DISSENTING OPINION OF ACOBA, J.

Pantheon did not present any evidence rebutting the declarations of Mitchell Kitay and three other witnesses regarding the price Kitay paid for the Pantheon stock shares. All other evidence was consistent with these declarations. Therefore, I disagree that there was a genuine issue of material fact regarding the price Kitay paid for the shares of the stock, and so I respectfully dissent.

I.

The following facts were adduced in the record of the case. The declarations of four individuals -- Kitay, John Rosenwald, Glenn G. White, and Kinichi Enomoto were filed with the court regarding the transfer of Stock Certificate No. 135 (the certificate) which represented seventeen Pantheon shares.

The declarations in common reflect the following. The transfer took place in California on the evening of March 30, 1998 at Enomoto's office, a mutual friend of White, Rosenwald and Kitay. At the meeting, Kitay gave White a check for $17,000 drawn from his personal checking account and the balance of $68,000 was paid in cash. Enomoto and Rosenwald assisted White in counting the cash to ensure that $68,000 was tendered. In exchange for the money paid on March, 30, 1998, White endorsed the certificate to Kitay, who then took possession of the certificate.

The individual declarations included the following additional information. In his declaration, Kitay stated that in early 1998, he was asked by Rosenwald whether he was interested in purchasing shares of stock in Pantheon. He understood that it was Rosenwald's friend, White, who was seeking to sell the stock. Kitay discussed this with Rosenwald, then made an offer to purchase White's seventeen shares for $5,000 per share, or $85,000 total. After this offer was made, White informed Kitay that he had to notify Pantheon of his offer, as the company had the right of first refusal to match Kitay's offer. Kitay was informed sometime later that Pantheon had not exercised its option to purchase the shares, so on March 30, 1998, Kitay purchased White's seventeen shares for $85,000.

White's declaration stated that he inherited the stock and owned it from 1994 to March 1998. He confirmed that he sold the certificate to Kitay for $85,000, receiving $17,000 in a check and $68,000 in cash from Kitay for the stock. White has in his possession approximately $30,000 of the cash remaining, he made deposits totaling $26,000 from some of the cash,[1] and spent approximately $12,000 on various items during the time period in question. White deposited the $17,000 check the day after the transaction at Enomoto's office.

Rosenwald's declaration stated that he knew White for twenty years and Kitay for twenty-five years, both of whom he

[1] White deposited $8,000 on April 22, 1998, $8,000 on October 28, 1998, $5,000 on October 28, 1998, and $5,000 on April 9, 1999.

considered to be close and personal friends. White approached him and said he was interested in selling Pantheon stock that he inherited from a family member. Rosenwald contacted Kitay to determine if he would want to purchase the stock. Kitay was interested and asked Rosenwald to find out more about the price and terms of the purchase. Rosenwald acted as an intermediary and arranged the agreement. Kitay asked Rosenwald if it would be all right if part of the purchase price was paid by check and part in cash, to which White agreed. Rosenwald helped White and Enomoto count the cash.

Enomoto's declaration stated that he knew White for twenty years and Kitay for fifteen years. He had also attended Pepperdine University with White and Rosenwald. He indicated that he helped count the $68,000 cash payment.

II.

Other principal facts were undisputed. On February 3, 1998, White notified Pantheon's Trustee, Cordelia MacLaughlin, that he had received an offer from Kitay to buy his seventeen shares at $5,000 per share. On March 3, 1998, McLaughlin wrote to Kitay indicating that his offer was circulating among the Board of Directors and that Pantheon had most recently purchased stock at $3,000 per share. Pantheon alleges in its opening brief that the March 3, 1998 letter also declined the offer to purchase

the stock at $5,000 per share.[2] In any event, both Pantheon and White agree that there was no attempt made by Pantheon to buy the stock.

In a letter dated March 30, 1998, Kitay requested that Pantheon transfer to him the seventeen shares previously belonging to White. Kitay transmitted the endorsed stock certificate with the letter.

