

**FOR PUBLICATION**

**IN THE SUPERIOR COURT  
OF THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**NORTHERN MARIANA ISLANDS  
RETIREMENT FUND,**

Plaintiff,

vs.

**COMMONWEALTH OF THE NORTHERN  
MARIANA ISLANDS GOVERNMENT,  
HON. BENIGNO R. FITIAL, in his official  
capacity as the Governor of the Commonwealth  
of the Northern Mariana Islands,  
DEPARTMENT OF FINANCE, and ELOY  
INOS, in his official capacity as the Secretary of  
the Department of Finance.**

Defendants.

**CIVIL ACTION NO. 06-0367**

**AMENDED  
JUDGMENT FOR DAMAGES AND  
ORDER THEREON**

This matter came before this Court on April 20, 21, 22, 23, 27 and 30, 2009 in Courtroom 205A for arguments concerning Sum Certain damages. On May 15, 2009 the parties argued motions regarding the Constitutionality of PL 15-15 and 1 CMC § 7207. On June 8, 9, 10, 11 and 15, 2009 the Court heard arguments concerning Extraneous damages. Viola Alepuyo, Esq., appeared on behalf of the Plaintiff. The Defendants were represented by Anthony Welch, Assistant Attorney General.

**INTRODUCTION**

The CNMI Retirement Fund is a mandatory pension program for Government

employees. It is funded by three separate sources: (1) Mandatory employee contributions which are taken from every employee's paycheck, (2) Employer contributions which are to be made every pay period and in an amount equal to an actuarially determined rate<sup>1</sup>, and (3) the market return generated from investing the first two sources of funding after the payment to retirees and Fund costs. In order for the Fund to fulfill its Constitutional obligations (*see infra*), the employees must make their contributions, Government contributions must be paid and up-to-date, and the money must be invested properly. The present matter concerns the Government's failure to meet its obligations to the Fund.

### **PROCEDURAL HISTORY**

The Retirement Fund filed its complaint on August 2, 2006. This was followed by a First Amended Verified Complaint filed on October 3, 2006. Defendants then filed a Motion to Dismiss the Third, Fourth, Fifth and Eleventh Causes of Action on October 23, 2006. Judge Lizama issued an Order Denying Defendants' Motion to Dismiss on May 6, 2008. On June 12, 2008, this matter was reassigned to Judge Manglona due to Judge Lizama's retirement. Judge Manglona recused herself from this matter on August 12, 2008 and it was assigned to this Court. The Defendants failed to timely file an answer and this Court granted the Plaintiff's motion for a default judgment on November 13, 2008. As a result, all factual allegations of the complaint are admitted as true, with the exception of damages. Before dealing with the damages the Court will first address the constitutional issues raised by the Plaintiff concerning Public Law 15-15 and 1 CMC § 7207.

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<sup>1</sup> Employer contributions are required to be paid by the Government in a percentage amount set by the Fund's actuary and approved by the Fund board of trustees ("Board"). PL 6-17 requires the Board to obtain a recommendation from its actuary and then adopt the rate of Employer contributions which the Government is required to pay. The current actuarial rate that has been adopted by the Board is 37.3909%.

## PUBLIC LAW 15-15

Public Law 15-15 was enacted by the Commonwealth Government in response to an ongoing financial crisis. It sought to alleviate this financial strain by suspending payment of all government obligations to the fund for fiscal years 2006 and 2007. This Court, having the authority to review the constitutionality of statutes enacted by the legislature, finds that this law is unconstitutional on two grounds: (1) it violates Article III, Section 20 of the CNMI Constitution and (2) it violates the Contracts Clause of the CNMI Constitution. *Tenorio v. Superior Court*, 1 N.M.I. 1, ¶16 (1989).

### **Public Law 15-15 is Unconstitutional Because it Unlawfully Diminishes or Impairs the Accrued Benefits of the Fund Pursuant to Article III, Section 20(a) of the CNMI Constitution.**

The retirement system for government employees is addressed in Article III, Section 20(a) of the Constitution of the Commonwealth of the Northern Mariana Islands. This section states that “Membership in an employee retirement system of the Commonwealth shall constitute a contractual relationship. Accrued benefits of this system shall be neither diminished nor impaired.” N.M.I. Const. art. III, § 20(a). This section creates a constitutional right of Government employees to their retirement fund.

