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7
8 Attorneys for Defendant Bernzomatic, an unincorporated
9 division of Irwin Industrial Tools, erroneously sued herein
10 as Newell Operating Company dba Bernzomatic Corporation

11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **SOUTHERN DIVISION**

15 BRADLEY ENGLEBRICK and
16 ROXANNE HERNANDEZ

17 Plaintiffs,

18 vs.

19 WORTHINGTON INDUSTRIES,
20 INC.; NEWELL OPERATING
21 COMPANY dba BERNZOMATIC
22 CORPORATION; LOWE'S and
23 DOES 1 through 100

24 Defendants.

25 Superior Court Case No.: 30-
26 200800113504

27 **NOTICE OF REMOVAL OF**
28 **CIVIL ACTION FROM THE**
SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF ORANGE
[28 U.S.C. §1441(b)]

29 TO THE HONORABLE JUDGES AND CLERK OF THE COURT:

30 PLEASE TAKE NOTICE that defendant Bernzomatic, an unincorporated
31 division of Irwin Industrial Tools, erroneously sued herein as Newell Operating
32 Company dba Bernzomatic Corporation ("Bernzomatic") hereby seeks removal to
33 the United States District Court for the Central District of California, of the above-
34 entitled civil action. Pursuant to 28 U.S.C. § 1441(b), the Court may and should
35 take jurisdiction over this action for all purposes for the following reasons:

- 36 1. **JURISDICTION (DIVERSITY):** This is a civil action over
37 which this Court has original jurisdiction under 28 U.S.C. § 1332 (diversity
38

1 jurisdiction) and thus it is properly removed to this Court pursuant to 28 U.S.C. §
2 1441. Complete diversity of citizenship exists.

3 Bradley Englebrick and Roxanne Hernandez are, and were at the time this
4 action was filed and removed, residents of and citizens of the State of California.

5 Defendant Worthington Industries, Inc. ("Worthington") is a corporation. It
6 is incorporated under the laws of the State of Ohio, and has its principal place of
7 business in the State of Ohio. See Exhibit 1, pertinent excerpts from Worthington
8 Industries, Inc.'s 2008 Annual Report. Pursuant to 28 USC §1332(c), Worthington
9 is a citizen of the State of Ohio.

10 Defendant Lowe's Companies, Inc. (sued herein as "Lowe's") is a
11 corporation. It is incorporated under the laws of the State of North Carolina, and
12 has its principal place of business in the State of North Carolina. See Exhibit 2,
13 pertinent excerpts from Lowe's Companies, Inc. 2008 Annual Report, and records
14 from the North Carolina Secretary of State. Pursuant to 28 USC §1332(c), Lowe's
15 is a citizen of the State of North Carolina.

16 Defendant Bernzomatic (erroneously sued herein as Newell Operating
17 Company dba Bernzomatic Corporation¹) is an unincorporated division of Irwin
18 Industrial Tool Company, a corporation. It is incorporated under the laws of the
19 State of Delaware with its principal place of business in Huntersville, North
20 Carolina. See Exhibit 3, records from the Delaware Secretary of State, and
21 McRae's Bluebook. Pursuant to 28 USC §1332(c), Bernzomatic is a citizen of the
22 States of Delaware, and North Carolina.

23 No defendant is a citizen of California. Thus the citizenship of each plaintiff
24 is diverse from the citizenship of each defendant.

25
26
27 ¹ It should be noted that diversity also exists for Newell Operating Company. Newell
28 Operating Company is a Delaware corporation, with its principal place of business in Freeport,
Illinois. See Exhibit 4, records from Delaware Secretary of State and McRae's Bluebook.

1 The Complaint is based upon an incident that allegedly occurred on April 7,
2 2008 in this district. Plaintiffs allege that they were injured by a "Worthington gas
3 cylinder (MAPP Gas) with a Bernzomatic attached welding device." Plaintiffs
4 have served Statements of Damages seeking a total of \$31.1 million (\$25.7 million
5 by plaintiff Englebrick, and \$5.4 million by plaintiff Hernandez). Therefore, the
6 amount in controversy requirement is satisfied as plaintiff's alleged damages
7 exceed \$75,000.

8 This Court therefore has original jurisdiction over this action under 28
9 U.S.C. § 1332 because each plaintiff and each defendant are citizens of different
10 states and the amount in controversy exceeds \$75,000, exclusive of interest and
11 costs. Accordingly, this case is properly removed pursuant to 28 U.S.C. § 1441.

12 2. **TIMELINESS:** Bernzomatic was served with the Summons and
13 Complaint on October 24, 2008. Worthington was served with the Summons and
14 Complaint after October 24, 2008. This removal is being filed less than 30 days
15 from service of the Summons and Complaint on Bernzomatic.
16 Therefore, the removal of this action is timely.

17 3. **JOINDER OF ALL SERVED DEFENDANTS:** Defendant
18 Worthington joins in this removal, as evidenced by the signature below.
19 Bernzomatic is informed and believes that as of the date of removal, Lowe's has
20 not been served with the summons and complaint.

