NO. S_____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HARDAGE HOTELS X, LLC, successor
In interest to HARDAGE HOTELS III, LLC;
and HARDAGE CONSTRUCTION CORPORATION,

Petitioners,

v.

FIRST CO.,

Respondents.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One
Case No. D053980
San Diego Superior Court Case No. GIC827498

PETITION FOR REVIEW

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ISSUES PRESENTED

(1) What role, if any, do privity and reliance play in an action based on an express (written) warranty?

(2) Is privity established (for express *and* implied warranties) when a manufacturer knows the identity of the end user at the time the product is sold to the initial purchaser?

(3) Is a Code of Civil Procedure § 998 offer presumed to settle the entire action between the parties unless it specifically states otherwise?

II.
WHY REVIEW SHOULD BE GRANTED

California warranty law is painfully unclear on the remaining role of privity and reliance after enactment of the Commercial Code. This Supreme Court addressed the issue only once, in *Hauter v. Zogarts* (1975) 14 Cal.3d 104 ("*Hauter")*, a case which is now being ignored and marginalized by confusing and conflicting appellate opinions.

This Petition will show that the confusion in warranty law is worsening, and begs for clarification. Litigants, practitioners, trial courts

and courts of appeal are wasting valuable time and resources attempting to decipher the law from decisions which remain in direct conflict with one another. For example, the general rule stated in *Hauter*, "[p]rivity is not required for an action based on express warranty," is often stated just the opposite. In *Blanco v. Baxter* (2008) 158 Cal.App.4th 1039 at 1058-1059 (Opinion p. 18) the Court states "the general rule is that privity of contract is required in an action for breach of either express or implied warranty."

The facts of this case provide the Supreme Court with an ideal platform to investigate and clarify the law. Here, *Construction* purchased HVAC units from manufacturer First Co. for installation at *Hotel*. First Co. provided a written warranty which accompanied delivery of the units to *Hotel*. *Hotel* sought to enforce the express warranty. The jury awarded damages for breach of warranty. The trial court granted a Motion for Judgment Notwithstanding the Verdict, reversing the warranty award for lack of privity. The Court of Appeal upheld.

Hotel's implied warranty claims were also denied for lack of privity, even though *Hotel* was referenced in the purchase order contract and First Co. representatives testified that they understood the HVAC units would be delivered to and installed in *Hotel* when they sold the units to *Construction*.

Review is necessary to secure uniformity of decision and settle an important question of law. Whether this Court rules for or against Petitioner, acceptance of this Petition for Review and the resulting clarification of warranty law will be a victory for all Californians. The right of enforcement for express and implied warranties cannot remain in a state of legal confusion. These issues beg for clarification.

III.

THE LAW ON ENFORCEMENT OF EXPRESS WARRANTY IS IN A STATE OF CONTRADICTION AND CONFUSION, WITH NO CLEAR DIRECTION TO COURTS, PRODUCT MANUFACTURERS AND PURCHASERS, RESULTING IN ARBITRARY ENFORCEMENT OF THE RIGHTS OF THE PARTIES

In order to appreciate the confusion, we turn to the current state of the law. This Supreme Court has just three opinions which provide guidance, only one of which applies the Commercial Code. In fact, it appears that California's abrogation of the Sales Act and enactment of the Commercial Code in 1965 marks the beginning of the confusion.

A. *Burr v. Sherwin Williams* (1954) 42 Cal.2d 682

Burr addresses only implied warranty, but also discusses express warranty "since there may be a new trial[.]" (*Id.* at 696.) *Burr* sets forth a general rule stating:

> The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale. (*Id.* at 695.)

Burr later implies that express "written" warranties are an exception to the requirement of privity. In analyzing privity in the context of implied warranty, *Burr* states as follows:

> The facts of the present case do not come within the exception relating to foodstuffs, and the other exception, where representations are made by means of labels or advertisements, is applicable only to express warranties. (*Id.* at 696.)

Although unclear, *Burr* may be recognizing a difference between *oral* express warranties and *written* express warranties. What is beyond dispute is that *Burr* is analyzing the Sales Act, Civil Code §§ 1732 and 1735, as it applies warranty law. The Sales Act was abrogated and replaced by the Commercial Code in 1965.

B. *Seely v. White Motor Company* (1965) 63 Cal.2d 9

In *Seely*, the Court addresses only express warranty and provides no analysis whatsoever on implied warranties. *Seely* provides a cross-over analysis, referring to the previous Sales Act and current Commercial Code.

(*Id.* at 13.) When citing the statutory requirement for an express warranty, *Seely* states:

> Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. (*Id.* at 13.)

This language is a direct quotation from Civil Code § 1732, and does not relate any of the changes mandated by Commercial Code § 2313. *Seely* applies the then current Sales Act to the facts because the sales transaction in controversy occurred in 1959. (*Id.* at 12.) Although Civil Code § 1732 requires reliance on the express warranty, the timing of reliance is not addressed. *Seely* states as follows:

> When, as here, the warrantor repeatedly fails to correct the defect as promised, it is liable for the breach of that promise as a breach of warranty. (Citations omitted) Since there was an express warranty to plaintiff in the purchase order, no privity of contract was required. (See *Burr v. Sherwin Williams Co.,* 42 Cal.2d 682, 696.)

Seely is referring to the exception to the privity requirement for express "written" warranties set forth in *Burr*, and implies that reliance on the warranty can occur when the product fails.

