DISSENTING OPINION BY ACOBA, J.

With all due respect, I must come to the conclusion that the circuit court of the third circuit (the court) did not properly grant summary judgment in favor of Defendant-Appellee/Cross-Appellant E.I. Du Pont de Nemours and Company (Defendant). The record indicates that (1) in relevant part the court's May 6, 2004 order[1] instructed the parties to "submit

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[1] The court's May 6, 2004 order entitled, "Order Related to Trial Procedures," states in its entirety:

> Pursuant to agreement by the parties at a telephone conference on April 22, 2004, with Melvin Agena, Esq., Chan Townsley, Esq., and Mark Hutton, Esq. representing the Plaintiffs, and Warren Price, III, Esq., Kenneth Okamoto, Esq., and Susan Yi, Esq. representing Defendants, and having received a letter dated April 23, 2004, from Warren Price, III, Esq., memorializing the matters discussed at the conference,
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> IT IS HEREBY ORDERED that [P]laintiffs shall be tried in groups. The parties shall confer and select the number and identities of groups of [P]laintiffs whose claims will be tried together. The trials shall follow one another seriatim.
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> IT IS FURTHER ORDERED that the parties shall confer and agree upon a trial date in 2005 for the first group of [P]laintiffs. The parties shall also confer and agree upon all attendant pretrial deadlines.
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> IT IS FURTHER ORDERED that, considering the scope of this case and the number of [P]laintiffs involved, the standard deadlines for submission of final expert reports shall be modified. Plaintiffs, as the parties with the burden of proof, shall submit their final expert report first. After [P]laintiffs submit their final expert reports, Defendant[s] shall be given a reasonable time to submit their final expert reports. The parties shall confer and agree upon deadlines for expert reports.
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> IT IS FURTHER ORDERED that experts will not be allowed to testify on any matters beyond their respective reports.
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> IT IS FURTHER ORDERED that at the time the parties meet to confer upon the trial date, trial groups, pretrial deadlines, and expert report deadlines, [P]laintiffs will state their position on the introduction of evidence at trial relating to the issue of whether Benlate was defective and/or contaminated. Plaintiffs will memorialize their position at that time and submit it to the [c]ourt and to Defendant[s].

(Emphases added.)

their final expert reports," and directed that "experts will not be allowed to testify on any matters beyond their respective reports"; (2) Plaintiffs-Appellants/Cross-Appellees Exotics Hawaii-Kona, Inc., et. al. (Plaintiffs) submitted declarations of their attorney-experts providing opinions regarding the damages that Plaintiffs suffered and such opinions would have been admissible at trial under Hawai'i Rules of Evidence (HRE) Rule 702 (1993) sufficient to present genuine issues of material fact to be tried; (3) in the February 28, 2005 summary judgment order[2]

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[2] The court's February 28, 2005 order entitled, "Order Granting Defendant's Motion for Summary Judgment Based on Plaintiffs' Inability to Prove Damages," states in its entirety:

> This matter, having come before the [c]ourt pursuant to Defendant's Motion for Summary Judgement Based on Plaintiffs' Inability to Prove Damages, filed February 3, 2005, and the [c]ourt having reviewed Plaintiffs [sic] Memorandum in Opposition to Defendant's Motion for Summary Judgment Based on Plaintiffs' Inability to Prove Damages, filed February 17, 2005, and Defendant's Reply Memorandum in Support of Defendant's Motion for Summary Judgment Based on Plaintiffs' Inability to Prove Damages, filed February 18, 2005, and the [c]ourt having heard oral argument on February 23, 2005, at 4:00 p.m., from Melvin Agena, Esq.[,] appearing on behalf of Plaintiffs, and Warren Price, III, Esq., appearing on behalf of Defendants,
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> IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is granted. The [c]ourt finds that, as a matter of law, when a [p]laintiff claims to have been fraudulently induced to settle a tort claim because of discovery/litigation fraud, (s)he has two options: (1) to sue to rescind the settlement contract; or (2) to affirm the contract and sue for fraud. If (s)he chooses to sue for fraud, the remedy available to [the p]laintiff is the fair compromise value of the claim at the time of the settlement. In order to meet their burden of proving the fair compromise value at the time of settlement, Plaintiffs would need to meet this burden with expert lawyer testimony directed to the numerous compromise factors, and how they would have applied to each Plaintiff's case. Plaintiffs have not submitted the expert testimony required to sustain their burden of proof on the proper measure of damages in their cases. The deadlines for Plaintiffs to submit their final reports and amend their pleadings were October 15, 2004, and December 14, 2004, respectively. This court previously made clear that the expert reports were to be final and that the experts would not be allowed to testify on matters beyond

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itself, the court for the first time declared that the remedy for fraud was "the fair compromise value of the claim at the time of settlement," and that "[i]n order to meet their burden of proving the fair compromise value at the time of settlement, Plaintiffs would need to [submit] expert lawyer testimony directed to the numerous compromise factors, and how they would have applied to each Plaintiff's case"; (4) it was not until that February 28, 2005 order, which granted the motion for summary judgment, that Plaintiffs were made aware of the specific standard to which their response to Defendant's summary judgment motion would be held and what the court would require of their attorney-expert witnesses other than the deadline set for submission of the expert reports set in the May 6, 2004 order; and (5) even if the "fair compromise value" is used as the basis for calculating damages, Plaintiffs have sufficiently identified "compromise factors" to put the "fair compromise value" of their claims in issue at trial. In light of the foregoing and for the reasons elucidated herein, I would vacate the court's February 28, 2005 order.

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[2](...continued)
their respective reports in its Order Related to Trial Procedures, filed May 6, 2004. Plaintiffs are therefore unable to prove the fact or amount of settlement fraud damages as a matter of law, and summary judgment is granted on all remaining claims herein.

(Emphasis added.) (Boldfaced font omitted.)

I.