Public Law 15-15 was enacted for the express purpose of allowing the Commonwealth Government to avoid its financial obligations to the Retirement Fund. By failing to pay its mandatory employer contributions, the Government (Legislative and Executive branches) has created a situation where the solvency of the Fund is threatened. The Retirement Fund now faces the possibility of bankruptcy in a few years. As such, the Court finds that this law clearly impaired the sacred obligation that the Government has towards its former and present employees. Therefore, Public Law 15-15 is unconstitutional because it diminished and impaired the obligations established pursuant to Article III, Section 20(a) of the CNMI Constitution.

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**Public Law 15-15 is Unconstitutional Because it Violates the Contracts Clause of the CNMI Constitution.**

The United States Constitution holds that no state shall pass any law which impairs a contractual obligation. U.S. Const. art. I, §10, cl. 1. The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, Section 501 made this clause applicable to the CNMI. Furthermore, the CNMI Constitution adopted this clause in Article 1, Section 1.

A Contracts Clause analysis must begin with the threshold question of whether a state law has operated as a substantial impairment of a contractual relationship. There are three components of this analysis: (1) Whether there is a contractual relationship; (2) Whether the law impaired the relationship; and (3) Whether the impairment was substantial. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)).

When applying the facts of the present matter to this analysis, we must first examine whether a contractual relationship exists. The Retirement Fund is a mandatory program for employees of the Commonwealth Government. This program is addressed in the CNMI Constitution, where it is defined as a contractual relationship. N.M.I. Const. art. III, § 20(a). Other courts have also held that the relationship between vested State employees and the State's retirement system is contractual in nature. *Bailey v. State of North Carolina*, 348 N.C. 130, 140 (1998). Therefore, a contractual relationship exists sufficient to satisfy the first step of the analysis.

The next step is to determine whether this contractual relationship was impaired by Public Law 15-15. The accrued benefits of the Retirement Fund, as previously discussed, have been diminished and impaired by this law. Therefore, the contractual relationship has clearly been impaired by Public Law 15-15.

The final component of the threshold analysis is whether this impairment was substantial. The Government used Public Law 15-15 as the basis to avoid paying millions of dollars due as employer contributions. This Court would be hard-pressed to interpret a sum of this magnitude as being anything other than substantial. Therefore, all three components of the threshold inquiry

are satisfied.

Once this threshold inquiry is made the burden shifts to the opposing party to prove two things. The first is whether the law had a legitimate public purpose. *Matsunaga v. Matsunaga*, 2006 MP 25, P 24. The next is whether the change in the rights and responsibilities of the contracting parties is appropriate in relation to the purpose which serves as justification. *Id.* A law that substantially impairs a contractual relationship can still be constitutional so long as it was created for a legitimate public purpose and the contractual interference is reasonable in relation to the contractual rights effected. *Id.*

The Government asserted that Public Law 15-15 was enacted to address a financial crisis. It argued that the CNMI is nearly broke and that Public Law 15-15 offered "... one of the few tools available to the Commonwealth to stabilize its finances..." *Constitutionality P.L. 15-15*, e-filed by Defendants on March 13, 2009.<sup>2</sup> The logic of attempting to balance the Government's budget by threatening the future financial security of present and future retirees escapes this Court. However, the Court does agree that protecting public services and balancing the budget are legitimate public purposes. Therefore, the Government has arguably met its burden of proving that Public Law 15-15 was enacted to serve a legitimate public purpose.

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<sup>2</sup> The "blame game" does not solve the present predicament of the Fund. However, the present crisis is a result of elected officials turning a blind eye to the health of the Fund over the last ten years and woefully ignoring the constitutional mandate imposed upon them.

The Fund is also partially responsible for the mess that it is in. It has been too generous in allowing the grandchildren and great grandchildren of the first generation of retirees to obtain benefits long after the original retiree has died. The Fund was designed to provide for retirees and their spouses. It is assumed that when a person retires that his or her children are already grown up. The Fund is not for the children of the retirees' children. This is unfair to future retirees who could possibly see the original retiree's family avail themselves of the Fund for over eighteen years.

