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17 UNITED STATES DISTRICT COURT  
 18 NORTHERN DISTRICT OF CALIFORNIA  
 19 (OAKLAND DIVISION)

20

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

22 Plaintiffs,

23 v.

24 LENNOX INDUSTRIES INC.; LENNOX  
 25 HEARTH PRODUCTS INC.; LENNOX  
 INTERNATIONAL INC., and DOES 1  
 26 through 25, inclusive,

27 Defendants.

28

NO. 4:08-CV-00836-CW (JCS)

**ORDER (1) CERTIFYING CLASS; (2)  
 GRANTING PRELIMINARY  
 APPROVAL; (3) PROVIDING FOR  
 NOTICE; AND (4) SETTING SCHEDULE  
 FOR FINAL APPROVAL**

1           WHEREAS, the Plaintiffs have made application, pursuant to Federal Rule of Civil  
2 Procedure 23, for an order (the “Preliminary Approval Order”) to (i) certify the Settlement Class;  
3 (ii) preliminarily approve the Settlement of the Federal Action, in accordance with the Stipulation  
4 and Agreement of Settlement dated as of November 12, 2010 (collectively, including the  
5 Exhibits, the “Settlement Agreement”); (iii) approve notice for dissemination to the members of  
6 the Settlement Class; and (iv) set a schedule for determination of whether the proposed  
7 Settlement should be finally approved, resulting in the dismissal with prejudice of the Federal  
8 Actions and the State Action (collectively, the “Actions”).

10           WHEREAS, this Preliminary Approval Order incorporates by reference the definitions in  
11 the Settlement Agreement, and all capitalized terms contained in this Preliminary Approval Order  
12 shall have the same meanings as set forth in the Settlement Agreement (in addition to those  
13 capitalized terms defined in this order); and

15           WHEREAS, the Court having considered the papers filed in support of the Agreed  
16 Motion for Preliminary Approval of Settlement, including without limitation, the Settlement  
17 Agreement, and having reviewed the evidence, including without limitation the declarations  
18 submitted, and having heard the arguments at the preliminary approval hearing:

19           NOW THEREFORE, IT IS HEREBY ORDERED:

20           1.       The Court has subject matter jurisdiction over the Federal Action, including all  
21 matters necessary to effectuate the Settlement, pursuant to 28 U.S.C. §1332(d).

23           2.       In order to effectuate the Settlement, the Court hereby modifies the Court’s prior class  
24 certification order dated February 16, 2010, which order shall be replaced and superseded  
25 entirely by this Preliminary Approval Order.

26           3.       The Court preliminarily certifies, for settlement purposes only, the following  
27 Settlement Class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, as defined in  
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1 this paragraph 3 (a)-(e). The following Settlement Class shall be the only certified class in this  
2 Federal Action and the definition of the Class in the Court's prior class certification order dated  
3 February 16, 2010 is hereby rendered inoperative.

4 a) All consumers who are residents of the United States and who own homes or  
5 other residential dwellings in which one or more Superior or Lennox brand single-pane sealed  
6 glass front gas fireplaces have been installed since February 6, 2004, through the date the Court  
7 preliminarily approves the Settlement; and  
8

9 b) All consumers who are residents of California and own homes or other  
10 residential dwellings in which one or more Superior brand single-pane glass sealed front gas  
11 fireplaces have been installed between March 1, 2003 and February 5, 2004.

12 c) The Settlement Class is hereby closed as of the date of this Preliminary  
13 Approval Order.  
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15 d) For purposes of the Settlement Class definition, "consumer" means an  
16 individual who bought his or her home or fireplace for personal, family or household purposes.

