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9 Plaintiff Pro Per

10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

12
13 ANDREW W. SHALABY,

14 Plaintiff,

15 vs.

16 BERNZOMATIC, an Unincorporated
17 Division of IRWIN INDUSTRIAL
18 TOOL COMPAN; WORTHINGTON
19 INDUSTRIES, INC.; IRWIN
20 INDUSTRIAL TOOL COMPANY;
21 NEWELL OPERATING COMPANY,
22 INC., DOES 1 THROUGH 50
23 INCLUSIVE;

24 Defendants.

Case Number 11cv68 AJB (POR)

Second Amended Complaint for
Injunctive Relief and Fraud

(Cal. Bus. & Prof. Code § 17200 et seq.,
Cal. Civ. Code § 1572

Demand for Jury Trial

25 I. JURISDICTION

26 1. Plaintiff Andrew W. Shalaby is an individual plaintiff, and resides in
27 Contra Costa County, California.

28 2. Plaintiff is informed and believes, and on the basis of belief alleges that
Defendant BERNZOMATIC, was, prior to July 2011, an unincorporated division of
the parent company IRWIN INDUSTRIAL TOOL COMPANY, and Irwin Industrial

1 Tool Company's parent NEWELL OPERATING COMPANY, INC., located in
2 Atlanta, GA, and/or otherwise the principle places of business for any and all of these
3 entities are located outside of the State of California. Based on information and belief,
4 Plaintiff further alleges that approximately in July 2011 (after the filing of this action),
5 Worthington Industries, Inc. (aka Worthington Cylinders) purchased
6 BERNZOMATIC. On information and belief, Plaintiff alleges WORTHINGTON
7 INDUSTRIES, INC. is headquartered in Columbus, Ohio.

8 3. The amount in controversy exceeds \$75,000, therefore this case is within
9 the diversity jurisdiction of this Court pursuant to 28 USC § 1332.

10 II. VENUE

11 4. This case arises from wrongful acts of all named Defendants taking place
12 in Contra Costa County, California, and includes a relation-back to injuries suffered
13 by Plaintiff in San Diego, therefore the San Diego Federal Court is the proper venue
14 pursuant to 28 USC § 1391(a)(2) and (b)(2).

15 III. PARTIES

16 5. Plaintiff, Andrew W. Shalaby, is an individual, and an attorney, licensed
17 to practice in the State of California, the Federal Appellate Courts, and the United
18 States Supreme Court. Plaintiff shall be represented or co-represented by qualified
19 legal counsel for the remainder of the case, after the pleading stage has completed.

20 6. At all times relevant herein, Defendant, BERNZOMATIC, was an
21 Unincorporated Division of IRWIN INDUSTRIAL TOOL COMPANY, and IRWIN
22 INDUSTRIAL TOOL COMPANY was a subsidiary of NEWELL OPERATING
23 COMPANY, INC. However, after this action was filed, based on information and
24 belief, Plaintiff alleges that WORTHINGTON INDUSTRIES, INC. purchased
25 BERNZOMATIC approximately in July 2011. Based on information and belief,
26 Plaintiff therefore alleges that BERNZOMATIC, IRWIN INDUSTRIAL TOOL
27 COMPANY, NEWELL OPERATING COMPANY INC., and WORTHINGTON
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1 INDUSTRIES are at present one and the same overall business entity and defendant,
2 and shall therefore hereinafter be jointly referenced as “BERNZOMATIC.” However,
3 after discovery better identifies the parties and their relationships, Plaintiff may move
4 for leave to amend the complaint to reflect the proper identities and relationships of
5 the companies herein described, as may be necessary and appropriate. This action is
6 filed against BERNZOMATIC, and whomever its “parent” company or corporation
7 is or was at all times relevant herein.

8 7. Based On information and belief, Plaintiff alleges that at all times
9 relevant herein BERNZOMATIC was the manufacturer and/or marketer and producer
10 of a handheld torch, consisting of two components: (1) a fuel cylinder containing a
11 fuel consisting of a mixture alleged to contain 44% methylacetylene-propadiene and
12 56% Liquefied Petroleum Gas, commonly known as “MAPP” gas (or any other
13 mixture denoted as “MAPP” gas by BERNZOMATIC); and (2) a torch handle which
14 mounted onto the cylinder, known as a model “TS4000” push-trigger “torch.” These
15 components shall jointly be referenced as the “subject torch,” referring specifically to
16 the torch products relevant to this action as further described below, while “subject
17 torches” shall refer to the MAPP gas cylinders and products produced by Defendants
18 in general. Any and all reference to products hereinafter is to these MAPP gas
19 cylinders and TS4000 torches (torch attachments), whether bearing the label
20 “BERNZOMATIC” or that of any of any other distributor obtaining these products
21 from BERNZOMATIC and its above-referenced parent companies and affiliates.

22 8. Plaintiff further brings this action on behalf of himself and all purchasers,
23 users, and consumers of the subject MAPP gas cylinders and torches in the
24 Continental United States of America within the jurisdiction of this Court under
25 Article III section 1 of the United States Constitution.

26 9. Plaintiff further brings this action pursuant to California Business and
27 Professions Code section 17200 et seq. and its counterpart, California Code of Civil
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1 Procedure section 1021.5, on behalf of all California users of the subject torches and
 2 MAPP gas cylinders. Plaintiff further brings this action pursuant to all applicable
 3 laws, State and Federal, whether based on private attorney general statutes or
 4 otherwise, which provide for injunctive relief to enjoin Defendants from failing to
 5 warn the public of the hazards of the subject MAPP gas torches and cylinders as
 6 described herein, and mandate recall of those hazardous products for the safety of
 7 himself and all purchasers and users of the products.

8 10. The true names and capacities, whether individual, corporate, associate
 9 or otherwise of Defendants sued herein as DOES 1 through 50 inclusive, are unknown
 10 to Plaintiff, who therefore sues said Defendants by such fictitious names, and Plaintiff
 11 will seek leave of the court to amend this complaint when the true names and
 12 capacities have been ascertained.

13 **FIRST CAUSE OF ACTION FOR FRAUD**
 14 (BERNZOMATIC MAPP GAS TORCHES AND CYLINDERS)

15 Plaintiff incorporates by reference all of the general allegations and factual
 16 recitals contained above, and in the SECOND cause of action as set forth below as
 17 well, and pleads as and for a FIRST cause of action, based on information and belief,
 18 as follows:

19 11. Under diversity jurisdiction, California Civil Code section 1572 applies
 20 to this action, and provides as follows:

21 ACTUAL FRAUD, WHAT. Actual fraud, within the meaning of this
 22 Chapter, consists in any of the following acts, committed by a party to
 23 the contract, or with his connivance, with intent to deceive another party
 24 thereto, or to induce him to enter into the contract:

- 25 1. The suggestion, as a fact, of that which is not true, by one who does
 26 not believe it to be true;
- 27 2. The positive assertion, in a manner not warranted by the information
 28 of the person making it, of that which is not true, though he believes it
 to be true;
3. The suppression of that which is true, by one having knowledge or
 belief of the fact;

1 4. A promise made without any intention of performing it; or,

2 5. Any other act fitted to deceive.

3
4 12. The false assertions, suppression of facts, and other acts fitting to
5 deceive, as set forth below, also apply to Plaintiff's second cause of action for unfair
6 business practices under Bus. & Prof. Code § 17200 et seq.

