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

In re:	)	Chapter 11
	)	
LOMBARD PUBLIC FACILITIES CORPORATION,	)	Case No. 17-22517
	)	
	)	Honorable Jacqueline P. Cox
Debtor.	)	
	)	**Status Hearing Date and Time:**
	)	**September 19, 2017 at 10:00 a.m.**

RESPONSE OF DEBTOR IN OPPOSITION
TO MOTIONS TO DISMISS

NOW COMES Lombard Public Facilities Corporation, debtor and debtor in possession (the "**Debtor**" or "**LPFC**"), and for its response (the "**Response**") in opposition to the motions to dismiss (collectively, the "**Motions to Dismiss**") this case under sections 109(d) and 1112(b) of the Bankruptcy Code (the "**Code**") filed by Lord Abbett Municipal Income Fund, Inc. ("**Lord Abbett**") [Dkt. No. 34] (the "**Lord Abbett Motion**") and the Office of the United States Trustee (the "**UST**," and together with Lord Abbett, the "**Movants**") [Dkt. No. 40] (the "**UST Motion**"), respectfully states as follows:

I. INTRODUCTION

The Debtor is eligible to file for chapter 11 bankruptcy. It is a "person" with a place of business and property in the United States. The term "person" includes a corporation, and the Debtor is a corporation. Persons are generally eligible for chapter 7 and chapter 11.

The Movants seek to dismiss the chapter 11 case for cause, arguing that the Debtor is a "governmental unit" and thus excluded from the definition of the term "person" under the Code. The term governmental unit includes any "instrumentality" of a municipality. The Movants argue that the Debtor is an "instrumentality" of the Village of Lombard (the "**Village**") but they

ignore the most influential and comprehensive modern case interpreting the term "instrumentality" in the context of chapter 11 eligibility: *In re Las Vegas Monorail Co.*, 429 B.R. 770 (Bankr. D. Nev. 2010) (the "**Monorail Case**").

Under the Monorail Case, the bankruptcy court undertook a detailed historical analysis of the Code and applicable caselaw to formulate a three-part test for determining whether a debtor is an "instrumentality":

- Part One of the analysis focuses on whether the debtor has the typical characteristics of a municipality. Here, the Movants concede that this is not the case.

- Part Two of the analysis asks whether the debtor has a public purpose, and if so, considers the ways in which the allegedly dominant entity (here the Village) controls the debtor, particularly on a day-to-day basis. Here, the Operating Managers (as defined hereinafter) control the day-to-day operations of the Debtor, without any input from the Village. While the Village enjoys some limited forms of control —*e.g.*, rights to appoint directors, to remove officers, and to take title to certain property at a later date —each of those facts (and other forms of control) was present in the Monorail Case and found insufficient to render the debtor an instrumentality.

- Part Three of the analysis evaluates whether the debtor is deemed to be a unit of local government under applicable state law, and particularly the extent to which the debtor fits into the state's system for financially distressed public entities. Here, Illinois state law does not consider the Debtor a unit of local government, nor would it allow the Debtor to participate in its programs for financially distressed governmental entities.

The Movants argue that the Court should disregard the Monorail Case because it dealt with the term "instrumentality" in the context of section 101(40) of the Code, while this case involves the term "instrumentality" under section 101(27) of the Code. The Movants' argument—that a single term within the same statutory section has two different meanings—defies common sense and violates the most basic tenets of statutory construction.

The Movants offer no legitimate alternative to the Monorail Case. They rely on two easily distinguishable cases – one of which actually adopts the Monorail Case's analysis. They also rely heavily on factual and legal positions advanced by the Debtor in state court litigation that took place over a decade ago in an altogether different legal context. There, the Debtor attempted to argue that it was an "agent or instrumentality" of the Village for purposes of state tax law—*and lost*, at every stage of the proceeding.

The Movants attempt to portray the Debtor's positions in that case as "admissions." But Seventh Circuit law is clear: a party is not bound by the legal or factual positions it took in a prior proceeding unless it prevailed there, which the Debtor decidedly did not. Moreover, as the Monorail Case explains in detail, calling an entity an instrumentality for purposes of tax law is very different than calling it an instrumentality for purposes of bankruptcy eligibility.

Ultimately, the legal analysis and rhetoric boils down to a simple fact: the Debtor is a corporation that owns and operates a hotel and two restaurants. There is a fundamental difference between this proprietary purpose and that of an instrumentality—such as a utility, a special district, a public educational institution, a public hospital, or a conduit for government pension funds—whose purpose is to implement a traditional government function.

Because the Debtor is not an instrumentality of the Village, the Motions to Dismiss should be denied.

II. FACTS[1]

A. The Formation of the Debtor, and the Hotel and Restaurant

The Debtor is an Illinois not-for-profit corporation that was organized on October 14, 2003 by the filing of its articles of incorporation with the Illinois Secretary of State. The precursor for the Debtor's incorporation was Village Ordinance No. 5351 (the "**2003 Village Ordinance**"), adopted on September 4, 2003, which approved the formation of "a not-for-profit corporation to assist in the financing and construction of a convention hall and hotel facility." UST Mot. Ex. C.

The Debtor was formed for the purpose of financing, constructing, and equipping a conference center, hotel, restaurants, and related improvements located within the Village (collectively, the "**Project**"). The Project consists of (a) a 500-room Westin hotel with 55,500 square feet of meeting space, and (b) two restaurants, one an Italian steakhouse and the other an upscale seafood restaurant. The Project officially opened in August 2007.

The Debtor financed the Project by issuing revenue bonds (the "**Bonds**") in 2005 and 2006. The Bonds are solely payable from and secured by (a) available revenues of the Debtor, after payment of operating expenses, and (b) the assets of the Project. The issuance of the Bonds was documented by, among other things, that certain Trust Indenture dated as of August 1, 2005, by and between the Debtor and Amalgamated Bank of Chicago, an Illinois banking corporation (as subsequently amended and supplemented, the "**Indenture**"). As of July 1, 2017, the

[1] Attached to this Response are the following exhibits which provide support for the facts and the documents referenced herein: (a) **Exhibit A** - affidavit of Paul Powers, President and a Director of the Debtor (the "**Powers Affidavit**"), (b) **Exhibit B** - affidavit of Timothy Sexton, Finance Director for the Village (the "**Sexton Affidavit**"), (c) **Exhibit C** - affidavit of Michael Feigenbaum, general manager of the Hotel Manager (the "**HM Affidavit**"), (d) **Exhibit D** - affidavit of Audrey O'Kelly, general manager of the Restaurant Manager (the "**RM Affidavit**"), and (e) **Exhibit E** – a portion of the Debtor's Official Statement dated September 7, 2005 (the "**Official Statement**"). Capitalized terms not otherwise defined herein shall have the meaning set forth in the Powers Affidavit.

aggregate balance of principal and interest due under the Bonds totaled approximately $246.65 million.[2]

The Indenture provides that the Village is not liable for repayment of the Bonds. Specifically, the Indenture states:

> THE BONDS SHALL NEVER CONSTITUTE A DEBT, INDEBTEDNESS OR MULTIPLE-FISCAL YEAR DIRECT OR INDIRECT DEBT OR OTHER FINANCIAL OBLIGATION WHATSOEVER OF THE VILLAGE WITHIN THE MEANING OF ANY PROVISION OR LIMITATION OF THE ILLINOIS CONSTITUTION OR STATUTES OR ORDINANCES OF THE VILLAGE AND SHALL NOT CONSTITUTE OR GIVE RISE TO ANY PECUNIARY OBLIGATION OF THE VILLAGE OR A CHARGE AGAINST ITS GENERAL CREDIT OR TAXING POWERS.

