David A. Tashroudian [SBN 266718]
Mona Tashroudian [SBN 272387]
TASHROUDIAN LAW GROUP, APC
12400 Ventura Blvd., Suite 300
Studio City, California 91604
Telephone: (818) 561-7381
Facsimile: (818) 561-7381
Email: david@tashlawgroup.com
mona@tashlawgroup.com

Attorneys for Twin Galaxies, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

WILLIAM JAMES MITCHELL, Plaintiff, v. TWIN GALAXIES, LLC; and Does 1-10, Defendants. AND RELATED CROSS-ACTION	Case No. 19STCV12592 Assigned to: Hon. Wendy Chang [Dept. 36] **REPLY OF TWIN GALAXIES, LLC IN SUPPORT OF MOTION TO COMPEL** [*Filed concurrently with Reply Declaration of David A. Tashroudian; and, Objections to Evidence*] **Hearing** Date: September 28, 2023 Time: 8:30 a.m. Place: Department 36 Reservation ID: 538297587672 Action Filed: 4/11/2019 Trial Date: 11/17/2023

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff inexplicably refuses to respond to Defendant's terminating sanctions motion regarding his spoliation of evidence and manipulation of witnesses to establish the false narrative that his Namco plaques – now two of them – were discovered by John Grunwald at the Bridge View Center in Ottumwa, Iowa on June 23, 2023. Instead he dismisses Defendant's argument as a conspiracy theory. But the facts – documents, pictures, expert analysis, video surveillance footage, and deposition testimony – support Defendant's version of events which is that Plaintiff arranged for his associate Isaiah TriForce Johnson to plant fabricated evidence at the Bridge View Center; then Plaintiff used his lawyers and other witnesses to create a false narrative about who found the plaques and where they were found. There is no evidence to the contrary from Plaintiff. There is similarly no evidence from the Plaintiff that the plaques are anywhere other than in his possession.

Aside from abusing the discovery process by spoliating evidence, Plaintiff does not deny other instances where he has abused the discovery process by giving false testimony under oath. Defendant has identified in its motion four times where Plaintiff has blatantly lied under oath. Plaintiff gives no testimony to the contrary, thereby implicitly admitting to the charges.

With respect to the issue of Plaintiff's son suborning perjury by Walter Day, it is clear from the record he has done so. Plaintiff admits in his papers that the deposition testimony and the declaration testimony differ but he downplays the difference. The difference, however, is monumental. The false statement attributed to Mr. Hall, as written by Plaintiff's son and as sworn to by Walter Day supports Plaintiff's allegations of constitutional malice, whereas the actual words spoken by Hall do not. This is the difference that is lost on Plaintiff.

The settlement agreement and the videos which Plaintiff's son has possession of should also be produced because the videos are direct evidence and the settlement agreement is germane to Defendant's affirmative defenses of mitigation and offset. No confidentiality provision can deny disclosure to Defendant.

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Lastly, this Court is vested with great discretion and deference to determine the value of the professional services performed before it. Defendant respectfully submits that the services performed before this Court on the motion are valued at $81,875.00 plus an additional $6,250.00 for services on this reply.

II. ARGUMENT

A. Plaintiff's failure to oppose the sanctions motion is a concession that Defendant's motion for terminating sanctions is meritorious.

Plaintiff cannot be bothered to submit a declaration attesting to facts that would show Defendant's version of the events is wrong and nothing more than a conspiracy theory. His prior declarations in this case were prolific, containing scores of paragraphs of testimony and hundreds of pages of "evidence" – including a declaration from Isaiah TriForce Johnson executed August 25, 2020. However, he does not submit a single shred of admissible evidence supporting his version of events now in the face of what is a essentially a dispositive motion. He does not declare that the plaques in the June 2023 Picture are original. Most notably though, he fails to testify that he is not in possession of the plaques. Indeed, none of the motley crew of Mr. Johnson, Plaintiff or Jerry Byrum provide declarations regarding the discovery of the plaques or about the current location of the plaques. The only admissible evidence regarding location of the plaques was provided by Defendant through John Grunwald's sworn deposition testimony. As such, the state of the evidence is that the awards were flown back to Plaintiff in Fort Lauderdale by Mr. Johnson on June 25, 2023. Billy Mitchell has the fake plaques now. There is nothing in the record – except for Ms. Ross' testimony which is hearsay and lacks foundation – to suggest otherwise. Not one iota. Plaintiff had the opportunity to submit opposing evidence but arrogantly refused to do so which exemplifies his absolute disdain for the orderly discovery of the truth.