7 13. BERNZOMATIC manufactures, distributes, brokers, advertises, markets,
8 and sells the subject MAPP gas cylinders and torches described above.

9 14. BERNZOMATIC is the SOLE manufacturer, marketer, broker,
10 distributor, and advertiser of the subject torches and cylinders in the Continental
11 United States.

12 15. BERNZOMATIC represents to the public, throughout the continental
13 United States of America, by way of its "Material Safety Data Sheet" and disclosures
14 communicated through the U.S. Department of Labor Occupational Safety and Health
15 Administration, the following with regard to its subject MAPP gas cylinders:

16 a. The cylinders and their contents present only two known hazards: ingestion
17 of the gas, and exposure to heat and flame (the latter being untrue as the product is
18 designed to *produce* a flame);

19 b. BERNZOMATIC's hazards disclosures do not extent to the need to take any
20 precautions in handling and storing. This allegation is false, as further described
21 below.

22 c. BERNZOMATIC's disclosed hazards do not include any disclosures or
23 hazard warnings with respect to the necessity to utilize "Protective Clothing or
24 Equipment," other than "Protective Gloves - Advisable when welding" and "Eye
25 Protection - Use filter shade No. 4 or Darker when welding." This allegation presents
26 the suppression of facts as further described below.

27 d. The subject cylinders comply with 49 CFR - Chapter I - Part 178, aka "Dot
28 39" Government mandated safety requirements. This assertion is false, as further

1 described below.

2 e. The subject cylinders contain brazed seams which are assembled to proper
3 fit to ensure “complete penetration of the brazing material throughout” all “brazed
4 joins.” This allegation is false, as further described below.

5 f. The subject cylinders contain brazed seams which have “design strength
6 equal to or greater than 1.5 times the maximum strength of the shell wall.” This
7 allegation is false, as further described below.

8 g. The subject cylinders contain “welded seams which are properly aligned
9 and welded by a method that provides clean, uniform joins with adequate
10 penetration.” This allegation is false, as further described below.

11 h. The subject cylinders contain material used for welded openings and
12 attachments which are of “weldable quality and compatibility with material of the
13 cylinder.” This allegation is false, as further described below.

14 i. When “one cylinder taken from the beginning of each lot, and one from each
15 1,000 or less successively produced within the lot thereafter” is “hydrostatically tested
16 to destruction” as mandated, the entire lot is rejected if ever a “failure initiates in a
17 braze or a weld or the heat affected zone thereof. This allegation is false, as further
18 described below.

19 j. When the test done above results in a failure occurring in any opening,
20 reinforcement, or at a point of attachment, the entire lot is rejected and discarded.
21 This allegation is false, as further described below.

22 k. The subject cylinders comply with all “Dot 39” requirements and thus meet
23 minimum required governmental safety requirements. This allegation is false, as
24 further described below.

25 l. The subject MAPP gas cylinders and torches will only fail if subjected to
26 “Unforeseeable Misuse,” while the application of force to the tip of the torch is,
27 according to BERNZOMATIC, not to be considered an “unforeseeable” misuse. The
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1 allegation that these products will only fail if subjected to “unforeseeable misuse” is
2 false, as further described below.

3 16. BERNZOMATIC made the above representations to the general U.S.
4 public and posted these disclosures widely on the internet and in a variety of public
5 disseminations at all times relevant herein, including on or about November 10, 2005,
6 and June 11, 2011.

7 17. BERNZOMATIC presently has most or all of these disclosures posted
8 throughout the internet, including its’ “Dot 39” postings, and other postings presently
9 at the following internet link:

10 [http://www.bernzomatic.com/Portals/8/Resources/2011-MSDS/Eng-](http://www.bernzomatic.com/Portals/8/Resources/2011-MSDS/Eng-MAPP-Gas-MSDS%206-11-11.pdf)
11 [MAPP-Gas-MSDS%206-11-11.pdf](http://www.bernzomatic.com/Portals/8/Resources/2011-MSDS/Eng-MAPP-Gas-MSDS%206-11-11.pdf) .

12 18. The above-described disclosures are materially false and misleading as
13 follows:

- 14 a. The cylinders and their contents present a variety of hazards which are
15 NOT disclosed, and those hazards account for the majority of injuries or
16 deaths caused by the products. (Civil Code section 1572 (1,3,5).)
- 17 b. That no precautions are required in handling and storage is FALSE. The
18 cylinders MUST be handled and stored in such a manner so as not to
19 cause any application of force to the top portion of the cylinders, known
20 as the “brazed joints,” where the horizontal dome on top of the cylinders
21 is welded to the vertical tubing and thread housing located at the very top
22 of the cylinders. (Civil Code section 1572 (1,2, 3,5).)
- 23 c. Protective clothing MUST be worn AT ALL TIMES while using the
24 subject cylinders. The clothing must be made of non-synthetic fabric,
25 and must cover all exposed skin areas. (Civil Code section 1572 (1,3,5).)
- 26 d. The subject cylinders DO NOT comply with 49 CFR - Chapter I - Part
27 178, aka “Dot 39” Government mandated safety requirements. (Civil
28 Code section 1572 (1,2,3,5))

- 1 e. Many of the subject cylinders DO NOT contain brazed seams which are
2 assembled to proper fit to ensure “complete penetration of the brazing
3 material throughout” all “brazed joins,” and Plaintiff has in his
4 possession such exemplars at this time, which he purchased for valuable
5 consideration. (Civil Code section 1572 (1,2,3,5).)
- 6 f. Many of the subject cylinders DO NOT contain brazed seams which
7 have “design strength equal to or greater than 1.5 times the maximum
8 strength of the shell wall.” (Civil Code section 1572 (1,2,3,5).)
- 9 g. Many of the subject cylinders DO NOT contain “welded seams which
10 are properly aligned and welded by a method that provides clean,
11 uniform joins with adequate penetration.” (Civil Code section 1572
12 (1,2,3,5).)
- 13 h. Many of the subject cylinders DO NOT contain material used for welded
14 openings and attachments which are of “weldable quality and
15 compatibility with material of the cylinder.” In particular, after
16 extensive testing, Plaintiff has learned that many of the cylinders contain
17 welding material which requires a temperature IN EXCESS of that of the
18 welding ovens used by BERNZOMATIC to melt the compounds, while
19 the ovens themselves operate at temperatures disclosed by
20 BERNZOMATIC that are TOO LOW to cause adequate wetting and
21 penetration of the welding compound. (Civil Code section 1572
22 (1,2,3,5).)
- 23 i. On several occasions between the years of 2004 and 2008 as disclosed
24 about May 19, 2010 by BERNZOMATIC’s former operations manager,
25 David Thomas, and/or as otherwise discovered by Plaintiff through
26 reasonable diligence, when “one cylinder taken from the beginning of
27 each lot, and one from each 1,000 or less successively produced within
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1 the lot thereafter” was “hydrostatically tested to destruction” as
2 mandated, the entire lot was NOT rejected if ever a “failure initiates in
3 a braze or a weld or the heat affected zone thereof. (Civil Code section
4 1572 (1,2,3,5).)

5 j. As further disclosed by BERNZOMATIC’s former operations manager
6 to Plaintiff in May 2010, and/or as otherwise discovered by Plaintiff
7 through reasonable diligence, when the test done above resulted in a
8 failure occurring in any opening, reinforcement, or at a point of
9 attachment, the entire lots were sometimes NOT rejected and discarded.
10 (Civil Code section 1572 (1,2,3,5).)

