Anthony J. Ellrod (State Bar No. 136574)
tony.ellrod@manningkass.com
Kristina Ross (State Bar No. 325440)
kristina.ross@manningkass.com
MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP
801 S. Figueroa St, 15th Floor
Los Angeles, California 90017-3012
Telephone: (213) 624-6900
Facsimile: (213) 624-6999

Attorneys for Plaintiff, WILLIAM JAMES MITCHELL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

WILLIAM JAMES MITCHELL,

Plaintiff,

v.

TWIN GALAXIES, LLC,

Defendants.

Case No. 19STCV12592
[Hon. Hon. Wendy Chang, Department 36]

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL FURTHER RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS, SET III AND REQUEST FOR TERMINATING SANCTIONS AND MONETARY SANCTIONS; REQUEST FOR MONETARY SANCTIONS IN THE AMOUNT OF $7,312.50

[Filed concurrently with Declaration of Kristina Ross and Declaration of David Bishop]

Hearing Date: **September 28, 2023**
Time: **8:30 a.m.**
Dept: **36**

Reservation ID: **Reserved by the Court**

Trial Date: *11/17/2023*

Plaintiff WILLIAM JAMES MITCHELL hereby submits this Opposition to Defendant TWIN GALAXIES, LLC's Motion to Compel Further Responses to Requests for Production of Documents, Set III, Request for Terminating Sanctions and Monetary Sanctions against Plaintiff and his counsel Anthony J. Ellrod and Manning & Kass in the Amount of $81,875.00. Plaintiff requests that the Court deny Defendant's motion and award Plaintiff monetary sanctions in the amount of $7,312.50 in fees and costs for having to oppose Defendant's motion.

I. STATEMENT OF FACTS

Plaintiff does not intend to address the conspiracy theory allegations in the Motion. Nor does Plaintiff intend to argue the weight of the evidence as does Defendant in the Motion. This material is inappropriate at this time, and irrelevant to this Motion. If the court would like Plaintiff to address these issues Plaintiff is happy to do so.

Defendant's motion mainly centers around a "Video Game Player of the Century" plaque produced by Namco. Plaintiff donated this and other awards to the International Video Game Hall of Fame in 2010. On June 26, 2023, at the deposition of Walter Day, a photograph of Plaintiff's awards, including Namco plaques, was discussed. At that time, Plaintiff's counsel Kristina Ross was forwarded an email in which John Grunwald sent Plaintiff a picture of the awards previously donated to the International Video Game Hall of Fame, and in which Mr. Grunwald stated, "It appears the lost has been found." See Defendant's Ex. 18; Ross Decl. ¶ 7.

That same day, defense counsel requested that he be provided with the photograph prior to the deposition of Jerry Byrum, the current principal of the International Video Game Hall of Fame, which was occurring after Mr. Day's deposition. In order to send it to him quickly, Plaintiff's counsel saved the image with the name "IVGHOF". During Mr. Byrum's deposition, defense counsel asked Plaintiff's counsel about the naming of the image and from where she received it. Working off what little information she had at the time, and in an effort to cooperate with defense counsel, Plaintiff's counsel advised that she received it that same day from Plaintiff with an email from John Grunwald. See Defendant's Ex. 11 and 18; Ross Decl. ¶ 8.

On June 26, 2023, Mr. Byrum testified that he did not look for the awards as requested in Defendant's subpoena and that he did not recall Plaintiff asking him to find the awards or send them to him. Mr. Byrum also testified that he did not personally receive any awards from Plaintiff; however, he further stated that he was not a part of the International Video Game Hall of Fame in 2010 when Plaintiff contends he donated the awards, and that sometime after 2019 he personally gained control over all the items that belonged to the International Video Game Hall of Fame, but the items were scattered among multiple storage areas along with his personal and business items. See Defendant's Ex 3 at 11:23-12:19; Plaintiff's Ex. A at 35:17-38:3; Ross Decl. ¶ 9.

On July 5, 2023, Defendant's counsel requested to meet and confer. Plaintiff's counsel, Ms. Ross, had a telephonic meet and confer with defense counsel and again repeated the information available to her and her understanding regarding the plaques, which was that they were found by Mr. Grunwald on the weekend of June 23, 2023 while at an event at the Bridgeview Center. The next day, Ms. Ross reiterated that the circumstances surrounding discovery of the plaques were based on the understanding she had at that time. See Defendant's Ex. 14; Ross Decl. ¶ 10. Obviously neither she nor the Plaintiff had personal knowledge of when, how and by whom the plaques were located.