"An award of summary judgment is reviewed de novo under the same standard applied by the [trial] court." French v. Pizza Hut, Inc., 105 Hawai'i 462, 466, 99 P.3d 1046, 1050 (2004) (citing Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22 (1992) (other citations omitted)). The standard for granting a motion for summary judgment is settled:

> Summary 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. 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.

Taniguchi v. Ass'n of Apartment Owners of King Manor, Inc., 114 Hawai'i 37, 46, 155 P.3d 1138, 1147 (2007) (emphasis in original) (quoting Bremer v. Weeks, 104 Hawai'i 43, 51, 85 P.3d 150, 158 (2004) (other citations omitted)). In a motion for summary judgment, "[a]ll evidence and inferences must be viewed in the light most favorable to the non-moving party." French, 105 Hawai'i at 466, 99 P.3d at 1050 (citing Maguire v. Hilton Hotels Corp., 79 Hawai'i 110, 112, 899 P.2d 393, 395 (1995)). Certain burdens are imposed in summary judgment proceedings:

> First, the moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.
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> Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving

> party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving part[y] is entitled to summary judgment as a matter of law.

Id. at 470, 99 P.3d at 1054 (quoting GECC Fin. Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (App. 1995) (citations omitted)) (some emphasis omitted and some added).

As the moving party, Defendant had the burden to demonstrate the absence of any genuine issue of material fact in its motion for summary judgment. Defendant's position was that "it would not have actually paid more in settlement than it did." Thus, it was Defendant's burden, as the moving party, to produce admissible evidence that Plaintiffs could not prove damages in excess of the settlement amount and to rebut evidence produced by Plaintiffs that they could prove such damages.

II.

It must first be noted that prior to the court's summary judgment ruling there was a dispute as to the appropriate standard for measuring damages. In their summary judgment motion, filed February 3, 2005, Defendant argued, inter alia, that Plaintiffs were limited in their remedies. Citing Delaware law, Defendant maintained that "[w]hen a plaintiff claims to have been fraudulently induced to settle a tort claim - because of discovery/litigation fraud or otherwise - (s)he has two options: (1) sue to rescind the settlement contract, or (2) affirm the contract and sue for fraud." (Emphases in original.) According to Defendant, if Plaintiffs opted for the first remedy,

rescinding, they could "then pursue [their] unliquidated tort claim and have a jury liquidate it, to wit, determine its 'actual judgment value.'" Defendant argues that if, in the alternate, Plaintiffs opted for the second remedy, suing separately for fraud, then their "only claim is for the fair compromise value of [their] released tort claim[.]" (Emphasis in original.) Defendant did not dispute that the general objective of fraud damages is "to place the defrauded plaintiff in the position he would have been 'but for' the fraud."

In their memorandum in opposition to Defendant's February 3, 2005 motion, Plaintiffs contended that the "[n]o 'election of remedies' doctrine limits Plaintiffs' claims to a speculative 'reasonable judgment value' in this action." They argued that "[t]he remedy for Plaintiffs' unreleased fraud claims is to place Plaintiffs' position [sic] absent the fraud." (Emphasis added.) According to Plaintiffs:

> Whether that position ultimately was a "reasonable settlement" or a claim litigated through trial is for a jury to determine. That decision will hinge on the evidence presented at trial; up till this date, it has been [Defendant's] position that no greater settlement would ever have been offered with or without fraud. If a jury accepts that proposition, the ultimate value of the position lost to fraud necessarily hinges on what value Plaintiff's [sic] underlying claims would have received at trial.

(Emphases added.)

The court's order of May 6, 2004 directed that "Plaintiffs, as the parties with the burden of proof, shall submit their final expert report first," and "experts will not be allowed to testify on any matters beyond their respective

reports." Plaintiffs apparently satisfied that order by submitting their attorney-expert reports by the October 15, 2004 deadline.

On February 28, 2005, the court entered summary judgment for Defendant. In its February 28, 2005 order, the court stated that "when a [p]laintiff claims to have been fraudulently induced to settle a tort claim because of discovery/litigation fraud, (s)he has two options: (1) to sue to rescind the settlement contract; or (2) to affirm the contract and sue for fraud." The court then declared that the remedy for fraud was "the fair compromise value of the claim at the time of settlement[,]" hence affirming Defendant's position.

Additionally, the court stated, "In order to meet their burden of proving the fair compromise value at the time of settlement, Plaintiffs would need to meet this burden with expert lawyer testimony directed to the numerous compromise factors, and how they would have applied to each Plaintiff's case." (Emphasis added.) The court concluded that "Plaintiffs have not submitted the expert testimony required to sustain their burden of proof on the proper measure of damages in their cases."

As previously noted, prior to the court's grant of summary judgment, the governing measure of damages was disputed. In this regard Plaintiffs argue that they had no notice regarding the court's aforesaid requirements for the attorney-experts' reports. According to Plaintiffs, "the [court] adopted this limitation [(setting out requirements for the expert

testimonies)] only after Plaintiffs had submitted their 'final' expert reports - all of which had been formulated in anticipation of [the then] prevailing rule of damages for fraud." (Emphasis added.) Plaintiffs maintain that "[n]or were Plaintiffs informed before that deadline that . . . the written opinions of Plaintiff[s'] experts were to include the complete bases of the opinion in addition to stating the ultimate opinion themselves." (Emphases added.)

On the other hand, in its Answering Brief on appeal, Defendant states that the court "merely enforced the proper measure of damages associated with the cause of action brought by [Plaintiffs]." According to Defendant, Plaintiffs "make a nonsensical argument that the [c]ourt cannot enforce its own rules because it 'did not advise [P]laintiffs' that it intended to 'change the nature of [P]laintiffs' remedy' or impose a requirement of expert attorney evidence on compromise factors."

III.

The majority disputes that Plaintiffs met their burden of proof as to the element of damages because "none of the attorney experts provide any opinion testimony as to what specific settlement factors were or should be considered in settling each of the [P]laintiff's underlying product liability cases and the evaluation of how those factors would have been altered had they known about the concealed evidence." Majority opinion at 57.