Plaintiff's refusal to address Defendant's arguments about the June 2023 Picture and the "discovery" of the Namco plaques is not without consequence. The Court should construe Plaintiff's failure to oppose Defendant's terminating sanctions motion as an admission that the motion is meritorious. (*See* The Rutter Guide, Cal. Prac. Guide Civ. Pro. Before Trial, Ch. 9(I)-C, § 9:105.10 ("some courts treat a party's failure to file opposition papers as an admission that

the motion is meritorious, and therefore refuse to hear oral argument from such party"); *see also* Sexton v. Sup.Ct. (Mullikin Med. Ctr.) (1997) 58 Cal.App..4th 1403, 1410 (purpose of treating failure to oppose as an admission is to prevent introduction of legal theories without notice to opposing counsel and the court).)

There is a reason for the failure to oppose. The rules of professional conduct state that Plaintiff's attorney cannot proffer evidence it knows to be false. (*See* Cal. R. Prof. Conduct, Rule 3.3(a)(3).) Manning & Kass has not offered Plaintiff's testimony in opposition to the terminating sanctions motion because his testimony would necessarily be false. If Plaintiff declared truthfully that he falsified his testimony and spoliated evidence, the Court would grant this motion without further inquiry so he must lie. Any evidence claiming the plaques in the June 2023 Picture are original and not replicas (as shown by Defendant's expert) is false so there is none of that evidence before this Court for this reason. There is similarly no evidence from Plaintiff that the Namco plaques were found by John Grunwald like Ms. Ross had misrepresented to Mr. Tashroudian because that evidence is false. There is no admissible evidence that Mr. Byrum has the plaques because that evidence is likely also false. Thinking of it logically, if Mr. Byrum did have the plaques, and since they are so important to Plaintiff's case and would save his complaint from being summarily stricken, couldn't Plaintiff have at least obtained a high resolution picture of the plaques from Mr. Byrum to show this Court that they are the same plaques as those that are in the public domain? He certainly has access to Mr. Byrum as exemplified by the fact that his son has obtained text messages between Mr. Byrum and Mr. Tashroudian to oppose this motion. Again, using common sense as all fact-finders must, if Mr. Byrum really has the plaques and if they are not bad replicas, Plaintiff would have submitted some evidence from Mr. Byrum showing the plaques are original. His silence on the issue is deafening.

B. This Court must determine the merits of Defendant's terminating sanctions motion based on the weight of the evidence in supporting declarations but has the power to order an evidentiary hearing if it wishes.

Plaintiff asserts in the first three lines of his opposition to this motion that he does not intend to argue the weight of the evidence Defendant has adduced to support its motion because it

is "inappropriate at this time, and irrelevant to this motion." Case law proves Plaintiff incorrect.

In determining a motion for sanctions, "[i]t is up to the trial court to weigh the evidence, resolve conflicts in it, and assess the credibility of witnesses." (Cornerstone Realty Advisors, LLC v. Summit Healthcare Reit, Inc. (2020) 56 Cal.App.5th 771, 789 (noting that the trial court must determine credibility and weigh evidence when ruling on a sanctions motion); *see also* Department of Forestry & Fire Protection v. Howell (2017) 18 Cal.App.5th 154, 185, fn. 15 ("[…] the trial court is required to consider the evidence presented to determine whether a misuse of the discovery process has occurred…the trial court was obliged, upon receiving defendants' motions for sanctions, to consider and weigh the evidence presented to it to make a determination on the merits of the claims of discovery abuse"); *see also* Deck v. Developers Investment Co., Inc. (2023) 89 Cal.App.5th 808, 824 (same).)

Failure on Plaintiff's part to accurately research and cite the law is fatal. This Court must weigh the evidence on this motion. Plaintiff had one opportunity to provide facts for this Court to weigh his evidence and assess his credibility against that of Defendant yet he squandered it under the mistaken assumption that he could avoid giving perjurious testimony. His opposition should be disregarded and the sanctions request should be granted accordingly. If this Court has any doubt about the propriety of issuing a terminating sanctions on this record, it should first hold an evidentiary hearing.