On or about July 20, 2023, Plaintiff's counsel was advised that Plaintiff's plaques were found by Isiah Triforce Johnson on June 23, 2023 in the storage room at Mr. Byrum's arcade while looking for his own memorabilia that he donated to the International Video Game Hall of Fame. Mr. Johnson then brought the awards to the Bridgeview Center, where he and Mr. Grunwald looked at the awards and Mr. Johnson took photographs of them. Mr. Johnson then took the awards, intending to return them to Plaintiff while in Florida; however, his flight was delayed and he did not land in Fort Lauderdale until 2:00 a.m. on June 26, 2023, too late to contact Plaintiff. Per Mr. Johnson, he then shipped the awards back to Mr. Byrum before his flight back to Jamaica at 10:00 a.m. on June 26, 2023. Ross Decl. ¶ 11. Again, all of this information was obviously based upon what Plaintiff and counsel were told by others.

On July 20, 2023, Mr. Grunwald testified that Plaintiff was not present for the event in Iowa that weekend, but he called Plaintiff and that Plaintiff seemed surprised and excited that the plaques were found. Further, Plaintiff did not ask where or how the plaques were found. Mr. Grunwald also testified that he did not ask Mr. Johnson where he found the awards, but he knew Mr. Johnson was going to the arcade, and upon his return, he had the awards. Further, Mr. Grunwald testified that the original plan was for Mr. Johnson to travel to and from Iowa with Plaintiff, as his layover from Jamaica was in Fort Lauderdale; however, Plaintiff was unable to attend the event and Mr. Grunwald simply assumed that Plaintiff got Mr. Johnson from the airport after the event, despite the multiple delays, as that was the original plan. See Defendant's Ex. 4, 18:13-19:19, 21:20-22:18, 28:5-29:15; 43:2-19; Ross Decl. ¶ 12.

Plaintiff and Plaintiff's counsel have diligently attempted to retrieve the plaques from Mr. Byrum. However, Mr. Byrum is not cooperating at this time and noted that he has been harassed via text message by Defendant's counsel over multiple days, starting on or about July 20, 2023, regarding the plaques. According to Mr. Byrum, this harassment continued despite Mr. Byrum's demands that Defendant's counsel stop harassing him. After Mr. Byrum asked Defendant's counsel to stop, Defendant's counsel continued to text him and even went so far as to send Mr. Byrum a text stating that concealing evidence is a crime in California, and send him screenshots of the California Penal Code. Plaintiff's Ex. C; Ross Decl. ¶ 13; see Rules Prof. Conduct, rule 3.10(a) ("A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute").

Based upon the foregoing, Defendant is seeking to compel Plaintiff to do something he simply cannot do – produce items that are not in his possession.

As to the communications between Plaintiff and his son, Plaintiff's son is an independent contractor law clerk for Manning & Kass on this matter and as such communications related to this case are privileged under attorney-client privilege. Defendant attempts to invade the attorney-client privilege that is asserted by claiming that Plaintiff's son suborned perjury due to Cross-Defendant Walter Day's deposition testimony and declaration differing. Ross Decl. ¶¶ 18, 19. This does not amount to perjury and Defendant has failed to meet it's burden of demonstrating that attorney-client privilege does not apply.

As to the settlement agreement between Plaintiff and Benjamin Smith, Defendant's Motion fails to provide a single shred of legal authority to compel Plaintiff to produce the settlement agreement despite the confidentiality clause, and instead only attacks the relevancy objection. Additionally, Defendant's Motion misrepresents Plaintiff's deposition testimony regarding the videos made by Benjamin Smith by claiming that Plaintiff testified that the videos made by Mr. Smith are in his possession. Plaintiff testified that he owned rights to the videos, not that he actually received copies of the videos. Ross Decl. ¶¶ 16, 17.

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II. ARGUMENT

A. Defendant's Motion is Procedurally Defective

As an initial matter, Defendant's Motion is procedurally deficient, as it fails to comply with California Rules of Court, rule 3.1345(a)(3), which requires a separate statement for any motion to compel further responses to requests for production of documents, and does not fall under any of the exceptions listed in California Rule of Court, rule 3.1345(b). This Court has the discretion to deny Defendant's motion on that basis alone, and should exercise that discretion. See *Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 893 (a trial court has the discretion to deny a motion to compel further discovery for failure to comply with the separate statement requirement).

