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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  
IN FURTHER SUPPORT FOR ITS  
REQUEST FOR SPOILIATION JURY  
INSTRUCTION**

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

**TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:**

Defendant, Applica Consumer Products, Inc. which will do business in California as Florida Applica Consumer Products, Inc., hereby submits the following memorandum of points and authorities in support of its motion for negative inference jury instruction.

In diversity cases, state law determines a party's duty to preserve evidence that is outcome-determinative, but federal rules govern sanctions for breach of that duty. *State Farm v. Broan Manufacturing Co., Inc.* 523 F. Supp. 2d 992 (2007).

1           The scope of the duty to preserve extends to what the party "knows,  
2 or reasonably should know, is relevant in the action, is reasonably  
3 calculated to lead to the discovery of admissible evidence, is reasonably  
4 likely to be requested during discovery, and/or is the subject of a pending  
5 discovery request." *Keithley v. The Home Store.Com Inc.*, 2008 U.S. Dist.  
6 LEXIS 61741, citing, *Wm. T. Thompson Co. v. General Nutrition Corp.* 593  
7 F. Supp. 1443, 1455 (C.D. Cal. 1984); *Columbia Pictures Indus. v. Bunnell*,  
8 2007 U.S. Dist. LEXIS 46364, 2007 WL 2080419; *Hynix Semiconductor v.*  
9 *Rambus Inc.* 2006 U.S. Dist LEXIS 30690, 2006 WL 565893, see also, *A*  
10 *Farber & Partners, Inc. v. Garber* 234 F.R.D. 186, 193 (C.D. Cal. 2006)  
11 (Holding a litigant has a duty to preserve evidence it knows or should know  
12 is relevant to imminent litigation).

13           The US District Court for the Northern District of California set forth  
14 the standard for determining whether an adverse inference jury instruction  
15 as a sanction for the spoliation of evidence is appropriate in *World Courier*  
16 *v. Barone*, 2007 US Dist LEXIS 31714. In *World Courier*, it was noted that  
17 "several district courts in California have adopted the Second Circuit's 3-  
18 part test to decide whether the specific sanction of an adverse inference  
19 instruction is appropriate. This test requires that a party seeking such an  
20 instruction establish that (1) the party having control over the evidence had  
21 an obligation to preserve it; (2) the records were destroyed with a culpable  
22 state of mind; and (3) the destroyed evidence was relevant to the party's  
23 claim or defense." *Id.*, citing, *Residential Funding Corp. v. De George Fin.*  
24 *Corp.* 306 F. 3d 99, 105 (2d Cir. 2002)

25           The mental culpability factor is satisfied where the party acted  
26 "knowingly or...negligently." *Id.*, citing, *Residential Funding Corp. v. De*  
27 *George Fin. Corp.* 306 F. 3d 99, 105 (2d Cir. 2002).

1 Here, plaintiff, failed to preserve and adequately document the fire  
2 scene, failed to timely notify Applica of the loss while the fire scene was still  
3 available for inspection and failed to collect potential ignition sources from  
4 the scene. In addition, plaintiff's engineering expert performed a unilateral  
5 inspection of the subject toaster oven, and thereafter, failed to preserve the  
6 toaster oven and the specific mechanism within the toaster oven which it  
7 claims was defectively manufactured.

8 Plaintiff clearly had knowledge of Applica's interest in this loss. Before  
9 the evidence was lost, altered or destroyed, plaintiff was aware that the  
10 subject toaster oven was a Black & Decker Brand; the corporate title  
11 "Applica Consumer Products, Inc." was stamped on the bottom steel plate  
12 of the toaster oven and clearly visible to plaintiff. Plaintiff was also aware  
13 that evidence at the fire scene and the subject toaster oven was relevant to  
14 any potential subrogation action that may arise out of the fire.

15  
16 Dated: November 19, 2008

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17  
18 By 

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