C. *Hauter v. Zogarts* (1975) 14 Cal.3d 104

Hauter addresses the Commercial Code for the first time in analyzing warranty law, stating:

> In analyzing these claims, we confront for the first time the California Uniform Commercial Code provisions relating to warranties. (Cal. U. Com. Code §§ 2313, 2314, and 2316.) (*Id.* at 114 - 115.)
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> * * *
>
> The fact that Fred Hauter is not in privity with defendants does not bar recovery. Privity is not required for an action based upon an express warranty. (*Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 14.) Although privity appears to remain a requirement for actions based on the implied warranty of merchantability (see *id.* at p. 29 [concurring opinion]; *Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682, 695 - 696), Fred Hauter comes within the well recognized exception to the rule: he is a member of the purchaser's family. (Citation omitted). (*Id.* at 115, fn. 8.)
>
> * * *
>
> We first treat the claim for breach of express warranty, which is governed by California Commercial Code section 2313. The key under this section is that the seller's statements - whether fact or opinion - must become "part of the basis of the bargain." [FN10] (See Cal. U. Com. Code, § 2313, com. 8; Ezer, *supra*, at p. 287, fn. 39.) The basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller (Citation omitted), the Uniform Commercial Code requires no such proof. According to official comment 3 to the Uniform Commercial Code following section 2313, "no particular reliance ... need be shown in order to weave [the seller's

> affirmations of fact] into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof."
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> * * *
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> FN10 . . . [T]he California Uniform Commercial Code expands sellers' liability beyond the former Uniform Sales Act (former Civ. Code, §§ 1732-1736) and provides greater coverage than Restatement Second of Torts, section 402B, discussed earlier. (*Id.* at 115.)

Hauter discusses the remaining role of reliance after enactment of the Commercial Code. Without resolving the reliance issue (*Id.* at 116), *Hauter* concludes that reliance is either eliminated altogether or perhaps remains as an affirmative defense, with the burden of proving non-reliance on the seller. (*Id.* at 115 - 117.)

With *Burr*, *Seely* and *Hauter* as the only guidance, the Courts of Appeal attempt to decipher the law and determine the remaining role of privity and reliance in actions based on express and implied warranties.

IV.

COURT OF APPEAL DECISIONS REVEAL A VARIETY OF CONCLUSIONS AND CONFLICTING RULES APPLIED TO CLAIMS ON EXPRESS AND IMPLIED WARRANTIES

Many Court of Appeal opinions ignore *Hauter* and *Seely* and set forth the pre-Commercial Code law as broadly stated in *Burr*, that privity is required for both express and implied warranty ("the *Burr* rule"). Other opinions closely follow *Hauter* and state a general rule that privity is not required for express warranty. The result is serious confusion in warranty law, as shown by these decisions.

A. *Presiding Bishop v. Cavanaugh* (1963) 217 Cal.App.2d 492

Presiding Bishop applies the Sales Act, since the Commercial Code was not yet enacted, and provides an analysis on a situation almost identical to that presented by Petitioner. *Presiding Bishop* states as follows:

> The difficult problem is whether the express warranty inured to the benefit of the plaintiff, the party owning the building in which the product was ultimately used in accordance with the representations of the manufacturer. Traditionally the existence of privity has been considered to be essential to a right of recovery by a person in the position of the plaintiff herein. But, borrowing the apt language of the court in *United States Pipe & Foundry Co. v. City of Waco,* 130 Tex. 126, it is "the tendency of modern courts [to move] away from the narrow legalistic view of the necessity of formal immediate privity of contract in order to sue for breach of an express or implied warranty." (See also Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* (1963) 1 Duquesne L.R. 1.) A realistic

> view must be taken of the purpose of the defendant manufacturer in making its representations to persons engaged in designing and installing radiant heating systems of the nature of that with which this case is concerned. . . . The person whose ultimate action was sought to be induced was the one for whom the construction would be done. In this case that person was the plaintiff. As stated in *Odell v. Frueh*, 146 Cal.App.2d 504 "The law has always recognized that communication by indirection may be just as effective as when direct. For example, a fraudulent misrepresentation is no less actionable because made to a third person who is intended to and does relay the information to the person who relies." The defendant Plastic Process Company by means of its representations hit the ultimate target at which it had aimed. That being the case, the concept of privity should not be so narrowly construed that that defendant is thereby insulated from responsibility for damage caused to the plaintiff by the inaccuracy of any representation made by it which was in the nature of a warranty. (Citations omitted.) (*Id.* at 513 - 514.)

Through its holding, *Presiding Bishop* recognizes that Petitioner here should prevail on an action for express warranty without privity or reliance, even under the old Sales Act.

B. *Thomas v. Olin Mathieson* (1967) 255 Cal.App.2d 806

The *Thomas* case addresses both express and implied warranties and applies the Sales Act, not the Commercial Code, because plaintiff purchased the product prior to the effective date (January 1, 1965) of the Commercial Code. (*Id.* at 809.)

Thomas holds that the implied warranty claims fail for lack of privity, but that privity is not required for express warranty, stating as follows:

> However, although the first and third causes of action [implied warranty] were properly dismissed, we conclude that the second count does state a cause of action based on express warranty. Where there is an express warranty by the manufacturer, no privity of contract is required. (*Seely v. White Motor Co., supra,* 63 Cal.2d 9.) A statement in a newspaper advertisement may be considered as part of the contract of sale (*Lane v. C.A. Swanson &* Sons (1955) 130 Cal.App.2d 210), and where a purchaser of a product relies on a representation on a label or in advertising material, recovery from the manufacturer may be allowed on the theory of express warranty without a showing of privity. (*Burr v. Sherwin Williams Co., supra,* 42 Cal.2d 682; *Smith v. Gates Rubber Co.* (1965) 237 Cal.App.2d 766). (*Id.* at 810-811.)

Reliance remains a requirement in *Thomas* through Civil Code § 1732.

C. *Rodrigues v. Campbell Industries* (1978) 87 Cal.App.3d 494

Rodrigues addresses express and implied warranties, and does not reference the Commercial Code. On the viability of the warranty causes of action, *Rodrigues* states:

> On the matter of liability under a breach of warranty theory, with certain exceptions not applicable here, privity between the plaintiffs and defendants remains a requirement for actions based upon the implied warranty of merchantability *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 695-696 and see *Hauter v. Zogarts*, 14 Cal.3d 104, 114, fn. 8 as well as the implied warranty of fitness *Anthony v. Kelsey-Hayes Co.*,

> 25 Cal.App.3d 442, 448. There was no privity here (see in this general connection cases collected in 16 A.L.R.3d 683).
>
> As was held in *Seely v. White Motor Co.*, *supra.*, 63 Cal.2d 9, at page 14, privity is not a requirement for actions based upon an express warranty. (*Id.* at 500.)

