

## SHALABY'S STATEMENT

The correct facts are as follows:

1. I held the torch assembly by the cylinder, lightly tapped the tip of the torch against a piece of firewood on the campfire, and the cylinder failed at the brazed joint.
2. The torch has a fracture groove designed to fracture if too much force is applied to the tip. It didn't fracture, because the force was far too low. The fracture groove fractures at about 26 foot pounds. I applied about 1 to 2 foot-pounds.
3. I don't believe I told anyone I kicked the cylinder into the fire. That's absurd...but who knows. Maybe I did, and just can't grasp that I would have said such a thing. See #8 below.
4. The allegation that I was banging the torch against a campfire ring is absurd and false.
5. The allegation that I used the torch to light a phantom water heater pilot light is false and absurd. I'm not even sure this would be "misuse."
6. Any allegations contradicting #1 above are false, since #1 is true.
7. Worthington's contention that the cylinder's brazed joint is the strongest part is false, evidenced by the fact that Bernzomatic invented the fracture groove to prevent failure of the weak brazed joint, and by the fact that all cylinders in all posted cases failed at the brazed joint.
8. Some of my testimony *may* have conflicted (emphasis on "may"). I suffered trauma and severe mental compromise due to medications in the hospital. For example, I don't remember telling the paramedic I kicked the cylinder into the fire, but that doesn't mean I did not say it. Maybe I did, and just can't remember. Maybe I did not, and the paramedic heard it from someone else and got it wrong. I also certainly believed my finger was on the trigger at the time of the explosion, but later discovered that this would have been impossible. The cylinders cannot fail - EVER - if the user is holding the assembly by the handle, and pressing the button. This is because the cylinder is BELOW the handle, so force to the tip will not reach the cylinder. The cylinder will ONLY fail if the assembly is held by the cylinder, and there is a flame source present, such as if one is using the trigger lock mechanism. These facts made me realize my earlier recollection that my finger was on the trigger

was not correct, and perhaps was a memory of an earlier moment in the chain of events. The defendants are therefore correct in their assertion that these sort of inconsistencies are all over the record of this case. However, these problems are the result of compromised reason, caused by the injury and medications...a by-product of the injury itself.

9. I investigated many of the cases posted here. It appears that in all cases the injured are not lawyers as myself, but are typically plumbers, and one welder. It appears that in every instance the cylinders failed because the users tapped the tip of their torches against pipes, or the torches fell and landed on the torch tips. Because this type of force application, it appears that most of the injury victims believe they were at fault. I have definitely observed some dishonest contrary representations were made by Plaintiffs' attorneys in some of the cases, where such dishonesty was never proper or even necessary. I think that the nature of these injuries, and how they occur, also prevent the majority of claims from ever being asserted (due to erroneous belief of user's fault).

10. I have personally seen and heard at least one cylinder leak, and have seen several cylinders with bad brazed joint welds right on the shelf at Home Depot. Some of those photos may be posted.

11. I know of at least one case alleging the brazed joint leaked and ignited without any force, but the user picked it up to put out the flames, and dropped it on the torch...and it exploded terribly.

12. I know, with certainty, that my MAPP gas cylinder failed because the brazed joint was extremely weak and defective. The brazed joint is designed to withstand more force than the torch's fracture groove, otherwise the fracture groove would not work to prevent failure of the cylinder. In my case, the force was far too light to fail the fracture groove, but failed the cylinder, therefore I have personal knowledge of my particular cylinder's defect. As for all the other failed cylinders posted, they all failed at the brazed joints, under application of force to the torch tips, therefore I can only surmise that there is a defect at the brazed joint with many of these cylinders. Many certainly evidence presence of serious corrosion.

13. I was told by John Nelson, a former quality control person at Bernzomatic in the 1980's, that these injuries have been occurring since the early 1980's, and that he was the one that asked Bernzomatic to implement the fracture groove.

14. I don't know of any cases where the propane cylinders failed. Just MAPP.

**(Matters designated as false or otherwise addressed on reply brief)**

**No. 09-56331**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**ANDREW W. SHALABY, SONIA DUNN-RUIZ**

**Plaintiffs and Appellants,**

**v.**

**NEWELL RUBBERMAID, INC.; THE HOME DEPO, INC.;;  
IRWIN INDUSTRIAL TOOL COMPANY, INC.;;  
BERNZOMATIC,**

**Defendants, Cross-Claimants, and Appellees,  
and**

**WESTERN INDUSTRIES, INC.; WORTHINGTON INDUSTRIES,**

**Cross-Defendants and Appellees.**

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Appeal from the United States District for the Southern District of California  
Michael M. Anello, District Judge, Presiding  
Barbara L. Major, Magistrate Judge, Presiding  
Case No.: 07-CV-2107 MMA BLM

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**ANSWERING BRIEF OF APPELLEE  
WORTHINGTON INDUSTRIES**

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**CORPORATE DISCLOSURE STATEMENT**

The undersigned counsel for Appellee Worthington Industries states as follows: Worthington Industries does not have a parent corporation and no publicly-held company owns ten percent or more of its stock.

Dated: December 2, 2009

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## STATEMENT OF THE CASE

Plaintiff Andrew Shalaby (hereinafter “Plaintiff” or “Shalaby”), who co-represents himself and his wife, plaintiff Sonia Dunn-Ruiz, was injured when gas allegedly escaped from a hand-held MAPP gas cylinder and torch Plaintiff had allegedly been using to try and reignite a simmering campfire. While Plaintiff purportedly recalls igniting the torch over a campfire when the accident occurred, impartial witnesses have testified that Plaintiff (1) **was seen banging** the torch/canister on the cement campfire ring, and (2) admitted immediately after the accident that it was “all [his] fault” and that he had in fact **kicked** the MAPP gas torch/cylinder into the fire.<sup>1</sup>

**FALSE**

**FALSE**

In an effort to support their argument that Shalaby’s injuries were caused by some product defect in the gas torch/canister, as opposed to his own negligence, Plaintiffs retained Dr. Robert Anderson to develop such an opinion. Ultimately, Dr. Anderson offered the opinion that gas had escaped from the device and ignited due to a defective braze joint where the center valve housing was affixed to the top

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<sup>1</sup> As discussed more fully below, Shalaby attempted to change his testimony following his deposition. After learning of the various opinions to be expressed by the defense experts, Plaintiff recalled that he had in fact been tapping the torch attached to the cylinder against a log in the campfire when the accident occurred.

of the gas cylinder. (Doc. No. 209, 2:19-20; ER Vol. I at 6.)<sup>2</sup> This alleged defect, according to Dr. Anderson, was likely caused by “porosity” in the braze joint.<sup>3</sup>

However, as explained in detail below, Dr. Anderson’s opinion makes no sense whatsoever as **the braze joint, even if porosity existed, is many times stronger than the steel of the cylinder itself.** In other words, the steel shell of the cylinder would fail before any failure in the braze joint. Dr. Anderson reached this erroneous conclusion due to incomplete and faulty preparation and testing. **FALSE**

As such, the Defendants immediately moved for summary judgment once expert discovery had been completed and Dr. Anderson had disclosed his opinions.<sup>4</sup> In this motion, Defendants also moved to exclude the proffered testimony of Drs. Anderson and Vredenburg, Plaintiffs’ warnings expert. (Doc. No. 45.)<sup>5</sup> In addition, the Bernzomatic Defendants filed a motion to exclude Plaintiffs from relying on expert opinions not timely disclosed. (Doc. No. 46.)

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<sup>2</sup> “ER” refers to Plaintiffs’ Excerpts of Record already on file.

<sup>3</sup> Based on Shalaby’s post-deposition “recollection”, and **after all discovery had been completed**, including the depositions of Shalaby and Dr. Anderson, Plaintiffs attempted to supplement Dr. Anderson’s findings with the opinion that the braze joint was additionally deficient because it was unable to withstand the force of Plaintiff tapping the torch on the piece of firewood. As discussed herein, the District Court properly exercised its discretion in denying Plaintiffs’ motions seeking to supplement Dr. Anderson’s testimony, reopen discovery, and amend their complaint. (Doc. No. 209, 2:23-3:13; ER Vol. I at 6-7.)

<sup>4</sup> As explained below, Bernzomatic brought the motion on behalf of all named defendants.

<sup>5</sup> The docket is located at ER Vol. I at 92-128.

Cross-defendant Worthington Industries likewise moved for summary judgment (Doc. Nos. 48-51), and filed a separate “Daubert” motion to preclude Plaintiffs’ experts from testifying. (Doc. Nos. 57-61, 63, 66, 70.) Cross-defendant Western Industries, Inc. joined in Worthington’s motions. (Doc. Nos. 73-75.) The primary basis for all of the above motions was that Plaintiffs cannot meet their burden to establish that a product defect caused the accident as the work performed by Drs. Anderson and Vredenburgh, and the opinions they expressed, fall woefully short of meeting the criteria for expert testimony established by F.R. Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

As a part of their opposition to these motions, Plaintiffs filed a document entitled Request for Judicial Notice. Through this document, Plaintiffs sought to have the District Court rule on whether the evidence they submitted with the Request was sufficient to establish that each of the 63 alleged “facts” identified in the document were true. (Doc. No. 200; ER Vol. II at 140.) Through the additional filing of three (3) motions to strike, Plaintiffs also requested that the Court preclude the defense experts from considering evidence that Shalaby (1) struck the MAPP gas torch/cylinder against the cement fire ring, (2) attempted to use the product to light a water heater, and (3) kicked the torch/cylinder into the campfire. (Doc. Nos. 105-107; ER Vol. IV at 812-835.)

Plaintiffs filed even more motions in an effort to avoid summary judgment. They filed motions seeking leave to supplement Dr. Anderson's opinions, to supplement their witness list, and to reopen discovery. (Doc. Nos. 93 and 116.) Finally, Plaintiffs filed a Motion for Leave to File Second Amended Complaint in which they sought to change the factual basis of their claims. (Doc. No. 98.) On March 11, 2009, Magistrate Judge Barbara Lynn Major denied Plaintiffs' motion to supplement their expert discovery with Dr. Anderson's supplemental report. (Doc. No. 131; ER Vol. I at 46-61.)<sup>6</sup> Consistent with the rationale of Magistrate Judge Major's rulings, the trial court denied Plaintiffs' motion for leave to amend their complaint. (Doc. No. 204; ER Vol. I at 33-39.)<sup>7</sup>

Thereafter, in an Order issued on July 28, 2009, the Honorable Michael M. Anello granted Worthington's motion to exclude the opinions of Plaintiffs' experts and Bernzomatic's motions for summary judgment and to prohibit Plaintiffs from relying on expert opinions not timely disclosed. (Doc. No. 209; ER Vol. I at 5-29.) In doing so, the District Court devoted sixteen (16) pages of its opinion to going

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<sup>6</sup> Plaintiffs thereafter filed a motion for reconsideration of this ruling, which was denied by Magistrate Judge Major on March 27, 2009. (Doc. No. 146; ER at 40-45.)

<sup>7</sup> Based on the above rulings, Dr. Anderson's untimely supplemental report and Plaintiffs' new theory of the case were excluded from the record. Nevertheless, Plaintiffs include all of this excluded information in their Excerpts of Record and proceed to brief their appeal, citing to the excluded evidence, as if these rulings had never been made. In doing so, Plaintiffs fail to distinguish between the proper record and the excluded evidence, and fail to disclose to this Court whether the evidence they cite is in the proper record or not.

through all of the various *Daubert* factors in assessing the evidentiary value of the work performed and opinions expressed by Drs. Anderson and Vredenburg. (Doc. No. 209, 4:6-20:19; ER Vol. I at 8-24.) Based on its determination that the opinions of Plaintiffs' experts were of essentially no value, the District Court appropriately found that Plaintiffs could not meet their burden to prove a defect and establish causation, and thus granted summary judgment for the Defendants.<sup>8</sup>

In light of the fact summary judgment was granted in favor of all of the Defendants, the District Court determined that the summary judgment motion brought by Worthington and Western Industries was "moot," and dismissed the third party complaint filed by the Defendants. (Doc. No. 209, 24:12-25:7; ER Vol. I at 28-29.) Plaintiffs appealed.

### ISSUES PRESENTED FOR REVIEW

1. Did the District Court properly exercise its discretion in finding that the opinions offered by Plaintiffs' metallurgy expert, Dr. Anderson, fail to meet the standards set forth in F.R. Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)?

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<sup>8</sup> In its Order, at footnote 3, the Court denied Plaintiffs' Request for Judicial Notice. The District Court had previously denied Plaintiffs' motions in limine (Doc. No. 205; ER Vol. I at 30-31), motions seeking leave to supplement Dr. Anderson's opinions, to supplement their witness list, and to reopen discovery (Doc. No. 131; ER Vol. I at 46-61), and motion seeking leave to file an amended complaint (Doc. No. 204; ER Vol. I at 33-39).

2. Did the District Court properly exercise its discretion in finding that the opinions offered by Plaintiffs' warnings expert, Dr. Vredenburg, fail to meet the standards set forth in F.R. Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)?

3. Did the District Court properly exercise its discretion in denying Plaintiffs' requests to supplement Dr. Anderson's opinions and reopen discovery based on the absence of "good cause," lack of diligence by Plaintiffs, and the prejudice to Defendants/Cross-Defendants?

4. Did the District Court properly conclude that Plaintiffs can not meet their burden to prove the existence of a defect in the MAPP gas torch and/or cylinder without the testimony of an expert witness, thus entitling the Defendants to summary judgment?

5. Was it a clear abuse of discretion for the District Court to deny Plaintiffs' motions to strike evidence that Shalaby was observed striking the MAPP gas torch/cylinder on the cement fire ring, used the torch/cylinder to light a water heater, and kicked the torch/cylinder into the campfire?

6. Did the District Court properly exercise its discretion in denying Plaintiffs' request to take judicial notice of 63 "facts" which Plaintiffs alleged to be true?

7. Did the District Court clearly abuse its discretion in refusing to permit Plaintiffs to amend their complaint to allege a new set of facts and theory on how the accident occurred after the close of percipient and expert discovery?

## STATEMENT OF FACTS

### I. THE PARTIES

The product at issue consists of a steel cylinder or canister, with a threaded center valve housing on top, to which a torch can be attached. The torch was manufactured by defendant and cross-claimant Bernzomatic.<sup>9</sup> It is unclear whether the steel cylinder was manufactured by Worthington Cylinders Wisconsin LLC or cross-defendant Western Industries, Inc.<sup>10</sup> It is undisputed that Plaintiffs purchased the torch handle and cylinder from defendant The Home Depo, Inc.<sup>11</sup>

### II. THE MAPP GAS CYLINDER

The MAPP gas cylinder is made up of a foot ring, a lower half, an upper half, a center valve housing and a pressure relief valve housing. (Doc. 59, 2:17-23; SER

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<sup>9</sup> Bernzomatic is a division of defendant Irwin Industrial Tool Company, Inc., which in turn is a subsidiary of defendant Newell Rubbermaid, Inc. (hereinafter together “Bernzomatic”).

<sup>10</sup> Bernzomatic acknowledges in its cross-complaint that it has no way of determining which entity manufactured the subject MAPP gas cylinder. (Doc. No. 38, ¶14.)

<sup>11</sup> As Bernzomatic has agreed to represent The Home Depo, Inc. in this matter, the Bernzomatic entities and Home Depo, Inc. will sometimes be referred to herein as “Defendants”.

Vol. II at 304.)<sup>12</sup> All of these components are affixed together by a process known as “brazing.” *Id.* Brazing joins metals by placing filler metal between the two metals being connected. *Id.* The foot ring is brazed to the lower half of the cylinder, the lower and upper halves are brazed together at the center seam, and the center valve housing and pressure relief valve housing are brazed to the top of the cylinder. *Id.* (Doc. 61, Ex. 2 [photograph of exemplar cylinder]; SER Vol. I at 272.)

The center valve housing is attached by inserting the valve housing into a hole in the top of the cylinder. At this connection, the metal of the cylinder actually protrudes downward into the interior of the cylinder. (Doc. 59, 2:24-26, SER Vol. II at 304.) This is depicted in a drawing of a sectioned cylinder provided with Worthington’s *Daubert* motion. (Doc. No. 61, Ex. 3; SER Vol. I at 274.) Four “dots” of braze paste are injected on the top of the cylinder shell around the center hole at the 12:00, 3:00, 6:00, and 9:00 positions. *Id.* at ¶5. The center valve housing is then press fit into the hole. *Id.* The cylinder is then placed into a braze furnace where the braze paste liquefies, flows circumferentially around the center valve housing and down into the interior of the cylinder to the bottom of the lip of the center valve housing hole. *Id.* When viewed three-dimensionally, the braze joint is shaped like a funnel.

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<sup>12</sup> “SER” stands for Appellees’ Joint Supplemental Excerpts of Record, which has been separately filed.