Moreover, in addition to being devoid of a separate statement, Defendant's motion lacks any clear and concise statement of the Requests for Production of Documents at issue or Plaintiff's responses to such requests. Defendant neither attaches the requests nor Plaintiff's responses as an exhibit, despite attaching over 200 pages of exhibits, including documents from *other* discovery in this matter. Whatever Defendant may argue in his motion, the Court has no actual evidence of what the document requests were, what Plaintiff's responses were, and why they were or were not deficient. Unsworn statements made by counsel in motion papers are not evidence. *Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1173; *Davenport v. Blue Cross of Cal.* (1997) 52 Cal.App.4th 435, 454; *Estate of Nicholas* (1986) 177 Cal.App.3d 1071, 1090. As such, the Court cannot determine whether there are any alleged deficiencies in Plaintiff's responses because neither the requests themselves, nor the responses, are properly before the Court.

Moreover, given the lack of a separate statement, document requests, or responses, it is unclear *what* requests Defendant is moving to compel and *why* it is moving to compel them. Much of Defendant's motion consists of a litany of unfounded accusations that are unrelated to the purported discovery motion at hand.

Defendant's motion is clearly procedurally deficient. Based on the foregoing, the Court has the power to deny Defendant's motion for failure to comply with the California Rules of Court, and should exercise that discretion in this instance.

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B. Neither Plaintiff, Nor His Counsel, Has Engaged in Discovery Abuse

Defendant's motion is replete with wholly unfounded accusations that Plaintiff and his counsel have engaged in perjury, forgery, and spoliation of evidence. Defense counsel, as an officer of this Court, should be above making such egregious and unsupported claims.

As noted throughout this Opposition and attested to in the Declaration of Kristina Ross, Plaintiff and his counsel have attempted to cooperate with Defendant and Defendant's counsel, going so far as to produce the photograph of the plaques informally the same day it was received by counsel and when Defendant's counsel requested.

C. Plaintiff Cannot be Compelled to Produce the Namco Plaques, as Plaintiff Does Not Have Possession, Custody, or Control of the Plaques

Defendant contends that Plaintiff's response to request for production 231 (and, again, neither the request nor the response is properly before the Court) is evasive because Plaintiff stated that the item no longer exists in his possession, custody, or control. As attested to in the Declaration of Kristina Ross, Plaintiff stated under oath that he donated the plaques, with other awards, to the International Video Game Hall of Fame in 2010 after he was inducted. The International Video Game Hall of Fame is located in Iowa. Plaintiff resides in Florida. Plaintiff has asked multiple people that reside in Iowa and are related to the International Video Game Hall of Fame and Bridgeview Center to attempt to locate his plaques.

Upon information and belief, during the weekend of June 23, 2023, the plaques, along with other awards, were located in Iowa in a storage room at Jerry Byrum's arcade by Isiah Triforce Johnson. Plaintiff was not in Iowa when the plaques and awards were located. Mr. Johnson then took the awards, intending to return them to Plaintiff while in Florida; however, his flight was delayed and he did not land in Fort Lauderdale until 2:00 a.m. on June 26, 2023, too late to contact Plaintiff. Per Mr. Johnson, he then shipped the awards back to Mr. Byrum before his flight back to Jamaica at 10:00 am on June 26, 2023. Ross Decl. ¶ 11. John Grunwald's deposition testimony confirms that Plaintiff was not in Iowa and instead Mr. Grunwald and Mr. Johnson called Plaintiff to advise him the awards and plaques were located. Ross Decl. ¶ 12, See Defendant's Ex. 4, 18:13-19:19, 21:20-22:18, 28:5-29:15; 43:2-19.

Plaintiff's counsel is currently attempting to obtain the plaques; however, has been unable to. This attempt has only been made more difficult due to Defendant's counsel's harassment of the third party witness that has possession of the plaques, Jerry Byrum. Ross Decl. ¶ 13, see Plaintiff's Ex. B. As a result, Plaintiff does not have the ability to produce the plaques; however, if Plaintiff can obtain possession, Defendant will be afforded the opportunity to inspect them at Plaintiff's counsel's office.

D. Plaintiff Should Not be Compelled to Produce Communications Between Himself, His Son, and Plaintiff's Counsel

Another of Defendant's document requests, which are not attached to its motion or repeated verbatim in a separate statement, concerns communications between Plaintiff, Plaintiff's attorneys, and Plaintiff's son who is a law clerk for Plaintiff's attorneys. Defendant contends that these communications are discoverable because Plaintiff's son, an independent contractor working for Manning & Kass as a law clerk, "suborned perjury by Walter Day." Mot. at 13. This unsupported claim is completely false and based on a grossly misleading interpretation of the evidence presented. That Plaintiff and Mr. Day provided some differing accounts of events does not, as Defendant seems to contend, lead to the inescapable conclusion that perjury occurred, or that perjury was "suborned" in this matter. Defendant similarly goes over the top when concluding that, because the language Mr. Day used in a declaration differed slightly from his deposition testimony, the inescapable conclusion is that perjury occurred. Ross Decl. ¶¶ 18-19.

