the docket in the above-captioned bankruptcy case (the “Bankruptcy Case”).

specifically defines the term “person” to exclude “governmental units,” except in limited circumstances irrelevant to the Bankruptcy Case. *See* 11 U.S.C. § 101(41) (“The term ‘person’ . . . does not include governmental unit . . . .”). Furthermore, the Bankruptcy Code broadly defines the term “governmental unit” to include not only a municipality, but also to include an “instrumentality” of a municipality. *See* 11 U.S.C. § 101(27) (emphasis added). Consequently, any instrumentality of a municipality is a governmental unit that is ineligible for chapter 11 bankruptcy relief.

3. Illinois public-facilities corporations are described in the Illinois Municipal Code, 65 ILCS 5/1-1 to 5/11-74.6 (the “Municipal Code”). Under the Municipal Code, Illinois municipalities are authorized “to incorporate a public-facilities corporation to exercise, as business agent of the municipality, the powers of the municipality” to construct, control, and operate a municipal convention hall. *See* 65 ILCS 5/11-65-10(a). *See also* 65 ILCS 5/11-65-1(1) (“‘Municipal convention hall’ means a municipally-owned building or auditorium with all necessary adjuncts thereto, including but not limited to hotels, restaurants, and gift shops . . . .”).

4. The Municipal Code further specifies that a public-facilities corporation is “organized solely” for the purposes of acquiring, constructing, and collecting revenue from a municipal convention hall, and it “shall assist the municipality it serves in the municipality’s essential governmental purposes.” *See* 65 ILCS 5/11-65-10(b). *See also* 65 ILCS 5/11-65-1(2) (“The objects and purposes defined and set forth in this Division 65 are municipal corporate objects and purposes.”). The Municipal Code also provides that “[t]he municipality shall retain control of the public-facilities corporation by means of the municipality’s expressed legal right, set forth in the articles of incorporation of the public-facilities corporation, to appoint, remove,

and replace the members of the board of directors of the public-facilities corporation.” *See* 65 ILCS 5/11-65-10(c).

5. The LPFC is an Illinois public-facilities corporation that was created by the Village of Lombard, Illinois (the “Village”). *Op.* at 1-2. On July 28, 2017, the LPFC initiated the Bankruptcy Case by filing a petition for chapter 11 bankruptcy relief. Lord Abbett and the Office of the United States Trustee subsequently filed motions to dismiss the Bankruptcy Case on the grounds that the LPFC constituted a governmental unit and was therefore ineligible for chapter 11 bankruptcy relief. *See* Bankr. ECF Nos. 34, 40. After briefing and an evidentiary hearing, the bankruptcy court denied the motions to dismiss for the reasons set forth in the Opinion.

6. Lord Abbett contends that the bankruptcy court erred in denying the motions to dismiss because its interpretation of the term “instrumentality” as used in § 101(27) of the Bankruptcy Code was unduly restrictive. The municipal purpose and control of an Illinois public-facilities corporation, as specifically expressed by the Illinois General Assembly through the Municipal Code, renders it an instrumentality of the municipality it serves. Therefore, as a matter of law, an Illinois public-facilities corporation such as the LPFC is a governmental unit under § 101(27), and it is consequently ineligible for chapter 11 bankruptcy relief.

7. As set forth in more detail below, this appeal presents a pure, controlling and contestable question of law, and its success would terminate the Bankruptcy Case immediately. Therefore, it is a “natural” for interlocutory review. *See Fruehauf Corp. v. Jartran, Inc. (In re Jartran, Inc.)*, 886 F.2d 859, 864 (7th Cir. 1989) (Accepting an interlocutory appeal from an order denying a motion to dismiss a bankruptcy case and stating that, “[i]f we ruled that the second Chapter 11 filing was impermissible, we would effectively end the proceeding. As we

noted in *In re Riggsby*, [745 F.2d at 1156], a case ‘where the district court rejects an argument that if accepted would terminate the proceeding, is a ‘natural’ for appeal under 28 U.S.C. § 1292(b).’”). For these reasons, leave to appeal from the Order on an interlocutory basis should be granted.

## **II. FACTUAL BACKGROUND**

### **A. The Village and the LPFC**

8. The Village is an Illinois municipality pursuant to the 1970 Illinois Constitution. Op. at 1. In 2003, the Village passed Ordinance No. 5351 (the “Ordinance”). *Id.* The Ordinance provided for the Village’s incorporation of LPFC as an Illinois not-for-profit corporation. *Id.* Through the Ordinance, the Village also approved LPFC’s articles of incorporation and by-laws and its initial slate of directors. *Id.* at 1-2.

9. The Village formed LPFC for the sole purpose of acting on behalf of the Village in financing, securing a location and constructing a convention hall and hotel facility (the “Project”) within the Village. *Id.* at 2. The Ordinance states that “providing for the financing, constructing and equipping of such convention hall and hotel facilities by the [L]PFC is in the public interest of the citizens of [the] Village and it is a proper public purpose in relation to which the President and Board of Trustees agree to cooperate with the [L]PFC and to assist it in fulfilling the requirements of all agencies of the federal, state and local governments.” *Id.* at 3.

10. The LPFC is a public-facilities corporation under the Municipal Code. *Id.* at 2, 4, 8. The LPFC’s articles of incorporation provide that it “is organized exclusively for the promotion of social welfare and for not-for-profit purposes and to assist the Village of Lombard in its essential government purposes.” *Id.* at 8. Moreover, its corporate by-laws provide for the Village to appoint the LPFC’s directors, who serve at the Village’s pleasure and may be removed with or without cause by a majority vote of the Village president and its board of trustees. *Id.* at

9. Similarly, the LPFC's officers may be removed with or without cause by the Village president and its board of trustees. *Id.*

11. The Village incorporated the LPFC as a separate entity because the Village was not authorized to borrow as much money as it needed to complete the Project. *Id.* at 2. The Ordinance authorized the LPFC to issue, sell and deliver bonds, encumber any real property or equipment acquired by it for the purpose of financing the construction and equipping of the Project, and enter into contracts for the sale of bonds and the construction and acquisition of the Project. *Id.* at 3. Upon redemption or retirement of LPFC's bonds, the Ordinance required LPFC to transfer title to the Project to the Village, free and clear of any and all liens and encumbrances thereon. *Id.* at 3.