11 k. The subject cylinders DO NOT comply with all “Dot 39” requirements,
12 and thus DO NOT meet minimum required governmental safety
13 requirements. They did not comply with Dot 39 requirements in several
14 instances between the years 2004 and present, and probably before 2004
15 as well. (Civil Code section 1572 (1,2,3,5).)

16 l. The subject torches and cylinders WILL fail, and HAVE failed, when
17 subjected to “unforeseeable misuse.”

18 19. BERNZOMATIC knew that the above assertions were FALSE, and had
19 for years possessed actual, personal knowledge of those facts which it suppressed.
20 BERNZOMATIC was on notice of the falsity of assertions and of the suppressed
21 material facts by virtue of complaints made to BERNZOMATIC in the early 1980's,
22 which were in turn given to its then-operations manager John Nelson and other high
23 level personnel, which in turn resulted in Mr. Nelson’s and others employees’
24 disclosure to BERNZOMATIC’s authorized decision-makers. In the 1980's,
25 according to Mr. Nelson’s disclosure to Plaintiff, he gave his upper management his
26 recommendation for design of the fracture groove after learning of the failures
27 occurring at the brazed joints of the subject cylinders. BERNZOMATIC’s former
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1 operations manager David Thomas likewise learned of the failures of the brazed joints
 2 of the subject cylinders and the above-described dangers and failures to warn,
 3 particularly between the years 1990 and 2006, during which he states he served as
 4 BERNZOMATIC's operations manager. Mr. Thomas informed BERNZOMATIC's
 5 upper management of the problems with the cylinders, the brazed joints, and several
 6 of the incorrect assertions and suppressed facts described above. BERNZOMATIC
 7 was further aware of these false assertions and suppressions of fact from the barrage
 8 of lawsuits filed against it and presently posted on the Court's PACER system, dating
 9 back to at least the year 2002. Those lawsuits disclosed to BERNZOMATIC the
 10 failures of its MAPP gas cylinder products and TS4000 torch fracture groove features,
 11 the nature and extent of injuries suffered, the fact that injuries were only to skin
 12 surfaces unprotected by non-synthetic clothing, and all other above-listed particulars.

13 20. At all times relevant herein BERNZOMATIC disclosed to the general
 14 public widely, on the internet and in its product brochures for the subject TS4000
 15 torches, as follows:

16 Fracture Groove:

17 A designed in failure point in the torch, so that when the torch &
 18 cylinder are dropped, the fracture groove will fail prior to the
 19 cylinder center bushing failing. If the center bushing fails, then an
 20 extremely large 8 to 10 foot flame will erupt from the cylinder.
 Examples of torches with a fracture groove are: UL2317, JT680,
 JT681, JT539, TS4000, TS7000.

21 <http://www.bernzomatic.com/resources/glossary.aspx>

22 BERNZOMATIC also markets and describes the fracture groove feature on the back
 23 of the packaging of the TS4000 torches, along with a photograph of the torch's
 24 fracture grooves. In fact, most, if not all, of the packaged TS4000 torches DO NOT
 25 contain the safety fracture groove. Moreover, BERNZOMATIC's above-quoted
 26 disclosure evidences BERNZOMATIC's actual knowledge that its MAPP gas
 27 cylinders do in fact fail at the brazed joint, and ominously states that the brazed joint
 28 (center bushing) will fail and emit an "an extremely large 8 to 10 foot flame" if a force

1 is applied to the tip of the torch and the torch does not fracture at its fracture groove,
2 which is precisely the common defect and hazard of the product. BERNZOMATIC
3 is aware that the cylinders are failing at a measure of force lower than required to
4 fracture the fracture grooves, and yet fails to disclose this danger to the public, and
5 fails to act to remedy the danger and prevent injuries.

6 21. BERNZOMATIC's disclosure that its TS4000 torches are safe and will,
7 in essence, prevent a failure of the brazed joint ("center bushing") of the subject
8 cylinders is largely FALSE. Upon testing by qualified experts and in reputable
9 laboratories in Hayward, California, Plaintiff has learned that the TS4000 torches in
10 many instances will NOT fracture at the fracture grooves to prevent failures of the
11 cylinders, and Plaintiff himself, as well as many other users of the subject torches and
12 cylinders, have suffered severe burn injuries due to failures of the fracture groove to
13 prevent failures of the subject cylinder brazed joints. Based on information and belief,
14 Plaintiff alleges that many of the subject cylinders will fail at a measure of force to the
15 brazed joint of the subject cylinders of "less than 22 foot-pounds," and in most
16 instances of failures, even "less than 15 foot-pounds," while the fracture groove of the
17 TS4000 torches are designed to and do in fact fail at approximately 22-26 foot-pounds
18 of force, establishing a widespread defect and hazard of the products.

19 22. As noted in paragraph 20 above, most, if not all, of the TS4000 torches
20 do not in fact have the safety fracture grooves. On October 8, 2011 it has come to
21 Plaintiff's attention that Plaintiff was misled by BERNZOMATIC in the year 2009
22 into believing that the TS4000 torch used by Plaintiff on April 21, 2006, at the time
23 of his injuries from the subject MAPP gas cylinder he was using at that time, did in
24 fact contain a fracture groove or its equivalent. On October 8, 2011 Plaintiff learned
25 that this was not true. Plaintiff now has found and presently holds a written
26 disclosure, from BERNZOMATIC's present operations manager, explaining that if
27 in fact the TS4000 torches that now no longer have the fracture groove feature do fail
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1 at a measure of force greater than the fracture groove design, they are inconsistent
2 with BERNZOMATIC's own manufacturing specifications, hence [plaintiff takes that
3 to mean] they are defective. The TS4000 torches that do not contain fracture grooves
4 do not fail at a measure of force less than that of the fracture groove torches, but
5 rather, they fail at a measure of force GREATER THAN that of the fracture groove
6 torches. BERNZOMATIC was aware of this, based on information and belief, at least
7 from the year 2005 onward. Based on information and belief, Plaintiff alleges that the
8 fracture groove feature ceased being used as of midyear the year 2005.

9 23. Plaintiff purchased a TS4000 torch tip in the year 2005. The packaging
10 disclosed that it contained a fracture groove feature. Plaintiff has learned on October
11 8, 2011 that in fact the TS4000 he was using at time he suffered his own injuries on
12 April 21, 2006 did NOT contain a fracture groove. Plaintiff was injured when the
13 TS4000 torch tip he was using lightly tapped against a piece of firewood. Plaintiff
14 therefore alleges that BERNZOMATIC's express misrepresentation, on the packaging,
15 on its website, and in fact in the course of the earlier litigation with Plaintiff in this
16 Court (dismissed 7/28/2009), were (1) intended to allure Plaintiff into purchase of the
17 TS4000 tip; (2) induced Plaintiff to do so; (3) plaintiff's reliance on the packaging and
18 internet disclosures regarding the fracture groove feature's existence was reasonable;
19 (4) Plaintiff's failure and inability to learn of the fact that his TS4000 torch in relation
20 to his injuries did not contain a fracture groove feature was due to the
21 misrepresentation; (5) Plaintiff lost his earlier litigation due to the misrepresentation;
22 (6) Plaintiff spent more than \$137,000 on expert witnesses and discovery in reliance
23 on BERNZOMATIC's representation that his TS4000 torch did in fact contain the
24 fracture groove; (7) and Plaintiff suffered damages in an amount in excess of
25 \$137,000 for expert expenses and investigations based on the misrepresentation.

