IN THE SUPREME COURT OF GUAM

VICENTE C. PANGELINAN, AND JOSEPH C. WESLEY,
Plaintiffs-Appellants,

vs.

FELIX P. CAMACHO, Governor; ALICIA G. LIMTIACO, Attorney General; LAWRENCE P. PEREZ, Director of the Department of Public Works; ANTHONY C. BLAZ, Acting Administrator of the Guam Economic Development and Commerce Authority; TEREZO R. MORTERA, Director of Land Management; Y'ASELA A. PEREIRA, Treasurer of Guam; GOVERNMENT OF GUAM
Defendants-Appellees,

and

GUAM RESOURCE RECOVERY PARTNERS,
Intervening Defendant-Appellee.

OPINION

Cite as: 2008 Guam 4

Supreme Court Case No.: CVA06-017
Superior Court Case No.: SP0212-00

Appeal from the Superior Court of Guam
Argued and submitted on May 15, 2007
Hagåtña, Guam

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BEFORE: RICHARD H. BENSON, Presiding Justice *Pro Tempore*; JOHN A. MANGLONA, Justice *Pro Tempore*; J. BRADLEY KLEMM, Justice *Pro Tempore*[1].

MANGLONA, Justice *Pro Tempore*:

[1] In *Pangelinan v. Gutierrez*, 2004 Guam 16, we amended our earlier decision in the case from *Pangelinan v. Gutierrez*, 2003 Guam 13, and remanded the case to the Superior Court. On remand, the Superior Court granted summary judgment for Intervening Defendant-Appellee Guam Resource Recovery Partners ("GRRP"), finding that an illegal contract provision was severable from the remainder of the contract. On appeal from the Superior Court's grant of summary judgment, we, for the following reasons, reverse and remand this matter for further proceedings consistent with this opinion.

I.

[2] We have discussed fully the procedural and factual background of this case in *Pangelinan v. Gutierrez*, 2003 Guam 13 ¶¶ 2-10 (*"Pangelinan I"*), and *Pangelinan v. Gutierrez*, 2004 Guam 16 ¶ 1 (*"Pangelinan II"*), and need not recite it completely here. This case involves a series of agreements between the Government of Guam and various parties regarding the building of a facility on Guam that would convert solid waste into electrical power. In *Pangelinan I*, we held that the entire Solid Waste Construction and Service Agreement entered into between GRRP and the Government of Guam in 1996 ("1996 Agreement") was null and void because it violated 48 U.S.C. § 1423j and 5 GCA § 22401.[2] *Pangelinan I*, 2003 Guam 13 ¶ 27. In *Pangelinan II*, we affirmed our holding in *Pangelinan I* that section 4.04 of the 1996 Agreement violated 48 U.S.C. § 1423j and 5

[1] Chief Justice F. Philip Carbullido and Associate Justice Robert J. Torres recused themselves from this matter. On April 26, 2007, pursuant to 7 GCA § 6108(a) and the Rule of Necessity, Chief Justice Carbullido appointed the Honorable Richard H. Benson as Presiding Justice *Pro Tempore* in this matter. John A. Manglona, Associate Justice of the Supreme Court of the Commonwealth of the Northern Mariana Islands, and J. Bradley Klemm sit as Justices *Pro Tempore*.

[2] Title 5 GCA § 22401 states in relevant part that "[n]o officer or employee of the government of Guam, including the Governor of Guam, shall . . . [i]nvolve the government of Guam in any contract or other obligation, for the payment of money for any purpose, in advance of the appropriation made for such purpose . . . ." 5 GCA § 22401(a)(3) (2005). Title 5 GCA § 22401 is Guam's Antideficiency Act. *See Pangelinan I*, 2003 Guam 13 ¶¶ 16-17.

GCA § 22401 but amended our earlier decision and remanded the case for a determination on whether or not section 4.04 was severable from the 1996 Agreement. *Pangelinan II,* 2004 Guam 16 ¶ 1. On remand we instructed the lower court to apply a two-part analysis for severability that tests, one, whether the illegal provision is the central purpose of the agreement and, two, whether the illegal provision is integral to the agreement.[3] *Id.* ¶ 18.

[3] Applying the *Pangelinan II* test, the Superior Court determined that section 4.04 was not the central purpose of the 1996 Agreement and that section 4.04 was not integral to the 1996 Agreement.[4] The court therefore held that section 4.04 of the 1996 Agreement was severable from the 1996 Agreement and granted GRRP's motion for summary judgment. Severing section 4.04, the Superior Court "declare[d] the remaining portions of the 1996 Agreement to be valid and enforceable."[5] Appellants' Excerpts of Record ("ER"), tab 4 (Judgment at 1). Pangelinan timely filed his appeal of the Superior Court's summary judgment for GRRP.