12. In accordance with the Ordinance, LPFC financed its acquisition and improvement of the Project by issuing tax-exempt governmental bonds (the "Bonds") in the aggregate principal amount of \$183,710,000. *Id.* at 6-7. LPFC had the ability to issue the Bonds on a tax-exempt basis because, as stated to prospective bond investors, LPFC "constitutes an instrumentality of the Village for federal tax law purposes." *Id.* at 7. Lord Abbett is one of those investors, and it holds outstanding A-1 Bonds in the aggregate original principal amount of \$8,500,000.

**B. The LPFC's Bankruptcy Case and the Motions To Dismiss**

13. On July 28, 2017, the LPFC filed its voluntary petition for chapter 11 relief and thereby commenced the Bankruptcy Case. Within a week of the filing, Lord Abbett and the Office of the United States Trustee filed their dismissal motions on the grounds that the LPFC was a governmental unit and ineligible to be a chapter 11 debtor. *See* Bankr. ECF Nos. 34, 40. The LPFC and its bond insurer filed objections to the dismissal motions (*see* Bankr. ECF Nos.

121, 123), and other LPFC creditors filed joinders on both sides of the dispute. *See* Bankr. ECF Nos. 124, 129, 164.

14. On December 6, 2017, the bankruptcy court entered orders denying the motions to dismiss the Bankruptcy Case. *See* Bankr. ECF Nos. 259, 260. As set forth in the Opinion, the bankruptcy court denied the motions on the primary basis that the Village was not “actively engaged in running or managing the Debtor’s business operations.” *See* Op. at 1. The bankruptcy court also found that the movants had “failed to show that the Debtor is not a separate entity [from the Village] for purposes of eligibility to be a debtor under chapter 11 of the Bankruptcy Code.” *See* Op. at 6-7.<sup>2</sup>

### III. QUESTION PRESENTED ON APPEAL

15. The Bankruptcy Code defines “governmental unit” to include an “instrumentality” of a municipality. *See* 11 U.S.C. § 101(27). The Municipal Code provides for Illinois municipalities to incorporate and control “public-facilities corporations,” which exercise specified municipal powers and assist the municipalities they serve in their “essential governmental purposes.” *See* 65 ILCS 5/11-65-10(b). Do Illinois public-facilities corporations constitute instrumentalities of their municipalities within the meaning of the Bankruptcy Code’s definition of governmental unit?

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<sup>2</sup> In making this finding, the bankruptcy court relied upon an Illinois Appellate Court case (*Lombard Pub. Facilities Corp. v. Dep’t of Revenue*, 378 Ill. App. 3d 921, 929 (2d Dist. 2008)) that arose from a 2005 lawsuit that the LPFC brought over its qualifications for a tax exemption as a “government body” under section 2-5(11) of the Illinois Retailers’ Tax Act (35 ILCS 120/2-5(11)). *See* Complaint for Administrative Review, *Lombard Pub. Facilities Corp. v. Illinois Dep’t of Revenue*, No. 2005MR001505, 2005 WL 6203446 (Dupage Cty. Cir. Ct. Dec. 12, 2005). In contrast to the Bankruptcy Code’s definition of “governmental unit” under § 101(27), the Retailers Tax Act exemption only applied to “governmental bodies, and not agents or instrumentalities thereof.” *See Lombard Pub. Facilities Corp.*, 378 Ill. App. 3d at 930. Consequently, LPFC failed to qualify for the exemption. *Id.* However, the outcome became moot after the Village successfully lobbied the Illinois General Assembly to amend the Municipal Code over the Governor’s veto in order to authorize public-facilities corporations, specifically recognize them as business agents of the municipalities they serve, and grant them tax exempt status. *See* 2007 Ill. Legis. Serv. P.A. 95-672 (S.B. 735) (West); Ill. S. Tran. 2007 Reg. Sess. No. 102 at 10 of 22 (discussion of Senate Bill 735).

#### **IV. REASONS WHY LEAVE TO APPEAL SHOULD BE GRANTED**

16. The district court may accept appeals from interlocutory orders of the bankruptcy court “with leave of the [district] court.” *See* 28 U.S.C. § 158(a)(3). The district court has broad discretion in determining whether to exercise jurisdiction over interlocutory appeals from the bankruptcy court. *See Capen Wholesale, Inc. v. Michel (In re Capen Wholesale, Inc.)*, 184 B.R. 547, 549 (N.D. Ill. 1995). This discretion provides a “‘useful safety valve [] for promptly correcting serious errors and addressing important legal questions.’” *Wolf v. FirstMerit Bank, N.A.*, 535 B.R. 772, 775 (N.D. Ill. 2015) (quoting *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1696 (2015)).

17. Because § 158(a)(3) of the Judicial Code is silent on the question of how a district court’s discretion is to be exercised on interlocutory appeals from the bankruptcy court, district courts often look to the interlocutory appeal standard from § 1292(b). *Wolf*, 535 B.R. at 775. Under that standard, district courts consider leave for an interlocutory appeal on the basis of the following four criteria: (1) there must be a question of law; (2) it must be controlling; (3) it must be contestable; and (4) its resolution must promise to speed up the litigation. *Id.* Each of these criteria is satisfied in Lord Abbett’s appeal from the Order.

##### **A. The Appeal Presents A Pure Question Of Law**

18. A question of law in the context of seeking leave for an interlocutory appeal means an “abstract legal issue,” such as “a question of the meaning of a statutory or constitutional provision.” *See Ahrenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674, 676-77 (7th Cir. 2000). This is a “pure question of law, something the [appellate court] could decide quickly and cleanly without having to study the record.” *See id.*

19. As set forth above, the question presented in this appeal is a pure question of law. It asks this Court to determine (1) the meaning of the term “instrumentality” as it appears in



§ 101(27) of the Bankruptcy Code, and (2) whether an Illinois public-facilities corporation operating under the Municipal Code falls within the scope of that term. That question is premised on the need for pure statutory interpretation, and it can therefore be decided without an immersion into the factual record below and without waiting for the conclusion of the Bankruptcy Case.

**B. The Appeal Presents A Controlling Question Of Law**

20. Moreover, the question is controlling. Under the interlocutory appeal standard of 28 U.S.C. § 1292(b), a question of law is considered to be controlling “‘if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so.’” *U.S. v. Moglia*, No. 02 C 6131, 2004 WL 1254128, at \*3 (N.D. Ill. June 7, 2004) (quoting *Sokaogan Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996)).