Rodrigues allows express warranty to proceed without privity. (*Id.* at 501.)

D. *Fundin v. Chicago Pneumatic* (1984) 152 Cal.App.3d 951

Fundin addresses express and implied warranties, and applies the Commercial Code. *Fundin* is vague on privity, stating:

> Privity of contract between a plaintiff and defendant is ordinarily required to recover for breach of warranty. (2 Witkin, Summary of Cal. Law (8th ed. 1973) Sales, §§ 187-188.) However, a number of exceptions to this requirement have been developed. For example, privity is not required when the goods involved are foodstuffs. (*Burr v. Sherwin Williams Co*. 42 Cal.2d 682, 695. Otherwise, when employees are injured by items bought by their employers, the courts have found a form of privity to exist despite the fact that no contract existed between the employee and the seller. (*Peterson v. Lamb Rubber Co*. (1960) 54 Cal.2d 339. No such exception applies in the case here as to plaintiff's implied warranty causes of action. (*Id.* at 956, fn. 1.)
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> * * *
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> However, plaintiff's cause of action based on breach of express warranty does not require privity of contract with Chicago; when a consumer relies on representations made by a manufacturer in labels or advertising material, recovery is allowable on the theory of express warranty without a showing of privity. (*Burr v. Sherwin Williams Co., supra.,* 42 Cal.2d 682, 696, and cases cited therein.) (*Id.* at 957.)

Fundin dispenses with implied warranty for lack of privity, but precludes the express warranty by statute of limitations of Com. Code § 2725. (*Id.* at 960 - 961.)

E. *Keith v. Buchanan* (1985) 173 Cal.App.3d 13

Keith addresses implied and express warranties in the context of the Commercial Code. *Keith* directs attention to analyzing "part of the basis of the bargain" set forth in Commercial Code § 2313, and the remaining role of reliance. *Keith* relies on *Hauter* to conclude that reliance has either been purposefully abandoned or possibly remains as an affirmative defense. (*Id.* at 22 - 23.) *Keith* finds no reason to resolve the issue since "[i]t is clear that the seller has not overcome the presumption that the representations regarding seaworthiness were part of the basis of this bargain." (*Id.* at 24.) *Keith* also analyzes the implied warranty and concludes that reliance remains a requirement. (*Id.* at 25.)

F. *Evraets v. Intermedics Intraocular* (1994) 29 Cal.App.4th 779

Evraets addresses express and implied warranties, and applies the Commercial Code. *Evraets* recognizes a difference in the law applied to

express warranty as opposed to implied warranty, stating:

> It is settled law in California that privity between the parties is a necessary element to recovery on a breach of an implied warranty of fitness for the buyer's use, with exceptions not applicable here." (*Anthony v. Kelsey-Hayes Co.* (1972) 25 Cal.App.3d 442, 448; *Rodrigues v. Campbell Industries* (1978) 87 Cal.App.3d 494, 500. The notable exception to this rule applies to manufacturers of foodstuffs. (*Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617, 621; *Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682, 695-696.) (*Id.* at 788.)
>
> * * *
>
> We note that privity is not a requirement for actions based upon an express warranty. (*Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 14; *Rodrigues v. Campbell Industries*, *supra*, 87 Cal.App.3d 494, 500.) (*Id.* at 789, fn. 4.)

Evraets concludes that the implied warranties fail for lack of privity but the express warranty does not. (*Id.* at 794.) *Evraets* wisely notes that express warranties are voluntarily given, while implied warranties are imposed by law. (*Id.* at 789.)

G. *Fieldstone v. Briggs Plumbing* (1997) 54 Cal.App.4th 357

Fieldstone addresses express and implied warranties, and applies the Commercial Code. *Fieldstone* states the *Burr* rule:

> As a general rule, privity of contract is a required element of an express breach of warranty cause of action. (*Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682, 695.) (*Id.* at 369.)

In addressing implied warranties, *Fieldstone* states:

> Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability. [Citations.]" (*U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441.) "[T]here is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale. [Citations.]" (*Burr v. Sherwin Williams Co., supra,* 42 Cal.2d at p. 695.) (*Id.* at 371.)

Fieldstone does not apply the harsh privity rule for express warranty, but instead precludes express warranty for lack of notice. (*Id.* at 370.) Only the implied warranty claims are precluded for lack of privity. (*Id.* at 371 - 372.)

H. *All West Electronics v. M-B-W* (1998) 64 Cal.App.4th 717

All West addresses only implied warranty and states the *Burr* rule on privity:

> The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale. (*Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682, 695-696; accord, *U.S. Roofing, Inc. v. Credit Alliance Corp., supra,* 228 Cal.App.3d at p. 1441; *Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 656.) (*Id.* at 725.)

Strangely, *All West* relies on *Evraets* (see ante p. 12 - 13), a case that holds that privity is not required for express warranty. (See *All West* at 725 - 726.)

I. *Windham v. Superior Court* (2003) 109 Cal.App.4th 1162

Windham addresses only implied warranties and applies the Commercial Code. *Windham* states the *Burr* rule:

> The general rule is that privity of contract [between the plaintiff and defendant] is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is [not] a party to the original sale. [Citations.]" (*Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682, 695 (*Id.* at 1169.)

Windham then extends the concept of privity to plaintiff, stating:

> [T]he term 'privity' itself appears to be of uncertain origin and meaning and to have been developed by the courts and applied in various contexts. [Citations.] One of the customary definitions is that 'privity' denotes mutual or successive relationship to the same thing or right of property; it implies succession. [Citation.] (*Id.* at 1169 - 1170.)

Windham allows recovery under implied warranty without direct contractual privity. (*Id.* at 1170.)

