

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 GRANTING
PLAINTIFFS' MOTION
FOR CLASS
CERTIFICATION

_____ /
This case involves the sale of single-paned sealed glass-front
gas-burning fireplaces. Plaintiffs claim that the sale of these
fireplaces violates the California Unfair Competition Law (UCL),
California Business & Professions Code § 17200; the Consumer Legal
Remedies Act (CLRA), California Civil Code § 1750; and the doctrine
of unjust enrichment. Plaintiffs have filed a motion for class
certification. Defendants¹ oppose the motion. The matter was

¹Defendants Lennox Industries and Lennox International are two
of the three parent companies of Defendant Lennox Hearth Products.

1 taken under submission on the papers. Having considered all of the
2 papers filed by the parties, the Court grants Plaintiffs' motion.

3 BACKGROUND

4 On February 6, 2008, Plaintiffs filed this putative class
5 action on behalf of themselves and all similarly situated persons
6 who are the owners of homes in which Defendants' glass-enclosed gas
7 fireplaces are installed. According to Plaintiffs' fourth amended
8 complaint (FAC), Defendants are the "developers, designers,
9 manufacturers, assemblers, testers, inspectors, marketers,
10 advertisers, distributors and sellers of Superior² and Lennox brand
11 single pane sealed glass front gas fireplaces." FAC ¶ 8.

12 Plaintiffs allege that Defendants sold the fireplaces with the
13 specific intention of having builders install them in homes
14 throughout the United States. FAC ¶ 14. By selling the
15 fireplaces, Defendants represented to consumers that they were
16 "safe, of mercantile quality, and fit for their intended and
17 reasonably foreseeable uses, and had sufficient protections and
18 warnings regarding potential dangers and hazards which reasonable
19 consumers would expect and assume to be provided in order to make a
20 decision whether to purchase a home installed with [the fireplace]
21 or purchase [a fireplace]." Id.

22 Plaintiffs further allege that Defendants failed to disclose
23 or concealed the fact that the fireplaces are dangerous and unsafe
24 given that the unguarded single pane glass-sealed front may reach
25 temperatures in excess of 475 degrees Fahrenheit, which may cause

26
27 ²Superior was acquired by Defendants in 1998. FAC ¶ 17b.

United States District Court
For the Northern District of California

1 third degree burns to skin contacting the glass. Id. at ¶ 15.
2 Lastly, Plaintiffs allege that because of Defendants' conduct and
3 omissions, members of the putative class came to own residential
4 homes in which the fireplaces were installed. Id. at ¶ 16.

5 On March 30, 2009, the Court granted in part Defendants' first
6 motion to dismiss the complaint. Plaintiffs were granted leave to
7 amend and they filed a second amended complaint on June 1, 2009.
8 On September 8, 2009, the Court granted Defendants' second motion
9 to dismiss the time-barred UCL, CLRA and unjust enrichment claims.
10 Thus, Plaintiffs' CLRA and unjust enrichment claims arising outside
11 of the three-year statute of limitations and their UCL claims
12 arising outside of the four-year statute of limitations were
13 dismissed.

14 Plaintiffs now move to certify a class consisting of:
15 All consumers who are residents of the United States and who
16 own homes or other residential dwellings in which one or
17 more Superior or Lennox brand single-pane sealed glass front
18 fireplaces have been installed since February 6, 2004 and
19 all consumers who are residents of California and own homes
20 or other residential dwellings in which one or more Superior
21 brand single-pane glass sealed front fireplaces have been
22 installed since March 1, 2003.

23 "Consumer" means an individual who bought his or her home or
24 fireplace for personal, family, or household purposes.

25 Excluded from the class are (1) the judge to whom this case
26 is assigned and any member of the judge's immediate family;
27 and (2) anyone who suffered personal injury related to
28 Defendants' fireplaces.

Motion for Class Certification at 2-3.

LEGAL STANDARD

Plaintiffs seeking to represent a class must satisfy the
threshold requirements of Rule 23(a) as well as the requirements

United States District Court
For the Northern District of California

1 for certification under one of the subsections of Rule 23(b). Rule
2 23(a) provides that a case is appropriate for certification as a
3 class action if: "(1) the class is so numerous that joinder of all
4 members is impracticable; (2) there are questions of law or fact
5 common to the class; (3) the claims or defenses of the
6 representative parties are typical of the claims or defenses of the
7 class; and (4) the representative parties will fairly and
8 adequately protect the interests of the class." Fed. R. Civ. P.
9 23(a).

