

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

IRWIN INDUSTRIAL TOOL COMPANY,
d/b/a BERNZOMATIC and NEWELL
OPERATING COMPANY

Plaintiffs,

-v-

WORTHINGTON CYLINDERS
WISCONSIN, LLC, WORTHINGTON
CYLINDER CORPORATION,
and WORTHINGTON INDUSTRIES, INC.

Defendants.

CASE NO.:

COMPLAINT

(JURY TRIAL DEMANDED)

Plaintiffs Irwin Industrial Tool Company (“Irwin”), doing business as BernzOmatic (“BernzOmatic”) and Newell Operating Company (“NOC”), by their attorneys, assert their complaint against Worthington Cylinders Wisconsin, LLC (“WCW”), Worthington Cylinder Corporation (“Worthington Cylinders”) and Worthington Industries, Inc. (“Worthington Industries”) (collectively “Worthington”) as follows:

NATURE OF THE CLAIMS

1. This is an action for breach of contract arising from Worthington’s breach of a Supply Agreement effective as of January 1, 2006 (“Supply Agreement”); for Worthington’s violation of the Lanham Act’s prohibition of unfair competition through false descriptions of fact and false advertising; for Worthington’s violations of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1; for Worthington’s tortious interference with BernzOmatic’s prospective business relationships; and for Worthington’s unlawful price

discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13. BernzOmatic and NOC seek injunctive relief prohibiting Worthington from continuing its contractual violations, Lanham Act violations, tortious interference, and price discrimination; and damages for Worthington's numerous unlawful acts.

THE PARTIES

2. Irwin is a Delaware corporation with its principal place of business in Huntersville, North Carolina. Irwin manufactures and markets a wide variety of tools, including, while doing business as BernzOmatic, hand torches and other gas combustion devices. Worthington supplies certain gas cylinders to BernzOmatic, commonly called "hand torch cylinders." The hand torch cylinders supplied by Worthington have a volume of between 40 and 70 cubic inches (in most instances, approximately 62 cubic inches), are capable of holding pressurized flammable gases including propane, oxygen, methyl acetylene propadiene mixture gas (commonly called MAPP gas), or propylene gas, and generally have a threaded valve on top that permits the attachment of a torch.

3. NOC is a Delaware corporation with a principal place of business in a state other than Ohio, Delaware or Wisconsin. NOC is the holder of certain trademark registrations for BERNZOMATIC®.

4. WCW is an Ohio limited liability company with its principal place of business at 300 East Breed St., Chilton, Wisconsin 53014. On information and belief, none of WCW's members are citizens of, incorporated in, or have their principal place of business in Delaware or North Carolina. On information and belief, WCW is a subsidiary of Worthington Cylinders, an Ohio corporation with its principal place of business at 200 Old Wilson Bridge Rd., Columbus, Ohio 43085. On information and belief, Worthington Cylinders is a subsidiary of Worthington

Industries, Inc., a publicly-traded Ohio corporation with its principal place of business at 200 Old Wilson Bridge Rd., Columbus, Ohio 43085.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1337; 28 U.S.C. § 1332; 28 U.S.C. § 1338 and 15 U.S.C. § 1121; and 28 U.S.C. § 1367. On information and belief, there is complete diversity of citizenship between plaintiffs and defendants. The amount in controversy exceeds \$75,000.00, exclusive of interests and costs. WCW, Worthington Cylinders and Worthington Industries are each subject to this Court's jurisdiction, including by their conduct described herein and their conducting business in North Carolina and in this judicial district.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a)(2), in that a substantial part of the events giving rise to this claim occurred in this judicial district.

FACTUAL BACKGROUND

7. In 1876, Otto Bernz founded Otto Bernz Co., which sold plumbers' tools, furnaces and torches. In the 1940s, Otto Bernz Co. changed its name to BernzOmatic. In the 1950s, BernzOmatic developed propane torches and gas cylinders.

8. BernzOmatic was the first company to commercially develop a one-pound hand torch that was portable and easy to use. Since such development over a half-century ago, BernzOmatic has been the market leader in hand torches and hand torch cylinders and BernzOmatic has been the name consumers have trusted when purchasing hand torches and hand torch cylinders.

