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

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding,
Barbara L. Major, Magistrate Judge, Presiding

APPELLANT'S OPENING BRIEF

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JURISDICTION

This is a products liability action involving a handheld torch distributed nationally and in other countries. The plaintiffs, defendants, and third-party cross-defendants resided in different states, therefore the district court's jurisdiction was based on diversity pursuant to 11 U.S.C. § 1332(a). The Court of Appeals has jurisdiction over the district court's final decision under 11 U.S.C. § 1291. The district court granted summary judgment dismissing Plaintiffs' action on July 28, 2009 (Doc. 209 at 24:11, ER vol. 1 at 28).[1] The Notice of Appeal was timely filed pursuant to Fed. R. App. P. 4(a)(1)(A) on August 17, 2009 (Doc. 228, ER vol. 1 at 1). The appeal is from a final judgment that disposes of all claims (Doc. 210, ER vol. 1 at 4).

ISSUES PRESENTED FOR REVIEW

1. Does the court's order evidence a legally incorrect standard for the causation a plaintiff must be able to show to survive summary judgment?

2. Was the court's exclusion of Plaintiffs' experts based on an erroneous application of the "risk-benefit" test instead of the "consumer expectations test"?

3. Was the court's conclusion 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*" based on an erroneous application of the

[1] "Doc." references the district court's document number. "ER" references the corresponding page on Appellants' Excerpts of Record.

"risk-benefit" test instead of the "consumer expectations test"?

4. May a court deny a request for judicial notice on grounds that granting judicial notice would operate as a "*motion for summary judgment*"?

5. May the court exclude a plaintiff's disclosure of the specifications of a product designed by the defendants themselves on grounds of "untimeliness"?

6. Was Plaintiffs' expert's opinion untimely?

7. Should the court dismiss a plaintiff's action based on exclusion of the plaintiff's expert's opinion which is deemed deficient if the court has before it the expert's supplemental opinion and requests for judicial notice curing the deficiency?

8. Did the court exclude Plaintiffs' experts' testimony by relying on erroneous factual findings and disregarding or overlooking necessary evidence?

9. Did the court abuse its discretion by refusing to allow amendment of the complaint on grounds that doing so would "*evaded what could have been the termination of* [the] *lawsuit on summary judgment*"?

STATEMENT OF THE CASE

This is a products liability case involving injuries sustained by Plaintiff Andrew Shalaby as the result of a defective "MAPP" gas fuel cylinder attached to a trigger-operated torch. The torch and cylinder product was not marketed to sophisticated users. It was, instead, sold in such retails establishments as Home Depot and recommended for such common uses as lighting barbecue grills. The derivative

emotional distress claims of Ms. Dunn-Ruiz, Mr. Shalaby's wife, are based on her having witnessed her husband engulfed in flames. The cylinder failed while being used in a reasonably foreseeable manner. Plaintiff was using the torch and cylinder assembly to light a campfire, when a defect in the cylinder caused it to breach and explode, severely burning Plaintiff. These facts present Plaintiffs' case-in-chief. In response to these facts, Defendants are free to allege that Plaintiff's was not being truthful, but their burden does not stop there. Defendants must further allege, and prove, that Plaintiff's injuries were caused by unforeseeable misuse. However, after the close of discovery, Defendants presented no admissible evidence of unforeseeable misuse, and all the facts developed in the course of discovery supported only one conclusion - that the cylinder failed solely because it was defective. Despite the state of the evidence before it, the district court erred and abused its discretion by reasoning that Plaintiffs were required to prove precisely what aspect of the cylinder was defective, but could not do so because the court excluded Plaintiffs' experts, excluded all evidence in support of Plaintiff's case, and refused to decide Plaintiffs' motions to strike Defendants' sole three misuse allegations on grounds that the case "*could very well be terminated on summary judgment.*" The grant of summary judgment and all its related orders under the facts of this case lead to the inescapable conclusion that the district court grossly abused its discretion in prioritizing dismissal of the case over its merits.

STATEMENT OF THE FACTS

(A) PRODUCT DESCRIPTION

Defendant "BernzOmatic" was the distributor and marketer of a handheld torch and cylinder kit commonly sold at Home Depot (Doc. 200-6, ER vol. 2 at 169). The cylinder was fueled with "MAPP" gas[2]. The MAPP gas cylinders distributed by Defendant contained a vulnerable "center bushing," a weak point which was prone to separation if leverage and force were applied to the torch tube.[3] BernzOmatic explains on its website what would happen if this vulnerable area of the cylinder fails: (http://www.bernzomatic.com/resources/glossary.aspx, as of 10/09):

> If the center bushing fails, then an extremely large 8 to 10 foot flame will erupt from the cylinder.

To protect against this hazard, BernzOmatic designed a safety "fracture groove" onto the torch.[4] On its website (supra), BernzOmatic explains the purpose of the fracture groove:

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[2]MAPP gas is a mixture of 44% methylacetylene-propadiene and 56% Liquefied Petroleum Gas, which burns at about 3,600°F.

[3]The exhibit shown at ER vol. 2 p. 192 is of a failed "center bushing" on an exemplar.

[4]The "torch" is the handheld apparatus which mounts to threads on top of the cylinder. The torch is lighted by a push-button trigger, and contains a trigger lock. The subject torch used by Plaintiff at the time of injury was a model "TS 4000" (Doc. 200 (RJN 2 - ER vol. 2 at 143). A picture of the torch is shown at ER vol. 2 p. 167-168 (subject torch) and ER vol. 2 p. 172 (a detailed exemplar).

> Fracture Groove: A designed in failure point in the torch, so that when the torch & cylinder are dropped, the fracture groove will fail prior to the cylinder center bushing failing. [If the center bushing fails, then an extremely large 8 to 10 foot flame will erupt from the cylinder].[5]

The fracture groove fractures at approximately 26 foot-pounds of force.[6] The cylinder's center bushing is therefore designed to withstand an amount of force greater than required to fracture the torch's fracture groove (greater than 26 foot-pounds).

(B) PARTIES

BernzOmatic is a subsidiary of Irwin Industrial Tool Company, Inc. (Irwin). Irwin is a subsidiary of Newell Rubbermaid, Inc. The subject MAPP gas torch and cylinder were purchased at Home Depot, Inc. BernzOmatic assumed the defense for Home Depot in this action (Doc. 36, ER vol. 1 at 81; Doc. 209 fn. 1, ER vol. 1 at 6).[7]

(C) BACKGROUND

The basic facts are set forth on the order (Doc. 209, 2:10-26, ER vol. 1 at 6) as follows:

> This action arises out of events that occurred on the night of April 21, 2006, in which Mr. Shalaby was engulfed in flames while he used a

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[5] There were two designs of this safety feature, both operating the same way. For the sake of simplicity, both types shall be referenced as the "fracture groove," except where otherwise distinguished.

[6] A foot-pound is the torque created by one pound of force acting at a perpendicular distance of one foot from a pivot point, as further described at ER vol. 2 at 461:21.

[7] These parties are jointly referenced as "Defendants" or "BernzOmatic."

> handheld torch attached to a MAPP gas cylinder. [Citation.] It is undisputed that Third-Party Plaintiff BernzOmatic manufactured the handheld torch; however, it remains in dispute whether Worthington Industries or Western Industries manufactured the MAPP gas cylinder.[8] Initially, Mr. Shalaby alleged that he was using the torch to light a campfire. He claimed that he kneeled downward over the [campfire], depressed the igniter button, heard a hissing sound, then a loud boom, and was then engulfed in flames. [Citation.] Within a few days of the accident, an unknown staff member at the campground discarded the torch and MAPP gas cylinder. [Citation.] Plaintiffs' expert, Dr. Robert Anderson, concluded that the accident was the result of a defective braze joint in the MAPP gas cylinder. Dr. Anderson did not conclude that there were any defects in the torch itself. After the close of discovery, however, Mr. Shalaby began alleging that immediately prior to depressing the trigger button, he lightly tapped the tip of the torch against a piece of firewood at the moment of the explosion. [Citation.]

More detailed, Plaintiff was using the torch assembly to light a campfire. He removed his hand from the handle of the torch, and repositioned it to the cylinder (Doc. 93-4, ER vol. 4 p. 865). While holding the assembly by the cylinder, he lightly tapped the tip of the torch against a piece of firewood (Doc. 93-3, ER vol. 4 p. 864). The torch's fracture groove did not fracture, because the amount of force to the tip of the torch was negligible (about 1 to 2.5 foot pounds - Doc. 200-40 at 3:17 (ER vol. 2 p. 310); Doc. 172-2 at 116:1 & 117:21 (ER vol. 3 at 460-461)). However, the cylinder was defective, and breached directly below the torch mounting threads, at the center

[8]The subject cylinder contained a "BernzOmatic" label (ER vol. 2 p. 167).

bushing area (Doc. 200, RJN 29-32 (ER vol. 2 at 150); Doc. 173-5 at 24:21 (ER vol. 3 at 574)). Plaintiff heard a very brief hiss, saw a powerful flame emit from the cylinder's center bushing, turned his head to the right, then heard a boom (Doc. 93-5 at 2:2, ER vol. 4 at 849). The torch had exploded in Plaintiff's right hand (Doc. 200-40, Shalaby declaration, ¶¶ 5-7 (ER vol. 2 p.209-310)) Plaintiff was wearing shorts, and suffered severe burn injuries to his legs, hands, and face (Doc. 172-2, 187, 172-12 to 172-18 (ER vol. 4 pp. 766-772)). There have been several near fatal injuries due to the same defects with the center bushings of the MAPP gas cylinders distributed and sold by these defendants (Doc. 172-28 at 4:8 (ER vol. 4 at 778); Doc. 172-46 through 172-51 (ER vol. 4 pp. 804-810), ER vol. 2 at 319 and 354).

SUMMARY OF THE ARGUMENTS

1. The court erroneously applied the "risk-benefit" test. A cylinder containing ultra-hazardous [MAPP] gas simply cannot fail under any application of force to the torch, because the torch's fracture groove will prevent such a failure, unless the cylinder is defective, therefore the "consumer expectations test" applies.