17 e) Excluded from this class are: (1) the judge to whom this case is assigned and  
18 any member of the judge's immediate family; (2) the lawyers in this case and any member of  
19 their immediate families; (3) the Mediator (the Honorable Edward Infante) and any member of  
20 his immediate family; and (4) anyone who suffered personal injury related to the Defendants'  
21 fireplaces.  
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23 4. The Court appoints the following Plaintiffs to serve as representative of the Settlement  
24 Class ("Class Representative"): Kirk Keilholtz; Kolleen Keilholtz; Anissa Nelson-Fields; Jerry  
25 Fields; Rich Perry; and, Donna Perry. The Court appoints the following lawyers to serve as  
26 counsel for the Settlement Class ("Class Counsel"): Kirk Wolden; Michael Ram; and, Jerome  
27 Tapley.  
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1           5.       Solely for the purposes of effectuating the Settlement, with respect to the Settlement  
2 Class and pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court further  
3 preliminary finds and concludes that:

4                   a)       joinder of all members of the Settlement Class in a single proceeding would be  
5 impracticable, if not impossible, because of their number and dispersion;

6                   b)       no conflict exists between the Class Representative or Class Counsel and the  
7 Settlement Class;

8                   c)       the Class Representative and Class Counsel are adequate representatives for  
9 the Settlement Class;

10                   d)       the Class Representative's claims are typical of the Settlement Class;

11                   e)       the Class Representative is a member of the Settlement Class and has claims  
12 representative of the claims and defenses presented in this case;

13                   f)       commonality is satisfied in this case for settlement purposes as a number of  
14 common issues exist among members of the Settlement Class;

15                   g)       common issues predominate over individual issues in the context of  
16 settlement; and

17                   h)       certification of an agreed-upon settlement class is a superior mechanism for  
18 resolving these claims.

19           6.       Subject to further consideration at the Settlement Approval Hearing described below,  
20 the Court preliminarily approves the Settlement Agreement and the Settlement contemplated  
21 thereby, including the terms and conditions for settlement and dismissal with prejudice of the  
22 Federal Action. The Parties entered into the Settlement Agreement in good faith following arms-  
23 length negotiation by counsel, including mediation sessions with the Honorable Edward Infante,  
24 retired Chief Magistrate Judge of the U.S. District Court, Northern District of California.  
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1       7.       The Court appoints Kinsella Media as the Notice Expert for the Settlement Class, who  
2 will administer the Notice Plan in accordance with the Settlement Agreement.

3       8.       The Court finds that the proposed long-form and summary notices attached as the  
4 revised Exhibits A and B to this Preliminary Approval Order (“Notices”, "Exhibit A", "Exhibit  
5 B"), Docket No. 278, and the Notice Plan attached as the revised Exhibit C to the Settlement  
6 Agreement ("Exhibit C"), Docket No. 279, fully satisfy Rule 23 of the Federal Rules of Civil  
7 Procedure and the requirements of due process, and provide for the best notice practicable under  
8 the circumstances. The Court further gives its approval to the form, content and disseminating  
9 procedures for the Notices to the Settlement Class as set forth in the Notice Plan, which shall  
10 include the following, without limitation:

11               a)       Not later than twenty days following entry of this Preliminary Approval Order  
12 or as soon thereafter as practicable, the Notice Expert shall cause a copy of the long-form notice,  
13 substantially in the form annexed as Exhibit A to this Preliminary Approval Order, to be mailed  
14 by first class mail to all individuals that Defendants have identified on the list transmitted to  
15 Plaintiffs’ Counsel on July 1, 2010;

16               b)       Not later than twenty days following entry of this Preliminary Approval Order  
17 or as soon thereafter as practicable, the Notice Expert shall cause a copy of the summary notice,  
18 substantially in the form annexed as Exhibit B to this Preliminary Approval Order, to be  
19 published through consumer magazines, newspaper supplements and online media as detailed in  
20 the Notice Plan;

21               c)       Not later than twenty days following entry of this Preliminary Approval Order  
22 or as soon thereafter as practicable, the Notice Expert shall cause the release on Business Wire  
23 and PR Newswires US1 National Wire of a copy of the summary notice, substantially in the form  
24 annexed as Exhibit B to this Preliminary Approval Order;

1           d)     The Notices will contain information directing the readers to a website at  
2 www.LennoxHearthClass.com and an automated telephonic hotline at 877-896-4837 that will  
3 provide information concerning the Settlement, including, if desired, copies of the Notices. The  
4 English language version of the long form notice shall include a statement in Spanish that a  
5 Spanish version of the long form notice will be available on the settlement website.