9. Since as early as 1954, BERNZOMATIC® has been registered as a trademark on the principal register in connection with gas cylinders and other related goods. Registration

numbers for BERNZOMATIC® include Reg. Nos. 593884, 587281, 757112, 759196 and 759059, and are owned by NOC. Irwin is the exclusive licensee of the BERNZOMATIC® trademarks.

10. BernzOmatic (or its predecessor in interest) has used the trademark BERNZOMATIC® exclusively since at least 1954 in connection with gas cylinders and related goods. BERNZOMATIC® is well known to consumers of such goods and has come to be recognized as the single source for such BernzOmatic products through decades of distribution, sales and advertising to customers throughout the United States. BernzOmatic has invested and continues to invest enormous amounts of time, money and resources building its reputation and developing the BERNZOMATIC® brand. The BernzOmatic trade dress, including the recognizable colors of its hand torch cylinders, is well known to BernzOmatic's customers.

11. For over twenty years, Worthington or its predecessor (Western Industries) has supplied BernzOmatic with the hand torch cylinders that BernzOmatic sells under the BERNZOMATIC® brand.

12. Under a previous supply agreement originally entered into by Western Industries, but whose rights and obligations were assumed by Worthington when Worthington purchased the torch cylinder assets of Western Industries, Worthington agreed to supply BernzOmatic's requirements for certain specified hand torch cylinders at set prices. Under that agreement, BernzOmatic was the sole outlet for the specified cylinders supplied by Worthington and had the exclusive right to sell such cylinders to all distributors and retailers.

13. In or about the summer of 2005, BernzOmatic and Worthington negotiated and entered into a new supply agreement (the "Supply Agreement"), a true and correct copy of which is attached hereto as Exhibit 1 and is specifically incorporated herein by reference. The Supply

Agreement was made as of effective January 1, 2006 and its initial term continues through December 31, 2008.

14. Pursuant to the Supply Agreement, Worthington agreed to supply BernzOmatic's requirements at specified prices for certain defined gas cylinders that were specified to have an internal volume of greater than 40 cubic inches but less than 70 cubic inches (the "Covered Cylinders"). BernzOmatic had the exclusive right to sell the Covered Cylinders to retail mass merchants, such as Home Depot and Wal-Mart, which merchants were set forth in Exhibit C of the Supply Agreement as BernzOmatic "Distribution Customers." Worthington had the exclusive right to sell Covered Cylinders to Worthington "Direct Account Customers," set forth in Exhibit B of the Supply Agreement. Upon giving proper notice, Worthington could terminate the exclusivity provisions if BernzOmatic purchased fewer than 14,250,000 Covered Cylinders in a twelve-month period.

15. Despite the limitations set forth in the Supply Agreement, and in complete disregard of the contractual restrictions it imposed, on information and belief Worthington developed a desire and concocted a scheme to sell Covered Cylinders directly to retail mass merchants (BernzOmatic's "Distribution Customers") and others, and to compete unfairly with BernzOmatic and exclude BernzOmatic from these customers and from the market, in order to maximize Worthington's sales and profits at the expense of BernzOmatic.

16. To do so, Worthington improperly and unjustifiably terminated its Supply Agreement with BernzOmatic, wrongfully and substantially increased the prices it charged BernzOmatic for Covered Cylinders, began a false and misleading advertising and sales campaign designed to damage BernzOmatic's good will and brand and diminish BernzOmatic's

sales, unlawfully discriminated in price against BernzOmatic vis-à-vis other, more favored customers, and intentionally interfered with BernzOmatic's customer relationships.

17. Specifically, on or about January 2, 2007, Harry A. Goussetis, President of Worthington, wrote to Robert Heisner, President of BernzOmatic, stating that pursuant to the Supply Agreement, Worthington was providing notice of termination of the exclusivity provisions of the agreement because BernzOmatic purchased fewer than 14,250,000 cylinders in 2006. Goussetis also (incorrectly) claimed that BernzOmatic's acquisition of the assets of a company named Ultra Blue Technologies Inc. one year earlier and its sale of UltraBlue's PowerCell™ products was "not an act of good faith" under the Supply Agreement.