See Indenture § 2.04, at 7-8. The Indenture also provides that the Debtor "is an independent nonprofit corporation that is separate and distinct from the Village." *Id.* § 7.36(b).

The day-to-day operations of the Project are conducted by a hotel management company (the "**Hotel Manager**") and a restaurant management company (the "**Restaurant Manager**," and together with the Hotel Manager, the "**Operating Managers**"), pursuant to a Hotel Management Agreement and a Restaurant Management Agreement, respectively (collectively, the "**Management Agreements**"). Until recently, the Debtor also engaged an Asset Manager, who was to oversee the work of the Operating Managers and report back to the Debtor pursuant to an Asset Management Agreement. Currently, the Hotel Manager has over two hundred (200) full- and part-time employees, and the Restaurant Manager has over ninety (90) full- and part-time employees.

Approximately two (2) years after the Debtor was formed, and simultaneously with the Debtor's execution of the Indenture, the Management Agreements, and other related documents, the Village and the Debtor entered into that certain Tax Rebate Agreement dated as of August 1,

[2] As is more fully set forth in the Indenture, the Bonds are broken into several series that include the A-1 Bonds, A-2 Bonds, B Bonds, and C Bonds.

2005 (the "**Tax Rebate Agreement**"), under which the Village agreed, among other things, (i) to pay up to two million dollars per year to cover annual debt service shortfalls on the A Bonds and to cover certain debt service shortfalls on the B Bonds in certain circumstances, each subject to prior appropriation approval therefor, and (ii) to rebate to the Debtor on a semi-annual basis certain taxes collected by the Village pertaining to the Project.

B. The DOR Case

In November 2003, shortly after the Debtor was formed, it applied to the Illinois Department of Revenue (the "**DOR**") for an exemption from the Illinois Retailers' Occupation Tax Act, 35 ILCS 120/1 *et seq*. The Debtor argued that its otherwise taxable purchases of goods should be tax-exempt because they were, in essence, purchases by a "governmental body." *See* 35 ILCS 120/2-5. The DOR denied the tax exemption, and the Debtor filed a complaint for administrative review in Illinois circuit court. UST Mot. Ex. A. When the circuit court affirmed the DOR's denial, the Debtor filed an appeal with the Appellate Court of Illinois. In January 2008, the appellate court issued its final ruling, holding that the Debtor was not a governmental body, and was therefore not entitled to a tax exemption. *See Lombard Pub. Facilities Corp. v. Dep't of Rev.*, 378 Ill. App. 3d 921 (2d Dist. 2008) (the "**DOR Case**").

In the DOR Case, the Debtor argued that its tax exemption arose because it was an "agent or instrumentality" of the Village. *See id*. at 930-32. The appellate court repudiated this argument, noting, among other things, that the Village "did not maintain daily control over the [Debtor's] property" and that the "Village did not funnel any of its own funds to [the Debtor]." *Id*. at 932. The appellate court concluded that, because the Village had chosen to utilize "a separate and distinct entity in order to benefit from its financing capabilities," the Village could

not later "avoid [the Debtor's] existence as a separate entity to avoid sales tax burdens." *Id*. at 934.

C. The PFC Statute

On October 11, 2007, largely in response to the position taken by the DOR in the DOR Case, the Illinois General Assembly passed legislation making a public-facilities corporation (a "**PFC**") that (a) is incorporated by a municipality and (b) owns and operates a municipal convention hall (which includes hotels and restaurants) within that municipality, exempt from certain state taxes. *See* 2007 Ill. Legis. Serv. P.A. 95-672 (S.B. 735) (codified at 65 ILCS 5/11-65-10 through 11-65-25, the "**PFC Statute**"). The PFC Statute extends the same tax exemptions to not-for-profit corporations that, like the Debtor, were formed prior to the PFC Statute's enactment. 65 ILCS 5/11-65-25.

The PFC Statute was added to the previously existing municipal-convention-hall statutes set forth in 65 ILCS 5/11-65-1 through 11-65-9, which had long permitted a municipality to own, finance, construct and operate a municipal conventional hall within its city limits (the "**Municipal Convention Hall Statute**"). To this end, the Municipal Convention Hall Statute enables municipalities to levy taxes and to exercise the power of eminent domain. 65 ILCS 5/11-65-3, 65-5. But the PFC Statute excludes those quintessentially governmental powers from the powers it confers on PFCs. 65 ILCS 5/11-65-10(a).

D. Governance and Operations of the Debtor

Ultimate control over the Debtor is exercised by its officers and directors, none of whom has been employed or otherwise compensated by the Village during their tenure with the Debtor. Powers Aff. ¶¶ 12-13, 23. At their annual meeting, the Debtor's board of directors is presented

with the Operating Managers' operating and capital budgets, which they may approve, reject, or modify as they see fit. *Id.* ¶ 15.

The Debtor has no employees. *Id.* Instead, its day-to-day operations are controlled by the Operating Managers. *Id.*; *see also* HM Aff. ¶¶ 6-8; RM Aff. ¶¶ 6-8. These tasks include, without limitation, setting rates, hiring and firing employees, procuring all supplies and services, paying Operating Expenses, maintaining the hotel and restaurants, obtaining all licenses and permits, developing marketing programs, complying with applicable laws, and maintaining books and records. HM Aff. ¶¶ 6-8; RM Aff. ¶¶ 6-8.

The Village possesses certain rights under the Debtor's by-laws (the "**By-Laws**"): (a) the right to appoint, and remove, directors; (b) the right to remove officers; (c) the right to approve or disapprove amendments to Article IV of the By-Laws[3]; (d) the right to approve or disapprove any transfer of the Project to a third party; and (e) in the event a sale of the Project to a third party is approved, the right to take title to the Project before title is transferred to the third party. Aside from the right to appoint directors and to approve changes to Article IV of the By-Laws, the Village has never exercised any of these rights. Powers Aff. ¶ 17.

Representatives of the Village have never met with the Operating Managers to discuss or give advice or direction concerning the day-to-day operations of the hotel and restaurants. HM Aff. ¶ 9; RM Aff. ¶ 9. Representatives of the Village have never pressured the Debtor's board to take any particular position concerning any matter brought before the Debtor's officers or board for approval, nor has the Debtor ever sought, or been required to seek, Village authority to take action with respect to such matters. Powers Aff. ¶ 17.

[3] Contrary to the UST's repeated assertions, the Village does not have the right to approve or disapprove "any" amendments to the By-Laws. *See* UST Mot. ¶¶ 14(c), 40(c). The Village only has the right to approve or disapprove changes to one section of the By-Laws pertaining to the Debtor's directors.

III. ARGUMENT

A. Chapter 11 Eligibility

The Debtor is eligible for relief under chapter 11 of the Code. Section 109(a) of the Code permits a person that has "a place of business or property in the United States" to be a debtor under the Code. Section 109(b) of the Code permits a person (with inapplicable exceptions) to be a debtor under chapter 7 of the Code, and section 109(d) of the Code generally permits a person eligible for chapter 7 to be a debtor under chapter 11 of the Code.

Section 101(41) of the Code defines a person as an "individual, partnership and corporation but does not include governmental unit . . . ." Here, the Debtor is an Illinois not-for-profit corporation that was organized on October 14, 2003 by the filing of its articles of incorporation with the Illinois Secretary of State. Powers Aff. ¶ 4. None of this is disputed, and thus the Debtor is clearly eligible to be a chapter 11 debtor.

