CASE NO. 16-35023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT and DANELLE BLANGERES,

Plaintiffs-Appellants

v.

UNITED STATES SEAMLESS, INC., KBP COIL COATERS, INC.,

KAYCAN LTD,

Defendants-Respondents.

ON APPEAL FROM THE ORDER GRANTING JUDGMENT FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
The Honorable Stanley A. Bastian, Judge
Case No. 2:13-cv-00260 (SAB)

APPELLANTS' REPLY BRIEF

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I. INTRODUCTORY STATEMENT

Plaintiffs and Appellants Robert and Danelle Blangeres ("Plaintiffs") submit this reply brief in support of their appeal of the Order of the District Court below entered December 10, 2015 ("Order"), which granted the Joint Motion for Summary Judgment submitted by Defendants United States Seamless, Inc. ("US Seamless"), K.B.P. Coil Coaters, Inc. ("KBP"), and Kaycan Ltd. ("Kaycan") (collectively "Defendants" or "Appellants"). Defendants' Respondents' Brief predictably suffers from the same logical deficiencies as the District Court's Order.

Defendants' Respondents' Brief additionally fails to rebut many of Plaintiffs' key factual contentions. For instance, Defendants point to no single specific instance where a warranty claim was denied because the customer failed to timely register the warranty, other than in Plaintiffs' warranty claim. The closest Defendants come is a vague statement in a declaration that 5.2% of their warranty claims were "closed" without payment from Defendants either because the warranty was not registered or because the Defendants never heard back from the homeowner. *See* Appellees' Supplemental Excerpts of the Record ("SR") at 72. Meanwhile, Plaintiffs present ample evidence that Defendants intended the registration cards simply to identify customers, and thus impliedly waived that purported registration requirement.

Additionally, in response to Plaintiffs' correct assertion that Defendants did not test the steel coil to determine whether it would rust, crack, blister, chip, peel or flake[1], Defendants aver that quality testing was done to ensure that applied primer stayed on the coil. Defendants' Respondents' Brief ("Defs' Br.") at 5. True or not, Defendants' argument misses the point. Plaintiffs have presented credible evidence that Defendants performed no testing on coated steel coil before selling it to consumers with a Lifetime Warranty, and thus at bare minimum there exists a factual dispute as to whether the tests done were adequate to justify the warranty. ER 196-202; *see also*, ER 666 (confirming testing done only on aluminum coil, not steel). As described in detail below and in Plaintiffs' Appellants brief, this goes directly to Plaintiffs' claims for actionable misrepresentation.

Furthermore, Defendants misrepresent the evidence as to Plaintiffs themselves, falsely claiming that Plaintiffs "did not rely on any statements from" Defendants when Plaintiffs both testified to having seen advertisements and had interactions concerning the warranty with a siding dealer.

Defendants' Respondent's Brief, as with the District Court's Order, fails to rebut Plaintiffs' proffered facts which establish the myriad of genuine disputed facts at issue. Plaintiffs accordingly request that this Court reverse the lower court's Order granting summary judgment.

[1] Excerpts from the Record ("ER") 196-202

II. ARGUMENT

A. Summary Judgment as to Plaintiffs' Express Warranty Claim Was Reversible Error.

The district court erred in dismissing Plaintiffs' express warranty claims because an issue of fact exists as to whether Defendants impliedly waived the right to enforce the Lifetime Warranty's purported registration requirement. Implied waiver arises where a party has pursued "such a course of conduct as to evidence an intention to waive a right, or where [a party's] conduct is inconsistent with any other intention than to waive it." *Bowman v. Webster*, 44 Wn.2d 667, 669 (Wash. 1954). Defendants correctly state that implied waiver "requires *unequivocal* acts of conduct evidencing an intent to waive." *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 769 (Wash. 2007) (emphasis in original).

Here, the record contains substantial evidence that Defendants unequivocally intended to waive strict compliance with the Lifetime Warranty's registration requirements. Defendants permitted consumers to fill out warranty registration cards years after the siding was installed and then submit a "backdated" card. *See* ER 223-228, 234, 238, 240, 246, 279-295, 298-311, 314-328, 329-330, 355-371, 432, 448, 464, 465-469. Defendants paid claims without requiring a registration card. ER 285, 288, 302-306, 318-322, 389-391. Of the 741 paid warranty claims,

approximately 100 were paid without a registration card on file. ER 188,[2] 225-226.

