CIVIL ACTION NO. [redacted] [redacted]**CIRCUIT COURT**
DIVISION TWO (2)
JUDGE [redacted]

FILED ELECTRONICALLY

Acme INC. D/B/A Acme INC. OF KENTUCKY PLAINTIFF

v.

Our client et al. DEFENDANTS

DEFENDANTS' REPLY TO Acme RESPONSE TO MOTION FOR DEFAULT JUDGMENT OR DISMISSAL AND FOR OTHER SANCTIONS

Defendants, by and through counsel, for their Reply to the Acme Response in this matter, state as follows:

At the heart of Acme amended complaint are the allegations that: (a) Mr. Client and Our client signed non-disclosure and non-circumvention agreements which were breached when Our client purchased the Acme debt to Creditor (Count I),[1] (b) Acme had "a very lucrative agreement with Creditor to settle its outstanding debt for a substantially discounted amount," effective in 2012, and Defendants tortiously interfered with that agreement (Count V),[2] (c) Smith was the owner of a roll former repossessed by Our client and Defendants tortiously interfered with Acme contract with Mr. Smith (Count VIII), (d) Acme had a vital business that Defendants tortiously interfered with (Count IX), and (e)

[1] Acme has never been able to produce these agreements, but Mr. Johnson has testified that he remembers seeing them. Defendants believe that these agreements never existed; consequently, Defendants do not claim that Acme has withheld valuable evidence with respect to these alleged agreements.

[2] In his Response to the Motion for Default, Mr. Alpha conceded that Acme did not have a compromise agreement with Creditor but defended against claims that he did not produce the Acme Creditor emails by saying that Defendants did not really need the Acme Creditor correspondence because they already knew that Acme was in default of its obligations to Creditor

the [redacted] inventory repossessed by [redacted] was owned by [redacted] and its repossession and transfer to [redacted] tortiously interfered with the contract between [redacted] and [redacted] (Count XIII). Each of these allegations is false and the efforts of [redacted] and its counsel to conceal this fraud have involved repeated conscious and intentional failures to comply with the Civil Rules and Orders of the Court.

Even after Defendants have filed five motions to compel and the Court has issued five Orders requiring [redacted] to augment its discovery, [redacted] has still not answered fully Defendants' discovery requests and has not been the least deterred from its efforts to mislead, conceal, and deceive. To uncover this abuse has cost the Defendants hundreds of thousands of dollars in legal fees and costs.

The discovery abuse has been egregious, pervasive, and clearly intended to conceal (including the claim that [redacted] lost all of its proprietary and confidential information in a computer crash). No penalty short of entry of default and the award of attorneys' fees and costs will be sufficient to deter this kind of conduct in the future. The conduct of Mr. [redacted] in the [redacted] *v.* [redacted] and [redacted] *Associates v.* [redacted] cases (as described in Defendants Appendix at pp. 20-23) makes clear that avoiding legitimate discovery requests is Mr. [redacted] standard practice. His refusal to abide by the rules has already led to the imposition of sanctions, **by this Court**, in the [redacted] *Associates* case. Moreover, no remedy other than entry of a default judgment will remedy the wholesale destruction of evidence which has taken place in this case.[3]

[redacted] has not been the least deterred by the Civil Rules or in the least humbled by the Court's Orders. [redacted] efforts to cover up, mislead, confuse, and dissemble were continued in its Damages Discovery and in its Response Brief. Nearly every page of the [redacted] Response Brief

[3] What adverse inference instruction can be given when [redacted] has destroyed virtually all its business records?

contains misstatements or absurd claims, so many and so varied that it is almost impossible to generalize about them. Consequently, most of Defendants' reply is contained in Exhibit 1 hereto, which is the Acme Response with Defendants' comments and corrections included alongside the Acme statements to which they apply. It is Defendants' belief that this approach will help the Court see through Acme tactics more clearly than would a more conventional brief.

It is, however, possible to make some general observations about Acme Response and to reply to inapposite citation of case authority.