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7           9.     On or before May 26, 2011, the Notice Expert will file proof with the Court (by an  
8 appropriate affidavit or declaration) of providing the required notification to the Settlement Class.

9           10.    Defendants properly and timely notified the appropriate state and federal officials of  
10 the Settlement Agreement, as required by the Class Action Fairness Act of 2005 (“CAFA”), 28  
11 U.S.C. § 1715. The Court has reviewed the Defendants’ CAFA notices and accompanying  
12 materials, and finds that they complied with the applicable requirements of CAFA. Defendants  
13 also have provided a copy of these submissions to Class Counsel.

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15           11.    The Court appoints Rust Consulting as the Settlement Administrator, who will  
16 administer the Claims Administration Plan in accordance with the Settlement Agreement.

17           12.    The Court finds that the proposed Claims Administration Plan (attached as Exhibit D  
18 to the Settlement Agreement) fairly and adequately addresses the matters of settlement  
19 administration, claims submission and distribution of the Class Settlement Consideration to  
20 Authorized Claimants. To become an Authorized Claimant to the Class Settlement  
21 Consideration in the event the Settlement is finally approved, a member of the Settlement Class  
22 must submit a claim in the manner set forth in the instructions accompanying the Claim Form. In  
23 the event of final approval and after the occurrence of the Effective Date, Defendants will make  
24 distributions of the Class Settlement Consideration to Authorized Claimants in accordance with  
25 the Claims Administration Plan and the Settlement Agreement.  
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1       13. Any member of the Settlement Class shall have the right to opt out of the Settlement  
2 Class by sending a written request for exclusion from the Settlement Class to the address listed in  
3 the long form notice, postmarked no later than **May 2, 2011**. To be effective, the request for  
4 exclusion must (a) include the Person's statement indicating the desire to be excluded from the  
5 Settlement in *Keilholtz v. Lennox Hearth Products* and (b) fully comply with the requirements for  
6 exclusion set forth in the Claims Administration Plan. On or before May 26, 2011, the  
7 Settlement Administrator shall provide to the Court and Parties' Counsel the names and  
8 addresses of the Persons who timely and properly opted out of the Settlement Class, as well as  
9 the total number of such Persons.  
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12       14. The Court will exclude from the Settlement Class those who timely and validly  
13 request exclusion in substantial compliance with the requirements of this Preliminary Approval  
14 Order and the Claims Administration Plan. If a timely and valid request for exclusion is made by  
15 a member of the Settlement Class, then that member will not be entitled to participate in the  
16 Settlement and cannot object to the Settlement. In the event the Settlement is finally approved,  
17 all members of the Settlement Class (whether or not he/she or it submits a valid Claim Form)  
18 who have not validly excluded themselves from the Settlement Class shall be bound by all  
19 determinations and judgments concerning the Settlement Agreement and the Settlement  
20 contemplated thereby.  
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22       15. The Court further orders that: (a) all proceedings in the Actions are stayed, other  
23 than proceedings in furtherance of the Settlement and (b) all members of the Settlement Class  
24 and all Persons acting or purporting to act on behalf of any member(s) of the Settlement Class,  
25 who do not timely and properly opt-out from the Settlement Class in accordance with the court-  
26 ordered procedures are enjoined under the All Writs Act, 28 U.S.C. 1651, the Anti-Injunction  
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1 Act, 28 U.S.C. 2283, and Federal Rule of Civil Procedure 65, from commencing or prosecuting  
2 any action, suit, proceeding, claim, or cause of action (except those based on personal injury), in  
3 any jurisdiction, court or forum against a Released Party relating to or arising out of the subject  
4 matter of the Actions.

