

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

TENTATIVE RULING ON MOTIONS TO DISMISS

Based on the parties' written submissions, and subject to oral argument and further reflection, I am inclined to dismiss this case on the ground 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 must begin by tracing a web of statutory definitions.

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.

Here the web of statutory definitions ends. The Bankruptcy Code does not define the term “instrumentality.” Under established principles of statutory interpretation,¹ 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). 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.² The legislative history is

¹Some 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.

²The 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 (9th Cir. 2003).

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, 95th Cong. 311 (1977); S. Rep. No. 989, 95th Cong. 24 (1978).

Reading the term “governmental unit” in the broadest sense, as Congress intended, and emphasizing the function of the Fund, I am inclined to 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 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 it hires to

help it carry out its duties. The Fund's contractors presumably have clients other than the Fund. 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.³ The Fund has no "customers" other than the government and its employees and retirees. The Fund exists for the 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.

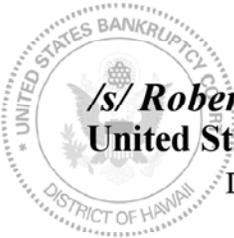
In re Nortel Networks, Inc., 669 F.3d 128 (3d Cir. 2011), supports the view that the Fund is a governmental unit. In the Nortel case, the court held that an entity established by the United Kingdom government to guaranty certain

³The Fund also receives investment income, but events have proven that the investment income is not nearly enough to cover the Fund's obligations.

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.

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 I am inclined to rule that 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 elected branches of the local government, rather than a federal court, should address such problems.



/s/ Robert J. Faris
United States Bankruptcy Judge
Dated: 05/29/2012