21 4. **STATE COURT PLEADINGS:** Attached hereto as Exhibit 5 are
22 true and correct copies of all of the process, pleadings and orders in the State Court
23 action.

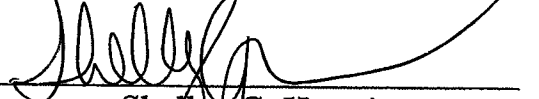
24 5. **NOTICE TO STATE COURT AND PLAINTIFFS OF**
25 **REMOVAL:** Bernzomatic has served a copy of this Notice of
26 Removal on plaintiff and will file a Notice of Filing Notice of Removal with the
27 Clerk of the Court of Orange County, California.

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DATED: November 13, 2008

HOLLAND & KNIGHT LLP



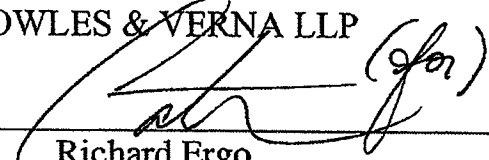
Shelley G. Hurwitz

Attorneys for Defendant Bernzomatic, an unincorporated division of Irwin Industrial Tools, erroneously sued herein as Newell Operating Company dba Bernzomatic Corporation

Defendant Worthington Industries, Inc. hereby joins in Bernzomatic's Notice of Removal.

DATED: November 13, 2008

BOWLES & VERNA LLP



Richard Ergo

Attorneys for Defendant Worthington Industries, Inc.

5791597_v1

SUMMONS
(CITACION JUDICIAL)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

WORTHINGTON INDUSTRIES, INC.; NEWELL OPERATING COMPANY dba
BERNZOMATIC CORPORATION; LOWES; and DOES 1 to 100, Inclusive

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

BRADLEY ENGLEBRICK and ROXANNE HERNANDEZ

10:31

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

FILED

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

OCT 21 2008

ALAN CARLSON, Clerk of the Court

BY: S. HERRERA-WILSON, DEPUTY

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia. Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

30-2008

The name and address of the court is:
(El nombre y dirección de la corte es):

Orange County Superior Court
700 Civic Center Drive West

Santa Ana, CA 927012
Central Justice Center

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Jeffrey A. Milman, Esq, SBN 99072 949-640-8222 949-640-8294
Kevin G. Liebeck, Esq, SBN 224317

HODES MILMAN, LLP
9210 Irvine Center Drive
Irvine, CA 92618

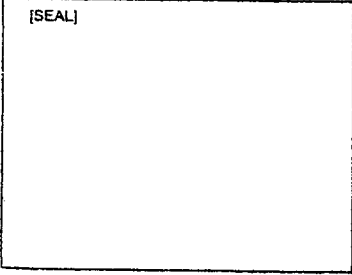
CASE NUMBER:
(Número del Caso): **00113504**

JUDGE SHEILA FELL
DEPT. C22

DATE: **2008** **ALAN CARLSON** Clerk, by **SONYA HERRERA-WILSON**, Deputy
(Fecha) (Secretario) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served



1. as an individual defendant.
2. as the person sued under the fictitious name of (specify):
3. on behalf of (specify):
under:

<input type="checkbox"/> CCP 416.10 (corporation)	<input type="checkbox"/> CCP 416.60 (minor)
<input type="checkbox"/> CCP 416.20 (defunct corporation)	<input type="checkbox"/> CCP 416.70 (conservatee)
<input type="checkbox"/> CCP 416.40 (association or partnership)	<input type="checkbox"/> CCP 416.90 (authorized person)
<input checked="" type="checkbox"/> other (specify):	
4. by personal delivery on (date):

SHORT TITLE: Englebrick/Hernandez v. Worthington Industries, Inc., et al.	CASE NUMBER:
--	--------------

4. Plaintiff (name):
 is doing business under the fictitious name (specify):

and has complied with the fictitious business name laws.

5. Each defendant named above is a natural person

a. except defendant (name): Worthington Industries, Inc.
 (1) a business organization, form unknown
 (2) a corporation
 (3) an unincorporated entity (describe):

(4) a public entity (describe):

(5) other (specify):

Newell Operating Company dba

c. except defendant (name): Bernzomatic Corporation
 (1) a business organization, form unknown
 (2) a corporation
 (3) an unincorporated entity (describe):

(4) a public entity (describe):

(5) other (specify):

b. except defendant (name): Lowes
 (1) a business organization, form unknown
 (2) a corporation
 (3) an unincorporated entity (describe):

(4) a public entity (describe):

(5) other (specify):

d. except defendant (name):
 (1) a business organization, form unknown
 (2) a corporation
 (3) an unincorporated entity (describe):

(4) a public entity (describe):

(5) other (specify):

Information about additional defendants who are not natural persons is contained in Attachment 5.

6. The true names of defendants sued as Does are unknown to plaintiff.

a. Doe defendants (specify Doe numbers): 1 - 50 were the agents or employees of other named defendants and acted within the scope of that agency or employment.

b. Doe defendants (specify Doe numbers): 51 - 100 are persons whose capacities are unknown to plaintiff.