21. If Lord Abbett succeeds on the legal question of whether an Illinois public-facilities corporation such as the LPFC is an instrumentality for purposes of § 101(27)’s definition of governmental unit, then this appeal will have a profound effect on the further course of the Bankruptcy Case. As a governmental unit, the LPFC cannot be a “person” eligible for chapter 11 bankruptcy relief under § 109(d) of the Bankruptcy Code, and the Bankruptcy Case will have to be dismissed as a result. *See* 11 U.S.C. §§ 101(41), 109(d).

22. Ineligibility as a chapter 11 debtor justifies case dismissal on jurisdictional grounds, or alternatively, for “cause” pursuant to § 1112(b) of the Bankruptcy Code.<sup>3</sup> Courts

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<sup>3</sup> Section 1112(b) of the Bankruptcy Code typically governs the dismissal or conversion of a chapter 11 case:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

routinely dismiss chapter 11 cases where the debtor does not constitute a “person” as defined by § 101(41). *See, e.g., In re C-TC 9th Ave. P’ship*, 113 F.3d 1304, 1309 (2d Cir. 1997); *In re Estate of Medcare HMO*, 998 F.2d 436, 447 (7th Cir. 1993); *Hunt v. TRC Properties (In re Hunt)*, 160 B.R. 131, 135-36 (B.A.P. 9th Cir. 1993); *In re Sung Soo Rim Irrevocable Intervivos Trust*, 177 B.R. 673, 679 (Bankr. C.D. Cal. 1995).

**C. The Appeal Presents A Contestable Question Of Law**

23. A question of law is contestable when there is a substantial basis for differences of opinion. *See Capen*, 184 B.R. at 549 (citing 28 U.S.C. § 1292(b)). The question raised in this appeal certainly qualifies as contestable because it revolves around the meaning and scope of the term “instrumentality” as it is used in § 101(27)’s definition of governmental unit. And as discussed below, courts have taken different approaches in determining the meaning and scope of that term, and those different approaches have consequently led to divergent results and differences of opinion.

24. The Bankruptcy Code does not define the term “instrumentality.” *See In re Hosp. Auth. of Charlton Cnty.*, No. 12-50305, 2012 WL 2905796, at \*5 (Bankr. S.D. Ga. 2012). But when used in the context of § 101(27)’s definition of “governmental unit,” the applicable legislative history suggests that the term “instrumentality” has a broad scope that includes entities that (i) have an active relationship with a federal, territorial, state, or municipal government, and (ii) “carry out *some* governmental function.” *See TI Fed. Credit Union v. DelBonis*, 72 F.3d 921, 930-31 (1st Cir. 1995) (emphasis added).

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11 U.S.C. § 1112(b). Since a governmental unit is not a “person” and therefore is not eligible for relief under chapter 7 or chapter 11, dismissal is the only alternative in the chapter 11 case of a governmental unit once the requisite “cause” has been established under § 1112(b).

25. Therefore, in the absence of an express definition for “instrumentality,” several courts have anchored their analyses of § 101(27) in its legislative history, and they have consequently extended a broad scope to the term. *See id.* (federal credit union was instrumentality and governmental unit under § 101(27)); *In re N. Mariana Islands Ret. Fund*, No. 12-00003, 2012 WL 8654317, at \*2 (D. N. Mar. I. 2012) (retirement fund was instrumentality and governmental unit under § 101(27)). *See also In re Oksentowicz*, 314 B.R. 638, 639-42 (Bankr. E.D. Mich. 2004) (privately owned apartment complex was governmental unit under § 101(27)). *Cf. Charlton Cnty.*, 2012 WL 2905796, at \*\*5-6 (finding § 101(27)’s legislative history to be vague but nevertheless concluding that hospital authority was instrumentality and governmental unit under § 101(27)).

26. On the other hand, the court in *In re Las Vegas Monorail Co.*, 429 B.R. 770 (Bankr. D. Nev. 2010), took a different approach to the question, and it concluded with a much more restrictive view of the term “instrumentality.” In *Monorail*, a creditor moved to dismiss a chapter 11 case on the grounds that the debtor – a monorail operator – was a municipality as defined by § 101(40) of the Bankruptcy Code and therefore ineligible to file anything other than a chapter 9 bankruptcy case. *See Monorail*, 429 B.R. at 774. In denying the motion and permitting the debtor to proceed in chapter 11, the *Monorail* court barely discussed § 101(27), and it did not devote a single word to § 101(27)’s legislative history. *See Monorail*, 429 B.R. at 775. Instead, the court’s focus turned almost immediately and entirely to the definition of municipality under § 101(40), the legislative history of chapter 9, and the restrictive scope of the term “instrumentality” when used in the context of § 101(40). *See id.* at 777 (“[A]n examination of the historical understanding of Chapter 9 eligibility can help inform the present meaning of ‘municipality’ in Section 101(40).”).

27. After completing its analysis, the *Monorail* court determined that the debtor came up short of having “sufficient municipal qualities to make [it] a municipality.” *See id.* at 800. The *Monorail* decision concludes by emphasizing the restrictive nature of chapter 9 eligibility and the consequent uniqueness of municipalities as State instrumentalities for purposes of § 101(40):

Chapter 9 is a bankruptcy remedy restricted to municipalities. As used in the Bankruptcy Code, this term includes instrumentalities of the State. Ambac contends that LVMC is such an instrumentality, contending that the level of control held and exercised by the State is sufficient for categorization under recent bankruptcy caselaw and tax law.

Instrumentalities under Chapter 9, however, are unique, and can be understood only by an examination of the history of Chapter 9 eligibility. That examination reveals a concern not with regulation of matters of public interest, but a concern with the separateness and sovereignty of States, as exemplified through laws affecting traditional public functions and the public fisc.

*Id.* In its ruling below in this case, the bankruptcy court cited *Monorail* and its restrictive view of the term “instrumentality” with approval. *See Op.* at 19.

28. However, given the *Monorail* court’s preoccupation with the definition of municipality in the context of chapter 9 eligibility, other courts have found it to have limited utility in the context of a § 101(27) dispute over a debtor’s status as a mere instrumentality of a municipality. *See N. Mariana Islands*, 2012 WL 8654317, at \*3; *Charlton Cnty.*, 2012 WL 2905796, at \*6. After all, “[t]he definition of ‘governmental unit’ [in § 101(27)] is broader than the definition of ‘municipality’ [in § 101(40)].” *Charlton Cnty.*, 2012 WL 2905796, at \*6. “If ‘instrumentality’ means exactly the same thing in both definitions, absurd results would follow.” *N. Mariana Islands*, 2012 WL 8654317, at \*3. The *N. Mariana Islands* court explained as follows:

As the Las Vegas Monorail court emphasized, many English words have multiple meanings; one cannot assume that the same word always has the same meaning regardless of the context. . . . Here, the difference in context is important. . . .