The Movants seek to dismiss this Chapter 11 case for cause under section 1102 of the Code on the ground that the debtor is a governmental unit and is consequently excluded from the definition of person under section 101(41) of the Code. "Governmental unit" includes, in relevant part, "municipality" and "department, agency, or instrumentality of . . . a municipality." 11 U.S.C. § 101(27). "Municipality," in this context, means "political subdivision or public agency or instrumentality of a State." *Id*. § 101(40).

The relevant question in determining whether the Debtor is eligible for chapter 11 bankruptcy, therefore, is whether the Debtor is a "department, agency, or instrumentality of" the Village. The Movants argue specifically that the Debtor is an instrumentality of the Village. Based on recent caselaw and legislative history, however, it is clearly not.

B. The Monorail Case

In the Monorail Case, a bankruptcy court was tasked with determining whether the debtor was an instrumentality of the State of Nevada. Courts and academics alike have lauded the Monorail Case as a "comprehensive review of legislative and case authority" on the subject. *See, e.g.*, Seena Foster, *Eligibility for Chapter 9 Bankruptcy Relief, Applicable to Municipalities, Pursuant to 11 U.S.C.A. § 109(c),* 57 A.L.R. Fed. 2d 121 § 6 (2011); *see also Ky. Emps. Ret. Sys. v. Seven Cntys. Servs., Inc.*, 550 B.R. 741, 757 (W.D. Ky. 2016) (finding Monorail Case to be "instructive" and applying its three-factor test in finding that debtor was not an instrumentality), *appeal docketed,* No. 16-5644 (6th Cir. May 13, 2016).

The debtor in the Monorail Case was a Nevada not-for-profit corporation organized for the purpose of constructing and operating a public monorail system. Monorail Case, 429 B.R. at 773. A department of the State of Nevada sponsored the issuance of tax-free bonds, the proceeds of which were used by the debtor to acquire and expand the monorail system. *Id*. The bonds were to be repaid primarily from, and secured by, the debtor's net revenues; they were without recourse to the State of Nevada. *Id*. at 744. Upon dissolution of the debtor, ownership of the monorail system was to transfer to the State of Nevada. *Id*. at 794.

The moving party in the Monorail Case argued that the debtor was an instrumentality of the State of Nevada for several reasons. First, as a condition of obtaining tax-free status for the bond issuance, the debtor had signed a certification admitting that it was "an instrumentality of the State of Nevada, . . . controlled by the Governor of the State of Nevada." *Id*. at 774 (alteration in original). Second, the movant argued that the State of Nevada's "participation in strategic and high level decisions—such as budget and selection of directors—when combined with [its] residual interest in any assets" was sufficient to make the debtor an instrumentality for

tax purposes, and also sufficed to make the debtor an instrumentality for bankruptcy eligibility purposes. *Id*. at 794.

The court in the Monorail Case disagreed, holding that the debtor was not an instrumentality, and was therefore eligible for chapter 11 bankruptcy. *Id.* at 800. The court found that an admission of "instrumentality" status for tax purposes was not dispositive of the debtor's status for bankruptcy purposes, because the term has different meanings under the two legislative schemes. *Id*. at 791. And while the State of Nevada's control over the debtor was "fairly expansive," *id*. at 774 n.3, it was not the kind of "control over day-to-day activities" contemplated by the term "instrumentality" under the Code, *id*. at 788.

Much of the Monorail Case consists of a survey of earlier cases on chapter 11 eligibility and the legislative history of the Code's use of "municipality" and "instrumentality." The bankruptcy court synthesized the cases and Code history into a three-part test[4] for instrumentality status, representing each of the three "threads" of inquiry that previous courts had considered:

> Part One: Does the entity have "any of the powers typically associated with sovereignty, such as eminent domain, the taxing power or sovereign immunity"? *Id*. at 788.
>
> Part Two: Does the entity have a "public purpose," and if so, what is the "level of control exerted by the [applicable municipality, in this case the Village] (or its agreed agents) on the entity's activities in furtherance of that purpose"? *Id*.
>
> Part Three: What is the applicable state's "designation and treatment of the entity"? *Id*.

[4] The UST misleadingly characterizes the Monorail Case as "describ[ing] a typical government instrumentality" with language from a Supreme Court decision interpreting the Foreign Sovereign Immunities Act. *See* UST Mot. ¶ 30. In fact, the Monorail Case criticized this definition and merely cited it as one of the "differing uses and definitions" of the term in other statutes which "underscore[s] that no unique or canonical meaning of 'instrumentality' exists." Monorail Case, 429 B.R. at 777. The Supreme Court's description was not adopted by the court, and does not factor into any part of the three-part test.

The bankruptcy court concluded that each of these inquiries led to the conclusion that the relevant entity was not an instrumentality and thus, not a governmental unit. *Id.* at 800.

Under the Monorail Case analyses, the Debtor is undoubtedly eligible for chapter 11 relief.

1. Part 1: Powers Typically Associated with Sovereignty

In Part One of the Monorail Case analysis, the court assessed "whether the entity has any of the powers typically associated with sovereignty, such as eminent domain, the taxing power or sovereign immunity." Monorail Case, 429 B.R. at 788. In that case, "[n]o one seriously contend[ed] that [the debtor there was] a political subdivision or agency of the State… [because i]t has no power to tax, no power of eminent domain, and no sovereign immunity." *Id.* at 795.

Likewise, the Movants here do not allege that the Debtor is a political subdivision or state agency. Nor could they; the Debtor has no power to tax, no power of eminent domain, and no sovereign immunity. *See People ex rel. Toman v. Edward Hines Lumber Co.*, 385 Ill. 366, 368 (1944) (finding that power to tax must be conferred by specific legislative enactment); 735 ILCS 30/15-1-5 (limiting powers of eminent domain to enumerated entities); *In re Chi. Flood Litig.*, 176 Ill.2d 179, 191-92 (1997) (describing abolition of sovereign immunity in Illinois).

The court in the Monorail Case also noted that since the debtor was "a creature of general nonprofit corporation laws rather than of a specific legislative enactment . . . the first thread of the definition of a municipality . . . is lacking." *See* 429 B.R. at 796. The same is true here; the Debtor is an Illinois not-for-profit corporation that owes its existence, like any other such corporation, to the filing of articles of incorporation. *See* 805 ILCS 105/102.15 ("Upon the filing of articles of incorporation by the Secretary of State, the corporate existence shall begin . . . .").

Despite the ease with which the Monorail Case disposed of this issue, the Movants make two tortured attempts to argue that the Debtor is a creature of "specific legislative enactment." First, the Movants (and particularly the UST) suggest that the Debtor was created by "legislative enactment" by pointing to the PFC Statute. According to the UST, the PFC Statute "was specifically enacted by the Illinois legislature to authorize the Village to create the Debtor." UST Mot. ¶ 39.

To credit this assertion, however, the Court would need to overlook the fact (noted in footnote three of the UST Motion) that the PFC Statute was not enacted until several years *after* the Debtor came into existence. *See* Act of Oct. 11, 2007, 2007 Ill. Legis. Serv. P.A. 95-672 (S.B. 735). It is therefore impossible that the PFC Statute created the Debtor or authorized its creation.

Second, the UST and Lord Abbett both assert that the Village "created LPFC through the adoption of the 2003 Village Ordinance," suggesting that the mere passage of the 2003 Village Ordinance —as opposed to the subsequent filing of a certificate of incorporation with the Illinois Secretary of State—gave birth to the Debtor. Lord Abbett Mot. ¶ 2(a); UST Mot. ¶ 38.