Defendants intentionally waived the warranty registration for business reasons. US Seamless represented that it offered "The Best Warranties in the Business." ER 230 ("There is one thing wrong with most siding warranties … they're full of holes"). Defendants "wanted to honor the terms of the warranty" to create goodwill with their customers. ER 227–28. Thus, they honored the warranties regardless of whether they had a warranty registration card so long as "credible" evidence existed identifying the manufacturer. *Id.*

Defendants assert that the fact they waived the registration for some customers does not mean they waived the registration requirement for Mr. and Mrs. Blangeres. Defs' Br. at 24. But Defendants' argument relies on cases involving *estoppel-based* theories of waiver, which Defendants concede do not apply here. *See* Defs' Br. at 24, n. 110. For example, in *Chesner v. Stewart Title Guaranty Company*, No. 1:06-cv-00476, 2009 WL 585823, at *11 (N.D. Ohio Jan. 9, 2009) the plaintiff alleged that the defendant failed to provide a discount in connection with the purchase of title insurance during refinancing. An implied term of the contract required the defendant to discount the title insurance if there was a previous purchase of title insurance on the same property. *Id.* The plaintiff

[2] Plaintiffs' opening brief mistakenly cited to ER 118. Plaintiffs correct this typographical error here.

asserted that the defendant was estopped from insisting upon direct evidence of the title insurance because it had accepted circumstantial evidence of title insurance in the past. *Id.* The court held the defendant's prior course of conduct did not apply to other consumers for purposes of waiver unless the consumer relied on the past conduct. *Id.*

In contrast to *Chesner*, Plaintiffs here rely on an implied waiver theory, which is characterized by unequivocal and decisive conduct manifesting an intent to waive. Unlike the defendant in *Chesner*, Defendants never intended to strictly enforce the warranty registration requirement. Instead, as a matter of policy and consistent practice, Defendants used the purported "requirement" only as one of many tools to identify the siding as manufactured and warranted by Defendants. Thus, the conduct at issue was unequivocally not intended to prevent a barrier to enforcement of the warranty but simply intended to identify customers. Such *unequivocal* conduct, which results from an intentional business decision on the part of Defendants to waive strict enforcement of the warranty registration requirement to create good will with customers, distinguishes this case from *Chesner* and other estoppel-based cases. To determine waiver in this case, the Court need only analyze whether Defendants *intended* the warranty requirement to serve as a tool for siding identification rather than a condition precedent to honor the warranty. Such a determination does not require analysis of whether the

Blangeres relied on Defendants' prior course of conduct. *See McDonald v. Asset Acceptance LLC*, 296 F.R.D. 513, 520 (E.D. Mich. 2013) (distinguishing *Chesner* and the estoppel theory of waiver from a theory of implied waiver and finding reliance not required).[3]

Defendants suggest that, at best, their conduct with respect to honoring warranties was "equivocal" but they fail to support this assertion with any evidence in the record. None exists. The record establishes that Defendants never treated the warranty registration requirement as if it were a condition precedent to honoring the Lifetime Warranty. Instead, it was simply a siding-identification tool. And, unlike *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 769 (Wash. 2007) no evidence exists that Defendants ever reserved their right to strictly enforce the warranty registration agreement. Because Defendants' conduct on this issue is unequivocal, Defendants have impliedly waived their right to strictly enforce the warranty registration requirement now. At a minimum, an

[3] *Robinson v. Charter Prac. Int'l LLC*, No. 3:14-cv-1736, 2015 WL 1799833 (D. Or. April 16, 2015), is distinguishable because it applies Oregon, not Washington law. In *Robinson* the defendants refused to renew a franchise agreement based on language contained in that agreement. The plaintiff argued that because the defendants had waived a non-competition clause at the time the franchise agreement was made, that waiver applied to the renewal of the agreement. The court found otherwise given explicit language of the franchise agreement and the right under Oregon law to revoke a waiver. *Id*. at *9-10. But Oregon law does not apply here and there is no showing by Defendants that Oregon law is similar to Washington or that the right to revoke a waiver would apply under Washington law. *See Bowman*, 44 Wash.2d at 670 ("Once a party has relinquished a known right or advantage, he cannot reclaim it without the consent of his adversary.")

issue of fact exists for the jury as to whether Defendants' conduct is "unequivocal" for purposes of implied waiver. The district court erred in granting summary judgment.