The present administration did the right thing in replacing defined benefit plan with the defined contribution plan. It stopped the bleeding and made it possible to ascertain how many retirees are left in the defined benefit plan, how long they and their spouses will live and how much money will be needed to take care of them.

The final issue remaining is whether the Government's decision to cease paying its obligations to the Retirement Fund was reasonable in relation to its desire to deal with the Commonwealth's financial crisis. In deciding this issue the Court must examine the rationale behind the offending law as well as whether other viable options existed. The United States Supreme Court noted that:

“In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.” *U.S. Trust Co. v. New Jersey*, 431 U.S. at 25-26 (1977).

The Commonwealth does not have free reign to ignore its contractual obligations when other policy alternatives exist. *State of Nevada Employees Ass. v. Keating*, 903 F.2d 1223, 1228 (1990). A Government should exhaust all other possible options before interfering with constitutionally protected funds. *Stone v State*, 664 S.E.2d 32, 43 (2008). The Commonwealth presented no evidence that it had identified and exercised all other possible options before enacting Public Law 15-15. The Court instead heard arguments that this was the only possible means of ensuring that other constitutionally guaranteed services were protected. These assertions fall flat in the face of several obvious and yet untried means of generating the needed revenue. Possibilities include selling Government properties located on Capital Hill, increasing taxation of foreign funded enterprises, such as the condominiums presently being built on the Lau Lau Bay Golf Resort, imposing a sales tax, diminishing tax rebates, curtailing all travel not funded by the Federal Government or even by auditing the Government agencies and reducing in

force unnecessary employees.<sup>3</sup> It was unreasonable for the Commonwealth to interfere with constitutionally protected retirement funds when other options were available and unexplored. As such, Public Law 15-15 is unconstitutional for violating the Contracts Clause of both the United States and Commonwealth Constitutions.

Public Law 15-15 is clearly unconstitutional. It violates Article III, Section 20(a) of the Constitution of the Commonwealth of the Northern Mariana Islands by threatening the solvency of the Retirement Fund. Public Law 15-15 also violates the Contracts Clause by unreasonably impairing a contractual relationship. As such, this Court finds Public 15-15 unconstitutional on both grounds as asserted by the Plaintiff.

### **1 CMC § 7207**

1 CMC § 7207 controls what funds may be disbursed to satisfy court judgments. The statute states:

“Except for funds appropriated for settlements and awards, no court may require the disbursement of funds from the Commonwealth Treasury or order the reprogramming of funds in order to provide for such disbursement. Any final judgment of a court shall be paid only pursuant to an item of appropriations for settlements and awards.” 1 CMC § 7207.

This statute effectively limits the Commonwealth’s liability to whatever amount it

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<sup>3</sup> All of this proposed cost cutting, and in fact this entire matter, could have been avoided had the Government shown a little foresight during the Commonwealth’s economic boom. For example, during the apex of the garment industry, if the Legislature had imposed an additional tax of ten cents per garment on garments manufactured in the CNMI and that tax had been earmarked for the Retirement Fund, the Fund most likely would have become fully funded and the money could have been invested in relatively secure triple A corporate bonds, treasury bills and long-term FDIC insured certificates of deposit. Had this been done, present and future pensioners would be spared the gut-wrenching news of the ups and downs of the stock market and the almost monthly dire predictions that the Fund will run out of money in two to five years. The reality of the situation appears to be that benefits will have to be reduced to keep the Fund viable.

appropriates each fiscal year towards settlements and judgments. The Plaintiff asserts that 1 CMC § 7207 violates the Separation of Powers Doctrine and is, therefore, unconstitutional.

Although this issue is not before the Court at this time, it should be raised if and when the Government attempts to avoid this Court's judgment by invoking 1 CMC § 7207. The Court would like to make the following remarks because it is concerned that the Government will act as it has in the past and use this statute as a means of avoiding or severely limiting its liability.