But it is the Illinois Secretary of State, not municipalities, that is empowered to bring not-for-profit corporations into existence. *See* 805 ILCS 105/101.05. The 2003 Village Ordinance may have authorized the Village's agents to file articles of incorporation with the Illinois Secretary of State, but the ordinance was not, as a matter of law, sufficient to "create" the Debtor. The Debtor did not exist as a legal entity until its articles of incorporation were filed. *See* 805 ILCS 105/102.15 ("Upon the filing of articles of incorporation by the Secretary of State, the corporate existence shall begin").

Because the Debtor does not possess attributes associated with sovereignty, it is not a "municipality" under Part One of the Monorail Case.

2. Part Two: Control by the Municipality

Part Two of the Monorail Case test shifts to whether the Debtor is an "instrumentality." Monorail Case, 429 B.R. at 795-96. Here, the court looks to whether the would-be debtor serves a "public purpose," and if so, the extent to which the dominant entity (in that case, the State of Nevada; in this case, the Village) controls the debtor's implementation of that purpose. *See id*. at 789. To be an instrumentality, the debtor must be subject to day-to-day control that is "operational and constant," rather than "primarily strategic and periodic." *Id*. at 797.

Additionally, "the *type* of control is critical." *Id*. (italics added). If the dominant entity's control "is necessary or designed to allow the [dominant entity] to manage its finances or its fisc,"[5] then the debtor is more likely to be an instrumentality. *Id*. If, on the other hand, the control "is more akin to oversight or regulation," then the debtor is less likely to be an instrumentality. *Id.*

a. Public Purpose

The 2003 Village Ordinance provides that the Debtor was incorporated for the purpose of financing, constructing, and equipping the Project, which the Village found to be in the public interest. 2003 Village Ordinance § 1; *cf*. Monorail Case, 429 B.R. at 796 (noting that the debtor had conceded it served the public purpose of transportation). The Debtor does not concede that it serves a public purpose in the sense contemplated by the court in the Monorail Case.

Having a public purpose, however, does not make an entity an instrumentality of government. *See In re Joliet-Will Cnty. Comm. Action Agency*, 847 F.2d 430, 431 (7th Cir.

[5] "Fisc" is defined as "the public treasury." *Black's Law Dictionary* (10th ed. 2014).

1988) (holding that a nonprofit community service organization financed exclusively through federal and state grants was not a governmental unit under the Code).[6] As the Monorail Case points out, many private enterprises, such as private security firms, charter schools, and taxi companies, serve public functions. Monorail Case, 429 B.R. at 796-97. Indeed, the purposes of these entities bear a much closer relationship with traditional government functions—public safety, education, and transportation, respectively—than the Debtor does in operating a hotel and restaurant. *Cf. O'Melia*, 303 Ill. App. 3d at 830 (identifying "traditional areas of governmental concern" as "basic public health, safety, welfare, and education").

Even if the Debtor's "public purpose"—indirectly fostering economic development—is considered equivalent to traditional government functions, Part Two of the Monorail Case is not satisfied. A court must still evaluate the level and type of control exercised by the dominant entity on the debtor. As noted above, the Village had virtually no involvement with the Debtor's operations and governance, other than appointing its directors from time to time. Moreover, the Village's control was never designed to help the Village "manage its finances or its fisc." The Village's financial exposure to the Project was, at most, limited in both scope and purpose.

b. Day-to-Day Control

The Movants argue that the Village exerts control over the Debtor because of the Village's rights to appoint and remove directors, to remove officers, to veto transfers of the Project to third parties, and to receive title to the Project if and when the Bonds are fully paid.

[6] The UST argues that the Debtor's not-for-profit status is evidence that the Debtor serves a "governmental" purpose. *See* UST Mot. ¶ 45 ("Finally, given the Debtor's not-for-profit status . . . there can be no conclusion other than that the Debtor was created for a specific governmental purpose."). To the extent the UST intends to refer to a purpose that serves the public good, it is correct; an Illinois not-for-profit corporation must be organized for at least one of thirty-four salutary purposes. *See* 805 ILCS 105/103.05. But it cannot seriously be argued that not-for-profit status makes an entity "governmental," because—among many other reasons—the Seventh Circuit has expressly held that an Illinois not-for-profit enterprise was not a governmental unit for purposes of bankruptcy eligibility. *See Joliet-Will Cnty.*, 847 F.2d at 431.

See UST Mot. ¶ 40; Lord Abbett Mot. ¶¶ 26-27. But as the Monorail Case points out, this type of control is insufficient to make the Debtor an instrumentality of the Village.

The court in the Monorail Case freely acknowledged that "the elements of control [by the State of Nevada] are many," including the State's rights to approve the debtor's fares, approve its budget, and appoint its directors. *See* 429 B.R. at 797. But the court nonetheless concluded that the State's "ability and exercise of control, both potentially and actually, [are] somewhat attenuated" and that the debtor operated "its day-to-day business in significant isolation from the State." *Id*.

Similarly, here the Village *exercises no direct control over the day-to-day business of the Debtor or the Project*. The Debtor's Operating Managers handle virtually all aspects of day-to-day operations of the Project with no involvement from the Village, and in fact very little day-to-day involvement from the Debtor itself.[7] The UST appears to suggest that because Village employees served certain administrative roles for the Debtor and the Debtor has historically held its meetings at the Village hall, the Village held *de facto* control over the Debtor's day-to-day business. *See* UST Mot. ¶¶ 12, 41. But even if the shared employees were working on the Village's behalf (which is not the case), their functions were administrative in nature, and too far removed from ongoing supervision and decision-making to amount to "operational and constant" control over the Debtor's business. *See* Powers Aff. ¶¶ 16-17; HM Aff. ¶¶ 6-9; RM Aff. ¶¶ 6-9.

In fact, the Village here exercises far less control than did the State of Nevada in the Monorail Case. There, the State of Nevada: (a) held plenary authority over the debtor's fares, budget, and capital expenditures, (b) could inspect and audit the debtor's books and records on an annual basis, and (c) could disapprove *any* by-law amendment. Monorail Case, 429 B.R. at

[7] The debtor in the Monorail Case was similarly managed by a separate manager, Bombardier Transit Corporation. Monorail Case, 429 B.R. at 774 n.4.

794 n.3. Here, conversely, the Village does not control the Debtor's budget, does not control the rates charged for hotel rooms or the prices charged to clientele of the restaurants or convention center, does not inspect and audit the Debtor's books and records, and does not have the power to disapprove changes to any part of the By-Laws other than Article IV.[8] Powers Aff. ¶¶ 12, 15-17; HM Aff. ¶¶ 6-9; RM Aff. ¶¶ 6-9.

Aside from the lack of day-to-day control, the Monorail Case court cited other facts as demonstrating the State of Nevada's "low level of state control," including (a) the requirement that the debtor "apply for permission to operate from other public agencies;" (b) that "its creditors are not, and do not expect to be, creditors of the State"; and (c) that "[i]t was created with the express and repeated promise that no taxes would be used to fund its operation." *Id*. at 797; *see also Seven Cntys.*, 550 B.R. at 748.