This process completed, the braze joint has both a vertical and horizontal leg. Each leg measures approximately 0.170 of an inch, for a total “width” of 0.340. (Doc. No. 61, 3:15-18; SER Vol. I at 239.) In particular, the aforementioned drawing shows that the width of the braze joint is many times the thickness of the cylinder shell. Specifically, the width of the braze joint is 0.340 of an inch and the cylinder shell is approximately 0.028 to 0.030 of an inch thick, making the braze joint approximately 12 times the thickness of the cylinder shell. (Doc. No. 61, 3:15-21; SER Vol. I at 239.) As such, the braze joint on the MAPP gas cylinder greatly exceeds the legal requirement that the minimum width of brazed joints be “at least four times the thickness of the shell wall.” Code of Federal Regulations, Section 178.65(c)(2)(iv). (Doc. No. 61, 3:2-6, 4:14-5:5; SER Vol. I at 239-240.) Indeed, **the brazed joint is three (3) times thicker than the minimum legal requirement.** (Doc. No. 61, 3:15-21; SER Vol. I at 239.)

**FALSE**

In addition to far surpassing the minimum thickness requirements, the braze alloy itself, based on the microhardness calculations performed by Plaintiffs’ own expert, is also at least 25% stronger than the steel of the cylinder. (Doc. No. 61, 3:22-4:11; SER Vol. I at 239-240.) Combined with the amount of surface being brazed together (the overlap between the cylinder shell and center valve housing), the strength of the braze joint is in fact at least 15 times stronger than the cylinder steel. (Doc. No. 61, 4:12-5:5; SER Vol. I at 240-241.) Thus, if the cylinder is

subjected to a given force (e.g., internal pressure or external trauma) sufficient to cause a failure, the failure will occur in the shell wall, not the braze joint. (Doc. No.

61, 5:8-6:5; SER Vol. I at 241-242.) If the brazed joint were weaker than the parent metal, then the joint would separate – come apart – when subjected to a given force, rather than there being a failure in the cylinder shell. *Id.*

**TRUE,**

**ACTUAL**

Porosity, which is the existence of tiny voids in the braze material, is to be expected. However, because the braze joint is so much stronger than the cylinder shell, even with 70% porosity the braze joint would still be 4 times stronger than

the parent metal, meaning the cylinder shell would necessarily have to fail before the brazed joint. (Doc. No. 61, 4:11-5:11; SER Vol. I at 240-241.) Significantly,

**FALSE**

none of the photographs produced by Dr. Anderson depict porosity levels of over 25%. (Doc. No. 61, 5:12-15; SER Vol. I at 241.)

Worthington's quality control procedures bear this out. One test required by the Department of Transportation, or DOT, is a burst test. In this test, not less than 1 out of every 1,000 cylinders manufactured is subjected to increasing pressure until the cylinder becomes so pressurized that the cylinder bursts. (Doc. No. 59, 4:14-23; SER Vol. II at 306.) Since engaging in the manufacture of MAPP gas cylinders, not less than 24,000 cylinders have been burst tested. In all of the burst tests conducted by Worthington, the bursts have always occurred in the cylinder

**TRUE FOR HEAT-EXPLODED, FALSE FOR IMPACT  
TO TORCH HEAD**

sidewall and not in any of the brazed joints, which is consistent with DOT requirements. *Id.*

### III. THE ACCIDENT

Plaintiff Shalaby purchased the MAPP gas torch kit for the purpose of lighting grills and campfires. (Doc. No. 62-1, Ex. A, 11:3-13, 62:12-15, 69:4-10, 97:23-98:7; SER Vol. III at 611, 622, 623, 633-634.) He used the torch on more than four trips before his accident. (Doc. No. 62-1, Ex. A, 99:3-9, 100:22-25, 101:1-9; SER Vol. III at 635-637.) Shalaby's torch had an on-off valve and igniter button. To ignite the torch, one turns the valve to the "on" position and depresses the igniter button, which ignites the MAPP gas.

On the evening of April 21, 2006, while on a trip to Campland in San Diego, Shalaby connected the torch to the cylinder. He listened for any leaks and detecting none, ignited the torch and used it to start a campfire in a cement fire ring. (Doc. No. 62-1, Ex. A, 115:1-116:8, 117:5-10, 127:5-24, 132:16-22; SER Vol. III at 638-640, 643-644.) Later that night, after the fire had died down, Shalaby added some wood to the fire and attempted to use the torch and cylinder to reignite the campfire. (Doc. No. 62-1, Ex. A, 123:8-10, 133:1-8, 136:10-137:14; SER Vol. III at 642, 645- 647.) According to Shalaby, he knelt down next to the campfire and depressed the igniter button, heard a hissing sound followed by a loud boom, and then was engulfed in flames. (Doc. No. 62-1, Ex. A, 141:2-12, 145:6-12, 146:3-16,

147:17-22, 151:14-16, 151:17-152:4, 159:17-160:8; SER Vol. III at 648-653, 656-657.) Shortly thereafter, Shalaby threw the torch and cylinder. (Doc. No. 62-1, Ex. A, 152:15-23, 156:20-157:6; SER Vol. III at 653-655.)

Randy Stephens, a Campland employee, immediately went to the accident scene and heard Shalaby state: "I'm an idiot. I can't believe I'm so stupid." "This is all my fault." (Doc. No. 62-1, Ex. C, 11:7-10, 35:11-24; SER Vol. III at 691-

692.) Warren Ratliff was also on duty at Campland and spoke to neighboring **MISLEAD** campers. (Doc. No. 62-1, Ex. B, 9:8-22, 18:21-19:2; SER Vol. III at 671-673.)

Ratcliff was told that Shalaby had attempted to light the campfire with his torch and, when he was unsuccessful, became "frustrated" and started banging the torch on the cement campfire ring. (Doc. No. 62-1, Ex. B, 19:7-20:23; SER Vol. III at 673-674.) **FALSE**

Paramedics Joe Russo and Robert Price treated Shalaby at the accident scene.

Both of these witnesses testified to Shalaby's statement that he had kicked the **MISLEAD** cylinder into the campfire, which resulted in the explosion. (Doc. No. 62-4, Ex. I, 19:19-20:1 and Ex. O, 14:3-25; 22:6-23:7; SER Vol. III at 800-801, 819-821.)

This testimony is consistent with the fire department report which states that **MISLEAD** Shalaby was "kicking around a propane torch. It went into a fire and blew up and burned him." (Doc. No. 62-4, Ex. I, 12:12-13:21, 19:19-20:1; SER Vol. III at 796-797, 800-801.)

Unfortunately, the torch and cylinder were discarded a few days after the accident. (Doc. No. 62-1, Ex. B, 36:15-21, 37:15-17; SER Vol. III at 678-679.) The fire department told Stephens and Ratliff that they did not need to take possession of the torch or cylinder because “[Shalaby] had already told them, and that it was an accident.” (Doc. No. 62-1, Ex. C, 61:22-62:4; SER Vol. III at 698-699.) As such, none of the experts were able to inspect the actual torch and cylinder involved in the accident.

However, Ratliff made an hour-long examination of the torch and cylinder before it was discarded. He observed that the torch was bent at an angle and that there was a crack in the cylinder just below the threads of the center valve housing. Ratliff described the crack as opening “outward” as if by an “explosion”. It appeared to him that the damage had been caused when the cylinder or torch was “banged against something.” (Doc. No. 62-1, Ex. B, 25:16-25, 28: 1-15, 66:20-23, 67:21-69:24, 70:10-20; SER Vol. III at 675-676, 682-686.) Stephens also observed the torch and cylinder in its post-accident condition. He too noted that the cylinder was “burst open” just “beyond the threads at the neck,” and that there was a “split approximately two and a half inches long” right “at the base of the neck.” (Doc. No. 62-1, Ex. C, 41:9-18; 42:14-43:1; SER Vol. III at 693-695.)

#### **IV. DR. ANDERSON'S OPINIONS**

Dr. Anderson set forth the crux of his analysis and opinions in his expert report dated June 25, 2008. (Doc. No. 172-33; ER Vol. IV at 783-786.) In sum, it is Dr. Anderson's central opinion that the MAPP gas cylinder is defective because of the existence of porosity in the braze joint, which according to Dr. Anderson resulted in insufficient fusion of the center valve housing to the cylinder wall. (Doc. No. 172-33, pg. 4; ER Vol. IV at 786.) Dr. Anderson theorizes that this caused "weakness" in the brazed joint, which purportedly allowed gas to escape from the cylinder. However, as exhaustively detailed by the District Court in its Order excluding Dr. Anderson's opinions, and as discussed in Section I-C of the Argument section herein, there are numerous problems with Dr. Anderson's analysis which render his opinions unreliable and largely irrelevant.

#### **V. DR. VREDENBURGH'S OPINIONS**

Dr. Vredenburg is Plaintiffs' expert on consumer warnings, and her opinions are set forth in her report and deposition testimony. (Doc. No. 45-3, Exs. K and L; SER Vol. II at 542-593.) As to the torch and packaging, it is Dr. Vredenburg's opinion that (1) the 6-point font used in the warnings is too small for most people to read, and (2) the packaging should not have stated that the torch was ideal for lighting grills. (Doc. No. 45-3, Ex. L, 72:24-25, 78:21-79:10; SER Vol. II at 577, 580-581.) With respect to the MAPP gas cylinder, Dr. Vredenburg

offered no opinions in her report. At her deposition, she initially criticized the cylinder label for not telling a consumer **how to protect oneself** in the event of an explosion, only to later concede that such a **warning was not necessary**. (Doc. No. 62-4, Ex. L, 128:22-129:2; SER Vol. II at 813-814.) As such, this expert had no opinion regarding the presence or absence of warnings on the cylinder.

The District Court properly excluded all of Dr. Vredenburgh's opinions based on her lack of qualifications and experience with respect to warnings on handheld torches, and as being unreliable and irrelevant under the *Daubert* standards. (Doc. No. 209, 17:4-20:19; ER Vol. I at 21-24.)

### **SUMMARY OF ARGUMENT**

The central issue in this action is whether there existed a defect in the subject MAPP gas torch and/or cylinder that caused or contributed to Plaintiffs' damages. Based on Plaintiffs' theory that a defect in the braze joint caused the accident, resolving this issue will necessarily involve an understanding and analysis of, among other things, how the MAPP gas cylinder is constructed, the physics of porosity in the braze joint, and the relative strengths of the braze joint versus the cylinder shell. Because an ordinary consumer does not understand these technical issues, a jury will not be able to determine whether the alleged defect exists **and if the product performed below minimum safety expectations** without the assistance of qualified expert testimony. Accordingly, the District Court

correctly determined that the “consumer expectations test” does not apply. Likewise, the District Court appropriately refused to apply the doctrine of *res ipsa loquitur* to the facts of this case as (1) the torch and MAPP gas cylinder were not within defendants/cross-defendants’ exclusive control and (2) the **trier of fact could easily conclude from the evidence** that Shalaby caused or contributed to the accident.

In this products liability case, Plaintiffs bear the burden of proof to show that a defect in the torch and/or MAPP gas cylinder caused their alleged damages. Because neither the consumer expectations test nor *res ipsa loquitur* apply, and the **question of whether the product contains a defect is beyond common experience**, it was Plaintiffs’ burden in opposing the summary judgment motion to present competent expert testimony establishing the existence of a defect. Without competent evidence of a defect, Plaintiffs can prove neither a defect nor causation.

In deciding whether Plaintiffs met their burden to present competent evidence of a product defect and causation in opposing summary judgment, the District Court first carefully examined the work product and testimony presented by Plaintiffs’ two (2) experts, Drs. Anderson and Vredenburgh. Dr. Anderson was Plaintiffs’ metallurgy expert and Dr. Vredenburgh was their disclosed expert on consumer warnings. In doing so, the District Court assessed the reliability and

relevance of their expert opinions under the standards set forth in Fed. R. Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

As to Dr. Anderson, the District Court found that his opinions were unreliable because (1) the testing he performed was inadequate and suspect, (2) there was no established rate of error in his testing, (3) his opinions were not supported by scientifically valid principles, (4) his opinions were not supported by other studies or subjected to peer review, and (5) Dr. Anderson inexplicably disregarded the testimony of the only witnesses to have inspected the MAPP gas torch/cylinder after the accident. The District Court likewise examined and excluded the opinions expressed by Dr. Vredenburgh as being unsupported, unreliable and irrelevant.

In ruling on the summary judgment and *Daubert* motions, the District Court further considered and properly denied Plaintiffs' Request for Judicial Notice and three In-limine Motions seeking to strike the evidence that Shalaby (1) was seen striking the MAPP gas torch/cylinder against the cement fire ring just prior to the accident, (2) had attempted to light a water heater with the torch/cylinder, and (3) kicked the torch and cylinder into the fire.<sup>13</sup>

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<sup>13</sup> Prior to issuing its ruling on the dispositive summary judgment and *Daubert* motions, the District Court also considered and correctly denied Plaintiffs' additional motions seeking to (1) supplement Dr. Anderson's opinions after his deposition had been completed and discovery had closed, (2) reopen discovery, and (3) amend their complaint to state a new factual theory on how the accident occurred.

Critically, Plaintiffs do not challenge the District Court's findings as to their experts' numerous failures to meet the *Daubert* criteria, instead arguing that the decision was incorrect because the Court made incorrect factual findings and refused to apply the consumer expectations test. Based on the exclusion of Plaintiffs' experts, the District Court found that Plaintiffs could not meet their burden to prove causation and thus properly granted summary judgment.

## ARGUMENT

### **I. THE DISTRICT COURT PROPERLY GRANTED THE DEFENSE MOTIONS TO EXCLUDE THE OPINIONS OF PLAINTIFFS' EXPERTS FOR FAILING TO MEET THE RULE 702 AND *DAUBERT* STANDARDS**

Understanding their need to prove that the MAPP gas torch/cylinder was defective in order to prevail in their lawsuit, Plaintiffs hired Drs. Anderson and Vredenburg and assigned them the task of coming up with opinions to support the existence of a defect. These opinions were set forth in the experts' respective reports and offered at their expert depositions. Believing that none of the opinions offered by Plaintiffs' experts were scientifically valid and reliable, Worthington and Bernzomatic moved to exclude Drs. Anderson and Vredenburg from testifying. After carefully comparing the opinions expressed against the applicable legal criteria, the District Court found all of the opinions to be significantly lacking

and excluded the opinion testimony of both experts. (Doc. No. 209, 4:7-20:19; ER Vol. I at 8-24.)

**A. Legal Standard.**

The trial court acts as a gatekeeper to the admission of expert scientific testimony under Federal Rules of Evidence, Rule 702. *Daubert, supra* at 579-580; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 and 152 (1999). Pursuant to Rule 702, a witness qualified as an expert in “scientific ... knowledge” may testify thereto if: “(1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods to the facts of the case.” Fed. R. Evid. 702. It is the burden of the proponent of the expert testimony to establish admissibility by a preponderance of the evidence. *Bourjaily v. United States*, 483 U.S. 11, 175-176 (1987). In deciding whether expert testimony meets the above criteria, the trial court conducts a two-prong preliminary assessment and considers whether (1) the reasoning or methodology underlying the expert testimony is scientifically valid (the reliability prong) and (2) whether the reasoning or methodology can properly be applied to the particular facts at issue (the relevancy prong). *Daubert, supra* at 592-593.

Importantly, in order for expert testimony to be deemed “reliable,” the testimony must be grounded in the methods and procedures of science – it must

signify something beyond “subjective belief or unsupported speculation.” *Id.* at 590. The expert’s inferences and assertions must be based on the “scientific method.” *Id.* In making this preliminary assessment, the trial court is to consider various factors, including (1) whether the theory can be and has been tested; (2) whether the theory has been subjected to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards and controls; and (4) whether the theory is generally accepted in the pertinent scientific community. *Id.* at 593-594. This inquiry is intended to be “flexible” and the district court is given broad latitude in deciding whether particular expert testimony is sufficiently reliable. *Daubert, supra* at 594; *Kumho Tire, supra* at 141-142.

In addition to being reliable, the trial court must also assess whether the proffered expert testimony is sufficiently relevant in that the testimony, if allowed, will actually be of assistance to the trier of fact in reaching a conclusion necessary to the case. *Daubert, supra* at 591-592. To this end the Ninth Circuit has advised that federal judges must therefore “exclude proffered scientific evidence under Rules 702 and 403 unless they are convinced that it speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1331 n.17 (9<sup>th</sup> Cir. 1995).<sup>14</sup>

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<sup>14</sup> Plaintiffs’ barren representation that, post-*Daubert*, “the rejection of expert testimony is the exception rather than the rule” is wholly unsupported by citation to case law and should thus be ignored. (Appellants’ Opening Brief, pg. 45).

Finally, while the court's focus is primarily on the expert's principles and methodology, as opposed to the conclusions reached, the United States Supreme Court has cautioned that "conclusions and methodology are not entirely distinct from one another." *General Elec. v. Joiner*, 522 U.S. 136, 146 (1997). As such, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.*

**B. Plaintiffs Do Not Challenge the District Court's Conclusion That the Opinions of Their Experts Fail to Meet the Rule 702 and *Daubert* Standards.**

Plaintiffs appeal the District Court's exclusion of the opinion testimony of their experts based on their position that the Court (1) should have applied the consumer expectations test, (2) failed to consider Dr. Anderson's supplemental report, (3) refused to take judicial notice of their alleged facts, and (4) relied on erroneous factual findings. **Tellingly, Plaintiffs do not contend that the District Court abused its discretion in assessing the relevance** and reliability of their experts' opinions under the Rule 702 and *Daubert* standards. As such, Plaintiffs have waived this issue. *Officers for Justice v. Civil Service Commission*, 979 F.2d 721, 726 (9<sup>th</sup> Cir. 1992).

