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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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LYNDA CARTWRIGHT and LLOYD
CARTWRIGHT, on behalf of
themselves and all others
similarly situated,

Plaintiffs,

NO. 2:07-cv-2159 FCD EFB

v.

VIKING INDUSTRIES, INC., an
Oregon Corporation, and DOES
1-100 inclusive,

Defendants.

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This matter is before the court on defendant Viking
Industries, Inc. ("Viking" or "defendant") motion for
reconsideration, pursuant to Rules 23(c)(1)(C) and 59(e) of the
Federal Rules of Civil Procedure, of the court's September 14,
2009 Memorandum and Order (the "September 14 Order"), granting in
part and denying in part plaintiffs' motion for class

1 certification.¹ Specifically, the court certified the following
2 class with respect to plaintiffs' Consumer Legal Remedies Act
3 ("CLRA"), Unfair Competition Law ("UCL"), fraudulent concealment
4 and unjust enrichment claims:

5 All current and past owners of residential property in
6 California in which Viking Series 3000 windows
7 manufactured by Viking Industries Inc. between
8 approximately March 1, 1991 and 1999 (the "Class
9 Period") are or have been installed. The proposed
10 class includes property owners who have replaced their
11 Viking windows. Excluded from the Plaintiff Class are
12 the Defendant, any entity in which Defendant has a
13 controlling interest, and their legal
14 representatives, heirs and successors, and any judge to
15 whom this case is assigned, and any member of the
16 judge's immediate family. Claims for personal injury
17 are excluded from the claims of the Plaintiff Class
18 which are alleged herein.

13 The court also certified the following subclass with respect to
14 plaintiffs' breach of express and implied warranty claims:

15 All original owners of residential property in
16 California who are the first occupant resident owner in
17 which Viking Series 3000 windows manufactured by Viking
18 Industries Inc. between approximately March 1, 1991 and
19 1999 (the "Class Period") are or have been installed.
20 The proposed class includes property owners who have
21 replaced their Viking windows. Excluded from the class
22 are named Plaintiffs in pending lawsuits against Viking
23 Industries, Inc. relating to Series 3000 windows other
24 than in Cartwright v. Viking; also excluded is the
25 Defendant, any entity in which the Defendant has a
26 controlling interest, and their legal representatives,
27 heirs and successors, and any judge to whom this case
28 is assigned, and any member of the judge's immediate
family. Claims for personal injury are excluded from
the claims of the Plaintiff Class which are alleged
herein.

24 However, the court denied plaintiffs' motion for class
25 certification with respect to their claims for strict liability
26 and negligence.

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28 ¹ Because oral argument will not be of material
assistance, the court orders this matter submitted on the briefs.
E.D. Cal. Local Rule 78-230(h).

1 Rule 23(c)(1)(C) provides that "[a]n order that grants or
2 denies class certification may be altered or amended before final
3 judgment." However, under Rule 59(e), "a motion for
4 reconsideration should not be granted, absent highly unusual
5 circumstances, unless the district court is presented with newly
6 discovered evidence, committed clear error, or if there is an
7 intervening change in the controlling law." 389 Orange St.
8 Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999).

9 Defendant asks the court to reconsider the September 14
10 Order and decertify the class. Specifically, defendant contends
11 that it was clear error (1) to rely on Viking's lifetime warranty
12 and associated marketing to support certification of fraud claims
13 by subsequent owners; (2) to adopt a presumption of reliance with
14 respect to plaintiffs' UCL, CLRA, and fraud claims; and (3) to
15 accept plaintiffs' theory of defect as a sufficient basis for
16 certification.

17 With respect to defendant's first and second arguments, the
18 court notes that, contrary to defendant's assertion, the court
19 did not rely solely on the lifetime warranty and associated
20 marketing in finding that common issues of law and fact
21 predominated. Rather, the court emphasized plaintiffs'
22 allegations and supporting evidence that defendant fraudulently
23 concealed the defective nature of the window products in order to
24 induce plaintiffs and class members to purchase them. This
25 allegation of non-disclosure applied to all owners, original and
26 subsequent.² The court concluded that plaintiffs' allegations of

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28 ² To the extent Viking's warranty contains language that
limits coverage to original owners, the court certified a
subclass for plaintiffs' breach of express and implied warranties

1 fraudulent concealment satisfied the predominance requirement
2 because the common question of the materiality of the non-
3 disclosed defects may establish common causation. Further, the
4 court relied upon various California and federal court decisions
5 that supported this conclusion. While defendant may seek to
6 distinguish these cases and may disagree with the court's
7 interpretation, it has failed to demonstrate that the court
8 committed clear error.

9 With respect to defendant's third argument, defendant's
10 assertion regarding the need for individualized proof of actual
11 damage is contrary to plaintiffs' theory of liability.
12 Plaintiffs allege that defendants' window products are inherently
13 defective and present evidence that such defects are
14 substantially certain to result in malfunction during the useful
15 life of the window products. The court concluded that the issue
16 of whether the window products were inherently defective was
17 common to the class. Further, the court noted that to the extent
18 proof of actual damage is necessary to claims of monetary
19 damages, such individualized determinations can be made after
20 common questions of liability are decided. Accordingly, despite
21 defendant's vigorous advocacy and argument relating to the true
22 nature of plaintiffs' claims, on the record before it, the court
23 did not commit clear error.³

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25 claims. Defendant's attempt to broadly conflate the elements of
26 plaintiffs' warranty claims with the statutory and fraud claims
is misplaced under the current record and argument.

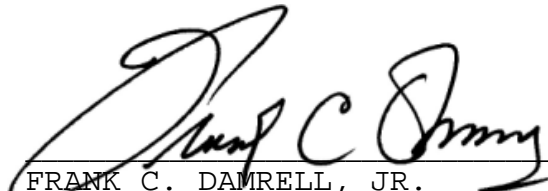
27 ³ Because the court does not reconsider its certification
28 order with respect to the statutory and common law fraud claims,
it does not address defendant's argument that the remaining class
is duplicative and thus, fails the superiority requirement.

1 Finally, the court notes that neither plaintiffs nor
2 defendant have filed a motion for summary judgment or summary
3 adjudication in this litigation. Indeed, the Ninth Circuit has
4 specifically noted that "summary judgment, and decertification,
5 are available to refine and narrow the class and issues that are
6 amendable to class action treatment." Jenson v. Fiserv Trust
7 Co., 256 Fed. Appx. 924 (9th Cir. Nov. 26, 2007) (affirming class
8 certification and noting the need for a more fully developed
9 record to ensure the continued viability of the certified class).
10 Because defendant's motion is based upon the same factual and
11 legal arguments previously addressed in the court's September 14
12 order, there is insufficient bases for the court to reconsider
13 class certification.

14 Accordingly, defendants' motion for reconsideration and
15 decertification is DENIED.

16 IT IS SO ORDERED.

17 DATED: November 17, 2009.

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19 FRANK C. DAMRELL, JR.
20 UNITED STATES DISTRICT JUDGE
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