

No. 09-56331

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

ANDREW W. SHALABY, SONIA  
DUNN-RUIZ,

Plaintiffs - Appellants,

v.

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

Defendants-cross-claimants - Appellees,

and

WESTERN INDUSTRIES, INC.;  
WORTHINGTON INDUSTRIES,

Cross-defendants - Appellees.

D.C. No. 3:07-cv-2107-MMA-  
BLM

Southern District of California,  
San Diego

**APPELLANTS' REQUEST FOR JUDICIAL NOTICE IN  
SUPPORT OF OPPOSITION TO MOTION TO STRIKE MOTION  
TO EXPEDITE APPEAL AND IN SUPPORT OF APPEAL**

Jonathan H. Lipsky sbn 262715  
Andrew W. Shalaby sbn 206841  
7525 Leviston Ave  
El Cerrito, CA 94530  
Tel. 510-528-8500, 510-524-7427  
email: andrew@shalabylaw.com  
email: jhlipsky@hotmail.com

Alan J. Gould SBN 68446  
Law Office of Gould and Hahn  
5801 Christie Ave, suite 385  
Emeryville, CA 94608  
Tel. 510-428-2229, fax 510-428-2232  
panel@eastbaylaw.com

Attorneys for Appellants.

TO THE COURT, ALL PARTIES, AND THEIR COUNSELS OF RECORD:

Appellants Andrew Shalaby and Sonia Shalaby respectfully requests that the Court of Appeals take judicial notice of the following exhibits, pursuant to F.R.Evid., Rules 201(b)-(d), in support to their opposition to Appellees' motion to strike Appellants' Motion to Expedite the Appeal, in support of the appeal itself, and rebuttal to the incorrect information Appellee Worthington Industries presents to this Court on pages 9 through 11 of its Appellee's brief:

Exhibit 1 attached hereto is a Pacer printout containing the names and case numbers of the cases referenced below, from which the photographs of the failed cylinders have been presented on Exhibit 2 hereto.

Exhibit 2 attached hereto consists of photographs of other failed fuel cylinders, each photograph identifying the source as follows:

- 1 - Vanderlinde cylinder, closeup of failed brazed joint, located in the record at ER v4 p. 805 (Appellants' Excerpts of Record (ER)), with corresponding declaration of Mr. Vanderlinde at ER v.2 p.354 (see attached Exhibit 1, Pacer, for full case name and number);
- 2 - Vanderlinde cylinder, full view
- 3 - Glenn cylinder, from Glenn v. Newell Operating Company dba Bernzomatic Corporation, Superior Court of California, Ventura County, case number 56-

2007-00285785-CU-PL-VTA, located in the record at ER v4 p. 806.;

4 - Glenn cylinder, closeup of brazed joint (Doc. 93-15);

5 - Barrett cylinder (Pacer, Exhibit 1), located at ER v4 p. 807;

6 - Welch cylinder (Pacer, Exhibit 1), located at ER v4 p. 809;

7 - New case discovered 10/26/09, after opening brief was filed, shows failure of a MAPP gas cylinder produced by the same defendant/Appellees, showing the split at both the brazing compound and the parent metal - please see Shalaby declaration below;

8 - Tucker cylinder, discovered 12/09 after Appellant's reply brief was filed, appeared on Pacer 12/09 - please see Shalaby declaration below.

Exhibit 3 attached hereto is a description of the subject cylinder in this case, provided by Witness Warren Ratliff, quoted from his deposition, as cited to the record of the appeal on the document.

Exhibit 4 attached hereto are true and correct copies of pages 9, 10, and 11 of Worthington's Appellees' briefs, containing misrepresentations which contradict the evidence presented in Exhibit 2 above, text highlight added.

#### **DECLARATION OF ANDREW W. SHALABY**

I, Andrew W. Shalaby, declare as follows:

1. Exhibit 1 hereto is a true and correct copy of a Pacer printout as shown

facially on the document.

2. Exhibit 2 hereto contains true and correct copies of the photographs identified above. However, three of the photos are not in the record. I did not see photo 2 in the excerpts of record. Photo 7 was provided to me by an expert metallurgist on October 26, 2009, after the Appellants' opening brief was substantively completed. The individual represented to me that the injury victim was using a MAPP gas cylinder manufactured by the same defendants in this case, though I do not recall if he said Worthington or Western manufactured the subject cylinder. He also told me he and his firm conducted metallurgy tests and confirmed the same findings our expert, Dr. Robert Anderson, made in this case. Photo 7 shows a failure of the cylinder, at the brazed joint, occurring in both the brazing compound and parent metal. I have requested a declaration, and shall present it for judicial notice once received. Photo #8 is from the Tucker case (Pacer, attached). Counsel in that case advised me that the cylinder failed at the same brazed joint location as shown in all the other pictures. I have asked for a declaration from the plaintiff in that action, and shall present it for judicial notice once received.


3. Exhibit 3 hereto is a description of the subject cylinder in this case, provided by Witness Warren Ratliff, quoted from his deposition, as cited to the record of the appeal on the document.

3. Exhibit 4 hereto are true and correct copies of pages 9-11 of Worthington's

Appellees' Brief, with highlight to the relevant portions of text added.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and within my personal knowledgeas.