26 24. Amongst the more depraved acts of fraud committed by
27 BERNZOMATIC, which it continues to commit to present, is its failure to disclose
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1 to the general public that the subject MAPP gas cylinders have a tendency to fail at
2 the brazed joints and explode, causing severe injuries or death, and have in fact failed
3 many times, as ascertainable from this Court's "Pacer" lawsuit registry dating back
4 to at least the year 2002. BERNZOMATIC discloses only that the brazed joints are
5 weak and will fail without the use of the fracture groove feature (above), but does not
6 disclose that even the fracture groove feature does not provide protection from injury
7 or death in many instances. Failure to warn the public constitutes fraud under
8 California Civil Code section 1572(3) - "The suppression of that which is true, by one
9 having knowledge or belief of the fact." But for this act of fraud alone, many injuries,
10 including severe injuries suffered by this plaintiff, and at least one known death,
11 would have been prevented had BERNZOMATIC not suppressed this paramount
12 disclosure regarding the subject products. BERNZOMATIC refuses to make these
13 disclosures because it has placed "profits over people" and is aware that the
14 disclosures will dramatically reduce sales of the products. With respect to this
15 plaintiff, BERNZOMATIC knew of the hazards described, from lawsuits alleging the
16 defects described above, as well as from one John Nelson, it's operations manager in
17 the 1980's presenting it with a memorandum describing these hazards, from at least
18 the year 2002 as posted on this Court's Pacer system (early lawsuits describing the
19 hazard and defect), and in fact knew from the 1980's, but took no action to warn the
20 public or recall the product before this plaintiff was injured. This act of fraud (Civil
21 Code section 1572(3)) caused this Plaintiff to purchase and use one subject
22 BERNZOMATIC MAPP gas cylinder and torch assembly and suffer severe burn
23 injuries by its failure.

24 25. BERNZOMATIC's safety disclosures and warnings to the public on its
25 material safety data sheets, product brochures, and virtually everywhere else where
26 posted, are grossly misleading with respect to one additional feature known as the
27 "trigger lock" of the TS4000 torches. The trigger lock is a locking mechanism
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1 designed by BERNZOMATIC on the torches to allow and encourage the user of the
2 subject torches and cylinders to remove his or her hand from the torch handle and
3 instead hold the assembly towards the bottom, on the cylinder itself, thereby enabling
4 the application of force and pressure to the tip of the torch if dropped or contacted
5 with an object. The feature also allows the torch assembly to be placed on a table or
6 surface with the flame engaged continuously while the trigger-lock button is engaged,
7 without the torch being held at all by the user. In such instances, if the table is
8 bumped or something causes the torch assembly to fall over, and the cylinder does in
9 fact fail at the brazed joint as it has a tendency to do, it will indeed explode and emit
10 a huge 8 to 10 foot flame and severely injure anyone near it. BERNZOMATIC knows
11 of this hazard, has faced lawsuits arising from this fact pattern, and yet continues to
12 advertise and tout the trigger lock feature as an attractive feature so that the consumers
13 would be inclined to purchase the torch units, and suppresses disclosure of the above-
14 described dangers. BERNZOMATIC fails to inform the users that the torch and
15 cylinder assembly MUST be held by the torch handle AT ALL TIMES during use to
16 prevent such an application of force to the vulnerable brazed joint disclosed by
17 BERNZOMATIC.

18 26. BERNZOMATIC's public warnings and disclosures posted as noted
19 above do not warn that only the TS4000 torch handles or similar handles with safety
20 features as the fracture groove must be used to protect against the failures
21 BERNZOMATIC discloses can occur. Instead, BERNZOMATIC misleads the public
22 into a false sense of security with respect to purchasing and using the subject torches
23 by disclosing only that the gas in the cylinder is dangerous if inhaled, and dangers
24 which in fact are not even "dangers." In fact the subject cylinders should, but do not,
25 have unique threat patterns adaptable only to torch handles that contain fracture groove
26 features or the like, and are in fact designed so as to accept just about any commercial
27 torch head or handle used for camping products to propane torches, and at least one
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1 recent death has resulted due to such a circumstance (use of a torch head that does not
2 contain a fracture groove safety feature). In that case, pending in New York at this
3 time (Tam v. Bernzomatic), the user of the torch died when his torch allegedly,
4 according to Worthington Industries (Bernzomatic's parent co.), somehow caused the
5 application of force to the torch tip on a torch that did not contain a fracture groove
6 feature, causing the vulnerable brazed joint to fail catastrophically.

7 27. At all times relevant herein BERNZOMATIC advertised and continues
8 to advertise and market a kit consisting of the TS4000 torch handle and MAPP gas
9 cylinder. On the packaging to this product, BERNZOMATIC touts that the kit can be
10 used to "light barbecue grills," lulling the purchasers into a false sense of safety and
11 security in suggesting that the product was suitable for such casual use.

12 28. BERNZOMATIC advertises that the subject torch and cylinder may be
13 used so casually as to light barbecue grills is entirely false and dangerously seductive
14 to the product purchasers and users. The product can fail, and has failed, while being
15 used in many instances where other persons were near the user, causing severe burn
16 injuries and property damage all around the product upon failure.

17 29. BERNZOMATIC represents to the public / users that the subject MAPP
18 gas cylinders will only fail if subjected to "unforeseeable abuse," which is completely
19 false, dishonest, and intended to secure consumer confidence and purchase of the
20 products.

21 30. BERNZOMATIC's subject torch brochures, packages, internet glossaries
22 and disclosures, material safety data and warning sheets posted for the general public
23 on the internet and with the public's dedicated agencies (i.e. OSHA), are INTENDED
24 to attract and appeal to plumbers, persons looking to purchase torches, and the general
25 public consumers throughout the Continental United States, and to cause such persons
26 to believe that these products are as safe as represented by BERNZOMATIC.
27 BERNZOMATIC's intent is to make a profit on the sales of these products to such
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1 consumers.

2 31. BERNZOMATIC's representations to the general public as presented on
3 its material safety data and warning disclosures available on the internet and at the
4 public's dedicated safety agencies (i.e. OSHA) are also intended to secure those
5 agencies' governmental approval for the manufacture, marketing, sales, and
6 distribution of these subject torches and cylinders.

7 32. The above-described false representations and disclosures of
8 BERNZOMATIC have induced the general public's authorized agencies to approve
9 the manufacture, marketing, sales, and distribution of these subject torches and
10 cylinders.

11 33. The above-described false representations and disclosures of
12 BERNZOMATIC have induced Plaintiff's and the general public's widespread
13 purchases and uses of these subject torches and cylinders.

14 34. The reliance of Plaintiff, and all persons and users of the subject
15 cylinders and torches throughout the continental United States, on the above-described
16 false representations of BERNZOMATIC as to the integrity and safety of the subject
17 torches and cylinders, was reasonable and justifiable, as they had no reason to
18 disbelieve BERNZOMATIC's representations.

19 35. Plaintiff, and millions of other consumers throughout the Continental
20 United States, and the world, have purchased the hazardous BERNZOMATIC subject
21 MAPP gas cylinders and torches, after being deceived as to the safety, quality,
22 integrity, and marketing misrepresentations of those products as stated above.

