



1 Plaintiffs' claims all relate to two allegations of legal malpractice against Shaffer and The Law  
2 Firm. Edward J. Kahn ("Khan") is a shareholder and officer of MIPI and GABI. (Complaint ¶ 7.)  
3 MIPI's allegations stem from a transaction in 1999 which was designed to transfer a leasehold interest  
4 from La. Mode, Inc. ("La Mode") to MIPI. (*Id.* ¶ 9-11.) MIPI alleges that the transaction documents  
5 did not contain proper words of conveyance and was insufficient to transfer the leasehold interest. (*Id.*)  
6 GABI's legal malpractice allegations relate to a 2002 transaction which was designed to, among other  
7 things, assign to GABI certain litigation matters pending before the Hong Kong court system as well  
8 as a related U.S. District Court judgment ("Hong Kong Claims").<sup>1</sup> (*Id.* ¶ 19-21.) Plaintiffs have  
9 asserted causes of action against Defendants including legal malpractice, breaches of fiduciary duty,  
10 and breaches of contractual duty.

## 11 12 **II. MOTION FOR SUMMARY JUDGMENT PURSUANT TO NMI R. Civ. P. 56(c)**

13 Plaintiffs have filed a motion for summary judgment as to all claims against Defendants.  
14 Defendants have filed three motions for summary judgment, which include: (1) motion for summary  
15 adjudication of issues as to Plaintiffs' claims for punitive damages; (2) motion for summary judgment  
16 or in the alternative summary adjudication of issues as to Plaintiff Golf Apparel Brands, Inc.  
17 [bankruptcy issues - causation]; and (3) motion for summary judgment or, in the alternative, summary  
18 adjudication of issues as to Plaintiff Golf Apparel Brands, Inc. (damages & causation).

### 19 **A. Legal Standard**

20 "Summary judgment may be granted where there is no genuine issue as to any material fact and  
21 the moving party is entitled to judgment as a matter of law." *Century Insurance Co. v. Hong Kong*  
22 *Entertainment*, 2009 MP 4 ¶ 14. "A party moving for summary judgment bears the initial and the  
23 ultimate burden of establishing its entitlement to summary judgment. . . . If a movant is a defendant,  
24 he or she has the [] duty of showing that the undisputed facts establish every element of an asserted  
25 affirmative defense." *Furuoka v. Dai Ichi Hotel*, 2002 MP 5 ¶ 22. "Once the moving party satisfies

---

26  
27 <sup>1</sup>*La Mode, Inc. and La Mode (Far East) Ltd. v. Tong Pat Ling Patrick, et al.*, High Court Action 10072 of  
28 2000; *La Mode, Inc. v. Wand Tai Enterprises (Int'l) Ltd., et al.*, High Court Action 1290 of 2001 (action to enforce  
judgment of *La Mode, Inc. v. Wand Tai Enterprises (Int'l) Ltd., et al.*, CV99-0023 (D.N.M.I.)).

1 the initial burden, the non-moving party must respond by establishing that a genuine issue of material  
2 fact exists. If the non-moving party cannot muster sufficient evidence to make out its claim, a trial  
3 would be useless and the moving party is entitled to summary judgment as a matter of law.” *Id.* ¶ 24.  
4 “In making a summary judgment determination, the trial court is required to consider the evidence and  
5 inferences most favorable to the party opposing the motion.” *Century*, 2009 MP 4 ¶ 14.

6 Summary judgment may be granted only when the court, after viewing facts and inferences in  
7 a light most favorable to the non-moving party, finds as a matter of law that the moving party is entitled  
8 to judgment as a matter of law. *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172, 176 (1990); *Rios v.*  
9 *Marianas Pub. Land Corp.*, 3 N.M.I. 512, 518 (1993). A party opposing a properly supported motion  
10 for summary judgment “may not rest upon the mere allegations or denials of his pleading, but...must  
11 set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*,  
12 477 U.S. 242, 248 (1986) (citation omitted). “If the evidence set forth by the non-moving party is  
13 ‘merely colorable...or [was] not significantly probative...summary judgment may be granted.’”  
14 *Eurotex, Inc. v. Muna*, 4 N.M.I. 280, 284 (1995) (citing *Anderson*, 477 U.S. at 249-50).