Most people would agree that a state police force is an “instrumentality” of the state government and therefore is a “governmental unit.” Most people would also agree that a state police force is not a “municipality” under any reasonable definition of that word, even though it is an “instrumentality” of the state. In other words, since every “instrumentality of . . . a State” is a “governmental unit,” but not every “instrumentality of a State” is a “municipality,” the word “instrumentality” must have a different meaning in the two contexts.

*Id.*

29. As the decisions in *N. Mariana Islands* and *Monorail* indicate, the Bankruptcy Code’s omission of a specific definition of the term “instrumentality” has created a substantial basis for differences of opinion over how that term should be construed and how broadly it should be extended for purposes of determining a debtor’s chapter 11 eligibility. For that reason, the legal question presented in this appeal is contestable, and leave to appeal should be permitted to obtain an answer.

**D. A Successful Appeal Will Speed The Termination Of The Bankruptcy Case**

30. The final criterion under consideration when determining a request for an interlocutory appeal is whether it may “materially advance the ultimate determination of the litigation.” *Moglia*, 2004 WL 1254128, at \*3 (quoting 28 U.S.C. § 1292(b)). This criterion is interpreted broadly in the context of a bankruptcy case. *See, e.g., Wolf*, 535 B.R. at 776 (granting leave to appeal where resolution of the issue would “move the case forward”); *See Branham Corp. v. Newland Resources, LLC*, No. 1:05cv0288-JDT-TAB, 2005 WL 1115856, at \*3 (S.D. Ind. March 30, 2005 (Tinder, J.) (granting leave to appeal where its resolution “may fundamentally alter the manner in which the bankruptcy case proceeds from this point forward”).

31. This criterion is satisfied here because this appeal will certainly advance the ultimate termination of the Bankruptcy Case if Lord Abbett succeeds on the question presented. As stated above, if this Court determines that an Illinois public-facilities corporation constitutes an instrumentality for purposes of bankruptcy eligibility, the Bankruptcy Case will effectively be

over. The LPFC will be unable to proceed in bankruptcy, and no further litigation in the Bankruptcy Case will be necessary. This Motion should be approved accordingly.

### **III. CONCLUSION**

WHEREFORE, Lord Abbett requests that the entry of an order: (i) granting this Motion; (ii) permitting Lord Abbett to appeal from the Order on an interlocutory basis; and (iii) providing such other and further relief as is just and to which Lord Abbett may be entitled under the circumstances.

Respectfully submitted,

Lord Abbett Municipal Income Fund,  
Inc. – Lord Abbett High Yield  
Municipal Bond Fund

Dated: December 20, 2017

By: /s/ Peter J. Roberts  
One of its attorneys

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# EXHIBIT 1

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	)	Chapter 11
	)	
Lombard Public Facilities Corporation,	)	Case No. 17 B 22517
	)	
Debtor.	)	Judge Jacqueline P. Cox

**Order Denying Motion to Dismiss (Dkt. No. 34)**

The Motion to Dismiss this Chapter 11 case filed by Lord Abbett Municipal Income Fund, Inc. - Lord Abbett High Yield Municipal Bond Fund, joined by Mid-America Hotel Partners, L.L.C. and Subordinated Securities, L.L.C., is denied for the reasons noted in this court's December 6, 2017 Memorandum Opinion.

**Date: December 6, 2017**

**ENTERED:**

*Jacqueline P. Cox*

*J. Cox*

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**Jacqueline P. Cox  
United States Bankruptcy Judge**



# EXHIBIT 2

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	)	Chapter 11
	)	
Lombard Public Facilities Corporation,	)	Case No. 17 B 22517
	)	
Debtor.	)	Judge Jacqueline P. Cox

**Amended Memorandum Opinion on Motions to Dismiss (Dkt. Nos. 34 and 40)**

**Introduction**

Lord Abbett Municipal Income Fund, Inc. - Lord Abbett High Yield Municipal Bond Fund (“Lord Abbett”) and United States Trustee Patrick Layng (“U.S. Trustee”) separately seek the dismissal of this bankruptcy case on the basis that the Debtor, the Lombard Public Facilities Corporation (“LPFC” or the “Debtor”), is ineligible to be a debtor under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”), because it is a governmental unit. Mid-America Hotel Partners, L.L.C. and Subordinated Securities, L.L.C. have joined the Motions to Dismiss. Joinder, Docket No. 164. Because the court finds that the Village of Lombard is not actively engaged in running or managing the Debtor’s business operations, the Motions to Dismiss will be denied.

The Village of Lombard (the “Village”) is an Illinois municipality pursuant to the 1970 Illinois Constitution. Article VII, Section 7. In 2003 the Village passed Ordinance No. 5351 (“Ordinance”) which provided for the Village’s incorporation of the Lombard Public Facilities Corporation as an Illinois not-for-profit corporation. The Ordinance also approved LPFC’s

Articles of Incorporation, By-Laws and its initial slate of directors. *See* Ex. A to Lord Abbett's Mot. to Dismiss, Docket No. 34 - Ex. A - Articles of Incorporation; Ex. B - By-Laws and Ex. C - Ordinance 5351.

The Village formed the LPFC "for the sole purpose of acting on behalf of the Village in financing, securing a location and constructing a convention hall and hotel facility within the Village." *See Lombard Public Facilities Corp. v. Illinois Dep't of Revenue*, No. 2005MR001505, 2005 WL 6203446, at ¶ 2 (Dupage Cty. Cir. Ct. Dec. 12, 2005). The Village incorporated the Debtor as a separate entity because it was not authorized to borrow as much money as it needed to complete the Project. Public facilities corporations are to be a "business agent of the municipality" to acquire rights and property for "municipal convention hall purposes." 65 ILCS 5/11-65-10(a). A public facilities corporation shall assist the municipality it serves in its essential governmental purposes. 65 ILCS 5/11-65-10(b). Control is to be maintained by the municipality by appointing, removing and replacing board directors of the public facilities corporation and by having title transferred to it upon retirement of any bonds or other debt instruments issued by it in connection with its development. 65 ILCS 5/11-65-10(c).