The record, however, appears to vindicate Plaintiffs' claims that they were not notified as to what the court would require of their attorney-expert witnesses, other than the deadline set for submission of the reports. In the May 6, 2004 order, the court did not require that the experts produce a settlement value, a judgement value, any other specific dollar amount related to damages, or that the experts set forth factors according to a particular standard by which damages must be measured. No party was ordered to submit evidence regarding compromise factors in advance of the summary judgment hearing, nor was the designated damages standard defined prior to the summary judgment hearing.

It was not until the February 28, 2005 order, which granted the motion for summary judgment, that Plaintiffs were made aware of the specific standard to which their response would be held. The majority contends that "the dissent fails to take into account that the [P]laintiffs were placed on notice of [Defendant's] position on damages -- at the latest -- when [Defendant] filed its motion for summary judgment" on February 3, 2005. Majority opinion at 62 n.17. However, that Plaintiffs may have been put "on notice of [Defendant's] position on damages" by virtue of Defendant's summary judgment motion, id., has nothing to do with the fact that Plaintiffs were not made aware of the specific damages standard that would be adopted by the court until the February 28, 2005 order. As the majority itself recognizes, up until the court's February 28, 2005 order,

Plaintiffs "continued to assert their contrary position on damages[.]" Majority opinion at 64. In fact, defense counsel's argument during the February 23, 2005 hearing on Defendant's summary judgment motion, that advocated the application of the fair compromise value standard, evinces that the specific standard which governed was still undecided at that time.

In sum, Plaintiffs had no notice that their experts were required to provide "testimony directed to the numerous compromise factors," because until the court decided the summary judgment motion, it had not determined that "the fair compromise value" standard would govern in the case. There was nothing specific the court demanded of the experts until it granted Defendant's motion for summary judgment.[3]

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[3] The majority claims that this dissent "fails to take into account" that Plaintiffs were put on notice of the alternate theory of damages when Defendant filed its motion for summary judgment, majority opinion at 62 n.17, "baldly and mistakenly" stating that Plaintiffs' notice of Defendant's alternative measure of damages is not the equivalent of notice as to which measure of damages will govern the court's decision, id. (citing dissenting opinion at 9). The majority fails to take account of the relative impact of these events. It is true that Plaintiffs were put on notice that Defendant advocated a different standard of damages when the motion for summary judgment was filed, but that was the matter in dispute.

Defendant's motion for summary judgment did not constitute binding law that Plaintiffs were obligated to follow. Moreover, as noted infra at 29-30, Defendant did not produce any expert testimony indicating what it thought the relevant compromise factors should be such that Plaintiffs would believe it necessary to produce contending affidavits. Thus, to reiterate, it was not until the court ruled on the motion for summary judgment that Plaintiffs were made aware of what the controlling law would be regarding damages for this case. They could not be expected to produce witness testimony relating to an unannounced standard under such circumstances.

The majority contends that Plaintiffs could have moved for a continuance under HCRP Rule 56(f) if they demonstrated a "'need to discover essential facts' to justify their opposition." Majority opinion at 63 (quoting Hall v. State of Hawaii, 791 F.2d 759, 761 (9th Cir. 1986) (brackets omitted). However, Plaintiffs did not need additional evidence to justify their opposition to Defendant's motion for summary judgment. Plaintiffs' opposition was premised on a different standard of damages that was in contention with Defendant's standard at that point. In essence, the majority's position would require Plaintiffs to assume that Defendant would

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IV.

Inasmuch as the designated remedy standard was not determined prior to the summary judgment hearing on February 23, 2005, Plaintiffs provided declarations sufficient to satisfy the May 6, 2004 order. See discussion infra. The declarations of the attorney-experts provided opinions regarding the damages Plaintiffs suffered. Such opinion evidence would have been admissible at trial. See HRE Rule 702 (stating in relevant part that, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise[]" (emphasis added)). Plaintiffs having satisfied the court's deadline set forth in the May 6, 2004 order, and having submitted declarations admissible at trial, it would be patently unjust to hold Plaintiffs responsible for failure to meet a standard and to provide factors that had yet to be determined as controlling before the deadlines established for production of their expert opinions.

V.

What was submitted by Plaintiffs should have been sufficient to preclude summary judgment. First, Plaintiffs

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prevail on summary judgment and abandon their argument that the controlling standard was not the fair compromise value of the products liability claims.

provided economist-expert opinions as to what each Plaintiff could have claimed at trial as damages. Plaintiffs alleged damages in Exhibits 8 to 13 of their opposition memorandum. The damage amounts were for Pacific Paradise Orchids, Inc., $1,287,775; Jim McCully, $11,847,889; S. Taka, $649,871; Albert Isa Nursery, $967,222; Nakashima Farm, $547,276; and Hawai'i Orchids, $3,278,202. According to Plaintiffs, the economist-expert reports "measured the fraud injury by the damages that each Plaintiff could have claimed at trial of their Benlate claim, less the amount of settlement paid in fact, plus the effects of interest, giving a total value for the fraud and deceit claims."

Second, Plaintiffs' attorney-experts satisfied the mandate of the court's May 6, 2004 order. The attorney-experts' opinions would aid the jury and supported awarding Plaintiffs more than what they had received in settlement for their claims. Attorney-expert Judith A. Pavey stated that "the stronger the liability case, the more value both sides assign." Upon that proposition, she concluded that "[t]his evidence would have added confidence to my assessment of the risk of loss on liability, even had some prior jury trials resulted in findings for [Defendant] on liability issues." Pavey also stated, "I know for a fact that some of the cases that settled prior to our cases would have either been settled for substantially higher sums or gone to trial[.]" (Emphases added.) According to Pavey, "added

confidence" would have been provided by the evidence withheld, since "both sides" identified the strength of the "liability case" as a "risk" factor in settlement.

