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1 CLAYEO C. ARNOLD
A Professional Corporation
2 Clayeo C. Arnold, SBN 65070
CLIFFORD L. CARTER, SBN 149621
3 KIRK J. WOLDEN, SBN 138902
865 Howe Avenue
4 Sacramento, CA 95825
Telephone: (916) 924-3100
5 Fax: (916) 924-1829
Email: kirk@justice4you.com

6 Ernest Cory (ASB-2279-Y83E)
7 F. Jerome Tapley (ASB-0583-A56T)
Hirlye R. "Ryan" Lutz, III (ASB-6641-E59L)
8 CORY WATSON CROWDER & DEGARIS, P.C.
2131 Magnolia Avenue
9 Birmingham, AL 35205
Telephone: (205) 328-2200
10 Facsimile: (205) 324-7896

11 Michael F. Ram (SBN 104805)
mram@ramolson.com
12 RAM & OLSON LLP
555 Montgomery Street, Suite 820
13 San Francisco, California 94111
Telephone: (415) 433-4949
14 Facsimile: (415) 433-7311

15 Attorney for Plaintiffs and the **CLASS**

16
17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 (OAKLAND DIVISION)

ADR

21 SEAN WHELAN, individually and on
22 behalf of those similarly situated,

23 Plaintiffs,

24 vs.

25 BDR THERMEA, BAXI GROUP, and
26 MILES INDUSTRIES LTD.,

27 Defendants.
28

No.

C11-02146

EDL

**INDIVIDUAL AND CLASS
ACTION COMPLAINT FOR
EQUITABLE RELIEF,
RESTITUTION, AND FOR
DAMAGES**

DEMAND FOR JURY TRIAL

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MAY - 2 2011
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

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1 Plaintiff SEAN WHELAN, by and through Plaintiff's undersigned counsel, individually and on
2 behalf of all others similarly situated, hereby sets forth in this Individual and **CLASS** Action
3 Complaint claims for equitable, injunctive and declaratory relief, restitution and damages.

4 This **CLASS** Action is brought on behalf of consumers (referred to herein collectively as
5 "Plaintiffs," "**CLASS** Members," "Consumers", the "**CLASS**" and "Homeowners") who purchased
6 a HAZARDOUS FIREPLACE or a home or other residential dwelling or space with a HAZARDOUS
7 FIREPLACE installed within the **CLASS** period. HAZARDOUS FIREPLACES, as that phrase is
8 defined at Paragraph 8, below, have been developed, designed, manufactured, assembled, tested,
9 marketed, promoted, advertised, sold and/or distributed by Defendants BDR THERMEA, BAXI
10 GROUP, and MILES INDUSTRIES, LTD. since at least 1986.

11 HAZARDOUS FIREPLACES are dangerous and should not have been sold to the **CLASS**
12 because these gas fireplaces are designed so that their glass front, installed in homes at a height
13 accessible even to small children and infants, can, and under reasonably expected consumer use
14 does, reach temperatures well in excess of that necessary to cause third degree burns even from
15 momentary contact with the super-heated glass.

16 Defendants have sold and continue to sell, to their significant financial gain, HAZARDOUS
17 FIREPLACES despite knowledge of the extreme danger posed by the unguarded glass front, and
18 without taking any reasonable steps to mitigate that unreasonable danger, or disclose said danger
19 to consumers, including Plaintiff and the **CLASS**.

20 WHEREFORE, Plaintiff individually and on behalf of the **CLASS** avers as follows:

21 1. At all times relevant to this action, Defendants intentionally, recklessly, and/or
22 negligently concealed, suppressed, and omitted the risks, dangers, defects and disadvantages of
23 their HAZARDOUS FIREPLACES and marketed, sold, and distributed HAZARDOUS FIREPLACES as
24 a safe fireplace when, in fact, Defendants had reason to know, and did know, that their
25 HAZARDOUS FIREPLACE were not safe or even useable at all for their intended purposes, and that
26 their HAZARDOUS FIREPLACES posed a serious safety risk, including the risk of severe burns,
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1 maiming and other catastrophic physical injuries to all individuals, including but not limited to
2 small children, coming in contact with a HAZARDOUS FIREPLACE.

3 2. Pursuant to Rules 23(b)(2), and/or 23(b)(3) of the Federal Rules of Civil Procedure,
4 Plaintiff seeks certification of a **CLASS** consisting of:

5 **All consumers who are residents of the United States and who own homes**
6 **or other residential dwellings in which one or more Valor brand direct**
7 **vent, sealed glass front gas fireplaces were intalled.**

8 3. This is a **CLASS** Action filed on behalf of a national **CLASS** of Consumers residing
9 in the United States who own homes and other residential dwellings installed with one or more
10 HAZARDOUS FIREPLACES. This action seeks injunctive and declaratory relief, damages,
11 restitution, and disgorgement arising out of Defendants' wrongful misconduct resulting in the
12 distribution and sale of HAZARDOUS FIREPLACES within the United States.