Each of these facts is also present here. First, the Debtor is required to apply for numerous licenses and permits from the Village, as well as from other public entities. HM Aff. ¶ 14; RM Aff. ¶ 13. Second, similar to the State of Nevada in the Monorail Case, the Village is insulated from the liabilities of the Debtor; creditors of the Debtor are not, and do not expect to be, creditors of the Village. Monorail Case, 429 B.R. at 797. The Indenture unequivocally provides that the Bonds "shall never constitute a debt . . . or give rise to any pecuniary obligation of the Village." Indenture § 2.04, at 7-8. This is true, as it was for the monorail entity, with respect to any "great losses" unexpectedly incurred by the Debtor, as well as the Debtor's operating losses, since the operating expenses are obligations of the Debtor and not the Village. Monorail Case, 429 B.R. at 798; HM Aff. ¶ 10; RM Aff. ¶ 10. Finally, the Debtor is not able to use taxes to fund its operations; neither its operative documents, nor the 2003 Village Ordinance,

[8] The UST makes the boldly conclusory statement that "the level of control that the State of Nevada had over the debtor was noticeably less than the control exerted by the Village over the Debtor," UST Mot. ¶ 31, without any support whatsoever.

nor the later-adopted PFC Statute, grants taxing power to the Debtor to satisfy bond payments. *See* 65 ILCS 5/11-65-10(a). Like the monorail entity, the Debtor's revenues are those which come from its own operations. Monorail Case, 429 B.R. at 797.

c. Control Designed to Protect Public Finances

In addition to the *level* of control exercised by the State, the court in the Monorail Case considered the *type* of control, namely whether the control was "designed to protect public finances or the public fisc." *Id*. The court found that the control exercised by the State of Nevada— including the right to appoint the entity's governing body —went "to the service [the entity] provide[d] and not to protection of [the State's] finances." *Id*. at 797. For the same reasons, the Village's right to appoint the Debtor's governing body, its right to title of the Project after all liabilities are paid,[9] and its ability to veto any changes to that portion of the By-Laws governing that right, all pertain to the service provided by the Debtor, rather than the protection of the Village's finances.

The UST, however, argues that the Village's agreement to rebate taxes to the Debtor somehow evinces "an intertwined financial relationship between the entities." UST Mot. ¶ 43.[10] But the Tax Rebate Agreement does not impose any great financial obligations on the Village and even if it did, it does not impart any Village control rights over the Debtor, pecuniary or

[9] Like the Village, which under its articles of incorporation is to receive all assets of the Project following payment of all liabilities, *see* Powers Aff. Ex. A, the dominant entity in the Monorail Case also held a "residual interest" in the debtor's assets. Monorail Case, 429 B.R. at 794.

[10] The UST also argues that the Village's annual financial statement "bolsters the indicia of control" of the Village over the Debtor because it contains references to the Debtor and its financial information. UST Mot. ¶ 42. The notes to the Village's financial statements, however, clearly point out that the Debtor is "legally separate" from the Village, and that its financial information "is reported separately from the [Village's financial information]." UST Mot. Ex. E. Accordingly, there is no support for the UST's inference that the Village asserts some level of control over the Debtor by merely making reference to it in its financial statements.

otherwise, to transform the Debtor into an instrumentality of the Village. First, the Village's financial exposure to the Project under the Tax Rebate Agreement is limited at most, because the rebated income was itself generated by the Debtor.[11] DOR Case, 378 Ill. App. 3d at 932 (finding that "the Village itself had limited financial exposure in the project because [rebated] tax income used toward paying off [certain of] the bonds was received from [the Debtor] pursuant to the Tax Rebate Agreement"). Second, any alleged control rights of the Village were created independently from the Tax Rebate Agreement. Indeed, the By-Laws—which the Movants cite as the key source of the Village's control over the Debtor—were adopted *two (2) years before* the Tax Rebate Agreement was executed. Accordingly, it cannot be said that the Village's alleged control rights were "designed to protect" the state's finances. Monorail Case, 429 B.R. at 797.

In any event, it is not wrong or uncommon for a municipality to offer tax rebates or even to raise financing for private enterprises as a form of incentive to stimulate economic development within its community. The Village has on many occasions, both in the past and currently, offered tax rebates and also raised tax exempt bonds for numerous other private enterprises. Sexton Aff. ¶ 7 (averring that the Village has provided millions of dollars in tax rebates and funds raised through tax-exempt bonds to incentivize private companies to do business in the Village, including without limitation, Sam's Club, Mariano's, Lombard Toyota, a private university, a manufacturer, a private school, and a residential development). Certainly, these forms of financial assistance or incentives do not transform private entities into instrumentalities of the Village. *See Joliet-Will Cnty.*, 847 F.2d at 431 (holding that an entity

[11] While the Village has paid tax rebates in prior years to the Debtor under the terms of the Tax Rebate Agreement, it has not approved appropriations, or transferred any funds, to cover any requested debt service shortfalls under the Tax Rebate Agreement. Powers Aff. ¶ 8. Furthermore, as noted above, the Village is not obligated to fund any of the Debtor's operating expenses, and the Indenture is clear that the Village is not obligated in connection with the Bonds.

"financed exclusively by federal and state grants" was not a governmental unit for purposes of bankruptcy eligibility).

In summary, even assuming the Debtor serves a public purpose (which the Debtor does not concede), the Debtor is not subject to the extent or type of control that courts have traditionally identified with "instrumentality" status. An instrumentality, in the eyes of the decisions synthesized by the Monorail Case, is subject to "operational and constant" control by the dominant entity, control which is "designed to protect public finances or the public fisc." *Monorail Case*, 429 B.R. at 797. In contrast, any control exercised by the Village is not "operational and constant," and is not intended to protect the Village's finances. Consequently, the Debtor is not an instrumentality of the Village.

3. Part Three: Designation by the State

In Part Three of its analysis, the Monorail Case examined whether the State of Nevada treated the debtor as one of its instrumentalities. "While not determinative," the Monorail Case explained, "this thread [of the analysis] reflects the policy of not interfering with a State's ability to select the form of financial assistance its agencies and departments may use." *Id*. at 789 (alteration added); *see also Seven Cntys.*, 550 B.R. at 760 ("This deference [to state designations] is not dispositive . . . .").

The court in the Monorail Case thus looked to provisions of Nevada law to determine whether the debtor was "the type of enterprise or public entity that Nevada has provided for in the case of public distress." Monorail Case, 429 B.R. at 799. The court determined that the debtor was not such an enterprise, based on the fact that Nevada extended financial distress support only to "local governments." *Id*. The court found that the monorail entity did not fall

within this category because, under Nevada law, "local government" means an entity with the power to tax, which power was "denied to" the debtor. *Id.*

Like Nevada, Illinois provides assistance to certain public entities in financial distress. *See* 50 ILCS 320/9; *cf.* 65 ILCS 5/8-12-1 through 8-12-24 (containing a separate financial-distress scheme only available to certain city governments). This assistance, however, is available only to "unit[s] of local government," as that phrase is defined by the Illinois Constitution. 50 ILCS 320/3(d).[12] The Illinois Constitution, in turn, defines "units of local government" as meaning:

> [C]ounties, municipalities, townships, special districts, and units, *designated as units of local government by law*, which exercise limited governmental powers or powers in respect to limited governmental subjects, but does not include school districts.

Ill. Const. Art. 7, § 1 (emphasis added).

To determine whether an entity is "designated as [a] unit[] of local government by law," courts look to the language of the entity's authorizing statute. *See Troutman v. Keys*, 156 Ill. App. 3d 247, 254-56 (1st Dist. 1987). The authorizing statute must specifically designate the entity as a "unit of local government."[13] *Id.* at 256 (internal citation omitted) (finding that the

[12] The statute further limits its application to units of local government "which have a population under 25,000." 50 ILCS 320/3(d). This limitation is further evidence that the Illinois legislature did not intend for the financial-distress statute to apply to public facilities corporations, which do not have any "population."