The discrepancies between Mr. Day's declaration and deposition testimony are relatively minor. However, the vast majority of jury trials include witnesses being impeached with prior testimony. A motion to compel is not the time or the place to determine which version of a witnesses story is accurate. Indeed, Plaintiff may end up impeaching Mr. Day with his sworn declaration. In any event, none of this rises to the level of perjury, much less suborning perjury.

The attorney-client privilege applies to communications between Plaintiff and his attorneys. Evid. Code § 954; *DP Pham LLC v. Cheadle* (2016) 246 Cal.App.4th 653, 663-664. Plaintiff's son is an independent contractor working for Manning & Kass as a law clerk. Ross Decl. ¶ 6. Defendant bears the burden of demonstrating that attorney-client privilege does not apply. His completely

speculative accusations fail to meet that burden. See *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 ("Once [the party claiming attorney-client privilege] establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply").

E. Plaintiff Should Not Be Compelled to Produce the Settlement Agreement Between Himself and Benjamin Smith

Plaintiff's responses to Requests Nos. 251 and 293 included objections on the ground that production of the settlement agreement would violate the confidentiality of the settlement agreement. The settlement agreement between Plaintiff and Benjamin Smith has a confidentiality clause, which Defendant has been advised of multiple times. Defendant provides no legal authority allowing for the settlement agreement to be produced despite this confidentiality clause. Plaintiff's Ex. D at 98:1-16.

Additionally, Defendant's counsel misrepresents Plaintiff's deposition testimony regarding the videos made by Mr. Smith, claiming Plaintiff testified that the videos made by Mr. Smith are in Plaintiff's possession. To the contrary, Plaintiff testified that he owned the rights to the videos, not that he actually had copies of the videos. Plaintiff's Ex. D at 98:18-99:4, 100:19-101:16.

Defendant's Motion fails to provide a single shred of legal authority to compel Plaintiff to produce the settlement agreement, despite the confidentiality clause. Instead, Defendant's Motion on this issue addresses only the relevance objection and ignores all other objections asserted. It again bears repeating that Defendant failed to comply with the critical requirement of providing a separate statement or the responses themselves, which would allow the Court to see *all* objections asserted by Plaintiff, and not simply the objections Defendant finds most convenient to attack. As noted at the Informal Settlement Conference Plaintiff is willing to produce the agreement for in camera review.

As such, Defendant's Motion should be denied as to Requests Nos. 251 and 293. Defendant cites no authority for the proposition that Plaintiff can unilaterally violate the settlement agreement's confidentiality clause. "Contentions are waived when a party fails to support them with reasoned

argument and citations to authority." *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1215.

F. Plaintiff Should Not Be Compelled to Sit for a Second Session of Deposition

On January 9, 2023, Plaintiff's deposition was conducted in person for approximately seven hours, excluding breaks. During this time, Plaintiff testified as to the Namco plaques extensively and the Benjamin Smith videos to the extent he was able, considering the confidentiality clause of the settlement agreement.

Defendant's Motion argues that a second session is necessary, especially to determine facts regarding the discovery and location of the Namco plaques, despite Defendant's full knowledge that Plaintiff was not in Iowa when and where the plaques were found. Mr. Grunwald's testimony confirms Plaintiff was not there and did not ask for any details regarding the discovery. Ross Decl. ¶ 12.

Again, Defendant's Motion provides no legal authority to support a second session of deposition, let alone for the cost to be shifted to Plaintiff. Plaintiff should not be compelled to sit for a second session of deposition. Furthermore, if the Court is inclined to order Plaintiff to sit for a second session of deposition, it should not be at Plaintiff's expense.

G. Terminating Sanctions Are Wholly Unjustified

Terminating sanctions are rarely, if ever, justified as an initial response to alleged discovery abuse: "The sanction of dismissal or the rendition of a default judgment against the disobedient party is ordinarily a drastic measure which should be employed with caution." *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793 (citations omitted). Here, there has been no disobedience of a prior order that would remotely justify imposing terminating sanctions in the first instance.

Defendant contends that terminating sanctions are warranted in the first instance due to allegedly "egregious" conduct. Although Defendant alleges a variety of fraudulent conduct, including destruction of evidence, Defendant's characterization of the events is wildly exaggerated and misleading, as discussed above. The request for terminating sanctions should be denied.