18. On or about January 10, 2007, BernzOmatic responded to Worthington by letter. BernzOmatic did not contest Worthington's right to terminate BernzOmatic's exclusivity rights under the Supply Agreement, but noted that Worthington's exclusivity rights were simultaneously terminated effective immediately. BernzOmatic further pointed out, however, that there was no breach of even the spirit of the Supply Agreement because the PowerCell™ cylinders are not Covered Cylinders (among other things, their volume is smaller than 40 cubic inches) and also because Worthington was unable to manufacture cylinders of that size (especially because such cylinders use patented technology). BernzOmatic thus expressly denied breaching the Supply Agreement and invited Worthington to reach an amicable resolution.

19. On or about January 29, 2007, Worthington responded by letter, contending that BernzOmatic's sales of PowerCell™ products were directly competitive with its sales of Worthington's cylinders. On information and belief, Worthington knew that BernzOmatic's sale of PowerCell™ products did not breach the Supply Agreement and were not directly competitive with its sales of Worthington's cylinders; indeed, Worthington had known about and not

objected to such sales for a year prior to the time Worthington ever raised it as an issue. On information and belief, Worthington raised the PowerCell™ issue as a pretext for terminating the Supply Agreement, pursuant to the aforementioned scheme to sell Covered Cylinders directly to retail mass merchants and others, to jettison the contractually-agreed pricing formula (and contractually-agreed payment terms) and impose significant price increases upon BernzOmatic and to compete unfairly with and exclude BernzOmatic from these customers and from the market. In furtherance of its scheme, Worthington gave notice that it was terminating the entire Supply Agreement effective March 1, 2007, on account of the purported breach by BernzOmatic arising from its sale of PowerCell™ products.

20. On or about February 2, 2007, BernzOmatic sent a letter to Worthington in which BernzOmatic again expressly denied that it breached the Supply Agreement in any manner, and demanded that Worthington rescind its purported termination of the Supply Agreement.

21. Despite the fact that BernzOmatic had not breached the Supply Agreement, which, on information and belief, Worthington knew, and despite BernzOmatic's demands that Worthington rescind its purported termination, Worthington refused to rescind its termination notice. Worthington's purported termination of the Supply Agreement is itself a breach of the Supply Agreement.

22. The Supply Agreement that Worthington purported to terminate included prices at which Worthington's cylinders would be sold to BernzOmatic. Following Worthington's purported termination of the Supply Agreement, Worthington refused to sell cylinders at the prices set forth in the Supply Agreement, and began selling Covered Cylinders to BernzOmatic only at dramatically increased prices, knowing that BernzOmatic had no alternative sources for such cylinders and thus had no choice but to pay the greatly-increased prices. Ultimately, after

much cost and effort, BernzOmatic was able to find an alternative supplier, but even then, only at prices far above those to which BernzOmatic was entitled pursuant to the Supply Agreement.

23. Worthington breached the Supply Agreement in additional ways. For example, Worthington failed to pay BernzOmatic royalties that were due by January 30, 2007. Specifically, by Amendment No. 1 to the Supply Agreement, Worthington agreed to pay BernzOmatic a royalty on each sale by Worthington of Covered Cylinders to a company named Rothenberger, and Worthington further agreed to provide supporting documentation for such sales. A true and correct copy of Amendment No. 1 is attached hereto as Exhibit 2, and is specifically incorporated herein by reference.

24. In its letter of February 2, 2007, BernzOmatic gave notice to Worthington of the latter's breach of the Supply Agreement by the non-payment of royalties and failure to provide supporting documentation. BernzOmatic specifically demanded that Worthington make such royalty payments and provide the documentation immediately.

25. Despite BernzOmatic's demands, Worthington refused to pay BernzOmatic the royalties it owed and to produce the supporting documentation relating thereto.

26. Worthington also breached the Supply Agreement through the unauthorized and improper use of BernzOmatic's trade name, trade dress, trademark, and logos, as described more fully below.

27. Worthington was BernzOmatic's only supplier of Covered Cylinders, and Worthington knew that no other readily-available supplier could satisfy BernzOmatic's supply requirements. After improperly and unjustifiably terminating the Supply Agreement, Worthington wrongfully and dramatically increased the prices it charged BernzOmatic for Covered Cylinders, and also imposed on BernzOmatic more onerous payment terms.

Worthington's termination of the Supply Agreement immediately disrupted BernzOmatic's ability to supply its customers.