15 “[T]he issue of material fact required by Rule 56(c) to be present to entitle a party to proceed  
16 to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather,  
17 all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require  
18 a jury or judge to resolve the parties’ differing versions of the truth at trial.” *Anderson*, 477 U.S. at  
19 248-49. A trial court cannot weigh the evidence and make findings on disputed factual issues on a  
20 motion for summary judgment. *Rios v. Marianas Pub. Land Corp.*, 3 N.M.I. 512 (1993).

21 When considering cross-motions for summary judgment, each party’s motion must be examined  
22 on its own merits, and in each case all reasonable inferences must be drawn against party whose motion  
23 is under consideration. *Hickok v. Orange County Community College*, 472 F. Supp. 2d 469 (S.D. N.Y.  
24 2006). “The filing of cross-motions for summary judgment, with both parties asserting that there are  
25 no uncontested issues of material fact, does not vitiate the court’s responsibility to determine whether  
26 disputed issues of material fact are present, since a summary judgment cannot be granted if a genuine  
27 issue as to any material fact exists.” *Fair Housing Council of Riverside County, Inc. v. Riverside Two*,  
28 249 F.3d 1132, 1136 (9th Cir. 2001) (citation omitted).

1 **B. Discussion**

2 1. Hong Kong Claims and District Court Judgment

3 Pursuant to 2001-2003 reorganizational efforts of La Mode, which included separating La  
4 Mode's Saipan and California based assets, Shaffer was retained to, among other things, assign La  
5 Mode's interest in the pending Hong Kong Claims to GABI. GABI argues that Shaffer failed to  
6 complete the assignments and that in 2005 when La Mode filed for bankruptcy, these interests became  
7 part of the bankruptcy estate. In May of 2009, GABI received these interests from Defendants'  
8 insurance carrier after purchasing them from La Mode's bankruptcy trustee via quitclaim deed. GABI  
9 argues that due to the passage of time, during which these interests were entangled with La Mode's  
10 bankruptcy, GABI may not be as successful in the Hong Kong Claims or enforcing the District Court  
11 judgment.

12 Defendants assert that these interests were assigned to GABI in 2002, and that while La Mode  
13 may have still been the named plaintiff in these actions, the bankruptcy filing indicated that they had  
14 previously been assigned to GABI. Defendants further contend that there is no evidence Kahn incurred  
15 additional expenses in substituting GABI for La Mode and that one of Kahn's other companies had  
16 been a named plaintiff in these actions and thus he still retained control over the litigation.

17 The dispute over damages is very complicated as to this issue because of the nature of the  
18 damages claimed by GABI, particularly the fact that these alleged damages stem from future judgments  
19 on pending litigation. In addition, GABI claims damage related to "loss of counsel who worked on the  
20 matter, and the costs and time of bringing current counsel up to speed." However, at oral argument it  
21 was conceded that the original Hong Kong Claims counsel was replaced due to health reasons.  
22 Therefore, any costs associated with bringing new counsel up to speed was not the result of Defendants'  
23 alleged negligence.

24 It is a routine practice for courts to dismiss claims as premature where the injury alleged is  
25 contingent upon a separate pending lawsuit. *See e.g., Lincoln House, Inc. v. Dupree*, 903 F.2d 845 (1st  
26 Cir. 1990). In *Lincoln*, plaintiff's claim alleged that defendant diverted assets to avoid paying plaintiff  
27 on a judgment in a case still pending against the defendant. Therefore, the injury was premised on  
28 defendant's alleged inability to satisfy a prospective judgment. Since the damages were contingent

1 upon the plaintiff's success in a separate action, the court held that the plaintiff's claim for damages  
2 was purely speculative and not ripe for resolution. *Id.* at 847.

3 In the case at bar, GABI asserts damages that are speculative and contingent upon the outcome  
4 of the Hong Kong Claims. Citing to Restatement (Third) of Law Governing Lawyer § 53 cmt. b, GABI  
5 argues that "the jury will be permitted to consider at trial whether Mr. Shaffer's misconduct has made  
6 it more difficult for GABI to prove what would likely have been the results in the original proceedings  
7 in Hong Kong."<sup>2</sup> The problem with this argument, as was conceded at oral argument, is that the Hong  
8 Kong Claims are still pending. Therefore, a jury would not be considering what "might have been" but  
9 what the outcome "might be" in the pending cases. Here, the damages are not only "speculative"  
10 because they are difficult to measure, but also are speculative because the damages claimed may never  
11 occur.