13 **JURISDICTION AND VENUE**

14 4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1332 because at
15 least one **CLASS** Member is a citizen of the State of California and the three Defendants are
16 citizens or subjects of foreign states. None of the causes of action stated herein has been
17 assigned or otherwise given to any other court or tribunal.

18 5. Venue is proper in this Judicial District pursuant to 28 U.S.C. §1332(a) (2) and (d)
19 because the three Defendants are aliens which do substantial business within the State of
20 California and in this Judicial District. Moreover, based on information and belief, Defendants are
21 registered to and in fact doing business within the State of California, and otherwise maintain the
22 requisite minimum contacts with the State of California. Additionally, Defendants distribute in this
23 Judicial District, receive substantial compensation and profits from the sales of HAZARDOUS
24 FIREPLACES in this District, and have and continue to conceal and make material omissions in this
25 District so as to subject them to *in personam* jurisdiction in this Judicial District. Therefore, a
26 substantial part of the events and omissions concerning the claims of the **CLASS** occurred within
27 this District. Furthermore, venue is proper in this District because at least one HAZARDOUS
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1 FIREPLACE to which this litigation relates is installed in the home of SEAN WHELAN, the
2 representative **CLASS** Plaintiff, which is located in this Judicial District.

3 **PLAINTIFFS**

4 6. At all times herein relevant, representative **CLASS** Plaintiff, SEAN WHELAN, was an
5 individual residing in the County of San Francisco, State of California.

6 7. Plaintiff brings this action individually and as a **CLASS** action. In this regard, Plaintiff
7 acts not only for himself but as the representative of a **CLASS** of similarly situated individuals who
8 fall within the description set forth in Paragraph 2, above.

9 **HAZARDOUS FIREPLACE**

10 8. Defendants are the developers, designers, manufacturers, assemblers, testers,
11 inspectors, marketers, advertisers, distributors and sellers of Valor brand direct vent, room-sealed,
12 glass front gas fireplaces that are designed and manufactured so as to reach unreasonably high
13 temperatures capable of causing third degree burns after only momentary contact with the glass
14 front while, and for a substantial period of time after, the fireplace was and is in operation
15 (hereafter "HAZARDOUS FIREPLACES"). Plaintiffs are the owners of homes and/or other
16 residential dwellings in which the HAZARDOUS FIREPLACES are installed.

17 **DEFENDANTS**

18 9. Defendants MILES INDUSTRIES, BAXI GROUP, and BDR THERMEA and their owners,
19 employees, parent companies, subsidiaries, affiliates, and agents, designed, manufactured,
20 assembled, distributed, sold, supplied, marketed, advertised, tested and/or provided warnings and
21 instructions for the HAZARDOUS FIREPLACES. At all times relevant herein, Defendant BAXI
22 GROUP provided Defendant MILES INDUSTRIES LTD. with the exclusive license to distribute and
23 sell the HAZARDOUS FIREPLACES, in North America. At all times relevant herein, Defendant BAXI
24 GROUP also provided Defendant MILES INDUSTRIES LTD. with the right to design, manufacture,
25 assemble and package for distribution the HAZARDOUS FIREPLACES for the consumer market in
26 the United States and Canada.
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1 10. At all times relevant herein, the corporate headquarters of Defendant BDR THERMEA
2 was and is at Marchantstraat 55, 7332 AZ Apeldoorn, the Netherlands. BDR THERMEA is the
3 owner, parent company, joint venturer, partner and/or affiliate of Defendant BAXI GROUP and on
4 information and belief supervises and supervised the operations of BAXI GROUP's design,
5 manufacture and production of Valor brand direct vent, room-sealed, glass front gas fireplaces.

6 11. Defendant BAXI GROUP is a registered company in the United Kingdom with a
7 registered office address at 16 Stanier Way, The Wyvern Business Park, Derby, DE21 6BF, United
8 Kingdom. The corporate headquarters of Defendant MILES INDUSTRIES LTD. is at 190-2255
9 Dollarton Highway, North Vancouver, BC, Canada V7H 3B1. At all or some portion of the relevant
10 time frame of this litigation, Defendants BAXI GROUP and MILES INDUSTRIES LTD. designed,
11 manufactured, assembled, distributed, supplied, marketed, advertised, sold, tested, provided
12 warnings and instructions for, and controlled the production of the HAZARDOUS FIREPLACES.