B. The District Court's Grant of Summary Judgment As To Plaintiffs' Claims for Breach of Implied Warranty Was Reversible Error

Defendants' brief fails to acknowledge the clear inconsistency between the plain language of Washington's statutory scheme and the decisions this Court and other courts have made with respect to the applicability of the future performance exception to implied warranties. Instead, Defendants attempt to lead this Court into a decision that would once again ignore and mischaracterize the letter and spirit of Washington law without addressing the plain language of Washington's statutory scheme.

Plaintiffs' argument is simple. Washington law incorporates express statements on the product label or manual into the implied warranty of merchantability. Express statements on the product label or manual are, by their very nature, explicit. If these statements on the product label or manual clearly, unambiguously, and distinctly set forth the future performance of the goods, those affirmations of fact or promises are incorporated into the implied warranty of merchantability, and, thus, the implied warranty of merchantability explicitly extends to the future performance of the goods. Plaintiffs' position is consistent

with the plain language of Washington law and furthers the commercial code's goal of establishing an across-the-board governing law for all commercial sales transactions that adequately addresses fairness and bargained for risk.

1. Plaintiffs' position is consistent with the plain language of RCW §§ 62A.2-314 and 62A.2-725

Washington's implied warranty statute clearly requires merchant-sellers to meet the express representations on the product label or product packaging. Washington's implied warranty of merchantability statute provides, in pertinent part, that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Rev. Code Wash. § 62A.2-314(1). Under the statute, to be merchantable, goods must be at least such as "conform to the promises or affirmations of fact made on the container or label if any." Rev. Code Wash. § 62A.2-314(2)(f). Subsection (2) of the statute represents the first attempt from the Washington legislature to define merchantability by statute, and Part (f) represents a departure from prior principles. *See,* Rev. Code Wash. § 62A.2-314 Wash. Cmt 2. Under prior Washington law, promises or affirmations made on a product label not attached by the seller may have been express warranties if the seller was found to have adopted them as his own statements. *Id.* Under Part (f) of subsection (2), conformity to the promises or affirmations of fact on the product label is made part of the concept of

merchantability and the difficult question of adoption is avoided.[4] *Id.* Part (f) derived from the general obligation of good faith which requires that a buyer should not be placed in the position of reselling or using goods delivered under false representations appearing on the package or container. *Id.*

Subsection (2) does not purport to exhaust the meaning of "merchantable" nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. Rev. Code Wash. § 62A.2-314 U.C.C. cmt. 6. The statutory language is "must be at least such as…," and the intention was to leave open other possible attributes of merchantability. *Id.* Washington courts have looked to factors such as the usage in the trade, the price actually paid as compared to the standard price, the characteristics of similar goods manufactured by others, government standards and regulations regarding such a good, and express statements included on the product's packaging and within the product's owner's manual to evaluate merchantability. *See Federal Signal Corp. v. Safety Factors,* 125 Wn.2d 413, 427 (Wash. 1994); *see also Hertzog v. Webtv Networks, Inc.,* 112 Wn. App. 1043 (Wash. Ct. App. 2002) .

The express statements found on a product label or manual are, by their nature, explicit. They are specific, express statements, identifying the quality of

[4] Reliance is not an element in an implied warranty claim. Whether or not Appellant's read the product descriptions or label, Washington law requires the goods conform to the product label or description.

the good purchased under a contract. When a product label or manual identifies or describes a good as having certain qualities, for example, a '25-year shingle' or 'rot-proof siding', these representations of fact are, by definition, express, definite and clear descriptions of the goods. As such, if the express representations relate to future performance of the goods, the implied warranty of merchantability explicitly extends to future performance of goods. Not only is this position consistent with the plain language of Washington law, but Washington law does not expressly limit the application of the future performance exception to express warranties created under Rev. Code Wash. § 2-313. No provision within the Washington statutory scheme expressly limits the application of the future performance exception to express warranties created under Rev. Code Wash. § 2-313. Under Rev. Code Wash. § 2-725(2), an exception is created where a warranty explicitly extends to the future performance of a good. Though this provision represented a change in Washington law by requiring that a warranty as to future performance be explicit, nothing in its definition limits its applicability to express warranties created under Rev. Code Wash. § 2-313. Rev. Code Wash. § 62A.2-725 Wash. Cmt.

Though no court has adopted this position, no decision on the issue has addressed the apparent inconsistency between the plain text of the statute and the presumed "nature" of the implied warranty of merchantability. Of the many

decisions cited by Defendants and acknowledged in Plaintiffs' opening brief, none account for their incompatibility with the letter and spirit of Washington's statutory scheme. None of these cases account for the Washington legislature's intent to define the warranty of merchantability to include express statements, but instead come to the same conclusion which rests on a flawed premise–that the implied warranty cannot explicitly extend to future performance. Defendants provide no meaningful reason for this Court to predict that the Washington State Supreme Court would do anything but adhere to the plain language of the statute.