10 Rule 23(b) further provides that a case may be certified as a
11 class action only if one of the following is true:

12 (1) prosecuting separate actions by or against individual
13 class members would create a risk of:

14 (A) inconsistent or varying adjudications with
15 respect to individual class members that would
16 establish incompatible standards of conduct for the
17 party opposing the class; or

18 (B) adjudications with respect to individual class
19 members that, as a practical matter, would be
20 dispositive of the interests of the other members
21 not parties to the individual adjudications or would
22 substantially impair or impede their ability to
23 protect their interests;

24 (2) the party opposing the class has acted or refused to
25 act on grounds that apply generally to the class, so that
26 final injunctive relief or corresponding declaratory
27 relief is appropriate respecting the class as a whole; or

28 (3) the court finds that the questions of law or fact
common to class members predominate over any questions
affecting only individual members, and that a class
action is superior to other available methods for fairly
and efficiently adjudicating the controversy. The
matters pertinent to these findings include:

(A) the class members' interests in individually
controlling the prosecution or defense of separate
actions;

1 (B) the extent and nature of any litigation
2 concerning the controversy already begun by or
against class members;

3 (C) the desirability or undesirability of
4 concentrating the litigation of the claims in the
particular forum; and

5 (D) the likely difficulties in managing a class
6 action.

7 Fed. R. Civ. P. 23(b).

8 Plaintiffs seeking class certification bear the burden of
9 demonstrating that each element of Rule 23 is satisfied, and a
10 district court may certify a class only if it determines that the
11 plaintiffs have borne their burden. General Tel. Co. v. Falcon,
12 457 U.S. 147, 158-61 (1982); Doninger v. Pac. Nw. Bell, Inc., 564
13 F.2d 1304, 1308 (9th Cir. 1977). In making this determination, the
14 court may not consider the merits of the plaintiffs' claims.
15 Burkhalter Travel Agency v. MacFarms Int'l, Inc., 141 F.R.D. 144,
16 152 (N.D. Cal. 1991). Rather, the court must take the substantive
17 allegations of the complaint as true. Blackie v. Barrack, 524 F.2d
18 891, 901 (9th Cir. 1975). Nevertheless, the court need not accept
19 conclusory or generic allegations regarding the suitability of the
20 litigation for resolution through class action. Burkhalter, 141
21 F.R.D. at 152. In addition, the court may consider supplemental
22 evidentiary submissions of the parties. In re Methionine Antitrust
23 Litig., 204 F.R.D. 161, 163 (N.D. Cal. 2001) (Methionine I); see
24 also Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir.
25 1983) (noting that "some inquiry into the substance of a case may
26 be necessary to ascertain satisfaction of the commonality and
27 typicality requirements of Rule 23(a);" however, "it is improper to

1 advance a decision on the merits at the class certification
2 stage"). Ultimately, it is in the district court's discretion
3 whether a class should be certified. Burkhalter, 141 F.R.D. at
4 152.

5 DISCUSSION

6 In addition to challenging Plaintiffs' class certification,
7 Defendants also argue that Plaintiffs lack standing to assert their
8 claims. The Court addresses the standing issues first.

9 I. Standing

10 The standing inquiry asks whether a plaintiff has suffered an
11 actual or imminent injury that is fairly traceable to the
12 defendant's conduct and that is likely to be redressed by a
13 favorable court decision. Salmon Spawning & Recovery Alliance v.
14 Gutierrez, 545 F.3d 1220, 1225 (9th Cir. 2008). Defendants argue
15 that Plaintiffs lack standing because the reason they no longer use
16 their fireplace has no causal connection to the allegations in
17 their complaint. Defendants argue that Plaintiffs testified that
18 they no longer use the fireplace because it makes the room too
19 warm, not because of any safety concerns. However, this reading
20 misstates Plaintiffs' testimony. Plaintiff Kolleen Keilholtz
21 testified that the fireplace would be "uncomfortable for a majority
22 of people . . . [b]ecause of how fast it heats the room." Warne
23 Decl., Exh. V, Kolleen Keilholtz Dep. at 34:18-22. She did not
24 directly state that she stopped using the fireplace only because it
25 heats the room too quickly. In fact, she stated that once she
26 found out that the fireplace could cause third-degree burns, she
27 "ceased using [her] Superior fireplace given the hazard it poses."

United States District Court
For the Northern District of California

1 Kolleen Keilholtz Decl. ¶ 6.

2 Defendants also argue that Plaintiffs lack standing because
3 they did not suffer any injury from the fireplace. Defendants rely
4 on Kirk Keilholtz's answer to the following question during a
5 deposition:

6 Q: And do you believe "the [inclusion of the fireplace
7 in your home has] caused you any loss or property damage
8 of any kind?"

8 A: I don't believe so.

9 However, Mr. Keilholtz has since clarified his response: "The
10 fireplace hasn't caused any fires or injured anyone in my family,
11 but it is a liability. The loss that I have suffered is the one
12 that this lawsuit is about, which includes paying for a fireplace
13 that my family cannot use." Wolden Decl., Exh. 3. Ms. Keilholtz
14 has also stated that she "would not have paid for or even allowed
15 the Superior fireplace to have been installed in my home had I been
16 advised of the high glass surface temperature it generates during
17 operation." Kolleen Kielholtz Decl. ¶ 6. Therefore, Plaintiffs
18 have satisfied the causation and injury elements of the standing
19 requirement.