13 12. Plaintiffs are further informed and believe and thereon allege that Defendants,
14 individually and collectively each of them, were at all times herein mentioned the agents, joint
15 venturers, third party administrators, servants, controlling and actively participating parent
16 companies, subsidiaries, affiliates, relations, predecessors, successors, or employees of each of
17 the other Defendants, and were at all times herein mentioned acting within the course and scope
18 of said agency, service, employment, joint venture, ownership, agreement for administrative
19 services, and/or affiliate, predecessor or successor relationship, and with the consent and
20 knowledge of, or in consort with, each other Defendant.

21 13. Plaintiffs further contend that Defendant BDR THERMEA failed initially and on an
22 ongoing basis to adequately capitalize Defendant BAXI GROUP, failed to observe corporate
23 formalities with respect to BAXI GROUP, and otherwise controlled, directed and oversaw the
24 activities of subsidiary BAXI GROUP, and refused to allow BAXI GROUP to operate independently
25 as a separate going concern, to the point where BDR THERMEA on the one hand and BAXI GROUP
26 on the other were in fact a single venture and going concern.
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1 14. In engaging in the conduct alleged herein, each Defendant acted as the agent for
2 each of the other Defendants, or as the agent of those Defendants' predecessors in interest, and
3 as a single, unified going concern.

4 **GENERAL ALLEGATIONS RE HAZARDOUS FIREPLACES**

5 15. Defendants and each of them offered for distribution and sale the HAZARDOUS
6 FIREPLACES with the specific intention and purpose that these FIREPLACES be installed by
7 builders and others in homes and other dwellings throughout the United States. In so conducting
8 themselves, Defendants represented to consumers that the FIREPLACES were safe, of
9 merchantable quality, fit for their intended and reasonably foreseeable uses, and had sufficient
10 protections and warnings regarding potential dangers and hazards which reasonable consumers
11 would expect and assume to be provided in order to make a decision whether to purchase a home
12 installed with the HAZARDOUS FIREPLACE or purchase a HAZARDOUS FIREPLACE.

13 16. Defendants and each of them failed to disclose the true facts, *to wit*, that the
14 HAZARDOUS FIREPLACES are a dangerous and patently unsafe hazard to be used in a home given
15 the ability of the unguarded glass sealed front to heat up to temperatures in excess of 450
16 degrees Fahrenheit — well in excess of a temperature necessary to cause third degree burns to
17 skin contacting the glass even momentarily. This undisclosed and concealed hazard, previously
18 known to Defendants, creates an unreasonable potential for harm to owners of homes, dwellings
19 and structures throughout the United States in which HAZARDOUS FIREPLACES are installed.

20 17. As a result of Defendants' conduct, and their omissions, the putative **CLASS**,
21 including Plaintiff, purchased and/or otherwise came to own homes, dwellings and structures in
22 which HAZARDOUS FIREPLACES are installed.

23 18. Plaintiff and the **CLASS** lost money and suffered monetary damages as a result.
24 Specifically, **CLASS** Members paid a readily ascertainable amount for the HAZARDOUS
25 FIREPLACES, as an independent addition to their existing homes, or as an expense, which along
26 with the cost of installation, was incorporated into the price of new homes and residences
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1 purchased by **CLASS** Members. **CLASS** Members have or will suffer further damage to the extent
2 that they have or will incur the cost of replacing or retrofitting the HAZARDOUS FIREPLACES, and
3 replacing the FIREPLACES with safe, merchantable products.

4 **DEFENDANTS' FRAUDULENT CONCEALMENT OF THE HAZARD**

5 19. Direct vent fireplaces with a sealed fixed glass front have been built since the mid-
6 1980s under the brand name Valor.

7 20. On information and belief, since at least the late 1990's, Defendants and their
8 predecessor companies have operated and certified their FIREPLACES under an American National
9 Standards Institute ("ANSI") standard, what is currently known as ANSI Z21-88, and/or other
10 standards including the Canadian standards. These standards are critical to Defendants' long-
11 standing knowledge of the temperatures that the glass surfaces of Defendants' HAZARDOUS
12 FIREPLACES have been reaching and the harm they pose. These standards provide for the taking
13 of temperature readings which provide Defendants, and each of them, with a maximum allowable
14 temperature which the exposed front of direct vent fireplaces like the HAZARDOUS FIREPLACES
15 may reach.
16

17 21. Plaintiffs are informed and believed that Defendants test their FIREPLACES to the
18 ANSI standard, which standard excludes the exposed, room-sided glass temperature from
19 compliance. The maximum temperature which the exposed front (excluding the glass) may reach
20 is 119 degrees Fahrenheit plus ambient room temperature.