23 36. A great many purchasers and users of the subject torches and cylinders,
24 including this plaintiff, have suffered severe burn injuries, property damage, and
25 financial losses due to failures of these misrepresented products. Many of these
26 injuries have resulted in litigations as posted on the Federal Court system's "Pacer"
27 database, with the majority of the lawsuits occurring between the years 2002 and
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1 present (2011).

2 37. The above-described fraudulent and deceptive acts do not extend to the
3 identically-constructed BERNZOMATIC “propane” cylinders. Based on information
4 and belief, Plaintiff alleges that there do not appear to be ANY instances of failures
5 of BERNZOMATIC’s propane cylinders, only the MAPP cylinders. On information
6 and belief, Plaintiff alleges that the cylinders appear to be the same size, same shape,
7 and same in every respect except for the color: propane cylinders are blue, MAPP
8 cylinders are yellow. Based on this information, Plaintiff further alleges that
9 BERNZOMATIC misrepresents safety of the products to the public by failing to
10 disclose that the MAPP cylinders are hazardous, while the propane cylinders are not.

11 38. During the past three years, Plaintiff has himself purchased and used the
12 subject cylinders and torches, whether personally or by his occasional construction
13 workers on various projects, and has suffered the losses of the purchase prices of some
14 of those cylinders upon discovery through diligent examination that the brazed joints
15 of those cylinders were defective and hazardous, presenting a strong likelihood of
16 failure as had been experienced by Plaintiff himself on one occasion in the past. Some
17 of those cylinders have been retained by Plaintiff and present readily observable
18 defects as described above, including readily observable noncompliances with the
19 above-described “Dot 39” manufacturing requirements (improper wetting and
20 adhesion of weld compound with unacceptable voids in the material as visible to the
21 naked eye).

22 39. Through “total diligence” and at an expense of approximately \$137,000,
23 Plaintiff was only able to learn of the above-described fraudulent misrepresentations,
24 suppressions of facts and information with the intent to deceive and allure purchases
25 of the products, and other acts fitted to deceive, on or about May 19, 2010, when the
26 disclosures were brought to his attention by BERNZOMATIC’s former operations
27 manager, David Thomas. Prior to May 19, 2010, Plaintiff had engaged in lengthy
28

1 litigation to try discovery whether there were any problems with the subject products,
2 and BERNZOMATIC's suppression of facts and "that which is true" prevented
3 Plaintiff and his experts from being able to discover that which was revealed to him
4 by Mr. Thomas.

5 40. Plaintiff retained expert witnesses approximately in the years 2008 and
6 2009 to investigate the subject torches to determine if they were, in fact, as marketed
7 and represented - safe and fit for their intended use, and would only fail of subjected
8 to unforeseeable misuse, as represented by BERNZOMATIC. BERNZOMATIC's
9 representations in this regard were revealed to have been false and contrived on or
10 about May 19, 2011, when Bernzomatic's former operations manager, Mr. David
11 Thomas, disclosed this deceit and revealed the true facts, false assertions, and
12 suppressions, many of which are stated above. BERNZOMATIC intended for
13 Plaintiff's experts to rely on its false assertions, and they did so justifiably, causing
14 Plaintiff to suffer an expenditure of approximately \$137,000 in relation to the
15 investigations needed for a former lawsuit involving Plaintiff and BERNZOMATIC,
16 which terminated in the year 2009.

17 WHEREFORE, Plaintiff prays for judgment for fraud as follows:

- 18 1. Actual damages representing the purchase prices of those cylinders
19 purchased by Plaintiff during the five years preceding the filing of this
20 lawsuit;
- 21 2. Actual damages for other personal injuries suffered by Plaintiff by way
22 of the above-said fraudulent acts during the past five years;
- 23 3. Plaintiff's damage claims include approximately \$137,000 expended on
24 experts retained by Plaintiff in the course of an earlier litigation intended
25 to determine whether or not the subject torches and cylinders were as
26 safe and fit for use as represented by BERNZOMATIC in its marketing
27 and disclosure campaigns, especially with respect to BERNZOMATIC's
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express representation that the subject cylinders could and would only fail if subjected to “unforeseeable misuse.”

4. Injunctive relief mandating BERNZOMATIC’s prompt and effective public disclosures and warnings of the above-said dangers of the subject torches and cylinders;
5. Injunctive relief mandating BERNZOMATIC’s recall of all the defective subject MAPP gas cylinders and torches;
6. Exemplary (punitive damages) for the above-described wrongful acts, depravity, indifference to human safety and the sanctity of life, and continued and undeterred marketing and distribution of the hazardous torches and cylinders described above; and
7. Such other and further relief as the Court deems proper.

SECOND CAUSE OF ACTION FOR INJUNCTIVE RELIEF
(BUS. & PROF. § 17200 ET SEQ. AND ALL INJUNCTION STATUTES)
(BERNZOMATIC MAPP GAS TORCHES AND CYLINDERS)

Plaintiff incorporates by reference all of the general allegations and factual recitals contained above, and pleads as and for a SECOND cause of action, based on information and belief, as follows:

41. Under diversity jurisdiction, California Business and Professions Code section 17200 et seq. applies to this action, and provides as follows:

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

Under applicable California law, the Legislature intended to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur.

42. In asserting this cause of action, Plaintiff does not limit relief to an injunction under Bus. & Prof. Code § 17200, but seeks injunctive relief under any and all State and Federal statutes providing for injunctive relief to enjoin activities and/or

1 conduct of the defendant(s) that cause unreasonable risk of injury or death to Plaintiff
2 and to the general public consisting of any and all purchasers and users of the subject
3 torches and cylinders.

4 43. Plaintiff asserts this cause of action on his own behalf as well as on
5 behalf of all purchasers and users of the subject MAPP gas cylinders and torches, not
6 only in California, but in the Continental United States. Plaintiff asserts the action
7 under California's Private Attorney General statute, Cal. Code Civ. Proc. § 1021.5,
8 and under its Federal statute counterpart(s).

9 44. BERNZOMATIC manufactures, advertises, distributes, markets, and
10 produces the subject MAPP gas torches and cylinders, and has done so since the late
11 1970's or early 1980's. On information and belief, Plaintiff alleges that
12 BERNZOMATIC is the only manufacturer and distributor of these products in the
13 United States. Plaintiff is a present-day purchaser and user of these products, and has
14 been since the early 1980's, from time to time.

15 45. BERNZOMATIC misrepresents the truth to the public in marketing the
16 subject torches and cylinders. It represents they are safe. It represents they are
17 suitable for such casual uses as lighting barbecues. It represents they comply with all
18 Governmental safety standards and requirements as outlined above. It represents that
19 the subject cylinders tend to fail at their brazed joints, but it had taken care of this
20 problem by designing a safety fracture groove (noted above). It represents that the
21 products are so safe that there is no need to wear safety clothing or use safety
22 equipment, except for gloves and glasses while "welding," and does not even suggest
23 a need to cover arms, legs, or any other part of the body while using the products. It
24 does not take steps to protect the user, such as coding the threads of the cylinders so
25 that only torch heads with the safety fracture groove feature can be installed, and it
26 does not even warn about the dangers of using torch tips without safety features. It
27 does not advise the public/users that there have been many failed cylinders and many
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1 injuries, and in fact represents that injuries can only result from “unforeseeable
2 misuse” of the subject torches. BERNZOMATIC actively and callously conceals and
3 suppresses from the public the unreasonable hazards of its MAPP gas torches and
4 cylinders.