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6 16. A Settlement Approval Hearing shall be held before this Court on June 2, 2011, at  
7 2:00 p.m. at 1301 Clay Street, Oakland, California in Courtroom Two, Fourth Floor to determine  
8 whether the Settlement on the terms and conditions provided for in the Settlement Agreement is  
9 fair, reasonable and adequate to the Settlement Class and should be finally approved by the  
10 Court; whether the Judgment and Order of Dismissal as provided in Exhibit F of the Settlement  
11 Agreement should be entered, and to determine the amount of fees and expenses that should be  
12 awarded to Class Counsel. The date and time of the Settlement Approval Hearing shall be set  
13 forth in, *inter alia*, the Notices.

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15 17. Class Counsel shall apply to the Court for an award of attorneys' fees and costs no  
16 later than March 30, 2011. This application for attorneys' fees and costs shall be posted on the  
17 website at [www.LennoxHearthClass.com](http://www.LennoxHearthClass.com) and shall be available for review by the Settlement  
18 Class on or before April 1, 2011.

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20 18. Any member of the Settlement Class may object to the Settlement if he/she or it has  
21 any reason why the Settlement should not be approved as fair, reasonable and adequate, or why  
22 the Judgment and Order of Dismissal should not be entered. Any member of the Settlement  
23 Class may also object if he/she or it has any reason why attorneys' fees and expenses should not  
24 be awarded to Class Counsel. In either event, however, unless otherwise ordered by the Court,  
25 any objector must, on or before **May 2, 2011**, (a) prepare a written objection, including the basis  
26 therefore, and any supporting written or documentary materials and (b) fully comply with the  
27 requirements for objections set forth in the Claims Administration Plan. All of the required  
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1 information and materials must be filed (by hand or first class mail) with the Clerk of the United  
2 States District Court of the Northern District of California, Oakland Division 1301 Clay Street,  
3 Suite 400 S, Oakland, California 94612-5212 and served (by first class mail) on the Settlement  
4 Administrator of the Lennox Hearth Settlement at P.O. Box 2390, Faribault, MN 55021-9090.  
5 The Settlement Administrator shall promptly, and in any event within two business days after  
6 receipt, provide copies of such written objections and materials to the Parties' Counsel. Any  
7 member of the Settlement Class who does not make his, her or its objection in the manner  
8 provided in this Preliminary Approval Order and the Claims Administration Plan shall be deemed  
9 to have waived such objection and shall forever be foreclosed from making any objection to the  
10 fairness, reasonableness or adequacy of the Settlement as incorporated in the Settlement  
11 Agreement and to the award of attorneys' fees and expenses to Class Counsel, but shall otherwise  
12 be bound by the Judgment and Order of Dismissal to be entered and the releases to be given.  
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15 19. If a member of the Settlement Class wishes to appear at the Settlement Approval  
16 Hearing either in person or through counsel, the Person must file with the Clerk of the Court and  
17 serve upon the Settlement Administrator (at the addresses in the paragraph above) a Notice of  
18 Intention to Appear, postmarked no later than **May 19, 2011**. The Notice of Intention to Appear  
19 must include copies of any papers, exhibits, or other evidence or information the member of the  
20 Settlement Class and/or his or her counsel will present to the Court at the Settlement Approval  
21 Hearing, along with all other information required by the Claims Administration Plan for Notices  
22 of Intention to Appear. Any member of the Settlement Class and/or his or her attorney who does  
23 not file a timely Notice of Intention to Appear in accordance with the Claims Administration Plan  
24 may be foreclosed from speaking at the Settlement Approval Hearing.  
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26 20. Papers in support of the Settlement, including any responses to a timely and properly  
27 filed objection, shall be filed with the Court and served on or before May 19, 2011.  
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1       21.     The Court reserves the right to adjourn the date of the Settlement Approval Hearing or  
2 modify any other dates set forth in this Preliminary Approval Order without further notice to the  
3 members of the Settlement Class, and retains jurisdiction to consider all further applications  
4 arising out of or connected with the Settlement Agreement. The Court may approve the  
5 Settlement, with such modifications as may be agreed to by the Parties, if appropriate, without  