12 Based on the foregoing, the Court hereby GRANTS Defendants' motion for summary judgment  
13 as to GABI's claimed damages. Having granted summary judgment in favor of Defendants as to  
14 GABI's claims for damages, the Court finds that Defendants motion for summary judgment as to  
15 causation as well as Plaintiffs' motion for summary judgment as to the Hong Kong Claims has been  
16 rendered MOOT.

17 2. Lease Assignment

18 MIPI's claims against Shaffer arise out of an Agreement of Purchase and Sale of Assets  
19 ("Agreement") entered into between plaintiff MIPI and La Mode on or about August 31, 1999. In the  
20 Agreement, La Mode contracted to sell various assets including a leasehold interest in certain property  
21 located in As Lito, Saipan to MIPI for \$2,250,000. According to the Agreement, the \$2,250,000 was  
22 to be paid as follows: \$112,500 at closing of the Agreement and the remaining balance to be paid over  
23 the course of seven years pursuant to a Promissory Note.

24 MIPI contends that although Shaffer had billed for creating a Lease Assignment, it was never  
25 actually created. MIPI further contends that the Agreement was merely a "promise for a promise" and  
26

---

27 <sup>2</sup>Plaintiffs' Memorandum in Support of their Motion for Summary Judgment and in Opposition to Defendants'  
28 Motions for Summary Judgment on GABI and Punitive Damages at 21.

1 indicates that any assignment would occur through some future act, thus making the Agreement a  
2 conditional contract. Because Shaffer failed to create a separate Lease Assignment, or record the  
3 Agreement, La Mode’s ground lease interest was never conveyed to MIPI which resulted in the ground  
4 lease becoming encumbered by a CNMI tax lien as well as becoming part of La Mode’s bankruptcy  
5 estate.

6 Shaffer asserts that the Lease Assignment was created and incorporated into the Agreement.  
7 Article I, Section 1.01 of the Agreement states that “Seller agrees to sell, convey, transfer, assign, and  
8 deliver to Buyer, and buyer agrees to purchase from Seller . . . [a]ll right, title and interest of Seller in  
9 and to the Lease Agreement . . . .” Specifically, Shaffer alleges that the Agreement contained all of the  
10 necessary elements to assign La Mode’s interest in the ground lease to MIPI. Additionally, Shaffer has  
11 alleged that recording the Agreement was not necessary since a failure to record only concerns claims  
12 from subsequent *bona fide* purchasers for value (“b.f.p.”). Furthermore, the CNMI was not a b.f.p.  
13 Therefore, the unrecorded property interest would prevail over the tax lien. Finally, the ground lease  
14 never became part of La Mode’s bankruptcy estate since the bankruptcy documents indicate that La  
15 Mode has no real property interests.

16 Having carefully reviewed the parties’ submissions, as well as oral arguments, the Court finds  
17 that there are genuine issues of material fact as to whether La Mode and MIPI intended the Agreement  
18 to serve as the Lease Assignment and whether the failure to record the Agreement resulted in actual  
19 damage to MIPI. Accordingly, the Court finds that it would be inappropriate to grant Plaintiffs’ motion  
20 for summary judgment regarding the Lease Assignment.<sup>3</sup>

21 3. Punitive Damages

22 “Punitive damages are generally permitted only on a showing of intentional or reckless  
23 misconduct by a defendant.” Restatement (Third) of Law Governing Lawyer § 53 cmt. h. Moreover,  
24 “[p]unitive damages may be awarded for outrageous conduct due to the ‘defendant’s evil motive or his  
25

---

26  
27 <sup>3</sup>Plaintiffs’ motion with respect to this issue relies in large part upon Defendants’ deemed admissions.  
28 However, as discussed below, the Court finds it necessary to permit Defendants to withdraw these admissions and  
submit belated responses while at the same time imposing a sanction upon Defendants’ counsel.

1 reckless indifference to the rights of others.’’ *Ishimatu v. Royal Crown Ins. Corp.*, 2010 MP 8, 34  
2 (citing *Santos v. STS Enters.*, 2005 MP 4, 22 (quoting Restatement (Second) of Torts § 908 (1979))).