Attorney-expert Wayne Parsons opined that Plaintiffs "would have been in a stronger position regarding settlement," on the basis that "the strength of the liability case is directly proportional to the recommendation given to the client regarding compromising the total damages of the case when considering a settlement offer." The reference to "the strength of the liability" being in direct proportion to the settlement recommendation is obviously a factor regarding compromise.

Attorney-expert George W. Playdon, Jr. explained that "the concealment and/or misrepresentation of factual information by [Defendant] impaired my ability to fairly evaluate the status of my client's Benlate litigation." Playdon maintained that "this information would have made a substantial difference in my analysis regarding the strength of the liability/causation case against [Defendant]." According to Playdon:

> 11. . . . If this information had been properly disclosed . . . , I would not have recommended my client settle his claim for the amount [Defendant] offered during negotiations.
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> 12. In my opinion, the value of my client's economic losses greatly exceeded the value of the settlement which was negotiated. In my opinion, assuming timely and appropriate access to all of the information represented by the aforementioned events and/or documents . . . , and further assuming that in any mediation arbitration or settlement negotiations [Defendant] would not and did not offer any settlement consideration greater than that which was in fact paid to settle my client's underlying Benlate claim, I would have taken the claims before a jury.

(Emphasis in original.) Playdon proffered two factors bearing on a settlement. He opined that "timely and appropriate access to all of the information" is a factor he would have considered in settlement. He also stated that since Defendant "would not and did not offer any settlement consideration greater than that which was paid," he would have gone to trial. Both the "access" and Defendant's unwillingness to settle may be viewed as factors affecting the fairness of any settlement.

Attorney-expert J. Richard Peterson said that "had [his Plaintiff] known in September 1994 all the information . . . , he would have rejected [Defendant's] settlement paid to him and gone to trial." According to Peterson, "[t]he information, taken as a whole, would have greatly strengthened [his Plaintiff's] claim that the Benlate was defective and the cause of his [damages]." The "taken as a whole" impact of the information withheld -- as opposed to the value of the case without such information -- was a specific factor to consider as to the strength of Plaintiffs' claims and the fairness of the prior settlement.

Attorney-expert Jeffrey Portnoy concluded that "it is my view that had I been representing these claimants, the settlement value of the cases would have been dramatically impacted had the wrongfully withheld information been available." According to Portnoy, "[h]ad that information been available, the settlement value of the Hawaii cases would have been significantly increased." Like attorney-expert Parsons,

Portnoy's settlement assessment would have been influenced by the information "wrongfully withheld." Such an assessment would be a factor in determining the "settlement value" and, thus, would be a specific factor to be considered.

Here the attorney-experts opined that the settlement value was higher than that for which the case was previously settled. See State v. Vliet, 95 Hawai'i 94, 106, 19 P.3d 42, 54 (2001) (explaining that expert testimony must only, at minimum, "assist the trier of fact," and enhance the jury's ability to resolve that matter (citations omitted)). The opinions of Plaintiffs' attorney-experts, if accepted, would have the effect of establishing damages greater than the amounts for which Plaintiffs settled. See id.

The specific amount to be awarded, if any, was for the jury. See, e.g., Auto. Underwriters, Inc. v. Rich, 53 N.E.2d 775, 779 (Ind. 1944) (explaining that a purpose of expert testimony is to give the jury "a method or means for measuring value," not that experts give such a value themselves). Expert testimony is intended "to aid the jury . . . [to avoid] conjecture and speculation," and "like any testimony, the jury may accept or reject it." Bachran v. Morishige, 52 Haw. 61, 67, 469 P.2d 808, 812 (1970) (citations omitted) (emphasis added). The declarations of the attorneys, therefore, were sufficient to raise genuine issues of material fact as to what the reasonable settlement amount should be or what the "fair compromise value,"

see February 28, 2005 order, of a settlement would have been.[4] Under HRE Rule 702, the testimony was admissible at trial as an aid to the jury's understanding of the evidence.[5]

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[4] Indeed, "[a]lthough an expert affidavit need not include details about all of the raw data used to produce a conclusion, or about scientific or other specialized input which might be confusing to a lay person, it must at least include the factual basis and the process of reasoning which makes the conclusion viable in order to defeat a motion for summary judgment." Hayes v. Douglas Dynamics, Inc., 8 F.3d 88, 92 (1st Cir. 1993) (citations omitted). Thus, "[w]here an expert presents 'nothing but conclusions--no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected,' such testimony will be insufficient to defeat a motion for summary judgment." Id. (quoting Mid-State Fertilizer v. Exchange Nat'l Bank, 877 F.2d 1333, 1339 (7th Cir. 1989) (other citations omitted)).

The attorney-experts' declarations were based on a common factual basis, namely, that the fraudulently withheld evidence would have been critical in Plaintiffs' decisions to settle their products liability claims. See supra at 12-15. In addition, the experts explained their reasoning in reaching the opinion that that factual premise resulted in the conclusion that the fraudulent inducement to settle injured Plaintiffs. Specifically, the attorney-experts explained that the fraudulently withheld evidence increased the value of the case assigned by each side, impacted the "assessment of the risk of loss on liability[,]" and strengthened the liability case, which was directly proportional to the attorney's recommendation to the client regarding settlement value. See supra at 12-13. The experts opined more generally that, taken as a whole, the case against Defendant was stronger once Plaintiffs had knowledge of the withheld information, and the totality of the information would cause the attorney-experts to change their recommendation to their respective clients regarding Defendant's settlement offer. See supra at 13-15. Thus, the majority's conclusion that these affidavits were insufficient to survive summary judgment based on a failure to establish damages, majority opinion at 58-59 n.14, is unconvincing.

In this case, the declarations of the attorney-experts, which opined that the settlement value was higher than that for which the case was previously settled, were clearly based on facts and inferences drawn thereon. Thus, the majority is incorrect in asserting that "the reports fail to set forth how those factors applied to each of their cases." Majority opinion at 59 n.14. The majority's categorization of the declarations of the attorney-experts as "unsubstantiated conclusions," majority opinion at 58 (emphasis added), is a unilateral inaccurate characterization, plainly contradicted by the declarations themselves.