Motions are typically determined based on affidavits alone. (*See* Beckett v. Kaynar Mfg. Co. (1958) 49 Cal.2d 695, 698, fn. 3 ("[m]otions are usually made and determined on affidavits alone"); *see also* Cal. R. Crt., Rule 3.1306(a).) This rule applies to motions for terminating sanctions as well. (*See* Los Defensores, Inc. v. Gomez (2014) 223 Cal.App.4th 377, 392 (court awarded terminating sanctions based on deposition testimony and other documentary evidence).) The Court, however, is empowered to hold an evidentiary hearing to determine a terminating sanctions motion if it so desires. (*See* Stephen Slesinger, Inc. v. Walt Disney Co. (2007) 155 Cal.App.4th 736, 755-756 (court held evidentiary hearing to determine sanctions motions and made detailed findings of fact).) Plaintiff says in his motion that "[i]f the court would like Plaintiff to address these issues Plaintiff is happy to do so." This Court should take Plaintiff up on his offer

if it is inclined to deny this motion so the truth can come out and the Court can assess Plaintiff's credibility for itself.

C. Defendant is not required to submit a separate statement in connection with its request for a terminating sanctions order.

Defendant's notice of motion states in the first paragraph and as the first enumerated request that it seeks an order of dismissal of Plaintiff's complaint pursuant to this Court's inherent authority to control the litigation before it based on Plaintiff's willful and egregious misuse of the discovery process. This is a motion for terminating sanctions as much as it is a motion to compel. (*See* Cal. Code Civ. Proc., § 1010.) Plaintiff cites no authority, nor is there any, that Defendant is required to submit a separate statement to obtain such an order. Defendant's request for a terminating sanctions order is procedurally proper and Plaintiff has not shown otherwise.

D. Defendant is not required to submit a separate statement in connection with its motion to compel production of documents.

A separate statement is not required with a motion to compel if the court allows the parties to submit a concise outline of the discovery requests and responses in dispute. (*See* Cal. Code Civ. Proc., § 2031.310(b)(3); *see also* Cal. R. Crt., Rule 3.1345(b)(2).) This Court's standing order permits the parties to submit a concise outline in lieu of a separate statement. Defendant has submitted a concise outline of the four document requests at issue with organized and reasoned argument in support of its position.

Defendant moves to compel production of further responses and documents pursuant to inspection demand numbers 231, 265, 251 & 293. A concise outline of inspection demand number 231 and Plaintiff's response is set forth in Defendant's motion. [*See* Motion to Compel § II(B), p. 12:20-22.] A concise outline of inspection demand number 265 and Plaintiff's response is set forth in the motion. [Id, at § II(C), 13:9-16.] A concise outline of inspection demand numbers 251 & 293 and Plaintiff's responses is set forth in the motion. [Id, at § II(D), 15:8-12.] These citations show that Defendant has complied with its obligation under the Civil Discovery Act, the California Rules of Court, and this Court's standing order such that its motion to compel should not be denied on procedural grounds.

E. Plaintiff has engaged in discovery abuse.

Plaintiff's argument in opposition to the motion that it is "replete with wholly unfounded accusations" of perjury, forgery and spoliation is not well-taken.

The accusation of perjury against Plaintiff is well-founded. One, Plaintiff does not rebut the fact that he perjured himself when he lied in deposition and in discovery about receiving $33,000.00 from Walter Day in connection with the sale of Twin Galaxies to Jace Hall. Two, he does not rebut the fact that he perjured himself in deposition and in declarations filed in this case when he swore that Josh Ryan installed a VCR to record Plaintiff's gameplay at the 2007 Mortgage Brokers Convention when Mr. Ryan testified he did not install a VCR and that there was no way for the gameplay to be recorded. Three, Plaintiff does not rebut the fact that he perjured himself when he swore in deposition and in his discovery responses that he never played *Donkey Kong* during Carlos Pineiro's testing when the video evidence at his deposition shows otherwise. And four, Plaintiff does not rebut the fact that he lied about being a director of the International Video Game Hall of Fame where his buddies' testimony is contradictory. These accusations of perjury are grounded in fact and remain unopposed.

The accusation of forgery is also well-founded. Defendant's expert Matthew Gabler performed a forensic morphological analysis of the standing Namco plaque in Plaintiff's June 2023 Picture against an image of Plaintiff's Namco plaque in the public domain and which was authenticated by Walter Day in discovery. The expert's analysis is that the two objects are not the same. The Pac-Man figure on the two plaques are completely different in size and so is the text pattern. The new plaque shows 17 lines of text whereas every example in the public domain, including those examples of Plaintiff holding his Namco plaque in movies, show only 15 lines of text. Plaintiff forged a plaque with 17 lines of text because he misrepresented in deposition that he received two plaques from Namco, with one saying "Video Game Player of the Century" and now he has to cover-up his lie. But his forgery was caught red-handed.