Consequently, assuming the District Court was correct in deciding the four issues identified above, all of which are discussed independently below, it is respectfully submitted that the Court of Appeals can deny Plaintiffs' appeal of the

District Court's decision to exclude their experts without any need to review the specifics of the trial court's Rule 702 and *Daubert* analysis. However, out of an abundance of caution, Worthington provides a summary of the critical flaws in the opinions offered by Drs. Anderson and Vredenburg.

**C. Dr. Anderson's Opinions are Unsupported and Unreliable.**

**1. Porosity and the Brazing Process.**

Perhaps most importantly, Dr. Anderson readily concedes that he (1) did not conduct any tests to determine what level of porosity would make a brazed joint unreasonably weak, (2) does not know of any standards regarding acceptable levels of porosity, and (3) is unaware of any study or testing which supports his opinion. (Doc. No. 62-2, Ex. D, 179:5-182:23; SER Vol. III at 786-789.) What Dr. Anderson did do was perform testing in an effort to determine whether porosity in fact existed in the brazed joint, and conducted "pull tests" to see whether he could pull a center valve housing from the top of a MAPP gas cylinder.

As some porosity is inherent in the brazing process, it is certainly not surprising that Dr. Anderson discovered the existence of porosity through the metallography testing he performed. However, his conclusion that the "voids" substantially weaken the braze joint is completely unfounded. Critically, Dr. Anderson has absolutely no idea how much porosity would need to be present in a braze joint before it would be compromised, or under what conditions this would

occur. As explained in the Statement of Facts, even with 70% porosity the braze joint would still be four times stronger than the parent metal, meaning the cylinder shell would necessarily have to fail before the braze joint. (Doc. No. 61, 4:11-5:11; SER Vol. II at 240-241.) None of the photographs produced by Dr. Anderson in support of his opinions depict porosity levels in a brazed joint of over 25%. (Doc. No. 61, 5:12-15; SER Vol. II at 241.)

The District Court's conclusion that Dr. Anderson's opinions are unreliable is perhaps best exemplified by Dr. Anderson's erroneous understanding of the composition of the braze paste, and his refusal to take into account the true composition in formulating his opinions regarding the melting point of the paste and its role in the "wetting" process. In this regard, it is Dr. Anderson's opinion that insufficient "furnace temperature" contributes to the allegedly weak braze joint. This is based on his erroneous assumption that the braze paste is a "copper nickel alloy". (Doc. No. 172-33; ER Vol. IV at 785-786.) To the contrary, the braze paste also includes phosphorous, which **lowers the melting point** of the paste. Dr. Anderson's erroneous assumption is made even more troubling in view of the fact that he himself identified phosphorous in the braze paste during his own testing. Although this error was brought to Dr. Anderson's attention multiple times, as noted by the District Court, Dr. Anderson has never bothered to correct his opinion. (Doc. No. 209, 7:10-23; ER Vol. I at 11.)

## 2. The “Pull Tests.”

Another example of the careless and indifferent manner in which Dr. Anderson went about his assignment was his attempt to show that the alleged failure in the subject cylinder could not have occurred in the parent metal by performing two “pull tests.” Dr. Anderson had one of his associates, Chris Schneider, use a mechanical pulling device to attempt to remove the center valve housing from the top of two MAPP gas cylinders by force. (Doc. No. 61, Ex. 7 (photograph of pulling device); SER Vol. II at 296.) Dr. Anderson hoped to show that the braze joint would fail before the steel shell of the cylinder.<sup>15</sup>

In one of the tests, the steel shell, or parent metal, failed while the brazed joint remained intact. (Doc. No. 61, 9:1-5; SER Vol. II at 245.) In the second test there were failures in both the parent metal and braze joint. Based solely on these two tests, in which there was a failure of the parent metal at least 50% of the time, Dr. Anderson brazenly concluded that the subject torch and cylinder must have failed in the braze joint as opposed to the parent metal.

In addition to conducting only the two pull tests, the video of the testing shows that the cylinder in the second test also failed in the parent metal. (Doc. No. 61, 9:6-13; SER Vol. II at 245.) In this regard, the braze joint in the second test

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<sup>15</sup> Dr. Anderson testified that he did not feel any need to conduct testing to determine the relative strengths of the parent metal and braze joint. (Doc. No. 62-2, Ex. D, 180:1-9, 181:5-21; SER Vol. III at 787-788.)

only failed after the joint was subjected to approximately 30 seconds of intense heat from a fire caused by gas escaping from an initial breach in the parent metal. The reason the braze joint ultimately failed in the second test was because the fire caused the braze paste to weaken or even melt, and not because the joint was defective. (Doc. No. 61, 9:6-23; SER Vol. II at 245.) As shown in the video, the braze joint failed only after the fire caused by the initial failure in the cylinder shell, and only after Mr. Schneider applied lateral force to the cylinder using the attached socket wrench. *Id.* (Doc. No. 61, 9:1-23; SER Vol. II at 245.)

As noted by the District Court, Dr. Anderson made no effort to explain the reason for the two failures in the second test, and Plaintiffs did not address this critical concern with Dr. Anderson's testing in opposing the summary judgment motions. (Doc. No. 209, 8:9-23; ER Vol. I at 12.) In any event, Dr. Anderson's conclusion that the subject torch and cylinder failed in the braze joint based on only two pull tests, in which there was admittedly at least a 50% failure in the parent metal, is not credible and inconsistent with the scientific method.

### **3. Additional *Daubert* Failures.**

In addition to its concerns with the quality of the testing and analysis performed by Dr. Anderson, the District Court also found that Plaintiffs failed to meet other *Daubert* criteria. Plaintiffs failed to provide evidence of the rate of error for the pull tests, that other publications or testing supported Dr. Anderson's

opinions, or that Dr. Anderson's conclusions had been subjected to scientific scrutiny. (Doc. No. 209, 9:8-12:16; ER Vol. I at 13-16.)

Finally, while acknowledging that the description of the damaged cylinder provided by Mr. Stephens and Mr. Ratcliff directly contradicted his theory that the accident was caused by a defective braze joint, Dr. Anderson refused to consider their testimony in forming his opinions. Dr. Anderson's failure to consider this significant evidence, when he had never inspected the actual cylinder himself, further demonstrates his willingness to advocate Plaintiffs' position in callous disregard for the truth. Likewise, Dr. Anderson summarily dismissed the evidence that Plaintiff was seen kicking the torch and cylinder into the campfire. Because

**FALSE**

**FALSE**

**PROJECTION**

Dr. Anderson's opinions are contradicted by the facts of the case, his opinion testimony is properly excluded. *Guidroz-Brault v. Missouri Pac. R.R. Co.*, 254 F.3d 825, 827 (9<sup>th</sup> Cir. 2001). This, according to the District Court, was just one more reason for finding Dr. Anderson's opinions to be unreliable. (Doc. No. 209, 12:17-14:19; ER Vol. I at 16-18.)

**D. Plaintiffs' Motion to Supplement Dr. Anderson's Expert Opinions Was Properly Denied as Patently Untimely and Unduly Prejudicial to the Defense.**

Dr. Anderson's supplemental report was prepared after he had been deposed and had disclosed all of the expert opinions he had formed and intended to offer at trial. It is further undisputed that the supplemental report was

untimely. According to Plaintiffs, Dr. Anderson's supplemental report was served on October 6, 2008. (Appellants' Opening Brief, pg. 37-38.) This was over two months after the **July 18, 2008** deadline set forth in the scheduling order for exchanging liability expert supplemental reports. (Doc. No. 11, ¶5; ER Vol. I at 65.)<sup>16</sup> Indeed, Plaintiffs concede that the supplemental report was not even given to the defense until six (6) days after the close of expert discovery. (Appellants' Opening Brief, pg. 37.)

There is thus no dispute that Dr. Anderson's supplemental report was not provided to the defense in a timely manner. Allowing Plaintiffs to supplement their expert discovery at that late date would also have been highly prejudicial to the defense as the case had been in litigation for two years, both percipient and expert discovery had been completed, and Dr. Anderson's deposition had been taken.<sup>17</sup> Based on the information obtained through discovery, the defense had filed numerous pretrial motions, including motions for summary judgment. (Doc. No. 131, 9:1-12; ER Vol. I at 54.)

Plaintiffs argue that the order denying their motion to supplement their expert discovery should be reversed because the Court (1) allegedly "excused the

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<sup>16</sup> Although this deadline was extended by agreement of the parties to August 1, 2008 (Doc. No. 146, 5:2-4; ER Vol. I at 44), Dr. Anderson's supplemental report was still served over two months late.

<sup>17</sup> Before the close of discovery, 21 fact and expert depositions had been taken in various locations across the country. (Doc. No. 225-3; SER Vol. I at 24-26.)

six day delay” when reconsidering its order, (2) based its denial of Plaintiffs’ motion for reconsideration on the additional finding that the supplemental report should actually have been provided two months earlier, and (3) Dr. Anderson’s new opinion as to why the torch/cylinder was defective had already been disclosed. Plaintiffs are wrong on all counts.

Contrary to Plaintiffs’ claim, the District Court never “excused” their alleged six (6) day delay in serving the supplemental report on the defense. All the Court did in ruling on Plaintiffs’ motion for reconsideration was “accept Plaintiffs’ representation,” for purposes of the motion, that “service of the report six days after the close of expert discovery was not the fault of Plaintiffs.” (Doc. No. 146, 4:18-24; ER Vol. I at 43.) In this regard, the Court merely accepted Plaintiffs’ position that it was their former attorney, not Plaintiffs, who deliberately failed to timely serve the report. (Doc. No. 146, 3:16-25; ER Vol. I at 42.) Whether the supplemental report was late by six (6) days, fourteen (14) days, or (2) two months was a non-issue in deciding the motion.<sup>18</sup> The critical question was whether Plaintiffs could demonstrate “good cause” for the delay.

That the supplemental report was actually over two months late is just further support for the Court’s decision to deny Plaintiffs’ motion. As the Court

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<sup>18</sup> The Court acknowledged its error in calculating the number of days the report was late, but found the exact number of days to be “immaterial” to its decision. (Doc. No. 146, 5:22-6:1; ER Vol. I at 44-45.)

noted, while the deadline to complete expert discovery was continued in order to provide the parties more time to complete expert depositions, the agreed

**August 1, 2008** deadline to provide supplemental expert reports never changed.

(Doc. No. 146, fn. 3; ER Vol. I at 44.) Based on the information provided in the supplemental expert reports, the parties thereafter went forward and conducted ten (10) expert depositions. (Doc. No. 146, 5:2-18; ER Vol. I at 44.)

Plaintiffs' third reason for why the district Court erred in denying their motion to submit Dr. Anderson's supplemental report and reopen discovery is that Dr. Anderson had allegedly "already timely testified" to his new opinion that because "Shalaby was holding the cylinder at the time of the accident," as opposed to the torch handle, that "had an 'abusive' force been applied to the tip [of the torch], the brass [on the torch] would have fractured, and not the cylinder". (Appellants' Opening Brief, pg. 40; Doc. No. 172-37; ER Vol. I at 802.)

**Plaintiffs misrepresent Dr. Anderson's prior deposition testimony entirely. FALSE/**  
deposed, **Dr. Anderson did not mention anything about** Shalaby holding the **MISLEAD**  
torch/cylinder by the cylinder, or that the "fracture groove ... did not fracture  
**upon the application of about 1 to 2.5 foot pounds of force to the tip of the torch,**"  
as Plaintiffs now represent on appeal. All that Dr. Anderson said was that in his  
opinion the brazed material failed due to "[s]ome force applied to the torch tip in

the order of 12 to 30 pounds.” (Doc. No. 173-2, 105:1-8; ER Vol. III at 460.)<sup>19</sup>

Contrary to Plaintiffs’ suggestion, the Court’s denial of their request to supplement their expert discovery was not a discovery “sanction” for which a discovery violation needs to be “willful and tactical” in order to warrant the exclusion of evidence. The issue for the District Court was whether “good cause” existed to permit Plaintiffs’ “eleventh hour” request to supplement Dr. Anderson’s opinions. Based on Plaintiffs’ failure to demonstrate sufficient “good cause” to excuse Dr. Anderson’s failure to formulate and provide this new opinion earlier, and considering the severe prejudice the defense would suffer if the new opinion were allowed, the District Court properly denied Plaintiffs’ motion.

**E. Dr. Vredenburgh’s Opinions are Unsupported and Unreliable.**

Based on Dr. Vredenburgh’s admission that she is not an engineer and that design issues are outside of her expertise, the District Court properly excluded her testimony as it relates to the design of the MAPP gas torch and cylinder. (Doc. No. 62-4, Ex. L, 120:16-124:11; SER Vol. III at 805-809.) In addition, as previously pointed out, Dr. Vredenburgh conceded that she had no opinion

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<sup>19</sup> The citations provided by Plaintiffs for Dr. Anderson’s purported disclosure of his new opinion do not support their claim that Dr. Anderson so testified at his deposition. “Doc. 200-40 at 3:17 ER vol. 2 p. 310” is a citation to Shalaby’s declaration and does not support Plaintiffs’ assertion. “Doc. 172-2 at 116:1 & 117:21 (ER vol. 3 at 460-461),” while citing from Dr. Anderson’s deposition transcript, does not contain the purported opinion testimony either.

regarding the presence or absence of a warning on the cylinder. (See, Statement of the Case, Section V, above.)

In addition, the trial court properly excluded Dr. Vredenburgh's failure to warn testimony as to the torch because she had no experience with the product. In this regard, Dr. Vredenburgh had never operated a hand held torch, had not seen one in over 17 years, did not know how to operate the MAPP gas torch and cylinder, and was unfamiliar with the users of this product. (Doc. No. 209, 18:9-19; ER Vol. I at 22.) The trial court further found that even if Dr. Vredenburgh were qualified to testify, her proffered testimony would ultimately be excluded as unreliable and irrelevant under the *Daubert* standards. (Doc. No. 209, 19:13-14; ER Vol. I at 23.) As noted by the District Court, Dr. Vredenburgh did not collect any empirical data, did not conduct any testing, did not conduct any surveys, did not seek data from manufacturers, did not review any peer-reviewed literature, did not conduct any other kind of research prior to forming her opinion, and could not even say that the lack of warnings resulted in Mr. Shalaby's injuries. (Doc. No. 209, 19:12-20:19; ER Vol. I at 23-24.)

For all of the above reasons, the District Court's Order excluding Dr. Anderson and Dr. Vredenburgh as experts in this case for failure to meet the Rule 702 and *Daubert* standards should be affirmed.

## **II. SUMMARY JUDGMENT WAS PROPERLY GRANTED AS PLAINTIFFS ARE UNABLE TO PROVE THAT THEIR DAMAGES WERE CAUSED BY A PRODUCT DEFECT**

California law applies to the District Court's assessment of Plaintiffs' claim that the MAPP gas torch/cylinder is defective. *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1193-94 (9<sup>th</sup> Cir. 2007) Under California law, "A product liability case must be based on substantial evidence establishing both the defect and causation...". *Stephen v. Ford Motor Co.*, 134 Cal. App. 4<sup>th</sup> 1363, 1365 (Cal. Ct. App. 2005). Mere possibility alone is insufficient to establish a prima facie case. *Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 403 (1985).

### **A. Plaintiffs' Burden In Opposing The Summary Judgment Motions.**

The summary judgment motions filed by Bernzomatic and Worthington were based on Plaintiffs' inability to prove the existence of a defect and causation, issues on which Plaintiffs would bear the burden of persuasion at trial. As such, Defendants and Cross-Defendants had the initial burden on summary judgment to show that Plaintiffs lacked sufficient evidence on these issues. The moving parties met their burden by demonstrating that the opinion testimony to be offered by Plaintiffs' expert witnesses was highly suspect and unreliable, and should thus be excluded. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102. Importantly, Defendants and Cross-Defendants did not have the burden of disproving Plaintiffs'

case. *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9<sup>th</sup> Cir. 1987).

The burden then shifted to Plaintiffs to produce credible evidence demonstrating that the MAPP gas torch and cylinder were in fact defective, and that the defect caused their injuries. To avoid summary judgment, Plaintiffs were required to demonstrate the existence of a genuine issue of material fact as to their ability to prove that the product was defective, and that the defect was the cause of their damages. *Celotex*, supra at 323-324.

**B. Plaintiffs Could Not Meet Their Burden on Summary Judgment to Show That the MAAP Gas Torch and Cylinder Were Defective Without Expert Testimony.**

In assessing whether Plaintiffs met their burden in opposing summary judgment, it should first be noted that Plaintiffs do not even attempt to argue that the opinions expressed by their experts created triable issues of material fact on the critical questions of defect and causation.<sup>20</sup> Rather, Plaintiffs take the position on appeal that they simply do not need expert testimony to prove the existence of a defect in the MAPP gas torch/cylinder. According to Plaintiffs, this is because a jury will not need any information from an expert to understand how gas escaped

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<sup>20</sup> As noted by the District Court, “Plaintiffs do not even address the alleged defect in the brazed joint, and fail to connect their theory that the braze material failed in the cylinder to the facts of their case. Thus, Plaintiffs have failed to meet their burden [in opposing summary judgment]. (Doc. No. 209, 22:22-24; ER Vol. I at 26.)

from the torch/cylinder to determine whether a defect occurred in the manufacturing process, and to assess whether a better design could have been used, among other things. Plaintiffs are mistaken. Contrary to Plaintiffs' contention, the consumer expectations test is inapplicable to the circumstances of the subject accident.