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[3] Specifically, we stated:

> On remand, upon examination of all the circumstances, the trial court must determine whether section 4.04 of the 1996 Agreement is the central purpose of the contract. If section 4.04 is the central purpose, then the trial court must find that the contract is unenforceable in its entirety. On the other hand, should the trial court determine that section 4.04 is collateral to the main purpose of the contract, it must then assess whether section 4.04 is severable. This severability analysis requires the trial court to examine the language and subject-matter of the contract, and the intention of the parties, to determine whether section 4.04 is integral to the contract. Should the court find that section 4.04 is an integral part of the contract, and therefore the illegal provision cannot be severed, the trial court must find that the contract in its entirety is invalid. Conversely, should the court find that section 4.04 is not integral to the contract, and thus the illegal provision may be severed from the contract, the trial court must then find that the contract is valid.

Pangelinan II, 2004 Guam 16 ¶ 18 (citation omitted).

[4] On remand, the Superior Court analyzed only section 4.04(c) of the 1996 Agreement for severability. This limitation of the scope of the analysis by the Superior Court has no impact on our reversal, and, to remain consistent with our instructions from *Pangelinan II,* we will generally refer to section 4.04 in its entirety.

[5] With this statement from the Judgment, the Superior Court painted with a bit too broad of a brush. Regarding severability, on remand the court confronted only whether section 4.04 invalidated the entire 1996 Agreement. Severing section 4.04 could not somehow validate every remaining provision of the voluminous 1996 Agreement. The remaining provisions could later be declared invalid for any of the myriad of reasons that invalidate provisions in agreements and contracts. However, because we determine that the entire 1996 Agreement fails, we need not rule on this statement by the Superior Court.

II.

[4] Prior to discussing the merits of this case, we must discuss an issue raised *sua sponte* by the court – plaintiffs' taxpayer standing to sue. We raised the issue of Pangelinan's taxpayer standing to sue due to the possibility of contradictory interpretations of what establishes standing under 5 GCA § 7103.[6] Contradictory interpretations of 5 GCA § 7103 are possible, because the statute permits a taxpayer to seek injunctive relief for expenditures without authorization "*and* to obtain a personal judgment." 5 GCA § 7103 (2005) (emphasis added).[7] Section 7103 could be read in the conjunctive and not disjunctive sense, allowing injunctive relief only when accompanied by personal judgments.[8] The parties provided supplemental briefs regarding the issue of standing under 5 GCA § 7103. We decline at this time to address the issue of standing under 5 GCA § 7103, however, because Pangelinan has a valid source of standing under the common law taxpayer standing recognized by *Santos v. Calvo*, Civ. No. 80-0223A, 1982 WL 30790 (D. Guam App. Div. Aug. 11, 1982).

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[6] Title 5 GCA § 7103 provides a resident Guam taxpayer with standing to sue the Government to enjoin the inappropriate expenditure of funds "and" to obtain a personal judgment against a Government officer, employee or contractor, and states:

> Any taxpayer who is a resident of Guam shall have standing to sue the government of Guam and any officer, agent, contractor, or employee of the Executive Branch of the government of Guam for the purpose of enjoining any officer, agent, contractor, or employee of the Executive Branch of the government of Guam from expending money without proper appropriation, without proper authority, illegally, or contrary to law, *and* to obtain a personal judgment in the courts of Guam against such officers, agents, contractors, or employees of the government of Guam and in favor of the Government of Guam for the return to the Government of Guam of any money which has been expended without proper appropriation, without proper authority, illegally, or contrary to law. For purposes of this Chapter, the Governor and Lt. Governor of Guam are officers of the government of Guam, and are included within the scope of this Chapter.

5 GCA § 7103 (2005) (emphasis added).

[7] Two cases obliquely implicate standing under Title 5 GCA Chapter 7. *See Gutierrez v. Pangelinan*, 276 F.3d 539, 543-47 (9th Cir. 2002); *Ada v. Guam Tel. Auth.*, 1999 Guam 10 ¶¶ 1-8.

[8] Pangelinan demonstrated in his complaint that he was unsure of the interpretation of the "and" in 5 GCA § 7103 when he stated that "Plaintiffs bring this petition against Defendants only in their professional capacities and not personally, except to the extent required by 5 [GCA] § 7103 for the purpose of Plaintiffs' standing." Intervening Appellee's Supplemental Excerpts of Record ("SER") 3 (Compl. for Declaratory & Injunctive Relief at 3 ¶ 8).