20 II. Class Definitions

21 Defendants argue that class certification must be denied
22 because Plaintiffs' proposed class definition is not precise and
23 the identity of the class members is not objectively ascertainable.
24 "An adequate class definition specifies 'a distinct group of
25 plaintiffs whose members [can] be identified with particularity.'" Campbell v. PricewaterhouseCoopers, LLP, 253 F.R.D. 586, 593 (E.D.
26 Cal. 2008) (quoting Lerwill v. Inflight Motion Pictures, Inc., 582

United States District Court
For the Northern District of California

1 F.2d 507, 512 (9th Cir. 1978). "The identity of class members must
2 be ascertainable by reference to objective criteria." 5 James W.
3 Moore, Moore's Federal Practice, § 23.21[1] (2001). Thus, a class
4 definition is sufficient if the description of the class is
5 "definite enough so that it is administratively feasible for the
6 court to ascertain whether an individual is a member." O'Connor v.
7 Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998).

8 Here, the class definition meets this standard. The
9 definition of the class is relatively straightforward. Class
10 members must (1) live in the United States and (2) own a home
11 within which a Superior or Lennox brand single-paned sealed glass
12 front fireplace was installed after a particular date. This
13 definition is not subjective or imprecise. Unnamed Plaintiffs will
14 be able to identify the alleged offending products by viewing the
15 exposed face of their fireplace, which will either bear the name
16 Superior or Lennox.

17 Defendants argue that the class is unascertainable because the
18 class includes original and subsequent purchasers of homes with the
19 offending fireplace but, under California law, a homeowner's claim
20 is not transferable absent an express assignment. See Krusi v.
21 S.J. Amoroso Construction Co., 81 Cal. App. 4th 995, 1005 (2000).
22 Defendants assert that it would be too difficult to locate the
23 original homeowners. Although finding these individuals may be
24 challenging, the task is not so formidable as to make the class
25 unascertainable.

26 Defendants also argue that the class definition improperly
27 includes consumers in California who had a Superior fireplace

1 installed after March 1, 2003 instead of February 6, 2004.
2 Plaintiffs argue that the class period should begin on March 1,
3 2003 because the statute of limitations was tolled by the March 1,
4 2007 filing of the related state court class action, Fields v.
5 Superior Fireplace Company, et al., No. 07-AS00918 (Sac. Cty. Sup.
6 Ct.). See Warne Decl., Exh. A. That case was stayed pending the
7 outcome of the present case. However, Plaintiffs may not include
8 individuals with claims accruing before February 6, 2004 in their
9 class definition because their claims are outside of the three year
10 statute of limitations for the CLRA and unjust enrichment claims
11 and the four year statute of limitations for the UCL claims. The
12 Court has already dismissed the claims outside of these statutes of
13 limitations.

14 II. Rule 23(a) Requirements

15 A. Numerosity

16 Although the parties do not agree as to the exact size of the
17 class, Defendants appear to concede that the number of individuals
18 who own one of their glass-enclosed gas fireplaces is large enough
19 to satisfy the numerosity requirement. In fact, Defendants
20 estimate that 556,639 of their fireplaces were sold to individuals
21 who would be included in the class. The Court therefore finds that
22 the numerosity requirement has been satisfied.

23 B. Commonality

24 Rule 23 contains two related commonality provisions. Rule
25 23(a)(2) requires that there be "questions of law or fact common to
26 the class." Fed. R. Civ. P. 23(a)(2). Rule 23(b)(3), in turn,
27 requires that such common questions predominate over individual

1 ones.

2 The Ninth Circuit has explained that Rule 23(a)(2) does not
3 preclude class certification if fewer than all questions of law or
4 fact are common to the class:

5 The commonality preconditions of Rule 23(a)(2) are less
6 rigorous than the companion requirements of Rule
7 23(b)(3). Indeed, Rule 23(a)(2) has been construed
8 permissively. All questions of fact and law need not be
9 common to satisfy the rule. The existence of shared
10 legal issues with divergent factual predicates is
11 sufficient, as is a common core of salient facts coupled
12 with disparate legal remedies within the class.

13 Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

14 Rule 23(b)(3), in contrast, requires not just that some common
15 questions exist, but that those common questions predominate. In
16 Hanlon, the Ninth Circuit discussed the relationship between Rule
17 23(a)(2) and Rule 23(b)(3):

18 The Rule 23(b)(3) predominance inquiry tests whether
19 proposed classes are sufficiently cohesive to warrant
20 adjudication by representation. This analysis presumes
21 that the existence of common issues of fact or law have
22 been established pursuant to Rule 23(a)(2); thus, the
23 presence of commonality alone is not sufficient to
24 fulfill Rule 23(b)(3). In contrast to Rule 23(a)(2),
25 Rule 23(b)(3) focuses on the relationship between the
26 common and individual issues. When common questions
27 present a significant aspect of the case and they can be
28 resolved for all members of the class in a single
adjudication, there is clear justification for handling
the dispute on a representative rather than on an
individual basis.