2. The court's error in applying the "risk-benefit" test instead of the "consumer expectations" test resulted in the court's erroneous exclusion of Plaintiffs' metallurgy and warnings experts.

3. Plaintiffs filed three motions to strike Defendants' only three unforeseeable misuse theories. Had the court granted these motions, the court would

have observed that the subject fuel cylinder's failure could only have occurred by virtue of a defect in the cylinder. However, the court declined to rule on Plaintiffs' motions to strike on grounds that the motions were "*premature* [because] *Plaintiffs' lawsuit could very well be terminated on summary judgment*." The court therefore erred, because Defendants bore the burden of demonstrating that there were no triable issues of material facts, and could not meet this burden if failure of the cylinder could only be explained by virtue of a product defect, and there were no feasible alternative explanations for the cylinder failure.

4. Plaintiffs presented requests for judicial notice, which if granted, would have established Defendant's liability as a matter of law. The court summarily denied all 63 requests for judicial notice on grounds that they would have operated as the equivalent of a motion for summary judgment. As a matter of law, a request for judicial notice may not be denied on this basis.

5. The court may not exclude a plaintiff's evidence of the defendant's own product specifications on grounds of "untimeliness," because the defendant invented those specifications.

6. Plaintiffs' supplemental expert report was untimely by six days. However, on a motion for reconsideration, the court found that the six day delay was not Plaintiff's fault, and excused the delay. However, the court then misinterpreted its order modifying an earlier scheduling order, and erroneously concluded that the

supplemental expert report was untimely based on this new ground.

7. The court abused its discretion by excluding Plaintiff's expert metallurgist's initial opinion because any possible deficiencies in that opinion were cured by the expert's supplemental findings in support of his initial opinions, and the court disregarded the supplemental findings based on the court's mistaken belief that the findings were untimely. The court also had before it an independent source for the information contained on the expert's supplemental findings, on Plaintiff's requests for judicial notice. However, the court also disregarded these requests for judicial notice on its mistaken belief that a request for judicial notice may properly be denied if it operates as the equivalent of a motion for summary judgment.

8. The court abused its discretion because it excluded Plaintiffs' experts' testimony by relying on clearly erroneous factual findings.

9. The court abused its discretion in denying Plaintiff's motion for leave to amend the complaint on grounds that allowing amendment would "*evaded what could have been the termination of* [the] *lawsuit on summary judgment,*" instead of determining the merits of the proposed amended complaint.

10. Because conclusion that the district court intentionally abused its discretion is inescapable, the Court of Appeals should reassign the case to a different judge upon remand.

ARGUMENT

I. CALIFORNIA PRODUCTS LIABILITY LAW

1. Strict Products Liability

Federal district courts sitting in diversity apply state law to product liability claims. *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 193-1194 (9th Cir. 2007)." P. 21. In California, a manufacturer, distributor, or retailer may be held strictly liable for placing a defective product on the market if the plaintiff's injury results from a reasonably foreseeable use of the product. *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 (Soule). Products liability may be premised upon a theory of design defect, manufacturing defect, or failure to warn. *Anderson v. Owens-Corning Fiberglas Corp*. (1991) 53 Cal.3d 987, 995 (Anderson).

A. Design defect

Defective design may be established under two theories: (1) the consumer expectations test, which asks whether the product performed as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner; or (2) the risk-benefit test, which asks whether the benefits of the challenged design outweigh the risk of danger inherent in the design. *Anderson, supra*, 53 Cal.3d at p. 995; *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 432. Both theories may be presented to the jury. (*McCabe v. American Honda Motor Co., Inc.* (2002) 100 Cal.App.4th 1111, 1126 (McCabe).)

1. Consumer expectation test for defect

Under the consumer expectations test, the design is defective if "the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Barker v. Lull Engineering Co.* 20 Cal.3d 413, 429 (1978) (Barker). This principle, *Barker* asserted, acknowledges the relationship between strict tort liability for a defective product and the common law doctrine of warranty, which holds that a product's presence on the market includes an implied representation ' " *'that it [will] safely do the jobs for which it was built*.' " ' (20 Cal.3d at p. 430, quoting from *Greenman v. Yuba Power Products, Inc.* 59 Cal.2d 57, 64 (Cal.1963) " '*Under this* [minimum] *standard*,' " *Barker* observed, " '*an injured plaintiff will frequently be able to demonstrate the defectiveness of the product by resort to circumstantial evidence, even when the accident itself precludes identification of the specific defect at fault.* [Citations.]' (20 Cal.3d at p. 430, italics added.)" In the more recent *Soule* case, the California Supreme Court clarified the consumer expectations test, explaining that "[*t]he 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*." (Id. at pp. 568-569, italics added). This 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." (Id. at p. 567, second italics added). A lay jury is competent to determine that a design, or the product itself, is defective if, in particular circumstances, it "perform[s] so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers." (Id. at p. 569.) The manufacturer may not defend a claim that a product's design failed to perform as safely as its ordinary consumers would expect:

> It follows that where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect. (*Soule*, *Id.* at 308, 617.)

2. Risk-benefit test for defect

Under the risk-benefit test, the design is defective if "the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design." *Barker, supra*, at p. 427. In other words, once proximate cause is established, the burden shifts to the defendant to show that the design's benefits outweigh its inherent risks. *Soule, supra*, 562; see also *Bresnahan v. Chrysler Corp.* (1995) 32 Cal.App.4th 1559, 1565 (under risk-benefit test for defect, where plaintiff proved causation but did not provide evidence as to risk-benefit analysis, nonsuit was improper because it is defendant's

burden to provide risk-benefit evidence).

An ordinary consumer who uses a "complex product" in a foreseeable manner and is injured may have "no idea" how safely the product should have operated. *Soule, supra*, 566-567. Such is the case, for instance, of the "ordinary consumer of an automobile" who simply does not know "how safe it should be made against all foreseeable hazards." *Soule,* at p. 567. Yet the absence of reasonable consumer expectations about a product's safety does not foreclose "[a]n injured person . . . from proving a defect." Ibid. "[A] product is still defective if its design embodies "excessive preventable danger" [citation], that is, unless "the benefits of the … design outweigh the risk of danger inherent in such design." Ibid. As *Barker* observed, 'past design defect decisions demonstrate that, as a practical matter, in many instances it is simply impossible to eliminate the balancing or weighing of competing considerations in determining whether a product is defectively designed or not. . . .' " (Soule, supra, 8 Cal. 4th at pp. 562-563.) Such "instances" include claims involving "complex" products which "cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance." (Id. at pp. 566-567.)

As a recent California Court of Appeal case explains, both theories may be presented to the jury:

> A claim of design defect may be proved under the consumer expectation theory (if applicable) or the risk benefit theory. The tests are not mutually exclusive, and a plaintiff may proceed under either or both.

> (Barker, supra, 20 Cal.3d at p. 435; see also BAJI No. 9.00.5 [designating the consumer expectation and risk-benefit as alternative tests and providing an instruction to accommodate either or both].)

McCabe v. American Honda Motor Co. 100 Cal.App.4th 1111, 1126 (Cal.App.2.Dist.2002)

3. Failure to warn for defect

> Failure to warn is the third basis of liability in products liability cases:
>
> In assisting the jury's determination of whether the absence of a warning makes a product defective, the trial court should focus their attention on such relevant considerations as the normal expectations of the consumer as to how the product will perform, degrees of simplicity or complication in the operation or use of the product, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including a warning.

Cavers v. Cushman Motor Sales, Inc. 95 Cal.App.3d 338, 348 (Cal.App.1.Dist.1979)

B. Manufacturing Defect

A manufacturing defect occurs when a product does not conform to the manufacturer's intended design. (Restatement Third of Torts, Products Liability, section 2, page 14; *Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1057, 245 Cal.Rptr. 412, 751 P.2d 470).

1. Res Ipsa Loquitur Analogous to Consumer Expectation Test

Appellants can find no authority addressing the question of whether or not the consumer expectations test applies to a manufacturing defect, though res ipsa loquitur appears to extend the consumer expectations test to manufacturing defects, as

reasoned in application of the doctrine in *Escola v. Coca Cola Bottling Co. of Fresno* 24 Cal.2d 453, 457-459, 150 P.2d 436, 438 - 439 (CA.1944):

> [1] Res ipsa loquitur does not apply unless (1) defendant had exclusive control of the thing causing the injury and (2) the accident is of such a nature that it ordinarily would not occur in the absence of negligence by the defendant. *Honea v. City Dairy, Inc.*, 22 Cal.2d 614, 616, 617, 140 P.2d 369, and authorities there cited; cf. *Hinds v. Wheadon*, 19 Cal.2d 458, 461, 121 P.2d 724; Prosser on Torts [1941], 293-301.
>
> Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession.

Therefore, although no authority addresses the question of whether the consumer expectations test applies to a manufacturing defect, when no design defect is present, the product fails while being used in a reasonably foreseeable manner, and there was no misuse or alteration of the product, it appears that the consumer expectations test would apply to establish causation, in addition to and independent of res ipsa loquitur.

II. GRANT OF SUMMARY JUDGMENT WAS ERRONEOUS BECAUSE THE CONSUMER EXPECTATIONS TEST APPLIES

The standard of review for errors of law and for grant of summary judgment is de novo. *Olympic Sports Products, Inc. v. Universal Athletic Sales* Co. 760 F.2d 910, 912 -913 (9th Cir. 1985).

There is nothing whatsoever complicated about this case. Plaintiff was using the MAPP gas torch and cylinder assembly to light a campfire, and when he lightly tapped the tip of the torch against a piece of firewood, the cylinder breached and exploded. In response to these facts, the defendants must prove either that:

> 1. A light tapping of the tip of the torch against a piece of firewood was an "unforseeable misuse"; or
>
> 2. Plaintiff is not telling the truth, because the cylinder failed due to an unforeseeable misuse which was not disclosed by Plaintiff.