While it is true that both the "consumer expectations" test and "risk benefit" analysis can be used to prove the existence of a product defect, the consumer expectations test is specifically reserved for situations where "the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers". *McCabe v. American Honda Motor Co.*, 100 Cal. App. 4<sup>th</sup> 1111, 1122 (Cal. Ct. App. 2002). In addition, the plaintiffs must establish that the product at issue failed while being used in an intended or reasonably foreseeable manner. *Barker v. Lull Engineering*, 20 Cal. 3d 413, 432 (1978). For the consumer expectations test to be used to prove a design defect, the trier of fact must be able to conclude from the facts that "the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design". *Soule v. General Motors Corp.*, 8 Cal. 4<sup>th</sup> 548, 566-567 (Cal. 1994). The test only applies "when the defect can be determined by common knowledge

... , not where (as here) an expert must balance the benefits of design against the risk of danger.” *Stephen, supra* at 1371, fn. 6 (citing *Baker v. Lull, supra*).

In *Soule*, the plaintiff brought an action against an automobile manufacturer, claiming that defects in the vehicle permitted the left front wheel to fall off. In holding that the consumer expectations test was inappropriate for the facts of that case, the Supreme Court focused on the technical and mechanical issues presented, and the ordinary consumer’s experience and understanding of the product’s design:

“Plaintiff’s theory of design defect was one of technical and mechanical detail.... An ordinary consumer of automobiles cannot reasonably expect that a car’s frame, suspension, or interior will be designed to remain intact in any and all accidents. Nor would ordinary experience and understanding inform such a consumer how safely an automobile’s design should perform under the esoteric circumstances of the collision at issue here.”

*Soule, supra* at 570.

Likewise, an ordinary consumer cannot reasonably expect a pressurized gas-filled cylinder to be impervious to any and all accidents. Understandably, when an alleged defect is one of “technical and mechanical detail regarding obscure components,” the lay juror is no longer able to accurately assess whether a product’s design violated minimum safety assumptions. Alternatively, the consumer expectations test is inapplicable to certain products because the ordinary or “everyday experience” of the product’s user would not inform them as to how the product’s design would perform under all foreseeable circumstances. *Id.*; see

also, *Pruitt v. General Motors Corp.*, 72 Cal. 4<sup>th</sup> 1480, 1483-1484 (Cal. 1999).<sup>21</sup>

Plaintiffs' suggestion that the design, construction, and use of the MAPP gas torch and cylinder is similar to the ladder at issue in *Massok v. Keller Industries, Inc.*, 147 Fed. Appx. 651, 2005 WL 2108654 (9<sup>th</sup> Cir. 2005), as opposed to the tire assembly in *Soule*, is both improper and misplaced. As a preliminary matter, Plaintiffs' citation to and reliance on *Massok* is improper because *Massok* is an unpublished opinion. Pursuant to Circuit Rule 36-3(c), an unpublished opinion issued prior to January 1, 2007 "may not be cited to the courts" unless it falls within one of the identified exceptions. Circuit Rule 36-3(c)(i-iii). As none of these limited exceptions apply, Plaintiffs' reliance on *Massok* is patently improper and should thus be ignored.<sup>22</sup>

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<sup>21</sup> Numerous other California cases hold that the consumer expectations test does not apply when the alleged defect and causation are beyond common experience. In *Rosburg v. Minnesota Mining & Mfg. Co.*, 181 Cal. App. 3d 726, 732-733 (Cal. Ct. Appeal 1986), the court determined that the consumer expectations test did not apply to allegedly defective breast implants as the product was beyond a consumers ordinary experience. Similarly, the court in *Morson v. Superior Court*, 90 Cal. App. 4<sup>th</sup> 775, 795 (Cal. Ct. App. 2001) held that allergic reactions allegedly caused by defective latex gloves did not qualify for application of the consumer expectations test even though latex gloves are a common product.

<sup>22</sup> At page 18 of their Opening Brief, Plaintiffs represent that the District Court "noted" in its Order that when a product has been lost or destroyed, circumstantial evidence can be used to prove both the existence of a defect and causation. The District Court made no such statement. In its Order, the Court simply disagreed with Defendants' assertion that Plaintiffs are unable to prove causation without the actual torch. (Doc. No. 209, 15:24-27; ER Vol. I at 19.) Plaintiffs' suggestion that circumstantial evidence can be used in place of expert testimony is wrong and unsupported by the cases they cite. Indeed, *Dimond v. Caterpillar Tractor Co.*, 65 Cal. App. 3d (Cal. Ct. App. 1976), cited by Plaintiffs, holds that **expert testimony is required** to establish causation where the complexity of causation is beyond common experience. *Id.* at 177.

Regardless, Plaintiffs' reliance on *Massok* to support their position that the District Court erred by not applying the consumer expectations test to the facts of this case is misplaced. In *Massok*, it was undisputed that the plaintiff fell from a ladder that he had set up backwards. *Massok* claimed the ladder was defective because the feet of the ladder did not rest flat on the ground, thus making the ladder prone to slipping while being used. *Massok, supra* at 654. The manner in which the accident occurred was arguably reasonably foreseeable, a condition for applying the consumer expectations test. The Court of Appeals held that the consumer expectations test could be used to prove that the ladder was defective because "an extension ladder is not so complex or arcane as to be beyond the grasp of an ordinary user," thereby making it "easy for anyone to grasp." *Id.* at 659. The "use of an extension ladder can be described as a 'matter of common experience' as to which ordinary consumers have formed 'reasonable, widely accepted minimum expectations about the circumstances under which it should perform safely'." *Id.* The Court of Appeals' decision to allow the consumer expectations test to be used was based on the fact that "the typical ladder user is fully aware that if the ladder feet do not pivot so that they rest flat on the ground, there is considerable risk." *Id.*

Unlike in *Massok*, the circumstances surrounding Shalaby's use of the MAPP gas torch and cylinder at the time of the accident is a central issue in

dispute. Plaintiffs cannot meet their burden to show that the product failed while being used in an intended or reasonably foreseeable manner. *Barker, supra* at 432.

Without knowing the circumstances under which the torch/cylinder supposedly failed, i.e., whether the torch/cylinder was struck on the cement fire ring, kicked into the fire, or was being used to relight the campfire, a jury would be at a complete loss to assess whether the product's design "violated minimum safety assumptions." For this reason alone, the District Court correctly determined that the consumer expectations test does not apply.

Furthermore, unlike the ladder in *Massok*, the MAPP gas torch and cylinder is not something that most consumers have used or understand, and the alleged defect is not something the trier of fact could understand without the assistance of expert testimony. The cylinder is a pressure vessel designed to hold flammable gas. Its construction, including the chemistry of the braze paste, is dictated by Federal Regulations. (Doc. No. 61, 3:2-6, Ex. 4; SER Vol. I at 239, 276-279.) Its manufacture and testing are dictated by Federal Regulations.

As in *Soule*, the alleged defect in this action involves technical and mechanical issues that a jury could not be expected to understand without the assistance of technical experts. The focus of Plaintiffs' claim is that due to a defect, the braze joint failed resulting in the accident. Dr. Anderson asserts that the braze joint failed due to, among other things, porosity, the melting temperatures of

binary alloy (in fact, the alloy is ternary) versus the braze furnace temperature, and insufficient fusion of the center valve housing to the cylinder wall. These are concepts that an ordinary lay juror would not be able to understand and appreciate without the assistance of experts in the field.

For example, for the jury to understand the effect of porosity in a braze joint, experts will need to explain what porosity is, why it exists, and what levels of porosity would impact the strength of a braze joint under what circumstances. Expert testimony is needed to explain to the jury why the levels of porosity identified by Dr. Anderson are of no consequence. This requires an understanding of the microhardness of the braze joint compared to the microhardness of the parent metal. As fully discussed in the Statement of Facts above, **it requires an understanding of the significance of the width of the braze joint compared to the thickness of the parent metal, and the importance of the extent to which the braze joint overlaps the cylinder shell.** (Doc. No. 61, 3:7-7:8; SER Vol. I at 239-243.)

Experts will also need to explain to the jury that the black marks that Dr. Anderson claims are porosity and result in poor fusion (images which Dr. Anderson magnifies by a factor of 100 to 200 through the use of a scanning electron microscope) are in fact nothing more than iron phosphide inclusions. (Doc. No. 61, 7:10-20, 8:9-11; SER Vol. I at 243-244.) This requires an explanation that porosity tends to be spherical in shape, whereas the black marks

identified by Dr. Anderson have angular corners which are consistent with solids as opposed to voids. This further requires showing the jury that these same black marks (in the same magnified images) also appear in the cylinder wall. If these black marks are in fact porosity, this would mean there are holes in the cylinder wall. (Doc. No. 61, 7:21-8:11; SER Vol. I at 243-244.)

Contrary to Plaintiffs' suggestion, expert testimony is necessary to establish a defect even if Shalaby's post-close of discovery assertion that the braze joint failed with a mere tap of the torch against fire wood is to be believed. In addition to explaining the issues of porosity, microhardness, and proper fusion of a braze joint to the jury, experts are also needed to explain what forces are required to cause the braze joint and/or the parent metal to deform and/or fail. If the braze joint failed by simply tapping the torch against a piece of firewood as Shalaby now "recalls," expert testimony is needed to assess and compare this minor "tapping" to the stresses caused by attaching and detaching the torch to the cylinder, Shalaby's transportation and use of the torch/cylinder on the previous four occasions, shipping the cylinder cross country to the retailer, and handling by the retailer.

Metallurgy, brazing, porosity, microhardness, fusion, characteristics of iron phosphide inclusions, and the reactions of metals and brazed joints to force and stress are not simple matters easily understood by lay persons. Rather, these concepts require detailed explanation by experts – persons with substantial training

and background in these complex subjects. These are simply not the kind of “nontechnical” issues an ordinary consumer has the necessary experience and understanding to accurately sort through without the assistance of expert testimony. Consistent with the Supreme Court’s holding in *Soule*, and as the District Court determined below, the consumer expectations test is not appropriate for the facts of this case.

Because “the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation.” *Stephen, supra* at 1365. Accordingly, based on its exclusion of Plaintiffs’ expert testimony, the District Court correctly granted the summary judgment motions.

**C. The Doctrine of *Res Ipsa Loquitur* Does Not Apply to Prove the Existence of a Manufacturing Defect.**

Not only is the consumer expectations test inappropriate to prove the existence of a design defect under the facts of this case, Plaintiffs readily concede that there are no cases applying the doctrine to manufacturing defects. (Appellants’ Opening Brief, pgs. 14 and 23.) Plaintiffs’ suggestion that the “doctrine of *res ipsa loquitur* overlaps with the consumer expectations test” and can thus be used as a substitute to prove the existence of a manufacturing defect is misplaced and wholly unsupported by the record. For *res ipsa loquitur* to apply, as Plaintiffs concede, (1) the accident must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality

within the exclusive control of the defendant; and (3) it must not have been due to any action or contribution by the plaintiffs. *Brown v. Poway Unified School District*, 4 Cal. 4<sup>th</sup> 820, 825-826 (Cal. 1993).

As support for their position that the MAPP gas torch and cylinder were in the “exclusive control” of Defendants/Cross-Defendants, and that Shalaby did not cause or contribute to the accident, Plaintiffs rely solely on Shalaby’s self-serving testimony. In his declaration, Shalaby asserted the factual and legal conclusions that the MAPP gas torch and cylinder “were in the same condition as they were at the time of purchase” and “were never subjected to abuse or misuse”. (Doc. No. 172-2, 4:9-12; ER Vol. IV at 756.) Not only are these statements impermissible factual and legal conclusions, Shalaby’s statements are unsupported by the facts. As accurately noted by the District Court in rejecting Plaintiffs’ argument, the torch and cylinder were clearly **not** in the exclusive control of Defendants/Cross-Defendants as the product was in Shalaby’s possession at the time of the accident, and in fact had previously been used by Shalaby on several occasions. Furthermore, Plaintiffs did not establish in opposing the summary judgment motions, as required for *res ipsa loquitur* to be applied, that Shalaby did not contribute to the accident.

Accordingly, the District Court properly rejected Plaintiffs’ contention that the doctrine of *res ipsa loquitur* should have been applied in determining whether

Plaintiffs met their burden to present evidence that the accident was caused by a manufacturing defect.<sup>23</sup>

### **III. THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' MOTIONS TO STRIKE EVIDENCE THAT SHALABY ABUSED THE MAPP GAS TORCH AND CYLINDER**

Plaintiffs assert that the District Court abused its discretion by refusing to exclude from evidence the witness testimony that Shalaby (1) struck the MAPP gas torch/cylinder against the cement fire ring, (2) was attempting to light a water heater, and (3) had kicked the torch/cylinder into the campfire immediately prior to the accident. In making this assertion, Plaintiffs advance several disingenuous and unsupportable claims.

Most notably, Plaintiffs brazenly suggest that it was Defendants' burden on summary judgment to "prove the elements of their misuse defenses".

(Appellants' Opening Brief, pg. 28.) This assertion is patently wrong and, not surprisingly, unsupported by citation to any law. Plaintiffs further misrepresent the basis on which the District Court denied their motions. The Motions to Strike,

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<sup>23</sup> As the District Court noted in its Order, it is unclear from the record whether Dr. Anderson believes there was a manufacturing defect in the Shalaby MAPP gas torch/cylinder. (Doc. No. 209, 8:24-25; ER Vol. I at 12.) While Dr. Anderson stated that it is "possible" the brazing material is "off specifications," he could provide no specifics. (Doc. No. 62-1, Ex. D, 164:3-167:23; SER Vol. III at 781-784.) Indeed, Dr. Anderson was not even sure when the subject cylinder was manufactured, and did not know if the cylinders he tested were the same as the Shalaby cylinder. (Doc. No. 45-3, 185:12-186:6; SER Vol. II at 536-537.) As such, it is impossible to say that the Shalaby cylinder was manufactured differently than designed.

or in-limine motions as referenced in the Court's Order, were not denied because the Court "elected not to decide the motion[s] at all" and favored "dismissal of the action over its merits" as Plaintiffs suggest. To the contrary, the motions were considered and denied, without prejudice to raising the arguments again at trial, based on the District Court's legally correct determination that the experts were free to rely on this evidence in forming their respective opinions. (Doc. No. 209, 31:16-32:12; ER at 31-32.)

In addition, Plaintiffs make the illogical argument that if the above scenarios of misuse are ruled out, the product must necessarily have been defective. This is nonsensical and simply untrue. In addition to the three scenarios identified by the evidence, there are clearly other circumstances under which the MAPP gas torch/cylinder could breach and not be defective. For example, the cylinder would no doubt breach if struck repeatedly with a **baseball bat**.

**A. Standard of Review.**

The standard of review for orders ruling on the admissibility of evidence is abuse of discretion. *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1109 (9<sup>th</sup> Cir. 1991).

**B. Plaintiffs' Motions Were Properly Denied as the Law is Clear That Experts Can Rely on Any Evidence in Forming Their Opinions.**

Plaintiffs' appeal from the District Court's denial of their Motion in Limine No. 1 (Doc. No. 105), Motion in Limine No. 2 (Doc. No. 106), and Motion in Limine No. 3 (Doc. No. 107). (Notice of Appeal, Doc. No. 232; ER at 3, ¶9.) In their Opening Brief, Plaintiffs take the position that the District Court should be reversed because the Court purportedly did not rule on the motions at all. (Appellants' Opening Brief, pg. 28.) Plaintiffs are clearly wrong and this argument must be rejected.

In its three page Order Denying Plaintiffs' motions, the District Court unequivocally denied the motions to the extent Plaintiffs sought to **preclude the defense experts from relying on the contested evidence**. Citing numerous cases addressing the issue, the Court properly found that the evidence would not be excluded as the defense experts were free to consider the evidence, even if otherwise inadmissible, in forming their opinions. (Doc. No. 209, 31:16-32:12; ER at 31-32.) Significantly, Plaintiffs make no effort whatsoever to challenge this stated basis of the District Court's ruling. As such, this portion of Plaintiffs'

appeal can and should be denied out of hand.<sup>24</sup>

**C. Defendants and Cross-Defendants Did Not Move For Summary Judgment on an Affirmative Defense of Misuse and Thus Had No Burden of Proof on This Issue.**

The summary judgment motions filed by Bernzomatic and Worthington were based on Plaintiffs' inability to prove the existence of a defect and causation, issues on which Plaintiffs would bear the burden of persuasion at trial. As such, Defendants and Cross-Defendants had the initial burden on summary judgment to show that Plaintiffs lacked sufficient evidence on these issues. As already detailed above, they met this burden by demonstrating that Plaintiffs' expert witnesses failed to comply with *Daubert* and should be excluded. *Celotex, supra* at 325; *Nissan Fire & Marine, supra* at 1102. It was then up to Plaintiffs to demonstrate the existence of a genuine issue of material fact as to their ability to prove that the product was defective, and that the defect was the cause of Plaintiffs' damages, in order to avoid summary judgment. *Celotex, supra* at 323-324.