To reiterate, the declarations, if accepted as true, would have the effect of establishing damages greater than the amounts for which Plaintiffs settled, thus raising genuine issues of material fact as to what the reasonable settlement amount should be or what the "fair compromise value" of a settlement would have been. The majority is also wrong in arguing that this "dissent fails to cite to any authority in support[.]" Majority opinion at 58 n.14. As noted infra, it is well established that "evidence and inferences must be viewed in a light more favorable to the non-moving party." French, 105 Hawai'i at 466, 99 P.3d at 1050.

[5] The majority disagrees that the declarations of the attorney-experts would be admissible at trial under HRE Rule 702, positing that they "simply consisted of conclusory opinions" which would not provide "assistance to the jury . . . ." Majority opinion at 59 n.14 (citing State v. Batangan,

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VI.

Based on the foregoing, Plaintiffs met their burden of showing genuine issues of material fact existed for trial. Even if the "fair compromise value" is used as the basis for calculating damages, Plaintiffs have sufficiently identified "compromise factors" to put the "fair compromise value" in issue, as noted supra. Plaintiffs' economic and attorney-expert submissions are aided by the directive that "evidence and inferences must be viewed [by this court] in the light most favorable to the non-moving" Plaintiffs. French, 105 Hawai'i at 466, 99 P.3d at 1050 (citation omitted).

Plaintiffs' experts' declarations, see supra, raise genuine issues of material fact as to the fairness of the prior settlement under the May 6, 2004 order and under the February 28,

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71 Haw. 552, 558, 799 P.2d 48, 52 (1990)). However, the declarations at issue in this case do not provide the type of conclusory legal opinion held inadmissible in Batangan. In that case, the expert witness implicitly testified that the Complainant in a child sexual abuse case was truthful and believable, a determination within the sole province of the jury. Batangan, 71 Haw. at 555, 779 P.2d at 50. Had the expert merely testified that the Complainant's behaviors that seemed contradictory to indicia of truthfulness, including delay in reporting and retracting the accusations, were consistent among child victims of sexual abuse by a family member, such testimony would have been admissible under HRE Rule 702 as helpful to the jury in reaching its determination regarding the credibility of a crucial witness. Id. at 557-58, 779 P.2d at 51-52. In the instant case, the declarations of the attorney-expert did not impinge on the jury's fact-finding authority. Rather, they were offered to assist the jury in determining whether Plaintiffs had settled for less than they should have as a result of Defendant's alleged fraud, and thus were admissible under HRE Rule 702.

Additionally, the majority's treatment of the attorney-experts' declarations creates the "Catch-22" Plaintiffs feared. The majority, like Defendant, would require Plaintiffs to submit expert testimony detailing the outcome of a hypothetical trial in which the wrongfully withheld evidence would be presented to the jury, but would then rule such evidence inadmissible under HRE Rule 702 as presenting nothing more than "conclusory opinions" that could not provide any assistance to the jury. Majority opinion at 59 n.14.

2005 order. Plaintiffs did produce specific matters joining the issue of whether the prior settlement was reasonable or represented a fair compromise value for trial in light of Defendant's assertion that it would not have paid more than what was already paid. See id.

The actual amounts Plaintiffs previously settled for provide a point from which the jury may evaluate damages. Indeed, as stated above, Defendant's position is "that it would not have actually paid more in settlement than it [already] did." (Emphasis added.) Plaintiffs' economic reports provide an upper range for estimating the damages incurred by Plaintiffs. Plaintiffs' lawyer-experts opined that settlement should have been at a level greater than that paid by Defendant. This would establish a range within which the jury could determine the fair compromise value of the claims.

VII.

Finally, the "ultimate burden of persuasion . . . always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law." Id. at 470, 99 P.3d at 1054 (citation omitted) (emphasis added). It would be ironic to sustain summary judgment in this case because apparently Defendant itself never named an expert attorney regarding "fair compromise value" factors prior to the expert deadline and before the court's summary judgment ruling.

Thus, Defendant did not provide expert lawyer testimony directed to the "numerous compromise factors and how they would have applied to each Plaintiff's case."[6] See February 28, 2005 order. As Plaintiffs note, "of [Defendant's] 20 experts, not one was retained to opine on fair settlement value, or the economics of Plaintiffs' fraud claims. There is no reference anywhere in the massive record of this action of [Defendant] offering opinions on this subject matter."[7] (Emphasis added.)

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[6] The majority incorrectly implies this dissent points to the Defendant's failure to produce its own expert lawyer testimony in an attempt to shift the burden of proof. See majority opinion at 60 n.15 ("the burden is upon the [P]laintiffs to prove damages, and [P]laintiffs cannot complain that [Defendant] did not establish a prima facie element of the [P]laintiffs' case[]" (emphasis omitted)). Rather, the absence of any such evidence from Defendant underscores two major points. First, Plaintiffs were not actually put on notice of the numerous factors on which their attorney experts were subsequently required to opine in order to establish a prima facie showing of damages under the fair compromise value standard because the controlling standard was not settled until the court ruled on the motion for summary judgment. See supra at 7-8.

Second, Defendant did not establish that there was no genuine issue of material fact with regard to Plaintiffs' ability to prove the damages element of their fraud claim required of Defendants as the party moving for summary judgment. Defendant's theory on summary judgment was that even if the fraudulently withheld evidence had been disclosed to Plaintiffs, Defendant would not have paid more in settlement than it actually did. Id. Thus, under the well-established standard for summary judgment, Defendants were required to prove that, based on the identified compromise factors, there was no genuine issue of material fact that the value of Plaintiffs' claims would not have changed, such that Plaintiffs could not prove that they were injured by Defendant's actions, i.e., that Plaintiffs would be unable to establish the damages element of their fraud claim.