[13] The Illinois General Assembly has specifically designated each of the following entities as a "unit of local government": Bloomington Civic Center Authority, 70 ILCS 200/20-10; Bowdre Township Metropolitan Exposition, Auditorium and Office Building Authority, 70 ILCS 200/30-10; Centre East Metropolitan Exposition, Auditorium and Office Building Authority, 70 ILCS 200/50-10; Decatur Metropolitan Exposition, Auditorium and Office Building Authority, 70 ILCS 200/75-15; Illinois International Convention Center Authority, 70 ILCS 200/100-10; Matteson Metropolitan Civic Center Authority, 70 ILCS 200/155-10; Milford Metropolitan Exposition, Auditorium and Office Building Authority, 70 ILCS 200/175-10, Orland Park Metropolitan Exposition, Auditorium and Office Building Authority, 70 ILCS 200/190-10; Sheldon Metropolitan Exposition, Auditorium and Office Building Authority, 70 ILCS 200/250-10; Vermilion County Metropolitan Exposition, Auditorium and Office Building Authority, 70 ILCS 200/265-15; Will County Metropolitan Exposition and Auditorium

authorizing statute for the Illinois board of education designated it as a "unit of local government" by specifically referring to it as "a body politic and corporate"). Here, the closest thing the Debtor has to an authorizing statute is the Illinois Not-for-Profit Corporation Act, and that statute certainly does not designate the Debtor as a unit of local government, or even as a "political subdivision" or "body politic and corporate."[14] As discussed above, the PFC Statute was not in existence at the time the Debtor was created and therefore could not have been the Debtor's authorizing statute. And even if the PFC Statute were construed as the Debtor's authorizing statute, its provisions specifically characterize a PFC as an "Illinois not-for-profit corporation," *i.e.*, an organizational form available to both public and private enterprises. 65 ILCS 5/11-65-10.[15] Because the Debtor is not a unit of local government as contemplated by Illinois law, "[i]t is not the type of enterprise" that Illinois has provided for in the case of public

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Authority, 70 ILCS 200/280-10; Metropolitan Pier and Exposition Authority, 70 ILCS 210/3; Illinois Medical District Commission, 70 ILCS 915/2; Southwestern Illinois Metropolitan and Regional Planning Commission, 70 ILCS 1710/4; Grand Avenue Railroad Relocation Authority, 70 ILCS 1915/15; West Cook Railroad Relocation and Development Authority, 70 ILCS 1920/10; Dixon Railroad Relocation Authority, 70 ILCS 1925/5-10; Southwest Suburban Railroad Redevelopment Authority, 70 ILCS 1930/10; Elmwood Park Grade Separation Authority, 70 ILCS 1935/15; Illinois Sports Facilities Authority, 70 ILCS 3205/4; Regional Transportation Authority, 70 ILCS 3615/1.04.

[14] The term "body politic and corporate" is commonly used in municipal law to designate an entity as a unit of local government, possessing "some attribute of sovereignty and exercis[ing] some sovereign power of the state, either through constitutional or legislative grant." *Union Cnty Reg'l Bd. of Sch. Trs.ex rel. Anna-Jonesboro Cmty. High Sch. Dist. No. 81 v. Union Cnty. Historical Soc'y, Inc.*, 52 Ill. App. 3d 458, 461 (5th Dist. 1977). In several eligibility cases, bankruptcy courts have given considerable weight to such a statutory designation. *See, e.g., In re Boise Cnty.*, 465 B.R. 156, 167 (Bankr. D. Idaho 2011); *In re Sullivan Cnty. Reg'l Refuse Disposal Dist.*, 165 B.R. 60, 73 (Bankr. D.N.H. 1994). No statute, or any other authority, characterizes the Debtor as a "body politic and corporate."

[15] As with any other corporation—and unlike a municipality or subdivision thereof—the Debtor may be dissolved by the Illinois Secretary of State if it does not timely file its annual report or pay applicable fees. *See* 805 ILCS 105/112.35. That, in and of itself, is another reason why the Debtor is not considered an instrumentality of a municipality under Illinois law. *See Seven Cntys.*, 550 B.R. at 760 (citing, in the context of analyzing Part Three of the Monorail Case analysis, a state's power to dissolve a corporation indicates that the state considered the debtor to be a private entity).

financial distress. Monorail Case, 429 B.R. at 799. Thus, as in the Monorail Case, it can be inferred that the State did not intend to bar the Debtor from filing bankruptcy.

Additionally, the court in the Monorail Case inquired whether the Nevada legislative scheme required companies in the debtor's business to be "government entities." *Id*. at 799-800. The court recognized that the Nevada statutes dealing with the ownership and operation of monorails expressly permit a "person" to own such entities, and since a "person" includes a corporation under Nevada law, "[t]his exclusion indicates Nevada's intent that 'persons' such as [the not-for-profit corporation debtor therein] are not governmental entities." *Id.* Similarly, in Illinois, government entities are not the only entities which can own and operate hotels, restaurants, or convention centers.

The court in the Monorail Case also observed that a state's classification of an entity as a governmental entity can be determinative if the classification "carries with it . . . *the powers and functions that are essential to a municipality*." Monorail Case, 429 B.R. at 789 (emphasis added). By comparison, the PFC Statute contains none of the powers that are normally essential to a municipality, such as the power to tax and the power of eminent domain, each of which is expressly granted to municipalities that own convention halls under the Municipal Convention Hall Statute. 65 ILCS 5/11-65-3, 65-5, 65-10(a).

Even if the PFC Statute has any relevance here,[16] it provides municipalities only the minimum amount of connections or controls necessary to qualify PFCs for favorable state tax treatment (see 65 ILCS 5/11-65-15, 11-65-20, 11-65-25) and are necessary for the PFC to issue tax-exempt bonds under federal tax laws. *Compare* Rev. Rul. 63-20, 1963-1 C.B. 24, *with* PFC

[16] It bears repeating, however, that the connections identified in the PFC Statute between a PFC and a municipality existed here between the Village and the Debtor, under the By-Laws and the Debtor's articles of incorporation, several years prior to the PFC Statute's enactment, and thus the PFC Statute did not give rise to any of these controls or connections.

Statute § 10(a)-(c).[17] The fact that the PFC Statute parrots the basic characteristics required for the issuance of tax-exempt bonds is not an indication that the Debtor holds "powers and functions that are essential to a municipality." *See* Monorail Case, 429 B.R. at 783 (noting that "private companies [involved in municipal finance] can facilitate municipalities' missions without themselves becoming municipalities").

The UST calls attention to the fact that the Debtor, through its By-Laws, at one time agreed to comply with Illinois' Open Meetings Act, State Gift Ban Act, and conflict-of-interest statute. UST Mot. ¶ 15.[18] Presumably, the UST intends to imply that the application of these acts makes the Debtor more akin to a public agency than a private enterprise. But the UST ignores that the Debtor's decision to comply with these statutes was entirely voluntary. The counterfactual phrasing of the By-Laws underscores this point: the Debtor is to act "as if" the statutes applied. By-Laws §§ 4.8, 6.3.

It is not difficult to imagine that even a private, for-profit company would choose to adopt standards similar, if not identical, to those contained in the State Gift Ban Act and the conflict-of-interest statute. Such a choice would rightly be interpreted as an indicium not of governmental involvement, but of responsible business practices. There is no reason to view the Debtor's voluntary application of these standards any differently. *See Seven Cntys.*, 550 B.R. at

[17] Indeed, four of the five requirements under IRS Revenue Ruling 63-20 for a not-for profit corporation to issue tax exempt bonds are met by virtue of subsections 10(a-c) of the PFC Statute (*i.e.*, having an Illinois not-for profit corporation, whose purpose is charitable and civic, and whose property is located within the municipality (section 10(a)-(b) of the PFC Statute), having directors appointed by the municipality, who serve without compensation, and having legal title to the property transfer to the municipality upon retirement of the bonds (section 10(c) of the PFC Statute)). Rev. Rul. 63-20, 1963-1 C.B. 24; *see also* Rev. Proc. 82-26, 1982-1 C.B. 476, at § 3. The fifth requirement under the IRS Revenue Ruling is satisfied if the municipality approves of the entity's formation, such as existed here in the form of the 2003 Village Ordinance.