[5] In *Santos v. Calvo*, the Appellate Division of the District Court of Guam determined that a party had general common law taxpayer standing to sue to enjoin spending by a public official. *Id.* at *2. The court stated that, "we adopt the majority rule and hold that Santos had [taxpayer] standing to bring an injunctive action against a public official of Guam." *Id.* We do not divert from precedents set by the Appellate Division of the District Court of Guam unless reason supports deviation, *In re Camacho*, 2006 Guam 5 ¶ 51 n.10, and we see no reason to divert from the precedent set in *Santos v. Calvo*.[9] We hold that Pangelinan has common law taxpayer standing in this case. With standing established, we now turn to the merits of the case.

III.

[6] This court has jurisdiction to review a final judgment of the Superior Court. 7 GCA §§ 3107 and 3108(a) (2005). We review the grant of summary judgment by a Superior Court *de novo. Guam Hous. & Urban Renewal Auth. v. Pac. Superior Enters. Corp.*, 2004 Guam 22 ¶ 14. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. Rule 56(c). "In rendering a decision on a motion for summary judgment, the court must draw inferences and view

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[9] Neither party cited to *Santos v. Calvo* in their supplemental briefs. An argument could be made that Guam's common law taxpayer standing provided in *Santos v. Calvo* was displaced when statutory taxpayer standing was established in 1985. *See* 5 GCA Ch. 7. However, this argument would be unavailing because:

> The general rule is that statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject or, in other words, to occupy the field. "[G]eneral and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter."

I.E. Assoc. v. Safeco Title Ins. Co., 702 P.2d 596, 598 (Cal. 1985) (citations and quotation marks omitted) (alteration in original) (quoting 2A Sutherland, *Statutory Construction* § 50.05 at 440-41 (Sands 4th ed. 1984)). Title 5 GCA Chapter 7 does not speak with sufficient detail to evidence any legislative intent to displace the common law, and it does not explicitly state that it preempts, modifies, supplants or displaces the common law. The Guam Code does contain a general provision covering the common law which explains that "common law rules that statutes in derogation of the common law, and penal statutes shall be strictly construed shall not apply." 1 GCA § 700 (2005). However, this provision does not alter a determination that the common law in *Santos v. Calvo* was not displaced by 5 GCA Chapter 7.

the evidence in a light most favorable to the non-moving party." *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7. "We review issues of contract interpretation *de novo*." *Pac. Superior Enters. Corp.*, 2004 Guam 22 ¶ 29.

IV.

[7] One of the main purposes for the remand in *Pangelinan II* was to give the Superior Court an opportunity to determine if section 4.04 of the 1996 Agreement was severable from the Agreement. *Pangelinan II,* 2004 Guam 16 ¶ 18. This court's severability instructions in *Pangelinan II* were pivotal, because the *Pangelinan II* court affirmed that section 4.04 of the 1996 Agreement violated 48 U.S.C. § 1423j and 5 GCA § 22401, *id.* ¶ 1, and determined that the entire 1996 Agreement would be invalid if section 4.04 was not capable of severance. *Id.* ¶ 18. The severability test from *Pangelinan II* outlines a two-part analysis that tests: (1) whether the illegal provision was the central purpose of the 1996 Agreement; and (2) whether the illegal provision is integral to the 1996 Agreement. *Id.*[10]

[8] The Superior Court determined under the first part of our *Pangelinan II* analysis that section 4.04 of the 1996 Agreement is not the central purpose of the 1996 Agreement. Due to our determination regarding the second part of the *Pangelinan II* severability analysis, we need not

[10] "The Legislature undisputedly has not appropriated funds for the 1996 Agreement."*Pangelinan I*, 2003 Guam 13 ¶ 22. We question the application of the concept of severability to a provision in a government contract that violates Guam's antideficiency act by obligating funds in advance of appropriation. *See Leiter v. United States*, 271 U.S. 204, 206-08 (1926); *Cray Research, Inc. v. United* States, 44 Fed. Cl. 327, 332-33 (1999); *City of Los Angeles v. United States*, 107 Ct. Cl. 315, 68 F. Supp. 974, 975-76 (1946); *In re Propriety of Continuing Payments under Licensing Agreement*, 66 Comp. Gen. 556, 559, 1987 WL 96981 (July 6, 1987) (stating that "[s]ince the agreement was only valid for 1 year, the question about severability does not arise"). *See generally* 2 General Accounting Office, Principles of Federal Appropriations Law 6-34 to 6-159 (3d ed. 2006) (explaining the Federal Antideficiency Act); Karen L. Manos, *The Antideficiency Act Without an M Account: Reasserting Constitutional Control*, 23 Pub. Cont. L.J. 337 (1994) (explaining the Federal Antideficiency Act); Gary L. Hopkins & Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3679): and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51 (1978) (explaining the Federal Antideficiency Act), *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/MilitaryLawReview.nsf/. However, we do not address this question, because neither party challenged applying severability in this appeal and our remand required a severability analyses.