3 At oral argument, Plaintiffs argued that Shaffer’s repeated behavior and subsequent  
4 misrepresentations to cover up that behavior constitutes the type of outrageous conduct that makes a  
5 punitive damages claim proper. Plaintiffs further contended, without citing to authority, that bad faith,  
6 in and of itself, can support a claim for punitive damages. Shaffer argued that this is a legal malpractice  
7 case with allegations of negligence relating to two transactions for a failure to use proper words of  
8 conveyance and that there is no evidence of intent or an evil motive.

9 When analyzing a claim for punitive damages the Court must consider the nature of the claims  
10 asserted against the defendant. Here, each plaintiff asserts legal malpractice, breach of fiduciary duty  
11 and breach of contract. The Restatement (Second) of Contracts § 355 states “[p]unitive damages are  
12 not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for  
13 which punitive damages are recoverable.” Punitive damages are available for a breach of fiduciary  
14 duty, but only where a high degree of moral culpability is shown.<sup>4</sup> Whatever duties Shaffer owed to  
15 the Plaintiffs arose from their attorney-client relationship, which was created by contract. However,  
16 an attorney’s duty to exercise reasonable care and skill arise from the relationship with his client,  
17 irrespective of the contract, and a breach of that duty constitutes negligence.

18 In the case at bar, the Plaintiffs have failed to proffer evidence from which a reasonable juror  
19 could conclude that any of Shaffer’s alleged actions reach the requisite threshold of moral culpability.  
20 The Court notes that GABI is not, at this time, able to show damages resulting from the Hong Kong  
21 Claims transaction and MIPI has failed to show that Shaffer’s conduct was reckless, let alone  
22 intentional. The underlying facts of this case allege a course of conduct that a reasonable jury could  
23 not conclude to be so morally reprehensible as to justify the award of punitive damages.

24  
25 **III. MOTION TO WITHDRAW AND AMEND ADMISSIONS**  
26

27  
28 

---

<sup>4</sup>See e.g., *Casa Orlando Apts., Ltd. v. Fannie Mae*, 624 F.3d 185 n. 58 (5th Cir. 2010) (citing cases).

1 On November 17, 2009, Plaintiffs served upon Defendants, via Lexis Nexus File & Serve, their  
2 Request For Admissions (“RFA”). Pursuant to Rule 36(a) of the Commonwealth Rules of Civil  
3 Procedure, a written response was due within 30 days of service. NMI R. Civ. P. 36(a). Defendants’  
4 counsel was unaware of the RFA until July 2010 upon reading references to it in Plaintiffs’  
5 memorandum in support of Plaintiffs’ motion for summary judgment. Defendants’ counsel claims  
6 “secretarial inadvertence” as the reason for being unaware of the RFA. On September 30, 2010,  
7 Defendants served belated answers in response to Plaintiffs’ RFA.

8 Defendants move the Court for permission to serve belated responses to Plaintiffs’ RFA. In the  
9 alternative, Defendants move the Court to allow Defendants to withdraw and amend certain admissions.

## 10 **A. Legal Standard**

11 Commonwealth Rule of Civil Procedure 36(a) provides that:

12 A party may serve upon any other party a written request for the  
13 admission of the truth of any matters within the scope of Rule 26(b) set  
14 forth in the request that relate to statements or opinions of fact or the  
application of law to fact, including the genuineness of any documents  
described in the request.

15 NMI. R. Civ. P. 36(a). Pursuant to Rule 36(a), “once a party is served with a written request for  
16 admissions, that party has thirty days to respond to each individually stated matter, failure to do so will  
17 deem each matter admitted and considered conclusively established for the purpose of the pending  
18 action only.” *Park v. Kim*, 2007 MP 13 ¶ 10 n. 2 (quoting *Young Jo Cho v. Min Wan Cho*, 6 NMI 516,  
19 518 (2002) (citing NMI R. Civ. P. 36(a))).

20 Under Rule 36, the trial court may permit a party to withdraw or amend a matter admitted  
21 “when the preservation of the merits of the action will be subserved thereby and the party who obtained  
22 the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in  
23 maintaining the action or defense on the merits.” NMI R. Civ. P. 36(b). The grant or denial of a  
24 motion to withdraw an admission rests within the sound discretion of the trial court. *Estate of Muna*  
25 *v. Commonwealth*, 2007 MP 16 ¶ 6.