21 The exposed glass portion of the sealed door (i.e., the room-facing side of the glass) is exempt
22 under the ANSI standard from this or any other maximum temperature limit. However, glass
23 surface temperature is tested and has been tested since at least the mid-1990's because of
24 concerns regarding the capacity of the glass to withstand the temperatures generated by direct
25 vent fireplaces without shattering or otherwise failing. As a result, the interior, heat-sided glass
26 temperature has a maximum allowable surface temperature which must be attained as a
27 prerequisite of ANSI certification, due to the ANSI certification's focus on the capacity of a
28

1 fireplace, including the interior glass, to withstand the heat generated by the gas mechanism.
2 Under the ANSI standard, the interior, heat-sided glass surface temperature is estimated through
3 the use of a mathematical formula which requires the input of the temperature of the room-sided,
4 exposed glass surface during normal operation. Thus, any direct vent fireplace, including
5 Defendants' HAZARDOUS FIREPLACES, must have the room-sided, exposed glass surface
6 temperature tested in order to attain ANSI certification.

7 22. Defendants have known since before 2000 that to pass required ANSI internal, heat-
8 sided glass temperature testing, the exposed, room-sided glass surface of their HAZARDOUS
9 FIREPLACES under normal operation must read less than 500 degrees Fahrenheit —
10 approximately 100 degrees higher than the heated surface of a clothes iron on its maximum linen
11 setting and approximately 300 degrees hotter than boiling water. In order to make sure that the
12 final production versions of their HAZARDOUS FIREPLACES would pass this approximately 500
13 degrees room-sided temperature, plaintiffs are informed and believe that Defendants implemented
14 internal standards which set a target for the room-sided, exposed glass surface temperature at
15 a specific level that was still unreasonably and dangerously high in order to ensure compliance
16 with the ANSI standard and without any concern for the safety or burn prevention of the
17 consumer. In other words, as a result of their internal developmental testing and formal ANSI
18 certification testing, Defendants are and were aware, and expected, that the room-sided exposed
19 glass temperatures that their HAZARDOUS FIREPLACES would obtain approximately 500 degrees
20 Fahrenheit during normal operation.

21
22 23. Any effort on the part of Defendants to claim they did not fully comprehend the
23 severity of the hazard posed by their HAZARDOUS FIREPLACES is not credible in light of their
24 testing, including ANSI testing. Furthermore, it is well-known and commonly understood that
25 temperatures even below that of boiling water can cause severe third degree burns. Therefore,
26 it would be unreasonable, implausible and unbelievable for Defendants, or any of them, to assert
27 credibly that they did not fully comprehend and understand the types of severe, maiming and
28

1 potentially life threatening burns that their HAZARDOUS FIREPLACES would cause even from
2 momentary contact with their exposed glass surface during normal and intended operation.

3 24. Despite this obvious knowledge of the hazard posed by their HAZARDOUS
4 FIREPLACES Defendants took no reasonable steps to prevent consumers like Plaintiffs, their
5 families, or their guests from coming into direct contact with the exposed, room-sided glass
6 surface of their HAZARDOUS FIREPLACES. Instead, Defendants marketed their products to
7 consumers, wholesalers, installers and home builders on their Internet Web site, in photographs
8 and marketing materials, and otherwise, as appropriate for installation without appropriate
9 guarding in family rooms and other common areas of consumers' homes just a few inches above
10 floor height and well within the reach of infants and small children. In so marketing, Defendants
11 misled distributors, installers, home builders and consumers through concealment of the severe
12 danger HAZARDOUS FIREPLACES pose.
13

14 25. Furthermore, despite this obvious knowledge of the danger posed by their
15 HAZARDOUS FIREPLACES, Defendants took no reasonable steps to warn and advise consumers,
16 either before or after their purchase of said HAZARDOUS FIREPLACES, of the extreme,
17 unreasonable hazard their FIREPLACES posed. Instead, Defendants buried warnings and
18 instructions regarding the FIREPLACES, and the availability of barriers, in areas where one would
19 have difficulty finding the warning and/or understanding the connection between, e.g. a
20 decorative door, and the hazard posed by the glass. Moreover, the misleading and incomplete
21 information offered was not reasonably available or accessible to reasonable consumers until after
22 they had purchased the HAZARDOUS FIREPLACE for installation or had purchased homes in which
23 HAZARDOUS FIREPLACES had been installed.
24

25 26. Defendants took no reasonable steps in adequately warning consumers because they
26 realized that they could not market and sell their HAZARDOUS FIREPLACES if they allowed
27 consumers to understand the severity of the hazard posed by their FIREPLACES under normal and
28 expected operation. Based on information and belief, Defendants believed that if they distributed

1 their HAZARDOUS FIREPLACES with a glass guard, they would experience a decline in sales
2 because their customers would not want a guard that would impede the purported ambiance of
3 Defendants' FIREPLACES. For this same reason, Defendants did not adequately warn of the
4 hazard posed by the glass front of the HAZARDOUS FIREPLACES and in order to sell HAZARDOUS
5 FIREPLACES had to conceal and omit this knowledge through insufficient and ambiguous
6 warnings, primarily provided after purchase and installation. And the ambiguous, inadequate and
7 misleading "warnings" given in manuals not received until after purchase did not mention the
8 glass specifically, the outrageous temperatures it would reach, or adequately delineate the
9 severity of burns likely with even momentary contact.