analyze the Superior Court's central purpose ruling.[11]

[9] Regarding the second part, we disagree with the Superior Court's determination that section 4.04 is not integral to the 1996 Agreement. Because section 4.04 is an essential part of the agreed exchange and, looking at the language of the 1996 Agreement, GRRP would not have entered into the 1996 Agreement without this provision, it is integral and not severable. We arrive at our severability determination by looking at the law underpinning the second part of our *Pangelinan II* severability analysis and then applying this law to section 4.04 and the 1996 Agreement.

[10] The second part of our severability analysis from *Pangelinan II* involves determining "whether section 4.04 is integral to the contract." *Pangelinan II,* 2004 Guam 16 ¶ 18. "Should the court find that section 4.04 is an integral part of the contract, and therefore the illegal provision cannot be severed, the trial court must find that the contract in its entirety is invalid." *Id.* The term "integral" in the *Pangelinan II* analysis originated from *John R. Ray & Sons, Inc. v. Stroman,* 923 S.W.2d 80, 87 (Tex. App. 1996). *Pangelinan II,* 2004 Guam 16 ¶¶ 17-18. *John R. Ray & Sons* did not explicitly define "integral," but the case provided a test for severability when the court stated:

> Where each covenant is such an indispensable part of what both parties intended that the contract would not have been made without the covenant, they are mutual conditions and dependent, in the absence of clear indications to the contrary. *The relevant inquiry is whether or not the parties would have entered into the agreement absent the unenforceable part.*

923 S.W.2d at 86 (emphasis added) (citations omitted).

[11] Furthermore, in *Pangelinan II* we cited with approval to *Panasonic Co. v. Zinn,* 903 F.2d 1039, 1041 (5th Cir. 1990), where that court stated, "'In determining whether a particular provision

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[11] We caution that the "central purpose" test from *Pangelinan II* does not solely involve an analysis of whether the illegal or unenforceable part of the contract or agreement is the central purpose of the contract or agreement. A fully formed "central purpose" analysis examines whether the central purpose of the contract is tainted with illegality. "'If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced.'" *Pangelinan II,* 2004 Guam 16 ¶ 13 (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.,* 6 P.3d 669, 696 (Cal. 2000)). In *Armendariz,* the court applied its illegal contract provision severability analysis to unconscionable provisions of an arbitration agreement. 6 P.3d at 695-96. The *Armendariz* court did not look solely to see if the central purpose of the employment arbitration agreement was illegal or unconscionable. The court noted that employment arbitrations may be valid if they meet certain requirements, *id.* at 674, but invalidated the entire agreement due to the unlawful provisions' inability to be severed. *Id.* at 696-97.

is severable, the issue is whether the parties would have entered into the agreement absent the illegal parts.'" *Pangelinan II,* 2004 Guam 16 ¶ 16 (quoting *Panasonic Co.,* 903 F.2d at 1041 (internal quotation marks and brackets omitted)). Inquiring whether the parties would have entered into the agreement absent the unenforceable or illegal part is a sound method of determining whether a provision is integral and comports with prudent policy regarding contracts.

[12] The policy behind a court examining whether or not the parties would have entered into the agreement absent the illegal or unenforceable part when making a severability determination was cogently explained by the Alaska Supreme Court in *Zerbetz v. Alaska Energy Center,* 708 P.2d 1270, 1282-83 (Alaska 1985). The court in *Zerbetz* stated:

> In general, courts try to give effect to agreements the parties have made, not to agreements the parties have not made but that the courts think would have been just. If parts of an agreement violate public policy, the "agreement" which remains after those parts have been excised may or may not seem to "result in some inequality." Even if it does not, it is still not the agreement the parties made. If a provision that the court must excise is an "essential part of the agreed exchange," the court cannot be sure that in that provision's absence the parties would have agreed at all. In that case the court should not enforce what remains of the agreement.