At no time did Defendants and Cross-Defendants have the burden of "proving the elements of their misuse defenses" as Plaintiffs claim. These

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<sup>24</sup> Plaintiffs' suggestion that the Court prioritized dismissal of the action over its merits is based on the District Court's statement in its Order that the motions were being "**DENIED without prejudice** to their renewal (bold in original)" at the time of trial in the event summary judgment was not granted. (Doc. No. 209, 31:16-20; ER at 31.) The Court did not deny the motions because granting them would have precluded summary judgment as Plaintiffs' suggest.

defenses were not the basis on which Defendants and Cross-Defendants requested summary judgment.<sup>25</sup> Indeed, Plaintiffs must be aware of this distinction as the cases they cite for the proposition that the defendant has the burden to establish the elements of a misuse defense are situations where product misuse was the very basis for bringing the summary judgment motions.

(Appellant's Opening Brief, pg. 28, citing *Self v. General Motors Corp.*, 42 Cal. App. 3d 1, 9 (Cal. Ct. App. 1974) and *Huynh v. Ingersoll-Rand*, 16 Cal. App. 4<sup>th</sup> 825, 831 (Cal. Ct. App. 1993).

**D. Plaintiffs Have Failed to Show They Were Prejudiced Because Summary Judgment Would Have Been Denied Had Any of Their Three In-Limine Motions Been Granted.**

It is the Plaintiffs' burden on the instant appeal to not only demonstrate that an error was made by the District Court in denying their in-limine motions, but also that the error somehow resulted in prejudice. *Jauregui v. City of Glendale*, 852 F.2d 1128, 1132-1133 (9<sup>th</sup> Cir. 1988). Here, Plaintiffs bore the burden in their Opening Brief to show both that the District Court erred in failing to grant one or more of their motions **and that this failure caused Plaintiffs**

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<sup>25</sup> This is the very reason the District Court found, as Plaintiffs complain about in their Brief, that it "need not consider whether Defendants have carried their burden of demonstrating that a triable issue of fact exists on their affirmative defense of unforeseeable misuse." Contrary to Plaintiffs' unsupported assertion that the District Court had a "predisposition towards dismissal by raising the misuse allegation" (Opening Brief, pg. 28), the truth is that the Court's focus was in demonstrating that Plaintiffs' expert, Dr. Anderson, inexplicably elected to ignore the evidence of misuse altogether in forming his opinions. (Doc. No. 209, 13:27-14:19; ER at 17-18.)

**prejudice.** In this regard, the mere fact that some of a district court's findings of fact may have been erroneous does not matter if other valid findings support the court's decision. *United States v. BNS, Inc.*, 858 F2d 456, 464 (9<sup>th</sup> Cir. 1988).

Had the District Court granted one or more of Plaintiffs' motions to strike, Plaintiffs would still have been left with the burden of producing sufficient evidence of a defect in order to avoid summary judgment. Even without eye witnesses to Shalaby's abuse of the torch/cylinder, expert testimony would still have been required to prove that the torch/cylinder was defective, and that the defect caused Plaintiffs' injuries. Here, Plaintiffs fail to establish how the granting of any of their three motions to strike would have resulted in the District Court denying the summary judgment and/or *Daubert* motions. Indeed, Plaintiffs could not meet this burden as the granting of the motions to strike would not have cured the failure of Plaintiffs' experts to comply with the *Daubert* standards.

**Because they failed to identify any such prejudice,** Plaintiffs have failed to meet their burden on appeal. Indeed, Plaintiffs have waived the right to assert this argument. *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 379, fn. 6 (9<sup>th</sup> Cir. 1995).

#### IV. PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE WAS CORRECTLY DENIED AS AN IMPROPER USE OF RULE 201 OF THE FEDERAL RULES OF EVIDENCE

After all of the briefing had been submitted by the parties on the various motions involved in this appeal, Plaintiffs filed a document entitled Request for Judicial Notice. (Doc. No. 200.) Through this document, Plaintiffs asked the District Court to take “judicial notice” of 63 alleged facts, all of which alleged facts directly related to controverted issues in this action. In other words, Plaintiffs asked the District Court to examine and weigh the evidence they selected and presented as to each of these 63 alleged facts, and then based on that adjudication determine whether the alleged facts should be judicially noticed for the purpose of ruling on the summary judgment and *Daubert* motions.

The District Court denied Plaintiffs' Request for Judicial Notice, finding that the 63 alleged “facts” identified by Plaintiffs were neither (1) generally known within the territorial jurisdiction of the court nor (2) capable of accurate and ready determination as required by Rule 201(b) of the Federal Rules of Evidence. (Doc. No. 209, 3:26-28; ER Vol. I at 7.)<sup>26</sup> The Court of Appeals must now decide whether or not the District Court committed a clear error in judgment in denying Plaintiffs' Request for Judicial Notice. *Ritter v. Hughes Aircraft Co.*,

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<sup>26</sup> The District Court additionally noted that Plaintiffs' last minute request to have the Court conclusively determine through the judicial notice process that certain alleged facts were true was nothing but an “untimely motion for summary judgment”. (Doc. No. 209, 3:28-4:27; ER Vol. I at 8.)

58 F.3d 454, 458 (9<sup>th</sup> Cir. 1995); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9<sup>th</sup> Cir. 1992).

**A. Plaintiffs' Self-Serving Version of Certain Facts Does Not Satisfy the Requirements For Judicial Notice.**

As Plaintiffs correctly recognize, F.R.Evid. 201(b) permits a court to take judicial notice of two categories of facts: (1) facts “generally known within the territorial jurisdiction of the trial court” and (2) facts “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Critically, the 63 alleged facts identified by Plaintiffs do not fall within either category as established by case law and other noted authorities on the subject. To the contrary, Plaintiffs’ Request for Judicial Notice consists of nothing more than (1) Plaintiffs’ version of certain evidence revealed through discovery, (2) opinions by Plaintiffs’ experts, (3) argument of counsel, and (4) self-serving conclusions of law.

For example, Plaintiffs asked the District Court to conclusively determine that “[the] subject torch and cylinder were not kicked into the campfire”. (Doc. No. 200, Request for Judicial Notice 12; ER Vol. II at 146.) However, this is a factual issue to be decided by the trier of fact. As the District Court pointed out in its Order, a paramedic at the scene of the accident in fact testified that Shalaby told him the cylinder exploded after he kicked it into the campfire. (Doc. No. 209, 14:2-5; ER Vol. I at 18.) Similarly, Plaintiffs sought to have the Court rule

that Shalaby “was holding the subject torch and cylinder assembly by the CYLINDER at the time it failed and caused his injuries.” As support for this purported “fact,” Plaintiffs cite to their own declarations. (Doc. No. 200, Request for Judicial Notice 42; ER Vol. II at 154.) Once again, this is an example of the kind of factual issue clearly inappropriate for judicial notice.

Plaintiffs additionally asked the Court to take judicial notice of the alleged “fact” that “[t]he subject MAPP gas cylinder contained a defect at the brazed joint area of the cylinder, and the defect was the cause of Mr. Shalaby’s injuries.” (Doc. No. 200, Request for Judicial Notice 60; ER Vol. II at 160.) This is Plaintiffs’ entire case! Indeed, the Request contains both an expert opinion (the existence of a defect) and a conclusion of law (the defect caused Plaintiff’s injuries). Tellingly, Plaintiffs have not cited to any case or other authority, either on appeal or in the court below, that stands for the proposition that the judicial notice process can be used to adjudicate factual issues reserved for the trier of fact. This is because no such authority exists.

Rather, it is well established that judicial notice is reserved for situations where the court is called upon to take notice of facts that are either (1) already known or (2) readily ascertainable through reliable sources. Obviously, a “generally known” fact poses no problem and judicial notice is appropriate. F.R. Evid. 201(b)(1). As to facts that are readily ascertainable under F.R. Evid.

201(b)(2), case law demonstrates that this category is intended to afford courts the ability to take notice of easily verified facts not subject to reasonable dispute.

**B. Plaintiffs Have Not Met Their Burden to Establish That the District Court Erred By Refusing to Take Judicial Notice of Any Particular Fact, and That the Alleged Error Prejudiced Plaintiffs.**

As discussed above, it is the Plaintiffs' burden on appeal to not only demonstrate that an error was made by the District Court, but also that the error somehow resulted in prejudice. *Jauregui, supra* at 1132-1133. Here, Plaintiffs bore the burden in their Opening Brief to show both that the District Court erred in failing to take judicial notice of one or more of their 63 Requests, and that this failure caused Plaintiffs' prejudice.

Although Plaintiffs broadly argue in their Opening Brief that the District Court should have granted all 63 of their Requests for Judicial Notice, Plaintiffs fail to identify any specific Request that was denied in error that, if granted, would have resulted in the District Court denying the summary judgment and/or *Daubert* motions. Because they failed to identify any such prejudice, Plaintiffs have failed to meet their burden on appeal and have waived the right to assert this argument. *In re Pacific Enterprises Securities Litigation, supra* at 379, fn. 6.

**V. IT WAS AN APPROPRIATE EXERCISE OF DISCRETION FOR THE DISTRICT COURT TO DENY PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR COMPLAINT**

Two years after filing their lawsuit, months after the close of percipient and expert discovery, and months after Benzomatic and Worthington had filed their summary judgment and *Daubert* motions, Plaintiffs requested leave to file a second amended complaint. (Doc. No. 98.) As properly noted by the District Court, “The question ... on Plaintiffs’ motion is essentially the same as that which was before Magistrate Judge Major when she issued the March 11, 2009 order [denying Plaintiffs’ motion to supplement Dr. Anderson’s opinions and reopen discovery].” (Doc. No. 204, 3:28-4:9; ER Vol. I at 35-36.) Because a Rule 16 scheduling order had been issued, the Plaintiffs had the burden to demonstrate due diligence and good cause to allow them to further amend their complaint. F.R. Civ. P. 16(b); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-608 (9<sup>th</sup> Cir. 1992).

The factual basis for Plaintiffs’ motion to amend, and the arguments they asserted in support of due diligence, are the same as were properly rejected by Magistrate Judge Major in denying Plaintiffs’ discovery motion. (Doc. No. 204, 4:1-24; ER Vol. I at 36.) Just as Plaintiffs failed to establish the requisite good cause to supplement Dr. Anderson’s opinions and reopen discovery, they failed to meet their burden in requesting leave to amend. Even where good cause exists,

denial of leave to amend is proper if the proposed amendment “(1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile.” *Amerisourcebergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9<sup>th</sup> Cir. 2006). As the District Court also noted, the Ninth Circuit has held that it is not an abuse of discretion to deny leave to amend to add a claim “raised at the eleventh hour after discovery was virtually complete and the [defendant’s] motion for summary judgment was pending before the Court.” *Roberts v. Ariz. Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981).

Here, not only was there a complete absence of good cause, all discovery had been conducted and completed based on Plaintiffs’ existing complaint and theory of the case. Further, the summary judgment and *Daubert* motions had been prepared based on the existing complaint, and had been on file for over two months when Plaintiffs sought leave to amend. As the trial court correctly noted, the proposed second amended complaint would have “drastically change[d] the theory of how the accident occurred.” (Doc. No. 204, 6:1-6; ER Vol. I at 38.) As such, the District Court properly found that the defense would have been severely prejudiced and the litigation would have been unduly delayed had the amendment been allowed.<sup>27</sup>

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<sup>27</sup> The District Court’s statement that the Plaintiffs “will have effectively evaded what could have been the termination of their lawsuit on summary judgment” if the amendment had been allowed is simply a reflection of the court’s finding that

Once again, Plaintiffs have not only failed to show that the trial court abused its discretion in denying leave to amend, Plaintiffs have also failed to show that the proposed amendments would have impacted the District Court's determination that Plaintiffs could not prove the existence of a defect with expert testimony. Summary judgment was based on the exclusion of Plaintiffs' experts and on their inability to make a *prima facie* case in opposing summary judgment. For these reasons, the Order denying Plaintiffs' motion for leave to amend their complaint should be affirmed.

### CONCLUSION

Despite Plaintiffs' jumbling of the record and mischaracterization of much of the evidence, the record reflects that the District Court carefully and properly applied the applicable law in excluding Plaintiffs' experts and in finding that the consumer expectations test did not apply to the facts of this case. Without expert testimony of a defect in the MAPP gas torch and cylinder, and that the defect caused Plaintiffs' alleged damages, the Court correctly determined that Plaintiffs did not meet their burden to set forth a *prima facie* case in opposing summary judgment.

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Plaintiffs' "litigation strategy is questionable at best, and at worst, creates a plausible inference of dilatory motive or bad faith." (Doc. No. 204, 6:19-27; ER Vol. I at 38.)

Moreover, Plaintiffs have failed to demonstrate that summary judgment would have been denied had the trial court decided any of the challenged rulings on the various other motions differently. Accordingly, it is respectfully requested that the District Court's granting of summary judgment be affirmed.

Dated: December 2, 2009

Respectfully submitted,

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Case No. 09-56331

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

Appeal from the United States District Court  
Southern District of California, San Diego  
No. 3:07-cv-2107-MMA-BLM

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**ANDREW W. SHALABY and SONIA DUNN-RUIZ,**  
Plaintiffs-Appellants,

v.

**NEWELL RUBBERMAID, INC.; THE HOME DEPOT, INC.; IRWIN  
INDUSTRIAL TOOL COMPANY, INC.; and BERNZOMATIC,**  
Defendants/Third-Party Plaintiffs-Appellees,

v.

**WESTERN INDUSTRIES, INC. and WORTHINGTON INDUSTRIES,**  
Third-Party Defendants-Appellees.

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**APPELLEE BRIEF of NEWELL RUBBERMAID, INC.; THE HOME  
DEPOT, INC.; IRWIN INDUSTRIAL TOOL COMPANY, INC.; and  
BERNZOMATIC**

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## I. INTRODUCTION

In this case, Appellant Mr. Shalaby was burned while using a flammable MAPP gas cylinder around a campfire. He sued and told his story about what happened over three days of depositions. After years of exhaustive fact discovery, expert reports and expert discovery finally closed, Bernzomatic<sup>1</sup> filed a motion for summary judgment. Realizing that their case had serious flaws, Appellants moved to reopen discovery, completely change Mr. Shalaby's story about what happened, and add a second supplemental expert report out-of-time to bolster their new story.

**FALSE**

The trial court followed Rule 16 and denied that motion. Using the record at the close of discovery, the trial court excluded Appellants' experts' testimony as unreliable and irrelevant. Because Appellants had no expert testimony to establish *prima facie* elements of product defect and causation, as both concepts would be beyond the understanding of the jury, the trial court granted summary judgment in favor of Bernzomatic.

In this appeal, Appellants foist their new story and untimely expert reports onto this Court without disclosing that the trial court excluded them from the proper record which includes Appellants' original story and expert testimony.

When this Court distinguishes the properly excluded and unsubstantiated

**FALSE**

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<sup>1</sup> "Bernzomatic" collectively refers to Defendants/Third-Party Plaintiffs-Appellees Newell Rubbermaid, Inc., The Home Depot, Inc., Irwin Industrial Tool Company, Inc. and Bernzomatic.

allegations from the facts in the record before the trial court, it will be clear that the trial court properly exercised its discretion in excluding Appellants' experts, Dr. Anderson and Dr. Vredenburg and properly granted summary judgment to Bernzomatic.

## **II. JURISDICTION**

Bernzomatic agrees that this Court has jurisdiction over this appeal.

## **III. ISSUES FOR REVIEW**

Appellants state nine issues for review in their brief. These issues are reorganized in the Argument portion (Section V below) of this brief to correspond to the trial court's orders they attack, in the sequence that those orders were entered, so that this Court can better understand how summary judgment was properly entered. Those orders are: (1) Orders denying Appellants leave to add expert opinions and fact discovery as out of time with the court's scheduling order; (2) Orders denying Appellants' Motion to File a Second Amended Complaint and Motions in Limine; and (3) an Order granting summary judgment. Bernzomatic's response is organized in support of these three orders.

## **IV. STATEMENT OF THE CASE**

Appellants make a mess of the record, citing mostly to things external to the record, things specifically excluded from the record by the trial court, and argue points completely out of sequence in time. Bernzomatic will provide a clear

picture of what is in the record—and what is not, and will also provide the sequence of events in the trial court.