6 further notice to the Settlement Class.  
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8       22.     Neither the Settlement Agreement nor the Settlement, nor any act performed or  
9 document executed pursuant to or in furtherance of the Settlement Agreement or the Settlement is  
10 evidence, or an admission or concession by any Party, any Released Party or any signatory to the  
11 Settlement Agreement, of any fault, liability or wrongdoing whatsoever, as to any facts or claims  
12 alleged or asserted in any of the Actions, or any other actions or proceedings. The Settlement  
13 Agreement is not a finding or evidence of the validity or invalidity of any claims or defenses in  
14 any of the Actions or any wrongdoing by any of the Defendants or any damages or injury to any  
15 member of the Settlement Class. Neither the Settlement Agreement, nor any of the terms and  
16 provisions of the Settlement Agreement, nor any of the negotiations or proceedings in connection  
17 therewith, nor any of the documents or statements referred to herein or therein, nor the  
18 Settlement, nor the fact of the Settlement, nor the settlement proceedings, nor any statements in  
19 connection therewith: (a) will (i) be argued to be, used or construed as, offered or received in  
20 evidence as, or otherwise constitute an admission, concession, presumption, proof, evidence, or a  
21 finding of any liability, fault, wrongdoing, injury or damages, or of any wrongful conduct, acts or  
22 omissions on the part of any of the Released Parties, or of any infirmity of any defense, or of any  
23 damage to any Plaintiff or member of the Settlement Class; or (ii) otherwise be used to create or  
24 give rise to any inference or presumption against any of the Released Parties concerning any fact  
25 alleged or that could have been alleged, or any claim asserted or that could have been asserted in  
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1 any of the Actions, or of any purported liability, fault, or wrongdoing of the Released Parties or  
2 of any injury or damages to any Person; or (b) otherwise be admissible, referred to or used in any  
3 proceeding of any nature, for any purpose whatsoever. Provided, however, (x) the Settlement  
4 Agreement and/or Judgment and Order of Dismissal may be introduced in any proceeding,  
5 whether before the Court in the Federal Action or otherwise, as may be necessary to argue that  
6 the Settlement Agreement and/or Judgment and Order of Dismissal has res judicata, collateral  
7 estoppel or other issue or claim preclusion effect or to otherwise consummate or enforce the  
8 Settlement and/or Judgment and Order of Dismissal; and (y) the notices, warnings, Screen  
9 Enhancements, and public information related to the Settlement may be used by Defendants in  
10 defending any Personal Injury Claim.  
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12 23. If the Settlement is terminated by Defendants pursuant to the terms of the Settlement  
13 Agreement, or if any specified condition to consummation of the Settlement set forth in Section  
14 IV(I)(2) of the Settlement Agreement is not satisfied for any reason, or if the Settlement is  
15 disapproved, or if the Court declines to enter the Judgment and Order of Dismissal or said  
16 judgment is reversed or modified in material part on or following appellate review, or if the  
17 Effective Date otherwise does not occur then, in any such event, the Settlement Agreement  
18 (including any amendment(s)), the MOU (including any amendment(s), this Preliminary  
19 Approval Order and all orders entered and releases delivered in connection with the Settlement,  
20 including without limitation the certification of the Settlement Class, shall be rendered null and  
21 void and of no further force or effect, without prejudice to any Party, and may not be introduced  
22 as evidence or referred to in any actions or proceedings by any Person, and each Party will be  
23 restored to his, her or its respective position as of the date of the execution of the MOU and they  
24 will proceed in all respects as if the Settlement Agreement and MOU had not been executed and  
25 the related orders had not been entered, and in that event all of their respective claims and  
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1 defenses as to any issue in any of the Actions will be preserved without prejudice in any way.  
2 Accordingly, upon the occurrence of said event, *inter alia*, the Court's prior class certification  
3 order dated February 16, 2009 will be reinstated in the Federal Action and Defendants will have  
4 the right to oppose and appeal certification of any plaintiff class in any of the Actions or other  
5 future proceedings.  
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7 SO ORDERED this 11th day of January, 2011.

8   
9 Hon. Claudia Wilken  
United States District Court Judge

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