The By-Laws made the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2004)), the State Gift Ban Act (5 ILCS 425/1 *et seq.* (West 2003)) and the conflict of interest statute (50 ILCS 105/3 (West 2004)) applicable to the Debtor. Is this enough to subject a private entity to those laws?

Ordinance 5351 states that "providing for the financing, constructing and equipping of such convention hall and hotel facilities by the [L]PFC is in the public interest of the citizens of this Village and it is a proper public purpose in relation to which the President and Board of

Trustees agree to cooperate with the [L]PFC and to assist it in fulfilling the requirements of all agencies of the federal, state and local governments.” Ordinance at § 3. It authorized LPFC to issue, sell and deliver bonds, encumber any real property or equipment acquired by it for the purpose of financing the construction and equipping of the hotel and convention center, (the “Project”), and to enter into contracts for the sale of bonds and the construction and acquisition of the Project. Upon redemption and retirement of LPFC’s bonds, the Ordinance provides that the Village will accept from [L]PFC title to the Project free and clear of any and all liens and encumbrances thereon. Ordinance at § 5. The parties seeking to dismiss this bankruptcy case characterize this provision as requiring LPFC to transfer title of the Project to the Village upon redemption and retirement of the bonds. Will the Village accept title to the Debtor’s property if it later becomes subject to liens before redemption or retirement of the bonds? The court doubts that the Village will accept transfer of title under those circumstances, incurring secured debt.

The Village’s taxing power and full faith and credit were not pledged as security for any of the bonds. *Lombard Public Facilities Corp. v. Dept. of Revenue*, 378 Ill. App. 3d 921, 924 (Ill. App. 2nd Dist. 2008). This aspect of the Project shows that the Village and Project are very separate. This lack of liability and responsibility shows that the Debtor is not the Village’s agent.

The Debtor lost its legal battles to be declared a governmental unit at the Department of Revenue and in the Circuit Court. The Appellate Court noted that the Debtor did not have authority to impose taxes, maintain a police force, provide water or sewage treatment and had not received a charter from the State of Illinois recognizing it as a governmental body. *Id.*, at 926. The Debtor’s principal acknowledged that the By-Laws required the Debtor to abide by the terms of Illinois’ Open Meetings Act (5 ILCS 120/1 *et seq.*), the State Gift Ban Act (5 ILCS 425/1 *et*

*seq.*) and the conflict of interest statute (50 ILCS 105/3) even though they did not apply to other private entities. This reflects a connection to the Village, not control of the Debtor by the Village.

That the Debtor is subject to the laws may not be enough to get a court to actually enforce them against the Debtor by those statutes' terms. A court could find that breaches of these provisions constitute breaches of contract, not actionable violations of state law as courts do when a tort defendant violates state law causing personal injury. Courts instruct juries that violations are evidence that a defendant has acted negligently. This court also questions whether the Debtor can qualify for immunity from tort liability under the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101.1. If not, the Debtor may not be a governmental unit.

In *Carroll v. Paddock*, 199 Ill. 2d 16 (2002) Justice Kilbride noted that an appellate court found that a hospital and human resources center were not local public entities under Illinois' Local Governmental and Governmental Employees Tort Immunity Act, 746 ILCS 10/1-206 because they were not publicly funded. That too is a reason to find that the Debtor is not a governmental unit; the Village did not appropriate funds to construct the Debtor's facilities and has not spent its funds to backstop the bonds, which obligation is not enforceable as the Village can disavow it by not appropriating funds to do so.

The statute under which the Debtor was organized, 65 ILCS 5/11-65-10(b), states that "a public facilities corporation means an Illinois not-for-profit corporation whose purpose is charitable and civic . . ." The Illinois Supreme Court noted in *Carroll* that the characteristics making a not-for-profit entity a charitable organization do not, without more, also qualify it as a

“local public entity” under the Tort Immunity Act, noting that the entities in issue conducted operations common to many entities in the private sector. *Carroll*, at 26. This court notes that the record does not disclose that the Debtor was operated differently than other hotels and convention centers, especially since they are operating under management agreements with Westin, a national entity well known in the industry.

The *Carroll* court also noted that private entities improve or affect the public interest but that fact alone does not transform them into public businesses. *Carroll*, at 27. “Public business is the business of government and a local public entity must either be owned by or operated and controlled by a local governmental unit.” *Id.* That Court stated that “a not-for-profit is involved in the operation of the government’s public business if and only if the not-for-profit is tightly enmeshed with government either through direct governmental ownership or operational control by a unit of local government.” *Id.*

In the Debtor’s matter the Illinois Appellate Court ruled that it was not an agent or instrumentality of a local government eligible for an exemption from the Retailers’ Occupation Tax Act as a governmental body. That Court noted that where corporations create separate entities and “receive economic benefits therefrom, they will not be permitted to disregard the maintenance of separate corporate identities.” *Lombard Pub. Facilities Corp. v. Dep’t of Revenue*, 378 Ill. App. 3d 921, 933 (2d Dist. 2008) (quoting *Superior Coal v. Dep’t. of Finance*, 377 Ill. 282 (1941)). The Appellate Court ruled that the Village would not be allowed to avoid the Debtor’s existence as a separate entity to avoid a sales tax burden. This court finds that Lord Abbett, Mid-America Hotel Partners, L.L.C., Subordinated Securities, L.L.C. and the U.S. Trustee have failed to show that the Debtor is not a separate entity for purposes of eligibility to

be a debtor under chapter 11 of the Bankruptcy Code. The Debtor was incorporated as a separate entity whose operations are separate from the Village's.

The Village may one day become the owner of the Project if the bonds get paid. This court agrees with the Appellate Court, however, that a "future benefit is merely a future expectancy," not an indicia of ownership necessary to find that the Debtor is a unit of government. *Id.* at 934.

This court agrees with the Appellate Court's findings that the Debtor was not organized as an agency or branch of the Village, that it did not perform functions necessary to maintain the Village's existence and that while Village employees were appointed to the Debtor's board, corporate meetings were conducted separate from Village meetings and the board had to get Village approval for limited activities. "Overall, the Village was not dependent upon LPFC for its governmental activities, and LPFC was also not dependent on the Village for its day-to-day project management activities." *Id.* at 935.