### A. Case Posture<sup>2</sup>

In late 2006, Appellants filed a Complaint in state court, which was removed, answered and transferred from the Northern District to the Southern District of California. (Docs. 35, 36, part of which is ER vol. I at 69-91). Bernzomatic also filed a cross-claim against Worthington and Western (Doc. 36). Soon thereafter, the court entered a scheduling order. (Doc. 11, ER vol. I at 64-68). As discovery ensued, the court granted a pair of extensions to the original scheduling order. (Doc. 24; Doc. 32, ER vol. I at 62-63). Pursuant to those scheduling orders, the trial court established the following deadlines:

June 27, 2008	Fact discovery closed per court's scheduling order, including exhaustive depositions, <sup>3</sup> including Mr. Shalaby's three separate days of testimony.
July 3, 2008	Liability expert reports deadline; reports exchanged
July 18, 2008	Liability expert supplemental/rebuttal reports deadline; reports exchanged
July 24, 2008	Damages expert reports deadline; reports exchanged
Aug. 1, 2008	Damages expert supplemental/rebuttal reports deadline; reports exchanged

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<sup>2</sup> The docket is located at ER vol. I at 92-128.

<sup>3</sup> There were over 20 fact and expert depositions taken prior to the close of discovery. (See Doc. 225-3, SER Vol. I at 24-26).

Sept. 30, 2008 Expert discovery closed (after all experts were deposed, including Dr. Anderson on Sept. 3, 2008)

Upon the close of all discovery—fact and expert—Bernzomatic filed its Motion to Exclude Experts and for Summary Judgment (Doc. 45)<sup>4</sup> and also filed its Motion to Exclude Appellants from Relying on Expert Opinions Not Timely Disclosed (Doc. 46).<sup>5</sup>

After that, Appellants moved to reopen discovery, restate and completely contradict their own deposition testimony, add new expert opinions—essentially, take a “mulligan” on everything done in the case to date. (Docs. 93, 114, 116, 125, 127)<sup>6</sup> The court denied Appellants motions and held the line on all deadlines for all discovery and expert opinions. (Doc. 131, ER vol. I at 46-61) Appellants moved for reconsideration which was denied. (Doc. 146, ER vol I. at 40-45)

Undeterred, Appellants continued their campaign to change their fact story, and add new expert opinions, filing an “opposition” to the motion to exclude out of time expert opinions (Doc. 172, 173, partially entered as part of ER vol. II, all of

**FALSE**

**PROJECTION**

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<sup>4</sup> Worthington also filed Motions to Exclude Appellants’ Experts. (Docs. 53, 58) which were joined by Western (Docs. 74 and 75).

<sup>5</sup> Appellants had submitted to Bernzomatic a third expert report on October 6, 2008. (*See* Doc. 131, ER Vol. I at 50-51). The Court incorrectly stated it was Oct. 14, 2008—either way, it was far after the July 18, 2008 scheduling order deadline.

<sup>6</sup> All Defendants timely opposed these filings. (Docs. 117, 118, 121, 123).

ER vol. III and part of vol. IV at 319-811) and an omnibus request for judicial notice (Doc. 200, ER vol. II at 140-318).

The bulk of Appellants' excerpts filed with this Court were excluded under the court's rulings as out of time (Doc. 131, ER vol. I at 46-61). Specifically, ER vol. II at 136, 167-180, 190-194, 233-246, 253-277, 283-285, 299-355; ER vol. IV at 749-799, 802-811, 836-870 are among the out-of-time testimony and expert opinions excluded by the trial court. Yet, Appellants cite to the excluded excerpts as if they were an integral part of the record, making no distinctions about whether something was timely and in the record on the motion for summary judgment, or untimely and excluded.

The trial court denied Appellants leave to file an eleventh-hour Second Amended Complaint (Doc. 204, ER, vol. I at 33-39); Appellants cite to it anyway and include more excluded "facts" (Doc. 98-3, ER vol. IV at 873-895) Much of what's left in ER volumes II-IV is either the various pleadings by Appellants attempting to get the out-of-time facts and expert opinions into the record, or those excluded facts and opinions. The trial court's order excludes these materials. (Doc. 131, ER vol. I at 46-61) None of it was part of this record before the trial court on summary judgment.

Ultimately, the trial court denied all of Appellants' attempts to add to the fact and expert record, and based upon the record at the close of all discovery on

September 30, 2008, excluded Appellants' experts and granted summary judgment to Bernzomatic. (Doc. 209, vol. I at 5-29) Judgment was entered (Doc. 210, vol. I at 4) and after exhausting every effort to try to obtain reconsideration of the judgment, Appellants finally filed their notice of appeal. (Doc. 232, vol. I at 1-3)<sup>7</sup>

## **B. Statement of Facts in the Record**

Mr. Shalaby has changed his story several times over the course of this litigation. First, immediately following the accident, he stated: "It is all my fault." (Doc. 45-3, SER<sup>8</sup> vol. II at 472:23-24) The first responders to the scene reported that Mr. Shalaby stated that he had kicked the gas cylinder into the campfire and it exploded. (Doc. 45-3, SER vol. II at 440:16-25) Then in his deposition a year later, Mr. Shalaby stated that he simply depressed the trigger to light the campfire and the cylinder spontaneously broke and created a flash fire. (Doc. 45-3, SER vol. II at 418) Later, after the close of all fact and expert discovery—two months after receiving Bernzomatic's Motion for Summary Judgment—Mr. Shalaby stated that while under hypnosis he learned that he tapped a piece of firewood with the tip of the torch which caused the cylinder to rupture. (Doc. 131, ER vol. I at 50) This last scenario which significantly changed Appellants' story and theory of the case was excluded by the trial court as untimely. (Doc. 131, ER vol. I at 46-61)

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<sup>7</sup> Appellants erroneously list their notice of appeal as Doc. 228 in their excerpt index.

<sup>8</sup> "SER" refers to the Joint Supplemental Excerpts of Record filed by Appellees.

Here are the salient facts in the record.

**1. Andrew Shalaby<sup>9</sup>**

Mr. Shalaby testified that he purchased the torch and cylinder in use at the time of the incident. (Doc. 45-3, SER vol. II at 407:19-408:10) Mr. Shalaby testified that he used the same torch and cylinder on several previous camping trips between April 2005 and April 2006, (Doc. 45-3, SER vol. II at 413:5-11) and four to sixteen times on prior days of the same camping trip in April 2006. (Doc. 45-3, SER vol. II at 410:13-19; 411:23-412:2)

On the day of the incident, Mr. Shalaby lit a fire using the torch and cylinder without incident at 8:30 pm that evening. (Doc. 45-3, SER vol. II at 414, 415) Mr. Shalaby testified that he added wood at 10:00 pm (Doc. 45-3, SER vol. II at 417:10-14) and attempted to ignite the torch immediately after that. Mr. Shalaby testified that he heard a hiss, and then saw a flame emanate from the neck of the cylinder. (Doc. 45-3, SER vol. II at 418:10-18) This flame injured Mr. Shalaby.

Mr. Shalaby was asked if he denied saying that he kicked the gas cylinder into the fire to EMT personnel immediately after the incident and he responded: “I

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<sup>9</sup> It is telling that Mr. Shalaby did not include anything from his own deposition. He only wants to cite to those things that were excluded by the trial court because they contradict his deposition and they were proffered well past the scheduling order deadline for discovery.

sure don't remember saying anything like that." (Doc. 45-3, SER vol. II at 420:16-20)

## **2. First Responders**

There were a number of responders. Warren Ratliff was park ranger supervisor at the campground. (Doc. 45-3, SER vol. II at 446:8-24) Randy Stephens was also a park ranger. (Doc. 45-3, SER vol. II at 467:24-25; 470:13-14) Joe Russo was a paramedic with the San Diego Fire Department. (Doc. 45-3, SER vol. II at 435:15-436:12) Robert Price was an intern EMT with the San Diego Fire Department. (Doc. 45-3, SER vol. II at 428:24-429:19) Mr. Price reported to Mr. Russo. *Id.*

### **a. Abuse of the torch and cylinder**

Mr. Price drafted the official Fire Department report. (Doc. 45-3, SER vol. II at 430:3-23) Mr. Price's report stated: "Patient was kicking around a propane torch. It went into a fire and blew up and burned him. Family called 911." (Doc. 45-3, SER vol. II at 431:19-432:1)

Paramedic Russo testified that Mr. Shalaby was never in shock and was alert and oriented. (Doc. 45-3, SER vol. II at 437:11-438:3) Mr. Russo stated that it was his job to help gather information to let the burn center know the EMT's best assessment of what occurred. (Doc. 45-3, SER vol. II at 439:18-440:1) When asked what information was gathered from his investigation, Mr. Russo stated that

Mr. Price was told by Mr. Shalaby that he “kicked the thing into the fire and it exploded.” (Doc. 45-3, SER vol. II at 440:16-25) Mr. Russo testified that “the thing” was a propane gas cylinder. (Doc. 45-3, SER vol. II at 441:1-7)

Mr. Russo further testified that if he or Mr. Price would have heard any other versions of what might have happened, they would have included that other version in their report. (Doc. 45-3, SER vol. II at 442:14-21) The only version of the incident that Mr. Russo heard while investigating the incident was that Mr. Shalaby kicked the gas cylinder into the campfire, and he heard that directly from Mr. Shalaby himself. (Doc. 45-3, SER vol. II at 442:22-443:2)

**b. Description of the torch and cylinder after the incident**

Ranger Ratliff was the one who discovered the torch and cylinder after the incident. (Doc. 45-3, SER vol. II at 451:7-15) Upon inspection, Ranger Ratliff observed a right-angle bend at the connection between the torch and cylinder, and a crack in the parent metal of the cylinder at the bottom thread level of the cylinder. (Doc. 45-3, SER vol. II at 452:21-25)

Ranger Ratliff testified extensively about his work as a Seabee (steel worker) in the Navy and about his experience using similar MAPP gas torches for plumbing and brazing applications. (Doc. 45-3, SER vol. II at 455-462, *generally*) Ranger Ratliff stated that the cylinder had a crack, forced open, outward. (Doc. 45-3, SER vol. II at 465:2-3) Plaintiff’s counsel asked Ranger Ratliff, based on his

experience with MAPP gas cylinders, what the crack appearance indicated to him.

Ranger Ratliff responded, “abuse.” (Doc. 45-3, SER vol. II at 465:25-466:5)

When plaintiff’s counsel asked him to elaborate, Ranger Ratliff stated that “it appears to me that it was banged against—the top of the nozzle was banged against something of a hard surface and not created the crack, but maybe, in my experience, that weakened the connection between the torch nozzle and the cylinder itself.” (Doc. 45-3, SER vol. II at 466:15-20)

Ranger Stephens explained, “We asked the fire—the engineer and the other rescue personnel if they actually needed the torch and the body—the torch body and the tip. And they said that—that the patient had already told them pretty much what happened and that they didn’t need it for further investigation.” (Doc. 45-3, SER vol. II at 471:2-13) Pursuant to that direction, a park employee disposed of the torch and cylinder. (Doc. 45-3, SER vol. II at 453:15-17)

Ranger Stephens investigated the incident and created an incident report. (Doc. 45-3, SER vol. II at 454:6-16) In describing the cylinder after the incident, Ranger Stephens stated that there was an elliptical hole at the base of the neck below the threads. (Doc. 45-3, SER vol. II at 474:23-475:8) From Mr. Shalaby, Ranger Stephens heard, “I’m an idiot. I can’t believe I’m so stupid.” (Doc. 45-3, SER vol. II at 472:16-19) And, “This is all my fault. I’m so stupid.” (Doc. 45-3,

SER vol. II at 472:23-24) The Appellants' experts' opinions ignored almost all of this testimony.

### **3. Dr. Anderson's Report**

Appellants provided the expert report of Dr. Robert N. Anderson. (Doc. 45-3, SER vol. II at 477-480) In this report, Dr. Anderson stated three main opinions:

1. The braze material between the center valve housing and the cylinder is the weak element in the assembly, and subject to failure when the torch is attached to the cylinder.
2. For these three cylinders [exemplars that Dr. Anderson examined] that were examined to be offered on the market clearly establishes the failure of Bernzomatic inspection and quality control procedures.
3. The MAPP gas torch and cylinder is unsafe and unreasonably dangerous as designed and manufactured.

(Doc. 45-3, SER vol. II at 480)

The main problem with these opinions is that Dr. Anderson establishes no causal link between his opinions and Mr. Shalaby's incident as reflected by the fact testimony in the record before the close of discovery. Without a causal link, Dr. Anderson's opinions fail to support a *prima facie* product liability case. Additionally, Dr. Anderson's investigation was incomplete and unscientific, such that it undermined his conclusions to the point that they had to be excluded as unreliable under the gate keeping standards enunciated in the *Daubert*<sup>10</sup> case.

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<sup>10</sup> *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579, 593 (1993).

#### **4. Dr. Anderson's Rebuttal Report**

Dr. Anderson's rebuttal report stated only that Defendants-Appellees' expert reports proposed three potential scenarios based upon the facts in the record before the close of discovery, including the likelihood that abuse to the cylinder caused the incident. (Doc. 45-3, SER vol. II at 482-483) Dr. Anderson did not provide any opinion as to what level of abuse was applied to the cylinder in the incident in question, how it was applied, or what caused it to fail. Dr. Anderson has no idea what kind of abuse of the cylinder actually caused the incident, although he readily admits during his deposition that some abuse had to occur. He really only points out that the cylinder did in fact fail.

#### **5. Dr. Anderson's Deposition**

##### **a. Dr. Anderson did not have the products involved in the incident to test or examine**

Dr. Anderson did not examine the products involved in the incident. He did not know whether the incident cylinder matched the two exemplars that he did examine. Yet he stated that he believed that the brazed joint of the main valve on the incident cylinder failed and allowed the MAPP gas to evaporate and become ignited "by some fire in the area." (Doc. 45-3, SER vol. II at 491:17-19) Dr. Anderson was unable to be specific about how he thought the brazed joint failed since he did not have the incident cylinder. He also did not know "what" fire in the area might have ignited the MAPP gas.

**b. Dr. Anderson's testimony was inconsistent with his own tests of exemplars**

When asked if he could rule out the possibility that the failure in the incident cylinder was a failure in the parent metal of the cylinder instead of the brazed joint,<sup>11</sup> Dr. Anderson stated that he could rule out that possibility—even without ever having seen the cylinder in question. (Doc. 45-3, SER vol. II at 493:21-494:18) But Dr. Anderson conceded that Rangers Ratliff and Stephens testimony that the cylinder metal curled outward was inconsistent with a failure in the brazed joint. (Doc. 45-3, SER vol. II at 529:25-530:4) Without explanation, Dr. Anderson simply rejected their testimony—the only description of the appearance of the actual cylinder after the incident. (Doc. 45-3, SER vol. II at 530:5-24)

Using exemplars,<sup>12</sup> Dr. Anderson created cylinder failures under a flame-and-pull test where 30-foot pounds of force are exerted on the braze joint. (Doc. 45-3, SER vol. II at 498:10-22) Dr. Anderson tested just two cylinders in this manner—one where he “abused” the cylinder by applying a torque wrench and twisting the main valve, and one where he did not. Based exclusively on that test, Dr. Anderson concludes that the “abuse” caused the parent metal to fail on one

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<sup>11</sup> The “parent metal” refers to the cylinder wall. The “brazed joint” refers to the braze material used to affix the valve to the cylinder wall. (Doc. 45-3, SER vol. II at 492:7-14)

<sup>12</sup> Dr. Anderson was unable to confirm whether the exemplars he used were similar or dissimilar to the incident cylinder. (Doc. 45-3, SER vol. II at 536:12-537:6)

cylinder, where the non-abuse failed in the braze on the other cylinder. (Doc. 45-3, SER vol. II at 499:10-500:5) No scientifically valid conclusion can be drawn from that test concerning the nature of the failure—whether it was parent metal or brazed joint.