These should be the sole questions of fact for the jury to determine liability. However, the defendants themselves have already admitted that a light tapping of the tip of the torch against a piece of firewood would never cause failure of the MAPP cylinder, absent a defect ([*n*]*either the torch nor the cylinder will fail if lightly struck against a piece of firewood* [absent a defect]." (Doc. 173-13, ER vol. 4 p. 749). Further, the testimony of defendants' own primary expert, Dr. Eagar, reveals that even a very strong impact to the tip of the torch would have merely fractured the torch's fracture groove, but would never have failed the cylinder, absent a defect. (ER vol. 4 at 745 (great force required); and fracture groove disclosure, supra.) In other words the case is all the more simple, because in response to the facts presented by Plaintiffs - that the cylinder failed upon a light application of force to the tip of the torch, Defendants must allege and prove that Plaintiff is not telling the truth, and that there was some other occurrence, an unforeseeable misuse, which caused the failure of the cylinder.

This would be a defense, but the court erroneously concluded it did not need to consider any defenses at all in ruling on Defendants' motions, therefore did not consider any of Defendants' defenses. (P.22:25.)

Proof of exactly what failed on the cylinder is clearly not the standard for survival of summary judgment. Under California Code of Civil Procedure section 437c, as well as Federal Rule of Civil Procedure section 56(c), the party moving for summary judgment bears the burden of demonstrating that there are no triable issues of material facts and that the movant is entitled to a judgment in its favor as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material issue of fact is one that raises a question that a trier of fact must answer to determine the rights of the parties under the substantive law that applies. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party. [Ibid.]" Additionally, "[t]he inferences to be drawn from the facts must be viewed in a light most favorable to the nonmoving party." *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1180 (9th Cir. 2002). Defendant "*must further demonstrate that the plaintiff does not possess and cannot reasonably obtain, needed evidence*." *Kahn v. East Side Union High School Dist.*, 31 Cal. 4th 990, 1003 (2003), *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir.1980), *Conaway v. Smith* 853 F.2d 789, 792 (C.A.10 (Kan.),1988).

Despite the state of the record before it – that defendants' product caused

plaintiff's injury while being used in a reasonably foreseeable manner - the trial court granted defendants' motion for summary judgment. The court arrived at this conclusion as a result of its complete misapprehension of the quantum of proof of "causation" necessary to survive summary judgment. The court's order sets forth facts sufficient to show its granting of summary judgment constituted reversible error (Doc. 209: 23:10-20, 24:9-11; ER vol. 1 at 27-28). As the court duly noted (P. 15:27), California law provides that where the product has been lost or destroyed through no fault of the plaintiff, the plaintiff may prove the existence of a product defect and the cause of injury not only by way of expert testimony, but by circumstantial evidence as well. *Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1260-1261; *Soule v. General Motors Corp.*, supra, 8 Cal.4th at 562; *Barker v. Lull Engineering Co., supra, 20* Cal.3d at 426. *Dimond v. Caterpillar Tractor Co.* 65 Cal.App.3d 173, 183, 134 Cal.Rptr. 895, 901 (Cal.App. 1976) explains:

> Courts have been sensitive to problems faced by consumers or users of defective products in proving defect and proximate cause. As we explained at the outset, the law recognizes that in a products liability case proof of those elements by direct evidence is frequently impossible; a plaintiff may, therefore, satisfy his burden of proving defect and causation by circumstantial evidence.

However, the risk-benefit test is inapplicable to this case, but was erroneously applied by the court (Doc. 209 p.8:28-9:7, ER vol. 1 at 12-13). The court analyzed this case as if expert testimony were required to establish legal causation for plaintiff's injuries,

in the same way the law requires for "an asbestos cancer case" presenting numerous "problems and uncertainties accompanying factual proof of causation" (*Rutherford v. Owens-Illinois, Inc*., 16 Cal. 4th 953, 974 (1997)). This is not the type of case in which the risk-benefit test applies, because the failure of a MAPP gas cylinder while being used in a manner as intended and foreseen by the manufacturer and users establishes a prima facie products liability case of a most simple nature. No user of the torch products would expect it to fail while being used to light a campfire in the manner acknowledged by the court in its statement of the facts. (P. 2.) In fact the manufacturer openly acknowledges that the MAPP cylinders are weak and vulnerable at the cylinder neck (center bushing), and openly discloses on its website that failure of the center bushing will cause "*an extremely large 8 to 10 foot flame* [to] *erupt from the cylinder*"(*supra*, Doc. 173-14 at 2:19, ER vol. 4 at 751). This is precisely what happened in this case. The center bushing failed, and an extremely large flame engulfed Plaintiff and severely burned him - an event painfully witnessed by Plaintiff himself (ER vol. 4 p.849 at 2:13). Under the facts recited by the court, it is beyond dispute that the cylinder was defective at the location of its failure, the center bushing, and that the defect caused Plaintiff's injuries. The circumstantial evidence overwhelmingly reveals the product defects as well. In the 16 disclosed MAPP gas injury lawsuits filed against these defendants (e.g. Doc. 172-46 through 172-51 (ER vol. 4 pp. 804-810), ER vol. 2 at 319 and 354), it appears that a particularly large

number of injuries occurred between the years 2004 and 2008, suggesting a particularly bad production run during those years, with the defects and failures occurring exactly at the same vulnerable center bushing as in this case. In every case, severe burn injuries occurred as the result of these failures of the center bushings, all disclosed photographically (Doc. 172-28 at 4:8 (ER vol. 4 at 778); Doc. 172-46 through 172-51 (ER vol. 4 pp. 804-810), ER vol. 2 at 319 and 354). Moreover, exactly as was the case here, in every case, the torches' fracture grooves never fractured to prevent the injuries, because there was never enough force applied to the torch tips to cause the fracture grooves to fracture (e.g. Doc. 172-46 through 172-51 (ER vol. 4 pp. 804-810), ER vol. 2 at 354). Even the court is aware that the supplemental expert report it excluded (doc. 93-3, disregarded by the court - P. 4:3) does nothing more than state the obvious consumer's expectation, therefore the court itself admits "[t]*he braze material may indeed be unreasonably weak*" (Doc. 209 p.16:9, ER vol. 1 at 20). However, the court disregarded the obvious application of the consumer expectations test, and proceeded to marshal through the factors of the inapplicable "risk-benefit" test, turning its focus on whether or not Plaintiffs' expert metallurgist adequately established that the cylinder's *porosity* was the culprit (Doc. 209:18-19, ER vol. 1 pp. 22-23). It is not necessary for the jury to assess the porosity. Here, the product's user would never expect it to fail when being used in a reasonably foreseeable manner, so the *consumer expectation test* applies.

The district court has also violated the basic tenet of a reliable and relevant expert opinion - it seeks to draw on cases that are "connected to [the] existing [case] only by [its] ipse dixit." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). In other words, "there is simply too great an analytical gap between" the authority on which the court relies and the facts of the case at bar, and the data and opinion proffered. For instance, the district court incorrectly analogized this case to *Soule: "like in Soule, this is simply not a case where the* [consumer expectations test] *should be applied."* (23:10-20.) *Soule* bears no resemblance to this case. In *Soule*, the plaintiff's ankles were broken in a car accident, and she alleged her injuries were attributed to a manufacturing defect enabling the wheel of the car to travel too far back into the passenger compartment. (*Soule, supra*, 8 Cal.4th at pp. 556-557.) A jury could never determine whether or not such a defect existed without expert testimony. The case is entirely dissimilar.

This case is much more analogous to *Massok v. Keller Industries, Inc*. 147 Fed.Appx. 651, 659-660, 2005 WL 2108654, 7 (9th Cir. 2005), in which the plaintiff was seriously injured when he fell from a defective ladder. In *Massok*, as in this case, the district court excluded Plaintiff's expert , then granted judgment in favor of the defendant as a matter of law. The Court of Appeals reversed, correctly reasoning:

> Ordinary consumers may reasonably expect extension ladders to perform safely when set up with the fly section in front of the base. It is undisputed that most ladders on the market (unlike the Keller Model

> 3116) are designed to be used in this manner. The formal nomenclature of the ladder components might be somewhat unfamiliar, but the basic phenomenon under discussion is not.
>
> Under *Soule*, no expert testimony is required to proceed under the consumer expectations test and *Campbell* instructs that a plaintiff may reach a jury on nothing more than his own testimony and evidence of the "objective conditions of the product." 32 Cal.3d at 126, 184 Cal.Rptr. 891, 649 P.2d 224. Massok has met this modest threshold. (*Id.* at 659.)

The product user would never expect a cylinder containing the ultra-hazardous "MAPP" fuel to be so delicate that it would fail by mere application of light tapping force to the tip of the torch. Moreover, even the application of "extreme" force should never fail the cylinder, because the torch's fracture groove was designed to intercept the force and prevent failure of the cylinder (Doc. 172-44, ER vol. 4 p. 804, http://www.bernzomatic.com/resources/glossary.aspx, as of 10/09). The manufacturer itself correctly states the "consumer expectation" based on the fact that the cylinder failed at its center bushing area upon a light "tapping" force to the tip of the torch -

> [n]either the torch nor the cylinder will fail if lightly struck against a piece of firewood [absent a defect] (Doc. 173-13, ER vol. 4 p. 749)."
>
> The lack of any failure in the torch's fracture groove can be explained by 1.) A manufacturing defect in the torch...
> [Doc. 58 at 22:5, ER vol. 2 p. 135][9]

While a design defect is quite evident, Plaintiffs also alleged a manufacturing defect

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[9] While this admission of liability defeats summary judgment, the culprit nevertheless remains the cylinder, not the torch (Doc. 203 at 2:22-3:2 (ER vol. 1 at 130); Doc. 200 (RJN 43-57, ER vol. 2 at 155)).

(ER vol. 1 at 79:1). Res Ipsa Loquitur applies, because the subject cylinder had not been modified, altered, or subjected to any unforeseeable misuse, and yet it failed in a manner which can only be explained by a defect (ER vol. 4 at 756). Further, as noted above, Appellants cannot find any authorities addressing the question of whether the consumer expectations test applies to a manufacturing defect, but it appears that the doctrine of res ipsa loquitur overlaps with the consumer expectations test, therefore it appears the consumer expectations test also applies to establish causation as to the manufacturing defect of the subject cylinder.