[7] Plaintiffs contend also that Defendant took inconsistent and contradictory positions on the necessity of expert lawyer testimony under the fair compromise value standard. On the one hand, Defendant maintained that "the lawyer experts cannot 'tell' the jury what the evidence was on the day of the settlement . . . nor can the lawyer expert 'tell' the jury the fair compromise value of [Plaintiffs'] case, as this would be usurping the function of the jury." But Defendant also argued that "[a]ssuming [Plaintiffs] could prove the fact of damage, they would also have to prove the amount of damages with reasonable certainty. The amount of damages, if any, would be the fair compromise value minus [Plaintiffs'] actual settlement amounts. To make this deduction, the fair compromise value, obviously, would have to be known." (Emphases added.)

Defendant, however, went on to assert that, "[a]s discussed, it is not the role of lawyer experts to opine on the fair compromise value -- that is for the jury's determination, with the necessary aid of experts to

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Defendant's response is that, Defendant "need not submit any evidence if it chooses not to. [Plaintiffs] have that burden of proof." But on summary judgment, "the ultimate burden of persuasion . . . always remains with [a] moving party" such as Defendant. French, 105 Hawai'i at 470, 99 P.3d at 1054 (citations omitted). Defendant did not produce any opposing attorney-expert declarations to those submitted by Plaintiffs even before the court determined on granting summary judgment that the measure of damages should be the fair compromise value and "compromise factors" were required to be identified by expert attorneys. On appeal, Defendant maintained "if [Plaintiffs] had provided proper expert testimony on settlement factors and methodologies, [Defendant] would have submitted rebuttal testimony."[8] But as is noted, Defendant itself had apparently not provided such expert testimony by the expert report deadline.

The May 6, 2004 order stated that "experts will not be allowed to testify on any matters beyond their respective reports." Defendant in fact did not appear to have any "expert lawyer testimony directed to the numerous compromise factors, and

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(...continued)
determine that amount." (Emphasis in original.) "In effect," as Plaintiffs argue, "[Defendant] sought a 'Catch-22': only testimony valuing a fictional settlement could satisfy Plaintiffs' burden of proof; but testimony valuing a fictional settlement was (according to [Defendant]) speculative and inadmissible."

[8] However, in the face of Plaintiffs' attorney-experts' declarations submitted before the court ruled on the appropriate damages measure, Defendant had the burden to respond to show that no genuine issue of material fact as to the fairness of settlement remained. Determination of that issue is one appropriately left for trial and the fact finder.

how they would have applied to each Plaintiffs' case," see February 28, 2005 order, by the expert deadline, for trial. Accordingly, Defendant would have had no experts to identify compromise factors and would be left to rely on cross-examination (if it chose to cross-examine) of Plaintiffs' experts who were adverse to Defendant's position. Defendant's position regarding the necessity for such evidence was, at the least contradictory, in light of the fact that Defendant claimed, and the court subsequently agreed, that such evidence was central and pivotal to the case.

VIII.

Against the foregoing record the majority reaches its result by mischaracterizing Plaintiffs' argument. The majority contends that "[t]he opportunity [to present further expert testimony at trial Plaintiffs] now seek . . . was available to them, via [Hawai'i Rules of Civil Procedure (HRCP)] Rule 56(f) (2007),[9] at the time the [court] was considering [Defendant's] motion for summary judgment" based on the Plaintiffs' inability to prove damages. Majority opinion at 62. In fact, Plaintiffs did not maintain that they should be given additional time to

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[9] HRCP Rule 56(f) states:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(Emphasis added.)

present evidence that they did not submit at the motion for summary judgment. Rather, Plaintiffs indicated that "[b]ecause the possibility of the [court] imposing a limited 'settlement fraud' remedy was unknown to the parties and was not foreseeable under Hawaii law at the time Plaintiffs obtained their reports, and answered discovery" (emphasis added), if this court adopts Defendant's damage standard on appeal "as the prevailing measure of damages, [then] Plaintiffs request that they be given the opportunity (on remand) to make an appropriate record for such purpose."

Thus, Plaintiffs' request is merely that in conjunction with their argument for reversal of the summary judgment order, they be given the opportunity to present evidence on remand on the damages standard that is confirmed by this court on appeal that "was not foreseeable . . . at the time Plaintiffs obtained their reports and answered discovery[.]" This is reasonable in light of the fact that the majority itself acknowledges, that until this case, "this court has not had the occasion to articulate what must be proven in order to bring a meritorious settlement fraud claim." Majority opinion at 28.

Accordingly, there was never any question that at the time Plaintiffs submitted their summary judgment papers "there was a need for a continuance[,]" as HRCP Rule 56(f) states, because as set forth above, at the time Plaintiffs and Defendant submitted their papers the appropriate damages standard had yet to be determined and, hence, the majority's posited need for a

continuance had yet to ripen. The majority maintains that Plaintiffs "waived their opportunity to secure further [discovery] . . . and cannot now raise it on appeal." Majority opinion at 67. But in fact, there was no reason for Plaintiffs to secure a HRCP Rule 56(f) continuance for "further discovery" since the purported need for such a continuance could only become apparent after the court decided what damages standard would apply at the hearing.

IX.

Not surprisingly, then, HRCP Rule 56(f) is not raised by the Plaintiffs or by Defendant. This is understandable because it was and is wholly irrelevant to the facts. Instead, it is the majority that raises HRCP Rule 56(f) sua sponte as the construct by which the majority rationalizes its outcome. Consequently, the majority's argument runs askew when it asserts that, "[h]ad the [HRCP Rule 56(f)] motion been raised and a ruling made, the issue would properly be before this court to review whether the [court] abused its discretion in granting or denying the request." Majority opinion at 66 n.20.

Inasmuch as HRCP Rule 56(f) was not raised by any party but by the majority sua sponte (and through a misapplication of Plaintiffs' argument), under the circumstances it is not properly before this court as the majority acknowledges. Id. The majority's unilateral insertion of HRCP Rule 56(f) into this case not only clashes with the facts, but also with the law the

majority itself cites. The majority's underlying premise (i.e., "had the motion been raised") is also faulty inasmuch as the facts demonstrate there was no reason for the Plaintiffs to raise HRCP Rule 56(f).