Id. (quoting Restatement (Second) of Contracts § 184(1) cmt. a (1981)).

[13] We adopt the analysis from *Panasonic, Zerbetz,* and *John R. Ray & Sons* as the measure of whether a provision is integral under the second part of our severability test from *Pangelinan II.* In order to determine whether or not section 4.04 of the 1996 Agreement is integral and, therefore, not severable, we must analyze whether the parties would have entered into the agreement absent the unenforceable or illegal part. If the unenforceable or illegal part is an essential part of the agreed exchange, then it is integral and not severable.

[14] We conclude that section 4.04 is an essential part of the agreed exchange and that GRRP would not have entered into the 1996 Agreement without the illegal and unenforceable part. We

come to this conclusion by looking solely at the terms of the 1996 Agreement.[12] Section 4.04(c) of the 1996 Agreement would provide GRRP with millions of dollars in payments. The section states:

> If such failure [to satisfy any Conditions Precedent set forth in sections 4.02 or 4.03] is the result of Government Fault, then (i) this Agreement shall terminate, (ii) the Government shall pay on or prior to the Termination Date to the Company its Phase I Development Costs, its Phase II Development Costs incurred through the Termination Date of this Agreement and the Defeasance Cost, if any, and the License Defeasance Cost, and (iii) the Company shall have no other claim against the Government arising from or relating to this Agreement.

Appellants' SER, tab 1 (Pls.' Mem. in Supp. of Summ. J., Ex. A (1996 Agreement at 70)) (hereinafter "1996 Agreement").

[15] The fact that GRRP would gain substantially under section 4.04(c) is not obvious, because the section is not a standalone provision. It is tied to many other sections of the 1996 Agreement, and one must look elsewhere in the 1996 Agreement to provide meaning to terms used in section 4.04(c). "Phase I Development Costs" are defined by the 1996 Agreement as "[o]ne million five hundred thousand dollars ($1,500,000), in respect of development services by the Company before January 1, 1993. Phase I Development Costs *shall not be subject to Cost Substantiation.*" 1996 Agreement at 43 (emphasis added). "Phase II Development Costs" are defined as:

> One million three hundred thousand dollars ($1,300,000), which shall be paid to the Company in respect of costs and expenses of the Company for the period from and after January 1, 1993, in connection with the development of the Facility; provided, however, that the Phase II Development Costs shall be subject to adjustment (i) if, within ninety (90) days following the Contract Date, the Government has not delivered to the Company either evidence of Legislative Approval or an unqualified opinion of nationally recognized bond counsel for the Government to the effect that no Legislative Approval is required for the execution, delivery and performance by the Government of its obligations hereunder, or (ii) as provided in Sections 7.06, 7.07 and 7.08. Phase II Development Costs *shall not be subject to Cost Substantiation*

[12] We express no opinion on whether or not an analysis of whether parties would have entered into the agreement absent the illegal or unenforceable part involves looking outside of the four corners of an agreement or contract, because, in this case, looking outside the 1996 Agreement is unnecessary. Texas courts look only to the language of the agreement. *John R. Ray & Sons,* 923 S.W.2d at 86. However, Alaska courts may be allowed to look outside of the language of the agreement. *Zerbetz,* 708 P.2d at 1283-84. The record before us contains no evidence regarding whether GRRP would have entered into the 1996 Agreement absent section 4.04, however, with this Agreement, no evidence outside of the terms of the Agreement is required.

> and, unless otherwise agreed by the parties, shall not be subject to increase or reduction based upon actual costs incurred by the Company.

1996 Agreement at 43-44 (underlines in original, italic emphasis added).

[16] GRRP would also receive "Defeasance Cost" and "License Defeasance Cost" through section 4.04(c). "Defeasance Cost" is defined to mean:

> [A]s of any calculation date, an amount sufficient to defease and discharge all outstanding Bonds in accordance with their terms, together with all related costs of defeasance and repayment, after giving effect to the release of any reserve funds or insurance proceeds which are made available for such purpose under the Indenture in connection with such defeasance, plus an amount equal to all outstanding Equity and all return thereon provided for under this Agreement accrued but unpaid as of such calculation date.

1996 Agreement at 15-16. "License Defeasance Cost" means "as of any calculation date (a) if such calculation date is prior to the Acceptance Date, the product of Three hundred thousand dollars ($300,000) times the number of years (including any partial year) prior to the year 2013, or (b) if such calculation date is on or after the Acceptance Date, the Fair Facility Value less the Defeasance Cost." 1996 Agreement at 35.