Failure to warn is the third basis of liability under California product liability law (*Morton, supra,* 33 Cal.App.4th at 1534, 40 Cal.Rptr.2d at 24). The Court acknowledges Plaintiffs' claim that BernzOmatic was liable for failure to warn that the user of the subject torches must wear proper clothing (inter alia) (Doc. 209 at 16:27-28, ER vol. 1 p. 20.)[10] However, the Court does not address the issue beyond disqualification of Plaintiffs' warnings expert. As explained in *Soule,* expert testimony is not even allowed to demonstrate what an ordinary consumer would or should expect:

> It follows that where the minimum safety of a product is within the

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Even in the event of cylinder failure, clothing prevents injury. Plaintiff sustained burn injuries and had to undergo skin grafts, all to areas where clothing was not present (on face, hands, and legs - doc. nos. 172-2, 187, 172-12 to 172-18 (ER vol. 4 pp. 766-772)).

> common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect. (*Soule*, *Id.* at 308, 617.)

Since the user of the product is the best arbiter of whether or not a proper warning could have prevented the injuries suffered by the user of the product, the warnings expert must examine the warnings labels from the perspective of the product's user, not an expert welder as the court suggests. The warnings expert's testimony should have been examined at the time of rebuttal to any defense expert testimony at trial, not excluded under the wrong "risk-benefit" test inapplicable to this case. Here, it appears no expert testimony is required at all, because after completing discovery, the defendants elected to declare the cause to be "undetermined":

> Consistent with methodologies in NFPA 921 *Guide for Fire & Explosion Investigations*, 2008 Edition, the cause of the fire and Mr. Shalaby's burns is undetermined. (Doc. 198-3, last page of defense expert report (ER vol. 4 at 872)).

Where a product fails while being used in a reasonably foreseeable manner, and the precise cause of failure of the cylinder is "undetermined," strict liability applies:

> California's products liability doctrine "provides generally that manufacturers, retailers, and others in the marketing chain of a product are strictly liable in tort for personal injuries caused by a defective product." [Citation.] "The rules of products liability 'focus responsibility for defects, whether negligently or nonnegligently caused, on the manufacturer of the completed product.' " [Citation.] *Taylor v. Elliott Turbomachinery Co., Inc.* 171 Cal.App.4th 564, 575, 90 Cal.Rptr.3d 414, 422 (Cal.App. 1 Dist.,2009).

Because the consumer expectations test applies, most of the court's other orders

subject to this appeal were based on the wrong "risk-benefit" test as well.

III. THE COURT'S EXCLUSION OF PLAINTIFFS' EXPERTS' TESTIMONY WAS BASED ON ITS APPLICATION OF THE WRONG PRODUCTS LIABILITY TEST

Because the court applied the wrong "risk-benefit" test, it erroneously turned to factors such as *peer review, rate of error,* and *alternative design* (Doc. 209 at 6:2, ER vol. 1 p. 10). These factors are not considerations under the consumer expectations test. The court's entire analysis of Plaintiff's experts' testimony was therefore premised on its mis-application of the "risk-benefit" test, and therefore the order excluding Plaintiff's experts should be reversed in its entirety.

The court also draws the assumption that "*both parties assumed that quite complicated design considerations were at issue, and that expert testimony was necessary to illuminate these matters*," citing to *Soule* at 570 (Doc. 209 at 23:16, vol. 1 at 27). This is an incorrect assumption. A plaintiff's retention of expert witnesses does not necessarily mean that the plaintiff shall use expert testimony to present his case to the jury, while additionally both the consumer expectations and risk-benefit tests can be presented simultaneously to the jury, should it be appropriate to do so (*McCabe, supra*). Moreover, "use of the 'consumer expectation test' is not precluded in complex cases involving expert testimony." *Sparks v. Ownes-Illinois, Inc.*, 32 Cal. App. 4th 461, 475; see also Soule, supra, 8 Cal. 4th at p. 569, fn. 6; *West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831, 867. To the extent that the

court imposed the burden of feasibility of an alternative design on Plaintiffs (p. 9), the court further evidenced its misunderstanding of the burdens applicable under the risk-benefit test. The burden of establishing that the benefit outweighs the risk is on Defendants. *Bresnahan*, *supra* at 1565 (it is defendant's burden to provide risk-benefit evidence). Here, the defendants do not even allege that the benefits of their torch products outweigh the risks, therefore clearly the risk-benefit test does not apply.

IV. THE ORDER DENYING PLAINTIFF'S MOTIONS TO STRIKE AS "PREMATURE" WAS ALSO BASED ON APPLICATION OF THE WRONG PRODUCTS LIABILITY TEST

Under California Code of Civil Procedure section 437c, as well as Federal Rule of Civil Procedure section 56(c), the party moving for summary judgment bears the burden of demonstrating that there are no triable issues of material facts and that the movant is entitled to a judgment in its favor as a matter. The court's sole reason for reaching its erroneous conclusion that the consumer expectations test did not apply was the fact that the cylinder could explode if subjected to unforeseeable abuse:

> Under the facts of this case, the consumer expectations test is not applicable. It is undisputed that the cylinder can explode for reasons other than a defect, e.g. abuse. (Doc. 209 at 23:11, ER vol. 1 at 27.)

However, if every one of the defendant's abuse theories fails as a matter of law, the *only* conclusion the court could reach is that the subject cylinder exploded because it was defective, making it abundantly clear that the consumer expectations test is the proper test for this case.

> [a] possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. *Jones v. Ortho Pharmaceutical Corp.* 163 Cal.App.3d 396 (Cal.App.2.Dist.1985)

Plaintiff presented three motions to strike Defendant's three sole unforeseeable misuse defenses (Doc. 105, 106, 107; ER vol. 1 pp. 808-831). Rather than deciding these motions to determine whether or not the subject cylinder could have failed due to unforeseeable misuse, the court erroneously concluded that it did not need to consider the misuse defenses at all:

> [t]he Court 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. (Doc. 209 at 22:25, ER vol. 1 at 26.)

Nevertheless, clearly the court tried to determine whether there was evidence of unforeseeable misuse:

> The Court also notes that Paramedic Joe Russo, who treated Mr. Shalaby at the accident scene, testified that Mr. Shalaby stated he had kicked the cylinder into the campfire which resulted in an explosion, thus further corroborating the testimony of the rangers. (P. 14.)

However, finding that Dr. Anderson ruled out theories such as this based on indisputable scientific evidence, and finding that Defendant's own "world-renown" expert, Dr. Eager, himself ruled out such theories (ER vol. 4 at 743-745), as did the report titled "The Behaviour of 'Bernzomatic' MAPP and Propane Cartridges When Exposed to Heat and Flame," published the year of injury by a reputable scientist for

the U.K. Government (ER vol. 2 at 253), the court reveals a predisposition towards dismissal by raising the misuse allegation. Further, aware that Plaintiffs' motion to strike contained indisputable evidence that such misuse allegations where not even possible as a matter of physics (ER vol. 4 at 812); the court simply elected not to decide the motion at all, yet alone Plaintiffs' other two motions striking Defendant's sole remaining defenses, openly prioritizing instead the dismissal of the action over its merits:

> Because Plaintiffs' lawsuit could very well be terminated on summary judgment, the motions are DENIED [without prejudice...]. (Doc. 205 at 2:16, ER vol. 1 at 31.)

A court may not decline to rule on motions because granting them may prevent termination of the lawsuit on summary judgment, since summary judgment can only be granted if there are no triable issues of material facts (FRCP 56c). Defendants bear the burden of proving the elements of their misuse defenses:

> "Misuse" is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 9, 116 Cal.Rptr. 575.) This causation is one of the elements of the "misuse" affirmative defense and thus the burden falls on the defendant to prove it. *Huynh v. Ingersoll-Rand* 16 Cal.App.4th 825, 831 (Cal.App. 2 Dist.,1993).

Granting the motions to strike Defendants' sole misuse defenses leaves only the *accurate and proper* conclusion that Plaintiff's injuries were caused by a defective MAPP gas cylinder produced by Defendants. Because the court's denial of Plaintiff's

motions to strike was based on its misapplication of the risk-benefit test instead of the consumer expectations test, and based on priority of dismissal of the action over the merits, that order (Doc. 205, ER vol. 1 at 30) should be reversed as well.

V. A REQUEST FOR JUDICIAL NOTICE CANNOT BE DENIED BECAUSE IT OPERATES AS A MOTION FOR SUMMARY JUDGMENT

The Court of Appeals reviews de novo the district court's interpretation of the Federal Rules of Evidence. *United States v. Sioux*, 362 F.3d 1241, 1244 n.5 (9th Cir. 2004). The standard of review of a district court's denial of a request for judicial notice is abuse of discretion. *United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994). Plaintiffs' presented 63 separate requests for judicial notice, on one document, to the district court (Doc. 200, ER vol. 2 at 140). The court denied all 63 requests on grounds that they operated as "*a camouflaged motion for summary judgment*" (Doc. 209 p. 3:26-28, ER vol. 1 at 7). This is an interpretation of F.R.Evid. 201, therefore the standard of review is de novo.

F.R.Evid. 201(d) provides that "*A court shall take judicial notice if requested by a party and supplied with the necessary information*." Section (b) permits the court to take judicial notice of facts not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Section (c) provides that "*A court may take judicial notice,*

whether requested or not." Section (f) provides that "*judicial notice may be taken at any stage of the proceeding*." *Rivera v. Philip Morris, Inc.* 395 F.3d 1142, 1151 (9th Cir. 2005). The very purpose of a request for judicial notice is to establish those facts which are not in dispute, and not reasonably subject to dispute, therefore the court erroneously interpreted F.R.Evid. 201 in denying Plaintiffs' requests for judicial notice on grounds that they operated as a "motion for summary judgment."