## 26 **B. Discussion**

### 27 1. Presentation of the Merits

28



1 The Court finds that the first prong under Rule 36(b) favors the Defendants. The Defendants  
2 are deemed to have admitted that (1) the document prepared to assign La Mode’s leasehold interest to  
3 MIPI contained an error which nullified the transfer (RFA No. 10.); (2) “MIPI never executed a  
4 Security Agreement in favor of La Mode granting a security interest in the assets transferred to MIPI”  
5 (RFA No. 12.) and; (3) La Mode failed to transfer the lease agreement to MIPI because Defendants  
6 failed to provide the assignment of the lease (RFA No. 48.).

7 The subject matter of these admissions reach the merits of the Defendants’ defense as these  
8 admissions would effectively preclude the Defendants’ defense from going forward. Throughout this  
9 proceeding Defendants have maintained that they had prepared all of the required documents to transfer  
10 the La Mode leasehold interest to MIPI. Therefore, the Court finds that the merits of this case will be  
11 promoted by allowing Defendants to withdraw their admissions.

12 2. Prejudice

13 The second prong under Rule 36(b) also favors the Defendants. Prejudice “relates to the  
14 difficulty a party may face in proving its case, e.g., caused by the unavailability of witnesses, because  
15 of the sudden need to obtain evidence with respect to the questions previously answered by the  
16 admissions.” *Conlon v. United States*, 474 F.3d 616, 622 (9th Cir. 2007) (citations omitted). The  
17 nonmoving party bears the burden of proving prejudice. *Id.*

18 While the Plaintiffs recognize that they bear the burden of proving prejudice, they have failed  
19 to establish the requisite prejudice to bar Defendants from withdrawing their admissions. For example,  
20 Plaintiffs’ Opposition to Defendants’ Motion to Withdraw and Amend Admissions focuses on  
21 Defendants’ arguments to justify withdrawal while their argument pertaining to prejudice encompasses  
22 one line which states “MIPI has moved for summary judgment in part based on the defendants’  
23 admission . . . .”

24 The Court agrees with Defendants’ suggestion to follow the rationale in *Manglona v. Tenorio*,  
25 4 NMI 322, 323 (1996). In *Manglona*, our Supreme Court upheld the trial court’s decision to grant  
26 plaintiff’s motion to withdraw admissions. The trial court, pursuant to NMI R. Civ. P. 37(a)(4),  
27 alleviated the nonmoving party’s prejudice, associated with filing a motion for summary judgment, by  
28 awarding reasonable expenses and costs of filing the motion for summary judgment. *Id.*

1 Here, Defendants have not adequately justified their failure to respond to Plaintiffs' RFA.  
2 Moreover, aside from the costs associated with filing the motion for summary judgment, the Plaintiffs  
3 have failed in their burden of proving prejudice should the Court grant Defendants' motion.  
4 Accordingly, the Court hereby GRANTS Defendants' motion to submit belated answers to Plaintiffs'  
5 Request For Admissions and pursuant to *Manglona*, 4 NMI 322 and NMI R. Civ. P. 37(a)(4) sanctions  
6 Defendants' counsel to pay for MIPI's reasonable attorney's fees and costs incurred in filing their  
7 motion for summary judgment.

8  
9 **IV. CONCLUSION**

10 For the aforementioned reasons, the Court rules as follows:

- 11 1. Defendants' motion for summary judgment as to Plaintiffs' claims for punitive damages is  
12 GRANTED.
- 13 2. Defendants' motion for summary judgment as to GABI's claimed damages is GRANTED. As  
14 a result of this ruling, GABI's claims against Defendants are DISMISSED without prejudice.  
15 Therefore, the only matters remaining for adjudication are those of MIPI against Defendants.
- 16 3. Defendants' motion for summary judgment as to causation of GABI's claims is rendered  
17 MOOT.
- 18 4. Plaintiffs' motion for summary judgment as to MIPI's claims against Defendants is DENIED  
19 and as to GABI's claims against Defendants is rendered MOOT.
- 20 5. Defendants' motion to withdraw and amend admissions is GRANTED. It is further ORDERED  
21 that Defendants' counsel reimburse MIPI for the reasonable attorney's fees and costs associated  
22 with brining their motion for summary judgment.

23 **SO ORDERED** this 6<sup>th</sup> day of January, 2011.

24  
25  
26 \_\_\_\_\_/s/\_\_\_\_\_  
27 **KENNETH L. GOVENDO, Associate Judge**  
28