**c. Dr. Anderson conceded that abuse caused the cylinder to fail**

Dr. Anderson admitted that he relied on Ranger Ratliff's testimony that "It appeared to me that the torch was—might have been banged against something that might have adjusted the thread area of where the torch nozzle and the canister (cylinder) would connect and had—may have weakened that area in the process of being banged, I guess you would say." (Doc. 45-3, SER vol. II at 501:12-21) Dr. Anderson further concedes that he could neither count nor discount whether Mr. Shalaby threw or dropped the torch or kicked it, or banged it against the cement fire ring. (Doc. 45-3, SER vol. II at 519:2-24) When asked if the force that caused the failure could have been the force generated by Mr. Shalaby banging the cylinder against the cement fire ring, Dr. Anderson conceded, "I think the force levels are somewhat commensurate of what would be required to cause a failure." (Doc. 45-3, SER vol. II at 520:5-15)

When asked about the investigative report by EMT Price where he determined that Mr. Shalaby kicked the cylinder into the fire, Dr. Anderson stated that he did not read EMT Price's deposition. (Doc. 45-3, SER vol. II at 521:6-13)

Dr. Anderson did review EMT Russo's deposition, but he did not give it any credence. (Doc. 45-3, SER vol. II at 522:17-25) Dr. Anderson did concede, however, that placing a MAPP gas cylinder in a fire pit with embers could result in enough heat to cause a vent and a failure in the cylinder wall. (Doc. 45-3, SER vol. II at 529:14-24) He further conceded that while he claims the possibility of throwing or kicking the cylinder into a fire pit and then fishing it out again as "bizarre" that there are documents and deposition testimony that "show bizarre activity." (Doc. 45-3, SER vol. II at 538:7-539:3)

**d. Dr. Anderson did not develop or test any alternative design necessary to demonstrate a design flaw**

Dr. Anderson criticized the design of the cylinder because he believes that the brazed joint between the cylinder and the main valve needs to be stronger. (Doc. 45-3, SER vol. II at 523:12-22) But Dr. Anderson concedes that while he might propose a theory for how to make an improvement, it would be something he has never seen in any cylinder or test, peer review or publication of such a design. (Doc. 45-3, SER vol. II at 524:1-527:18) Dr. Anderson conceded he did not know the failure rate or even what standards would apply to such a design. *Id.* Dr. Anderson conceded that his proposed design is neither accepted within the scientific community nor the manufacturing community. (Doc. 45-3, SER vol. II at 527:20-528:3)

**e. Dr. Anderson found no manufacturing defect, but alleged one anyway**

Dr. Anderson stated in his report, “It is possible that the brazing material is off specifications.” (Doc. 45-3, SER vol. II at 532:4-6). When asked specifics about the braze process, Dr. Anderson was very vague. For example, when asked about the sufficiency of the temperature in the furnace, Dr. Anderson stated, “It would kind of depend on how long it’s going to be in there, but I think I would want a higher temperature.” (Doc. 45-3, SER vol. II at 533:3-8) When asked how long the alloy would have to be exposed to the temperatures referenced in the process, Dr. Anderson admitted, “I don’t know. I haven’t calculated that.” (Doc. 45-3, SER vol. II at 533:9-12) When asked about porosity of the braze, Dr. Anderson admitted, “I really need more information to solve their problem so they don’t have this again.” (Doc. 45-3, SER vol. II at 534:8-16) Dr. Anderson was asked, so you don’t know and responded, “Nobody asked, and nobody said.” (Doc. 45-3, SER vol. II at 535:4-5) And when asked if there were any other factors contributing to the porosity, Dr. Anderson conceded, “That’s pretty complete.” (Doc. 45-3, SER vol. II at 535:18-23)

Furthermore, Dr. Anderson did not examine the products involved in the incident. Dr. Anderson conceded that the exemplar cylinders that he examined and tested were made in one year (“G”) but that he did not know when the cylinder involved in the incident was manufactured, so he just assumed that they were

similar. (Doc. 45-3, SER vol. II at 536:12-537:6) Dr. Anderson had no idea whether or not there was a manufacturing defect in the cylinder involved in Mr. Shalaby's incident.

**f. Dr. Anderson found nothing wrong with the torch**

Dr. Anderson conceded that there was nothing wrong with the torch whatsoever. (Doc. 45-3, SER vol. II at 540:6-541:9) Note that there is nothing in this record about the torch, much less its fracture groove.<sup>13</sup> Only after the close of all discovery did Appellants attempt to change the story and their experts' theory. (Doc. 131, ER vol. I at 46-61). Mr. Shalaby's untimely statements about his flash memories under hypnosis that he merely was tapping a piece of firewood with the tip of the torch and Dr. Anderson's untimely opinions about these new statements were properly excluded by the trial court. (Doc. 131, ER, vol. I at 46-61).

**g. Dr. Anderson provided no causal link between his findings with the exemplar cylinders and the actual reason for the failure of the cylinder involved in the incident**

In the end, all Dr. Anderson could really say was that he tested two exemplar cylinders, the braze failed under duress in one, and the parent metal of the cylinder failed under duress in the other. He had never seen nor examined the incident cylinder to determine whether the braze or parent metal failed in the incident

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<sup>13</sup> The fracture groove is a safety feature of the torch, but in this case, is nothing more than a red herring thrown in front of this Court to try to deflect the inconsistencies in Appellants' fact scenarios and their experts' opinions.

cylinder. Indeed, the only fact testimony in the record described a failure in the parent metal of the incident cylinder which by Dr. Anderson's own admission, would result from abuse.

## **V. ARGUMENT**

### **A. Summary of Argument**

Appellants raise nine<sup>14</sup> different issues that all fall under one of three sets of orders: (1) Orders denying Appellants leave to add expert opinions and fact discovery as out of time with the court's scheduling order (Appellants' issues 5-8, p. 32-52 of Appellant brief); (2) Orders denying Appellants' Motion to File a Second Amended Complaint and Motions in Limine (Appellants' issue 3, p. 26-29 of Appellant brief); and (3) an Order granting summary judgment (Appellants' issues 1-4 and 9, p. 15-32, 52-54 of Appellant brief). Bernzomatic's response is organized in support of these three sets of orders, rather than in response to these nine discordant issues separately.

First, Bernzomatic argues that the trial court did not abuse its discretion when it denied Appellants' motion for leave to supplement their experts' opinions out-of-time with the scheduling order and to reopen discovery. Appellants lacked

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<sup>14</sup> Appellants cite a tenth issue at page 54 of their appellant brief in which they wish for a new judge, which requires no response.

the diligence required under Rule 16 and failed to show good cause for such relief as required under Rule 16.

Second, Bernzomatic argues that the trial court neither abused its discretion when it denied Appellants' eleventh-hour motion to file a second amended complaint, for the same reasons under Rule 16, nor when it denied Appellants' motions in limine when those motions were premature at the summary judgment stage.

Third, Bernzomatic argues that the trial court did not abuse its discretion when it excluded Appellants' experts, because their opinions were shown to be unreliable and largely irrelevant because they contradicted uncontroverted facts, were not scientifically valid, and failed to demonstrate either a defect or causation from a defect. Finally, Bernzomatic argues that in that same order, the trial court correctly found that Appellants cannot make their *prima facie* case of defect and causation without an expert witness because this is not a case in which the everyday experience of the product's users permits a conclusion that the product's design was defective regardless of expert opinion about the merits of the design. Accordingly, the trial court correctly granted summary judgment to Bernzomatic.

**B. The Trial Court Did Not Abuse Its Discretion When It Denied Appellants' Motion for Leave to Supplement Expert Opinions, Add to Witness Lists and to Reopen Discovery (Docs. 131 and 146)<sup>15</sup>**

Mr. Shalaby gave 450 pages of deposition testimony over three days (September 24, 2007, September 25, 2007 and October 16, 2007). Then, a year after this deposition and several weeks after the discovery cutoff, Mr. Shalaby alleged that under hypnosis, he determined that the accident had occurred in a manner wholly inconsistent with his prior testimony. (Doc. 131, ER vol. I at 48).

Months after all deadlines in the scheduling order passed, Appellants filed a motion on December 16, 2008 claiming the “hypnotic flashbacks” were “new evidence” and in the same filing, attempted to sneak Dr. Anderson’s second supplemental report into the record of the case. (Doc. 93).

Here is a chronology of some key events in this case:<sup>16</sup>

June 27, 2008	Fact discovery closed per court’s scheduling order
July 3, 2008	Liability expert reports deadline; reports exchanged
July 18, 2008	Liability expert rebuttal reports deadline; reports exchanged
July 24, 2008	Damages expert reports deadline; reports exchanged
Aug. 1, 2008	Damages expert rebuttal reports deadline; reports exchanged

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<sup>15</sup> A district Court’s evidentiary rulings are reviewed for abuse of discretion, and the appellant is additionally required to establish that any error is prejudicial. *Tritchler v. County of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004).

<sup>16</sup> Scheduling order deadlines are found at Doc. 11, 32, ER vol. I at 62-68.

Sept. 3, 2008 Dr. Anderson deposition

Sept. 30, 2008 Expert discovery closed<sup>17</sup>

**At this point, all discovery is closed**

Oct. 6, 2008 Second supplemental report from Dr. Anderson (out of time from the July 18 deadline) (Doc. 131, ER vol. I at 50-51)

Oct. 10, 2008 Dispositive/*Daubert* motion deadline; Defendant Bernzomatic and Third-Party Defendant Worthington each filed *Daubert* motions and Bernzomatic filed a Summary Judgment motion against Appellants. (Doc. 131, ER vol. I at 48)

Dec. 16, 2008 Appellants' move to reopen discovery and allow a third supplemental expert report (Doc. 93)

Dec. 23, 2008 Appellants' move for leave to file a second amended complaint (Doc. 98)

Jan. 26, 2009 Appellants' filed a "supplement" to their motion to reopen discovery and allow a third supplemental expert report (Doc. 114)

Feb. 6, 2009 Appellants' filed a second "supplement" to their motion to reopen discovery and allow a third supplemental expert report (Doc. 116)

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<sup>17</sup> 21 fact and expert depositions were taken across multiple cities such as Boston, Milwaukee, Chicago, San Francisco, San Diego, Los Angeles, Walnut Creek. They included depositions of Betty Hawks, Adam Goldyne, Christina Diaz, Alison Vredenburgh, Christine Wood, Eric Morgenthaler, Thomas William Chapman, Robert Anderson, Warren Ratliff, Randy Stephens, Joseph Russo, Timothy Myers, William Kane, Thomas Eager, Michael Ridley, Steven Gentry, Sonia Dunn-Ruiz, three days of Andrew Shalaby, Robert Lee Spangler, Robert Price and Dallas Schwalenberg before discovery closed. (Doc. 225-3, SER Vol. I at 24-26).

Mr. Shalaby assessed the chances of his case after dispositive motions were filed, and took a shot at changing his story about how the incident occurred and having his expert provide different opinions out-of-time with the scheduling order.

Under Rule 16(b), Appellants must show “good cause” in order for the court to amend the scheduling order and reopen discovery or permit Dr. Anderson to render his supplemental report out of time. Rule 16(b) “primarily considers the diligence of the party seeking the amendment.” The district court may modify the pretrial schedule “if it [the schedule] cannot reasonably be met despite the diligence of the party seeking the extension.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992), *citing* Fed. R. Civ. P. 16 advisory committee’s notes (1983 amendment) and *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 469 (D.N.J. 1990) (other citations omitted). But that was not the case here, and the trial court properly exercised its discretion when it denied Appellants’ delinquent and contradictory factual testimony and expert report without showing good cause.

As the trial court explains, Mr. Shalaby testified in his deposition that he believed the cylinder exploded when he pulled the trigger of the torch. But then after discovery closed and he received Bernzomatic’s motion for summary judgment, he claimed that under hypnosis, a new memory surfaced that he tapped a piece of firewood with the tip of the torch. Ironically, Mr. Shalaby also said that

he previously had this memory way back in April 2006 and did nothing to pursue it then, or during his three days of deposition in fall 2007. (Doc. 131, ER vol. I at 52-53).

Even though the deadline for discovery and expert reports had passed, Mr. Shalaby went to his expert Dr. Anderson to once again investigate the torch. But as the trial court explained in its order, evidence overwhelmingly contradicts Plaintiff's assertion that he did not know anything about the torch and its features, including the fracture groove until late 2008. (Doc. 131, ER vol. I at 51, fn 2) The court stated that the issue is whether Appellants diligently pursued discovery, citing *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295-96 (9th Cir. 2000). (Doc. 131, ER vol. I at 52). The trial court found that all of Appellants' delays in pursuing the out-of-time theory with respect to the torch were attributable to Appellants, and such delay was "inexcusable." *Id.*

Additionally, the trial court also found that granting Appellants' requests would severely prejudice Bernzomatic,<sup>18</sup> citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d at 604 (9th Cir. 1992). (*Id.* at 54) Because Appellants failed to diligently pursue discovery, the trial court properly denied Appellants motion and

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<sup>18</sup> See footnote 17, *supra*. Furthermore, all parties in the case had spent significant resources litigating the case for two years prior to the close of discovery, at great expense. (Doc. 225-3, SER Vol. I at 24-26).

excluded the late factual testimony, expert opinions and denied reopening discovery. (*Id.* at 55-60)

For these reasons, this Court should affirm the trial court's order denying Appellants leave to add expert opinions and fact discovery out of time with the court's scheduling order and deny Appellants' issues 5, 6, 7 and 8.

**C. The Trial Court Did Not Abuse Its Discretion When It Denied Appellants' Motion to File a Second Amended Complaint and Motions in Limine (Doc 204 and Doc. 205)<sup>19</sup>**

Appellants moved for leave to file a Second Amended Complaint over two years after filing the lawsuit and nearly three months after the close of discovery as an attempted "end around" the scheduling order. (Doc. 98). The trial court saw this ruse for what it was and denied the motion. (Doc. 204, ER vol. I at 33-39) The trial court stated, "The question before the Court on Plaintiffs' motion is essentially the same as that which was before Magistrate Judge Major when she issued the March 11, 2009 order." (*Id.* at 35-36, citing Doc. 131) Just as the trial court found in its prior order when it excluded the late factual testimony, expert opinions and denied reopening discovery (Doc. 131, ER vol. I at 55-60), the court restated the reasons that Appellants failed to demonstrate diligence in pursuing its

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<sup>19</sup> Both the review of an order denying a motion to file an amended complaint out of time under Rule 16(b) and the review of the denial of motions in limine are reviewed for abuse of discretion. *Tritchler*, 358 F.3d at 1155, (A district Court's evidentiary rulings are reviewed for abuse of discretion, and the appellant is additionally required to establish that any error is prejudicial).

late theories of the case and lacked “good cause” under Rule 16(b) to permit a new complaint. (Doc. 204, ER vol. I at 37) The trial court also noted, “The Ninth Circuit has held that it is not an abuse of discretion to deny leave to amend to add a claim raised at the eleventh hour after discovery was virtually complete and the defendant’s motion for summary judgment was pending before the Court,” *Id.* at 38, citing *Roberts v. Ariz. Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981). As the trial court notes, the *Roberts* case was in the same posture as this case and it denied Appellants’ motion. (*Id.* at 38)

Separately, Appellants filed three motions in limine to exclude supposed hearsay evidence. (Doc. 105, 106, 107) The trial court denied those motions without prejudice as premature. (Doc. 205, ER, vol. I at 31) The trial court pointed out: “Federal Rule of Evidence 703 provides that an expert may rely upon hearsay or other inadmissible evidence to form the basis of his opinion,” citing Fed. R. Evid. 703; *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 873 (9th Cir. 2001); and *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1262 (9th Cir. 1984). (*Id.* at 31-32)

Here, summary judgment was based on the exclusion of Appellants’ experts and on the untenable inability to make a prima facie case without experts. It had little to do with Appellants’ motions in limine and more to do with Appellants’ failure to meet their burden to prove a defect and causation. For these reasons, this

Court should affirm the Order denying Appellants' Motion to file an eleventh hour Amended Complaint, affirm the Order denying Appellants' Motion in Limine and deny Appellants' issues 3 and 9.

**D. The Trial Court Did Not Abuse Its Discretion When It Excluded Appellants' Experts (Doc. 209)<sup>20</sup>**

**1. Dr. Anderson's opinions did not meet the *Daubert* standard and therefore his testimony was excluded from this case**

Where an expert witness bases his theory of the case on assumptions that are contradicted by undisputed facts in the record, his testimony is properly excluded under Federal Rule of Evidence 702. Rule 702 permits testimony by experts qualified by "knowledge, skill, expertise, training, or education" to give opinion testimony if the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Under Rule 702, experts may testify "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Id.*

In *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court emphasized the

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<sup>20</sup> The exclusion of expert witnesses is reviewed for abuse of discretion. *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579, 593 (1993). The grant of summary judgment is reviewed *de novo*. *E.g.*, *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008).

“gatekeeping role” of trial courts in determining the admissibility of proffered expert testimony under Fed. R. Evid. 702. *Daubert*, 509 U.S. at 597; *Kumho Tire*, 526 U.S. at 141, 152. The Supreme Court stated that Courts must analyze both the relevance and the reliability of the testimony. *See Daubert*, 509 U.S. at 589.

Testimony is relevant if it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than without the evidence.” *See* Fed. R. Evid. 401.

Testimony is reliable under *Daubert* if it constitutes scientific knowledge. *Daubert*, 509 U.S. at 592. In determining reliability, courts should consider if (1) “the testimony is grounded on sufficient facts or data;” (2) “the testimony is the product of reliable principles and methods;” and (3) “the witness has applied the principles and methods reliably to the facts of the case.” *See* Fed. R. Evid. 702.

Under *Daubert* and Rule 702, district courts have “broad discretion” to exclude improper expert testimony. *Daubert*, 509 U.S. at 593. At all times, the proponent of expert testimony bears the burden of establishing admissibility by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). Appellants fail to meet that burden with Dr. Anderson.<sup>21</sup>

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<sup>21</sup> The trial court enunciated these same standards. (Doc. 209, ER vol. I at 8).

**2. Dr. Anderson's opinions were not premised upon sufficient facts or data**

Federal courts in California recognize that pursuant to Rule 702 and *Daubert*, 509 U.S. at 592-93, 597, an expert's opinion testimony must be excluded when it is contradicted by the facts of the case. *See, e.g., Guidroz-Brault v. Missouri Pac. R.R. Co.*, 254 F.3d 825 (9th Cir. 2001). In *Guidroz-Brault*, the Ninth Circuit held that "the facts . . . provided no basis for [the expert's] assumption. . . ." *Guidroz-Brault*, 254 F.3d at 827. Noting that "an expert must back up his opinion with specific facts," the Ninth Circuit found that the trial court properly excluded the expert testimony. *Id.*

Likewise, in *Robinson v. G.D. Searle & Co.*, 286 F.Supp. 1216, (N.D. Cal. 2003), the Plaintiff relied exclusively upon the expert opinion of her physician, who testified that the Plaintiff developed "rebound insomnia" as a result of taking Ambien. *Robinson*, 286 F.Supp. at 1219. But the expert's opinion contradicted facts in evidence, including Plaintiff's emails detailing similar symptoms prior to when she began taking Ambien. *Id.* at 1218. In this case, a key factual premise on which [the expert's] opinion was based is directly refuted by Plaintiff's admissions." *Id.* at 1221.