10 **PLAINTIFF'S PURCHASE AND DISCOVERY OF THE CONCEALED BURN HAZARD**

11
12 27. On or about April 17, 2008, representative **CLASS** Plaintiff, SEAN WHELAN,
13 purchased a HAZARDOUS FIREPLACE, listed as Model No. Ventana 1200EAN, from a retail
14 fireplace store in San Francisco. SEAN WHELAN's purchase was based on a depiction of the
15 FIREPLACE in the midst of a family room, which projected a picture of ambiance, luxury and
16 sophistication. SEAN WHELAN does not recall receiving a customer care or user manual, even
17 with the later delivery of the HAZARDOUS FIREPLACE. Moreover, he recalls seeing nothing prior
18 to or after his purchase that caught his attention in terms of a warning or instruction regarding
19 the temperature of the room-facing glass or the burn danger posed by the HAZARDOUS
20 FIREPLACE. Specifically, Plaintiff SEAN WHELAN did not know nor was it reasonable for him to
21 understand at the time of the purchase or installation of the HAZARDOUS FIREPLACE, that it was
22 capable and in fact designed to reach temperatures hundreds of degrees above that necessary
23 to cause a third degree burn in one second of contact with the glass.

24
25 28. On July 27, 2010, Plaintiff SEAN WHELAN became alarmed about the extreme
26 danger of the glass surface temperature of the FIREPLACE installed in his home when his eleven
27 month old daughter suffered burns to her hands after touching the surface of the FIREPLACE
28 glass for only a moment. Prior to the injuries sustained by his daughter, Plaintiff had no

1 knowledge that the HAZARDOUS FIREPLACE was anywhere nearly as dangerous as it was. The
2 HAZARDOUS FIREPLACE had the fit and appearance of an appliance like their oven, dishwasher,
3 or microwave. Plaintiff knew that these other appliances were designed to generate heat, but
4 they could be touched without burning one's flesh. The HAZARDOUS FIREPLACE was designed
5 to be installed low to the floor, well within reach of Plaintiff's small children and without any
6 guarding or warning. Given its appearance and design, and lack of appropriate warnings, Plaintiff,
7 **CLASS** members and consumers simply did not and cannot reasonably expect that this appliance
8 could be capable of causing any severe injuries and burns.

9
10 29. A large number of the HAZARDOUS FIREPLACES are installed in new homes during
11 construction. **CLASS** Members who purchase these new homes have no reasonable or objective
12 expectation that the HAZARDOUS FIREPLACES, placed in family areas low enough to be touched
13 by infants and small children and resembling many other home appliances known to generate
14 heat—yet safe to touch, would be anywhere near as dangerous as they are. **CLASS**
15 representative, SEAN WHELAN, discovered the severity of the hazards posed by the HAZARDOUS
16 FIREPLACES only when his daughter suffered burns after touching the glass surface of the
17 FIREPLACE momentarily. No reasonable consumer, including the **CLASS**, in the absence of some
18 specific event like that which SEAN WHELAN experienced, is likely to discover or have reason to
19 investigate the unreasonable dangers posed by HAZARDOUS FIREPLACES. Neither SEAN WHELAN
20 nor any reasonable, objective consumer would have purchased a HAZARDOUS FIREPLACE, nor
21 paid as much for them had they known the true facts, all of which Defendants had to and did
22 intentionally conceal from Plaintiff SEAN WHELAN and the **CLASS** in order to sell their
23 HAZARDOUS FIREPLACES.

24 **CLASS ALLEGATIONS**

25
26 30. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs seek
27 certification of the following **CLASS**:
28

1 **All consumers who are residents of the United States and who**
2 **own homes or other residential dwellings in which one or**
3 **more Valor brand direct vent, room-sealed, glass front gas**
4 **fireplaces were installed.**

5 31. This action has been brought and may properly be maintained and certified as a
6 **CLASS** action because:

- 7 (a) The questions and issues of law or fact raised herein are of a common or
8 general interest, affecting a large **CLASS** of individuals and the public at
9 large;
- 10 (b) The **CLASS** consists of a sufficiently large group of individuals, believed to
11 exceed 10,000 members, and is so large that it is impractical to join all
12 members of the **CLASS** before the Court as individual plaintiffs. Plaintiffs are
13 informed and believe that the identity of **CLASS** Members is readily
14 ascertainable from various sources including the examination of residences
15 and builder records, and/or via simple notice by publication;
- 16 (c) The questions of law or fact common to the **CLASS** are substantially similar
17 and predominate over those questions affecting only specific members of the
18 **CLASS**;
- 19 (d) The **CLASS** is united by a community of interest in obtaining appropriate
20 equitable relief including injunctive relief and recall and replacement of the
21 HAZARDOUS FIREPLACES and restitution, damages, and other available relief
22 designed to redress the wrongful conduct of Defendants;
- 23 (e) Plaintiff is a member of the **CLASS**, and his claims are typical of the **CLASS**;
- 24 (f) Named Plaintiff will fairly and adequately represent the claims of the **CLASS**,
25 and protect the interests of the **CLASS** without exercising personal interest
26 or otherwise acting in a manner inconsistent with the best interests of the
27 **CLASS** generally;
- 28

- 1 (g) Named Plaintiff has retained attorneys experienced in the litigation of **CLASS**
2 and representative claims, and in the area of consumer protection litigation
3 who have agreed to, and will, responsibly and vigorously advocate on behalf
4 of the **CLASS** as a whole;
- 5 (h) Without **CLASS** certification, the prosecution of separate consumer actions
6 by individual members of the **CLASS** would be impracticable and financially
7 difficult, and create a risk of repetitive, inconsistent and varying
8 adjudications. This would have the effect of establishing incompatible
9 standards of conduct for Defendants, discouraging the prosecution of
10 meritorious but small claims, and/or result in adjudications which would be
11 dispositive of the interests of other **CLASS** Members not parties to the
12 adjudication, or otherwise substantially impair the ability of **CLASS** Members
13 to protect their rights and interests;
- 14 (i) Defendants have acted or refused to act on grounds generally applicable to
15 the **CLASS**, thereby making the award of equitable relief and/or restitution
16 appropriate to the **CLASS** as a whole; and
- 17 (j) The **CLASS** action procedure is superior to other methods of adjudication,
18 and specifically designed to result in the fair, uniform and efficient
19 adjudication of the claims presented by this Complaint. This **CLASS** action
20 will facilitate judicial economy and preclude the undue financial,
21 administrative and procedural burdens which would necessarily result from
22 a multiplicity of individual actions.

23
24 **FIRST CAUSE OF ACTION**

25 **(Unfair Business Practices)**

26 32. Plaintiff individually and for the **CLASS** incorporates by reference all preceding
27 Paragraphs, as though fully set forth herein, and avers against Defendants, and each of them.
28

1 33. California Business & Professions Code Section 17200 (hereinafter "Unfair
2 Competition Law" or "UCL") precludes unfair competition, *i.e.*, the employment of any unlawful,
3 unfair or fraudulent business acts or practices; and any unfair, deceptive, untrue or misleading
4 advertising violative of Cal. Bus. & Prof. Code Section 17500. This prohibition extends to any act,
5 omission or conduct, or pattern of activity, engaged in within California which affects the rights
6 of consumers within the State of California and elsewhere.

7 34. In marketing and selling the HAZARDOUS FIREPLACES, and in otherwise causing
8 the FIREPLACES to be placed into the stream of commerce for use by consumers in the United
9 States designed without adequate glass barriers or screens and without disclosing the serious burn
10 hazard they posed, and in continuing to conceal this critical safety information regarding the
11 dangers associated with the use of the HAZARDOUS FIREPLACES, Defendants and each of them,
12 made available for consumer use a dangerous and patently unsafe product which is not safely
13 useable for its intended purpose. Defendants, individually and collectively, were and remain
14 obligated to disclose the hazard associated with the FIREPLACES because of the public's
15 reasonable expectation that the FIREPLACES would not under normal and expected use heat up
16 on the exposed glass sealed front to temperatures well in excess to inflict third degree burns and
17 other catastrophic injuries on persons by simply inadvertently contacting the surface of the glass
18 front for a moment. In failing to disclose this critical safety issue which was known and readily
19 apparent to Defendants but not to reasonable consumers, including Plaintiff and the **CLASS**,
20 Defendants engaged in fraudulent conduct under Cal. Bus. & Prof. Code §17200. Plaintiffs
21 incorporate herein as though fully set forth herein Paragraphs 15 through 29, *supra*, as
22 particularized evidence of the pattern of concealment perpetrated by Defendants, and each of
23 them, against Plaintiff and the **CLASS**.

24 35. The aforementioned conduct is unlawful within the meaning of the UCL in that,
25 among other things, it violates Cal. Civil Code §1750, et seq. (hereinafter "Consumer Legal
26 Remedies Act" or "CLRA") to the extent that Defendants and each of them represented, by the
27
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1 omission and concealment of critical safety information well-known to Defendants, that the
2 HAZARDOUS FIREPLACES: (a) had characteristics, uses or benefits that they did not have in
3 violation of Section 1770(a)(5) of the CLRA; and (b) was of a particular standard, quality or grade
4 when it was of another in violation of 1770(a)(7) of the CLRA.