Id. at 1022 (citations and internal quotation marks omitted).

Although Defendants assert that this case does not satisfy
Rule 23(a)'s commonality provision, their arguments actually focus
on whether common issues predominate, and thus are more
appropriately directed at the issue of certification under Rule
23(b)(3), discussed below. Rule 23(a)(2) only requires that there

1 be some common issues of fact and law. The class members' claims
2 clearly have something vital to this case in common: all class
3 members own a home in which one of Defendants' fireplaces has been
4 installed and their claims are based on a common theory of
5 liability. Rule 23(a)(2)'s commonality requirement has therefore
6 been satisfied.³

7 C. Typicality

8 Rule 23(a)(3)'s typicality requirement provides that a "class
9 representative must be part of the class and possess the same
10 interest and suffer the same injury as the class members." Falcon,
11 457 U.S. at 156 (quoting E. Tex. Motor Freight Sys., Inc. v.
12 Rodriguez, 431 U.S. 395, 403 (1977)) (internal quotation marks
13 omitted). The purpose of the requirement is "to assure that the
14 interest of the named representative aligns with the interests of
15 the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th
16 Cir. 1992). Rule 23(a)(3) is satisfied where the named plaintiffs
17 have the same or similar injury as the unnamed class members, the
18 action is based on conduct which is not unique to the named

19
20 ³Defendants object to Plaintiffs' declaration of Carol
21 Pollack-Nelson offered to establish the commonality and typicality
22 requirements of class certification. Defendants argue that this
23 declaration lacks the foundation necessary to qualify as an expert
24 opinion. On a motion for class certification, the Court makes no
25 findings of fact and announces no ultimate conclusions on
26 Plaintiffs' claims. Therefore, "the Federal Rules of Evidence take
27 on a substantially reduced significance, as compared to a typical
28 evidentiary hearing or trial." Fisher v. Ciba Specialty Chem.
Corp., 238 F.R.D. 273, 279 (S.D. Ala. 2006) ("the Federal Rules of
Evidence are not stringently applied at the class certification
stage because of the preliminary nature of such proceedings"). On
a motion for class certification, the Court may consider evidence
that may not be admissible at trial. Therefore, the Court
overrules Defendants' objection.

1 plaintiffs, and other class members have been injured by the same
2 course of conduct. Id. Class certification is inappropriate,
3 however, "where a putative class representative is subject to
4 unique defenses which threaten to become the focus of the
5 litigation." Id. (quoting Gary Plastic Packaging Corp. v. Merrill
6 Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d Cir.
7 1990), cert. denied, 498 U.S. 1025 (1991)).

8 Plaintiffs' claims are all based on Defendants' sale of
9 allegedly dangerous fireplaces without adequate warnings.
10 Plaintiffs' claims are "reasonably co-extensive with those of
11 absent class members." Hanlon, 150 F.3d at 1020. Defendants point
12 to particular facts that are unique to Plaintiffs' claims -- in
13 particular, the facts that Plaintiffs purportedly did not read the
14 entire manual for the fireplace when they bought their home and
15 that the warnings in their manual may have differed from those of
16 other unnamed class members. These particularities, however, do
17 not render Plaintiffs' claims atypical in the sense that they
18 differ from the claims of most class members. In actuality,
19 Defendants' argument goes to whether the claims can be proved on a
20 class-wide basis or whether, instead, no class member's claims can
21 be established without looking at the particular circumstances of
22 that class member. Thus, this issue is more appropriately
23 characterized as going to Rule 23(b)(3)'s predominance requirement,
24 and is discussed below. Accordingly, the Court concludes that
25 Plaintiffs' claims are typical of those of other class members.

26 D. Adequacy

27 Rule 23(a)(4)'s adequacy requirement ensures that absent class
28

1 members are afforded adequate representation before entry of a
2 judgment which binds them. Hanlon, 150 F.3d at 1020. "Resolution
3 of two questions determines legal adequacy: (1) do the named
4 plaintiffs and their counsel have any conflicts of interest with
5 other class members and (2) will the named plaintiffs and their
6 counsel prosecute the action vigorously on behalf of the class?"
7 Id. Defendants advance three arguments for disqualifying the
8 Arnold Law Firm, Cory Watson and Ram & Olsen as counsel, but the
9 Court find all these arguments unpersuasive.