J. *Blanco v. Baxter* (2008) 158 Cal.App.4th 1039

Blanco addresses only implied warranties, and applies the Commercial Code.[1] *Blanco* states the *Burr* rule on privity:

> The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale. [Citations.] (*All West Electronics, Inc. v. M-B-W, Inc.* (1998) 64 Cal.App.4th 717, 725, 75 Cal.Rptr.2d 509.) (*Id.* at 1058 - 1059.)

Blanco rejects the plaintiff's implied warranty claim for lack of privity. Like *All West*, *Blanco* improperly relies on *Evraets*, which holds that privity is not required for express warranty.

K. *Cardinal Health v. Tyco* (2008) 169 Cal.App.4th 116

Cardinal Health addresses express and implied warranties and applies the Commercial Code. *Cardinal Health* analyzes the privity requirement for express and implied warranties, stating a general rule for implied warranties as follows:

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[1] *Blanco* is relied on by the Appellate Court here when it states the "general rule" as requiring privity for both express and implied warranties. (See Opinion, p. 18.)

> Although we agree that vertical privity is a necessary element of an implied warranty claim, we conclude the circumstances here come within the "direct dealings" exception to the privity requirement set forth in *U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 279 Cal.Rptr. 533 (*U.S.Roofing.*) (*Id.* at 138.)

The Court entertains a detailed analysis to determine whether or not there were sufficient "direct dealings" between the end user and the manufacturer to apply the exception to the privity requirement (*Id.* at 138 - 143), and concludes the "direct dealings" satisfy the requisite privity for implied warranties. (*Id.* at 143.)

The Court then turns its attention to express warranties, stating:

> Privity is generally not required for liability on an *express* warranty because it is deemed fair to impose responsibility on one who makes affirmative claims as to the merits of the product, upon which the remote consumer presumably relies. (*Hayman v. Shoemake* (1962) 203 Cal.App.2d 140, 157.) However, where the subject of the action is an implied warranty-i.e., one that is implied in law and *did not originate from the manufacturer's own statements or conduct*-there is no similar justification for imposing liability on a defendant in favor of every remote purchaser. (Emphasis in original.) (*Id.* at 143 - 144.)

Cardinal Health recognizes that requiring privity for a warrantor's voluntary express warranty is unfair to the remote purchaser. Implied warranty, on the other hand, is imposed by law, and it is unjust to the manufacturer if not limited by privity.

L. *Weinstat v. Dentsply* (2010) 180 Cal.App.4th 1213

Weinstat addresses only express warranty and relies heavily on the Commercial Code. *Weinstat* focuses directly on the meaning of "part of the basis of the bargain" in Commercial Code § 2313.

Weinstat provides the first thorough analysis of Commercial Code § 2313 since *Hauter* and *Keith*. *Weinstat* importantly notes that ". . . section 2313 focuses on *the seller's* behavior and obligation - his or her affirmations, promises, and descriptions of the goods - all of which help define what the seller "in essence" agreed to sell." (*Id.* at 1228.) *Weinstat* concludes that Commercial Code § 2313 eliminates the concept of reliance altogether, and that reliance no longer plays any role in an action based on express warranty. (*Id.* at 1226 - 1228.)

V.

FEDERAL COURTS APPLYING CALIFORNIA WARRANTY LAW RECOGNIZE THE CONFLICT BUT PERPETUATE THE CONFUSION

Federal Courts attempting to decipher California law on express and implied warranties find the law conflicted and confusing and come to divergent conclusions.

A. *Cellars v. Pacific Coast Packaging* (1999) 189 F.R.D. 575

Cellars addresses only express warranty, but does not analyze the Commercial Code. *Cellars* recognizes the confusion in the law, stating:

> The parties debate whether privity of contract is a requirement for an express warranty claim under California law. As the California Supreme Court noted in *Burr v. Sherwin Williams Co.,* 42 Cal.2d 682, 268 P.2d 1041 (1954), courts have traditionally required a showing of privity of contract in breach of express warranty actions. Over the years, however, California courts have developed a number of exceptions to the privity requirement. *Fundin v. Chicago Pneumatic Tool Co.,* 152 Cal.App.3d 951, 956 n. 1, 199 Cal.Rptr. 789 (1984). For instance, no privity is required in cases involving foodstuffs or in cases in which a manufacturer warrants its product in "labels or advertising material." *Burr,* 42 Cal.2d at 695-696, 268 P.2d 1041.
>
> Plaintiff argues that these exceptions have swallowed the rule, and that California courts no longer require privity *at all* in express warranty cases. Indeed, a few post-*Burr* cases contain language which supports plaintiff's theory. *See Seely v. White Motor Co.,* 63 Cal.2d 9, 14, 45 Cal.Rptr. 17, 403 P.2d 145 (1965) ("Since there was an express warranty to plaintiff in the purchase order, no privity of contract was required."); *Hauter v. Zogarts,* 14 Cal.3d 104, 115, 120 Cal.Rptr. 681, 534 P.2d 377 (1975) ("Privity is not required for an action based upon an express warranty.") (citing *Seely, supra*). Neither *Seely* nor *Hauter* expressly overruled *Burr,* and, in *Seely,* the California Supreme Court even cited *Burr* for the proposition that privity was not required. Notably, both *Seely* and *Hauter* involved written warranties similar to advertisements and labels, and therefore arguably fall within *Burr's* exception to the privity rule. (*Id.* at 579 - 580.)

After recognizing the confusion, the Court decides that privity remains a requirement, without discussing the impact of the Commercial Code. (*Id.* at 580.)

