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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 FOR
 SANCTIONS; REQUEST FOR
 MONETARY SANCTIONS IN THE
 AMOUNT OF \$7,125.00 AGAINST
 DEFENDANT AND/OR DEFENDANT'S
 COUNSEL**

[Filed concurrently with Declaration of
 Kristina Ross ISO Plaintiff's Opposition to
 Defendant's Motion for Sanctions and
 Plaintiff's Evidentiary Objections]

Date: January 11, 2024
 Time: 8:30 a.m.
 Dept.: 36

Reservation No.: 568771917469

Action Filed: 04/11/2019
 Trial Date: 04/26/2024

TWIN GALAXIES, LLC,
 Cross-Complainant,
 v.
 WILLIAM JAMES MITCHELL; WALTER
 DAY; Roes 1-25,
 Cross-Defendants.

1 **TO THE HONORABLE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 Plaintiff WILLIAM JAMES MITCHELL (“Plaintiff”) hereby submits this Opposition to
3 Defendant TWIN GALAXIES, LLC’s (“Defendant”) Motion for Sanctions. Plaintiff requests that
4 the Court deny Defendant’s motion and award Plaintiff monetary sanctions in the amount of
5 \$7,125.00 against Defendant and/or Defendant’s counsel in fees and costs for having to oppose
6 Defendant’s motion.

7 **I. STATEMENT OF FACTS**

8 As an initial matter, Defendant provided Plaintiff an extension for this instant opposition to
9 be filed on December 29, 2023.

10 Defendant previously brought a Motion to Compel Further Responses to Requests for
11 Production of Documents, Set III, Request for Terminating Sanctions and Monetary Sanctions
12 which was heard on September 28, 2023. The Court denied this motion “without prejudice to a
13 properly filed motion in limine, or to be addressed in another form, during the immediate pretrial
14 phase of this case.” (See Court’s Minute Order dated September 28, 2023).

15 The instant motion is essentially the exact same motion as that heard on September 28, 2023,
16 and requests the exact same relief plus further sanctions, without any considerable differences in the
17 motion itself. The motion relies on the same facts. Only three new paragraphs and a declaration
18 were added that do not amount to substantial changes in facts or law. As such, this motion is an
19 improper motion for reconsideration of the motion heard on September 28, 2023 long after the time
20 for the filing of a motion for reconsideration expired. On this basis alone the motion should be
21 summarily denied.

22 Defendant’s motion again is centered around a “Video Game Player of the Century” plaque
23 from Namco. Plaintiff donated this and other awards to the International Video Game Hall of Fame
24 in 2010. Plaintiff responded to multiple discovery requests regarding the Namco plaques that
25 Plaintiff cannot comply due to Plaintiff not having possession of the plaques as he donated them
26 over ten years ago. Plaintiff also responded to discovery requests for production of pictures of the
27 awards on June 9, 2023 that Plaintiff was unable to comply as Plaintiff did not have any photographs
28 at that time. Plaintiff believed Defendant was requesting photographs of the awards themselves, not

1 the same photograph of Plaintiff on stage with the awards in Tokyo, which Defendant had already
2 attached as evidence to support the Anti-Slapp and presented as an exhibit to Plaintiff in deposition.
3 Plaintiff then produced photographs obtained thereafter, informally and then as production
4 responses to further requests, including the photographs provided by David Bishop and the
5 photograph taken on or about the weekend of June 23, 2023. (Ross Decl. ¶ 2.)

6 On June 26, 2023, at the deposition of Walter Day, a photograph of Plaintiff's awards,
7 including Namco plaques, was discussed. At that time, Plaintiff's counsel Kristina Ross was
8 forwarded an email in which John Grunwald sent Plaintiff a picture of the awards previously donated
9 to the International Video Game Hall of Fame, and in which Mr. Grunwald stated, "It appears the
10 lost has been found." (See Defendant's Ex. 18; Ross Decl. ¶ 3.)