10 1. Conflict of Interest

11 Defendants argue that the Arnold Law Firm and Cory Watson must
12 be disqualified because they represent Anissa and Jerry Fields in
13 the closely related state court class action, Fields v. Superior
14 Fireplace Company, et al. No. 07-AS00918. See Warne Decl., Exh. A.
15 Defendants rely primarily on Kayes v. Pacific Lumber Co, 513 F.3d
16 1449, 1465 (9th Cir. 1995), in which the Ninth Circuit held that
17 even the appearance of divided loyalties justifies disqualification
18 of class counsel. The court explained, "The 'appearance' of
19 divided loyalties refers to differing and potentially conflicting
20 interests and is not limited to instances manifesting such
21 conflict." Id. Here, Defendants have not explained how the Arnold
22 Law Firm's and Cory Watson's simultaneous representation might
23 undermine their ability to adequately represent each class. There
24 is no evidence that the Fields plaintiffs and Plaintiffs in the
25 present case have antagonistic interests. Defendants appear to be
26 able to satisfy a judgment in both cases. See Sullivan v. Chase
27 Inv. Serv., Inc., 79 F.R.D. 246, 258 (N.D. Cal. 1978).

1 California Rule of Professional Conduct 1-400, which prohibits
2 attorneys and their agents from soliciting prospective clients in
3 person or over the telephone. See also Cal. Bus. & Prof. Code
4 § 6151(a). Plaintiffs' counsel respond that they approached
5 homeowners as part of their investigation, and not as part of a
6 solicitation effort. See Rose v. State Bar, 49 Cal. 3d 646, 649
7 (1989) ("An attorney who contacts accident victims for legitimate
8 investigative purposes is not barred from representing them if
9 requested to do so, but it is misconduct to directly solicit such
10 employment."). Although Defendants' solicitation allegations are
11 troubling, without further evidence, the Court will not make any
12 findings as to the propriety of Plaintiffs' counsel's conduct. By
13 itself, Plaintiffs' counsel's judge shopping does not disqualify
14 counsel. Accordingly, the Court finds that Plaintiffs' counsel is
15 adequate.

16 III. Certification Under Rule 23(b) (3)

17 A. Predominance

18 "The Rule 23(b) (3) predominance inquiry tests whether proposed
19 classes are sufficiently cohesive to warrant adjudication by
20 representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623
21 (1997). "When common questions present a significant aspect of the
22 case and they can be resolved for all members of the class in a
23 single adjudication, there is clear justification for handling the
24 dispute on a representative rather than an individual basis."
25 Hanlon, 150 F.3d at 1022 (internal quotation marks omitted).

26 1. Predominance of Legal Issues: Choice of Law

27 Defendants argue that common issues do not predominate because
28

1 the proposed nation-wide class would be subject to myriad legal
2 issues arising from the application of various state laws.
3 Plaintiffs address this issue by proposing the application of
4 California law to the nation-wide class. Defendants respond that
5 to do so would violate due process.

6 To apply California law to claims by a class of nonresidents
7 without violating due process, the Court must find that California
8 has a “‘significant contact or significant aggregation of contacts’
9 to the claims asserted by each member of the plaintiff class,
10 contacts ‘creating state interests,’ in order to ensure that the
11 choice of [the forum state’s] law is not arbitrary or unfair.”
12 Phillips Petroleum, Co. v. Shutts, 472 U.S. 797, 821-22 (1995).
13 “When considering fairness in this context, an important element is
14 the expectation of the parties.” Id. at 822.

15 The parties dispute the contacts Defendants maintain in
16 California. Plaintiffs claim that in “the last decade, 82% of the
17 hazardous fireplaces sold under the Superior brand⁴ were
18 manufactured in California.” The more relevant time period is that
19 within the statute of limitations: three years for the CLRA and
20 unjust enrichment claims and four years for the UCL claims.

21 Defendants have provided sales and manufacturing information
22 going back to February 1, 2004. Since that date, Defendants have
23 sold 556,369 Superior and Lennox brand gas fireplaces with a
24 sealed, single-pane glass front. Sabin Decl. ¶ 3. Of those,

25
26 ⁴Plaintiffs assert that they only refer to Superior brand
27 sales because Defendants did not provide them with information
28 pertaining to Lennox brand sales before they filed their motion for
class certification.

1 105,748 (nineteen percent) were sold to distributors, retailers or
2 installers within California. Id. at 6. Although nineteen percent
3 does not represent a simple majority of Defendants' overall sales,
4 it exemplifies a significant amount of contact between Defendants
5 and California.⁵

6 Defendants manufacture, assemble and package their fireplaces
7 in Lynwood, California; Union City, Tennessee; Toronto, Canada; and
8 Auburn, Washington. Dischner Decl. ¶ 5. Since February 1, 2004,
9 117,016 fireplaces (twenty-one percent) were exclusively
10 manufactured, assembled and packaged outside of California and
11 17,628 (three percent) were exclusively manufactured, assembled and
12 packaged inside of California. The remaining 421,725 (seventy-six
13 percent) were partly manufactured, assembled or packaged at plants
14 in California and partly in at least one other state. Although
15 many fireplaces were produced exclusively outside of California,
16 the fact that seventy-six percent maintained a production
17 connection to California weighs in favor of finding that applying
18 California law to the class claims would not be arbitrary or
19 unfair. Plaintiffs have shown that a significant portion of
20 Defendants' alleged harmful conduct emanated from California.
21 Overall, this class action involves a sufficient degree of contact
22 between Defendants' alleged conduct, the claims asserted and
23 California to satisfy due process concerns. See Parkinson v.
24 Hyundai Motor America, 258 F.R.D. 580, 597-98 (C.D. Cal. 2008);

25
26 ⁵The parties only provided two categories of sales data:
27 California and non-California sales. Therefore, the Court cannot
28 determine whether California sales constitute a plurality of
Defendants' overall sales.