B. *Anunziato v. eMachines, Inc.* (2005) 402 F.Supp.2d 1133

Anunziato addresses express and implied warranties without applying the Commercial Code. *Anunziato* does not analyze privity for express warranty, but instead finds that the express warranty claim is time barred. (*Id.* at 1141.) Turning to the implied warranty, the Court states:

> In California, a "plaintiff alleging breach of warranty claims must stand in 'vertical privity' with the defendant." (*Id.*) "The term 'vertical privity' refers to links in the chain of distribution of goods. If the buyer and seller occupy adjoining links in the chain, they are in vertical privity with each other." *Osborne*, 198 Cal.App.3d at 656 n. 6, 243 Cal.Rptr. 815. Further, "if the retail buyer seeks warranty recovery against a manufacturer with whom he has no direct contractual nexus, the manufacturer would seek insulation via the vertical privity defense." (*Id.*) Finally, "there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale." *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 695, 268 P.2d 1041 (1954). (*Id.* at 1141.)

Anunziato then concludes that implied warranty fails for lack of privity. (*Ibid.*)

C. *Clemens v. DiamlerChrysler Corp.* (2008) 534 F.3d 1017

Clemens addresses express and implied warranties and applies the Commercial Code. The requirement of privity is not discussed in the context of express warranty. Rather, the express warranty claim is rejected

because "the repairs in the case were made after the warranty period expired." (*Id.* at 1023.)

Turning to implied warranty, *Clemens* finds that the plaintiff's action fails for lack of privity, stating:

> Clemens's implied warranty claim also fails, but for a different reason. Under California Commercial Code section 2314, the implied warranty provision invoked by Clemens, a plaintiff asserting breach of warranty claims must stand in vertical contractual privity with the defendant. *Anunziato v. eMachines, Inc.*, 402 F.Supp.2d 1133, 1141 (C.D.Cal.2005). A buyer and seller stand in privity if they are in adjoining links of the distribution chain. *Osborne v. Subaru of Am. Inc.*, 198 Cal.App.3d 646, 656 n. 6, 243 Cal.Rptr. 815 (1988). Thus, an end consumer such as Clemens who buys from a retailer is not in privity with a manufacturer. (*Id.* at 1023.)

Clemens then chronicles the exceptions to privity in the context of implied warranty, declining to create a new exception. (*Id.* at 1023 - 1024.)

D. *Wolph v. Acer America* (2009 WL 2969467 (N.D. Cal.))

Wolph addresses express and implied warranties but does not apply the Commercial Code. *Wolph* sets forth the elements for a cause of action for express warranty, without including privity:

> [T]o plead a cause of action for breach of express warranty, one must allege the exact terms of the warranty, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury." *See Williams v. Beechnut Nutrition Corp.*, 185 Cal.App.3d 135, 142, 229 Cal.Rptr. 605 (1986); *see also Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 696, 268 P.2d 1041 (1954). (*Id.* at 1.)

Wolph determines that the purported express warranty is "mere puffery" and cannot support a warranty claim. (*Id.* at 2.)

Turning to the implied warranties, *Wolph* states the *Burr* rule on privity:

> The general rule is that "privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale." *Burr*, 42 Cal.2d at 695, 268 P.2d 1041; *see also U.S. Roofing, Inc. v. Credit Alliance Corp.*, 228 Cal.App.3d 1431, 1441, 279 Cal.Rptr. 533 (1991). (*Id.* at 2.)

After analyzing the exceptions to privity in the context of implied and express warranties, the *Wolph* Court concludes that implied warranty fails for lack of privity. (*Id.* at 2 - 3.)

E. *Sanders v. Apple, Inc.* (2009) 672 F.Supp.2d 978

In *Sanders*, the Court addresses only express warranty, and applies the Commercial Code. In setting forth the elements of the cause of action for express warranty, *Sanders* does not require privity, stating as follows:

> To plead an action for breach of express warranty under California law, a plaintiff must allege: (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff's injury. *Williams v. Beechnut Nutrition Corp.*, 185 Cal.App.3d 135, 142, 229 Cal.Rptr. 605 (1986). (*Id.* at 986 - 987.)

Sanders then takes up the issue of reliance as it relates to "part of the basis of the bargain" under Commercial Code § 2313. *Sanders* concludes that reliance remains a requirement, stating:

> Yonai asserts that reliance is not required to support a claim for breach of express warranty, but rather that the statements become "part of the basis of the bargain" under California Commercial Code § 2313. *See Keith v. Buchanan*, 173 Cal.App.3d 13, 23, 220 Cal.Rptr. 392 (1985). However, another court this district has dismissed express warranty claims brought by a plaintiff who never saw the warranted statement, stating that "California courts have held that '[u]nder the law relating generally to express warranties a plaintiff must show reliance on the defendant's representation.'"

Sanders' conclusion on reliance is in direct conflict with *Weinstat.* (See ante p. 18.)

F. *Salinas v. City of San Jose* (2010 WL 725803 (N.D. Cal.))

Salinas addresses express and implied warranty claims, but does not apply the Commercial Code. *Salinas* recognizes a change in California warranty law, stating:

> California law once provided that privity of contract was necessary in an action for breach of either express or implied warranty and that no privity existed between the original seller and a subsequent purchaser unconnected to the original sale. *Burr v. Sherwin Williams Co.* 42 Cal.2d 682, 695, 268 P.2d 1041 (1954). As discussed below, over time exceptions to the privity requirement developed, and it appears to have been abandoned entirely in the context of express warranty claims. (*Id.* at 1.)

Salinas then analyzes implied warranty and concludes it is barred for lack of privity. (*Id.* at 2.) Turning to express warranty, *Salinas* states:

> Plaintiffs' claim based on *express* warranty, however, is a different matter. As the *Evraets* court noted, California case law generally has abolished the requirement of privity for express warranty claims. *Evraets,* 29 Cal.App.4th at 789 n. 4, 34 Cal.Rptr.2d 852 (citing *Seely v. White Motor Co.* 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145 (1965) and *Rodrigues v. Campbell Industries,* 87 Cal.App.3d 494, 151 Cal.Rptr. 90 (1978)). (*Id.* at 3.)

Salinas holds that privity is not a requirement for express warranty. (*Id.* at 3 - 4.)

VI.