28. In furtherance of the aforementioned scheme, and soon after improperly and unjustifiably terminating the Supply Agreement, Worthington began manufacturing and selling its own hand torch cylinders, in direct competition with BernzOmatic. These hand torch cylinders were physically similar to the hand torch cylinders sold by BernzOmatic, and used the same trade dress as that used by BernzOmatic for years, including but not limited to BernzOmatic's distinctive blue color for propane cylinders and yellow for MAPP gas cylinders. On information and belief, Worthington's hand torch cylinders are substantially the same product they sold to BernzOmatic.

29. Also in furtherance of the aforementioned scheme, Worthington sold such hand torch cylinders to favored purchasers who were competitors of BernzOmatic, including, on information and belief, one or more of the Thermadyne companies (Thermadyne Holdings Corporation and its subsidiaries and affiliates, which sell torch and torch-related products under brands including Victor® and TurboTorch®), at lower prices than they charged BernzOmatic. By so doing, Worthington injured competition and deprived BernzOmatic of sales and profits to which it was lawfully entitled.

30. Worthington also began an advertising campaign that used the BernzOmatic trade name, trademark, logo and trade dress in a disparaging manner. The advertising campaign falsely stated and implied that BernzOmatic was not the single source for BERNZOMATIC® hand torch cylinders. Worthington's advertising falsely implied that Worthington, and not BernzOmatic, was the single source of BERNZOMATIC® hand torch cylinders.

31. For example, one of Worthington's print ads depicted a hand tearing away a BERNZOMATIC® label on its hand torch cylinder, revealing a WORTHINGTON label underneath. The ad told the consumer to "Uncover the name you've trusted all along." A true and correct copy of this ad is attached hereto as Exhibit 2 and incorporated herein.

32. The Worthington advertising campaign falsely stated and implied, among other things, that consumers have not trusted and should not trust BERNZOMATIC®, that the name that consumers have "trusted all along" is Worthington, that consumers have actually been purchasing a Worthington product when they thought they were purchasing a BERNZOMATIC® product, and that BERNZOMATIC® was not the brand they have come to trust and rely on.

33. By its actions, Worthington is seeking to appropriate for itself the decades of consumer goodwill, brand equity, and reputation for safety and quality that BernzOmatic has built and maintained under the BERNZOMATIC® trademark. Worthington has sought to impugn and denigrate the BERNZOMATIC® trademark and BernzOmatic's reputation so that it can usurp BernzOmatic's goodwill and customer relationships and capture BernzOmatic's business without making the enormous, time-consuming brand investment that BernzOmatic has made.

34. Worthington's advertising campaign is and was unfair and deceptive, breached the Supply Agreement, and has interfered with and injured BernzOmatic's customer relationships.

COUNT I – BREACH OF CONTRACT
(WRONGFUL TERMINATION OF CONTRACT)

35. BernzOmatic realleges and reincorporates Paragraphs 1 through 33 above as if fully set forth herein.

36. The Supply Agreement is a valid and enforceable contract between BernzOmatic and Worthington.

37. BernzOmatic has performed all contractually stated conditions precedent, and has otherwise fully complied with all of the terms and conditions of the Supply Agreement.

38. Worthington has improperly and unjustifiably terminated the Supply Agreement. Thus, Worthington has breached the Supply Agreement.

39. After improperly terminating the Supply Agreement, Worthington refused to honor the prices it agreed to charge BernzOmatic under the Supply Agreement. Worthington has improperly, unilaterally, and repeatedly increased its prices to BernzOmatic for the Covered Cylinders above the prices agreed upon in the Supply Agreement.

40. Article III of the Supply Agreement concerns pricing of the Covered Cylinders. Specifically, Section 3.1 provides that “Prices to be paid by BernzOmatic to [Worthington] for the Covered Cylinders provided hereunder” shall be calculated in conformity with a formula set out on Exhibit A. Consistent with the purposes of a requirements contract, Section 3.1 and Exhibit A to the Supply Agreement in essence provide that Worthington may only increase prices to: (a) cover increases in raw material costs (for example, the market price of steel used to make the cylinders), or (b) cover increases in product costs attributable to changes in applicable governmental regulations or industry requirements (for example, a regulatory change that requires that the Covered Cylinders have thicker steel walls, requiring additional steel). Section 3.1 explicitly provides that “[i]n general, no change in price will be made due to manufacturing or SG&A cost”

41. On repeated occasions, Worthington dramatically raised the prices it would charge BernzOmatic. Each time, Worthington did not provide BernzOmatic with any justification for the price increases and did not provide the required notices to BernzOmatic.