[17] Thus, GRRP stands to gain millions of dollars from section 4.04 regardless of whether they perform any work or incur any cost. Due to this substantial gain afforded by section 4.04, it is an essential part of the agreed exchange and integral to the entire contract. Furthermore, the importance placed on section 4.04 by the parties is made clear by the fact that section 4.04 is specifically referred to in other provisions of the 1996 Agreement. Section 6.02 and section 6.04 allow GRRP to exercise its rights under section 4.04 if the parties cannot agree on a revised facility price or GEDA or another political subdivision of the Government of Guam fails to agree to issue bonds despite being able to issue the bonds. 1996 Agreement at 96, 98. Because the parties would not have entered into the 1996 Agreement without section 4.04, the presence of a severability clause in section 19.15 of the 1996 Agreement does not save the Agreement in this case. "'[W]hen the severed portion is integral

to the entire contract, a severability clause, standing alone, cannot save the contract.'" *Pangelinan II*, 2004 Guam 16 ¶ 17 (quoting *John R. Ray & Sons,* 923 S.W.2d at 87).

[18] GRRP's arguments that section 4.04 is not integral are unavailing. GRRP argues that section 4.04 of the 1996 Agreement is not integral and is severable, because section 4.04 is a collateral damages provision. However, GRRP's argument is unpersuasive. GRRP cited two cases to support its proposition that courts have generally held that damages provisions of a contract are not essential or integral and are, therefore, severable: *Tata Consultancy Services v. Systems International, Inc.*, 31 F.3d 416 (6th Cir. 1994), and *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001). Neither case involves a government contract, and the provisions dealt with in *Tata* and *Gannon* are not similar to section 4.04.[13] Further, GRRP calls section 4.04 a "damages provision," Intervening Defendant-Appellee's Brief p. 13 (Mar. 14, 2007), but this "damages provision" is not similar to a provision in any case cited.[14]

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[13] In *Tata,* the court, while reversing a lower court's summary judgment determination in a tortious interference with an employment contract case, only briefly mentioned that the possibly unenforceable liquidated damages provisions in the employment contracts were severable. 31 F.3d at 428-29. The *Gannon* court dealt with a limitation on punitive damages in an employment dispute arbitration agreement when they reversed the lower court's invalidation of the entire arbitration agreement due to an offensive provision. 262 F.3d at 681-83.

[14] GRRP does not explain its "damages provision" moniker. Guam Law voids "damages provisions" or other compensation provisions implicated upon breach, 18 GCA § 88103 (2005), except that "[t]he parties to a contract may agree therein on an amount which shall be presumed to be the amount of damage sustained by a breach thereof; when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." 18 GCA § 88104 (2005). Furthermore:

> It is generally agreed that a liquidated damages provision does not violate public policy when, at the time the parties enter into the contract containing the clause, the circumstances are such that the actual damages likely to flow from a subsequent breach would be difficult for the parties to estimate or for the nonbreaching party to prove, and the sum agreed upon is designed merely to compensate the nonbreacher for the other party's failure to perform.

24 Richard A. Lord, *Williston on Contracts* § 65:1 (4th ed. 2007) (footnote omitted). Perhaps GRRP did not refer to section 4.04 as a penalty provision, because doing so would define the provision as violating public policy. *See id.* But, even referring to it as a "damages provision" could render the provision void under 18 GCA § 88103 (2005). However, it makes no difference what label is placed on section 4.04, because we find this illegal and unenforceable provision to be integral, thus rendering the entire 1996 Agreement unenforceable.

[19] GRRP further argues that they do not need section 4.04 to enforce the 1996 Agreement, because the Government Claims Act, 5 GCA Chapter 6, is available. However, GRRP's need for the provision to enforce its rights under the 1996 Agreement is not the question. The question is whether GRRP would have entered into the 1996 Agreement absent section 4.04. The generous terms and operation of section 4.04 and its inclusion in other provisions of the Agreement belie any argument by GRRP that the provision is not integral to the 1996 Agreement. Because section 4.04 is an essential part of the agreed exchange and, looking at the language of the 1996 Agreement, GRRP would not have entered into the Agreement without this provision, it is integral and not severable. Therefore, the entire 1996 Agreement is unenforceable, because an illegal provision is not severable. Since we have determined that the 1996 Agreement is unenforceable due to section 4.04 being integral and not severable, we need not address the remaining issues raised on appeal regarding the 1996 Agreement.[15]

V.