As in the *Guidroz-Brault* and *Robinson* cases, Dr. Anderson's testimony should be excluded because Dr. Anderson's opinion is contradicted by facts in the record. Dr. Anderson is unable to back up his opinion with specific facts in the

record to support his theories of design and manufacturing defects in the cylinder. Indeed, Dr. Anderson's opinions contradict the specific facts in the record. Dr. Anderson has never seen or examined the incident cylinder. He only has the testimony of the park rangers who saw the cylinder after the incident, yet he inexplicably ignores their description without scientific explanation. (Doc. 209, ER vol. I at 20). The trial court found that Dr. Anderson's theory necessarily disregarded the descriptions by the only eyewitnesses to examine the post-incident torch and cylinder before they were discarded. *Id.* Furthermore, Dr. Anderson is unable to back up his opinion with specific facts about a causal link between his opinions and evidence in the record regarding how the incident occurred.

Dr. Anderson forms opinions about the MAPP gas cylinder involved in the incident, based solely upon the testing of two exemplars, even though he did not know if the incident cylinder was the same as the two exemplars he examined and could not state what year the incident products were manufactured. *Id.* Dr. Anderson examined just two exemplar cylinders to draw conclusions that he admits could be true or untrue with respect to the cylinder that was actually involved in the incident, and that he concedes had two very different results. (Doc. 45-3, SER vol. II at 499:10-500:5) The trial court goes into great detail about how the testing itself, inconsistencies in Dr. Anderson's testimony about the testing, and

ultimately, Dr. Anderson's test conclusions are unreliable. (Doc. 209, ER vol. I at 10-13)

### **3. Dr. Anderson's opinions were not scientifically valid**

The trial court is obligated to act as a gatekeeper with regard to the Rule 702 admissibility requirements, which "entails a preliminary assessment of whether the reasoning or methodology is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93.

Courts should consider many factors in determining whether an expert's testimony is scientifically valid, including but not limited to whether the expert's theory has been tested, whether it has been subjected to peer review or publication, and whether there is a known potential rate of error. *Id.* These are all thoroughly examined by the trial court in its opinion, and Dr. Anderson failed at every turn. (Doc. 209, ER vol. I at 10-15). Federal courts have been very careful to note that, when determining whether expert testimony is scientifically valid, courts also should consider whether an expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered."). In determining admissibility, Federal courts should also consider whether an expert

has adequately accounted for alternative explanations. *Claar v. Burlington Northern R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994).

Dr. Anderson ignored several alternative explanations for the fire and specifically ignored the testimony of neutral eyewitnesses. (Doc. 209, ER vol. I at 20) Importantly, these eyewitnesses had a job responsibility to investigate and understand what occurred at the campsite. Dr. Anderson conceded that Rangers Ratliff and Stephens testimony that the cylinder metal curling outward was inconsistent with his own theory of the failure in the braze of the cylinder. (Doc. 45-3, SER vol. II at 529:25-530:4) But Dr. Anderson rejected their testimony—the only description of the appearance of the cylinder after the incident. (Doc. 45-3, SER vol. II at 530:5-24)

For Dr. Anderson's opinion to be scientifically valid, he needs sufficient facts to support his assumptions that the incident was caused by a design or manufacturing defect, without an intervening cause, such as a traumatic force applied to the cylinder. Yet Dr. Anderson's assumptions are directly contradicted by the facts in the record. (Doc. 209, vol. I at 16-19).

**4. Dr. Anderson rendered his design defect opinions without investigating the design parameters or creating a feasible alternative design**

Dr. Anderson puts forth in this case that there is a design defect in the cylinder because the braze is not strong enough. The Second, Seventh and Eighth

Circuit have excluded expert testimony regarding design defects where the expert neither designed nor tested proposed alternatives to the current design, nor read any studies of such alternative designs, nor did the excluded expert have any practical knowledge of use of the device or proposed alternative device in the work setting. *See Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (2<sup>nd</sup> Cir. 2000); *Cummins v. Lyle Indus.*, 93 F.3d 362, 366-371 (7<sup>th</sup> Cir. 1996); *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 296-298 (8<sup>th</sup> Cir. 1996).

Dr. Anderson neither owns nor uses MAPP gas cylinders and he has never testified as an expert about one until this case. (Doc. 45-3, SER vol. II at 486:20-25; 487:7-20) Dr. Anderson did not conduct any quantitative analysis, did not design an alternative, did not test or assess any proposed change that might benefit the current design, and only formed a qualitative opinion about the design. (Doc. 209, ER vol. I at 12-13). Yet Dr. Anderson concedes that while he might propose a theory for how to make an improvement, it would be something he has never seen in any cylinder, test, peer review or publication. Dr. Anderson does not know the failure rate or standards that would apply to such a design. (Doc. 45-3, SER vol. II at 524:1-527:18) Dr. Anderson concedes that his proposed design is not accepted within the scientific community or the manufacturing community. (Doc. 45-3, SER vol. II at 527:20-528:3; *see generally*, Doc. 209, ER vol. I at 12-13).

### **5. Dr. Anderson alleged a manufacturing defect with no basis at all**

The California Supreme Court has defined a manufacturing defect as one where a product is defective because it differs from the manufacturer's design or intended result or from identical units of the same product line.<sup>22</sup> With respect to a manufacturing defect, Dr. Anderson stated, "It is possible that the brazing material is off specifications." (Doc. 45-3, SER vol. II at 532:4-6) But Dr. Anderson could not provide any specifics. (Doc. 45-3, SER vol. II at 533:3-535:23)

Importantly, Dr. Anderson did not have the products involved in the incident. Dr. Anderson conceded that the exemplar cylinders that he examined and tested were made in one year ("G") but that he did not know when the cylinder involved in the incident was manufactured, so could only assume that they were similar. (Doc. 45-3, SER vol. II at 536:12-537:6) By alleging a manufacturing defect, Dr. Anderson is alleging that something went wrong in manufacture of the specific product involved in Mr. Shalaby's incident, yet he cannot even say when the incident product was manufactured or how a specific defect occurred during the manufacturing process of the incident cylinder. Indeed, Dr. Anderson admits to knowing little or nothing about the manufacturing process. (Doc. 45-3, SER vol. II at 533:3-535:23)

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<sup>22</sup> See, e.g., *Carlin v. Superior Court*, 13 Cal. 4th 1104, 1149 (1996).

This is not scientific inquiry. There is nothing to support an opinion that a manufacturing defect existed with respect to the cylinder involved in the incident. And the opinion that there is a manufacturing defect with respect to even the exemplars that Dr. Anderson examined is unsupported, with the exception of vague references to the possibility that the furnace temperature was not hot enough or that the brazed joint was not left in the furnace long enough. There is certainly nothing to link any alleged manufacturing defect to the cause of the incident.

For all of these reasons, the trial court found, “no indicia of reliability with respect to Dr. Anderson’s proffered testimony that the braze material was the source of the failure in Mr. Shalaby’s cylinder.” (Doc. 209, ER vol. I at 18-19). It also found that Dr. Anderson’s opinion irrelevant, because it, “does not answer the ultimate question of what caused Mr. Shalaby’s torch to fail, nor will it assist the jury in answering the question.” (Doc. 209, ER vol. I at 20).

#### **6. Dr. Vredenburg’s testimony was properly excluded**

The trial court properly excluded Dr. Vredenburg's purported expert warning testimony because it found that she had no knowledge of the product, she did not know how the product worked, she was unfamiliar with the product's audience and she had no knowledge about the industry. (Doc. 209, ER vol. I p. 22:9-13). The trial court further found that even if Dr. Vredenburg were qualified to testify, her proffered testimony would ultimately be excluded as unreliable and

irrelevant. (Doc. 209, ER vol. I p. 23:13-14). Among the many failings of Dr. Vredenburg's proffered testimony, the trial court noted that she did not collect any empirical data, did not conduct any testing, did not conduct any surveys, did not seek data from manufacturers, did not review any peer-reviewed literature, did not conduct any other kind of research prior to forming her opinion, and that she could not say that the lack of warnings resulted in Mr. Shalaby's injury. (Doc. 209, ER vol. I p. 23:12-24:19).

For these reasons, this Court should affirm the Order excluding Dr. Anderson and Dr. Vredenburg as experts under the *Daubert* standard and deny Appellants' issue 2.

**E. The Order Granting Summary Judgment to Bernzomatic is Correct Because Appellants Cannot Make a *Prima Facie* Case Without an Expert Witness (Doc. 209)<sup>23</sup>**

Under California law,<sup>24</sup> expert testimony is necessary to establish a product defect claim against Bernzomatic. *See, e.g., Stephen v. Ford Motor Co.*, 134 Cal. App. 4th 1363, 1365 (Cal. Ct. App. 2005). Because Appellants' expert must be excluded, Appellants have failed in their burden to present a *prima facie* claim against Bernzomatic, and summary judgment was therefore appropriate. Lacking

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<sup>23</sup> The grant of summary judgment is reviewed *de novo*. *E.g., Dietrich*, 548 F.3d at 896.

<sup>24</sup> Federal Courts sitting in diversity apply state law to product liability claims. *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1193-94 (9th Cir. 2007).

an expert, Appellants try to meet their burden to show a defect and causation using two inapplicable tests—the consumer expectations test and the doctrine of *res ipsa loquitur*. (Doc. 209, ER vol. I at 27-28).

In California, a product liability case must be based on substantial evidence that establishes both the alleged defect and a substantial probability that the alleged defect caused the Plaintiff's injury. *Id.* at 1373. Where, as here, the complexity of the alleged defect and the issue of causation is beyond common experience, expert testimony is required to establish both the defect and causation. *Id.*; *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 976 (1997) (failure to present admissible expert was fatal to Appellants' case). "The plaintiff must prove that the defective products supplied by the defendant were a substantial factor in bringing about his or her injury." *Rutherford*, 16 Cal. 4th at 968.

Because Appellants' experts were properly excluded, summary judgment in favor of Bernzomatic is warranted. *See Robinson*, 286 F. Supp.2d 1216 (granting summary judgment where the Plaintiff failed to support her case with admissible/reliable expert evidence).

**1. Appellants' theory of defect and causation are too complex for the consumer expectations test**

The California Supreme Court has stated that the consumer expectations test is "reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety

assumptions and is thus defective regardless of expert opinion about the merits of the design.” *Soule v. Gen. Motors Corp.*, 8 Cal. 4th 548, 567 (1994).

In citing this passage from *Soule*, the trial court explained how cylinders can explode for reasons other than defect, such as user abuse, and that ordinary users of cylinders cannot reasonably expect cylinders filled with pressurized flammable gas to be indestructible and incapable of exploding. (Doc. 209, ER vol. I at 27).

Additionally, Appellants’ own theory of defect was very technical in nature. *Id.* In addition to failing to establish a defect with scientific reliability, Appellants have failed to even state a theory of causation. *Id.* at 26.

In *Massok v. Keller Ind., Inc.*, 147 Fed. Appx. 651 (9th Cir. 2005)<sup>25</sup>, the Plaintiff was injured because he fell off a ladder. Citing to *Soule*, this Court stated “The crucial question in each individual case is whether the circumstances of the product’s failure permit an inference that the product’s design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers.” *Massok*, 147 Fed. Appx. at 658. This Court decided that falling off a ladder does not involve the “behavior of several obscure components or complex circumstances beyond a normal user’s frame of reference.” *Id.* Accordingly, the consumer expectations test was applied in *Massok*.

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<sup>25</sup> Appellants’ citation to and reliance on *Massok* is improper because *Massok* is an unpublished opinion. Circuit Rule 36-3(c). Even if *Massok* had any precedential value, it would remain inapplicable in this case for the reasons that follow.

But the fact pattern in this case is distinguishable. Appellants put forth a theory of defect that “The braze material between the center valve housing and the cylinder is the weak element in the assembly, and subject to failure when the torch is attached to the cylinder.” (Doc. 45-3, SER vol. II at 523:12-22) Dr. Anderson also stated that he believed (1) the brazing material could be off specifications;<sup>26</sup> (2) the temperature in the furnace when making the cylinders might not be high enough;<sup>27</sup> and (3) the porosity of the braze might be causing a problem.<sup>28</sup> All of these theories and the design for cylinders are subject to regulation DOT 39 (49 C.F.R. 178.65 (Doc. 61-2, SER vol. I at 276-279) and require the analysis of a metallurgist. (Doc. 45-3, SER vol. II at 476-480) None of these complex theories of defect are a “matter of common experience” the way that falling from a ladder might be.<sup>29</sup> And there is no demonstration of causation found in this record.

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<sup>26</sup> (Doc. 45-3, SER vol. II at 532:4-6)

<sup>27</sup> (Doc. 45-3, SER vol. II at 533:3-8)

<sup>28</sup> (Doc. 45-3, SER vol. II at 534:8-16)

<sup>29</sup> There are many cases where, as here, the theories of defect and causation are beyond common experience: *Morson v. Superior Court*, 90 Cal. App. 4th 775, 795 (Cal. Ct. App. 2001): In *Morson*, the plaintiff brought a product liability suit claiming that latex gloves were defectively designed because they caused her to have an allergic reaction. The court found that the consumer expectations test was inappropriate because "plaintiffs were seeking to prove that their conditions were caused by more than a natural allergy to a natural substance, such that a product defect or a wrongdoing by a defendant could have been causative factors. The complexity of this task makes it inappropriate to apply the consumer expectations test for design defect." *Pruitt v. General Motors*, 72 Cal. App. 4th 1480, 1483,-85,

Therefore, the consumer expectations test was inapplicable under these facts, and an expert witness was required to establish both the existence of a defect and causation. The trial court properly ruled that Plaintiffs' claims therefore fail without an expert.

## **2. *Res Ipsa Loquitur* does not apply to this case**

To apply *res ipsa loquitur* requires that the torch and cylinder be in the exclusive control of Bernzomatic. (Doc. 209, ER vol. I at 28). But the torch and cylinder were under the control of Mr. Shalaby at the time of the incident. That point alone defeats Appellants' argument regarding *res ipsa loquitur*. *Id.*

Furthermore, Appellants never established that Mr. Shalaby did not contribute to the accident by abusing it. *Id.* Indeed, Mr. Shalaby's first words after the incident

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86 (Cal. Ct. App. 1999): In *Pruitt*, the court refused to apply the consumer expectation test to a defective design of an air bag. The court found that deployment of an airbag is not part of an everyday experience and their minimum safety standards are not within the common knowledge of consumers. *Rosburg v. Minnesota Mining & Mfg. Co.*, 181 Cal. App. 3d 726, 732-33 (Cal. Ct. App. 1986): In *Rosburg*, the court found the consumer expectation test inappropriate in application to defective breast implants. Breast implants are not the type of commonly available products that the ordinary consumer encounters in her ordinary experience. *Lunghi v. Clark Equip. Co.*, 153 Cal. App. 3d 485, 496 (Cal. Ct. App. 1984): In *Lunghi*, the court considered whether to apply the consumer expectation test to a front loader. The court found that the "'user of a loader' is distinguishable from 'ordinary consumers.'" "An ordinary consumer would not know what to expect from a piece of heavy machinery like the Bobcat loader."

were, “Its all my fault.” Accordingly, even Dr. Anderson had to admit that some abuse was likely. (Doc. 45-3, SER vol. II at 501:12-21; 519:2-24; 520:5-15)

The facts of the case at bar are similar and even more persuasive than in *Stephen*. Dr. Anderson ignored the testimony of the emergency responders’ reports, did not examine the products involved in the incident, did not take steps to ensure that the exemplars he examined were identical to the incident products, failed to adequately demonstrate his opinions of design and manufacturing defect, and ignored alternative explanations for the fire—namely, abuse of the cylinder. Likewise, Dr. Vredenburg’s opinions were not scientifically valid and were wholly irrelevant. As such, Appellants’ expert testimony must be excluded. Without expert testimony to establish either a design, manufacturing or warning defect in the products involved in Mr. Shalaby’s incident that can be causally linked to the incident, Appellants cannot make a *prima facie* case. Thus, summary judgment was correctly entered for Bernzomatic.

For these reasons, this Court should affirm the Order excluding Dr. Anderson and Dr. Vredenburg as experts and granting summary judgment to Bernzomatic. Accordingly, this Court should deny Appellants’ remaining issues 1 and 4.

## VI. CONCLUSION

All of the orders challenged in this case are correctly decided. Because Dr. Anderson's and Dr. Vredenburg's testimony are properly excluded, and the questions of defect and causation are beyond the common experience and knowledge of the jury, the Appellants cannot meet their burden of making a *prima facie* case and this Court should affirm summary judgment in favor of Defendant Bernzomatic.

Date: December 1, 2009

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