Acme does not now try to argue that its answers were complete. For example, neither Mr. Alpha nor Acme mention (much less refute) in their Responses the Affidavit of Carole Craddock attached as Exhibit 13 to Defendants Memorandum, in which Mrs. Craddock makes clear that no Acme Creditor or Acme Smith correspondence was produced by Acme produced Mr. Johnson correspondence with Defendants, but not his correspondence with Creditor and Mr. Smith Mr. Johnson or his counsel made a conscious decision not to produce the Creditor and Smith correspondence, so they could not have had any confusion about whether that material was produced. For example, on July 17, 2012, Mr. Johnson forwarded to Doe email from Client -- this email was produced by Acme Bates # 000539. That same day, Mr. Johnson and Mr. Smith exchanged three emails -- these emails were produced by Mr. Smith and not by Acme Bates Nos. -00765, -01077 and -01081. The next day, Creditor sent the Default Letter to Mr. Johnson (dated 7/17/2012, but sent via email the next day) – this email was produced by Creditor but not by Mr. Johnson Bates No. Creditor 0284). Clearly, to pick from Mr. Johnson email files one email on July 17, 2012 and produce it, but not to produce the other emails sent that day or the next, required a conscious effort to exclude.

Instead, [redacted] argues that its failures to produce requested documents should be overlooked by the Court because: (a) Mr. [redacted] innocently threw away the computer on which all of his pre-litigation emails (as well as substantially all of [redacted] confidential and proprietary information) was stored, (b) Defendants were able to obtain the documents from other sources, (c) the information contained in the missing documents was not particularly important, (d) there was no reason for [redacted] to conceal the [redacted] Default Letter or the or the [redacted] correspondence because Defendants would have obtained them eventually anyway, (e) the Defendants' discovery requests were too vague and narrow to have required the disclosures Defendants now say they want, (f) [redacted] efforts to conceal its financial condition[4] were legitimate efforts to protect confidential information and [redacted] condition was not that bad anyway, (g) [redacted] financial condition is a matter of fact to be weighed by the Jury, and (h) [redacted] claims (including its damage claims) can be established without any records of actual operations in any event. Each of these arguments is identified and refuted in the comments made on [redacted] Response (Exhibit 1 hereto).

None of the cases cited by [redacted] provide it any cover. None involved the pervasive, conscious efforts present in this case to prevent discovery, evade Court orders, mislead counsel and the Court, and none involved the willful destruction of evidence present in this case. For example, *Stapleton v. Shower,* 251 S.W.3d 341, 343 (Ky. App. 2008), involved failure to timely respond to discovery requests. The Court of Appeals remanded the case for findings consistent with *Ward v. Housman*, *infra*: (1) the extent of the party's personal responsibility; (2) the history of dilatoriness; (3) whether the attorney's conduct was willful and in bad faith; (4) the meritoriousness of the claim; (5) prejudice to the other party; and (6) the availability of

[4] Efforts to prevent disclosure of [redacted] Report and tax returns, refusal to acknowledge [redacted] insolvency, gamesmanship about the number of [redacted] active sales contracts, etc.

alternative sanctions. *Ward v. Housman*, 809 S.W.2d 717 at 719 (Ky. App. 1991). In this case, all of these factors point to default judgment as the most appropriate sanction.

First, [redacted] can hardly claim that it is without fault in these discovery abuses. In other words, Mr. [redacted] is as culpable (or more culpable) in these efforts to conceal information from Defendants as [redacted] counsel. It was not [redacted] counsel who threw away Mr. [redacted] computer, for example.

Second, it should go without saying that this case has involved a history of willful failure to respond to Defendants' discovery requests. [redacted] served its First Discovery Requests on February 4, 2013. Now, more than three years later, Defendants still have not received complete answers to those requests.

Third, the [redacted] Discovery Responses, the [redacted] Damages Disclosures, and the [redacted] Response to Defendants' Sanctions Motion all make clear that [redacted] counsel have participated in the abuses intentionally and in bad faith.

Fourth, the allegations which are at the heart of the [redacted] amended complaint have all been proven to be false, at great expense to Defendants.

Fifth, the prejudice of this conduct to Defendants cannot be overestimated. They have incurred significant fees and costs to be sure, but Defendants will never know what information has been lost which would have been useful in their defense.

Finally, as has already been said, no remedy other than the grant of a default judgment and the award of attorneys' fees and costs will be sufficient to deter this kind of conduct or remedy the wholesale concealment and destruction of evidence which has occurred in this case.

Defendants' motion should be granted. Default judgment should be entered against Acme on all counts, and Defendants should be awarded their costs and fees incurred in defending these frivolous claims.

Respectfully submitted:

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and

[redacted]

ATTORNEYS FOR Our client [redacted]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion was served by e-mail and U.S. Mail, postage prepaid, on this the 15th day of February, 2016, on the following:

[redacted]

/s/ *John M. Sosbe*
Counsel for [redacted]