[20] Because section 4.04 of the 1996 Agreement is integral and not severable, we **HOLD** that the entire 1996 Agreement is unenforceable. We, therefore, **REVERSE** the Superior Court's grant of summary judgment for GRRP and **REMAND** this matter for further proceedings consistent with this Opinion.

Original Signed By: J. Bradley Klemm

J. BRADLEY KLEMM
Justice *Pro Tempore*

Original Signed By: John A. Manglona

JOHN A. MANGLONA
Justice *Pro Tempore*

[15] In the interest of a complete review, we ordered additional briefing regarding whether Guam Government Code § 57172(b)(1) and 10 GCA § 51103(b)(1) applied to any of the agreements in this case. Pangelinan raised this issue for the first time in his Reply Brief. "The general rule is that issues raised for the first time in a reply brief are deemed waived." *In re Estate of Concepcion*, 2003 Guam 12 ¶ 10. This Court has the discretion to reject issues raised for the first time in a reply brief. *Id.* ¶ 11. However, due to our holding regarding severability, we need not address this issue.

BENSON, Presiding Justice *Pro Tempore*, Concurring and Dissenting:

[21] I concur that Pangelinan and Wesley have standing to sue and respectfully dissent on the issue of severability. For the reasons set forth below, I would affirm the trial court and uphold its finding that section 4.04 is severable from the rest of the contract.

[22] The main issue in this case is the second prong of the *Pangelinan II* analysis, that is, whether section 4.04 is integral to the 1996 Agreement. Although we instructed the lower court in *Pangelinan II* "to examine the language and subject-matter of the contract, and the intention of the parties, to determine whether section 4.04 is integral to the contract," the record contains no evidence of intent other than the 1996 Agreement itself. 2004 Guam 16 ¶ 18. The trial court found that there were no genuine issues of material fact, and no appeal was taken from this finding. Thus the determination of severability is reached by an examination of the 1996 Agreement alone.

[23] One proposed method of deciding whether section 4.04 is integral to the agreement is to determine "'whether the parties would have entered into the agreement absent the illegal parts.'" *Pangelinan II*, 2004 Guam 16 ¶ 16 (quoting *Panasonic Co. v. Zinn*, 903 F.2d 1039, 1041 (5th Cir. 1990)). However, a careful reading reveals that the court in *Panasonic* made no finding on the issue of "whether the parties would have entered into the agreement absent the illegal parts." 903 F.2d 1039. This "issue" does not require a finding, it is instead a way of examining whether the illegal provision is integral or collateral to the rest of the contract. Other courts referred to in our earlier decisions and confronting the same issue also failed to make an explicit finding in that regard. *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80 (Tex. App. 1996) (a case upon which the majority relies); *Alston Studies, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279 (4th Cir. 1974).[16] Other than the assertion that "the generous terms and operation of section 4.04 . . . belie any argument . . . that

[16] The one court that did make such a finding did so only because the party who stood to suffer from the unenforceability of the illegal provision proceeded to consummate the sale even after renouncing the offending provision. *Rogers v. Wolfson*, 763 S.W.2d 922, 925 (Tex. App. 1989).

the provision is not integral to the 1996 Agreement," the majority opinion is based on the single argument that the parties would not have entered into the contract absent the illegal provisions. I do not believe this approach is consistent with the case law cited above.

[24] Moreover, the argument as to why the parties would not have agreed to the severed contract is not persuasive. The majority's calculation of the actual sum that might have been transferred to GRRP by operation of section 4.04 need not be repeated, but the final sum is subject to so many contingencies that it could only be approximated as "millions of dollars." Furthermore, at the time of the signing of the contract, transfer of those "millions of dollars" to GRRP was contingent upon events that had not yet occurred. If the parties perceive a future contingency to be improbable at the time a contract is entered into, the value of the damages clause triggered by that contingency may be quite low.

[25] At the time the parties entered into the 1996 Agreement, the Government had not yet failed in its promise to appropriate money and issue bonds. Since there is no evidence in the record indicating whether the parties believed this event to be either likely or improbable, I am not convinced that the majority has a sound basis upon which to assert that the terms and operation of section 4.04(c) were so "generous" as to "belie any argument . . . that the provision is not integral to the 1996 Agreement." More importantly, if the majority's argument is that GRRP would not have entered into the agreement absent the generous provisions of section 4.04, I would have to disagree that this issue alone is dispositive of the case.