The court further abused its discretion by denying all 63 requests for judicial notice on grounds that they were "clearly in dispute" (Doc. 209 p.3:28, ER vol. 1 at 7), because the court reveals its awareness that this assertion was not true on the face of its order. The court adopted request for judicial notice ("RJN") 1 (Doc. 209, order p.2:11, ER vol. 1 at 6), RJN 2 (Doc. 209, order p.2:11, ER vol. 1 at 6), RJN 4 (Doc. 209, order p. 12:22-26, ER vol. 1 at 16), RJN 5 (Doc. 209, order p. 12:20-21, ER vol. 1 at 16), RJN 6 (Doc. 209, order p. 2:17-18, ER vol. 1 at 6) , RJN 14 (Doc. 209, order p. 2:25, ER vol. 1 at 6), RJN 29 (Doc. 209, order p. 13:4-7, ER vol. 1 at 17), and RJN 33 (Doc. 209, order p. 12:24, ER vol. 1 at 16). Moreover, many of the facts presented on the requests for judicial notice came directly from the defendants, therefore clearly were not in dispute. An important example is RJN 14, asking the court to take judicial notice of the fact that "the TS4000 torch contained a 'fracture groove' designed to prevent failure of the cylinder in the event of the application of force to the tip of the torch." The defendants themselves disclosed this fact (Doc. 200-10 (ER vol. 2 p.

174), Doc. 117 at 7:25). The court further denied other requests for judicial notice of facts provided *by the defendants themselves*, e.g. the actual warnings labels on the subject torches and cylinders (RJN 39-41); the existence of an asset purchase and indemnification agreement between the two cylinder manufacturers (RJN 20); and the packaging and contents of the TS4000 torches (RJN 22 & 10). The court provides no explanation for its assertion that all 63 requests for judicial notice were "clearly in dispute," evidencing that the court did not likely read the requests for judicial notice before summarily denying them on the erroneous grounds that a request for judicial notice may properly be denied if it operates as a motion for summary judgment. As required by F.R.Evid. 201(d), Plaintiff supplied the court with all the necessary information so that the court may properly consider the requests for judicial notice on the merits, and the defendants did not dispute any one of the requests for judicial notice (Doc. 202, ER vol. 2 at 137). Because a request for judicial notice may not be denied on grounds that it operates as a motion for summary judgment, and because the requests for judicial notice were not disputed and were of facts which were accurate in every respect and were therefore not reasonably capable of dispute, the portion of the court's ruling summarily denying Plaintiff's requests for judicial notice should be reversed, and all 63 requests for judicial notice should be granted as established facts, even if those facts establish liability as a matter of law.

VI. EXCLUSION OF EVIDENCE OF THE PRODUCT SPECIFICATIONS ON GROUNDS OF "UNTIMELINESS" IS IMPROPER BECAUSE DEFENDANTS INVENTED THEM

On summary judgment, the court must determine whether plaintiff possesses, or can reasonably obtain, the needed evidence. *Kahn*, supra, 31 Cal. 4th at 1003 (2003). The rules of discovery were not intended to preclude one party's discovery of evidence already known by the other party. Rather, they were intended to promote mutual knowledge of all the relevant facts. *Hickman v. Taylor* 329 U.S. 495, 507, 67 S.Ct. 385, 392 (U.S. 1947). Here, Dr. Anderson's supplemental findings (Doc. 93-3, ER vol. 1 at 832) were already known to the defendants, because they consisted of specifications *invented* by the defendants. Plaintiffs can present the same evidence at trial through the defendants themselves, through other witnesses, through Plaintiff Shalaby based on his personal knowledge of the facts (Doc. 200-40 at 4:9-20, ER vol. 2 at 311), and by judicial notice (Doc. 200, ER vol. 2 at 140). Dr. Anderson's supplemental report and findings establish that the TS4000 torch's fracture groove fractures at 26 foot-pounds (Doc. 93-3 at 4:16, ER vol. 1 at 834), that the horizontal surface of the MAPP cylinders adjacent to the center bushing will begin to "deform" at 15 foot-pounds of force, and that a MAPP cylinder which is free of defects will not breach at the center bushing even under a force well in excess of 152 pounds (Doc. 93-3 at 5:1, ER vol. 4 at 840). These are all facts already known to the defendants, since they designed the products. The report further establishes that because the

subject cylinder was not "deformed," any force applied would have had to have been *less than* 15 foot-pounds (Doc. 93-3 at 6:13, ER vol. 1 at 837), far less than required to fracture the torch's fracture groove, hence far less than capable of failing a defect-free cylinder (Doc. 93-3 at 5:1-3, ER vol. 1 at 836). Finally, the report *reiterates* the same conclusion Dr. Anderson reached with his "timely" earlier opinion, that the center bushing of the MAPP cylinders was unreasonably weak and defective (Doc. 209 p. 2:19-20, ER vol. 1 p. 6), only this time he supports his conclusion with Defendants' own specifications (Doc. 93-3 at 4:14-17 and 5:1-3, ER vol. 1 p. 835-836). Defendants' own primary expert, Dr. Thomas Eager, correctly reaches the same conclusions (Doc. 173-12, ER vol. 4 at 745):

> 123:13 A: Using what is called Ockham's Razor, which is the simplest explanation is the best. That is Ockham's Razor. 1292 AD. In any case Ockham's Razor basically favors banging against the fire ring, it explains the split, it explains the bend.
>
> 124:13 A: I don't get 30 foot pounds or 12 foot pounds or anything else by swinging this around or pulling the trigger. I'm off by a factor of a hundred in my scientific forces.
>
> 148:16 A: It [15 to 30 foot pounds] is not something that you do with your wrist. It is not something that you do with your wrist and your elbow. This is something that you have to do with your shoulder on. Okay. Let me just say that. In order to get 15 foot pounds, you don't do that with your wrist. Not even Arnold Schwarzenegger does it with his wrist...I have to use my shoulder into it. I have to have leverage of the length from my shoulder to my hand.

Dr. Eager accurately points out that an extreme force is required to fail a defect-free

cylinder. However, Dr. Eager must not have been aware of the existence of the torch's fracture groove, because he referred to "15 foot pounds" as a measure of force capable fo failing the cylinder, while he overlooked the fact that the torch's fracture groove fails at 26 foot pounds (Doc. 200, RJN 25 & 26 (ER vol. 2 at 149)). Moreover, the great amount of force Dr. Eagar described, which would be closer to the 30 foot pounds he references (depo. p. 124:12), would have broken the torch's safety fracture groove, and prevented failure of the cylinder:

> Fracture Groove: A designed in failure point in the torch, so that when the torch & cylinder are dropped, the fracture groove will fail prior to the cylinder center bushing failing. If the center bushing fails, then an extremely large 8 to 10 foot flame will erupt from the cylinder (*supra*).

In other words, Dr. Eagar proves that the amount of force applied to the tip of the torch was far lower than would be necessary to fail a defect-free cylinder, because the torch's fracture groove did not fracture (Doc. 200 at 16:46, ER vol. 1 at 155), and he further proves irrefutably that the cause of injury was a defect with the cylinder, because the amount of force he attests to would have necessarily fractured the torch's fracture groove, *not failed the cylinder*, absent a defect with the cylinder itself.

Plaintiffs' other sources of admissible evidence include the defendants themselves, who would testify as to their own manufacturing specifications of the torch's fracture groove, and the amount of force the center bushing area of their cylinders were designed to withstand. One of the witnesses was also an "expert,"

Ranger Warren Ratliff, and recognized as such by the defendants themselves (Doc. 45 at 4:13), and apparently also by the court (Doc. 209 at p.12:22, ER vol. 1 at 16). Mr. Ratliff was a certified welder with extensive experience using the BernzOmatic MAPP gas cylinders and torches (Doc. 173-5 at 57:25, ER vol. 3 at 605). Based on his personal experience, and his *personal inspection* of the subject torch and cylinder, he correctly opined (Doc. 173-5 at 6:15, ER vol. 3 at 616):

> It appears to me that it was banged against– the top of the nozzle was banged against something over 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][sic].

When asked what he believed was the cause of failure of the cylinder (Doc. 173-5 at 28:20, ER vol. 3 at 578), Ranger Ratliff correctly opined:

> [Examiner] Q: Can you remember any other thoughts that came to your mind as to what might have caused the bend that you saw in the torch [sic]?
>
> 29:23 [Mr. Ratliff] - Just the natural explosion itself could have- or a faulty - you know, my personal experience with these cylinders is faulty materials, manufactured materials.

Other witnesses capable of testifying to the excluded evidence included injury victims Mr. Vanderlinde (Doc. 174-6, ER vol. 2 at 354) and Mr. Englebrick (Doc. 174-1, ER vol. 2 at 319) , but the court disregarded or overlooked their declarations entirely, and makes no mention of the declarations anywhere on its order. These witnesses, and even their own experts, were already known and familiar to these defendants, by

virtue of the fact that Bernzomatic was also the defendant in those actions (Doc. 127-2 at 2:10 (ER vol. 2 at 355); Doc. 174-1 at 2:3 (ER vol. 2 at 320)), and were available to testify at trial. Even without witnesses at all, the fact that the subject torch contained a fracture groove designed to prevent failure of the center bushing was independently subject to judicial notice, but the court disregarded this indisputable evidence as well, failing to meet the standards for granting summary judgment. The court even disregarded admissions by the cylinder manufacturer that the failure of the cylinder upon a light tapping force to the tip of the torch could only occur if either the cylinder or the torch were defective (Doc. 173-13 (ER vol. 4 p. 749); Doc. 58 at 22:5 (ER vol. 2 p. 135) - quoted supra). The court's exclusion of evidence of the amount of force required to fracture the torch's fracture grooves and fail the center bushing of the cylinders was therefore improper because the defendants invented those specifications, and because summary judgment cannot be granted if *plaintiff possesses and can reasonably obtain the needed evidence* (*Kahn, supra*).