2. Plaintiffs' position furthers the commercial code's goal of establishing an across-the-board governing law for all commercial sales transactions that adequately addresses fairness and bargained for risk

Defendants do not argue that the plain language of the implied warranty of merchantability statute incorporates express statements on a product label or manual. Instead, Defendants assert that Plaintiffs ignore the distinction between implied warranties, which arise by operation of law, and express warranties, which arise by a seller's voluntary action. This argument presumes that an action which arises by operation of law is not triggered by a merchant-seller's voluntary action – such as entering into a contract, placing a label on a product, or placing the product in the market place. The material distinction between implied and express warranties is that implied warranties arise out of a contract and express warranties arise out affirmations of fact or promises that are only collateral to any contract for

the sale of goods. The Washington legislature chose to include express affirmations of fact on a product label or container in the definition of merchantability, setting a change in the law. Under prior Washington law, promises or affirmations made on a product label not attached by the seller may have been express warranties if the seller was found to have adopted them as his own statements. Rev. Code Wash. § 62A.2-314 Wash. Cmt. 2 Under the change, conformity to the promises or affirmations of fact on the product label were made part of the concept of merchantability, eliminating any need to make reliance or adoption determinations. *Id.* This change derived from the general obligation of good faith which requires that a buyer should not be placed in the position of reselling or using goods delivered under false representations appearing on the package or container, which furthers the commercial code's goal of establishing an across-the-board governing law for all commercial sales transactions that adequately addresses fairness and bargained for risk. *See, id.*; *see also, Central Wash. Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 521 (Wash. 1997) (Guy, J., dissenting).

C. The District Court's Grant of Summary Judgment As To Plaintiffs' Claims for Breach of Implied Warranty Was Reversible Error

The District Court erred in dismissing Plaintiffs' fraudulent concealment claim, because a genuine issue of material fact exists as to whether Defendants

concealed subjective knowledge of a defect. Such an issue of fact arises, at least, from the 1993 letter in which Defendants voice urgent concern about the quality of their products. ER 494-95. That letter states that "quality is a constant problem," and that there are "peeling problems," which are generating customer claims. *Id.*

Indeed, the District Court's own Order does not contain findings sufficient to justify its dismissal. It states only that "[t]he 1993 letter that Plaintiffs rely upon does not establish that Defendants knew there would be problems with peeling and cracking of the siding of customers' houses." ER 15. But the 1993 letter need not "establish" anything to preclude summary dismissal of the claim. The letter provides a basis upon which a reasonable jury could conclude that Defendants had "actual subjective knowledge of a product defect that was unknown to Plaintiffs." *See Burbo v. Harley C. Douglass, Inc*., 125 Wn. App. 684, 698 (Wash. Ct. App. 2005). The District Court's only additional finding, that "the record establishes" that the first customer warranty claim was made in 1999, is directly contradicted by the 1993 letter.[5] *See* ER 15, 494-95.

The District Court also ignored separate evidence demonstrating, first, that Defendant knew that KBP had no experience applying paint to steel, and second,

[5] Additionally, Defendants' attempt to downplay the significance of the 1993 letter is purely obfuscatory. Indeed, Defendant's contention that the issues raised in that letter were subsequently addressed to Defendants' satisfaction is supported only by a self-serving declaration, which a reasonable finder of fact could easily discredit. *See* SER 8-9.

that Defendant had done nothing to verify the resistance of its products to the defects experienced by Plaintiffs. ER 666, 196-202.

The District Court erred, and this Court should reverse its dismissal of Plaintiffs' fraudulent concealment claim.

D. A Genuine Issue of Material Fact Exists As To Misrepresentation

The District Court erred in dismissing Plaintiffs' misrepresentation claim on the basis that "[a] reasonable jury would not find that the alleged misrepresentations were material, or that Plaintiffs relied on the representations to their detriment."[6] ER 15.