5 46. BERNZOMATIC represents to its entire body of intended consumers of
6 the subject MAPP gas cylinders and torches that the MAPP gas cylinders, like the
7 propane cylinders it sells, can only fail if subjected to “unforeseeable misuse.”
8 Furthermore, BERNZOMATIC represents to the intended consumers that the
9 application of force to the tip of the torches is foreseeable, and therefor
10 BERNZOMATIC designed the TS4000 torch with the fracture groove safety feature
11 to assure that the subject torches and cylinders will only fail if subjected to
12 “unforeseeable misuse” (e.g. misuses *other* than the application of force to the tip of
13 the torch). This representation is grossly false and evidences depravity and
14 indifference towards the safety of the users. BERNZOMATIC is aware that the
15 cylinders have a tendency to fail at their brazed joints, and that the fracture grooves
16 have on many occasions failed to prevent failures of the fracture grooves, and yet it
17 maintains its false representations and assurances of safety of the product to the
18 public.

19 47. BERNZOMATIC’s marketing and advertising of the trigger-lock feature
20 of the TS4000 torches presents to the intended consumers that this is a good feature
21 because it allows the user to hold the assembly by the bottom of the cylinder while the
22 flame is engaged, and allows the user to set the assembly down on a table with the
23 flame engaged so that the user can work with the flame without having to hold the
24 cylinder. BERNZOMATIC further absurdly warns the users not to use the product
25 near flames (Safety Data Sheet posted with OSHA, described above with internet
26 link). The warning is absurd because the product is designed for no other purpose
27 than to emit a very hot flame. BERNZOMATIC however suppresses disclosure to the
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1 users that in fact the trigger lock feature is perhaps the most hazardous feature of the
2 assembly. BERNZOMATIC does disclose that the brazed joint of the cylinder is
3 essentially the weak part and will fail if there is force applied to the tip of the torch
4 (above). However, it does not disclose that if the trigger lock is engaged, then in the
5 event the assembly is dropped or knocked over, and in the event of failure of the
6 vulnerable brazed joint, the gas will then come into contact with the flame emitting
7 from the trigger-locked torch head, and explode catastrophically, severely injuring or
8 killing the user. BERNZOMATIC further knew of this problem from years back due
9 to the injuries that did in fact occur under such uses of its MAPP gas torch products,
10 failed to warn the public in time to prevent injuries to this plaintiff, failed to warn the
11 public in time to prevent injuries to the many other users of the subject torches that
12 followed, and fails to warn the public and recall the hazardous products to this day.

13 48. As explained above, on October 8, 2011 Plaintiff learned that
14 BERNZOMATIC wrongfully, deceitfully, and intentionally misrepresented to him,
15 and to all its TS4000 product consumers, and continues to do so today, in writing, on
16 the back of the packaging of the TS4000, on the internet and elsewhere, that the
17 TS4000 torches contained and do contain the safety fracture groove feature, designed
18 to prevent failure of the MAPP gas cylinder's brazed joint in the event of the
19 application of force to the tip of the torch. Plaintiff purchased his torch in the year
20 2005. The packaging and disclosures were false as of the year 2005, up to this present
21 year. There is no safety fracture groove on these torches. As disclosed to Plaintiff by
22 BERNZOMATIC's present-day management personnel, if the TS4000 torches
23 without the fracture groove feature fail at more than the amount of force required to
24 fail the fracture grooves, they are defective. Plaintiff had qualified experts test these
25 TS4000 torches in a competent laboratory, and they ARE defective. They DO NOT
26 fracture at a measure of force LESS THAN that of the fracture groove torches. They
27 fracture at a measure of force GREATER THAN required to fracture the fracture
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1 groove torches. Plaintiff suffered his severe injuries when his TS4000 torch tip came
2 into a light application of force with a piece of firewood. There was no fracture
3 groove feature, so the torch did not fracture. Instead, the vulnerable brazed joint of
4 the cylinder failed, causing his severe injuries. This was also the case in the
5 Vanderline case and all other cases set forth below and arising from the application
6 of force to the torch tips of the TS4000 torches manufactured after mid-year 2005.
7 Those torches are still on the market.

8 49. BERNZOMATIC refuses to recall its extremely dangerous and hazardous
9 MAPP gas cylinders and torches, and refuses to warn the public of the above-
10 described dangers, because recall and/or disclosure of the hazards will reduce
11 BERNZOMATIC's profits. Instead, it misrepresents the products as very safe,
12 governmentally compliant, fit for use by unlicensed and untrained consumers, and will
13 only fail if subjected to "unforeseeable misuse."

14 50. Plaintiff has himself suffered severe injury while using the subject torch
15 and MAPP gas cylinder product. On one occasion during the past five years, while
16 using the torch assembly to light a campfire at a campground on Mission Bay, San
17 Diego, California, and in close proximity to his young children, wife, and dog, one
18 such BERNZOMATIC-brand torch failed at the brazed joint and exploded in his hand.
19 The failed torch and cylinder were in new condition, recently purchased, and never
20 subjected to mishandling or abuse. The failure occurred when a piece of campfire
21 wood lightly tapped against the tip of the TS4000 torch containing the safety fracture
22 groove feature. The TS4000's trigger lock feature was engaged. Plaintiff was holding
23 the assembly by the bottom of the cylinder when it failed. The fracture groove feature
24 did not exist so as to operate as disclosed on the packaging. Instead, at a very light
25 application of force, the brazed joint separated. The injuries to Plaintiff were severe,
26 and all persons and animals around him were threatened. Based on this experience,
27 Plaintiff has personal knowledge of that particular defect. In the course of subsequent
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1 investigation, Plaintiff met and interviewed other plaintiffs in other lawsuits against
2 BERNZOMATIC, saw their products and obtained the facts of their failures, and
3 investigated diligently to determine whether or not the BERNZOMATIC MAPP gas
4 cylinders and torches were “as marketed and advertised,” namely very safe and
5 capable or failure only if subjected to “unforeseeable misuse.” Plaintiff summarizes
6 some of the circumstances of the product failures and injuries suffered by a very few
7 of the pool of injured persons as follows:

8 1. Tucker v. Bernzomatic, USDC Pennsylvania #09-05881, Mr. Tucker was
9 severely and permanently injured on July 6, 2007, when his subject
10 “Bernzomatic” MAPP gas torch were merely being used as intended, with the
11 torch in his hand and the flame lit. Mr. Tucker represents that the torch failed
12 without any unforeseeable misuse whatsoever.

13
14 2. Westman v. Bernzomatic, Court of Common Pleas, Philadelphia (Pacer
15 10cv3509-MAM) - Mr. Wade Wessner, residing at 30 Wessner Lane, Auburn,
16 Pennsylvania, 17922, was severely and permanently injured on October 6, 2008
17 while using his subject “Bernzomatic” MAPP gas torch and TS4000 torch tip.
18 The MAPP cylinder is identified as unit number “W12D18E.” Mr. Westman
19 was merely using the torch to perform repairs to a deli slicer when the assembly
20 fell out of his hand - a disclosed “foreseeable” event by BERNZOMATIC. The
21 assembly landed on the torch tip, but the fracture groove on the TS4000 failed
22 to “fracture.” Instead, the vulnerable brazed joint of the cylinder failed, causing
23 the gas to escape and explode.