VII. PLAINTIFFS' EXPERT'S SUPPLEMENTAL FINDINGS IN SUPPORT OF HIS INITIAL OPINION WERE NOT UNTIMELY

The court initially excluded Dr. Anderson's supplemental report solely on grounds that it was given to the defendants six days after the close of expert discovery. On that order (Doc. 131, ER vol. 1 at 46), the court mistakenly believed that the report was given to the defendants 14 days late, instead of a six day delay which the court

ultimately excused (infra) (Doc. 131 pp.6:4-6, ER vol. 1 at 51):

> Plaintiffs gave the supplemental report to Defendants on October 14, 2008, two weeks after the expert discovery deadline. (Doc. 131 p.6:4-6)[11]

Based solely on this erroneous belief of a 14-day noncompliance, the court excluded Dr. Anderson's opinions:

> [i]t is clear Dr. Anderson should have known about the existence of the fracture groove much earlier. As there is no evidence that Defendants concealed its existence, Dr. Anderson's ignorance can only be attributed to his, Plaintiffs' counsel's, or Plaintiffs' carelessness. (Doc. 131 p.6:23-25, ER vol. 1 at 51)

The court overlooked the fact that the report was only six days late (Doc. 146 p.4:18-24, ER vol. 1 at 43), and the court ultimately excused that delay (Doc. 146 p.4:18-24, ER vol. 1 at 43). The court further overlooked the fact that Dr. Anderson had provided his test results and opinions to Plaintiffs' counsels on September 29, 2008, *before* the close of expert discovery, as evidenced by its statement that "*Dr. Anderson should have known about the existence of the fracture groove much earlier* [than the September 30, 2008 expert discovery deadline]." On the basis of these errors, Plaintiffs moved for reconsideration. In response, the court acknowledged its error (doc. 146 at 5:22, ER vol. 1 at 44), accepted the reason, and excused the six day delay:

> For the purpose of this Order, the Court accepts Plaintiffs'

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11 The initial date for completion of expert discovery was August 8, 2008 (Doc. 131 at 2:25 (ER 47), Doc. 11 at 2:22 (ER 65). The court modified the date for completion of expert discovery to September 30, 2008 (Doc. 32 at 2:1, ER vol. 1 at 63).

> representations that (1) "Dr. Anderson timely prepared and submitted his expert report to Plaintiffs' counsels before the [September 30, 2008] expert discovery deadline had passed;" and (2) "the service of the report six days after the close of expert discovery was not the fault of Plaintiffs." (Doc. 146 p.4:18-24, ER vol. 1 at 43.)

However, the court then cited an entirely new and erroneous basis for exclusion, a basis which did not exist at all on the court's initial order (Doc. 131):

> Pursuant to stipulation between counsel, as reflected in the Court's July 16, 2008 Order, supplemental expert reports were due no later than August 1, 2008. [Citation.] Thereafter, based on the expert reports timely submitted, the parties deposed ten experts before expert discovery closed on September 30, 2008. [Citation.] Therefore, even if Defendants had received Dr. Anderson's expert report on September 29, 2009, the date it was completed and submitted to Plaintiffs' former attorneys, it would have been untimely by almost two months. For the reasons stated in the Court's March Order, the Court finds that this two month delay in completing the supplemental expert report is inexcusable and attributable to Plaintiffs' lack of diligence. (Doc. 146 p.5:2-18, ER vol. 1 at 44.)

The court's statement, "[f]*or the reasons stated in the Court's March Order, the Court finds that this two month delay in completing the supplemental expert report is inexcusable and attributable to Plaintiffs' lack of diligence*," is erroneous, because on the court's earlier order the court made no mention at all of a "two month delay," indeed because there was no "two month delay." The court's earlier order precluded Dr. Anderson's supplemental report only because it was given to the defendants six days after the close of discovery, which the court erroneously believed was a 14-day delay, but as explained above, that delay was excused. The date for close of expert discovery was September 30, 2008 (Doc. 146 at 5:11, ER vol. 1 at 44). There was no

provision precluding supplemental expert opinions learned between the dates of August 1, 2008 and September 30, 2008 (Doc. 32, ER vol. 1 at 62). For these reasons, Plaintiffs' expert's supplemental findings were not untimely, except to the extent of the six days excused by the court, therefore exclusion of the evidence was improper.

To the extent that the court may have interpreted its scheduling orders to preclude expert opinions learned between the dates of August 1, 2008 and September 30, 2008, this court has held that "*minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence*" do not afford a basis for exclusion. *See Scamihorn v. General Truck Drivers*, 282 F.3d 1078, 1085 n. 7 (9th Cir.2002). The ultimate sanction of exclusion of evidence applies for discovery violations which are "*willful and tactical*," and if sanctions are warranted, the court should impose less drastic remedies than exclusion. *United States v. Peters*, 937 F.2d 1422, 1425 (9th Cir. 1991). Here, the court attributes Dr. Anderson's failure to learn of the stress test specifications on his supplemental report to "ignorance" (Doc. 131 p.6:23-25, ER vol. 1 at 51). Ignorance is a "lack of knowledge" or "unawareness" (*Marriam Webster* dict., 2000). In this instance, Dr. Anderson's lack of knowledge was an honest mistake based on the fact that there was a design change in the fracture groove, and a packaging discrepancy. On September 24, 2008 Dr. Anderson learned that the subject torch contained the newer "fracture point" design, and also that the packaging in which the newer TS4000 torches were sold contained a picture of the

wrong fracture groove design (Doc.93-3 p.3:15-19 (ER vol. 4 at 838); Doc. 172-52 (ER vol. 4 at 811)). Prior to this date, Dr. Anderson saw no fracture groove on the subject torch, because it did not utilize that design (Doc. 200-1 (RJN 14-19 - ER vol. 2 at 146), Doc. 200-9 (ER vol. 2 p. 173), Doc. 172-52 (ER vol. 4 at 811)). Dr. Anderson's failure to discover Defendant's fracture groove specifications until just four days before the close of expert discovery, if significant, was not even an "inconsistency," because he had already timely testified at his deposition that the subject torch contained a fracture groove which did not fracture upon the application of about 1 to 2.5 foot pounds of force to the tip of the torch (Doc. 200-40 at 3:17 (ER vol. 2 p. 310); Doc. 172-2 at 116:1 & 117:21 (ER vol. 3 at 460-461) - calculation method and conversion, ER vol. 3 at 462). It was merely a delay in obtaining the specifications for the fracture groove due either to an honest mistake, oversight, or the newly discovered evidence of the change in design and packaging discrepancy, which do not afford a basis for exclusion (*Scamihorn, supra*). The delay did not prejudice the defendants, because Dr. Anderson completed his supplemental report before the September 30, 2008 due date, and the mere six day delay in providing the report to the defendants was excused by the court because it was not attributed to Plaintiffs. In fact the report was given to the defendants before they filed their motions for summary judgment (Doc. 146 at 5:19 (ER vol. 1 p. 44 - service date 10/6/08); Doc. 45 (ER vo. 1 at 102 - MSJ and Daubert motions filed 10/4/08)).

Furthermore, while the defendants already knew the specifications of their own products, if any remedy was necessary, the court could have allowed the defendants to take Dr. Anderson's deposition again, rather than imposing the extreme sanction of exclusion and disregard of the evidence, and a dismissal of the entire action which clearly would have been prevented by allowing the supplemental report (Doc. 209 at 4:3-5, ER vol. 1 8).

VIII. EXCLUSION OF DR. ANDERSON'S TESTIMONY WAS IMPROPER BECAUSE THE CURE TO ALL THE CITED DEFICIENCIES WAS ALREADY BEFORE THE COURT, BUT IMPROPERLY EXCLUDED AND DISREGARDED

The standard of review for a district court's exclusion of scientific evidence and expert testimony is abuse of discretion. *United States v. W. R. Grace*, 504 F.3d 745, 762-759 (9th Cir. Mont. 2007). Dr. Anderson is 76 years old (Doc. 173-2 at 8:18; ER vol. 3 at 362 - d.o.b. 11/8/33), suffers some recollection impairment from time to time, and is perhaps a bit slower to reach his conclusions than a younger expert may, but his opinions were nevertheless accurate, reliable, and already before the court. The court abused its discretion in excluding Dr. Anderson's testimony because all of the problems cited by the court on its order with regard to Dr. Anderson's initial expert opinion were cured by the supplemental report and requests for judicial notice which were already before the court, but improperly disregarded (Docs. 93-3 (ER vol. 4 at 836), and 200 (ER vol. 2 at 140)). Here, the exclusion of testimony underlies the

grant of summary judgment. The grant of summary judgment requires a showing that *"plaintiff does not possess and cannot reasonably obtain, needed evidence*." (*Kahn, supra*.) Here, the court was aware that Plaintiff had the needed evidence to cure any possible deficiencies with Dr. Anderson's earlier expert opinions, as well as to prevail in the action, but intentionally excluded the evidence on grounds which were not legally cognizable, such as denying requests for judicial notice because they operated as a "motion for summary judgment." The court made clear its priority of dismissal of the action over the merits:

> Because Plaintiffs' lawsuit could very well be terminated on summary judgment, the motions [to strike Defendants' misuse defenses] are DENIED (Doc. 205 at 2:18, ER vol. 1 p. 31)
>
> If Plaintiffs are allowed to amend their complaint now, they will have effectively evaded what could have been the termination of their lawsuit on summary judgment. (Doc. 204 p.6:24, ER vol. 1 p. 38.)

Ultimately, the court's exclusion of Dr. Anderson's testimony was not based on its unreliability or failure to meet the standards of the "risk-benefit" test articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but rather based on its exclusion of the *cure* to any possible defects with Dr. Anderson's testimony. On summary judgment, the standard is not whether or not Plaintiff's expert will not be permitted to rely on certain facts underlying his opinion because those facts have been excluded. Rather, it is whether or not Plaintiff, or his expert, can reasonably obtain the needed evidence from any admissible source at trial (*Kahn*, *supra*). Here,

Dr. Anderson has multiple sources available to replace the precluded evidence of the fracture groove, and its stress specifications, including the defendants themselves, other witnesses, and the requests for judicial notice, as discussed above. Dr. Anderson's opinions expressed on his declaration (Doc. 93-3, ER vol. 4 at 836) can therefore be based on the alternative sources of evidence, including expert witness Dr. Eagar himself (as quoted above (ER vol. 4 at 745) for example).