11 That same day, defense counsel requested that he be provided with the photograph prior to
12 the deposition of Jerry Byrum, the current principal of the International Video Game Hall of Fame,
13 which was occurring after Mr. Day's deposition. In order to send it to him quickly, Plaintiff's
14 counsel saved the image with the name "IVGHOF". During Mr. Byrum's deposition, defense
15 counsel asked Plaintiff's counsel about the naming of the image and from where she received it.
16 Working off what little information she had at the time, and in an effort to cooperate with defense
17 counsel, Plaintiff's counsel advised that she received it that same day from Plaintiff with an email
18 from John Grunwald. (See Defendant's Ex. 11 and 18; Ross Decl. ¶ 4.)

19 On June 26, 2023, Mr. Byrum testified that he did not look for the awards as requested in
20 Defendant's subpoena and that he did not recall Plaintiff asking him to find the awards or send them
21 to him. Mr. Byrum also testified that he did not personally receive any awards from Plaintiff;
22 however, he further stated that he was not a part of the International Video Game Hall of Fame in
23 2010 when Plaintiff contends he donated the awards, and that sometime after 2019 he personally
24 gained control over all the items that belonged to the International Video Game Hall of Fame, but
25 the items were scattered among multiple storage areas along with his personal and business items.
26 (See Defendant's Ex. 3 at 11:23-12:19; Ross Decl. ¶ 5.)

27 On July 5, 2023, Defendant's counsel requested to meet and confer. Plaintiff's counsel, Ms.
28 Ross, had a telephonic meet and confer with defense counsel and again repeated the information

1 available to her and her understanding regarding the plaques, which was that they were found by
2 Mr. Grunwald on the weekend of June 23, 2023 while at an event at the Bridgeview Center. The
3 next day, Ms. Ross reiterated that the circumstances surrounding discovery of the plaques were
4 based on the understanding she had at that time. (See Defendant's Ex. 14; Ross Decl. ¶ 6.) Obviously
5 she did not have personal knowledge of when, how or by whom the plaques were located, nor was
6 Plaintiff present in Iowa when they were located. (Ross Decl. ¶ 6.)

7 On or about July 20, 2023, Plaintiff's counsel was advised that Plaintiff's plaques were found
8 by Isiah Triforce Johnson on June 23, 2023 in the storage room at Mr. Byrum's arcade while looking
9 for his own memorabilia that he donated to the International Video Game Hall of Fame. Mr. Johnson
10 then brought the awards to the Bridgeview Center, where he and Mr. Grunwald looked at the awards
11 and Mr. Johnson took photographs of them. Mr. Johnson then took the awards, intending to return
12 them to Plaintiff while in Florida; however, his flight was delayed and he did not land in Fort
13 Lauderdale until 2:00 a.m. on June 26, 2023, too late to contact Plaintiff. Per Mr. Johnson, he then
14 shipped the awards back to Mr. Byrum before his flight back to Jamaica at 10:00 a.m. on June 26,
15 2023. (Ross Decl. ¶ 7.) Again, all of this information was obviously based upon what Plaintiff and
16 counsel were told by others.

17 On July 20, 2023, Mr. Grunwald testified that Plaintiff was not present for the event in Iowa
18 that weekend, but he called Plaintiff and that Plaintiff seemed surprised and excited that the plaques
19 were found. Further, Plaintiff did not ask where or how the plaques were found. Mr. Grunwald also
20 testified that he did not ask Mr. Johnson where he found the awards, but he knew Mr. Johnson was
21 going to the arcade, and upon his return, he had the awards. Further, Mr. Grunwald testified that the
22 original plan was for Mr. Johnson to travel to and from Iowa with Plaintiff, as his layover from
23 Jamaica was in Fort Lauderdale; however, Plaintiff was unable to attend the event and Mr. Grunwald
24 simply assumed that Plaintiff picked up Mr. Johnson from the airport after the event, despite the
25 multiple delays, as that was the original plan. (See Defendant's Ex. 4, 18:13-19:19, 21:20-22:18,
26 28:5-29:15; 43:2-19; Ross Decl. ¶ 8.)