DECISIONS NOT CERTIFIED FOR PUBLICATION, INCLUDING THIS UNPUBLISHED OPINION, SHOW THAT THE CONFUSION CONTINUES AND THAT LITIGANTS ARE OBTAINING WIDELY DIVERGENT RESULTS

Decisions not certified for publication continue the confusion of the above-referenced cases, and reveal the pervasiveness of the problem. These cases show that litigants are obtaining divergent results on express and implied warranty claims because of the serious confusion on the concepts of privity and reliance.[2]

A. *Zavala v. TK Holdings* (2004 WL 2903981 (Cal.App. 2 Dist.))

Zavala analyzes only express warranty, and does not apply the Commercial Code. *Zavala* states the *Burr* rule:

> The general rule is that privity of contract is required in an action for breach of either express or implied warranty, and that there is no privity between the original seller and a subsequent purchaser who is not a party to the original sale. (See *Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 720 [implied warranty].) When a consumer relies on

[2] Petitioner understands that unpublished opinions of the California Courts of Appeal are not authority for any proposition. (Rule of Court, Rule 8.1115(a)). Unpublished Federal decisions can be cited as persuasive but not precedential authority. (*Pacific Shore Funding v. Lozo* (2006) 138 Cal.App.4th 1342, 1352.) Petitioner cites these cases not as persuasive or precedential authority, but to emphasize the divergent decisions resulting from the confused state of the law.

> representations made by a manufacturer in labels or advertising material, however, recovery is allowable on the theory of express warranty without a showing of privity. (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 957; *Evraets v. Intermedics Intraocular, Inc., supra,* 29 Cal.App.4th at p. 789, fn. 4.) (*Id.* at 12.)

Zavala recognizes the legal confusion, stating:

> The parties debate whether privity of contract is a requirement for an express warranty claim under California law. As the California Supreme Court noted in *Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682 (*Burr*), courts have traditionally required a showing of privity of contract in breach of express warranty actions. Over the years, however, California courts have developed a number of exceptions to the privity requirement. (*Fundin v. Chicago Pneumatic Tool Co., supra,* 152 Cal.App.3d at p. 956, fn. 1 .) For instance, no privity is required in cases involving foodstuffs or in cases in which a manufacturer warrants its product in "labels or advertising material." (*Burr, supra,* at pp. 695-696.) Appellants argue that courts no longer require privity at all in express warranty cases. Indeed, a few post-*Burr* cases contain language which supports plaintiff's theory. (See *Seely, supra,* 63 Cal.2d at p. 14 ["Since there was an express warranty to plaintiff in the purchase order, no privity of contract was required"]; *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 (*Hauter*) ["Privity is not required for an action based upon an express warranty"].) Neither *Seely* nor *Hauter* expressly overruled *Burr.* Notably, both *Seely* and *Hauter* involved written warranties similar to advertisements and labels, and therefore arguably fall within *Burr's* exception to the privity rule. (*Id.* at 13.)

After reviewing conflicted law, *Zavala* denies plaintiff's claim on express warranty for lack of privity. (*Ibid.*)

B. *Bridge Street v. Superior Ct.* (2004 WL 1535616 (Cal.App. 3 Dist.))

Bridge Street addresses express and implied warranties, but does not apply the Commercial Code. The Court states the *Burr* rule:

> The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale.... Another possible exception to the general rule is found in a few cases where the purchaser of a product relied on representations made by the manufacturer in labels or advertising material, and recovery from the manufacturer was allowed on the theory of express warranty without a showing of privity." FN4 (*Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682, 695-696.)
>
> FN4. Some California cases have stated more broadly that "[p]rivity is not required for an action based upon an express warranty." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 114, fn. 8; see also *Evraets v. Intermedics Intraocular, Inc.* (1994) 29 Cal.App.4th 779, 789, fn. 4; *Rodrigues v. Campbell Industries* (1978) 87 Cal.App.3d 494, 500.) These cases, however, can be traced to the passage from the Supreme Court's decision in *Burr* set forth above, which makes clear that an action for breach of an express warranty can be maintained despite a lack of privity only where the purchaser of a product relies on representations made by the manufacturer in labels or advertising material. (*Id.* at 5.)

The Court holds that express warranty could proceed without privity due to plaintiff's alleged reliance, but that implied warranty fails for lack of privity. (*Id.* at 4.)

C. *Brothers v. Hewlett-Packard* (2007 WL 485979 (N.D. Cal.))

Brothers emphasizes the confusion in the law, stating:

> HP first argues that Brothers's claim fails for lack of privity of contract. HP cites *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 695-97 (1954), for the proposition that as a general rule privity is required in an action for breach of express warranty. In *Burr*, the court held that the trial court erred in instructing the jury that privity is not a requirement for *implied* warranties between a manufacturer and a subsequent purchaser. *Id.* at 696. Although the court observed that, in general, privity is a requirement for both express and implied warranty claims, the court's holding did not address express warranties. In *Seely v. White Motor Co.*, 63 Cal.2d 9, 14 (1965), the court, citing *Burr*, concluded that no privity of contract was necessary between the manufacturer and a subsequent purchaser because "there was an express warranty to plaintiff in the purchase order" from the manufacturer. Privity appears to remain a general requirement in breach of express warranty claim. *See All West Elecs., Inc. v. M-B-W, Inc.*, 64 Cal.App. 4th 717, 725 (1998) ("The general rule is that privity of contract is required in an action for breach of either express or implied warranty."); *Cellars v. Pac. Coast Packaging*, 189 F.R.D. 575, 580 (N.D.Cal.1999) ("privity of contract remains a requirement in express warranty actions"); *But see Hauter v. Zogarts*, 14 Cal.3d 104, 115 (1975) ("Privity is not required for an action based upon an express warranty."). (*Id.* at 3.)