The CNMI Constitution creates three separate and equal branches of government, the Executive, Legislative and Judicial branches. N.M.I. Const. art. II, §1; N.M.I. Const. art. III § 1; and N.M.I. Const. art. IV, § 1. "No branch may assert control over the others, except as provided in the constitution, and no branch may exercise the power granted by the constitution to another. *Reyes v. Reyes*, 2004 MP 1 ¶90 (N. Mar. I. Jan. 15, 2004). The Superior Court has "all inherent powers, including the power to issue all writs necessary to the complete exercise of its duties and jurisdiction under this constitution and the laws of the Commonwealth." N.M.I. Const. art. IV, § 2. One of the Court's most solemn duties is to enforce those judgments that it has rendered.

The Government argues that any action by the Court against this statute would impinge upon the inherent powers of the Legislature to appropriate funds and would violate the Separation of Powers Doctrine. This argument ignores the fact that the statute itself violates the very doctrine behind which the Government seeks sanctuary. It is well established that a Court has the authority and the duty to review the constitutionality of statutes enacted by the legislature. *Tenorio v. Superior Court*, 1 N.M.I. 1, ¶16 (1989). As the Court is acting within its own inherent powers, it cannot be accused of usurping those of another branch. Therefore, this Court may review the constitutionality of 1 CMC § 7207 without violating the Separation of Powers Doctrine.

The District Court of the Northern Marianas recently addressed this issue and held that 1 CMC § 7207 does not apply to the Federal Courts. *See Order Granting Motion for Writ of Execution, and, in the alternative for an order in aid of judgment*, Civil Action 05-0043, District Court of the Northern Mariana Islands, Sept 30, 2008 Munson, J (unpublished). Although this decision was based upon that particular court's status as a Federal District Court, the reasoning expressed in its opinion is applicable in the present matter. The order stated that:

“... the failure of the Legislature to fulfill its constitutional mandate [*in appropriating funds to satisfy judgments*] does not, cannot, and will not prevent the court from taking *all* necessary steps to ensure that its judgments are enforceable. A court that cannot enforce its judgments must forever close its doors, as it will have become nothing more than a historical curiosity.” *Id.* at p. 6.

This Court, likewise, agrees that 1 CMC § 7207 may curtail its ability to ensure the enforceability of its judgments. The value of a Superior Court judgment against the Commonwealth becomes negligible when the prevailing party is relegated to its place in an ever growing line of unpaid judgment creditors. This sort of outcome undermines community confidence in the Superior Court and breeds a chilling effect that will dissuade prospective claimants from seeking relief.

The proper purpose of 1 CMC § 7207 is to allow the Commonwealth to control budgetary appropriations relative to the payment of judgments. Senator Maria Pangelinan testified that legislative budgetary committees give minimal consideration to outstanding debts, settlements and judgments when creating the budget. This disregard towards the Government’s creditors exhibits a disturbing amount of bad faith. If a private individual chose to conduct his financial affairs in such a manner he would be bankrupt in no time at all. This testimony, exposing the Government’s indifference to outstanding monetary judgments awarded by the courts, indicates that the Government has been using 1 CMC § 7207 in bad faith as a means of shielding the Commonwealth from liability. The Government must instead make payment of its debts a priority, especially those debts owed to the Retirement Fund because so many retirees count on their pension checks as their only means of survival.<sup>4</sup>

A statute that interferes with the inherent powers of another of branch is a violation of the Separation of Powers Doctrine and must be stricken. *See Reyes v. Reyes*, 2004 MP 1 ¶92 (N. Mar. I. Jan 15, 2004). 1 CMC § 7207 clearly interferes with the Judicial Branch’s inherent powers to render judgments against the Commonwealth. It allows the Legislative and Executive

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<sup>4</sup> This Court believes that the first priority of the Government’s budgeting process should be to budget for and pay its contributions to the Retirement Fund.

branches to decide which judgments will be addressed at which time, thereby usurping the power of the courts to fully adjudicate matters in a just and timely manner. Many judgments owed to less politically connected individuals have been postponed, potentially into perpetuity.

### **1 CMC § 8365**

1 CMC § 8365 states that 30% of the hotel occupancy taxes and 20% of the alcohol container taxes will be given to the Retirement Fund each year. The Government has failed to provide these funds as ordered by this statute. This statute is a legislatively enacted appropriation and it is within the power of this Court to order the disbursement of these particular funds.