24
25 3. Barrett v. Bernzomatic (Irwin), USDC Florida, Tampa #07cv01355, Mr. John
26 Barrett, accompanied by Mr. Anthony McWhorter, were permanently and
27 severely injured on August 22, 2006 while using his subject BernzOmatic torch
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1 and cylinder in the manner intended, without unforeseeable misuse. They were
2 using the torch to try to repair a plumbing leak. As Mr. Barrett tried to re-light
3 the subject torch, it merely exploded, engulfing both men in flames.
4

5 4. Carranza v. Miranda, Bernzomatic, et al., Superior Court, California, San
6 Francisco County, case number CSC06-457381. Mr. Melvin Wilfredo Bonilla
7 Carranza was severely injured on June 13, 2005, at 2009 Jennings Street, San
8 Francisco, CA. Mr. Carranza's medical bills exceeded \$380,000. The failing
9 cylinder was a BernzOMatic MAPP gas cylinder identified as "ID# 5D48E."
10 Mr. Carranza was in the presence of others using the subject torch and cylinder
11 in a foreseeable manner, with torch in hand of the user, and flame emitting.
12 There was no unforeseeable misuse at the time of failure. Plaintiff believes that
13 the cylinder failed perhaps when the torch tip tapped against a solid pipe or
14 object, with a measure of force much lighter than mandated by "Dot 39"
15 standards. (The cylinder brazed bushing failed at a measure of force estimated
16 to be less than 20% of that which it was designed to withstand, as determined
17 by the measure of force required to "deform" the top of the cylinder, compared
18 to the measure of force required to break the torch's fracture groove features.)
19

20 6. Vanderlinde v. Bernzomatic, et al. Minnesota, Hennepin County - Mr. Jeffrey
21 A. Vanderlinde was severely and permanently injured on August 16, 2006
22 while using his subject "Bernzomatic" torch and cylinder in the manner
23 intended, without unforeseeable misuse. He had placed it on a solid surface
24 about 24 inches above the ground, when it fell. The TS4000 torch tip hit the
25 ground. The fracture groove of the torch did not fracture. Instead, the
26 vulnerable brazed joint failed, and the cylinder gas discharged. Based on
27 information and belief, Plaintiff alleges that the trigger lock of the TS4000 was
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1 engaged and a flame was emitting at the time of failure, evidencing a design
2 defect as further described in this complaint.

3
4 7. Englebrick v. Bernzomatic, et al., USDC, Sourthern Dist., CA # 08cv01296
5 CJC - On April 7, 2008 Mr. Bradley Englebrick and Ms. Roxanne Hernandez
6 were severely and permanently injured when the subject BernzOmatic MAPP
7 gas cylinder, containing a Bernzomatic torch head which is not believed to have
8 had a safety fracture groove, fell and ignited. The cylinder was newly
9 purchased and full of gas. It was on the table in their apartment. Ms.
10 Hernandez was trying to light a candle nearby with a match. Unbeknownst to
11 her, the vulnerable brazed joint of the cylinder was already leaking, just as it sat
12 on the table. A flame ignited at the brazed joint. Mr. Englebrick was in the
13 shower. He ran out, unclothed, and grabbed the cylinder to try to extinguish the
14 flame. The cylinder was very hot, and he dropped it. The cylinder assembly
15 landed on the torch head, as they tend to do because the torch head portion is
16 the heaviest part of the assembly. The already weak brazed joint broke open
17 and the cylinder exploded, nearly killing Mr. Englebrick and Ms. Hernandez.
18 Mr. Englebrick was in a coma for some time, and ultimately suffered in excess
19 of \$2.1 million in medical bills.

20
21 8. Regents of the University of California v. Bernzomatic, et al., California
22 Superior Court, Yolo County #CV10-0845. Mr. Scott Callaway and Mr. James
23 Bartlett, employees of UC Davis, were severely and permanently injured on
24 September 2, 2008, when their subject BernzOmatic MAPP gas cylinder and
25 torch assembly fell to the ground in an enclosed space. Once again, there was
26 no unforeseeable misuse. Once again, the torch fracture groove did not fracture
27 when the torch tip hit the ground. Once again, the measure of force was far less
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1 than that which the cylinder was designed to withstand and as required by “Dot
2 39” standards.

3 Plaintiff has personally spoken with many of the injured and/or their counsels and/or
4 their expert witnesses in other cases and other unfiled injury events as well. Most of
5 the injuries occurred between the years 2002 and 2011 (this year), with the bulk of
6 injuries occurring after the year 2004. In every instance, the BERNZOMATIC
7 MAPP gas cylinders failed at the brazed joints. In every instance there was no
8 “unforeseeable misuse” involved. In every instance where a TS4000 torch tip was
9 used, there was no fracture to the fracture groove. In one case from England, the
10 cylinder was cross-sectioned and examined, and the expert noted and photographed
11 some severe noncompliances with the “Dot 39” manufacturing specifications and
12 requirements as pleaded above, and provided this plaintiff with copies of the photos
13 showing a complete failure of the weld material on the failed cylinder. Based on these
14 investigations and Plaintiff’s own personal knowledge of his failed cylinder, Plaintiff
15 confidently asserts that the subject MAPP gas cylinders and torches are NOT as
16 marketed and advertised, are NOT safe, are NOT only subject to failure if subjected
17 to “unforeseeable misuse,” DO contain product-wide design defects rendering every
18 unit sold unreasonably dangerous (i.e. the “trigger-lock” feature described above), and
19 DO present compelling reasons to warn the public immediately of the dangers, and to
20 recall the hazardous products before others suffer severe injuries or deaths.

21 51. Plaintiff’s investigation of the above-described dangers and defects was
22 conducted by experienced and well-credentialed experts in approved laboratories in
23 Hayward, California. Based on these investigations, it was determined that any failure
24 of any BERNZOMATIC MAPP gas cylinder which occurs, without the occurrence
25 of a “deformity” to the uppermost horizontal dome surface of the cylinder, evidences
26 a defective cylinder. Specifically, the dome will “deform” at less than “15 foot-
27 pounds,” while under Dot 39 standards the brazed joint must withstand in excess of
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1 30 foot-pounds of force. Under BERNZOMATIC's own standards, the brazed joint
2 must withstand a force greater than required to fracture the TS4000 fracture groove
3 feature, which fractures at 22-26 foot pounds. Thus, any cylinder brazed joint failing
4 at "less than" 22 foot-pounds of force is, by definition, defective and hazardous.
5 Since the dome will "deform" at 15 foot-pounds, it is established that any cylinder
6 brazed joint failing without evidence of deformity to the "Dome" is defective.
7 Plaintiff has reviewed the details of failures of almost all the failed BernzOmatic
8 MAPP gas cylinders which were subject of lawsuits filed and noted on Pacer between
9 the years 2004 and present, and some State Court lawsuits on the same issues and
10 products and arising from the same "unforeseeable misuse" failures of the brazed
11 joints as well, and has noted that in only two of those cases there was evidence of
12 deformity of the dome, while in all the other cases there was *no* deformity of the
13 domes. Of the two noted deformed cylinders, one of the failures is believed to have
14 occurred at a measure of force in excess of 15 foot-pounds, but still under 22 foot-
15 pounds, because the TS4000 fracture groove did not fracture. On the other cylinder,
16 the injured person died from his injuries, and it is believed that the plaintiff threw the
17 torch after it exploded, causing the application of force after the explosion. On that
18 particular cylinder, the torch tip was broken, but the cylinder nevertheless failed,
19 either before or after the application of force, evidencing a defect either way.

