SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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SMART WIN INTERNATIONAL LIMITED, :

Plaintiff, : Index No. 651479/10
(Hon. Jeffrey K. Oing, *J.S.C.*)

- against - :

EMPIRE ENERGY CORPORATION INTERNATIONAL and MALCOLM BENDALL, :

Defendants. :

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**REPLY MEMORANDUM OF DEFENDANTS EMPIRE ENERGY CORORATION AND MALCOLM BENDALL (A) IN FURTHER SUPPORT OF MOTION TO STRIKE PLAINTIFF SMART WIN INTERNATIONAL LIMITED'S COMPLAINT AND ITS REPLY TO COUNTERCLAIMS AND (B) IN OPPOSITION TO CROSS-MOTION**

Defendants Empire Energy Corporation International ("Empire") and Malcolm Bendall respectfully submit this Reply Memorandum (i) in further support of their motion to strike plaintiff's Complaint and its Reply to Counterclaims because of plaintiff's violation of the Order entered on October 3, 2013 (the "Order") and plaintiff's history of evading its discovery obligations over the more than three years in which this action has been pending and (ii) in opposition to plaintiff's cross-motion seeking, in effect, to amend the Order which plaintiff ignored by extending the Order's deadline for compliance.

**Summary and Introduction**

Any review of the multiple papers by which Smart Win International Limited ("Smart Win") has opposed the motion reveals, in effect, how contumacious its conduct has been. Smart Win does *not* dispute that it is in violation of the Order. Smart Win does *not* provide any reason why the witnesses could not have appeared for their depositions in the very generous 75-day period granted to them for compliance. Indeed, the essence of the excuses contained in

two virtually identical affidavits signed by the witnesses is the arrogant assertion that they were too busy and too important to comply with the Order. They apparently had better things to do.

Given its inexcusable failure to comply, Smart Win resorts primarily to *ad hominem* attacks on defense counsel. Plaintiff and its New York attorneys accuse defense counsel of failing to "confer" with plaintiff's counsel before filing the motion and lacking professional courtesy in declining to agree to plaintiff's unilateral change of the Order. Plaintiff repeatedly utilizes nonsense words such as "frivolous" to describe defense counsel's effort to enforce the consequences of Smart Win's disobedience of the Order and Smart Win's long history, in a case which it initiated, of delay, obstruction, lack of cooperation and contempt for the processes of this Court.

As the balance of this reply memorandum demonstrates, the need to file this motion was and is self-evident, as is the need to sanction Smart Win for its conduct with respect to the Order and its long pattern of misconduct in this litigation. The Order was carefully crafted by the Court. It was entered as a result of defendants' detailed showing on its motion to compel, a motion opposed by Smart Win with virtually the same arguments made in its current papers. The Order, in an obvious exercise of fairness that benefited Smart Win, awarded plaintiff 75 days in which to comply.

The issue on the present motion is not defense counsel's taking the initiative to enforce an Order of the Court. The issue is the consequence of Smart Win's cavalier election to ignore it.

## Factual Background

The full factual and procedural background relevant to the motion, as well as to the cross-motion, is set forth in the underlying December 2, 2013 affirmation of Paul Batista. Additional facts responsive to plaintiff's opposition papers and its cross-motion are described in the accompanying reply affirmation. In the interest of brevity, we will not repeat or summarize the factual and procedural background at this stage of this memorandum. Instead, we will move to an explanation of the additional reasons why the underlying motion should be granted and the cross-motion denied.

## Argument

### THE UNDERLYING MOTION TO STRIKE SHOULD BE GRANTED AND THE CROSS-MOTION DENIED

"Although the drastic remedy of striking a pleading pursuant to CPLR 3126 for failure to comply with court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be willful, contumacious, or in bad faith, it is equally well settled that when a party disobeys a court order, and by his or her conduct frustrates the disclosure scheme provided by the CPLR, dismissal of a pleading is within the broad discretion of the trial court . . . ." *Castrignano* v. *Flynn*, 255 A.D.2d 352, 679 N.Y.S.2d 674, 674-675 (2d Dept. 1998). In *Castrignano*, the Second Department cited as a reason for dismissal of a complaint the fact that the plaintiffs "offer[ed] inadequate excuses for their failure" to appear for depositions. 679 N.Y.S.2d at 675.

The striking of pleadings was also sustained on facts analogous to this case in *Homburger* v. *Levitin*, 130 A.D.2d 715, 515 N.Y.S.2d 825 (2d Dept. 1987). In *Homburger*, as here, the defendant "engaged in conduct which was deliberately dilatory, evasive and obstructive with respect to plaintiff's discovery rights and marked by an inexactitude which operated to

frustrate disclosure." 515 N.Y.S.2d at 827. The *Homburger* Court described the defendant's conduct as so "willful and contumacious" that the "imposition of such a harsh sanction" as dismissal was warranted. *Id. See also Corona* v. *A-B-C Packaging Machine Corp.*, 129 A.D.2d 762, 514 N.Y.S.2d 756 (2d Dept. 1987); *Penafiel* v. *Puretz*, 298 A.D.2d 446, 748 N.Y.S.2d 767, 768 (2d Dept. 2002) (reversing the trial court's decision *not* to dismiss a complaint in light of "plaintiff's flagrant failure to comply").

As to plaintiff's claim that the consequences of dismissal are too severe, there are always consequences to a party when its pleadings – whether they are complaints, answers, counterclaims or replies to counterclaims – are stricken. If the severity of the consequences were decisive, no pleadings would ever be stricken as a result of breaches of court orders relating to discovery.

Another factor is important: judicial economy. As the First Department emphasized in *Arts4All, Ltd. v. Hancock*, 54 A.D.3d 286 (1st Dept. 2008).

> The public policy favoring resolution of cases on their merits is not promoted by permitting a party to a single [case] to impose an undue burden on judicial resources to the detriment of all other litigants. *Nor is the efficient disposition of the business of the courts advanced by undermining the authority of the trial court to supervise the parties before it.* [54 A.D.3d at 287; emphasis supplied.]

## Conclusion

For the foregoing reasons, as well as for the reasons set forth in defendants' moving memorandum, Empire Energy Corporation International and Malcolm Bendall respectfully request that (A) their motion be granted in its entirety and (B) plaintiff's cross-motion be denied.

Dated: New York, New York
December 18, 2013

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By _____
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