### **Tax/Funding**

The Debtor financed its acquisition and build-out of the Project by issuing the following series of tax-exempt governmental bonds: (a) the \$63,915,000 original principal amount Lombard Public Facilities Corporation Conference Center and Hotel First Tier Revenue Bonds, Series 2005A-1 (the "A-1 Bonds"); (b) the \$53,995,000 original principal amount Lombard Public Facilities Corporation Conference Center and Hotel First Tier Revenue Bonds, Series 2005A-2 (the "A-2 Bonds"); (c) the \$43,340,000 original principal amount Lombard Public Facilities Corporation Conference Center and Hotel Second Tier Revenue Bonds, Series 2005B (the "B Bonds") and (d) the \$22,460,000 original principal amount Lombard Public Facilities

Corporation Conference Center and Hotel Third Tier Revenue Bonds, Series 2005C-1, Series 2005C-2, and Series 2005C-3 (the “C Bonds” and, together with the A-1 Bonds, the A-2 Bonds and the B Bonds, the “Bonds”). The Debtor was able to issue the Bonds on a tax-exempt basis because, as stated in its Official Statement to prospective bond investors (“Official Statement”), LPFC “constitutes an instrumentality of the Village for federal tax purposes.” Official Statement at I. Docket 34, Ex. D. The Debtor stated in the tax appeal that “[t]he LPFC acts as an agency or instrumentality of the Village.” 2005 WL 6203446, at ¶ 19. Should the Debtor be allowed to say otherwise herein? This query will be answered later. The court notes that the Village is not an obligor on the debt in issue, contributing to the finding that the Village does not actively operate or manage the Debtor’s operations.

In the Debtor’s 2003 application for exemption from the Illinois Retailers’ Occupation Tax Act it alleged that its purchases were made by the Village, a governing body. The Illinois Department of Revenue denied the application. In the Debtor’s complaint seeking review of that decision it admitted that it was incorporated for the sole purpose of securing a location for and constructing the Project; that net income would be received by the Village; title would vest in the Village for no consideration upon redemption or retirement of the bonds; that it was the Village’s alter ego; that it was formed by the Village to perform essential government purposes and that all purchases made by the Debtor in furtherance of the construction of the Project were made on behalf of the Village, the ultimate recipient of the benefits of the Project. Ex. B to U.S. Trustee’s Mot. to Dismiss, Docket No. 40. p. 5. Compl. for Administrative Review, *Lombard*, 2005 WL 6203446, at ¶ 2.



The Debtor's Articles of Incorporation state that LPFC "is organized exclusively for the promotion of social welfare and for not-for-profit purposes and to assist the Village of Lombard in its essential government purposes." Articles of Incorporation at 5(a). That being said, however, the court finds that the Debtor was organized to strengthen the Village's economic base, not to provide essential government services such as police, fire and health care services.

Lord Abbett points out that according to Illinois law as a public facilities corporation, the Debtor is subject to the Village's control. *See* 65 ILCS 5/11-65-10(c) ("The municipality shall retain control of the public facilities corporation . . ."). Mot. to Dismiss, Docket No. 34, p.6. Control has to be accomplished, according to Illinois law, "by means of the municipality's expressed legal right, set forth in the articles of incorporation of the public-facilities corporation, to appoint, remove and replace the members of the board of directors of the public-facilities corporation." *Id.* The Village, however, does not control the Debtor. It appoints its directors who, according to the record herein, have acted to further the Debtor's purposes to operate a profitable hotel and convention center. That may be because the Debtor's interests and the Village's interests are aligned.

Another issue is the Villages's financial statements. In accord with Government Accounting Standards requirements the Village reports the Debtor's financial performance as a "component unit" on its financial reports. The U.S. Trustee points out that although they are legally separate, as a "component unit," the Village is financially accountable for the Debtor, subject to certain conditions. The most important condition, of course, is the backstop condition that the Village pays only if it chooses to appropriate funds to do so. That does not make the Village financially accountable for the Debtor. Because payment by the Village is optional, the

Debtor is connected to, but not controlled by the Village.

Pursuant to the Tax Rebate Agreement entered into between the Village and the Debtor, the Debtor is to transfer title of the hotel and convention facility to the Village upon the earlier of the redemption or retirement of the bonds issued by the Debtor for the construction and operation of the hotel and convention facility. In addition, the Debtor may not sell, transfer or convey title to the Project to a third party without the prior consent of the Village's President and Board of Trustees, with consent to be solely within their discretion. By-Laws, § 10.1. This provision does not weigh against the finding that the Village does not control the Debtor since the Debtor could hold title to the Project indefinitely, there being no provision requiring that title pass to the Village at a certain point in time.

The Debtor is governed by a five-member board of directors, each of whom has to be appointed by the Village President with the advice and consent of Lombard's Board of Trustees. By-Laws, §§ 4.1 and 4.2. The appointees do not have to be Village officers or employees. The Debtor's directors serve at the pleasure of the Village and may be removed with or without cause by a majority vote of the Village President and Board of Trustees. By-Laws, § 4.1. The Debtor's officers are chosen annually by the Debtor's board of directors at an annual meeting. They hold office until their successor's selection, or until such officer's resignation, death or removal. The officers may be removed with or without cause by resolution adopted by the Village President and its Board of Trustees. By-Laws, §§ 5.2, 5.3. The court notes that the directors are Village employees. However, the directors do not operate or manage the Project. The Project has an asset manager, and separate hotel and restaurant managers who report to the asset manager, not to the Village. The Debtor has no employees.

The Village and the Debtor entered into a Tax Rebate Agreement. Docket No. 34, Ex. E to Mot. to Dismiss. It provides that the Village will refund to the Debtor certain state and local taxes collected by the Village in connection with the Project. Tax Rebate Agreement, § V(A), (c) at p. 6.<sup>1</sup> That agreement also provides for the Village to backstop certain of the Debtor's debt service obligations on the bonds, subject to the requirement of a prior appropriation. Tax Rebate Agreement, § V(D)-(E) at p. 7. That agreement also committed the Village, subject to the requirement of a prior appropriation, and other conditions, to provide a Supplemental Reserve Fund for the Series A Bonds in an annual amount of \$2 Million from its Hotel/Motel Tax Fund or from other of its funds if the bond service payment could not be paid from the Project's revenues. These provisions do not burden the Village; it can choose to not appropriate funds to make these payments. The Village is involved with this Project, however, it does so from a distance, without binding financial obligations.

