

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,

No. C 08-00836 SI

**ORDER GRANTING DEFENDANTS’  
MOTION FOR SANCTIONS**

Plaintiffs,

v.

SUPERIOR FIREPLACE COMPANY,  
LENNOX HEARTH PRODUCTS, INC.,  
LENNOX INTERNATIONAL, INC., and DOES  
1 through 25, inclusive,

Defendants.

On December 12, 2008, the Court heard oral argument on defendants’ motion for sanctions. Having considered the arguments of the parties and the papers submitted, and for good cause shown, the Court rules as follows.

**BACKGROUND**

This case involves claims on behalf of a putative national class of consumers who own homes installed with gas fireplaces that have glass fronts and are allegedly designed, manufactured, distributed and sold by defendants. On February 6, 2008, Kirk Wolden, an attorney with the law firm Clayco C. Arnold, P.L.C., (“the Arnold law firm”) filed two complaints in the Northern District of California. The named plaintiffs in one complaint (Case No. 08-834) were Rich and Donna Perry; the other complaint (Case No. 08-836) named Kirk and Kolleen Keilholtz as plaintiffs. See Decl. of William R. Warne in Supp. of Defs. Mot. for Sanctions (“Warne Decl.”), at exs. C, E. The two sets of plaintiffs live on the same street, about a tenth of a mile away from each other, in Oakley, California. See *id.* at ex. N. Other

1 than the identity of the named plaintiffs, the complaints are identical. *See id.*, at exs. C, E. The Arnold  
2 law firm did not file a Notice of Related Case. No summonses were issued at the time of filing, nor was  
3 either case served at that point.

4 The *Perry* case was assigned to Magistrate Judge James and the *Keilholtz* case was assigned  
5 Magistrate Judge Chen. *See id.* exs. K, L. The *Perry* plaintiffs consented to proceed before Judge  
6 James on March 3, 2008. *See id.* ex. K. On April 22, 2008, plaintiffs in the *Keilholtz* case declined to  
7 proceed before Judge Chen and the case was reassigned to this Court on April 28. *See id.*, ex. L. On  
8 May 2, 2008, summonses issued for the *Keilholtz* case. On May 5, 2008, Rich and Donna Perry  
9 voluntarily dismissed the *Perry* case. *See id.*, ex. K.

10 Defendants are represented by the law firm Downey Brand, L.L.P. On February 14, 2008, Mr.  
11 Wolden advised Downey Brand by letter of the *Perry* lawsuit. *See id.* ex. I. The letter made no mention  
12 of the *Keilholtz* case. *See id.* On May 2, 2008, Mr. Wolden informed Downey Brand that it had filed  
13 the *Keilholtz* complaint three months earlier. *See id.* at ex. G. William Warne, a lawyer at Downey  
14 Brand, states that the May 2 letter was the first notice defendants or their counsel received of the  
15 *Keilholtz* case. *See id.* ¶ 16.

## 16 17 LEGAL STANDARD

18 “[A] district court has the inherent power sua sponte to dismiss an action for judge-shopping.”  
19 *Hernandez v. City of El Monte*, 138 F.3d 393, 398 (9th Cir. 1998). “[A] ‘primary aspect’ of every  
20 federal court’s inherent power is ‘the ability to fashion an appropriate sanction’ for conduct which  
21 abuses the judicial process. Judge-shopping clearly constitutes conduct which abuses the judicial  
22 process.” *Id.* at 398-99 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991)). A district court  
23 must consider five factors before resorting to the penalty of dismissal: “(1) the public’s interest in  
24 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice  
25 to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the  
26 availability of less drastic sanctions.” *Id.* at 399 (citing *Oliva v. Sullivan*, 958 F.2d 272, 274 (9th Cir.  
27 1992)).  
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1 correct counsel's attempt to manipulate the random assignment process.

2 Defendants also seek monetary sanctions for attorneys' fees incurred preparing this motion. The  
3 Court agrees that it is appropriate for plaintiffs' counsel to be sanctioned with these fees as this motion  
4 would be wholly unnecessary but for counsel's improper conduct. Defense counsel have submitted  
5 declarations establishing that defendants were billed \$4866.50 for the preparation of this motion.  
6 See Warne Decl.; Decl. of Meghan M. Baker in Supp. of Defs. Mot. for Sanctions, ¶ 13, Decl. of  
7 Michael J. Thomas in Supp. of Defs. Mot. for Sanctions, ¶ 12. Defense counsel have also requested fees  
8 for work related to the *Perry* case. The Court finds that the latter fees are not warranted because the  
9 *Perry* case is essentially identical to this case. Defense counsel's work on the *Perry* case should  
10 therefore be applicable to this action.

11 **Accordingly, the Court orders this case reassigned through the Northern District's random**  
12 **assignment process and orders plaintiffs' counsel to pay defendants \$4866.50 in attorneys' fees**  
13 **within three weeks of the date of this order.**

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15 **IT IS SO ORDERED.**

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17 Dated: 12/29/08

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20 SUSAN ILLSTON  
21 United States District Judge  
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