7. Defendants who are joined under Code of Civil Procedure section 382 are (names):

8. This court is the proper court because

a. at least one defendant now resides in its jurisdictional area.

b. the principal place of business of a defendant corporation or unincorporated association is in its jurisdictional area.

c. injury to person or damage to personal property occurred in its jurisdictional area.

d. other (specify):

9. Plaintiff is required to comply with a claims statute, and

a. has complied with applicable claims statutes, or

b. is excused from complying because (specify):

PLD-PI-001

SHORT TITLE:

Englebrick/Hernandez v. Worthington Industries, Inc., et al.

CASE NUMBER:

10. The following causes of action are attached and the statements above apply to each (each complaint must have one or more causes of action attached):

- a. Motor Vehicle
- b. General Negligence
- c. Intentional Tort
- d. Products Liability
- e. Premises Liability
- f. Other (specify):

11. Plaintiff has suffered

- a. wage loss
- b. loss of use of property
- c. hospital and medical expenses
- d. general damage
- e. property damage
- f. loss of earning capacity
- g. other damage (specify):

12. The damages claimed for wrongful death and the relationships of plaintiff to the deceased are

- a. listed in Attachment 12.
- b. as follows:

13. The relief sought in this complaint is within the jurisdiction of this court.

14. Plaintiff prays for judgment for costs of suit; for such relief as is fair, just, and equitable; and for

- a. (1) compensatory damages
- (2) punitive damages

The amount of damages is (in cases for personal injury or wrongful death, you must check (1)):

- (1) according to proof
- (2) in the amount of: \$

15. The paragraphs of this complaint alleged on information and belief are as follows (specify paragraph numbers):
First Cause of Action

Date: October 16, 2008

Jeffrey A. Milman

(TYPE OR PRINT NAME)

(SIGNATURE OF PLAINTIFF OR ATTORNEY)

SHORT TITLE: Englebrick / Hernandez v. Worthington Industries, Inc., et al.	PLD-PI-001(5) CASE NUMBER:
--	-------------------------------

FIRST _____ CAUSE OF ACTION—Products Liability Page 4
 (number)

ATTACHMENT TO Complaint Cross - Complaint
 (Use a separate cause of action form for each cause of action.)

Plaintiff (name): Bradley Englebrick and Roxanne Hernandez

Prod. L-1. On or about (date): April 7, 2008 plaintiff was injured by the following product:
 A Worthington gas cylinder (MAPP Gas) with a Bernzomatic attached welding device.

Prod. L-2. Each of the defendants knew the product would be purchased and used without inspection for defects.
 The product was defective when it left the control of each defendant. The product at the time of injury was being
 used in the manner intended by the defendants.
 used in the manner that was reasonably foreseeable by defendants as involving a substantial danger not readily apparent. Adequate warnings of the danger were not given.

Prod. L-3. Plaintiff was a
 purchaser of the product. user of the product.
 bystander to the use of the product. other (specify):

PLAINTIFF'S INJURY WAS THE LEGAL (PROXIMATE) RESULT OF THE FOLLOWING:

- Prod. L-4. **Count One—Strict liability** of the following defendants who
- a. manufactured or assembled the product (names):
 Worthington Industries, Inc.; Newell Operating Company dba Bernzomatic Corporation; Lowes; and
 Does 1 _____ to 100 _____
 - b. designed and manufactured component parts supplied to the manufacturer (names):
 Worthington Industries, Inc.; Newell Operating Company dba Bernzomatic Corporation; Lowes; and
 Does 1 _____ to 100 _____
 - c. sold the product to the public (names):
 Worthington Industries, Inc.; Newell Operating Company dba Bernzomatic Corporation; Lowes; and
 Does 1 _____ to 100 _____
- Prod. L-5. **Count Two—Negligence** of the following defendants who owed a duty to plaintiff (names):
 Worthington Industries, Inc.; Newell Operating Company dba Bernzomatic Corporation;
 Lowes; and Does 1 _____ to 100 _____
- Prod. L-6. **Count Three—Breach of warranty** by the following defendants (names):
 Worthington Industries, Inc.; Newell Operating Company dba Bernzomatic Corporation;
 Lowes; and Does 1 _____ to 100 _____
- a. who breached an implied warranty
 - b. who breached an express warranty which was
 written oral
- Prod. L-7. The defendants who are liable to plaintiffs for other reasons and the reasons for the liability are
 listed in Attachment-Prod. L-7 as follows:

**-DO NOT FILE WITH THE COURT-
- UNLESS YOU ARE APPLYING FOR A DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE § 585 -**