H. Defendant's Request for Monetary Sanctions Should Be Denied

Defendant requests an outrageous and completely unjustified award of $81,875.00 in

monetary sanctions for bringing the instant motion. As demonstrated above, Plaintiff has not engaged in any abuse of the discovery process. Plaintiff acted with "substantial justification," and thus, an award of sanctions to Defendant would be unjust. Code Civ. Proc. § 2031.310(h).

Moreover, simply making such an outrageous request would justify a denial of any fees even if they were justified. Defendant's counsel avers that he has spent 131 hours "seeking the discovery" requested. Tashroudian Decl. ¶ 70. The Civil Discovery Act makes *abundantly clear* that a party making a motion to compel discovery is entitled *only to the reasonable expenses incurred for the motion itself*. See *Lund v. Superior Court* (1964) 61 Cal.2d 698, 715; *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262. Anything in excess of that amount constitutes an impermissible penalty, and the monetary sanctions contemplated by the Civil Discovery Act are *compensatory*, not punitive. *Id.*

Of the 131 hours defense counsels avers he spent "seeking the discovery" (which already constitutes an admission that this time is not related to the instant motion), 32 hours constitute time already spent on depositions, 12 hours constitute time spent meeting and conferring, 28 hours constitute time "investigating" Plaintiff's claims (including a staggering 22 hours reviewing closed-circuit television clips), and a whopping 59 hours spent drafting the instant motion.

Of the 59 hours spent drafting the instant motion (which is the only time that is conceivably compensable), defense counsel states under penalty of perjury that he spent *14 hours* researching and drafting the motion. Much of the motion is fact-based and simply incorporates elements of the declarations filed concurrently with the motion. The remainder consists of well-trod legal propositions such as the Court's authority to impose terminating sanctions (Mot. at 6-7), the crime-fraud exception (*id*. at 14), and the Court's authority to impose monetary sanctions (*id*. at 16-17). Defense counsel also states that he spent *17 hours* drafting his own declaration and *16 hours* reviewing six deposition transcripts. The complexity of the issues presented and the length of the documents filed do not warrant such an award. Defendant's claimed expenses are, in short, outrageous and offensive. Making such an outrageous demand in and of itself justifies denying the request in its entirety. As our Supreme Court noted:

"A fee request that appears unreasonably inflated is a special circumstance permitting the

trial court to reduce the award or deny one altogether. [Citations] Here, the trial court reasonably could and presumably did conclude that plaintiff's attorney fee request in the amount of $ 870,935.50 for 1,851.43 attorney hours was grossly inflated when considered in light of the single claim on which plaintiff succeeded, the amount of damages awarded on that claim, and the amount of time an attorney might reasonably expect to spend in litigating such a claim. This fact alone was sufficient, in the trial court's discretion, to justify denying attorney fees altogether." (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 990-991.)

I. Plaintiff Should Be Awarded Monetary Sanctions for the Costs Incurred in Opposing Defendant's Motion

Code of Civil Procedure section 2031.310(h) provides that the Court "shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to a demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

Plaintiff has been forced to oppose a motion that is procedurally defective and substantively meritless. Plaintiff has expended $7,312.50 in fees and costs doing so, and consequently requests an award of monetary sanctions in that amount. Ross Decl. ¶ 20.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's motion, deny Defendant's request for terminating and monetary sanctions, and award Plaintiff monetary sanctions in the amount of $7,312.50 for the expenses incurred opposing Plaintiff's motion.

DATED: September 14, 2023

MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP

By: _____
Kristina Ross
Attorneys for Plaintiff, WILLIAM JAMES MITCHELL

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 S. Figueroa St, 15th Floor, Los Angeles, CA 90017-3012.

On September 14, 2023, I served true copies of the following document(s) described as **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL FURTHER RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS, SET III AND REQUEST FOR TERMINATING SANCTIONS AND MONETARY SANCTIONS; REQUEST FOR MONETARY SANCTIONS IN THE AMOUNT OF $7,312.50** on the interested parties in this action as follows:

David Tashroudian, Esq. Mona Tashroudian, Esq. TASHROUDIAN LAW GROUP, APC 12400 Ventura Blvd. Suite 300 Studio City, CA 91604 Telephone: (818) 561-7381 Facsimile: (818) 561-7381 Email: david@tashlawgroup.com Email: mona@tashlawgroup.com *Attorney for Defendants, TWIN GALAXIES*	Robert W. Cohen, Esq. Law Offices of Robert W. Cohen 1901 Avenue of The Stars, Suite 1910 Los Angeles, CA 90067 Telephone: (310) 282-7586 Email: rwc@robertwcohenlaw.com *Attorneys for Cross-Defendant, WALTER DAY*

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address rhea.mercado@manningkass.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 14, 2023, at Los Angeles, California.

Rhea Mercado