

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KIRK KEILHOLTZ and KOLLEEN KEILHOLTZ,
for themselves and on behalf of those
similarly situated,

Plaintiffs,

v.

LENNOX HEARTH PRODUCTS INC.; LENNOX
INTERNATIONAL INC.; LENNOX INDUSTRIES
and DOES 1 through 25, Inclusive,

Defendants.

No. C 08-00836 CW

ORDER DENYING
DEFENDANTS' MOTION
FOR LEAVE TO FILE
MOTION FOR
RECONSIDERATION

Defendants move for reconsideration of the Court's February
16, 2010 Order granting Plaintiffs' motion for class certification.
Under Civil L.R. 7-9, a party may ask a court to reconsider an
interlocutory order if the party can show:

(1) That at the time of the motion for leave, a material
difference in fact or law exists from that which was
presented to the Court before entry of the interlocutory
order for which reconsideration is sought. The party
also must show that in the exercise of reasonable
diligence the party applying for reconsideration did not
know such fact or law at the time of the interlocutory
order; or

(2) The emergence of new material facts or a change of

1 law occurring after the time of such order; or

2 (3) A manifest failure by the Court to consider material
3 facts or dispositive legal arguments which were presented
to the Court before such interlocutory order.

4 Defendants argue that the Court should reconsider its
5 order in light of the recent Ninth Circuit decision Birdsong v.
6 Apple, Inc., 590 F.3d 955 (9th Cir. 2009), filed on December
7 30, 2009. Defendants had the opportunity to notify the Court
8 of this decision before the Court issued its order on
9 Plaintiffs' motion for class certification, but did not do so.
10 Although the parties cannot be faulted for not knowing the
11 precise date the Court will file its orders, they should bring
12 to the Court's attention as soon as possible any facts or law
13 that may affect the motion. Because Defendants waited until
14 after the Court filed its order granting Plaintiff's motion for
15 class certification to notify it of a decision published before
16 the filing of the order, Defendants' motion for leave to file a
17 motion for reconsideration does not fall under any of the three
18 categories described above.

19 Moreover, Birdsong has no effect on the Court's class
20 certification decision. In Birdsong, consumers brought a class
21 action lawsuit under California's Unfair Competition Law against
22 Apple, the manufacturer of a digital audio player, the iPod. The
23 consumers alleged that iPods are defective because of the inherent
24 risk of noise-induced hearing loss users may suffer. The court
25 concluded that the lower court correctly dismissed the plaintiffs'
26 UCL claims for lack of standing. The court analyzed the issue as
27 follows:

1 The plaintiffs do not claim that they suffered or imminently
2 will suffer hearing loss from their iPod use. The
3 plaintiffs do not even claim that they used their iPods in a
4 way that exposed them to the alleged risk of hearing loss.
5 At most, the plaintiffs plead a potential risk of hearing
6 loss not to themselves, but to other unidentified iPod users
7 who might choose to use their iPods in an unsafe manner.
8 The risk of injury the plaintiffs allege is not concrete and
9 particularized as to themselves.

10 Birdsong, 590 F.3d at 960 (emphasis in original). The instant case
11 is not about people using Defendants' fireplaces "in an unsafe
12 manner." Rather, it is about using Defendants' fireplaces in any
13 manner at all. Plaintiffs allege that the glass covering
14 Defendants' fireplaces reaches such high temperatures that they are
15 unsafe to operate. As Kolleen Keilholtz noted, she "ceased using
16 [her] Superior fireplace given the hazard it poses," not because of
17 the hazard it may pose. Kolleen Keilholtz Decl. ¶ 6. Moreover,
18 Ms. Keilholtz noted that, if she had known of the high glass
19 surface temperature the fireplace generates during its operation,
20 she would not have paid for, or even allowed, the fireplace to be
21 installed in her home. Id. Thus, Plaintiffs have alleged a
22 sufficient injury in fact to confer standing.

23 Defendants also argue that a notice sent on December 30, 2009
24 by the Consumer Product Safety Commission (CPSC) establishes that
25 Plaintiffs lack standing. The CPSC has the power to order product
26 recalls, but the agency stated that it would not take action on the
27 fireplaces at issue. Just as the agency's decision to recall a
28 product would not necessarily establish Plaintiffs' standing, the
29 agency's decision not to recall a product does not establish
30 Plaintiffs' lack of standing.

31 Accordingly, the Court denies Defendants' motion for leave to

1 file a motion for reconsideration. Docket No. 247.

2 IT IS SO ORDERED.

3 Dated: 06/04/10



CLAUDIA WILKEN
United States District Judge

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