[18] The Debtor's most current By-Laws, attached as an exhibit to the Powers Affidavit, do not reference the Open Meetings Act, and the State Gift Ban Act they reference was repealed in 2003. Ill. Pub. Act 93-617, § 85 (eff. Dec. 9, 2003). Both of these facts underscore the voluntary nature of the Debtor's compliance.

760 (in applying Part Three of the Monorail Case test, finding that the fact that the debtor complied with open meetings act even though it was not subject to it, "suggest[ed] that Kentucky treat[ed the debtor] as a private entity and not a governmental unit").

In summary, Illinois statutes do not consider the Debtor to be an instrumentality of a municipality because its financial distress laws do not apply to the Debtor, and the only law directly addressing entities like the Debtor, the PFC Statute, clearly labels it as an "Illinois not-for profit corporation" and not as a "unit of local government," and does not endow it with any of the "powers and functions that are essential to a municipality" such as the power to tax and eminent domain.

Because Illinois law does not afford governmental status to the Debtor, it is not an instrumentality of the Village under Part Three of the Monorail Case test.

C. The DOR Case and tax classifications are irrelevant.

The Movants suggest that the legal and factual positions taken by the Debtor in the DOR Case and the Official Statement (*i.e*., Ex. D to Lord Abbett Mot.) are somehow binding in the bankruptcy court's eligibility determination. The Movants refer to these positions as "admissions," without citing any legal basis for treating them as such in this proceeding. *See*, *e.g.*, UST Mot. at 1 n.1, ¶¶ 20, 38, 44; Lord Abbett Mot. ¶¶ 10, 21, Ex. D. In fact, nothing in the DOR Case binds the Debtor both because judicial estoppel is inapplicable, and also because determinations as to "municipality" or "instrumentality" status for tax purposes are inapplicable to such determinations for bankruptcy eligibility purposes.

1. Inapplicability of Judicial Estoppel

The Movants are apparently hoping to invoke the doctrine of judicial estoppel, which "prevents a party that has taken one position in litigating a particular set of facts and prevailed

under that position from later reversing its position when it is to its advantage to do so." *Commonwealth Ins. Co. v. Titan Tire Corp.*, 398 F.3d 879, 887 (7th Cir. 2004) (internal citation omitted). For judicial estoppel to apply, however, three "clear prerequisites" must be present: "(1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position." *1st Source Bank v. Neto*, 861 F.3d 607, 612 (7th Cir. 2017) (internal citation omitted). Judicial estoppel applies to positions on questions of fact as well as law. *In re Cassidy*, 892 F.2d 637, 641-42 (7th Cir. 1990).

Judicial estoppel is inapplicable to positions taken by the Debtor in the DOR Case because the Debtor did not "prevail," in any sense, in that proceeding. [19] The Debtor did not "convince" either the trial court or the appellate court of any legal or factual position; despite the Debtor's efforts to the contrary, it lost at every phase of the DOR Case. Because the elements of judicial estoppel are not satisfied, positions taken in the DOR Case do not bind the Debtor now.

2. Inapplicability of Tax Classifications

Furthermore, any position taken or determination made as to the Debtor's status as a municipality or instrumentality for tax purposes, whether in the DOR Case, the Official Statement, or elsewhere, is inapplicable to those determinations for eligibility purposes.

In the Monorail Case, the objecting party offered evidence that the debtor qualified as an "instrumentality" of the State of Nevada for federal tax-exemption purposes pertaining to the bonds, based on the level of control exercised by the state. The objecting party even cited a certification in which the debtor expressly stated that it was an "'instrumentality of the State of Nevada, . . . controlled by the Governor of the State of Nevada.'" Monorail Case, 429 B.R. at

[19] The DOR Case held that the Debtor was not a "governmental body." DOR Case, 378 Ill. App. 3d at 930.

774 (alteration in original). The court rejected this argument, finding that "[r]egardless of treatment under the tax code . . . the instrumentality test under the Bankruptcy Code is separate and independent." *Id*. at 795.[20] As the court recognized, the Supreme Court has "rejected" the premise "that a word used in one federal statute necessarily has the same meaning in another federal statute." *Id*. at 789 (citing *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996)).[21]

In fact, courts interpreting the federal tax code set a lower bar for establishing instrumentality status, such that the dominant entity's "participation in strategic and high level decisions," combined with that entity's "residual interest in any assets" are sufficient to characterize an entity as an instrumentality. *Id*. at 794. But not so under chapter 11 eligibility analysis which, as discussed above, looks to factors such as control of day-to-day operations. *Id*. at 795. Due to the stricter standard under bankruptcy law, "if an entity is not an instrumentality for tax reasons, it is quite likely it will not be an instrumentality for bankruptcy purposes; the obverse, however, may not be true." *Id*. at 792.

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[20] The court in the Monorail Case stated that "it is critical to note that [the debtor] did not make [these representations or arguments] in connection with an acknowledgment that it was ineligible for Chapter 11. Rather, [the debtor] made this statement in connection with its efforts to ensure that interest on the Bonds would be free from federal taxation – indeed, the Bond offering itself told investors that [the debtor] could not waive bankruptcy protection." Monorail Case, 429 B.R. at 790-91. By comparison, the same type of Official Statement issued by the Debtor here, and referenced to in the Lord Abbett Motion, also tells investors that the Debtor may file bankruptcy *See* Official Statement, attached hereto as Ex. E, at 120 ("no assurances can be made that the [Debtor] will not file bankruptcy [should the Project fail])."

[21] Ironically, while urging the Court to ignore the Monorail Case definition of "instrumentality" because it arose under a different sub-section of the Code, the UST asks the Court to import a definition from *dicta* in a now (at least partially) abrogated Supreme Court case interpreting an *entirely different statutory scheme*: the Foreign Sovereign Immunities Act. UST Mot. ¶¶ 30, 47. As with the definition of the term "instrumentality" under tax law, the Foreign Sovereign Immunities Act definition is one of the many "differing uses and definitions [which] underscore that no unique or canonical meaning" of the term exists. Monorail Case, 429 B.R. at 777. This definition was also criticized in the Monorail Case as being "somewhat vague." *Id*. at 776.

There is presumably even less parity of meaning where a party attempts to apply terms from *state* tax law to the exclusively federal arena of bankruptcy law. As the Monorail Case points out, application of state law terms would run afoul of the Supremacy Clause of the United States Constitution. *Id*. at 799 n.30; *cf. United Food & Commercial Workers Local 100A v. John Hofmeister & Son, Inc.*, 950 F.2d 1340, 1346 (7th Cir. 1991) ("Federal courts must ensure that the importation of state law will not frustrate or interfere with the implementation of federal policy.").

Because judicial estoppel is inapplicable, and because state and federal tax definitions have different meanings than terms used by the Code, any positions taken, or determinations made, with respect to the Debtor's "instrumentality" status for tax purposes have no bearing on whether the Debtor is eligible for chapter 11 relief.