So too is the accusation of spoliation. Spoliation is the destruction or alteration of evidence. (R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal.App.4th 486, 497 (noting that terminating sanctions may be appropriate in the first instance without a violation of prior court

orders in egregious cases of intentional spoliation of evidence).) Plaintiff has engaged in spoliation by secreting away the true Namco plaque that was given to him in 1999. He instead produced an abnormally low resolution image of two altered plaques that do not match the ones in the public domain. Plaintiff has also engaged in spoliation by altering evidence and staging the discovery of the Namco plaques at the Bridge View Center on June 23, 2023 and using John Grunwald, Laura Carrell, and Isaiah Triforce Johnson to create a false narrative that was parroted by his attorney to misdirect Defendant's counsel and derail its investigation. Defendant's theory is not a conspiracy, it is supported by the facts.

F. Plaintiff has control of the Namco plaques and must be ordered to produce them.

The state of the evidence shows that Plaintiff has control over the plaques sufficient to require production pursuant to California Code of Civil Procedure section 2031.010(a). Plaintiff has had sufficient control since Mr. Johnson returned to Florida with the plaques to personally deliver them to Plaintiff. Both parties agree this is what happened. Plaintiff's unsupported fairytale that the plaque were sent back to Jerry Byrum is farcical and makes little sense all thing considered. Even then, if Mr. Byrum really has the plaques Plaintiff would be able to produce at least a picture of them considering that he has produced text messages with Twin Galaxies' counsel to Plaintiff's son.

To address Plaintiff's argument regarding donation of the awards, he has throughout this litigation asserted that he donated his Namco plaque to the International Video Game Hall of Fame in 2010 but has yet to produce any witness corroborating that assertion. Assuming the Hall of Fame has the plaques as Ms. Ross states, Plaintiff is a director of the organization and in that capacity would have control of the plaques to make the production. Either way he should be required to produce this key evidence.

G. Plaintiff's son has suborned perjury such that the attorney-client privilege does not apply.

Plaintiff's argument in opposition to Defendant's claim of suborning perjury is weak and sometimes incomprehensible. Plaintiff's admits that the deposition testimony of Walter Day differs from his declaration in this case but minimizes the difference. The difference is huge.

Plaintiff avers in his complaint that Defendant had a pre-ordained conclusion about the investigation into Plaintiff's *Donkey Kong* scores. He establishes this fact through Walter Day's declaration which has proven to falsely attribute a quote to Mr. Hall. The quote attributed to Mr. Hall – "How will you feel when I announce that [Billy] Mitchell cheated" – overtly shows that his mind was made up prior to the completion of the investigation. That evidence, if it was real helps Plaintiff prove actual malice. Plaintiff submitted that evidence to prove actual malice knowing the Court on a special motion to strike must accept the evidence as true – which it did and it cited the evidence in its order denying Defendant's anti-SLAPP motion. The evidence was not true. What Mr. Hall said to Mr. Day, as Mr. Day stated in deposition, is "How will it affect you if it is determined that Billy cheated." What Mr. Hall actually said does not support the pre-ordained conclusion and actual malice arguments so his words were altered and manipulated by Plaintiff's son to fit Plaintiff's false narrative that Defendant had a pre-ordained conclusion. Walter Day committed perjury when he executed the false declaration drafted by Plaintiff's son who has been exposed as an independent contractor law clerk for Manning & Kass. The attorney-client privilege has been blown up and Plaintiff must produce the requested documents.

H. Plaintiff should be compelled to produce the settlement agreement and videos he received from settlement with Benjamin Smith.

Plaintiff admits that he owns the rights to videos that show him with percipient witnesses Carlos Pineiro and Robert Childs during the time of the investigation into his *Donkey Kong* scores which he received in settlement of a defamation claim against Benjamin Smith in 2020. His reason for refusing to produce the videos is that he does not have the actual videos because his son – again a Manning & Kass law clerk – has them. Plaintiff has control over the videos because they are in the possession of his attorneys by virtue of his son and they must be produced.

Plaintiff refuses to produce the settlement agreement for a defamation claim on the additional basis that the agreement is confidential. Defendant has a right to review the confidential settlement agreement to support its failure to mitigate damages and its offset affirmative defenses. (*See* Mediplex of California, Inc. v. Superior Court (1995) 34 Cal.App.4th 748, 749; *see also* J. Allen Radford Co. v. Superior Court (1989) 216 Cal.App.3d 1418, 1423.)