20
21 52. Plaintiff alleges that the hazards and risk of failures of the brazed joints
22 on a great many of the subject MAPP gas cylinders are present at this time throughout
23 the Continental United States, and certainly abroad as well, where other injuries have
24 been disclosed to Plaintiff.

25 53. Plaintiff alleges that other persons are very likely to suffer severe
26 injuries, and possibly deaths will result, between this time and the time
27 BERNZOMATIC is ultimately compelled to warn the public of the dangers described.
28 This allegation is based on the frequency and occurrence of injuries noted on this

1 Court's PACER database, where it appears a new suit against BERNZOMATIC
2 alleging the same failed brazed joints on the MAPP cylinders has appeared on average
3 every three to four months, through this year of 2011.

4 54. Plaintiff alleges that between the time he suffered his injuries noted
5 above and this date, there have been numerous other injuries caused by the subject
6 cylinders and torches.

7 55. Plaintiff alleges that the dangers of the subject torches and cylinders
8 threaten injuries to himself, his workers, and any and all other consumers and users
9 of these products at present.

10 56. In the absence of preliminary and permanent injunctive relief as set forth
11 below, Plaintiff, and many other purchasers and users of the subject torch and cylinder
12 products, are likely, if not certain, to suffer irreparable harm. BERNZOMATIC
13 remains the sole manufacturer and distributor of the subject MAPP gas cylinders.
14 Plaintiff continues to use the product, and most recently used the MAPP gas cylinder
15 and torch product two weeks before filing this pleading, to remove a welded bolt
16 assembly. While Plaintiff has exercised every conceivable precaution to avoid
17 injuries, his best effort to do so would mitigate injuries at best upon failure of the
18 brazed joint of the subject MAPP cylinders. Plaintiff and his workers continue to
19 suffer great risk to serious injury while using these products because it is impossible
20 to use the subject products without such risk due to the problems with their brazed
21 joints and TS4000 fracture grooves. Moreover, Plaintiff's employees, not having
22 experienced first hand the injuries as suffered by Plaintiff, often and foreseeably do
23 not take precautions beyond those advised by BERNZOMATIC (see above - wearing
24 gloves and glasses only during certain operations are the only advisements, and are
25 wholly inadequate).

26 57. Plaintiff alleges that the subject torches and cylinders can be made safe
27 and governmentally-compliant at a minimum cost. (1) The brazed joints need to be
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1 made stronger. (2) The torch fracture grooves need to be made to fracture at a lower
2 measure of force. (3) The push-button “trigger lock” needs to be removed or
3 accompanied by warning to keep hand on handle at all times during use. (4) Warnings
4 need to be made to cover all exposed skin with non-synthetic clothing. (5) All the
5 MAPP cylinders need to be recalled and replaced with new improved cylinders
6 (stronger brazed joints).

7 58. Plaintiff alleges that the “identically-constructed” blue propane cylinders
8 do not fail and do not cause injuries. In his research, he noted that every injury case
9 posted on “Pacer” involved only the MAPP gas cylinders, with exception on one
10 “propane” case, and that case did not implicate a failed brazed joint. This suggests the
11 MAPP gas itself is causing a problem, a likely corrosion of the weld compound.
12 Plaintiff alleges that the above-described safety and design measures will virtually
13 eliminate risk of injury caused by the cylinders, and in fact non-synthetic clothing
14 alone will eliminate all risks of injury to all areas protected by clothing, with
15 exception of risk from gas inhalation, and risk of injury from secondary sources or
16 explosions.

17 WHEREFORE, Plaintiff prays for injunctive relief, pursuant to Bus. & Prof.
18 Code § 17200 and all other applicable State and Federal Statutes, as follows:

19 1. Mandating BERNZOMATIC’s immediate and effective public disclosure
20 of the dangers of the MAPP gas cylinders and torches described above;

21 2. Mandating recall of the above-described cylinders, but not the TS4000
22 torches, as improved cylinder design alone will remedy the defects of the TS4000
23 torches;

24 3. Mandating that BERNZOMATIC warn the consumer that if the torch
25 “trigger-lock” is engaged, the user must still hold the assembly by the torch handle to
26 prevent the transfer of dangerous forces to the vulnerable brazed joint;

27 4. Mandating BERNZOMATIC’s instruction to the product users to wear
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1 protective non-synthetic clothing to cover all exposed skin areas while using the
2 subject torches;

3 5. Any other injunctive relief in any form so as to protect the users of the
4 subject MAPP gas cylinders and torches;

5 6. Compensation for actual personal injuries and/or financial losses suffered
6 by this plaintiff, including lost purchase costs in relation to the failed and defective
7 cylinders and torches he has purchased and used over the course of the five years
8 preceding the filing of this action;

9 7. Punitive damages, based on the fact that BERNZOMATIC engaged in
10 unfair business practices with depravity and indifference for the safety and sanctity
11 of life of its MAPP gas torch and cylinder purchasers and users;

12 8. Attorney's fees under Cal. Code Civ. Proc. § 1021.5 and/or the Federal
13 Counterpart Private Attorney General Statute, to be awarded to Plaintiff's
14 representative counsel;

15 9. Costs of suit; and

16 10. Such other and further relief as the Court deems proper.

17 **UNFAIR BUSINESS PRACTICES & FRAUD -**
18 **(PULLING DOWN PLAINTIFF'S WEBSITE)**

19 Plaintiff incorporates by reference all of the general allegations and descriptions
20 of the parties referenced above, and pleads Fraud and Unfair Business Practices claims
21 based on BERNZOMATIC's removal of Plaintiff's website described below as
22 follows:

23 59. Approximately in the year 2008 Plaintiff posted a website at
24 www.bernzomaticinjuries.com to warn the public of the dangers of the above
25 products.

26 60. Approximately in January 2009 BERNZOMATIC contacted the Website
27 hosting company posting the website, represented to it that the Website belonged to
28 BERNZOMATIC, and instructed that the website be pulled down. The hosting

1 company pulled the website down.

2 61. Upon learning of the removal of the website by BERNZOMATIC,
3 Plaintiff contacted the hosting company and inquired, and was told of the above
4 events. Upon learning that it had been tricked and deceived by BERNZOMATIC, the
5 hosting company put the website back up. BERNZOMATIC then filed an action at
6 an arbitration facility in Switzerland aimed at having the website removed
7 permanently. It did not prevail.

8 62. The above-described wrongful act of BERNZOMATIC was facially an
9 act of fraud.

10 63. The above-described wrongful act of BERNZOMATIC was an unfair
11 business practice under Bus. & Prof. Code § 17200.

12 64. The above-described wrongful act of BERNZOMATIC in pulling down
13 Plaintiff's website was a trespass to Plaintiff's intellectual property.

14 65. The above-described wrongful act of BERNZOMATIC in pulling down
15 Plaintiff's website was intended to prevent disclosure of the defects and hazards of the
16 subject torches and cylinders publicly so that BERNZOMATIC's profits and revenues
17 would not be reduced, but at the cost of human injury and potential deaths.

18 WHEREFORE, Plaintiff prays for Judgment against BERNZOMATIC for fraud
19 and unfair business practices in relation to its pulling down of Plaintiff's website, for
20 punitive damages for BERNZOMATIC's depravity in placing its profits ahead of the
21 protection of people and by way of fraud and deceit, and for such other and further
22 relief as the Court deems proper.

23
24 A jury trial is respectfully demanded.

25
26 Dated: October 7, 2011

27 s/Andrew W. Shalaby
Andrew W. Shalaby, Plaintiff