Executed January 9, 2010 in El Cerrito,

  
Andrew W. Shalaby

CA

# **EXHIBIT 1**

(Pacer cases)

# U.S. Party/Case Index

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3 BERNZOMATIC Wooden et al v. Newell Rubbermaid, Inc. et al	<a href="#">kywdce</a>	<a href="#">3:2008cv00185</a>	04/07/2008	365	04/07/2009
4 BERNZOMATIC Irwin Industrial Tool Company et al v. Worthington Cylinders Wisconsin, LLC et al	<a href="#">ncwdce</a>	<a href="#">3:2008cv00291</a>	06/25/2008	190	
5 BERNZOMATIC Irwin Industrial Tool Company et al v. Worthington Cylinders Wisconsin, LLC et al	<a href="#">gandce</a>	<a href="#">1:2009mi00383</a>	09/09/2009	890	09/25/2009
6 BERNZOMATIC Mayfield et al v. Newell Rubbermaid Inc et al	<a href="#">lawdce</a>	<a href="#">3:2008cv00861</a>	06/17/2008	365	
7 BERNZOMATIC Welch et al v. Newell Rubbermaid Inc et al	<a href="#">lawdce</a>	<a href="#">3:2007cv01228</a>	07/26/2007	365	10/15/2007
8 BERNZOMATIC Essex Insurance Company v. Enviro Safe Refrigerants Inc et al	<a href="#">iledce</a>	<a href="#">1:2009cv01230</a>	07/02/2009	110	10/02/2009
9 BERNZOMATIC ROLAND v. WESTERN INDUSTRIES, INC. et al	<a href="#">insdce</a>	<a href="#">1:2006cv01292</a>	08/29/2006	365	04/23/2007
10 BERNZOMATIC Bradley Englebrick et al v. Worthington Industries Inc et al	<a href="#">cacdce</a>	<a href="#">8:2008cv01296</a>	07/28/2009	365	
11 BERNZOMATIC Shalaby et al v. Newell Rubbermaid Inc et al	<a href="#">casdce</a>	<a href="#">3:2007cv02107</a>	10/30/2007	365	07/28/2009
12 BERNZOMATIC Shalaby et al v. Newell Rubbermaid Inc et al	<a href="#">casdce</a>	<a href="#">3:2007cv02107</a>	10/30/2007	365	07/28/2009
13 BERNZOMATIC Irwin Industrial Tool Company et al v. Worthington Cylinders Wisconsin, LLC et al	<a href="#">gandce</a>	<a href="#">1:2009cv02710</a>	09/25/2009	890	10/06/2009
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Baxter v. Bernzomatic, Inc. et al

## **EXHIBIT 2**

**(Photos of failed cylinders from other cases)**



1 - Vanderlinde



2-Vanderlinde



3 - Glenn



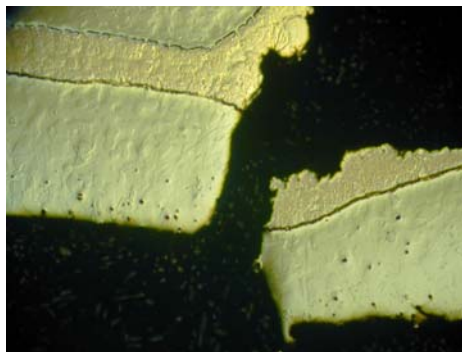
4 - Glenn



5 - Barrett



6 - Welch



(closeup of split on brazing and on parent metal)

7 - New case discovered 10/26/09,



8 - Tucker, appeared on Pacer after AOB was filed

### **EXHIBIT 3**

(Description of subject cylinder from this case)

**DESCRIPTION OF SUBJECT CYLINDER IN THIS CASE**  
(Appellants' Reply Brief pp. 6-7)

Ranger Warren Ratliff's Description of the Cylinder  
(Doc. 173-5, ER v.3 at 561)

25:22 - The cylinder had a right-angle bend to it at the torch, where the connection of the cylinder is, and appeared to be a crack in the cylinder at the bottom thread level of the cylinder.

26:24: It just appeared to be a split along the very bottom, the last thread of the neck.

28: 6 [the bend was] at the base of the nozzle and the torch - the cylinder itself.

28:9 At the explosion part, or whatever the break in the cylinder was, is where it was actually bent.

70:24 The threaded part was forced at a right angle of the cylinder itself.

71:2 Q: Is that what you were testifying about earlier, that right angle?

71:4 Yes, the right angle. Not the torch nozzle, but the cylinder and the torch nozzle... Opposite of the bend of the side – on the side of where the crack was, the angle went to the right; right-side angle of that crack.

73:23 Q: Other than the one crack– I'm going to use the term "crack" – you describe up on the neck of the bottle, did you see any other breaches in the metal bottle of the cylinder or anywhere else?

74:2 No, sir.<sup>1</sup>

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1

Ranger Stephens corroborates Ranger Ratliff's description of the cylinder. (Doc. 173-7, Stephens depo. pp. 31:4, 42:3, 42:19, 44:19, 44:23, 45:12, 45:14, 47:12, 47:16, 48:4, 72:24, 73:15, 79:24, 80:7 (ER v.4 at 638).

**EXHIBIT 4**

(pages 9-11 of Worthington's Appellee Brief)

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.)

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.*

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,  
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

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,