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): Jeffrey A. Milman, Esq., SBN 99072 Kevin G. Liebeck, Esq., SBN 224317 HODES MILMAN, LLP 9210 Irvine Center Drive Irvine, CA 92618	TELEPHONE NO.: 949/640-8222	FOR COURT USE ONLY
ATTORNEY FOR (name): Plaintiffs, Bradley Englebrick and Roxanne Hernandez		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Orange STREET ADDRESS: 700 Civic Center Drive West MAILING ADDRESS: P.O. Box 838 CITY AND ZIP CODE: Santa Ana, CA 92702-0838 BRANCH NAME: Central Justice Center		
PLAINTIFF: BRADLEY ENGLEBRICK and ROXANNE HERNANDEZ DEFENDANT: WORTHINGTON INDUSTRIES, INC., et al.		
STATEMENT OF DAMAGES (Personal Injury or Wrongful Death)		CASE NUMBER:

To (name of one defendant only): NEWELL OPERATING COMPANY dba BERNZOMATIC CORPORATION
 Plaintiff (name of one plaintiff only): BRADLEY ENGLEBRICK
 seeks damages in the above-entitled action, as follows:

1. General damages

	AMOUNT
a. <input checked="" type="checkbox"/> Pain, suffering, and inconvenience	\$ 20,000,000.00
b. <input type="checkbox"/> Emotional distress	\$ _____
c. <input type="checkbox"/> Loss of consortium	\$ _____
d. <input type="checkbox"/> Loss of society and companionship (wrongful death actions only)	\$ _____
e. <input type="checkbox"/> Other (specify) _____	\$ _____
f. <input type="checkbox"/> Other (specify) _____	\$ _____
g. <input type="checkbox"/> Continued on Attachment 1.g.	\$ _____

2. Special damages

a. <input checked="" type="checkbox"/> Medical expenses (to date)	\$ 2,500,000.00
b. <input checked="" type="checkbox"/> Future medical expenses (present value)	\$ 1,000,000.00
c. <input checked="" type="checkbox"/> Loss of earnings (to date)	\$ 200,000.00
d. <input checked="" type="checkbox"/> Loss of future earning capacity (present value)	\$ 2,000,000.00
e. <input type="checkbox"/> Property damage	\$ _____
f. <input type="checkbox"/> Funeral expenses (wrongful death actions only)	\$ _____
g. <input type="checkbox"/> Future contributions (present value) (wrongful death actions only)	\$ _____
h. <input type="checkbox"/> Value of personal service, advice, or training (wrongful death actions only)	\$ _____
i. <input type="checkbox"/> Other (specify) _____	\$ _____
j. <input type="checkbox"/> Other (specify) _____	\$ _____
k. <input type="checkbox"/> Continued on Attachment 2.k.	\$ _____

3. **Punitive damages:** Plaintiff reserves the right to seek punitive damages in the amount of (specify) ..\$ _____ when pursuing a judgment in the suit filed against you.

Date: October 20, 2008

JEFFREY A. MILMAN
 (TYPE OR PRINT NAME)

(SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

(Proof of service on reverse)

**STATEMENT OF DAMAGES
(Personal Injury or Wrongful Death)**

**-DO NOT FILE WITH THE COURT-
- UNLESS YOU ARE APPLYING FOR A DEFAULT JUDGMENT UNDER CODE OF CIVIL PROCEDURE § 585 -**

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): Jeffrey A. Milman, Esq., SBN 99072 Kevin G. Liebeck, Esq., SBN 224317 HODES MILMAN, LLP 9210 Irvine Center Drive Irvine, CA 92618	TELEPHONE NO.: 949/640-8222	FOR COURT USE ONLY
ATTORNEY FOR (name): Plaintiffs, Bradley Englebrick and Roxanne Hernandez		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Orange STREET ADDRESS: 700 Civic Center Drive West MAILING ADDRESS: P.O. Box 838 CITY AND ZIP CODE: Santa Ana, CA 92702-0838 BRANCH NAME: Central Justice Center		
PLAINTIFF: BRADLEY ENGLEBRICK and ROXANNE HERNANDEZ DEFENDANT: WORTHINGTON INDUSTRIES, INC., et al.		
STATEMENT OF DAMAGES (Personal Injury or Wrongful Death)		
		CASE NUMBER:

To (name of one defendant only): NEWELL OPERATING COMPANY dba BERNZOMATIC CORPORATION
 Plaintiff (name of one plaintiff only): ROXANNE HERNANDEZ
 seeks damages in the above-entitled action, as follows:

1. General damages

	AMOUNT
a. <input checked="" type="checkbox"/> Pain, suffering, and inconvenience	\$ 5,000,000.00
b. <input type="checkbox"/> Emotional distress.....	\$ _____
c. <input type="checkbox"/> Loss of consortium.....	\$ _____
d. <input type="checkbox"/> Loss of society and companionship (wrongful death actions only).....	\$ _____
e. <input type="checkbox"/> Other (specify) _____	\$ _____
f. <input type="checkbox"/> Other (specify) _____	\$ _____
g. <input type="checkbox"/> Continued on Attachment 1.g.	\$ _____