42. Section 3.1 of the Supply Agreement also requires Worthington to provide BernzOmatic with any new pricing information one month prior to each calendar quarter. Worthington failed to comply with Section 3.1 before repeatedly imposing new prices on BernzOmatic.

43. Worthington (and its predecessor) has long been BernzOmatic's sole supplier of Covered Cylinders, and Worthington knows that BernzOmatic had no other readily-available supplier. Worthington's termination of the Supply Agreement injured and disrupted BernzOmatic's ability to supply its customers. Because of this, Worthington has been able to extort prices from BernzOmatic that exceed the prices provided in the Supply Agreement, exceed the competitive rate, exceed the rate Worthington charges to other buyers of Covered Cylinders, and are so high as to make BernzOmatic's sales of cylinders unprofitable and uncompetitive.

44. BernzOmatic seeks damages from Worthington arising from Worthington's wrongful termination of the Supply Agreement.

COUNT II – BREACH OF CONTRACT

(FAILURE TO MAKE REQUIRED ROYALTY PAYMENTS)

45. BernzOmatic realleges and reincorporates Paragraphs 1 through 44 above as if fully set forth herein.

46. Amendment No. 1 to the Supply Agreement, dated January 1, 2006, set forth an agreement whereby Worthington agreed to pay BernzOmatic certain royalty payments in partial consideration for resolution of a dispute between the parties related to Worthington's ability to

make sales of Covered Cylinders in Europe to BernzOmatic's customers, including Rothenberger A.G. ("Rothenberger").

47. Pursuant to Amendment No. 1 to the Supply Agreement, Worthington was obligated to pay a royalty to BernzOmatic (the "BernzOmatic Royalty Payment"). *See* Paragraph 3 of Amendment No. 1 to the Supply Agreement (Exhibit 2 hereto) at pages 1-3.

48. Worthington was obligated to make BernzOmatic Royalty Payments on January 30, 2007, July 30, 2007, and January 30, 2008. Worthington was required to support each of its payments with documentation, the accuracy of which is attested to by an officer of Worthington. Worthington has failed to make any of these required payments and has failed to provide any documentation whatsoever. Worthington has accordingly breached the Supply Agreement.

49. Amendment No. 1 to the Supply Agreement further required Worthington to make all books and records available to BernzOmatic (or a mutually agreeable third party inspector), upon reasonable request, to allow BernzOmatic to verify the quantities of cylinders sold to Rothenberger (and, in turn, the amount of the BernzOmatic Royalty Payment due for the relevant period). *See* Paragraph 4 of Amendment No. 1 to the Supply Agreement (Exhibit 2 hereto) at page 3.

50. Worthington has refused to make its books and records available to BernzOmatic or a mutually agreeable third party, and has accordingly breached the Supply Agreement.

51. BernzOmatic has been damaged by Worthington's breach by virtue of not receiving monies and payments to which it is contractually entitled.

52. Accordingly, BernzOmatic seeks damages and injunctive relief to require that Worthington promptly and specifically perform all of the terms and obligations applicable to it

pursuant to the Supply Agreement, including making its books and records available and making the required BernzOmatic Royalty Payments.

COUNT III – BREACH OF CONTRACT

**(UNAUTHORIZED AND IMPROPER USE
OF BERNZOMATIC’S TRADE NAMES, TRADE DRESS, TRADEMARKS AND LOGOS)**

53. BernzOmatic realleges and reincorporates Paragraphs 1 through 52 above as if fully set forth herein.

54. Section 4.3 of the Supply Agreement provides that “BernzOmatic may designate certain of the trade names, trademarks or logos owned by BernzOmatic (collectively, the “Trade Names”) for use on the labeling of Covered Cylinders supplied by [Worthington] under this Agreement.”

55. In Section 4.3 of the Supply Agreement, Worthington promised not to “make use, direct or indirect, of the Trade Names except as provided by this Agreement or except as otherwise advised by BernzOmatic to [Worthington] in writing.”