27 Plaintiff and Plaintiff's counsel have diligently attempted to retrieve the plaques or even
28 photographs of the plaques from Mr. Byrum. However, Mr. Byrum is not cooperating due to the

1 harassment from Defendant's counsel. (Ross Decl. ¶ 9.)

2 As noted the Court has already ruled on this exact issue and stated that there is not sufficient
3 evidence to deduce fraud by Plaintiff and that it is a question of fact for a jury or should be subject
4 to preclusion by a motion in limine. Thus, this motion is wholly improper and should be denied
5 outright.

6 Finally, Defendant's motion was filed publicly with a Compendium of Evidence 166 pages
7 long. While the documents are the same as previously filed for Defendant prior motion heard on
8 September 28, 2023, the Court on December 1, 2023 ordered the protective order in this matter
9 would extend to all discovery to protect the integrity of this litigation regardless of whether it was
10 produced prior to the Order. As such, Defendant should have filed all depositions and discovery
11 related documents under seal pursuant to the protective order.

12 The refiling of this same motion is another example of Defendant's counsel's inability to
13 separate himself from this case; however, we will brief this issue more thoroughly in Plaintiff's
14 Order to Show Cause brief.

15 Plaintiff is once again forced to oppose an improper motion that is substantively meritless
16 and procedurally improper. As such, Plaintiff requests monetary sanctions in the amount of
17 \$7,125.00 for fees incurred to oppose this motion. (Ross Decl. ¶ 11).

18 **II. ARGUMENT**

19 **A. Defendant's Motion Should be Denied as an Improper Motion for**
20 **Reconsideration**

21 Defendant is essentially asking the Court to reconsider its September 28, 2023 ruling on a
22 previous, identical motion. To the extent the Court characterizes its motion as one for
23 reconsideration, the time has long since passed for such a motion, which must be filed within "10
24 days after service upon the party of written notice of the entry of the order." Code Civ. Proc. §
25 1008(a). The instant motion was filed on December 18, 2023, long after the time to file a motion for
26 reconsideration expired. Defendant's motion additionally fails to state what new or different facts,
27 circumstances, or law are claimed in support of its motion, as the facts and circumstances giving
28 rise to the instant motion are nearly identical to those in the previous motion. Code Civ. Proc. §

1 1008(a). In fact, Defendant’s counsel’s declaration concedes that his declaration and the alleged
2 facts for the motion are all the same aside from three paragraphs that do not substantially change
3 the issues presented and an additional declaration that the motion only mentions once.

4 Thus, Defendant’s motion should be denied outright as it is an improper motion for
5 reconsideration and goes directly against the Court’s September 28, 2023 Order.

6 **B. Legal Standard for Sanctions**

7 Defendant’s motion requests either an evidentiary sanction, an issue sanction, or a
8 terminating sanction.

9 While the Court has inherent power to issue sanctions due to misuse and abuse of the
10 discovery process, “[t]he statutes state that the court may impose an issue, evidence, or terminating
11 sanction, however, **only if a party fails to obey a court order compelling discovery.**” (*New*
12 *Albertsons, Inc. v. Superior Ct.*, (2008) 168 Cal. App. 4th 1403, 1423 (emphasis added).) “The
13 statutory requirement that there must be a failure to obey an order compelling discovery before the
14 court may impose a nonmonetary sanction for misuse of the discovery process provides some
15 assurance that such a potentially severe sanction will be reserved for those circumstances where the
16 party’s discovery obligation is clear and the failure to comply with that obligation is clearly
17 apparent.” (*Id.*) Further, the courts have held only in exceptional circumstances can this procedural
18 requirement be ignored. “[V]iolation of a discovery order is not a prerequisite to **issue and evidence**
19 **sanctions** when the offending party has **engaged in a pattern of willful discovery abuse that**
20 **causes the unavailability of evidence.**” (*Id.* at 1426 (emphasis added).)