2. Special damages

a. <input checked="" type="checkbox"/> Medical expenses (to date).....	\$ 100,000.00
b. <input checked="" type="checkbox"/> Future medical expenses (present value).....	\$ 200,000.00
c. <input checked="" type="checkbox"/> Loss of earnings (to date).....	\$ 50,000.00
d. <input checked="" type="checkbox"/> Loss of future earning capacity (present value).....	\$ 50,000.00
e. <input type="checkbox"/> Property damage.....	\$ _____
f. <input type="checkbox"/> Funeral expenses (wrongful death actions only).....	\$ _____
g. <input type="checkbox"/> Future contributions (present value) (wrongful death actions only).....	\$ _____
h. <input type="checkbox"/> Value of personal service, advice, or training (wrongful death actions only).....	\$ _____
i. <input type="checkbox"/> Other (specify) _____	\$ _____
j. <input type="checkbox"/> Other (specify) _____	\$ _____
k. <input type="checkbox"/> Continued on Attachment 2.k.	\$ _____

3. **Punitive damages:** Plaintiff reserves the right to seek punitive damages in the amount of (specify)..\$ _____
 when pursuing a judgment in the suit filed against you.

Date: October 20, 2008

JEFFREY A. MILMAN
 (TYPE OR PRINT NAME)


 (SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

(Proof of service on reverse)
**STATEMENT OF DAMAGES
(Personal Injury or Wrongful Death)**

COPY

1 RICHARD A. ERGO (# 110487)
WILLIAM T. NAGLE (#180162)
2 CATHLEEN S. HUANG (# 219554)
BOWLES & VERNA LLP
3 2121 N. California Blvd., Suite 875
Walnut Creek, CA 94596
4 Telephone: (925) 935-3300
Facsimile: (925) 935-0371
5 Email: raergo@bowlesverna.com
wnagle@bowlesverna.com
6 chuang@bowlesverna.com

7 Attorneys for Defendant
Worthington Industries, Inc.

FILED
SUPERIOR COURT OF CALIFORNIA/
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

NOV 13 2008

ALAN CARLSON, Clerk of the Court

BY B. LEA , DEPUTY

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9
10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF ORANGE – CENTRAL JUSTICE CENTER**

12 BRADLEY ENGLEBRICK and ROXANNE
13 HERNANDEZ,

14 Plaintiffs,

15 vs.

16 WORTHINGTON INDUSTRIES, INC, NEWELL
17 OPERATING COMPANY dba BERNZOMATIC
CORPORATION, LOWES, and DOES 1 to 100,
18 Inclusive,

19 Defendants.

Case No.: 30-2008- 0113504

**WORTHINGTON INDUSTRIES, INC.'S
ANSWER TO COMPLAINT**

ASSIGNED FOR ALL PURPOSES TO:

Judge Sheila Fell
Department C22

Complaint filed on October 21, 2008

BY FAX

20 Defendant Worthington Industries, Inc. (hereinafter "WII" or "Defendant") hereby answers
21 Plaintiffs' Complaint.

22 **GENERAL DENIAL**

23
24 Pursuant to the provisions of Section 431.30(d) of the California Code of Civil Procedure, this
25 answering Defendant denies generally and specifically, each and every allegation therein contained, and
26 the whole thereof, and denies that Plaintiffs are entitled to the relief requested in the Complaint or to any
27 recovery against Defendant by reason of any act, breach, or omission on the part of this answering
28 Defendant.

1 In further answering the Complaint on file herein, this answering Defendant denies that
2 Plaintiffs have sustained any injury, damage or loss by reason of any act or omission on the part of this
3 answering Defendant.
4

5 **FIRST AFFIRMATIVE DEFENSE**
6 **(Insufficient Facts to Constitute a Cause of Action)**

7 1. As a first, separate and distinct affirmative defense to the Complaint and each cause of
8 action thereof, WII alleges that some or all of Plaintiffs' purported claims for relief fail to state facts
9 sufficient to constitute a cause of action against WII.

10 **SECOND AFFIRMATIVE DEFENSE**
11 **(Negligence of Plaintiffs)**

12 2. As a second, separate and distinct affirmative defense to the Complaint and each cause
13 of action thereof, WII alleges that Plaintiffs were careless and negligent with respect to matters alleged
14 in the Complaint and such carelessness and negligence proximately caused and contributed to the extent
15 of one hundred percent (100%) to the happening of the accident and injuries, loss and damages
16 complained of, if any there were, and this contributory negligence bars or at least proportionately
17 reduces any potential recovery.

18 **THIRD AFFIRMATIVE DEFENSE**
19 **(Negligence of Others)**

20 3. As a third, separate and distinct affirmative defense to the Complaint and each cause of
21 action thereof, WII alleges that the damages complained of, if any there were, were proximately
22 contributed to or caused by the carelessness, negligence, fault or defects created by the remaining
23 parties in this action, or by other persons, corporations or business entities, unknown to WII at this time
24 and were not caused in any way by WII or by persons for whom WII is legally liable.
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FOURTH AFFIRMATIVE DEFENSE
(Imputed Negligence)

4. As a fourth, separate and distinct affirmative defense to the Complaint and each cause of action thereof, WII alleges that the damages complained of, if any there were, were either wholly or in part, negligently or otherwise, caused by persons, firms, corporations, or entities other than WII, and such negligence or other conduct is either imputed to Plaintiffs, by reason of the relationship of such parties to Plaintiffs, and/or such negligence or other conduct comparatively reduces the percentage of negligence, if any, by WII.