Furthermore, in presenting an additional argument that would foreclose Plaintiffs' requested relief, the majority places itself in Defendant's position. In the circumstances of this case, by positing a HRCP Rule 56(f) argument that Defendant did not raise, the majority has given Defendant another "bite at the apple," an advantage it expressly denied to Plaintiffs.[10] See majority opinion at 66 ("To permit the [P]laintiffs to now establish another record relating to the proof of damages . . . would entitle them to two bites of the apple." (Citation omitted).). Plaintiffs have thus been doubly wronged.[11]

Plaintiffs could not have appropriately moved to continue the decision on Defendant's motion for summary judgment because the February 28, 2005 court order reiterated the court

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[10] The majority misconstrues this dissent in reference to the majority's second bite at the apple comment. See majority opinion at 66-67 n.21. The point is not that Defendant will be given another opportunity to prevail at trial, as the phrase is used by the majority but, rather, in relation to the advantage given Defendant on this appeal. Defendant had the opportunity to assert any theory it chose to support the court's grant of summary judgment. It chose not to argue to this court that the Plaintiffs should have moved for a continuance under HRCP Rule 56. Thus, by injecting a new theory to support the majority's decision, the majority has afforded Defendant the basis for prevailing on this appeal despite the fact that it was not argued by any party and, as noted supra, does not comport with the facts.

[11] The majority contends that this dissent, in criticizing the application of HRCP Rule 56(f) in this case, ignores an appellant's burden of persuasion on appeal. Majority opinion at 67 n.21. However, given that HRCP Rule 56(f) was not raised before the court and therefore was not decided by the court, Plaintiffs cannot be reasonably or fairly required to convince this court that they are entitled to relief based on a then wholly hypothetical theory of the case.

had precluded any further revision of expert testimony. The order confirmed that "[t]he deadlines for Plaintiffs to submit their final expert reports and amend their pleadings were October 15, 2004, and December 14, 2004, respectively." (Emphasis added.) The court then stated that it "previously made clear that the expert reports were to be final[.]" (Emphases added.) Thus, in deciding that "Plaintiffs are therefore unable to prove . . . fraud damages as a matter of law," (emphasis added) the court made abundantly plain that it would not have considered any continuance under Rule 56(f) were that Rule even relevant to this case.

X.

The majority's assertion that Plaintiffs should have moved for a Rule 56(f) continuance of the summary judgment hearing when Defendant's "theory of damages . . . became clear[] upon the filing of its motion for summary judgment[,]" majority opinion at 60-61, is even more incongruous inasmuch as there was no way to anticipate before the hearing was held that the court would adopt Defendant's standard of damages and apply it to Plaintiffs' expert testimony.[12] The only opportunity Plaintiffs

[12] On this point, the federal cases cited by the majority for the proposition that a party who fails to move for relief under Federal Rules of Civil Procedure (FRCP) Rule 56(f) cannot be awarded relief in the form of additional discovery on appeal are distinguishable. See majority opinion at 63-65. The majority cites to Weinberg v. Whatcom County, 241 F.3d 746, 751 (9th Cir. 2000), in which the Ninth Circuit Court of Appeals held that the district court properly awarded summary judgment in favor of defendants because the plaintiff did not move for additional time "to obtain expert testimony necessary to substantiate his allegations of damages" under FRCP Rule 56(f). But notably, in Weinberg, the plaintiff did not file any expert testimony regarding his damages by the deadline set by the district court.

(continued...)

would have had to acquire expert testimony re-evaluating their fraud claims under the "reasonable settlement" standard would have been after the court made its February 28, 2005 order granting summary judgment. This is because it was not until that order was issued that the reasonable settlement amount was disclosed as the governing standard for damages. The order determined that "[i]f (s)he chooses to sue for fraud, the remedy available to Plaintiffs is the fair compromise value of the claim at the time of settlement."

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[12](...continued)
Id. at 750. Thus, there was absolutely no evidence that could possibly establish the damages element of the plaintiff's claim. Id. Furthermore, the plaintiff was fully aware that he needed to submit such evidence, inasmuch as he asked for the district court's "indulgence" to submit an untimely report, but never formally moved for a continuance under FRCP Rule 56(f). Id.

In contrast, Plaintiffs in this case had submitted expert reports regarding damages in compliance with the court's May 6, 2004 order and the then-prevailing measure of damages. Plaintiffs, unlike Weinberg, had no reason to suspect that they required more time to gather expert evidence to support their claim. Therefore, the application of Weinberg in this case is inappropriate.

The majority also cites to Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 832-33 (10th Cir. 1986), holding that "where a party opposing summary judgment and seeking a continuance pending completion of discovery fails to take advantage of the shelter provided by [FRCP] Rule 56(f) . . . there is no abuse of discretion in granting summary judgment[.]" Majority opinion at 65. However, Pasternak is inapposite to the present case. In Pasternak, the Tenth Circuit Court of Appeals rejected the defendant's argument that when the trial court is aware of a party's need to conduct more discovery by virtue of other events in the litigation, strict compliance with FRCP Rule 56(f) is not required. Pasternak, 790 F.2d at 833.

In contrast, in this case, other events in the course of litigation would not have apprised the court of Plaintiffs' need to conduct additional discovery before it ruled on the summary judgment motion, thus triggering the rule in Pasternak. The event that necessitated the additional discovery was the court's ruling that the applicable standard of damages was the fair compromise value. Once that ruling was made, and Plaintiffs learned that they would need additional attorney expert testimony beyond what they submitted by the October 15, 2004 deadline for final expert reports (a fully four months before Defendant filed its motion for summary judgment), a HRCP Rule 56(f) continuance was no longer available to Plaintiffs.