5 36. Defendants' conduct is unfair within the meaning of the UCL in that the alleged
6 consumer injury is substantial, creating an unreasonable risk of catastrophic physical injury to any
7 persons coming into contact with HAZARDOUS FIREPLACES. There is no countervailing benefit
8 to having or continuing to conduct themselves in the wrongful manner averred to herein.

9 37. Were it not for the unfair competition of Defendants, the **CLASS** would not have
10 purchased homes and residences within which the HAZARDOUS FIREPLACES had been installed
11 or would not have installed HAZARDOUS FIREPLACES in their homes.

12 38. The members of the **CLASS** have and will continue to suffer injury in fact and lose
13 money as a direct result of Defendants' unfair competition in that each has expended money to
14 purchase residences incorporating HAZARDOUS FIREPLACES or to purchase HAZARDOUS
15 FIREPLACES, and have or will be caused to expend money, including but not limited to, expending
16 money to remove the FIREPLACES from their homes and other residences they purchased and
17 own, retrofit same for safe use, and/or replace.

18 39. As a result of Defendants' unfair competition, Plaintiff and the **CLASS** are entitled
19 to appropriate equitable relief, including injunctive relief, and monetary relief in the form of
20 restitution (including fluid recovery if certified as a **CLASS** action). Plaintiffs are also entitled to
21 recover penalties, as well as an award of attorneys' fees for prosecuting this action.
22

23 **SECOND CAUSE OF ACTION**

24 **(Violation of the Consumers Legal Remedies Act)**

25 40. Plaintiff individually and for the **CLASS** incorporates by reference all preceding
26 Paragraphs, as though fully set forth herein, and avers against Defendants, and each of them.
27
28

1 41. California Civil Code Section 1750, *et seq.*, precludes Defendants from representing
2 that goods have characteristics and benefits which they do not have in transactions which are
3 intended to result, or which have resulted in the sale, installation in homes and other dwellings,
4 ownership and use of HAZARDOUS FIREPLACES by consumers, including Plaintiff and the **CLASS**.

5 42. In engaging in the conduct described herein, as more specifically set forth in
6 Paragraphs 15-29, and 34 of this Complaint, Defendants, and each of them, violated the
7 Consumers Legal Remedies Act, including Civil Code §1770(a)(5) and (7).

8 43. Were it not for the misconduct of Defendants, Plaintiff and the **CLASS** would not
9 have purchased homes and residences within which the HAZARDOUS FIREPLACES had been
10 installed, and/or would not have installed HAZARDOUS FIREPLACES in their homes.

11 44. Plaintiffs and members of the **CLASS** have suffered and will continue to suffer injury
12 in fact, and lose money and suffer damages as a direct result of Defendants' unfair competition,
13 in that each has expended money to purchase residences incorporating HAZARDOUS FIREPLACES
14 and have or will be caused to expend money, including but not limited to, expending money to
15 remove the FIREPLACES from their homes and other residences they purchased and own.

16 45. Notice in accordance with Cal. Civil Code §1782 has been delivered by certified mail
17 to the principal place of business of each Defendant. Upon the expiration of thirty (30) days from
18 the service of that notice, plaintiff will amend this complaint to state a claim for damages in the
19 event compliance with the requirements of the notice is not undertaken as required by Cal. Civ.
20 Code §1782(c) by defendants, and each of them.

21 46. Defendants, and each of them, know and have known, or have otherwise
22 consciously ignored and disregarded, the patently dangerous temperatures the HAZARDOUS
23 FIREPLACES are designed and manufactured to reach under normal, expected and reasonable
24 use, and the extent of injury and disfigurement the HAZARDOUS FIREPLACES will cause.
25 Defendants designed these fireplaces, which are in reality principally "ornamental" and serve
26 no meaningful function, for use at heights and in positions in family rooms which make
27
28

1 vulnerable children and infants the HAZARDOUS FIREPLACES' most likely victims. Defendants
2 are aware of the extreme temperatures and continue to produce and sell HAZARDOUS
3 FIREPLACES, claiming that they have not figured out a way to deal with the problem.
4 Defendants have and continue to recklessly and intentionally ignore the danger they have
5 created, failing to rectify the enormous risk by removing the HAZARDOUS FIREPLACES,
6 installing appropriate warnings or guards, and ceasing the manufacture of HAZARDOUS
7 FIREPLACES without appropriate corrective action, and with knowledge that other
8 manufacturers of similar fireplace products have for several years been selling their fireplaces
9 with mandatory protective glass front guards and other safety features.