21 Terminating sanctions are rarely, if ever, justified as an initial response to alleged discovery
22 abuse: “The sanction of dismissal or the rendition of a default judgment against the disobedient
23 party is ordinarily a drastic measure which should be employed with caution.” *Deyo v. Kilbourne*
24 (1978) 84 Cal.App.3d 771, 793 (citations omitted). Here, there has been no disobedience of a prior
25 order that would remotely justify imposing terminating sanctions in the first instance.
26 “[T]erminating sanctions are to be used sparingly because of the drastic effect of their application.”
27 (*Dep’t of Forestry & Fire Prot. v. Howell*, (2017) 18 Cal.App.5th 154, 191.) “[S]anctions are
28 generally imposed in an incremental approach, with terminating sanctions being the last resort”

1 except for in extreme cases. (*Id.* at 191-192.)

2 “The sanctions the court may impose are such as are suitable and necessary to enable the
3 party seeking discovery to obtain the objects of the discovery he seeks but the court may not impose
4 sanctions which are designed not to accomplish the objects of the discovery but to impose
5 punishment.” (*Caryl Richards, Inc. v. Superior Ct. In & For Los Angeles Cnty.*, (1961) 188 Cal.
6 App. 2d 300, 304.)

7 **C. Plaintiff Has Not Engaged in Discovery Abuse**

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

11 There is no evidence to support Defendant’s baseless claim that Plaintiff created fake Namco
12 plaques, nor that Plaintiff fabricated evidence, nor that Plaintiff or Plaintiff’s counsel gave false or
13 misleading information. At most there is a question of fact for a jury to consider.

14 As noted throughout this opposition and attested to in the Declaration of Kristina Ross,
15 Plaintiff and his counsel have attempted to cooperate with Defendant and Defendant’s counsel,
16 going so far as to produce the photograph of the plaques informally the same day it was received by
17 counsel and when Defendant’s counsel requested. This production was **after** Plaintiff’s responses
18 to the requests for production on June 9, 2023 as the plaques were not located until the weekend of
19 June 23, 2023. Moreover, Plaintiff believed Defendant was requesting photographs of the awards
20 themselves, not the same photograph of Plaintiff on stage with the awards in Toyko, which
21 Defendant had already attached as evidence to support the Anti-Slapp and presented as an exhibit
22 to Plaintiff in deposition. Further, the same photograph of Plaintiff on stage in Tokyo that Mr.
23 Bishop obtained from Namco for Plaintiff was not received by Plaintiff’s counsel until after June 9,
24 2023. Thus, Plaintiff’s discovery responses were not evasive and there is no evidence of discovery
25 abuse or misdirection. Moreover, as the Court is aware, the requested plaques are not in the
26 possession of Plaintiff and are in the possession of third party Jerry Byrum who refuses to provide
27 them, including even pictures of them, due to the harassment Mr. Byrum incurred from Defendant’s
28 counsel. Therefore, it is Defendant’s counsel’s own conduct that has led to the evidence not being

1 produced in this matter. If anyone is entitled to an evidentiary sanction on this issue it is Plaintiff.

2 Finally, the photograph provided from David Bishop in 2023 was produced to Defendant in
3 discovery. Defendant is still not appeased by this and brought this motion falsely claiming that
4 Plaintiff “refuses to produce any picture of his Namco award” despite the fact that Plaintiff has
5 produced the photographs in his possession, custody, and control in discovery. (Defendant’s Motion
6 17:17-18).

7 **D. The Requested Sanctions Against Plaintiff Are Not Warranted**

8 As noted above, allow Court have the inherent authority to issue sanctions, evidentiary, issue
9 and terminating sanctions are considered severe and only justified in extreme cases. Defendant has
10 failed to produce any evidence that this is an extreme case wherein Plaintiff is committing egregious
11 discovery abuse.

12 Firstly, Defendant has not obtained a Court order regarding the plaques, despite serving
13 multiple requests for production for the same exact discovery. Issue, evidence, or terminating
14 sanctions are secondary sanctions to occur after a party fails to obey a court order compelling
15 discovery. (*New Albertsons, Inc. v. Superior Ct.*, at 1423).