FIFTH AFFIRMATIVE DEFENSE
(Improper Use)

5. As a fifth, separate and distinct affirmative defense to the Complaint and each cause of action thereof, WII alleges that any product which was designed, manufactured or distributed by WII was improperly used in a manner which was not reasonably foreseeable, and such misuse proximately contributed to the happening of the accident and injuries, loss and damages complained of, if any there were.

SIXTH AFFIRMATIVE DEFENSE
(Alteration)

6. As a sixth separate and distinct affirmative defense to the Complaint and each cause of action thereof, WII alleges that any product which was designed, manufactured or distributed by WII was altered after it left the control of WII, and this alteration proximately caused the happening of the accident and injuries, loss and damages complained of, if any there were.

SEVENTH AFFIRMATIVE DEFENSE
(Assumption of Risk)

7. As a seventh separate and distinct affirmative defense to the Complaint and each cause of action thereof, WII alleges that Plaintiffs assumed the risks complained of and accordingly are barred from any recovery.

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EIGHTH AFFIRMATIVE DEFENSE
(Superseding and Intervening Cause)

8. As an eighth separate and distinct affirmative defense to the Complaint and each cause of action thereof, WII alleges that responsibility for any harm, injury or damage sustained by Plaintiffs was caused by acts or events which constitute a superseding and intervening cause.

NINTH AFFIRMATIVE DEFENSE
(Failure to Mitigate)

9. As a ninth separate and distinct affirmative defense to the Complaint and each cause of action thereof, WII alleges that Plaintiffs failed and neglected to use reasonable care to protect themselves and to minimize the losses and damages complained of, if any there were.

TENTH AFFIRMATIVE DEFENSE
(Civil Code § 1431.2(a), et seq.)

10. As a tenth separate and distinct affirmative defense to the Complaint and each cause of action thereof, WII alleges that its liability, if any, for non-economic damages suffered by Plaintiffs shall be severable, and not joint, and WII shall be liable, if at all, only for the non-economic damages allocated to it in direct proportion to its percentage of fault, if any, pursuant to Civil Code Section 1431.2(a), et seq.

ELEVENTH AFFIRMATIVE DEFENSE
(Other Defenses)

11. As an eleventh separate and distinct affirmative defense to the Complaint and each cause of action thereof, WII reserves all rights to supplement this Answer with additional denials and/or affirmative defenses, as further facts are discovered in this litigation.


WHEREFORE, WII prays for judgment as follows:

1. That Plaintiffs take nothing by reason of this Complaint on file herein;
2. That WII recovers its costs of suit incurred herein, including attorneys' fees; and
3. For such other and further relief as the Court may deem just and proper.

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Dated: November 13, 2008

BOWLES & VERNA LLP

By: 
Cathleen S. Huang
Attorneys for Defendant
Worthington Industries, Inc.

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PROOF OF SERVICE

**(Englebrick & Hernandez v. Worthington Industries, Inc., et al. - Superior Court of California, County of Orange
Case No.: 30-2008-00113504)**

I, the undersigned, declare as follows: I am a citizen of the United States, over the age of 18 years, and not a party to, or interested in the within entitled action. I am an employee of BOWLES & VERNA LLP, and my business address is 2121 N. California Blvd., Suite 875, Walnut Creek, California 94596.

On November 13, 2008, I served the following document(s):

WORTHINGTON INDUSTRIES, INC.'S ANSWER TO COMPLAINT

on the following parties in this action addressed as follows:

Attorneys for Plaintiffs

Jeffrey A. Milman
Hodes Milman, LLP
9210 Irvine Center Drive
Irvine, CA 92618
Phone: 949-640-8222
Fax: 949-640-8294
jmilman@hodesmilman.com

XX *(BY MAIL) I caused each such envelope, with postage thereon fully paid, to be placed in the United States mail at Walnut Creek, California. I am readily familiar with the business practice for collection and processing of mail in this office. That in the ordinary course of business said document(s) would be deposited with the U.S. Postal Service in Walnut Creek on that same day. I understand that service shall be presumed invalid upon motion of a party served if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained on this affidavit.*

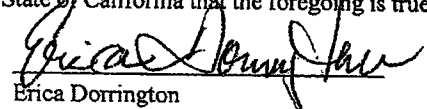
 (BY ELECTRONIC MAIL) I caused each such person to be served vial electronic mail via ECF System.

 (BY PERSONAL SERVICE) I caused each such envelope to be delivered by hand to each addressee above.

