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10 APPLICA CONSUMER PRODUCTS, INC. WHICH
11 WILL DO BUSINESS IN CALIFORNIA AS FLORIDA
12 APPLICA CONSUMER PRODUCTS, INC.

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

15 WAWANESA GENERAL INSURANCE
16 COMPANY, a California corporation as
17 subrogee of SANDY ASCH,

18 Plaintiff,

19 vs.

20 APPLICA CONSUMER PRODUCTS,
21 INC., WHICH WILL DO BUSINESS IN
22 CALIFORNIA AS FLORIDA APPLICA
23 CONSUMER PRODUCTS, INC.; and
24 DOES 1-20, inclusive,

25 Defendant.

Case No. 06CV1781 WQH (NLS)
Date Filed: 9/05/06

**DEFENDANT APPLICA'S BENCH BRIEF
ON ISSUE OF SPOILIATION JURY
INSTRUCTION**

Trial Date: November 18, 2008
Time: 9:00 a.m.
Court room 4

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant, Applica Consumer Products, Inc. which will do business in California as Florida Applica Consumer Products, Inc., hereby submits, as requested by the Court, its bench brief on the issue of a spoliation jury instruction.

The Court has the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence. *Glover v. BIC Corporation*, 6 F.3d 1318, 1329 (9th Cir. 1993). In the case of *State Farm v. Broan Manuf. Co., Inc.*, 523 F. Supp. 2d 992 (2007) the plaintiff's subrogation action was dismissed with prejudice as sanction for its failure to preserve the fire scene. The Court

1 there found that plaintiff insurance company did not afford defendant manufacturer the
2 opportunity to investigate other potential causes for the fire to defend against plaintiff's
3 allegations that defendant's exhaust fan caused the fire in question. The Court in *State*
4 *Farm* also found that a party's destruction of evidence qualifies as willful spoliation if the
5 party has some notice that the evidence was potentially relevant to the litigation before it
6 was destroyed. See also, *Leon v. IDX Systems Corp*, 464 F.3d 951, 958 (9th Cir. 2006).

7 Moreover, a permissive negative inference jury instruction derives from the
8 notion that a party who destroys evidence (or permits it to be destroyed) when facing
9 litigation, knowing the relevancy of the evidence to the issues in the case, may well do
10 so out of a sense that the evidence would hurt his/her position in the lawsuit. See *Beil v.*
11 *Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994). Consistent with this
12 rationale, a suitable foundation must exist before such an inference can materialize. *Id.*
13 Thus, the sponsor of the inference must proffer evidence sufficient to permit the trier to
14 find that the party who destroyed the evidence knew of (a) the claim (that is, the
15 litigation or the potential for litigation), and (b) the evidence's potential relevance to that
16 claim. *Id.* Moreover, even if these foundational requirements have been met, the trier
17 nonetheless may refuse to draw the negative inference. In other words, the inference is
18 permissive, not mandatory. *Id.*

19 The undersigned has been unable to find a pattern jury instruction that compels
20 the jury to negatively presume that lost, discarded or altered evidence is unfavorable to
21 plaintiff's allegations that a manufacturing defect caused the fire in question. However,
22 it's clear that permissive negative jury instructions have been found to be appropriate by
23 Courts, where spoliation of evidence has been committed.

24 In that regard, we have simultaneously filed a revised proposed negative
25 inference jury instruction, for the above-referenced matter.
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Dated: November 18, 2008

WILSON, ELSE, MOSKOWITZ,
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By /s/ Thomas M. DeMicco
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