### **Law**

An entity is eligible for bankruptcy relief under chapter 11 of the Bankruptcy Code if it is a person that may be a debtor under chapter 7. 11 U.S.C. § 109(d). The Code's definition of person, in relevant part, specifically excludes government units: "The term 'person' includes individual, partnership, and corporation, but does not include governmental unit . . ." 11 U.S.C. § 101(41). The term governmental unit is defined as: "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States ..., a State, a Commonwealth, a District, a Territory, a municipality, or a foreign

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<sup>1</sup> The tax rebate feature of the arrangement may be similar to what states and municipalities routinely offer various manufacturers to attract their business.

state; or other foreign or domestic government.” 11 U.S.C. § 101(27).

Section 101 (27)’s legislative history makes clear that the Code defines governmental unit broadly, but that the relationship must be an active one in which the department, agency, or instrumentality is actually carrying out some governmental function. H.R. Rep. No. 595, 95th Cong, 1st Sess 311 (1977). The Debtor does not carry out governmental functions; it is a commercial enterprise which competes with others in the hotel and convention center industry.

The movants argue that the Debtor is the Village’s instrumentality and for that reason is ineligible for chapter 11 bankruptcy relief. The court finds that it is not an instrumentality of the Village. Section 1112(b) of the Bankruptcy Code allows for the dismissal of a case for “cause.” A debtor’s ineligibility to be a debtor may be “cause” to dismiss a case. *In re Borges*, 440 B.R. 551, 562 (Bankr. D.N.M. 2010). A debtor bears the burden of establishing its eligibility to be a debtor under Code section 109. *In re Gen. Growth Properties, Inc.*, 409 B.R. 43, 70 (Bankr. S.D.N.Y. 2009). The Debtor has carried this burden.

In *In re Estate of Medicare HMO*, 998 F.2d 436, 440 (7th Cir. 1993) the Seventh Circuit held that “[w]hen interpreting the Bankruptcy Code, as with any other statute, a court must look first to the statutory language.” That Court also noted that “in defining categories excluded from federal bankruptcy protection, courts are to look to the law of the state of incorporation of the entity in question.” *Id.* Illinois law requires that the governments that set up public facilities corporations control them, specifically by appointing their directors. The Village appoints the Debtor’s directors, however, it does not control its operations or management.

In *TI Federal Credit Union v. DelBonis*, 72 F.3d 921, 937-38 (1st Cir. 1995) the First Circuit held that federal credit unions qualified as government units within the meaning of 11

U.S.C. § 523(a)(8), which excepted educational loans extended by government lenders from discharge. The Bankruptcy Code does not define instrumentality. However, this court agrees with Lord Abbett’s position that when used in the context of section 101(27)’s definition of governmental unit, it should cover entities that have an active relationship with federal, state or municipal governments and that carry out governmental functions. Lord Abbett’s reliance on the *DelBonis*, *Northern Mariana Islands* and *Charlton County* cases, however, is not persuasive.

In *DelBonis* the First Circuit, in holding that a credit union was a governmental unit in the context of a student loan discharge exception, noted that such entities were created by Congress to perform significant governmental purposes of “broadening the availability of credit in the United States [.]” to invest in governmental obligations, invest in securities and serve as fiscal agents of the United States and depositories for public funds. Such functions were regarded as important governmental functions by other courts. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 211 (1921); *U.S. v. Michigan*, 851 F.2d 803, 806 (6th Cir. 1988) (“Federal credit unions also perform another, though somewhat less significant, federal function. Under 12 U.S.C. § 1767, federal credit unions are authorized to act as fiscal agents of the United States and as depositories of public money.” (internal citation omitted)). Operating a hotel and convention center, however, is not a government function. Generating and encouraging economic activity is worthwhile, but it is not a core government function.

In *In re Northern Mariana Islands Retirement Fund*, 2012 WL 8654317 (D.C.N. Mariana Islands 2012) the Court held that a retirement fund was a governmental unit ineligible for bankruptcy protection under 11 U.S.C. § 109(d). That Court noted that the legislative history of section 101(27) defines governmental unit in the broadest sense but noted that a department,

agency, or instrumentality did not include an entity that owes its existence to state action, such as the granting of a charter or license but that has no other connection with a state or local government or the federal government. The relationship must be an active one in which the department, agency, or instrumentality actually carries out some government function.

H.R.Rep. No. 595, 95th Cong. 311 (1977); S. Rep. No. 989, 95th Cong. 24 (1978). The Debtor does not actively carry out a government function of the Village. It is a commercial enterprise, in competition with other hotels and convention centers. The State of Illinois issued the Debtor's corporate charter, not the Village. The Debtor's business actively and indirectly impacts the Village's economy by providing jobs and broadening its economic base. Village officers and employees do not operate the hotel or convention center. The Village appoints its directors and certain representatives who are alleged to be actively engaged in the Debtor's business in light of their efforts to obtain a water recycling system, deal with a wind tunnel issue and obtain larger dinner plates for one of its restaurants. These are minor matters that do not exhibit the kind of control necessary to show that the Debtor is an instrumentality of the Village sufficient to exclude it from bankruptcy protection by section 101(41).

In *U.S. Trustee v. Hospital Authority of Charlton County (In re Hospital Authority of Charlton County)*, 2012 WL 2905796 (Bankr. S.D. Ga. 2012) a bankruptcy court ruled that a hospital authority founded under Georgia law that authorized its creation and operation, was ineligible for bankruptcy protection under Chapter 9 of the Bankruptcy Code pursuant to 11 U.S.C. § 109(c)(2) which requires that municipalities have specific authorization via state law to file a petition for relief from the payment of its debts under any federal statute. Georgia law

states that each hospital authority shall be a “public body corporate and politic.” *In re Hosp. Auth. of Charlton County*, WL 2905796, at \*1. The statute also states that every hospital authority was deemed to exercise public and essential governmental functions and noted that each authority had the following powers:

- (1) To sue and be sued;
- (2) To have a seal and alter the same;
- (3) To make and execute contracts and other instruments necessary to exercise the powers of the authority;
- (4) To acquire by purchase, lease, or otherwise and to operate projects;
- (5) To construct, reconstruct, improve, alter, and repair projects;
- (6) To sell to others, or to lease to others . . . any lands, buildings, structures or facilities . . . In the event a hospital authority undertakes to sell a hospital facility, such authority shall, prior to the execution of a contract of sale, provide reasonable public notice of such sale and provide for a public hearing to receive comments from the public concerning such sale . . .
- (7) To lease . . . for operation by others any project, provided that the authority shall have first determined that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community . . . ;