 (BY OVERNIGHT DELIVERY) I caused each envelope, with delivery fees provided for, to be deposited in a box regularly maintained by UPS/FEDERAL EXPRESS. I am readily familiar with Bowles & Verna's practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course of Bowles & Verna's business practice the document(s) described above will be deposited in a box or other facility regularly maintained by UPS/FEDERAL EXPRESS or delivered to an authorized courier or driver authorized by UPS/FEDERAL EXPRESS to receive documents on the same date that it is placed at Bowles & Verna for collection.

 (BY FACSIMILE) By use of facsimile machine number (925) 935-0371 or (925) 256-1755, I served a copy of the within document(s) on the above interested parties at the facsimile numbers listed above. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 13, 2008, at Walnut Creek, California.


Erica Dorrington

COPY

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

NOV 13 2008

ALAN CARLSON, Clerk of the Court

BY: R. LUCEY DEPUTY

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HOLLAND & KNIGHT LLP
Shelley G. Hurwitz (State Bar #217566)
633 West Fifth Street, 21st Floor
Los Angeles, California 90071-2040
Telephone (213) 896-2400
Facsimile (213) 896-2450

Attorneys for Defendant Bernzomatic, an unincorporated
division of Irwin Industrial Tools, erroneously sued herein
as Newell Operating Company dba Bernzomatic Corporation

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE**

BRADLEY ENGLEBRICK and
ROXANNE HERNANDEZ

Plaintiffs,

vs.

WORTHINGTON INDUSTRIES, INC.;
NEWELL OPERATING COMPANY dba
BERNZOMATIC CORPORATION;
LOWE'S and DOES 1 through 100

Defendants.

Case No.: 30-20080113504

**BERNZOMATIC'S ANSWER TO
COMPLAINT**

Judge: Fell
Dept: C22

BY FAX

1 Comes now defendant Bernzomatic, an unincorporated division of Irwin Industrial Tools,
2 erroneously sued herein as Newell Operating Company dba Bernzomatic Corporation
3 ("BERNZOMATIC"), answering for itself alone, and in response to the unverified Complaint of
4 Plaintiffs, admits, denies and otherwise avers as follows:

5 **ANSWER**

6 Defendant BERNZOMATIC denies each and every allegation of the Complaint and the
7 whole thereof, to the extent it purports to make claims against BERNZOMATIC, and denies that
8 Plaintiffs were damaged or injured in the sum alleged, or in any other sum, or at all.

9 **AFFIRMATIVE DEFENSES**

10 **FIRST AFFIRMATIVE DEFENSE**

11 The causes of action set forth in the Complaint, and each of them, are barred because the
12 Complaint fails to state a claim upon which relief may be granted.

13 **SECOND AFFIRMATIVE DEFENSE**

14 The causes of action set forth in the Complaint, and each of them, are barred because any
15 recovery by Plaintiffs would constitute unjust enrichment.

16 **THIRD AFFIRMATIVE DEFENSE**

17 The causes of action set forth in the Complaint, and each of them, are barred by the
18 doctrine of latches.

19 **FOURTH AFFIRMATIVE DEFENSE**

20 The causes of action set forth in the Complaint, and each of them, are barred because
21 Plaintiffs' damages, if any, were not caused by defendant BERNZOMATIC.

22 **FIFTH AFFIRMATIVE DEFENSE**

23 The causes of action set forth in the Complaint, and each of them, are barred because
24 Plaintiffs cannot show actual damages as a result of any acts or omissions by defendant
25 BERNZOMATIC.

26 **SIXTH AFFIRMATIVE DEFENSE**

27 The Complaint, and each cause of action thereof, is barred in that the action was not filed
28 and/or served within the time prescribed by the applicable statutes of limitations.

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SEVENTH AFFIRMATIVE DEFENSE

BERNZOMATIC herewith place in issue the negligence, if any, of all persons who contributed in any degree to the damages and/or injuries alleged in the Complaint, and the degree that such negligence contributed to the damages and/or injuries allegedly sustained.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to exercise reasonable care to mitigate the damages allegedly sustained, and Plaintiffs are therefore barred from recovery or any recovery should be reduced accordingly.

NINTH AFFIRMATIVE DEFENSE

The injuries, damages, losses and/or detriment of which Plaintiffs complain and for which the Complaint seeks recovery, if any, were the result of causes independent of the purported acts or omissions of BERZNOMATIC, which causes operated as intervening and superseding causes, thereby cutting off any liability on the part of BERZNOMATIC.

TENTH AFFIRMATIVE DEFENSE

Any defect in the product manufactured and/or distributed by this answering Defendant resulted, if at all, from the redesign, modification, alteration, treatment, or change in the product after this answering Defendant relinquished possession and/or control of it and not from any act or omission of BERZNOMATIC.

ELEVENTH AFFIRMATIVE DEFENSE

The subject product was misused and abused.

TWELFTH AFFIRMATIVE DEFENSE

The product was not being used as intended and/or was not being used in a reasonably foreseeable manner at the time of the incident described in the Complaint.

THIRTEENTH AFFIRMATIVE DEFENSE

The accident, injuries and the damages complained of were the result of an unavoidable accident.

