

**UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN MARIANA ISLANDS**

In re

NORTHERN MARIANA ISLANDS  
RETIREMENT FUND,

Debtor.

Case No. 12-00003  
Chapter 11

Re: Docket Nos. 24, 50, 53, 79, 81,  
90

**MEMORANDUM OF DECISION ON MOTIONS TO DISMISS**

The motions to dismiss this case primarily argue that the Northern Mariana Islands Retirement Fund (the “Fund”) is a “governmental unit” which is not eligible for relief under chapter 11 of the Bankruptcy Code. I agree and will grant the motions.

Only a “person” may be a debtor in a chapter 11 case. 11 U.S.C. § 109(d), (b). “The term ‘person’ . . . does not include governmental unit . . . .” Id. § 101(41).

The term “governmental unit” means 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 state; or other foreign or domestic government.

Id. § 101(27)(emphasis added). The question thus boils down to whether the Fund is an “instrumentality” of the government of the Commonwealth of the Northern

Mariana Islands.

The Bankruptcy Code does not define the term “instrumentality.” Under established principles of statutory interpretation,<sup>1</sup> the next step is to look to the “plain meaning” of the word. Ransom v. FIA Card Servs., N.A., 131 S.Ct. 716, 724 (2011).

The dictionary defines “instrumentality” as “the quality or state of being instrumental” and “instrumental” as “serving as a means, agent, or tool . . . .” Merriam-Webster’s Collegiate Dictionary 605 (10<sup>th</sup> ed. 2001). See also Black’s Law Dictionary 720 (5<sup>th</sup> ed. 1979) (defining “instrumental” as “serviceable, helpful; serving as a means or agent; something by which an end is achieved.”)

The dictionary definitions are too indefinite to be useful. Governments use many “agents” to accomplish their goals. Congress could not have intended to exclude every “agent” of a government (for example, construction contractors and

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<sup>1</sup>Some decisions suggest that there are three approaches, or tests, to determine whether a particular entity is a "governmental unit." First, the "independent classification" test is "essentially statutory construction by another name." In re Family Health Svcs., Inc., 101 B.R. 618, 621 (Bankr. C.D. Cal. 1989). Second, the "state classification" test examines whether applicable nonbankruptcy law places a debtor in one of the excluded categories. Id. at 622. Third, the "alternate relief" test considers whether bankruptcy is a satisfactory method, compared with nonbankruptcy alternatives, to address the entity's financial distress. Id. at 626.

The "three tests" are puzzling. “Governmental unit” and “instrumentality” are statutory terms. The court's job is to interpret those terms. The "three tests" suggest that courts must interpret those terms using unique techniques. But no one has explained why the usual tools of statutory construction are inadequate or inapplicable. The third test is particularly suspect, because it is completely unmoored from the statutory text.

employees hired by the government) from bankruptcy relief. Unfortunately, the word “instrumentality” has “no unique or canonical meaning” and no single “plain meaning.” In re Las Vegas Monorail Co., 429 B.R. 770, 777 (Bankr. D. Nev. 2010).

Therefore, one must look to extrinsic aids.<sup>2</sup> The legislative history is instructive.

[Section 101(27)] defines “governmental unit” in the broadest sense. . . . “Department, agency, or instrumentality” does 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 a local government or the Federal Government. 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, 95<sup>th</sup> Cong. 311 (1977); S. Rep. No. 989, 95<sup>th</sup> Cong. 24 (1978).

Reading the term “governmental unit” in the broadest sense, as Congress intended, and emphasizing the function of the Fund, I hold that the Fund is an “instrumentality” of the Commonwealth. The government formed the Fund as a means of carrying out the government’s obligations to its current and retired employees. Providing compensation and benefits to government employees is a

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<sup>2</sup>The terms “governmental unit” and “instrumentality” do not necessarily have the same meaning in all statutes. United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213 (1996). Cases interpreting those terms in other contexts must therefore be read with caution. Aguon v. Commonwealth Ports Auth., 316 F.3d 899 (9<sup>th</sup> Cir. 2003).

quintessential governmental function. This is particularly true in the Commonwealth, where government employees' and retirees' pension rights enjoy constitutional protection.