Plaintiffs have brought forth numerous facts that could lead a reasonable jury to conclude that the misrepresentations were material and that Plaintiffs detrimentally relied upon them. First, Defendant marketed and warranted the Siding as durable enough to last a lifetime. ER 213-15. Second, Defendant guaranteed that the very defects suffered by Plaintiffs would not occur. ER 692 ("With steel siding from United States Seamless you get the strength of steel and the durability afforded by a tough PVC coating. Because of its toughness and heat resistance, it is guaranteed not to rust, crack, blister, chip, peel or flake"). These strong, meaningful statements were consistent with how Defendant

[6] It is worth observing that the District Court *did not deny that Defendant made false representations*—its holding rested solely on the materiality and reliance elements of the tort.

systematically misrepresented its products in the advertising that Plaintiffs saw. ER 499-501. Further, there can be little doubt that such statements were material insofar as Defendant and Plaintiffs "attached importance to the fact misrepresented." *Ki Sin Kim v. Allstate Ins. Co.*, 153 Wn. App. 339, 354-55 (Wash. Ct. App. 2009), as amended (Jan. 6, 2010) .

Defendant's additional misrepresentations include falsely listing Kaycan as the coil manufacturer, and as the guarantor of its warranty. ER 204-210, 214. Defendant admitted this was done for marketing purposes, supporting an inference that the misrepresentation was material. ER 208.

Plaintiffs have clearly brought forth enough evidence to permit a reasonable jury to find that Defendants made material misrepresentations upon which Plaintiffs detrimentally relied. The District Court's summary dismissal of the claim should be reversed.

E. Plaintiffs' Negligence and Unjust Enrichment Claims Are Not Preempted by The WPLA

Without offering any reasoning, and citing only one case—*Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402 (Wash. 2012)—the District Court concluded that Plaintiffs' negligence and unjust enrichment claims are preempted by the Washington Product Liability Act Rev. Code Wash. § 7.72.010 ("WPLA"). ER 16. The dismissal can only be predicated on a misunderstanding of Plaintiffs'

claims, and Defendants' attempts to retroactively justify the District Court's decision fail. This Court should reverse the dismissal of one or both claims.

The District Court overlooked a crucial fact when it found Plaintiffs' negligence claim to be preempted by the WPLA. Namely, Plaintiffs' negligence claim is not exclusively "based on harm caused by a product," and therefore lies outside the scope of WPLA preemption. *See Macias* at 409. As Defendants observe, the *Macias* court ruled that negligence claims for health damage *caused by asbestos products* were preempted. *See* Def's Br. at 39. But here, Plaintiffs seek not only consequential damages, but also injunctive relief requiring Defendants to remedy their negligent and unlawful business practices by modifying their warranty claims processes. In that respect the claims are not "product based" under *Macias*, and they lie outside the WPLA's preemptive scope. The District Court erred in overlooking this aspect of Plaintiffs' negligence claims.

The District Court repeated its error—overlooking that Plaintiffs' claims are not exclusively "product based"—when it dismissed the unjust enrichment claim. But there are additional factors preventing the WPLA's preemption of the unjust enrichment claim. Namely, this claim sounds in intentional conduct which, as Defendants admit, is excluded from the WPLA's preemptive scope. *See* Def's Br. at 39; Rev. Code Wash. § 7.72.010(4); *see also Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wash. 2d 847, 850–51 (1989).

Nor is the unjust enrichment claim duplicative of Plaintiffs' warranty claims, as Defendants argue on the basis of *Macdonald v. Hayner*, 43 Wn. App. 81, 86 (Wash. Ct. App. 1986) . *See* Appellee's Brief at 40. *MacDonald* stands only for the canonical proposition that where a transaction has been reduced to an express contract, claims in quasi-contract are precluded. Here, Plaintiffs' unjust enrichment claim relates to the totality of Defendant's conduct, which cannot be simply reduced to the terms of the deceptive and false Limited Warranty.

This Court should reverse the District Court's erroneous and overbroad application of the WPLA's preemptive scope, and revive Plaintiffs' negligence and unjust enrichment claims.

F. The District Court's Order Dismissing Plaintiffs' CPA Claim Should Be Reversed

The District Court opinion dismissed the CPA claim (Rev. Code Wash. (ARCW) § 19.86.170) as an afterthought with no legal reasoning and no statement of the facts supporting the dismissal. Defendant's Respondent's Brief actually highlights critical factual disputes ignored by the District Court as to whether Defendants engaged in unfair or deceptive acts. Moreover, Appellees' failure to even cite the District Court's Order in its CPA argument shows that reversal (or remand with instructions to expound) is necessary based on the District Court's Order's complete silence as to any reason for the CPA claim's dismissal.