D. <u>The Movants fail to distinguish the Monorail Case</u>

Despite the many parallels between the Monorail Case and the case at bar, the Movants attempt to persuade the court to ignore it. Their primary argument is that the Monorail Case dealt with the meaning of the term "instrumentality" as it is used in subsection 101(40) of the Code, rather than the meaning of the term "instrumentality" as it is used in subsection 101(27) of the Code. Despite the Monorail Case's own characterization of the two uses of "instrumentality" as "somewhat redundant" of one another, Monorail Case, 429 B.R. at 775 n.6, the Movants urge the Court to view the two uses of the term as having entirely different meanings, such that the Monorail Case is inapplicable.

The Movants are thus asking the Court to ignore the "established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479,

501 (1998). While this canon applies to all statutory texts, courts have been particularly rigorous in applying it to multiple uses of the same term in the Code. *See, e.g., Bank of Am., N.A. v. Caulkett,* __ U.S. __, 135 S. Ct. 1995, 2000 (2015) (stating that "historical and policy concerns" are an "insufficient justification for giving [a term] a different definition" depending on its usage); *Law v. Siegel*, __ U.S. __, 134 S. Ct. 1188, 1195 (2014) (finding "no reason to depart from the normal rule of statutory construction that words repeated in different parts of the same statute generally have the same meaning") (internal citation omitted); *Ryan v. United States,* 725 F.3d 623, 628 (7th Cir. 2013) ("Not only is the rule against multiple interpretations of the same statute well entrenched, it is of special importance.") (internal citation omitted).

Here, not only is the term "instrumentality" contained in the same legislative scheme (the Code), but it is used in the same statutory section (section 101 of the Code) and even the same context (bankruptcy eligibility of government entities).[22] Under these circumstances, it would be illogical to conclude that different meanings should be given to the term. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears. . . . We have even stronger cause to construe a *single* formulation . . . the same way each time it is called into play."); *Ryan*, 725 F.3d at 627 ("It is rare enough to interpret the same language differently in distinct statutory sections, but is an entirely different matter for a court to give a term a different meaning in the same statutory provision.").

The Movants had no principled reason to ignore the Monorail Case's studied, scholarly interpretation of the term "instrumentality," other than the obvious: they did not like the

[22] In fact, the entire phrase that is the subject of the Monorail Case—*i.e.*, the meaning of "instrumentality of a State"—is present in both subsections (27) and (40).

outcome. Certainly, none can be found in the two unpublished decisions cited by the Movants in an attempt to distinguish the case.

One of the unpublished cases cited by the Movants in their attempt to distinguish the Monorail Case is *United States Trustee v. Hospital Authority of Charlton County (In re Hospital Authority of Charlton County)*, No. 12-50305, 2012 WL 2905796 (S.D. Ga. July 3, 2012). But far from supporting the Movants' position that the Monorail Case has "limited utility," Lord Abbett Mot. ¶ 7 n.7, or "should not govern this Court's analysis," UST Mot. ¶ 31, the *Charlton County* opinion unequivocally adopted the Monorail Case as its rule of decision. The *Charlton County* court acknowledged that the definition of "municipality" under section 101(40) of the Code was not directly at issue, but nonetheless found the Monorail Case's analysis to be "relevant" in determining whether the debtor was an instrumentality of a county government. *Charlton Cnty.*, 2012 WL 2905796, at *6. Nearly the entire rest of the decision was devoted to applying the Monorail Case's three-factor test. *Id*. at *6-8. As yet another court to adopt the Monorail Case's analysis observed, the *Charlton County* court "fully considered and applied the *Las Vegas Monorail* factors." *Seven Cntys.*, 550 B.R. at 741.

The other unpublished decision is *In re Northern Mariana Islands Retirement Fund*, No. 12-00003, 2012 WL 8654317, at *3 (D. N. Mar. I. June 13, 2012). There, the District Court for the Northern Mariana Islands found the Monorail Case to be "helpful, but feared that giving both uses of "instrumentality" the same meaning would have the "absurd result" of suggesting that every instrumentality of a state (the court used a "state police force" as a hypothetical) is a municipality. The *Northern Mariana* court reasoned that the phrase "instrumentality of a State" within the definition of "municipality" in section 101(40) must have a different meaning than it does when used within the definition of "governmental unit" in section 101(27), because

otherwise, a "state police force" (which it considered an "instrumentality of a State") would qualify as a municipality under section 101(40). *Id.* According to that court, such an outcome would be "absurd," and proved that the Monorail Case was inapposite, because "[m]ost people would . . . agree that a state police force is not a 'municipality' under any reasonable definition of that word." *Id.*

But, with due respect for that tribunal, the court's reasoning is flawed. The section 101(40) definition of the word "municipality" is not based on what "most people would agree" should be the definition, but instead, it is specifically defined to mean three specific things, one of which is an "instrumentality of a State." The *Northern Mariana* court's rationale violates the basic law of statutory interpretation that forbids a court to override the plain language of a statutory definition with what he or she believes "most people" would interpret a term to mean. *See Fox v. Standard Oil Co. of N.J.*, 294 U.S. 87, 96 (1935) (Cardozo, J.) ("[D]efinition by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others. . . . There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves.").

E. The *Northern Mariana* and *Charlton County* debtors were unlike the Debtor.

The Movants' reliance on the *Charlton County* and *Northern Mariana* cases is particularly misplaced due to the profound differences between the Debtor and the entities at issue there.

Unlike the Debtor, for instance, the debtor in *Charlton County* was not a corporation. It was a "hospital authority," brought into existence as a "public body corporate and politic" by an

act of the Georgia legislature. *Charlton Cnty*., 2012 WL 2905796 at *1.[23] Also unlike the Debtor, this entity enjoyed the right of eminent domain. *Id*. at *2. Whereas the Debtor's board consists of private citizens, the *Charlton County* entity's board was made up of "public officials." *Id*. at *7. And whereas the Debtor's operating expenses are paid entirely by the revenues it generates, the Charlton County debtor "receive[d] tax revenues" from the county government. *Id*. at *6.

Likewise, the entity in the *Northern Mariana* case was nothing like the Debtor. It solely functioned as a conduit—a mere "intermediary"—to "receive money from the government, invest[] the money until it is needed, and pay[] out the money to government employees and retirees in accordance with the law." 2012 WL 8654317, at *2. The court found that the debtor did "literally nothing other than carry out the government's duties." *Id*. This function, the court observed, was a "quintessential government function." *Id*. The Debtor, on the other hand, essentially exists to operate a hotel and restaurants. This could hardly be described as a "government function," and certainly not a "quintessential" one. *Id*.

The Debtor is also very different from the *Northern Mariana* entity in the way it conducts its business. In that case, the debtor had very little discretion in how it operated, as the legislature "specifie[d] (and from time to time change[d]) to whom the [debtor] must pay benefits and in what amounts." Id. at *2. This would be the equivalent of the Village directing the Debtor how to operate the hotel and what rates to charge its guests, which the Village most certainly does not.[24] Finally, in what the *Northern Mariana* court described as "perhaps [the] most important[]" aspect of government control, the government provided "virtually all of [the debtor's] funding and resources." *Id*. Here, in contrast, construction of the Project was financed

[23] *See supra* note 14.
[24] HM Aff. ¶¶ 9, 12; RM Aff. ¶¶ 9, 12.

by the proceeds of the Bonds, and the Debtor's operating expenses are paid from its business revenues.

It is not surprising that the debtors in *Charlton County* and *Northern Mariana* were held to be "instrumentalities," as the facts there justify it, even under the three-part test of the Monorail Case. But those two cases provide no justification to abandon the sound and principled analysis of the Monorail Case here.

IV. CONCLUSION

For the reasons stated herein, the Debtor respectfully requests that the Court enter an order denying the Motions to Dismiss, and granting such further relief as is appropriate under the circumstances.

Respectfully Submitted,

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