This set off a series of letters between the parties. On May 6, 1998, Pantheon's attorney wrote to Kitay informing him that Pantheon had received the endorsed certificate. Before agreeing to transfer the stock, Pantheon sought to ascertain compliance with Article 13, Section 31A of the company's by-laws, that states:

> 31A. No Stockholder shall have the right or power to sell or otherwise dispose of their [sic] stock, except by will, without first offering said stock for sale to the company, at the actual price per share at which such said stock is to be sold. Such offer shall be made by the stockholder in writing and shall remain open for acceptance by the company for a period of thirty (30) days from the date of delivery of such notice in order to enable the company to purchase it or place it with any of the other stockholders. <u>If at the expiration of the thirty (30) days the offer shall not have been accepted, the stockholder wishing to sell shall have the right to sell such stock at the actual price per share at which said share or shares were offered to the company.</u>

(Emphasis added.) Pantheon also requested documentary evidence confirming that $85,000 was paid for the shares.

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[2] The majority inaccurately subscribes to the position that, "Pantheon declined the offer to purchase White's shares at $5,000 per share." Majority opinion at 3. However, nothing in Pantheon's March 3, 1998 letter specifically states that Pantheon declined the offer.

On May 19, 1998, Kitay sent a letter to Pantheon's attorney stating that he paid $85,000 -- $17,000 by check and $68,000 in cash. Pantheon's attorney responded to Kitay's attorney in a July 2, 1998 letter in which Pantheon requested a deposit slip, cancelled check, or bank statement as evidence of payment of the $85,000. In addition, Pantheon requested an explanation of why such a large amount of the transaction was paid in cash.

Kitay's attorney did not respond to the July 2, 1998 letter, but instead wrote a letter dated September 9, 1998, in which he demanded Pantheon recognize Kitay as the owner of the stock by September 16, 1998, and threatened to file suit if this did not occur. In reply, Pantheon's attorney wrote to Kitay's attorney on September 11, 1998, maintaining that the matter did not have to go to court if Kitay gave independent evidence, other than the statements of the buyer and seller, that he had paid $85,000 to White.

III.

Kitay responded by filing a complaint on September 17, 1998. Count I of the complaint requested a declaratory judgment to the effect that Kitay was the lawful owner of the certificate, that he owned seventeen shares, and that he was one of Pantheon's stockholders. Count II of the complaint, alleging breach of contract, claimed that the refusal of Pantheon to recognize Kitay as a shareholder constituted a breach of Pantheon's by-laws and

Kitay was entitled to damages in an amount to be proven at trial. Count III of the complaint alleged a violation of Hawai‘i Revised Statutes § 490:8-401 (Supp. 2000), claiming that Pantheon's refusal to register the transfer of shares was unreasonable and entitled Kitay to an award of damages to be proven at trial.

Pantheon requested Kitay produce documents, such as bank records or receipts, that evidenced payment. Kitay produced documents on January 27, 1999, including a bank statement from Wells Fargo Bank showing a $17,000 check drawn on his account that was paid on April 1, 1998. Kitay also turned over a copy of a $17,000 check from the bank dated March 30, 1998. The memo line on the check contained the notation: "@ 1,000" and "17 shares Pantheon Company, Limited."

On November 18, 1998, Pantheon served Kitay with a request for answers to interrogatories. Kitay responded on January 28, 1999, answering that he paid cash because he had it, and that Rosenwald and Enomoto were present at the transaction on March 30, 1998.

Pantheon issued a subpoena deuces tecum for certain documents. Kitay produced the documents on May 26, 1999. These documents included White's tax returns for 1998, deposit slips, and bank statements.

IV.

On June 14, 1999, Kitay filed a motion for partial summary judgment as to Count I based on the declarations of

Kitay, White, Enomoto, and Rosenwald referred to earlier. On June 25, 1999, Pantheon opposed summary judgment, asserting a genuine issue of material fact existed because it appeared Kitay had paid only $17,000, not $85,000.

At a hearing on July 6, 1999, the court granted partial summary judgment. The court determined that:

> Now, the primary issue, factual issue, is whether or not there was a payment of a total of $85,000.00. The parties do no dispute that there was a $17,000.00 check issued for payment of the stocks, so the question remains regarding the payment of $68,000.00 and the claim by the plaintiff is that the $68,000.00 was paid in cash.
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> The affirmative evidence by the declaration[s] submitted by the Plaintiff is that indeed that the $68,000.00 was paid in cash and we have the undisputed declarations submitted. The Court notes that, on the other hand, there is no affirmative evidence disputing the -- the claim as well as the evidence that the $68,000.00 was paid.
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> Now, the defendant points to basically the absence of documentary evidence to support this claim, but the Court believes that once this issue was raised by the plaintiff that there was a payment in cash, the defendant's burden is to come forward to affirmatively dispute this claim. But there is none -- there is no such evidence which was presented.
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> Now, some of the evidence which the defendant relies on may point to inappropriate and improper handling of these funds for business and tax purposes, but that is not the issue before this Court. The Court does not believe there is competent and admissible evidence undisputed by the defendant which point to and confirms that the $68,000.00 was paid.
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> And so for those reasons, the Court will grant the motion.