IX. EXCLUSION OF BOTH EXPERTS WAS IMPROPER BECAUSE THE COURT RELIED ON CLEARLY ERRONEOUS FACTUAL FINDINGS

A court abuses its discretion when it relies on clearly erroneous factual findings:

> Abuse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions. *Sports Form, Inc. v. UPI*, 686 F.2d 750, 752 (9th Cir.1982). (*Brotherhood of Locomotive Engineers v. Burlington Northern R. Co.* 838 F.2d 1102, 1104 (C.A.9 (Mont.),1988)

Dr. Anderson

Plaintiffs' reference to Dr. Anderson's supplemental report should not be construed as a concession that Dr. Anderson's initial report and findings were insufficient or inadequate, but rather should be considered in evaluating the Court's overall objective in excluding Dr. Anderson. The court's admitted disregard of Dr. Anderson's supplemental report evidences an abuse of discretion, and a predisposition favoring dismissal of the action over its merits, but nothing is more telling than the court's startling concession that *"It does not appear from the motions before the*

Court that Defendants are contesting the quality of the various metallurgical tests conducted by Dr. Anderson. Thus, the Court finds that Dr. Anderson's metallurgical tests were conducted in accordance with generally accepted principles." (P. 6, fn. 7, italics added.) This concession would seem to mandate the admissibility of Dr. Anderson's testimony, for as the court notes, F.R.Evid. Rule 702 is concerned with the "principles and methodology underlying an expert's testimony, not the expert's conclusions. *Daubert*, 507 U.S. at 595." P. 4.

The court examined six factors under the *Daubert* analysis (Doc. 209 at 4:20, ER vol. 1 at 8). F.R.Evid. 702 was amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*. *Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested---that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert, supra*, 509 U.S. at 595. However, the court did not provide Dr. Anderson with an opportunity to address its concerns with his testimony. It simply dismissed the case by marshaling through the incorrect “risk-benefit” test criteria:

1. Dr. Anderson did not know how the braze paste was applied to the MAPP gas cylinders (Doc. 209 at 6:19);

2. Dr. Anderson provided no basis for his conclusion that the voids made the braze material at the center bushing unacceptably weak (Doc. 209 at 7:1);

3. Dr. Anderson could not name any study to support his opinion that the levels of porosity or voids made the braze joint insufficiently strong (Doc. 209 at 7:4);

4. Dr. Anderson’s hypothesis as to why voids occur in the braze compound was inadequately supported (Doc. 209 at 7:10);

5. Dr. Anderson did not conduct a sufficient amount of testing to support his

theory that the braze joint was the cause of Plaintiff's injuries (Doc. 209 at 7:24); and

6. Dr. Anderson did not test his proposed alternative design (Doc. 209 at 9:2).

The court entirely disregarded the fact that the subject cylinder failed at the center bushing without even fracturing the torch's fracture groove, and this was Dr. Anderson's precise conclusion as to the cause of failure of the cylinder *before* performing his subsequent fracture groove tests, as he timely testified at his deposition (Doc. 173-2 at 116:5, ER vol. 3 at 460):

> [Examiner]: Actually my question was, what was the cause of the failure of the brazed material?
>
> [Dr. Anderson]: Some force applied to the torch tip in the order of 12 to 30 pounds.
>
> [Examiner]: 12 to 30 foot pounds of force?
>
> [Dr. Anderson]: Well, if it's applied to the tip, then I can take the foot out.[12]

The court is correct that Dr. Anderson testified he believed a failure in the braze compound was "more likely" than in the parent metal (cylinder wall), but the court overlooks the fact that Dr. Anderson also concluded the failure could have been in the parent metal. On page 2 of his expert report (Doc. 172-35, ER vol. 4 at 801), he

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[12] The forces specified equate to 1 to 2.5 foot pounds. For calculation method, please see Doc. 173-2 at 117:21 (ER vol. 3 pp. 461-462).

concludes:

> I performed testing of the MAPP gas cylinders and determined that the center valve fitting would fail at approximately 30 foot-pounds of force. *The failures can happen in the cylinder wall* or the center bushing. This amount of force appears to be above the normal abuse level [on a defect-free cylinder]. [Emphasis added.]

Therefore, all six points raised by the court do not negate the fact that it is *certain* the cylinder failed at the center bushing *because it was defective*, whether the failure occurred at the parent metal or the braze compound, simply by virtue of the fact that the torch's fracture groove was designed to prevent failure of the center bushing, and the fracture groove did not even fracture, as Dr. Anderson timely testified (Doc. 200-16 p. 218:12, ER 189):

> [Dr. Anderson]: This tip is referred to as the TS4000. It's a little bit stronger than that one.
>
> [Examiner]: So the tip -- with respect to Mr. Shalaby's accident, the TS4000, you don't believe it collapsed as --
>
> [Dr. Anderson]: I think it has the capability in this area, but, no, I don't believe it did collapse.

Thus, even if with the court's exclusion of Dr. Anderson's supplemental findings, the fact that Dr. Anderson timely testified that the subject torch contained a fracture groove designed to prevent failure of the center bushing, but that the force applied was too low to cause failure of the torch's fracture groove, establishes that the cylinder failure was the result of a defect at the center bushing area with engineering certainty.

However, Dr. Anderson did not limit his opinion to these facts. He *thoroughly* established that the braze compound did not properly adhere to the parent metal, and that the brazed joint overall was very prone to corrosion and weakness: His report, (Doc. 172-33, ER vol. 4 at 785) recites:

> Conclusions/findings:
>
> Based on the facts of failure in the brazed area, I have examined three MAPP gas cylinders, (W10G57E,W11G152W and WAG230E), with respect to the Cu-Ni braze between the center valve housing and the cylinder. Microhardness testing of the brazing metal gave values of 23 HRC for W10D57E, 33 HRC for W11G152W, and 97 HRB for WAG230E. The cylinders have been sectioned in half and four sections have been cut from each cylinder to show a portion of the neck piece and cylinder wall and the brazing material between. These sections have been mounted in plastic and polished and photographically documented. Representative examples of the microphotographs from each cylinder are shown in Photographs 3, 4, and 5. The brazing materials have large voids in the bulk and smaller voids in the interface between the cylinder walls and the center mount housing as shown in Microphotographs 6, 7, and 8. The brazing on the outer surface of the cylinder is undercut in all three cylinders rather than forming a meniscus. The undercutting is a sign of lack of wetting and penetration of the brazing material with the cylinder and valve. A good meniscus shows the wedding has occurred. The brazing defects shown in photographs 3-8 reduce the strength of the joint and make it more likely that the valve will partially separate from the cylinder and release gas when the torch is used as intended. The outside surface of the brazing material that is undercut represents a lack of wetting and penetration of the brazing material with the cylinder and valve housing. This flaw is sufficient to reject the cylinder. This flaw should have been picked up by the manufacturer with a simple visual inspection of the cylinders. The Bernzomatic one-pound MAPP gas cylinder is manufactured for federal specification published in 49 CFR 178.65 (D.O.T. 39). The specification for non-reusable (non-refillable) cylinders states “brazed seams must be assembled with proper fit to ensure complete penetration of the brazing material throughout the

> brazed joint." The brazed joints shown in micro photographs 6,7, and 8 lack complete penetration. Corrosion tests show that the brazing material is strongly cathodic to the cylinder and valve and will cause the steel to corrode in a suitable moist atmosphere. The interior walls, of the sectioned cylinders, also showed signs of corrosion. See Photograph 9, Interior View of Cylinder W10G57E Showing Corrosion.
>
> In my opinion, the braze material between the center mount housing and the cylinder is the weak element in the assembly, and subject to failure when the torch is attached to the cylinder. The brazing material has voids and lacks sufficient fusion to the cylinder wall and valve housing to resist stress placed on it when used in a normal manner. This problem with the brazing material is due to a combination of poor cleaning of the brazing area, contamination of the brazing material and improper process parameters such as furnace temperature and time. For these three cylinders that were examined to be offered on the market clearly establishes the failure of Bernzomatic inspection and quality control procedures. The MAPP gas torch and cylinder is unsafe and unreasonably dangerous as designed and manufactured.

Three facts are certain: (1) the cylinder failed at the center bushing area just below the torch mounting threads (Doc. 173-5 pp. 25-36, ER vol. 3 at 574); (2) several of the exemplar cylinders evidenced separation and excessive voids in the brazing compound or otherwise where the center bushing is brazed (Doc. 172-6 (ER vol. 4 p. 761); Docs. 172-10 and 172-11 (ER vol. 4 pp. 764 and 765); and (3) every failed MAPP gas cylinder in every one of the disclosed lawsuits failed at the location (the center bushing) (e.g. - Docs. 172-46, 47, 48, 50, 51 (ER vol. 4 pp. 805, 806, 807, 809, 810). These facts alone very strongly support Dr. Anderson's conclusions, and further establish the defect with the center bushing area of the cylinders by circumstantial evidence independent of Dr. Anderson's conclusions. The court disregarded all this

evidence, and instead turned to peer review and publication, rate of error, and several other considerations, to try to find fault in Dr. Anderson's opinions (Doc. 209 at 9:8, ER vol. 1 at 13). Those factors are not dispositive. The opinion of a qualified expert witness is admissible if: (1) it is based upon sufficient facts or data; (2) it is the product of reliable principles and methods; and (3) the expert has applied the principles and methods reliably to the facts of the case. *Pro Service Automotive, LLC v. Lenan Corp.*, 469 F.3d 1210, 1215 (8th Cir. 2006) (citing Fed. R. Evid. 702). Whether the court considers Dr. Anderson's timely testimony that the subject torch contained a fracture groove intended to prevent failure of the cylinder upon application of force to the torch tube, or simply takes judicial notice of this disclosure provided by BernzOmatic itself (supra), that fact alone establishes that because the subject cylinder failed upon a light application of force to the tip of the torch, and the torch contained the fracture groove designed specifically to prevent this type of failure, the cylinder was defective with engineering certainty. The court therefore clearly relied on erroneous factual findings, and disregarded and excluded all evidence which would have precluded exclusion of Dr. Anderson's opinions, including the declarations of injury victim Vanderlinde (Doc. 174-6, ER vol. 2 at 354), victim Englebrick (Doc. 174-1, ER vol. 2 at 319), all 63 requests for judicial notice (Doc. 200), Dr. Anderson's supplemental findings (Doc. 93-3, ER vol. 4 at 836), and Plaintiff's eye witness testimony (Doc. 93-5 at 2:2, ER vol. 4 at 849). In this

instance, the court looked only at evidence it wished to use to support dismissal of the case, and disregarded and excluded all other evidence that would have precluded dismissal, then stated that it was not convinced that proximate cause had been established; in other words the court acted as the ultimate finder of fact, and abused its discretion by excluding evidence without mention of why the evidence was not considered (such as the declarations of Mr. Englebrick and Mr. Vanderlinde certifying their failed cylinders, injuries, and causation), then excluded other evidence improperly and declined to decide motions to strike all of Defendants' defenses. This is of course not the standard for judging if there are triable issues of disputed facts, nor the standard for exclusion of expert testimony.