16 In order to bypass this procedural requirement, Defendant must show that Plaintiff has
17 “engaged in a pattern of willful discovery abuse that causes the unavailability of evidence.” (*Id.* at
18 1426.) As detailed herein, Defendant is the cause of the unavailability of the evidence in this matter
19 and Plaintiff has attempted to obtain possession of the requested evidence to no avail due to
20 Defendant’s counsel’s conduct. Defendant’s motion alleges a discovery order would be futile;
21 however, Defendant did attempt to obtain such a discovery order on September 28, 2023 and was
22 denied such so now Defendant has filed another essentially identical motion and is again
23 procedurally defective.

24 Therefore, the requested sanctions are not warranted as there is no violation of a Court order,
25 there is no evidence Plaintiff engaged in a pattern of discovery abuse, and Plaintiff is not the cause
26 of the unavailability of the evidence. Defendant’s motion should be denied.

27 Secondly, the requested sanctions are severe and not warranted.

28 ///

1 Defendant requests that only one photograph of one of the Namco plaques should be allowed
2 into evidence. Not only is this not the only photograph produced by Plaintiff in discovery of the
3 subject plaques, but as noted there is no basis for such an evidentiary sanction. Defendant requests
4 an issue sanction for an alleged fact.

5 Defendant's motion fails to state applicable law for the Court to make an order establishing
6 an alleged fact in this matter and requests the Court simply order an issue sanction for Defendant's
7 allegation that Plaintiff was not given an award by Namco stating Plaintiff was "Video Game Player
8 of the Century."

9 Defendant contends that terminating sanctions are warranted in the first instance due to
10 allegedly "egregious" conduct. Although Defendant alleges a variety of fraudulent conduct,
11 including destruction of evidence, Defendant's characterization of the events is wildly exaggerated
12 and misleading, as discussed above. The request for terminating sanctions should be denied. Again,
13 Defendant's counsel's conduct has caused the unavailability of the evidence in question as it has not
14 been in Plaintiff's custody, possession, or control and Defendant's counsel has harassed the third
15 party in possession.

16 Thus, Defendant's motion is procedurally defective as no Order was obtained to compel the
17 production of the evidence at issue and Defendant fails to prove that Plaintiff has engaged in such
18 egregious conduct as required for the Court to order an issue, evidence, or terminating sanction as
19 requested.

20 **E. Plaintiff Should be Awarded Monetary Sanctions for Costs Incurred in**
21 **Opposing Defendant's Motion**

22 "The court may impose a monetary sanction ordering that one engaging in the misuse of the
23 discovery process, or any attorney advising that conduct, or both pay the reasonable expenses,
24 including attorney's fees, incurred by anyone as a result of that conduct. **The court may also impose**
25 **this sanction on one unsuccessfully asserting that another has engaged in the misuse of the**
26 **discovery process**, or on any attorney who advised that assertion, or on both." (*Code of Civil*
27 *Procedure* 2023.030(a) (emphasis added).)

28 ///

Plaintiff has been forced for the second time to oppose a motion that is procedurally defective and substantively meritless. Plaintiff has expended \$7,125.00 in fees and costs doing so, and consequently requests an award of monetary sanctions in that amount. (Ross Decl. ¶ 11.)

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's motion in its entirety, and award Plaintiff monetary sanctions in the amount of \$7,125.00 against Defendant and/or Defendant's counsel for the expenses incurred opposing Defendant's motion.

DATED: December 29, 2023

**MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP**

By: 

Anthony J. Ellrod
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.

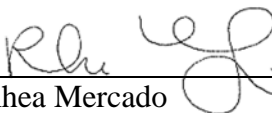
On December 29, 2023, I served true copies of the following document(s) described as **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SANCTIONS; REQUEST FOR MONETARY SANCTIONS IN THE AMOUNT OF \$7,125.00 AGAINST DEFENDANT AND/OR DEFENDANT'S COUNSEL** on the interested parties in this action as follows:

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: rwcohenlaw.com Attorneys for Cross-Defendant, WALTER DAY
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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 December 29, 2023, at Los Angeles, California.


Rhea Mercado