10
11 47. Defendants further have failed and continue to fail to recognize the reckless
12 danger their HAZARDOUS FIREPLACES have created by ignoring the existence of an increasing
13 body of empirical evidence confirming the enormity of the problem their HAZARDOUS
14 FIREPLACES have and continue to cause. Recent studies, including a 2004 publication by the
15 American Burn Association, memorialize the seriousness of the problem created by the
16 HAZARDOUS FIREPLACES, recognizing: "an alarming [15 fold] increase in the incidence of
17 pediatric palmar burns associated with gas fireplaces[,]" and "the increasing popularity of
18 these units places more children at risk." Given Defendants' position in the industry, and their
19 significant market share as a manufacturer and supplier of gas fireplaces, the statistics and
20 information which are discussed herein are directly and reasonably attributable to the
21 Defendants' conduct in designing, manufacturing, distributing, advertising, marketing, and
22 selling their HAZARDOUS FIREPLACES.

23
24 48. The information and statistics referred to in Paragraph 47, *supra*, and well as
25 Defendants' awareness from their ANSI certification and other testing of the extremely high
26 temperatures that glass front reaches, have all put Defendants on notice of the danger posed
27 by their HAZARDOUS FIREPLACES. Yet, Defendants' officers and directors have ignored these
28 known hazards and have and continue to make profit-directed decisions in conscious disregard

1 of the safety and well-being of California children and families and others across the nation,
2 entitling the **CLASS** to an award of punitive damages.

3 49. As a result of the violations of the Consumers Legal Remedies Act engaged in by
4 Defendants, the **CLASS** is entitled to injunctive relief, monetary and punitive damages, and an
5 award of attorneys' fees.

6 **THIRD CAUSE OF ACTION**

7 **(Unjust Enrichment)**

8 50. Plaintiff individually and for the **CLASS** incorporates by reference all preceding
9 Paragraphs, as though fully set forth herein, and avers against Defendants, and each of them.

10 51. Defendants have been, and continue to be, unjustly enriched, to the detriment of
11 and at the expense of the **CLASS** members, as a result of their conduct directed against the
12 **CLASS** as a whole and their resulting collection of money from the sale of HAZARDOUS
13 FIREPLACES.

14 52. Defendants have unjustly benefitted through the unlawful and/or wrongful collection
15 of money from the sale of HAZARDOUS FIREPLACES, and continue to so benefit to the detriment
16 and at the expense of **CLASS** members.

17 53. Accordingly, Defendants should not be allowed to retain the proceeds from the
18 benefits conferred upon them by Plaintiff and **CLASS** members, who seek disgorgement of
19 Defendants' unjustly acquired profits and other monetary benefits resulting from its unlawful
20 conduct, and seek restitution and/or rescission for the benefit of the Plaintiffs and **CLASS**
21 members, in an equitable and efficient fashion to be determined by the Court.

22 54. Plaintiff and **CLASS** members are entitled to the imposition of a constructive
23 trust upon Defendants such that their enrichment, benefit and ill-gotten gains may be
24 allocated and distributed equitably by the Court to and/or for the benefit of **CLASS** members.

25 ///

26 ///

RELIEF REQUESTED

WHEREFORE, Plaintiff and the **CLASS** pray judgment against Defendants, and each of them, as follows:

ON THEIR FIRST CAUSE OF ACTION:

1. Equitable and/or injunctive relief as appropriate;
2. Monetary relief including restitution and fluid recovery;
3. Attorneys' fees, expenses and costs of suit;
4. Interest; and
5. Such other and further relief as the Court deems proper.

ON THEIR SECOND CAUSE OF ACTION:

1. Injunctive relief;
3. Attorneys' fees, expense and costs of suit;
4. Interest; and
5. Such other and further relief as the Court deems proper.

ON THEIR THIRD CAUSE OF ACTION:

1. Equitable relief in the form of restitution and disgorgement of profits;
2. Consequential damages;
3. Imposition of a constructive trust over the revenues of sale and resulting profits received as a result of defendants' wrongful conduct;
4. Costs, expense and attorneys' fees;
5. Interest; and
6. Such other and further relief as the Court deems proper.

Dated: April 27, 2011

CLAYEO C. ARNOLD
A Professional Law Corporation

By: 

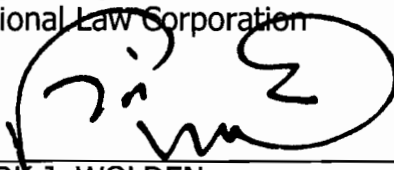
KIRK J. WOLVEN
Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

1
2 Plaintiff and the **CLASS** demands trial by jury of each cause of action set forth in this
3 complaint
4 and the issues in this matter.

5 Dated: April 27, 2011

6 CLAYEO C. ARNOLD
A Professional Law Corporation

7
8 By: 
9 KIRK J. WOLDEN
Attorney for Plaintiffs