Brothers concludes that the case is more analogous to *Seely* and that the representations made therein were to the end user of the HP product. Consequently, the breach of express warranty action was not barred for lack of privity. (*Ibid.*)

D. *Davis v. Louisiana-Pacific* (2008 WL 2030495 (Cal.App. 5 Dist.))

Davis analyzes only implied warranty and does not apply the Commercial Code. *Davis* recognizes that privity is required for an implied warranty action. The Court also recognizes the confusion on privity, stating:

> We are also not persuaded by plaintiffs' suggestion based on *Atkinson* that it would be inconsistent to recognize privity when evaluating claims that the express warranties were breached, and yet reach the opposite conclusion when evaluating claims that the implied warranty of merchantability was breached. Privity is not a requirement for actions based upon express warranty. (*Rodrigues v. Campbell Industries* (1978) 87 Cal.App.3d 494, 500, 151 Cal.Rptr. 90.) We recognize that the so-called inconsistency is not without foundation. It is the breach of promises actually made and intended to reach the ultimate consumer that gives rise to an express-warranty cause of action, not the breach of implied warranties arising by operation of law. In any event, vertical privity remains a requirement in actions for breach of an implied warranty until the Supreme Court or the state Legislature declares otherwise. FN2
>
> FN2. We are aware that the rule has been criticized by legal scholars and has not been followed in all states. (See 4 Witkin, Summary of Cal. Law (10th ed. 2005) Sales, § 98, p. 99 ["The privity requirement has been strongly attacked, and a legislative and judicial trend away from it is apparent"].) (*Id.* at 4.)

The *Davis* Court then concludes that the implied warranty claims fail for lack of privity. (*Ibid.*)

E. *Wiley v. Yihua Intl.* (2009 WL 3720903 (Cal.App. 4 Dist.))

Wiley addresses only express warranty, applying Commercial Code § 2313. *Wiley* finds that the written warranty did not become "part of the basis of the bargain" because the initial purchaser bought the product "as is," without any warranty. In essence, the Court held that a subsequent purchaser could not "resurrect" a warranty that was "taken out of the agreement." (*Id.* at 4 - 6.)

The *Wiley* Court then addresses an alternative theory to reject the express warranty claim, lack of privity, even though it was not addressed by the parties. *Wiley* first states the *Burr* rule that privity is required. (*Id.* at 6.) *Wiley* then criticizes its own recent *published* opinion in *Cardinal Health,* concluding the statement that privity is not required for express warranty, is dicta. (*Id.* at 6, fn. 5.) Like the Opinion here, *Wiley* and *Cardinal Health* are each decisions of the Fourth District, Division One.

VII.

THE CONFUSION IN THE LAW IS RELATED TO ENACTMENT OF THE COMMERCIAL CODE AND DIFFICULTY ASCERTAINING ITS IMPACT ON WARRANTY LAW

California Commercial Code § 2313 replaces Civil Code § 1732 and does not require reliance. The implied warranties of merchantability (§ 2314) and fitness for a particular purpose (§ 2315) replace Civil Code §

1735. Rarely have courts analyzed the impact of these new statutes to pre-existing case law.[3]

Interestingly, California did not enact § 2-318 of the Uniform Commercial Code, the provision that addresses extension of warranty beyond privity. The comments to § 2318 reveal that the Legislature understood that Uniform Com. Code § 2-318 did not go far enough in abolishing the concept of privity.

The commentators state:

> This section of the code wipes out the distinction between food and drugs and other goods, but it does not go as far in abolishing the privity requirement in terms of the parties eligible to sue as the wording of the California cases does.
>
> * * *
>
> This section in its present form is not suitable for enactment in California. Whatever gains accrue from wiping out the distinctions between food and drugs and other goods are more than offset by the restrictions on the designation of parties entitled to sue in warranty -- restrictions already rejected by the California courts.
>
> * * *
>
> This section, as presently drawn, was apparently intended to extend liability in states having a much more restrictive law of privity of contract than California. In California, it would be a step backward. (See Com. Code § 2318, California Code Comment, Progress Report to Legislature (1959 - 1961).

[3] Other than *Hauter, Keith* and *Weinstat*, Petitioner is aware of no California cases addressing the impact of this dramatic change in warranty law.

Although California's refusal to enact § 2-318 may be the cause of present day confusion, it was certainly not intended to strengthen any privity requirement, which appears to be the unfortunate result.

VIII.

THE OPINION HERE REQUIRES RELIANCE AT THE TIME OF PURCHASE FOR ENFORCEMENT OF EXPRESS WARRANTY

As an exception to the purported privity requirement, the Opinion requires that *Hotel* prove that it relied on the warranty at the time *Construction* purchased the air conditioning units from First Co. The Opinion states this requirement several times as follows:

> However, we disagree with *Hotels*' contention that under the California Uniform Commercial Code, a remote purchaser may enforce an express warranty that it was not aware existed prior to its receiving the products in question. (Opinion at p. 17.)
>
> * * *
>
> In fact, *Hotels* has pointed to no evidence in the record that would support the jury's conclusion that *Hotels* relied on any of First Co.'s statements "in deciding to use the HVAC units." (Opinion at p. 23.)
>
> * * *
>
> Notably, *Hotels* does not cite to any evidence that would support the jury's finding that *Hotels*, as opposed to *Construction*, relied on First Co.'s warranty "*in deciding to use* the HVAC units." (Opinion at p. 24.)

* * *

> However, the concepts of "reliance" and "basis of the bargain" are not co-extensive, and should not be treated as such. A plaintiff must demonstrate that a defendant made a statement of fact or promise that "became part of the basis of the bargain" (Cal. U. Com. Code, § 2313) by showing either that the defendant made the statement or promise to the plaintiff or that it was made available to the plaintiff, or that the plaintiff considered the statement as part of the bargain *at the time* the plaintiff decided to purchase the product or *in connection with* the plaintiff purchasing the product. After a plaintiff who is not in privity with the defendant makes such a showing, the defendant can overcome the presumption of reliance that is created as a result of statements of fact or promises that "became a part of the basis of the bargain," by affirmatively establishing that this plaintiff did not, in fact, rely on those statements of fact or promises. (Emphasis in original.) (Opinion, p. 27, fn. 15; See Modified Opinion, p. 2.)