In Mediplex, a non-settling defendant in a construction defect action opposed a good faith settlement motion on the ground that it never saw the confidential settlement agreement and questioned the valuation assignment. (Mediplex, *supra*, at p. 750.) After the trial court found the parties had divulged the necessary terms of the settlement and approved the settlement, the non-settling defendant sought a writ of mandate. The Court of Appeal held the non-settling defendant had the right to review the confidential settlement agreement to determine independently whether the undisclosed terms had any effect on reducing an offset. (Id. at p. 749.)

Similarly, in Radford, *supra*, 216 Cal.App.3d at page 1423, three of the parties agreed to a sliding scale settlement. The terms of the settlement were generally described in the good faith settlement motion papers. The settlement agreement itself, which the trial court reviewed in camera, was not produced to the non-settling party. The non-settling defendant filed a petition for a writ of mandate, which was denied by the Court of Appeal. The California Supreme Court granted its petition for review and directed the Court of Appeal to issue an alternative writ. (Id. at p. 1423.) On remand, the Court of Appeal concluded that the non-settling party should have been permitted to see the settlement agreement. (Id.)

Defendant, like the defendants in Mediplex and Radford, is entitled to review the settlement agreement between Plaintiff and Mr. Smith to see what offset it is entitled to and to determine if Plaintiff has reasonably mitigated his damages by compromising the Smith defamation claim. Moreover, the confidentiality provision is moot since Mr. Smith committed suicide shortly after the settlement agreement was negotiated by Isaiah TriForce Johnson.

I. This Court is the best arbiter of the value of the services performed before it.

"The value of legal services performed in a case is a matter in which the trial court has its own expertise….The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case." (PLCM Group v. Drexler (2000) 22 Cal.4th 1084, 1096 *quoting* Melnyk v. Robledo (1976) 64 Cal.App.3d 618, 623-624.)

Plaintiff complains about the expense Defendant incurred to uncover his fraud. When

considering the Melnyk factors above, Defendant is entitled to every penny of the $81,875.00 in attorney's fees requested. This is a First Amendment freedom of speech case brought by a public figure requiring special attention to robust and nuanced case law by Defendant's counsel. The case and the relief requested herein have been a made difficult by Plaintiff's refusal to play by the rules and tell the truth. The amount involved is millions of dollars and there have been millions of dollars in attorney's fees incurred by both sides after law and motion, appellate work, and extensive oral and written discovery. The skill required to defend against a defamation claim under these circumstances cannot be understated and has been exemplified by Defendant's counsel's zealous and quality advocacy throughout the course of this litigation. And the attention given to this matter should be clear from Defendant's counsel's work product. Defendant requests additional fees and costs of $6,250.00 to prepare this reply. [Tashroudian Decl., ¶ 3.]

III. CONCLUSION

Defendant respectfully requests that this Court grant the motion in full. The facts are clear that Plaintiff is not playing by the rules and Defendant will not have a fair trial because of his behavior. Plaintiff should not be allowed to maintain his action on this record.

Respectfully submitted,

Dated: September 20, 2023

TASHROUDIAN LAW GROUP, APC

By: /s/ David Tashroudian, Esq.
David Tashroudian, Esq.
Mona Tashroudian, Esq.
Attorneys for Twin Galaxies, LLC

PROOF OF SERVICE
Case No. 19STCV12592

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is **TASHROUDIAN LAW GROUP, APC**, located 12400 Ventura Blvd., Suite 300, Studio City, California 91604. On September 20, 2023, I served the herein described document(s):

REPLY OF TWIN GALAXIES, LLC IN SUPPORT OF MOTION TO COMPEL

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Woodland Hills, California addressed as set forth below.

X E-File - by electronically transmitting the document(s) listed above to tony.ellrod@mannigkass.com & rwc@robertwcohenlaw.com pursuant to an agreement of the parties.

Anthony J. Ellrod *tony.ellrod@mannigkass.com* MANNING & KASS ELLROD, RAMIREZ, TRESTER LLP 801 S. Figueroa St, 15th Floor Los Angeles, California 90017-3012	Attorneys for Plaintiff WILLIAM JAMES MITCHELL
Robert W. Cohen *rwc@robertwcohenlaw.com* Law Offices of Robert W. Cohen, APC 1901 Avenue of the Stars, Suite 1910 Los Angeles, CA 90067	Attorneys for Cross-Defendant WALTER DAY

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 20, 2023 at Woodland Hills, California.

Mona Tashroudian