The Fund argues that many entities provide retirement benefits and administer retirement plans. This argument scants the key fact that, unlike the other entities to which the Fund refers, the Fund administers a plan that benefits only the government's employees and retirees. The Fund also argues that if it is an "instrumentality" of the government, then so must be the companies the Fund hires to help it carry out its duties. The Fund's contractors presumably have clients other than the Fund. Unlike the contractors, the Fund acts solely as an intermediary between the government and its employees and retirees.

Further, the Commonwealth has significant ongoing influence over the Fund. The governor appoints its trustees, the legislature specifies (and from time to time changes) to whom the Fund must pay benefits and in what amounts, and, perhaps most importantly, the government provides (or rather, is supposed to provide) virtually all of its funding and resources.<sup>3</sup> The Fund has no "customers" other than the government and its employees and retirees. The Fund exists for the

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<sup>3</sup>The Fund also receives investment income and mandatory contributions from employee's salaries and wages, but events have proven that these sources of income are not nearly enough to cover the Fund's obligations.

sole purpose of receiving money from the government, investing the money until it is needed, and paying out the money to government employees and retirees in accordance with the law governing the relationship between the government and its employees. The Fund does literally nothing other than carry out the government's duties.

In re Nortel Networks, Inc., 669 F.3d 128 (3d Cir. 2011), supports the view that the Fund is a governmental unit. In the Nortel case, the court held that an entity established by the United Kingdom government to guaranty certain obligations of failed private pension plans was not a "governmental unit." The U.K. entity was funded entirely by private employers and benefitted only nongovernmental employees. The only connection between the entity and the U.K. government was the fact that the government had established it. The court said that the requisite "active" relationship between the government and the entity was lacking because the entity "stands in the shoes of a private party [i.e., the insolvent private pension plan]." Id. at 138. In this case, the Fund acts solely as an intermediary between the government and its employees and retirees. No private employer and no nongovernmental employees are involved. The Fund does not stand in the shoes of any private party.

All parties cite and rely on Las Vegas Monorail, which held that a particular

entity was not a “municipality” under section 101(40) of the Bankruptcy Code. Las Vegas Monorail is helpful because “instrumentality,” the key word in section 101(27), also appears in section 101(40)’s definition of “municipality.” But it would be a mistake to rely too heavily on Las Vegas Monorail in this case. 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. 429 B.R. at 778. Here, the difference in context is important. If “instrumentality” means exactly the same thing in both definitions, absurd results would follow. 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.

The trustees of the Fund should be praised, not criticized, for commencing this case. The trustees find themselves in an intolerable position. The Fund for which they are responsible is caught between an irresistible force – obligations to

retirees which it cannot pay – and an immovable object – the government, which has persistently failed to pay its debt to the Fund. The trustees’ attempt to find a solution to this dilemma is creative and praiseworthy even though it cannot succeed. Congress did not intend that the Bankruptcy Code could solve all problems, least of all the financial problems of governmental units. The dismissal of this case will leave the Fund and its beneficiaries at the mercy of the Commonwealth government, but Congress intended that the local government, rather than a federal court, should address such problems.

Some administrative issues must be resolved in conjunction with the dismissal of this case.

All professionals retained by the Fund and any other party wishing to assert an administrative expense must file an appropriate application or motion not later than June 29, 2012. The Debtor shall promptly give notice of all such applications and motions. The notice shall provide that, if an objection to any such application or motion is filed by a date certain (which shall be not sooner than 14 days after notice is given), the court will consider the contested application or motion at a hearing on July 27, 2012, at 9:30 a.m., and that, if no timely objection is filed to any of the applications or motions, the court will consider the uncontested applications and motions without a hearing. The order dismissing this case will be

entered after orders on the applications and motions are entered and all approved compensation, reimbursement, and administrative expenses are paid.

When the court enters the order dismissing this case, the court will also enter orders dismissing without prejudice all adversary proceedings and remanding all removed proceedings.

The seal of the United States Bankruptcy Court, District of Hawaii, is a circular emblem. It features a central shield with a scale of justice and a sword, surrounded by a wreath. The text "UNITED STATES BANKRUPTCY COURT" is inscribed around the top inner edge, and "DISTRICT OF HAWAII" is at the bottom. A small star is positioned on the left side of the seal.  
***/s/ Robert J. Faris***  
**United States Bankruptcy Judge**  
Dated: 06/13/2012