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FOURTEENTH AFFIRMATIVE DEFENSE

The benefits of the design of the product outweigh any risk of danger inherent in the design.

FIFTEENTH AFFIRMATIVE DEFENSE

The then-current state of knowledge was such that Defendant did not, and could not, know that the product distributed might pose a risk of harm in normal and foreseeable use.

SIXTEENTH AFFIRMATIVE DEFENSE

To the extent that any loss, injury or damage suffered by Plaintiffs was proximately caused by the negligent or willful acts or omissions of third parties whom Defendant neither controlled nor had the right to control, and was not proximately caused by any act, omission or other conduct of Defendant, such acts, omissions, or other conduct of third-parties constitute intervening or superseding causes of that loss, injury or damage allegedly suffered by Plaintiffs, thereby cutting off any liability on the part of Defendant.

SEVENTEENTH AFFIRMATIVE DEFENSE

There is no privity of contract between Plaintiffs and Defendant. Plaintiffs are therefore barred from seeking to enforce against this Defendant the express and implied warranties alleged in the Complaint.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims, if any, are barred because Plaintiffs are seeking to enforce warranties that are expressly disclaimed.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred because Plaintiffs failed to give timely notice of the breach of any warranties alleged in the Complaint.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred because Plaintiffs had full knowledge of all the risks, dangerousness and hazards, if any there were, and nevertheless voluntarily and with full appreciation of the amount of danger involved in their actions and the magnitude of risk involved, assumed the risk of damages to themselves.

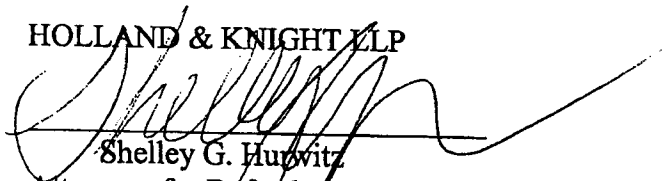
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WHEREFORE, Defendant BERNZOMATIC prays for judgment against Plaintiffs as follows:

1. That Plaintiffs take nothing by way of their Complaint;
2. That the Complaint be dismissed with prejudice as against BERNZOMATIC;
3. That judgment be entered in favor of BERNZOMATIC and against each and every claim asserted by Plaintiffs;
4. For costs of suit herein and reasonable attorneys fees; and
5. For such other and further relief as the Court deems just and proper.

DATED: November 3, 2008

HOLLAND & KNIGHT LLP



Shelley G. Hurwitz

Attorneys for Defendant Bernzomatic, an unincorporated division of Irwin Industrial Tools, erroneously sued herein as Newell Operating Company dba Bernzomatic Corporation

5801539_v1

Bradley Englebrick, et al. v Worthington Industries, Inc., et al.
Orange County Superior Court No. 30-2008-00113504-VTA

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 West Fifth Street, 21st Floor, Los Angeles, California 90071.

On **November 13, 2008**, I served the document described **BERNZOMATIC'S ANSWER TO COMPLAINT** on the interested parties in this action, enclosed in a sealed envelope, addressed as follows:

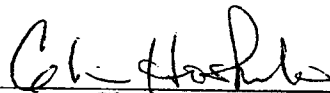
Jeffrey A. Milman, Esq.
Hodes Milman, LLP
9210 Irvine Center Drive
Irvine, CA 92618

BY MAIL

Following ordinary business practices, I placed the document for collection and mailing at the offices of Holland & Knight, LLP 633 West Fifth Street, 21st Floor, Los Angeles, California 90071, in a sealed envelope. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service, and, in the ordinary course of business, such correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 13, 2008, at Los Angeles, California.



Gloria Hoshiko

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Bradley Englebrick, et al. v Worthington Industries, Inc., et al.
United States District Court, Central District of California, Southern Division (Santa Ana)
Case No. _____

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 West Fifth Street, 21st Floor, Los Angeles, California 90071.

On **November 14, 2008**, I served the document described **NOTICE TO PLAINTIFF OF REMOVAL OF CIVIL ACTION FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE** on the interested parties in this action, enclosed in a sealed envelope, addressed as follows:

Jeffrey A. Milman
Kevin G. Liebeck
Hodes Milman, LLP
9210 Irvine Center Drive
Irvine, CA 92618

(949) 640-8222
(949) 640-8294

jmilman@hodesmilman.com

Richard A. Ergo
William T. Nagle
Cathleen S. Huang
Bowles & Verna
2121 N. California Blvd., Suite 875
Walnut Creek, CA 94596

(925) 935-3300
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raergo@bowlesverna.com
wnagle@bowlesverna.com
chuang@bowlesverna.com

BY MAIL

Following ordinary business practices, I placed the document for collection and mailing at the offices of Holland & Knight, LLP 633 West Fifth Street, 21st Floor, Los Angeles, California 90071, in a sealed envelope. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service, and, in the ordinary course of business, such correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the United States that the above is true and correct and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on November 14, 2008, at Los Angeles, California.



Gloria Hoshiko