Until the February 28, 2005 order, Plaintiffs could only maintain -- as they always had -- that their damages should be measured up to the judgment value of their claims. Indeed, the court's May 5, 2004 order mandated Plaintiffs to "state their position on the introduction of evidence at trial relating to the issue of whether Benlate was defective and/or contaminated." The February 28, 2005 order thus barred the possibility of a continuance for further discovery.[13]

The majority disagrees that "the only opportunity [Plaintiffs] would have had to acquire expert testimony re-evaluating their fraud claims . . . would have been after the court made its February 28, 2005 order granting summary judgment[]" because of "the remedy available pursuant to HRCP Rule 56(f)[.]" Majority opinion at 66 n.20. As pointed out before, the defect in this reasoning is that Plaintiffs would have needed to know what specific standard the court would eventually decide governed in order to have a basis for requesting a continuance pursuant to HRCP Rule 56(f) in order to conduct further discovery.

The majority contends that it "is nothing more than mere speculation" that the court would have denied any motion for

[13] To make clear, the majority states that, "by the time the [court] entered its ruling on [Defendant's] summary judgment, i.e., on February 28, 2005, the discovery cut-off had not yet expired[]" inasmuch as "[t]he discovery cut-off date was set for April 14, 2005." Majority opinion at 65 n.18. However, the majority fails to indicate that the deadline for Plaintiffs to submit their final expert reports was on October 15, 2004, and the court's February 28, 2005 order made it evident that the court had "previously made clear that the expert reports were to be final[.]"

further discovery. Majority opinion at 66 n.20. Obviously, a court, in its discretion, may grant or deny a request for continuance pursuant to HRCP 56(f). See 808 Dev., LLC v. Murakami, 111 Hawai'i 349, 355, 141 P.3d 996, 1002 (2006) ("A circuit court's decision to deny a request for a continuance pursuant to HRCP Rule 56(f) will not be reversed absent an abuse of discretion." (Brackets and citation omitted.)). In other words, even if Plaintiffs requested a continuance, there is no assurance that the court would have granted it. Thus, the irony of the majority's position is that it itself speculates that the court might have granted a Rule 56(f) continuance.

That aside and more to the point, again, the majority ignores the manifest language of the court's order granting Defendant's summary judgment motion that "the expert reports were to be final and that the experts would not be allowed to testify on matters beyond their respective reports[.]" As indicated supra, per the court's February 28, 2005 order, it was not disposed to grant any motion for further discovery even if Plaintiffs moved for such discovery. The court plainly related in its February 28, 2005 order that it would not have considered any continuance. To decide as the majority does is to question the credence of the court's orders.

The court first set the expert deadline in its May 5, 2005 Order Relating to Trial Procedures. That the court stated the deadline in two orders is telling of their conclusiveness. To say, then, that Plaintiffs should have moved to continue once

Defendant filed its motion for summary judgment is to fault Plaintiffs for following the court order -- an order which was specifically designed to reduce litigation clutter and delay.

XI.

Manifestly, it is the lack of notice that Defendant's measure of damages would control the parameters of expert testimony that unfairly prejudices Plaintiffs here. Until the court entered its February 28, 2005 order, Plaintiffs had no notice that the "reasonable settlement amount" was the measure by which its attorney-experts would have to evaluate the case. The majority's position that it was not unforeseeable that the court would rule in favor of Defendant on summary judgment, majority opinion at 67 n.21, does not address the central issue here, namely that when Plaintiffs submitted their final expert reports, they were not on notice of the governing measure of damages subsequently announced in the court's February 28, 2005 order.

What makes the majority's position even more egregious is that Defendant, while maintaining the reasonable settlement amount as the measure of damages, never produced expert testimony applying such a standard and, thus, there was no reason for Plaintiffs to request a Rule 56(f) continuance of the summary judgment hearing to respond to non-existent affidavits applying such a standard.[14] Hence, the illogic of the majority's position

[14] The majority contends that "[Defendant], as the party moving for summary judgment, 'need not support [its] motion with affidavits or similar materials that negate [Plaintiffs'] claims, but need only point out that there is [an] absence of evidence to support [Plaintiffs'] claims.'" Majority (continued...)

is that, until the court designated the appropriate measure of damages as to which the attorney-experts were to opine, Defendant could not discharge its burden, as the majority asserts, simply by pointing to a lack of evidence produced by Plaintiffs, majority opinion at 60 n.15, because such a contention presupposes the existence of an established measure of damages as to which "any absence of evidence" would be compared -- and the court had yet to adopt such a measure. The majority is incorrect, then, in alleging that the Plaintiffs failed to discharge their burden. See majority opinion at 58-59 n.14. To fault Plaintiffs ex post facto for producing only expert testimony directed to their proposed standard of damages and not directed to Defendant's proffered measure impermissibly deprives Plaintiffs of their right to a trial on their claims.

XII.

Under the circumstances above, it cannot be reasonably concluded that Plaintiffs had notice of the standard the court would impose on the evidence they had marshaled in opposition to Defendant's summary judgment motion, or that Defendant has

[14](...continued)
opinion at 60 n.15 (quoting Young v. Planning Comm'n of County of Kauai, 89 Hawai'i 400, 407, 974 P.2d 40, 47 (1999)). First, placed in context, the majority's quotation from Young comes from a parenthetical in which this court drew a comparison to the Federal Rules of Civil Procedure. See Young, 89 Hawai'i at 407, 974 P.2d at 47, not supporting authority (stating that "a party moving for summary judgment under [FRCP] Rule 56 need not support his or her motion with affidavits or similar materials that negate his or her opponent's claims, but need only point out that there is absence of evidence to support the opponent's claims" (quoting Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Second, as reiterated before, until the appropriate damages standard was established by the court, the declaration plainly raised genuine issues of fact as to the proper damages calculations as to which Defendant was obligated to respond.

"convinc[ingly,]" established its entitlement to summary judgment. French, 105 Hawai'i at 470, 99 P.3d at 1054 (citation omitted). With all due respect, although I believe the court acted conscientiously, summary judgment should not have been granted. Accordingly, I would vacate the February 28, 2005 order and remand the case for further proceedings.