56. In or about July 2007, Worthington launched an advertising campaign in various trade magazines and, on information and belief, in other publications. That advertising campaign uses the BERNZOMATIC® trade name, trademark, logo and trade dress in a disparaging manner and casts the BERNZOMATIC® trade name, trademark, logo and trade dress in a negative light.

57. Worthington’s use of the BERNZOMATIC® trade name, trademark, logo and trade dress in the advertising campaign was not permitted under the Supply Agreement, nor did BernzOmatic authorize such use in any other way, including in writing.

58. Accordingly, Worthington's use of the BERNZOMATIC® trade name, trademark, logo and trade dress in the advertising campaign breached Section 4.3 of the Supply Agreement.

59. Worthington's breach has harmed BernzOmatic by damaging its good will, diminishing its sales, and unjustly increasing the profits of Worthington, among other things. In addition, Worthington's illegal conduct continues to cause injury to BernzOmatic, some of which is incapable of remedy by monetary measure alone and can only be remedied by injunctive relief.

COUNT IV – BREACH OF CONTRACT

**(FAILURE TO PROVIDE MOST FAVORED CUSTOMER PRICING
AND BREACH OF PAYMENT TERMS)**

60. BernzOmatic realleges and reincorporates Paragraphs 1 through 59 above as if fully set forth herein.

61. Section 3.3 of the Supply Agreement is titled "Most Favored Customer Pricing" and provides that "[t]he parties agree that WCW, in offering Covered Cylinders from time to time to WCW Direct Account Customers, shall not sell Covered Cylinders at a price lower than that which is provided to BernzOmatic. The parties further agree that the prices charged to BernzOmatic, as compared to other customers of Covered Cylinders, should account for the significant cost savings resulting from the long-term commitment and expected volumes to be purchased by BernzOmatic under the Agreement." Thus, Section 3.3 requires WCW to give BernzOmatic its best pricing and not to sell Covered Cylinders to any other customer at prices lower than WCW charges BernzOmatic.

62. Section 3.4 of the Supply Agreement further states that the payment terms applicable to BernzOmatic's purchases of Covered Cylinders are "net 60 days after date of invoice, with a 2% discount for payments received within 30 days of invoice date."

63. WCW has charged other customers, including but not limited to its Direct Account Customers, lower prices than it has charged BernzOmatic, thereby breaching Section 3.3. Additionally, after wrongfully and unilaterally terminating the Supply Agreement, WCW failed to honor the contractually-agreed payment terms set forth in Section 3.4. BernzOmatic has been damaged as a result of both breaches.

COUNT V – VIOLATION OF LANHAM ACT SECTION 43(a)

64. BernzOmatic and NOC reallege and reincorporate Paragraphs 1 through 63 above as if fully set forth herein.

65. In 2007, Worthington began an advertising campaign that falsely states or implies that BernzOmatic is not the single source for BERNZOMATIC® hand torch cylinders. Worthington's advertising falsely implies that Worthington, and not BernzOmatic, is the single source of BERNZOMATIC® hand torch cylinders.

66. For example, one of Worthington's print ads depicts a hand tearing away a BERNZOMATIC® label on its hand torch cylinder, revealing a Worthington label underneath. The ad tells the consumer to "Uncover the name you've trusted all along."

67. The Worthington advertising campaign falsely states or implies, among other things, that consumers have not trusted and should not trust BERNZOMATIC®, that consumers have actually been purchasing a Worthington product when they thought they were purchasing a BERNZOMATIC® product, and that BERNZOMATIC® is not the brand they have grown to trust. Worthington's claims are false and misleading.

68. Worthington's false and misleading descriptions and representations of fact are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Worthington with BernzOmatic, or as to the origin, sponsorship, or approval of Worthington's and BernzOmatic's goods, and therefore constitute a violation of Section 43(a)(1)(A) of the Lanham Act.

69. Worthington's false and misleading descriptions and representations of fact in its commercial advertising misrepresents the nature, characteristic, qualities of Worthington's and BernzOmatic's goods, and therefore constitute a violation of Section 43(a)(1)(B) of the Lanham Act.