[26] The *Pangelinan II* test for severability also requires an examination of the references to 4.04 in the balance of the 1996 Agreement. The object of this exercise is to determine whether "the central purpose of the contract is tainted with illegality." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 696 (Cal. 2000). Stated another way, one must determine whether the valid provisions are "so interwoven with those illegal as to make divisibility impossible." *Alston*, 492

F.2d at 285. Here, the majority cites only two provisions of the contract that trigger the operation of section 4.04. The first is section 6.02, Adjustment of Facility Price, subsection (c), which provides that if the parties are not able to agree on a revised facility price, the rights and obligations of each are subject to Section 4.04. 1996 Agreement at 95. The second is section 6.04, Financing of the Facility, subsection (b), which permits GRRP to exercise its rights under section 4.04 in the event that the Government fails to issue bonds to cover the cost of the facility, despite having the ability to do so, because such failure "shall constitute Government Fault." 1996 Agreement at 98. It is hard to see how the illegal text of section 4.04 is so interwoven with the rest of the contract "as to make divisibility impossible." *Alston*, 492 F.2d at 285.

[27] The words "integral" and "collateral," "dependent" and "independent," "essential" and "ancillary" are not terms of art. That the several words are used interchangeably assists in reaching an understanding of whether section 4.04 is integral to the Agreement. *Panasonic Co. v. Zinn*, a case that appears in *Pangelinan II*, has facts that are most similar to the present case. Zinn's waiver of his homestead exception benefitted only Panasonic, the supplier. Examining the guarantee before the court, it determined that the "waiver provision clearly is not an essential feature of the guarantee," but "ancillary and merely provides additional security." 903 F.2d at 1041-42. *Panasonic* cites *Rogers*, 763 S.W.2d 922. The *Rogers* case is similar in that the illegal provision is solely for the benefit of one party. The case involved a sale of an optometry practice in which the contract included a provision dealing with "prearranged pricing schedules and arrangements for buying supplies." *Id.* at 925. The court held that the provision was "clearly ancillary to the main purpose of the agreement and inured solely to the benefit of the [sellers]." *Id.* In the case before us, section 4.04 benefitted GRRP by providing sure relief in case the Government failed to fulfill the conditions precedent required of it. By analogy to the case law mentioned above, section 4.04 is for the sole benefit of GRRP and ancillary to the essential purpose of the 1996 Agreement.

[28] The majority is too quick to dismiss the relevance of *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001). In *Gannon*, an invalid clause reducing the employee's maximum collectible punitive damages from $300,000 to $5,000 was found to be severable from the rest of the arbitration agreement. *Id.* at 683. The court reasoned that "[t]he punitive-damages clause represents only one aspect of their agreement and can be severed without disturbing the primary intent of the parties . . . ." *Id.* at 681. The court also determined that "inclusion of the damages clause does not meet the public-policy exception prohibiting severance under Missouri contract law." *Id.* at 681-82. Missouri's public policy exception was described as a narrow one, and ordinarily an invalid term was severable from the rest of the agreement if possible. *Id.* at 680-81. Here, severing section 4.04 will only reduce the amount of damages GRRP will be able to collect, and neither party makes a convincing argument that severability is against public policy under the circumstances. *Gannon* suggests that section 4.04 should therefore be severable from the rest of the 1996 Agreement.

[29] This dispute involves sophisticated parties negotiating a very complex agreement with the full assistance of their respective legal counsel. Given these circumstances, I am not prepared to simply dismiss as "boilerplate" their express intention that any illegal portion of the contract be severable from the rest. *See* 1996 Agreement at 278 (Section 19.15. Severability); *Gannon*, 262 F.3d at 680 (noting that the severability clause "express[es] an unambiguous intent by the parties to sever any terms determined to be invalid"); *but see Broadley v. Mashpee Neck Marina, Inc.*, 471 F.3d 272, 276 (1st Cir. 2006) (dismissing severability clause as "boilerplate"). The Agreement under review contains 281 pages of text, plus over 100 additional pages containing 21 schedules and two exhibits. The extraction of a single section from this monumental work does not, I believe, either obliterate its central purpose or substantially affect its overall integrity. To nullify a contract of this magnitude for a single offending section, and in doing so render invalid possibly thousands of man-hours of careful negotiation would be a remedy out of proportion to the fault at issue. I therefore conclude

that "nullifying the entire contract would be an extreme remedy unwarranted by the factual situation here." *Mathias v. Jacobs*, 167 F. Supp. 2d 606, 620 (S.D.N.Y. 2001). For the foregoing reasons, I respectfully dissent on the issue of severability.

Original Signed By: Richard H. Benson

RICHARD H. BENSON
Presiding Justice *Pro Tempore*