(Emphasis added.)

On July 23, 1999, a written order granting partial summary judgment on Count I of the complaint was entered, declaring Kitay the lawful owner of seventeen shares and that Pantheon must comply with its by-laws. The parties stipulated to dismiss Counts II and III without prejudice on September 13,

1999. On October 29, 1999, final judgment and notice of final judgment were entered. Defendant filed its notice of appeal the same day.

V.

"'We review a circuit court's grant or denial of summary judgment de novo under the same standard applied by the circuit court.'" Mottl v. Miyahira, 95 Hawai'i 381, 388, 23 P.3d 716, 723 (2001) (quoting Dairy Road Partners v. Island Ins. Co., Ltd., 92 Hawai'i 398, 411, 992 P.2d 93, 106 (2000)).

"[S]ummary judgment is appropriate 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 judgment as a matter of law." Bronster v. United Pub. Workers, 90 Hawai'i 9, 13, 975 P.2d 766, 770 (1999) (quoting Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998) (additional citations omitted).

"'A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.'" Blair v. Ing, 95 Hawai'i 247, 252, 21 P.3d 452, 457 (2001) (quoting Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982) (citations omitted)).

"'The evidence must be viewed in the light most favorable to the non-moving party.'" Fujimoto v. Au, 95 Hawai'i

116, 137, 19 P.3d 699, 720 (2001) (quoting State ex rel. Bronster v. Yoshina, 84 Hawai‘i 179, 186, 932 P.2d 316, 323 (1997) (citing Maguire v. Hilton Hotels Corp., 79 Hawai‘i 110, 112, 899 P.2d 393, 395 (1995)).

VI.

In its appeal, Pantheon argues that the court erred in granting partial summary judgment as to Count I because there was a genuine factual issue as to whether Kitay paid $85,000 to White for the seventeen shares of stock in Pantheon. Pantheon's contention rests on the following: (1) the $17,000 check contained the notations "@ 1,000" and "17 shares Pantheon Company, Limited," (2) $68,000 was not withdrawn from Kitay's bank account, (3) only the $17,000 check and none of the cash was deposited by White the day after the transfer, (4) $85,000 was not reported on White's tax returns, and (5) White's witnesses are impeachable.

Pantheon also maintains that the declarations were made either by persons with a financial interest, assumably Kitay and White, or people who were close personal friends, Rosenwald and Enomoto, and the latter are subject to impeachment. Pantheon argues that this is enough to preclude summary judgement.

VII.

To draw the conclusion the majority does in this case means that the notation on the check must be singled out, in

disregard of all other evidence in the record. It cannot be concluded, upon viewing the entire record, that there is a genuine issue of material fact that would preclude summary judgment as to Count I. The declarations of White, Kitay, Rosenwald and Enomoto are not in conflict or rebutted by any specific evidence to the contrary and are consistent with the notations on the check.

A.

Because Pantheon's understanding of the significance of the notations on Kitay's check amounts to speculation and is not supported by affidavits, the check notations cannot be understood to create a genuine issue of material fact. Hawai‘i Rules of Civil Procedure (HRCP) Rule 56(e) explains that affidavits are necessary to rebut claims raised by an opposing party:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(Emphases added); see also Young v. Planning Comm'n of County of Kaua‘i, 89 Hawai‘i 400, 407, 974 P.2d 40, 47 (1999) ("'[A] party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor is he or she entitled to a trial on the basis of a hope that he [or she] can produce some evidence at that time.'" (Quoting Henderson v. Professional Coatings Corp., 72 Haw. 387, 401, 819 P.2d 84, 92 (1991)

(brackets omitted).) (Emphasis added.); Acoba v. General Tire, Inc., 92 Hawai‘i 1, 16, 986 P.2d 288, 303 (1999) (stating that a "broad, unsupported conclusion is insufficient to raise a genuine issue of material fact"). Here, Kitay provided the affidavits of several witnesses who indicated that the $17,000 check was only for part of the certificates Kitay received, and that Kitay paid $68,000 in cash for the remainder of the certificates. Because Pantheon's allegation to the contrary is not supported by affidavits reflecting otherwise, and because Pantheon's claim that the check reflected payment for all of the certificates amounts to unsupported speculation, the trial court properly determined that there was no genuine issue of material fact regarding the significance of the check.