* * *

> Here, in contrast, there is simply no evidence that *Hotels* relied, or could have relied, on the warranty in deciding to use the First Co. HVAC units. (Opinion, p. 31.)

In making these statements, the Opinion refuses to follow *Weinstat*, where the Court holds that reliance was eliminated by § 2313. Not only does the Opinion conclude that reliance remains a requirement for express warranty, but also that reliance must occur at the time the product is initially sold. In other words, according to the Opinion, an end user must not only rely on the express written warranty, but must somehow rely at the time the original purchaser bought the product from the manufacturer.

Rather than recognize that reliance is abolished by § 2313, the Opinion requires reliance, and makes its timing crucial.

IX.

SINCE FIRST CO. KNEW *HOTEL* WAS THE END USER OF THE HVAC UNITS WHEN IT SOLD THE PRODUCT TO *CONSTRUCTION*, PRIVITY WAS ESTABLISHED FOR IMPLIED WARRANTY

Privity remains a requirement for implied warranties. The Opinion sets forth a restrictive view of privity, requiring a direct contractual relationship and consideration. (Opinion, p. 39-40.) The Court found that the relationship between First Co. and *Hotel* was insufficient because there was no "contract between First Co. and *Hotels.*" (*Ibid.*) The Court also found "the record is unclear as to which Hardage entity the warranty was extended." (*Ibid.*)

At trial, First Co.'s sales representative testified he knew the HVAC units were intended for use at *Hotel* when entering into the purchase order with *Construction.* (3 RT 388 - 389; 8 CT 2063; 3 RT 423.) The purchase order contract itself expressly recognizes that the HVAC units are for "work at Woodfin Suites Hotel." (8 CT 2061.) The warranty extends "for a period of one year from the date of original installation." (6 CT 1652.) After the units failed, *Hotel* wrote a letter to First Co. confirming extension of the warranty. (8 CT 2054.)

The Court of Appeal does not address any of this evidence in the Opinion or Modification. Instead, the Court requires that *Hotel* prove it was the party that purchased the HVAC units from First Co. The Court further held that these facts did not make *Hotel* a third party beneficiary of the contract, despite the holding in *Gilbert Financial v. Steelform* (1978) 82 Cal.App.3d 65. (See Opinion, p. 40 - 45.) Such a restrictive view of privity is not in accord with the cases set forth herein, and unduly inhibits recovery for implied warranty.

X.

IN ORDER TO FURTHER THE LEGISTLATIVE INTENT OF PROMOTING SETTLEMENT, A CCP § 998 OFFER MUST BE INTERPRETED AS AN OFFER TO SETTLE THE ENTIRE ACTION BETWEEN THE PARTIES UNLESS IT EXPRESSLY STATES OTHERWISE

First Co. made a pre-trial CCP § 998 offer to *Construction*, which was accepted. It is undisputed that the offer does not address, exclude or preserve any claim against *Construction*, but instead offers to settle "the above entitled action." The trial Court held that First Co. could proceed with a later filed Cross-Complaint against *Construction*, even though the potential future cross-claim was not excluded from the scope of the offer.

Applying strict rules of contract interpretation, and ignoring the legislative intent of CCP § 998, the Court of Appeal looked to the actions of the parties after the offer and acceptance to determine the scope of the offer, and upheld the trial Court's ruling. [See Opinion, p. 47 - 51.] The Opinion states:

> We reject *Construction*'s argument that under *Westamerica Bank* parties could presume that all the claims against each other would be resolved in the absence of express language excluding some of those claims. (Opinion, p. 57.)

The Opinion does not discuss the legislative intent of CCP § 998. The very essence of the offer to compromise statute is its encouragement of settlement. (*One Star, Inc. v. Staar Surgical Co.* (2009) 179 Cal.App.4th 1082, 1089.) General contract principles should be invoked in applying § 998 only where such principles neither conflict with the statute nor defeat its purpose, which purpose is the encouragement of pre-trial settlement. (*Id.* at 1089-1090.) 998 offers are to be strictly construed against the offeror. (*Bird v. Darden* (2004) 120 Cal.App.4th 721, 727.) The legislative purpose of the offer of judgment rule is generally better served by bright line rules that can be applied to statutory settlement offers, at least with respect to the application of contractual principles in determining the validity and enforceability of a settlement agreement. (*Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 142.)

If the recipients of 998 offers cannot reasonably presume that the offer seeks to settle the entire action between the parties, settlements will be greatly inhibited. 998 offers that fail to describe any retained claims will be rejected by the offeree as too vague for acceptance. Here, Petitioner was punished for accepting First Co.'s (arguably) vague offer.

A simple bright line rule is fair, equitable and encourages settlement: A 998 offer will be presumed to offer settlement of the entire action, unless the offer specifically states otherwise. This Supreme Court should provide such a general rule to breath life into § 998 and further the legislative intent of encouraging settlement.

XI.

CONCLUSION

California warranty law begs for clarification. This case provides an excellent opportunity to secure uniformity of decision and settle an important question of law. The resulting clarification of warranty law will be a victory for all Californians.

Dated: McATEE • HARMEYER LLP

By: _____
JEFF G. HARMEYER
Attorney for Petitioners

CERTIFICATE OF WORD COUNT

PURSUANT TO RULE OF COURT 8.204(c)(1)

I, JEFF G. HARMEYER, declare:

1. I am an attorney at law duly licensed to practice before all Courts of the State of California and a partner of McAtee • Harmeyer, LLP, attorneys of record for Appellants Hardage Hotels X, LLC, successor in interest to Hardage Hotels III, LLC and Hardage Construction Corporation.

2. According to my computer, the word count, including footnotes of this Petition for Review is 8,379 words, which is less than the maximum amount of words allowed by Rules of Court, Rule 8.504(d)(1) word limit.

Executed on this 25th day of May, 2010 at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____

JEFF G. HARMEYER