Dr. Alison Vredenburgh

The court supports its exclusion of Dr. Alison Vredenburgh by overlooking facts, as it did with Dr. Anderson:

> The Court notes that Plaintiffs' opposition contends that Dr. Vredenburgh opined that the warning on the cylinder should have advised the user to "wear proper clothing." (Pls.' Opp. at36:10-16.) The Court, however, finds no support for Plaintiffs assertion in Dr. Vredenburgh's testimony.

This assertion is incorrect, because Dr. Vredenburgh testified:

> [i]f there's no way to prevent the separation, then it sounds as though clothing, certain clothing --it would have to be specific clothing --because certain types of clothing could be very dangerous and melt on the user, but possibly some kind of clothing might protect the user. (Doc. 173-11 at 68:24 (ER vol. 4 p. 738)).

> [The warning label] doesn't say how to protect yourself. It identifies what some of the hazards are but not how to protect the user. (Docl 173-11 at 70:10 (ER vol. 4 p. 740.)

The court further abused its discretion in excluding Dr. Vredenburgh's testimony on grounds that she lacked experience with the torch, because the warnings must be aimed at the layperson purchaser buying the torch for such common uses as "lighting grills" (Doc. 209 at 16:20, ER vol. 2 at 18), not an "expert user."

X. DENIAL OF LEAVE TO AMEND THE COMPLAINT ON GROUNDS THAT AMENDMENT WOULD PREVENT TERMINATION OF THE ACTION IS ABUSE OF DISCRETION

Fed. R. Civ.P. 15(a)(2) provides for amendment of pleadings, and states in relevant part that "[T]he court should freely give leave when justice so requires." Generally leave to amend is freely given. *Foman v. Davis* 371 U.S. 178,182, 83 S.Ct. 227, 230 (U.S.Mass. 1962).

Plaintiffs moved to amend the complaint to extend Plaintiffs' claims to Worthington Industries, because the cross-motions of the defendants and third-party defendants established that Worthington was the manufacturer of the subject cylinder (Doc. 200-1 (RJN 14-21, ER vol. 2 at 146)). On the proposed amended complaint Plaintiffs also updated the factual allegations (Doc. 98-3 at 7:9, ER vol. 4 p. 879), and added an allegation that the torch's trigger-lock design was hazardous (Doc. 98-3 at 12:14, ER vol. 4 at 884). The most important consideration for the court should have

been the merits of the complaint. Instead, the court prioritized *termination of the action* (Doc. 204 p.6:24, ER vol. 1 at 38):

> If Plaintiffs are allowed to amend their complaint now, they will have effectively evaded what could have been the termination of their lawsuit on summary judgment. This litigation strategy is questionable at best, and at worst, creates a plausible inference of dilatory motive or bad faith. Accordingly, the Court hereby DENIES Plaintiff's motion.

Had Plaintiff changed his testimony or introduced new evidence after a motion for summary judgment had already been filed, the court would have been well within its province to disregard such evidence. (*Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc*. 397 F.3d 1217, 1225 (9th Cir. 2005)). However, this clearly is not the case here, because Plaintiff learned of the new facts giving rise to amendment of the complaint well *before* Defendants filed their Daubert motions and motions for summary judgment (Doc. 146 at 5:19 (ER vol. 1 p. 44 - service date 10/6/08); doc. 45 (ER vo. 1 at 102 - MSJ and Daubert motions filed 10/4/08))[13], making it clear there was no attempt to evade summary judgment. The court does not even allege that there were any changes of facts asserted to try to defeat any motion for summary judgment, because it was aware the facts were disclosed to the defendants before any Daubert motions or motions for summary judgment were filed. The court therefore abused its discretion because it openly prioritized termination of the action over its

[13] As described above, the facts were learned in 9/08, disclosed on 10/6/08, Defendants moved to exclude Dr. Anderson's supplemental report based on these facts on 10/6/08, and Defendants filed MSJ's on 10/10/08.

merits.

REQUEST FOR REASSIGNMENT TO ANOTHER JUDGE

On remand, under 28 U.S.C. § 2106, the Court of Appeals may reassign the case to another judge if it finds appropriate grounds to do so, and considers:

> "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." [Citation.]

U.S. v. National Medical Enterprises, Inc. 792 F.2d 906, 914 (C.A.9 (Cal.),1986).

Unfortunately Honorable Judge Anello's order leads to the inescapable conclusion that he is predisposed towards dismissal of the action over its merits, as further evidenced by his simultaneous dismissal of BernzOmatic's cross-complaint for indemnity against Worthington and Western. (P. 24.) The prejudice is further quite clear insofar as Judge Anello has threatened Plaintiffs with sanctions three times, including the ultimate sanction of dismissal, without cause. In the first instance, in response to a mere request by Plaintiffs to the *court clerk* for a hearing date, they received back the following *order:*

> The Court shall not entertain any further attempts by Plaintiffs to relitigate this issue. Failure to comply with this Order and the Civil Local Rules shall result in sanctions being imposed upon Plaintiffs *which may include dismissal of the action* pursuant to Federal Rule of Civil

> Procedure 41(b). [Emphasis added.] (Doc. 208 at 2:21.)

In the second instance, in response to Plaintiffs' objection that Judge Anello's Chamber Rule IV was in conflict with the rules of civil procedure to the extent that Rule IV requires a party to file a brief limited to four pages in seeking *permission* to file a Rule 59 or Rule 60 motion, Judge Anello again threatened sanctions:

> Failure to abide by this Court's orders, the Federal Rules of Civil Procedure, this Court's chambers rules, and/or this district's local rules shall result, without further warning, in sanctions as deemed appropriate by the Court. (Doc. 220 at 3:13.)

In the third instance, Plaintiffs merely asked Judge Anello to continue a motion to retax costs until final disposition of this appeal, and were again threatened with sanctions:

> ORDER denying [257] Motion to Continue. The Court has already denied Plaintiffs' request to continue awarding costs pending disposition of their appeal in [242] Order Denying Plaintiffs' Ex Parte Applications to Continue Costs Hearing. Accordingly, Plaintiffs' Motion is DENIED. Plaintiffs shall not file any additional motions on this issue. Failure to abide by this Court's orders, the Federal Rules of Civil Procedure, this Court's chambers rules, and/or this district's local rules shall result, without further warning, in sanctions as deemed appropriate by the Court. Signed by Judge Michael M. Anello on 10/23/2009. (Doc. 258.)[14]

In addition to the threats of sanctions and baseless dismissal of BernzOmatic's cross-

---

[14] Plaintiffs had not previously requested continuance of the hearing to retax costs. The earlier request was in relation to an initial hearing before the court clerk for taxation of costs (Doc. 242).

complaint for indemnification, as stated above, Judge Anello made clear his priority of dismissal of the action over its merits:

> Because Plaintiffs' lawsuit could very well be terminated on summary judgment, the motions are DENIED [without prejudice...]. (Doc. 205 at 2:16.)

And,

> If Plaintiffs are allowed to amend their complaint now, they will have effectively evaded what could have been the termination of their lawsuit on summary judgment. (Doc. 204 p.6:24.)

It appears that Judge Anello is not able to fairly preside over this case, and therefore Appellants respectfully request that this case be reassigned to another judge upon remand, if Judge Anello himself does not permit Plaintiffs' motion for reassignment pending before hit at the time of this filing (Doc. 259).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the court reverse the orders (1) granting summary judgment (Doc. 209, ER vol. 1 at 24); (2) excluding the experts' testimony (Doc. 209, ER vol. 1 at 9); (3) denying Plaintiffs' requests for judicial notice (Doc. 209, ER vol. 1 at 7 fn.3); (4) excluding Dr. Anderson's supplemental report and related opinions (Doc. 131, ER vol. 1 p. 46); (5) declining to decide Plaintiffs' motions to strike (Doc. 205, ER vol. 1 p. 30); and (6) denying Plaintiffs' motion for leave to file their amended complaint (Doc. 204, ER vol. 1 p. 33).

Dated: November 1, 2009

S/ Andrew W. Shalaby
Andrew W. Shalaby, Appellant and co-counsel

Dated: November 1, 2009

S/ Alan J. Gould
Alan J. Gould, co-counsel

STATEMENT OF RELATED CASES

There are no related cases pending in relation to this appeal.

Dated: November 1, 2009

s/ Andrew W. Shalaby

Andrew W. Shalaby, Appellant and co-counsel

Form 8. Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 09-56331

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief*

I certify that: **(check appropriate option(s))**

X 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☒ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages; As applicable to each of the multiple orders appealed; however, please see Motion for Enlargement of Brief Size filed herewith.

Date: November 1, 2009 s/Andrew W. Shalaby

9th Circuit Case Number(s) 09-56331

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) November 1, 2009 .

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Signature (use "s/" format) s/Andrew W. Shalaby

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