B.

Pantheon's contention that $68,000 was not withdrawn from Kitay's bank account also does not raise a genuine issue of material fact, considering that the unrefuted affidavits of the witnesses to the transaction stated that the $68,000 was paid in cash. Moreover, in answer to Pantheon's interrogatories, Kitay stated that the cash was not withdrawn from accounts, but rather, he had "[o]ver the past years, . . . accumulated cash from various sources, including but not limited to, the sale of collectibles, junkets to Las Vegas, and from [his] family's restaurant business in California." Finally, the bank statements

corroborate White's receipt of the cash. This evidence supports the conclusion that $85,000 was paid.

Similarly, the fact that White did not deposit any of the cash immediately cannot be said, even when viewed in the light most favorable to Pantheon, to indicate that White did not receive any cash for the stocks. As stated supra, White's subsequent cash deposits reveal that he had received the $68,000 in cash.

C.

Contrary to the majority's position, White's tax return does not raise a genuine issue of material fact with regard to the purchase price of the stocks. Whereas White's federal income tax return does not reflect a sales price of $85,000 for the Pantheon stock, neither does it reveal anything regarding the transaction between White and Kitay.[3] Because White's tax return does not contain any information about the transaction, it cannot be said that the lack of mention of the $85,000 in the return makes that purchase amount a genuine issue of material fact. Pantheon does not dispute that a sale took place, only that the amount of the sale price was not accurately reflected. In that regard, lack of any reference at all to the sale of the stock

[3] White's tax return does report receipt of dividends from Pantheon. In his affidavit, White explained that he "continue[s] to receive dividend payments from Pantheon which [he] ha[s] endorsed over to Mr. Kitay pursuant to the sale of [his] Certificate to him." Notably, the sale of the stock took place on March 30, 1998 -- not at the beginning of the reportable income period.

does not raise any inference or specific facts relevant to whether the amount paid was accurate.

VIII.

Citing Cordeiro v. Burns, 7 Haw. App. 463, 470, 776 P.2d 411, 417 (1989), Pantheon maintains that the statements of Kitay and White are self-serving and there is enough affirmative evidence to create a credibility issue. However, "[t]he non-moving party must come forward with some evidentiary matters to support its position. By failing to present any specific evidence of discrepancies or contradiction among the [witnesses'] statements, the nonmoving party has failed to raise any genuine issue of material fact." Costa v. Able Distribs., Inc., 3 Haw. App. 486, 489, 653 P.2d 101, 104 (1982) (brackets omitted). In Costa, the appellant questioned the appellee's credibility and reasoned that he was entitled to have a jury pass on it. See id. at 488, 653 P.2d at 104. However, the appellant did not point to any specific discrepancies or contradictions between appellee's affidavit and deposition but, instead, simply asserted that a jury might choose to disbelieve appellee's testimony. See id.

The Intermediate Court of Appeals (ICA) held that, by failing to present any specific evidence of discrepancies or contradiction among the appellee's statements, the appellant failed to raise any genuine issues of material fact. See id. at 489, 653 P.2d at 104. In Critchfield v. Grand Wailea Co., 93 Hawai'i 477, 6 P.3d 349 (2000), this court clarified that

> [a]lthough, as the ICA has held, the credibility of an affiant or deponent, standing alone, does not produce a genuine issue of material fact, the fact remains that, where the record evinces a conflict in the evidence regarding the content of an affidavit or deposition, then the issue of the affiant's or deponent's credibility involves more than a mere bald allegation that an affiant's or deponent's statements are self-serving fabrications, and, therefore, the credibility of the affiant or deponent must be assessed by the trier of fact. Compare Cordeiro, 7 Haw. App. at 469-71, 776 P.2d at 416-17 (credibility of deponent did not constitute a genuine issue of material fact where deposition was not self-serving and deponent's statements on record were not contradictory), and Costa, 3 Haw. App. at 488-89, 653 P.2d at 104 (credibility of affiant did not constitute genuine issue of material fact absent discrepancy or contradiction in affiant's statements on record), with Jacoby v. Kaiser Foundation Hospital, 1 Haw. App. 519, 526-28, 622 P.2d 613, 618 (1981) (credibility of affiant constituted an issue for the trier of fact).