*Valdez v. Cory*, 139 Cal. App. 3d 773, 792-3 (Cal. App. 3d Dist. 1983).

### **DAMAGES**

For eleven days the Court heard testimony about the amount of damages owed to the Plaintiff. One would think that this many days of testimony would produce a befuddling amount of data for the Court to sort through in order to assess damages. However, this was not the case. The Defendants chose to make the Plaintiff painstakingly prove every bit of damages, even though the question of liability was uncontested. The Plaintiff did just that by producing various public laws and through the introduction of 46 exhibits<sup>5</sup>. For the most part, the Defendant does not dispute damages and the difference between what the Plaintiff wants and what the Defendant agrees to is minute considering the sums involved.

Basically, the Defendant had no defenses to the amounts that the Plaintiff claimed. Instead, it argued that there were no damages since the actuarial rate takes into consideration past amounts owed and if the actuarial rate is paid, then past amounts would eventually be paid off. This may or may not be true. But it presents an interesting dilemma. The Plaintiff wants the Government to pay its employer contribution at the actuarial rate of 37.3909% starting immediately. Even if the Government started paying this actuarial rate upon the rendering of this judgment, how long would it take for the past debt to be paid off and would the Fund even

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<sup>5</sup> The Defendants, on the other hand, only offered seven exhibits.

survive? No one knows and the retirees cannot afford to wait and see how it would play out.

More importantly, the Government, through its own witnesses, the Secretary of Finance, the Special Assistant to the Secretary of Finance and Senator Pangelinan have testified that the Government simply cannot afford to pay the present actuarial rate under any circumstances. Indeed, Senator Pangelinan testified that 1,000 government jobs would be lost if the employer contribution rate is raised beyond 11%. This appears to be a dramatic overstatement since absolutely no evidence was introduced to support this claim. However, there is no doubt in the Court's mind that the community would be adversely affected if the rate was increased to the full rate as requested by the Plaintiff.

By clear and convincing evidence, the Plaintiff has proven damages in the amount of \$231,689,477 and JUDGMENT IS SO ENTERED. These damages were calculated by examining the following factors:

**1. Audit Confirmation Letters**

These writings, each of which was acknowledged by Secretary of Finance Inos as being valid, were letters confirming the amounts due to the Fund from the Government. Mr. Schrack either acknowledged the sum due or set forth a different number acknowledged to be due by the Government.

**2. The Actuarially Determined Employer Contribution Rate**

See footnote 1 for an explanation of how this rate is determined.

**3. Budget Acts**

PL 11-41 was the Budget Act for 1999. Because there was no appropriations act passed, only a continuing resolution, PL 11-41 continued to be the controlling Budget Act for 2000, 2001 and 2002. Likewise, PL 13-24 was the Budget Act for 2003, and since no budget act was passed until 2007, it continued to be the budget for 2004, 2005 and 2006. PL 15-28 was the Budget Act passed in 2007 and controlled through 2008. PL 16-32 was passed in 2009 and continues to be the controlling budget act.

**4. Memorandum of Agreement**

The Government and the Fund signed this Memorandum of Agreement at the end of 2001, agreeing that the Government would make a \$500,000 payment on every other non-

payday Friday. The purpose of this payment was to allow the Government to catch up on its obligations. However, the Government subsequently failed to make the required payments and thus breached the Memorandum of Agreement.

**5. Employer Contributions**

The Government is liable for paying Employer Contributions as set by the actuarially determined rate. Although previous laws have set the rate lower than the actuarially determined rate, the Government is still liable for the difference. The testimony of all the witnesses and the documents admitted into evidence showed that the Government owed \$158,106,672 in deficient Employer Contribution payments as of April 15, 2009.

**6. Statutory Penalty for Untimely Payments of Employer Contributions**

PL 6-17, as codified by 1 CMC §8362(e) and amended by PL 16-2, provides for a penalty on untimely Employer Contribution payments. It states:

“Any employer who fails to pay or remit contributions as required by this part shall pay a penalty on the amount of unpaid contributions of 10 percent if paid within 30 days after the payment is due, 20 percent if paid within 60 days after the payment is due, and 25 percent if paid within 61 days or more after the payment is due.”