1 Mazza v. American Honda Motor Co., 254 F.R.D. 610, 620-21 (C.D.
2 Cal. 2008).

3 Defendants argue that, even if Plaintiffs' claims against them
4 comport with due process, choice of law principles do not support
5 the application of California law. However, the Court notes that
6 it must apply California law to California statutory claims. Even
7 if the consumer protection and unfair competition statutes of other
8 states differed considerably from those in California, Defendants
9 are in no position to force Plaintiffs or unnamed class members to
10 sue under the statutes of those states. If they wish, unnamed
11 class members may opt out of the current class action and attempt
12 to sue Defendants under the statutes of their state of residence.

13 Although the Court finds it unnecessary to engage in a choice
14 of law analysis in order to apply California law to California
15 statutory claims, state and federal courts in California have
16 conducted such an analysis. See e.g., Parkinson, 258 F.R.D. at
17 597-98; Mazza, 254 F.R.D. at 620-21; Wershba v. Apple Computer, 91
18 Cal. App. 4th 224, 241-44 (2001). Therefore, the Court will do so
19 as well. The same choice of law analysis will apply to the unjust
20 enrichment claim.

21 Because applying California law to Plaintiffs' claims against
22 Defendants comports with due process, the Court presumes that such
23 law applies to the claims of the nation-wide class unless
24 Defendants meet the "substantial burden" of showing that foreign
25 law, rather than California law, applies. Martin v. Dahlberg, 156
26 F.R.D. 207, 218 (N.D. Cal. 1994); see Church v. Consolidated
27 Freightways, 1992 WL 370829, *4 ("This Court generally presumed

1 that California law will apply unless defendants demonstrate
2 conclusively that the laws of the other states will apply.”).

3 “When a federal court sitting in diversity hears state law
4 claims, the conflicts laws of the forum state are used to determine
5 which state’s substantive law applies.” Orange Street Partners v.
6 Arnold, 179 F.3d 656, 661 (9th Cir. 1999). The Court thus looks to
7 California choice of law doctrine to determine whether to apply
8 California law or some other state’s law to the claims.

9 California has adopted the “governmental interest” approach to
10 choice of law issues. As the California Supreme Court has
11 explained,

12 the governmental interest approach generally involves
13 three steps. First, the court determines whether the
14 relevant law of each of the potentially affected
15 jurisdictions with regard to the particular issue in
16 question is the same or different. Second, if there is a
17 difference, the court examines each jurisdiction’s
18 interest in the application of its own law under the
19 circumstances of the particular case to determine whether
20 a true conflict exists. Third, if the court finds that
there is a true conflict, it carefully evaluates and
compares the nature and strength of the interest of each
jurisdiction in the application of its own law to
determine which state’s interest would be more impaired
if its policy were subordinated to the policy of the
other state, and then ultimately applies the law of the
state whose interest would be the more impaired if its
law were not applied.

21 Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 107-08
22 (2006) (citation and internal quotation marks omitted). “A party
23 advocating application of foreign law must demonstrate that the
24 foreign rule of decision will further the interest of that foreign
25 state and therefore that it is an appropriate one for the forum to
26 apply to the case before it.” Tucci v. Club Mediterranee, S.A., 89
27 Cal. App. 4th 180, 188-89 (2001). If California law can be applied
28

1 without violating the policy of the foreign state, there is a false
2 conflict, and California law should be applied. See id.

3 Defendants argue that the consumer protection statutes of the
4 non-forum states are different from those of California and they
5 attach an appendix which catalogues state-by-state variations
6 involving reliance, scienter, damages and other elements necessary
7 to Plaintiffs' claims. See Appendix of State Law Variations.
8 Although Defendants have pointed out variations between California
9 law and the relevant law in other jurisdictions, Defendants have
10 not met their burden of showing that the differences between
11 California law and that of the other jurisdictions are material.
12 See Washington Mutual Bank v. Superior Court of Orange County, 24
13 Cal. 4th 906, 919-20 (2001) (difference among the state laws must
14 be material).

15 For instance, Defendants argue that Plaintiffs suing under the
16 UCL in California are limited to restitution and injunctive relief
17 but similar laws in other jurisdictions permit greater relief, such
18 as actual damages, treble damages, punitive damages and attorneys'
19 fees. However, "a CLRA violation, which serves as a predicate to a
20 UCL violation under the UCL's 'unlawful' prong, provides for each
21 of the remedies that Defendant[s] contend[] would be unavailable
22 with the application of California law to a nationwide class."
23 Mazza, 254 F.R.D. at 622.