Id. at 488, 6 P.3d at 360.

The majority quotes part of this passage in Critchfield and contends that, "[i]n the instant case, the 'conflict in the evidence' contained in the record derives from the plain language of the memo line on the $17,000 check." Majority opinion at 13. First, there are no material conflicts, discrepancies, or contradictions among the statements made by the four witnesses and the other evidence in the record.[4] The statements of all

[4] In the concurring opinion in GECC Financial Corp. v. Jaffarian, 79 Hawaii 516, 904 P.2d 530 (App.), concurring opinion adopted by 80 Hawai'i 118, 119, 905 P.2d 624, 625 (1995), cited by the majority opinion at 9-10, it was said that, "in situations where the moving party has failed to meet its burden, or its papers indicate that a genuine issue exists, the nonmoving party does not have to present affidavits or evidence countering the motion." Id. at 525, 904 P.2d at 539 (Acoba, J., concurring). Obviously, in the instant case, the moving party met its burden, thus requiring specific affidavits or evidence in response.

In Jaffarian, the plaintiffs had not met their burden, inasmuch as their affidavits did not address the heart of the issue in that litigation. There, "the sole affirmative defense pleaded by [the defendants] in their answer was that GECC had failed to properly mitigate its damages under the terms of the leases, which required GECC to dispose of the vehicles in a commercially reasonable manner in accordance with accepted trade practices in the automobile industry." Id. at 522, 904 P.2d at 536. The ICA majority concluded that the affidavit of the Assistant Vice-President of GECC "demonstrated a genuine issue of material fact" because the affidavit concluded that GECC's acts were "'consistent with the accepted trade practices,' [but] failed to demonstrate how, as an employee of a financial

(continued...)

four witnesses indicate that the transaction took place in the evening of March 30, 1998 at Enomoto's office. The witnesses all agreed that Kitay gave White a check for $17,000 and cash in the amount of $68,000 in exchange for the stock certificate.

Second, there is nothing to rebut the affidavits of the parties and the answer to the interrogatories which reflect that the $17,000 check was payment for only a portion of the stock. There would be a conflict if there was evidence, such as a statement or response to an interrogatory, that contradicted the affidavits. For example, in Critchfield, the plaintiffs' affidavits conflicted with their statements made during interviews with the defendants' insurance administrators. See 93 Hawai'i at 480-81, 6 P.3d at 352-53. Moreover, the cases that Critchfield asks its readers to compare, i.e., Cordeiro and Costa with Jacoby, illustrates that there must be some form of actual evidence in conflict.

In Cordeiro, the ICA determined that a case was proper for summary judgment in part because "there is no contradiction between Burns' account of the accident given at his deposition and the statements he gave to the police immediately after the accident." 7 Haw. App. at 470, 776 P.2d at 417. Similarly, in Costa, the ICA again concluded that, in a case where the plaintiff "has not presented any . . . discrepancies between [a witness]'s affidavit and his deposition" and "has merely asserted

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[4](...continued)
institution, [the vice-president] had personal knowledge and was competent to testify about the accepted trade practices of the automobile industry." Id. at 525, 904 P.2d at 539.

that a jury might choose to disbelieve [the witness]'s testimony[,]" the plaintiff's assertions were "not sufficient to raise a genuine issue of material fact." 3 Haw. App. at 489, 653 P.2d at 104. Contrastingly, in Jacoby, the ICA determined that there existed an "issue . . . of credibility . . . for the trier of fact" where the plaintiff's affidavit conflicted with statements she made to a newspaper. 1 Haw. App. at 527, 622 P.2d at 617. In the instant case, there are no such conflicts.

IX.

Even viewing the evidence in the light most favorable to Pantheon, a genuine issue of material fact was not demonstrated. There was unrebutted evidence that the $17,000 check was deposited, and that subsequently, during the time in question, White made several cash deposits totaling $28,000. In addition, White disclosed in his declaration that, of the cash, he spent $12,000, deposited some of it, and had approximately $30,000 in cash remaining. White thus accounted for all of the money Kitay paid him. The amount accounted for was verified by the unrebutted declarations of three other people.

X.

For the foregoing reasons, I would affirm the circuit court's judgment filed October 29, 1999.