The Government first stopped paying Employer Contributions on August 14, 1999. Since then their payments have been sporadic at best. The Fund showed that the balance owed for these statutory penalties, as of Fiscal Year 2008<sup>6</sup>, is \$37,475,946.

**7. Special Annuity**

PL 6-17, codified at 1 CMC §8357, provides a Special Annuity for former Governors and Lieutenant Governors. The law provides for the Government to make contributions to the fund each year necessary to fund special retirement annuities which are separate and in addition to those contributions made pursuant to 1 CMC §8362. The Government became delinquent in its Special Annuity payments beginning in 2001. The Government currently owes \$448,998 for the

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<sup>6</sup> Fiscal Year 2008 was the last audited financial statement and the most recent and reliable source for this figure.

Special Annuity payments for former Governors and Lieutenant Governors that had been previously paid and appropriated but never remitted to the Fund.

**8. Public Law 8-31 Appropriations**

PL 8-31 provides for appropriations in order to pay for a cost of living allowance, an increase in service annuity benefits, premiums for annuitants' Group Health and Life Insurance and to preserve the actuarial soundness of the Fund. The Government owes \$15,026,332 in monies that have been appropriated but never remitted to the Fund.

**9. Public Law 8-30, Early Retirement Bonus**

PL 8-30 provides for an early retirement bonus for Government employees. The law provides that the employer is to bear the cost of the bonus. However, in the event that the employer is unable to pay, the Fund was obligated to pay the bonus subject to reimbursement through appropriations. The Fund has disbursed \$3,366,061. The Government has yet to repay this amount and owes \$3,366,061 to the Fund.

**10. Public Law 9-25 Trust Territory Prior Service Receivable**

PL 9-25 provides that all employees who paid any employer's contribution in order to earn a service credit in the Fund for employment during the Trust Territory period will be reimbursed by the Fund and shall be included as a liability to the Government. The Fund paid out \$780,733, but was never reimbursed. As such, the Government owes the Fund the amount of \$780,733.

**11. The Amount Due from the General Fund**

The Fund's 2002 Audited Financial Statement provided as follows:

“In July 1986, a U.S. federal financial assistance award was granted to the CNMI to initiate study and implementation of a plan for an actuarially sound, locally funded pension system.

Subsequent to the execution of this grant, the Governor for the CNMI delegated the authority to expend \$350,000 in grant funds to the Fund. At September 30, 2002 and 2001, the balance due from the General Fund for this program was \$10,698.”

This amount remains unpaid and is booked as a receivable against the Government.

Therefore, the Government owes the Fund for what is stated above in the amount of \$10,698.

## **12. Lost Opportunity Costs**

The initial principal of the Fund was three million dollars in 1980. Before 1998, there was approximately \$130 million in principal that was invested in the stock market by the Fund. The Fund invests pursuant to an Investment Policy Statement (the “IPS”), which is industry standard. The IPS is adopted by the Board and lays out the benchmark, risk tolerance, time frame and other factors which provide guidance in investment decisions.<sup>7</sup> The IPS requires that benchmarks are tracked and met so that investment managers can be judged on their performance and terminated if necessary.

Investments are made pursuant to an asset allocation set forth by the IPS and monitored by the Fund. The Fund had to pay out in excess of thirty million dollars as a draw down<sup>8</sup> because of the shortage of employer contributions for 2008. This money came from the sale of bonds and should have been reinvested in equities instead of being taken out completely.

The effect of the draw downs the Fund has been forced to take out to pay retirees’ pensions are: 1) to pay out assets which could be making a return; 2) to cause portfolio managers

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<sup>7</sup> The Court wonders whether the IPS that is supposedly industry standard is currently suitable for the Fund in light of what happened in 2008 to the stock market. A significant amount of money is basically earning very little at the present time and the corpus is dwindling. Yet, the Board of Trustees, the investment manager and the administrator seem to have an undeserved reverence for the fund consultant, Merrill Lynch. Indeed, they seem to be cheerleaders for Merrill Lynch even though its investment strategy has turned out to be an irresponsible disaster for the Fund. Basically, the 70-30 or 60-40 investment of equities to bonds or other more secure holdings seems questionable and destined to spell disaster for the Fund as the people responsible for managing it merrily allow Merrill Lynch to think for them and subject the retirees to a heart attack every month when the value of the Fund is published.