- (8) To extend credit or make loans to others for the planning, design, construction acquisition, or carrying out of any project . . .;
- (9) To acquire, accept, or retain equitable interests, security interests or other interests in any property, real or personal, by mortgage, assignment, security agreement, pledge, conveyance, contract, lien, loan agreement or other consensual transfer in order to secure the repayment of any moneys loaned or credit extended by the authority;
- (10) To establish rates and charges for the services and use of its facilities;
- (11) To accept gifts, and devises of property;
- (12) To acquire by exercise of the right of eminent domain property essential to the purposes of the authority;
- (13) To sell or lease within 20 years after the completion of construction of properties or facilities operated by the hospital authority where grants of financial assistance have been received from federal or state governments, after such action has first been approved by the department in writing;
- (14) To exchange, transfer, assign, pledge, mortgage or dispose of real or personal property or interest therein;
- (15) To mortgage, pledge, or assign its revenue, income, tolls, charges or fees received by the authority;
- (16) To issue revenue anticipation certificates or other evidences



of indebtedness for the purpose of providing funds to carry out the duties of the authority; provided, however, that the maturity of any such indebtedness shall not extend for more than 40 years.;

(17) To borrow money for any corporate purposes;

(18) To appoint officers, agents and employees;

(19) To make use of any facilities afforded by the federal government or any agency or instrumentality thereof;

(20) To receive from governing bodies of political subdivisions issuing the same, proceeds from the sale of general obligation bonds or other county obligations issued for hospital authority purposes;

(21) To exercise any or all powers now or hereafter possessed by private corporations performing similar functions;

(22) To make plans for unmet needs of their respective communities;

(23) To contract for the management and operation of the project by a professional hospital or medical facilities consultant or management firm . . . .

(24) To provide management, consulting, and operating services . . . ;

(25) To provide financial assistance to individuals for the purpose of obtaining educational training in nursing or another health care

field if such individuals are employed by, or are on an authorized leave of absence from, such authority or have committed to be employed by such authority upon completion of such educational training; . . .;

(26) To exercise the same powers granted to joint authorities in subsection (f) of Code Section 31-7-72; and

(27) To form and operate, either directly or indirectly, one or more networks of hospitals, physicians, and other health care providers and to arrange for the provision of health care services through such networks . . . .

O.C.G.A. § 31-7-75.

*Charlton County*, at 2-3.

Hospital authorities were prohibited from operating or constructing projects for profit and the interest on their revenue anticipation certificates were exempt from all taxes. *Id.*

Hospital authorities did not have the power to tax but they could contract with cities and counties to provide medical care to indigent persons. Those payments were authorized to be made from their general fund or by levying an ad valorem tax. Dissolution of a hospital authority required joint action of the authority's board and the county's governing body. Upon dissolution a hospital authority cannot, without specific legislation, convey its property to a private person or entity. *Id.*

The Hospital Authority of Charlton County filed a petition for chapter 9 bankruptcy relief on April 30, 2012. That region's U.S. Trustee sought its dismissal soon thereafter. The Hospital

Authority filed a motion to convert its case to chapter 11 of the Bankruptcy Code. The Hospital Authority conceded that its chapter 9 petition was not authorized. The Court found that the Hospital Authority could not convert to a chapter of the Bankruptcy Code unless it was eligible for relief thereunder. The case turned on whether the Hospital Authority was an ineligible governmental unit under 11 U.S.C. § § 109(d) - that only persons and entities eligible for bankruptcy relief under Chapter 7 may be a debtor under Chapter 11. Recall that 11 U.S.C. § 101(41) excludes governmental units from the definition of “person.”

The Court found that because the Hospital Authority was created by statute, could exercise eminent domain, was exempt from paying taxes and received tax revenues from the County’s general fund or from ad valorem taxes and issued tax-exempt revenue anticipation certificates, it was a governmental unit not eligible to seek bankruptcy relief. The Hospital Authority argued that it was not a governmental unit because it did not have sovereign immunity. The Court noted court rulings that certain entities were municipal or governmental units even though they did not have sovereign immunity. *Crosby v. Hospital Authority of Valdosta and Lowndes County*, 93 F. 3d 1515, 1519-20 (11th Cir. 1996). The Court held that the Charlton County Hospital Authority was ineligible for chapter 9 bankruptcy relief because the state of Georgia had not authorized such and that it was ineligible for chapter 11 relief because it was a governmental unit.

#### **Debtor’s Prior Statements**

Statements made previously before taxing authorities are not binding. This court is not persuaded by the statements made in the 2003 application for exemption from the Illinois Retailers’ Occupation Tax Act.

Debtor appropriately notes the analysis made by the *Monorail* Court in determining whether a debtor is a governmental instrumentality. Step one of the analysis involves determining whether the entity in question has any traditional governmental attributes or engages in traditional government functions. *In re Las Vegas Monorail Co.*, 429 B.R. 770, 788 (Bankr. D. Nev. 2010). The court must next focus on the extent to which the State controls the implementation of the functions and attributes determined to be traditionally governmental. *Id.* at 789. In addition, consideration is given to the State's categorization of the entity in question. Although this factor is not decisive, it is informative. *Id.* Although the Debtor made statements before the taxing authorities claiming that they were indeed an instrumentality, *Monorail* informs that, "it is not uncommon for the same word or phrase to have different meanings in different codes." *Id.* at 790. The Court noted that the *Monorail* debtor did not make its representation before the taxing administration with an acknowledgment that it was ineligible for chapter 11. It made its representation with an interest that the bonds remain free from taxation. *Id.* The same holds true for the statements made by LPFC in its 2003 effort to obtain an exemption from a tax.

The *Monorail* Court noted that the tax code definition of a governmental instrumentality is not the same as the Bankruptcy Code's: "[r]egardless of treatment under the tax code, however, the instrumentality test under the Bankruptcy Code is separate and independent." *Monorail*, at 795.

## Conclusion

The Motions to Dismiss were denied on December 6, 2017; those orders stand.

This Amended Memorandum Opinion constitutes this court's findings of fact and conclusions of law.

Date: December 18, 2017

ENTERED:

*Jacqueline P. Cox*  
*J. Cox*

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Jacqueline P. Cox  
United States Bankruptcy Judge