24 Defendants also argue that the unjust enrichment laws of the
25 fifty states vary such that a material conflict exists. Although
26 many states follow the Restatement's definition of unjust
27 enrichment, not all do. See In re Terazosin Hydrochloride, 220

1 F.R.D. 672, 697 (S.D. Fla. 2004). Laws concerning unjust
2 enrichment do vary from state to state. But differences in state
3 laws do not always outweigh the similarities, especially in cases
4 concerning unjust enrichment claims. See, e.g., Westways World
5 Travel, Inc. v. AMR Corp., 218 F.R.D. 223, 2240 (C.D. Cal. 2003)
6 (certifying nation-wide class of unjust enrichment claimants). As
7 noted in Schumacher v. Tyson Fresh Meats, Inc., 221 F.R.D. 605, 612
8 (D. S.D. 2004),

9 Where federal claims and common law claims are predicated on
10 the same factual allegations and proof will be essentially the
11 same, even if the law of different states might ultimately
12 govern the common law claims -- an issue that need not and is
13 not decided at this juncture -- certification of the class for
14 the whole action is appropriate. The spectre of having to
15 apply different substantive laws does not warrant refusing to
16 certify a class on the common-law claims.

17 (quotations and alteration omitted); see also Hanlon, 150 F.3d at
18 1022 ("Variations in state law do not necessarily preclude a
19 23(b) (3) action.").

20 Here, the variations among some states' unjust enrichment laws
21 are not material because they do not significantly alter the
22 central issue or the manner of proof in this case. Common to all
23 class members and provable on a class-wide basis is whether
24 Defendants unjustly profited from the sale of their fireplaces.
25 See Schumacher, 221 F.R.D. at 612 ("In looking at claims for unjust
26 enrichment, we must keep in mind that the very nature of such
27 claims requires a focus on the gains of the defendants, not the
28 losses of the plaintiffs. That is a universal thread throughout
 all common law causes of action for unjust enrichment."). The
 "idiosyncratic differences" between state unjust enrichment laws

1 "are not sufficiently substantive to predominate over the shared
2 claims." See Hanlon, 150 F.3d at 1022. Overall, Defendants have
3 not shown that the differences among the various state laws are
4 material. Therefore, the Court need not move beyond the first step
5 in the choice of law analysis. Accordingly, common issues of law
6 predominate, as required by Rule 23(b)(3).

7 2. Predominance of Factual Issues

8 Defendants argue that, irrespective of the choice of law
9 issues, individual factual issues preclude class certification.
10 Determining whether common questions predominate on any of the
11 three claims asserted in this action requires an analysis of the
12 elements of those claims.

13 a. UCL

14 The UCL prohibits any "unlawful, unfair or fraudulent business
15 act or practice." Cal. Bus. & Prof. Code § 17200. It incorporates
16 other laws and treats violations of those laws as unlawful business
17 practices independently actionable under state law. Chabner v.
18 United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000).
19 Violation of almost any federal, state, or local law may serve as
20 the basis for a UCL claim. Saunders v. Superior Ct., 27 Cal. App.
21 4th 832, 838-39 (1994). In addition, a business practice may be
22 "unfair or fraudulent in violation of the UCL even if the practice
23 does not violate any law." Olszewski v. Scripps Health, 30 Cal.
24 4th 798, 827 (2003). With respect to fraudulent conduct, the UCL
25 prohibits any activity that is "likely to deceive" members of the
26 public. Puentes v. Wells Fargo Home Mortgage, Inc., 160 Cal. App.
27 4th 638, 645 (2008).

1 Plaintiffs assert that Defendants' knowing sale of their
2 allegedly hazardous fireplaces and failure to inform Plaintiffs and
3 unnamed class members that Defendants' fireplaces could reach
4 temperatures of 475 degrees and cause third-degree burns on contact
5 generally constitute unfair and deceptive business practices.
6 Defendants argue that proving this claim requires an inquiry into
7 the specific warnings each putative class member received and an
8 assessment of whether those warnings would have misled reasonable
9 members of the public. However, the California Supreme Court has
10 held, "Relief under the UCL is available without individualized
11 proof of deception, reliance and injury." In re Tobacco II Cases,
12 46 Cal. 4th 298, 320 (2009). Although there may be individual
13 variations concerning the warnings class members received with
14 their fireplaces, they do not undermine the conclusion that common
15 issues predominate on the UCL claim. As the California Court of
16 Appeal noted in Mass. Mut. Life Ins. Co. v. Superior Court, 97 Cal.
17 App. 4th 1282, 1292-93 (2002),

18 The fact that a defendant may be able to defeat the showing
19 of causation as to a few individual class members does not
20 transform the common question into a multitude of individual
21 ones; plaintiffs satisfy their burden of showing causation
22 as to each by showing materiality as to all. Thus, it is
sufficient for our present purposes to hold that if the
trial court finds material misrepresentations were made to
the class members, at least an inference of reliance would
arise as to the entire class.