The Court also notes that it was never brought out exactly what the investment counselors earn for managing the Fund’s investments. But one wonders whether they also take a share of the losses when their decisions negatively impact the Fund’s assets.

<sup>8</sup> A draw down is a reduction in account equity.

to liquidate long term positions early; and 3) to throw off the balance of the portfolio because assets which should have been transferred into a different type of investment were instead withdrawn.

More specifically, when the Fund is not forced to draw down, it follows a specific reallocation plan of its portfolio when it is determined that one asset class outweighs the others. The money is then pulled out of the heavier class and reinvested in the underweight class. This has the effect of selling high and buying low. But when the Fund is forced to pull out money in a draw down, it is unable to buy when prices are low.

The Plaintiff introduced several exhibits that summarized the returns that the Fund would have realized had the Government paid all the monies owed to the Fund. These proved that the total amount lost because the Fund was unable to invest the money was \$16,474,037. Therefore, the Government owes the Fund \$16,474,037 in lost opportunity costs.

### **CONCLUSION**

The Court must now address the difficult issue of how this judgment is to be paid. Before these hearings started on April 20, the Court was advised that the parties wished to discuss settlement. After that the word mediation was brought up by the Government. The Court encouraged both parties to pursue these avenues since the Court has always believed that both parties have a better idea than the Court as to the amounts that were claimed and due and what could be paid. Unfortunately, no settlement has materialized at the time of this decision. The Court is still of the opinion that settlement, rather than enforcement of a judgment, is the best way to resolve this matter.<sup>9</sup>

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<sup>9</sup> In its summation brief, the Fund is requesting numerous things from this Court. In addition to the sum certain and lost opportunity monetary damages, the Fund wants an order transferring title to it of 1,000 shares of common stock in the Pacific Islands Development Bank, fee simple title to the "Marianas House" in Washington, D.C., title to two vehicles formerly used by the Office of the Resident Representative to the United States and the MPLT interest that ordinarily goes to the General Fund. The Fund also wants an order for the Government to identify all revenue generating public lands and an order transferring fee simple title to it for public lands situated on

The Court ORDERS the Secretary of Finance to:

1. Pay to the Plaintiff an employer contribution rate of 16%, beginning with the pay period ending August 14, 2009.
2. Pay to the Plaintiff, under 1 CMC § 8365, 30% of the hotel occupancy taxes and 20% of the alcohol container taxes. This payment shall commence on August 1, 2009 and shall continue until further order of Court.

The Court expects that this decision will only be the starting point for negotiations between the two parties and reserves the right to modify its judgment in response to changing circumstances. The judgment will need to be updated to take into account the additional damages that have accrued since the April 15, 2009. The employer contribution rate may need to be readjusted if it becomes apparent that 16% is not sufficient to keep the Fund solvent. In addition, the contribution rate will also need to be modified if any assets are executed upon or transferred between the parties pursuant to agreement of the parties and/or post-judgment remedies. Finally, the issues of interest on the judgment and cost of suit will be taken up at a later date.

A review hearing is scheduled for November 2, 2009 at 9:00 a.m. in Courtroom 205A.

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Capitol Hill, behind the Garapan Elementary School, the Samoan Housing units on Navy Hill and in the seaport area between the Army Reserve area and the area across from the Shell gas station in Puerto Rico.

Additionally, the Plaintiff wants an order transferring CUC preferred stock currently held by CDA to the Fund, an order directing that all monies appropriated from the Saipan Local Legislative Delegation, except for SHEFA funds, be given to the Fund, an order directing the Government to provide the Fund a list of hotels, golf courses and any other companies generating revenue on public lands and an order directing the Government to provide the Fund with a list identifying with specificity all leases paid by the Government to private companies and/or individuals.

Other than the sum certain and lost opportunity damages that the Court has already addressed, the Court chooses not to address *at this time* (emphasis added) the other requests by the Fund since they are in the nature of post-judgment remedies. If there is not a reasonable response from the Government in paying its liabilities to the Fund, the Court will deal with the above requests in post-judgment motions.