Defendants' first attempt to fill the District Court's decisional void by seeking to rebut their own documents relied on by Plaintiff by citing to self-serving declarations concerning warranty claims, thereby, requiring a factual determination as to both the *weight and interpretation* of the conflicting evidence. This is not proper for summary judgment. *Menotti v. City of Seattle*, 409 F.3d 1113, 1150 (9th Cir. Wash. 2005) ("We, of course, are not empowered to make factual determinations when faced with conflicting evidence."); *Peterson v. Minidoka Cty. Sch. Dist. No. 331*, 118 F.3d 1351, 1362 (9th Cir. Idaho 1997), *amended*, 132 F.3d 1258 (9th Cir. Idaho 1997) ("Discrediting [conflicting] evidence in this way is for the trier of fact to do, not the court on summary judgment."); *see also Leslie v. Grupo ICA*, 198 F.3d 1152, 1159 (9th Cir. Cal. 1999) (Holding lower court erred when granting summary judgment based on its interpretation and weight of contradicting evidence). As such, Appellees' Response Brief further supports that dismissing the CPA claims at the procedural stage of summary judgment was error.

Defendants secondarily attempt to fill the District Court's decisional void by arguing that the warranty cannot be a basis for the CPA claim as it did not "explicitly" promise a defect-free product. This argument likewise misses the mark. The issue is whether the warranty misrepresented the defective nature in violation of the CPA based on the marketing statements[7] of durability and also the

[7] Some of these marketing statements are repeated in the warranty itself.

failure to honor warranty claims by Appellees. *See Aecon Bldgs., Inc. v. Zurich N. Am.*, 572 F. Supp. 2d 1227, 1239 (W.D. Wash. 2008) ("…there are issue of fact regarding whether his explanation was "reasonable" and whether he "misrepresented" the facts and policy"). Defendants also attempt to water down their unfair practices by arguing, without citation to any evidence or to the District Court's decision that some customers were allowed to proceed with a claim by showing alternative proof of product installation in lieu of registration. In doing so, Appellees have created a material factual dispute as to the claim process and what practices were used that cannot be resolved on summary judgment while simultaneously raising the issue why such practices are not available to all purchasers.

For the reasons set forth above, the District Court erred in granting summary judgment on the CPA claims. Plaintiffs respectfully request this Court to reverse the District Court's Order and vacate the judgment as to the CPA claims.[8]

G. Plaintiffs Did Not Abandon Their Claims for Injunctive and Declaratory Relief Because the Trial Court's Order Did Not Specifically Dismiss Those Claims.

Finally, Defendants argue that Appellants' Opening Brief abandoned their claims for declaratory and injunctive relief. However, Plaintiffs should not be

[8] In alternative, Appellant seeks remand with instructions to the District Court to issue a new order that includes a statement of reasons for granting summary judgment on the CPA claims.

deemed to have abandoned those claims, as the District Court's underlying order contains absolutely no reference to those claim for relief other than a perfunctory mention during the list of all claims for relief. ER 12. The District Court's Order contained no subsequent reference to, or analysis of, Plaintiffs' claims for injunctive and declarative relief. ER 8-17. Nor did the District Court address those claims for relief during the hearing on Defendants' motion for summary judgment. ER 18-67. In short, Plaintiffs did not raise issues concerning their declaratory or injunctive relief claims for relief because there were no issues to be raised.

Nevertheless, Plaintiffs seek remand to the District Court with respect to those claims for declaratory and injunctive relief so that the District Court may state its reasons for dismissing those claims, if it indeed did so. *See Sunset Drive Corp. v. City of Redlands*, 282 F. App'x. 609, 610 (9th Cir. 2008) ("We have held that although Federal Rule of Civil Procedure 52(a) relieves a district court from the obligation to make findings of fact and conclusions of law when granting a motion for summary judgment, the rule "does not relieve a court of the burden of stating its reasons somewhere in the record when its underlying holdings would otherwise be ambiguous or inascertainable [] "Appellate review is a particularly difficult process when there is nothing to review," and a summary judgment order that fails to disclose the court's reasons runs contrary to the interests of judicial economy and increases the danger that litigants will perceive the judicial process to

be arbitrary and capricious. "Accordingly, this court has held that when multiple grounds are presented by the movant and the reasons for the district court's decision are not otherwise clear from the record, it may vacate a summary judgment and remand for a statement of reasons.")

III. CONCLUSION

The District Court's Order granting summary judgment as to Plaintiffs' warranty, misrepresentation, and CPA claims was in error on the law and facts, and should be reversed. Accordingly, Plaintiffs respectfully request that the Court reverse the Order granting summary judgment, and remand for further proceedings.

Dated: August 29, 2016

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format) /s/ S. Clinton Woods