23 (Internal quotation marks and citations omitted). Therefore,
24 Plaintiffs may prove with generalized evidence that Defendants'
25 conduct was "likely to deceive" purchasers of their fireplaces.
26 However, "should it develop that class members were provided such a
27 variety of information that a single determination as to

1 materiality is not possible, the trial court has the flexibility to
2 order creation of subclasses or to decertify the class altogether.”

3 Id. at 1294 n.5

4 b. CLRA

5 The CLRA makes it unlawful to use “unfair methods of
6 competition or deceptive acts or practices” in the sale of goods or
7 services to a consumer. Cal. Civ. Code § 1770(a). Such unlawful
8 conduct includes “representing that goods or services have . . .
9 characteristics[,] . . . uses, benefits, or qualities which they do
10 not have,” and “representing that goods or services are of a
11 particular standard, quality, or grade . . . if they are of
12 another.” Id. §§ 1170(a)(5) and (7).

13 Defendants argue that individual factual issues preclude
14 certification because Plaintiffs’ CLRA claims require claimant-
15 specific inquiries into causation, reliance and damages. However,
16 “the causation required by the [CLRA] does not make plaintiffs’
17 claims unsuitable for class treatment.” Mass. Mut., 97 Cal. App.
18 4th at 1292. “Causation as to each class member is commonly proved
19 more likely than not by materiality. That showing will undoubtedly
20 be conclusive as to most of the class.” Id. As noted above,
21 common questions predominate even if Defendants can defeat the
22 showing of causation as to a few individual class members. Id. As
23 long as Plaintiffs can show that material misrepresentations were
24 made to the class members, an inference of reliance arises as to
25 the entire class. Id. at 1292-93. Materiality is determined from
26 the perspective of the reasonable consumer. See Falk v. Gen.
27 Motors Corp., 496 F. Supp. 2d 1088, 1095 (N.D. Cal. 2007).

1 Plaintiffs' CLRA claim is based on Defendants' alleged failure
2 adequately to disclose to consumers that Defendants' fireplaces
3 could reach temperatures of 475 degrees and cause third-degree
4 burns on contact. Here, the "ultimate question of whether the
5 undisclosed information [is] material [is] a common question of
6 fact suitable for treatment in a class action." Mass. Mut., 97
7 Cal. App. 4th at 1294. Therefore, common issues will predominate
8 on the CLRA claim. However, as noted above, the Court may create
9 subclasses or decertify the class if a single determination of
10 materiality is not possible. Id. n.5

11 c. Unjust enrichment

12 Plaintiffs sufficiently show that common factual issues
13 predominate as to this claim. The common question of whether
14 Defendants' alleged failure to warn Plaintiffs and unnamed class
15 members that Defendants' fireplaces reach temperatures of 475
16 degrees and cause third-degree burns on contact induced Plaintiffs
17 and unnamed class members to buy homes with those fireplaces
18 installed therein predominates over any questions affecting only
19 individual members.

20 B. Superiority

21 The Court finds that adjudicating class members' claims in a
22 single action would be superior to maintaining a multiplicity of
23 individual actions involving similar legal and factual issues.
24 Although Defendants argue that class action treatment is not
25 superior because they believe individual questions will
26 predominate, they do not identify any other reason why individual
27 actions would be preferable. The Court concludes that this action

1 satisfies Rule 23(b)(3)'s superiority requirement.

2 CONCLUSION

3 For the foregoing reasons, the Court grants Plaintiffs' motion
4 for class certification. Docket No. 126. The following class is
5 hereby certified pursuant to Fed. R. Civ. P. 23(a) and (b)(3):⁶

6 All consumers who are residents of the United States and who
7 own homes or other residential dwellings in which one or
8 more Superior or Lennox brand single-pane sealed glass front
9 gas fireplaces have been installed since February 6, 2004
10 and all consumers who are residents of California and own
11 homes or other residential dwellings in which one or more
12 Superior brand single-pane glass sealed front gas fireplaces
13 have been installed since February 6, 2004.

14 "Consumer" means an individual who bought his or her home or
15 fireplace for personal, family, or household purposes.

16 Excluded from the class are (1) the judge to whom this case
17 is assigned and any member of the judge's immediate family;
18 and (2) anyone who suffered personal injury related to
19 Defendants' fireplaces

20 IT IS SO ORDERED.

21 Dated: 02/16/10



22 _____
23 CLAUDIA WILKEN
24 United States District Judge

25
26 _____
27 ⁶The Court modifies Plaintiffs' proposed definition to specify
28 that the fireplaces at issue are "gas" fireplaces.

United States District Court
For the Northern District of California