70. Worthington's violations of the Lanham Act have damaged BernzOmatic and NOC by damaging their good will, diminishing its sales, and unjustly increasing the profits of Worthington, among other things. In addition, Worthington's illegal conduct continues to cause injury to BernzOmatic and NOC, some of which is incapable of remedy by monetary measure alone and can only be remedied by injunctive relief. This case is an exceptional case pursuant to Section 35 of the Lanham Act.

COUNT VI- UNFAIR COMPETITION AND DECEPTIVE TRADE PRACTICES

(NORTH CAROLINA GEN. STAT. § 75-1.1)

71. BernzOmatic realleges and reincorporates Paragraphs 1 through 70 above as if fully set forth herein.

72. Worthington has engaged in unfair competition and deceptive trade practices by using the BERNZOMATIC® trade name, trademark and logo to mislead consumers and customers. Specifically, Worthington has falsely stated or implied, among other things, that consumers have not trusted and should not trust BERNZOMATIC®, that the name that

consumers have “trusted all along” is Worthington, that consumers have actually been purchasing a Worthington product when they thought they were purchasing a BERNZOMATIC® product, and that BERNZOMATIC® is not the brand they have grown to trust.

73. Worthington has also engaged in unfair competition by interfering with BernzOmatic’s customer relationships in an attempt to take business away from BernzOmatic.

74. Worthington has also engaged in unfair competition by improperly and unjustifiably raising the prices it charges to BernzOmatic for hand torch cylinders. Because Worthington (or its predecessor) has been BernzOmatic’s sole supplier for so many years, and BernzOmatic has no other real option to purchase hand torch cylinders at competitive prices, Worthington knows that it has the power to injure BernzOmatic and has unlawfully exercised that power to injure BernzOmatic. Worthington wrongly, deceptively, and unfairly asserted its power over BernzOmatic to injure BernzOmatic and its ability to compete in the market.

75. Worthington has accordingly violated North Carolina’s Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1.

76. Worthington’s actions are in commerce and affect commerce, and have proximately caused injury to BernzOmatic. BernzOmatic’s injuries include, but are not limited to, loss of good will, injury to its customer relationships, and loss of sales.

77. BernzOmatic seeks compensatory damages for its injuries, to be trebled pursuant to N.C. Gen. Stat. § 75-16, plus its reasonable attorneys’ fees, pursuant to N.C. Gen. Stat. § 75-16.1.

COUNT VII – TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

(NORTH CAROLINA COMMON LAW)

78. BernzOmatic realleges and reincorporates Paragraphs 1 through 77 above as if fully set forth herein.

79. In an effort to misappropriate BernzOmatic's hand torch cylinder business, Worthington engaged in efforts, including but not limited to the publication of the advertisements referenced in Counts III and IV, to diminish BernzOmatic's reputation and harm its relationships with its customers, and to impose drastic price increases upon BernzOmatic in an effort to damage BernzOmatic's ability to effectively compete in the hand torch cylinder market.

80. Worthington had no lawful right, privilege, or justification to interfere with BernzOmatic's customers or other business relationships. Worthington's conduct was malicious, and in willful and wanton disregard of BernzOmatic's rights.

81. BernzOmatic has been greatly injured by Worthington's wrongful conduct. BernzOmatic's damages include, but are not limited to, loss of good will, injury to its customer relationships, and loss of sales and profits. BernzOmatic seeks to recover its compensatory damages and also seeks an injunction prohibiting Worthington from further interference with BernzOmatic's business relationships.

COUNT VIII – PRICE DISCRIMINATION

(ROBINSON-PATMAN ACT, 15 U.S.C. § 13)

82. BernzOmatic realleges and reincorporates Paragraphs 1 through 81 above as if fully set forth herein.

83. Worthington is engaged in interstate commerce in the manufacture and sale of hand torch cylinders. These cylinders have a volume of between 40 and 70 cubic inches (in most instances, approximately 62 cubic inches), are capable of holding pressurized flammable gases including propane, oxygen, MAPP gas, and propylene gas, and generally have a threaded valve on top that permits the attachment of a torch. Such hand torch cylinders are commodities.

84. As part of the aforementioned scheme to sell Covered Cylinders directly to retail mass merchants and others, and to compete unfairly with BernzOmatic and exclude BernzOmatic from these customers and from the market in order to maximize Worthington's sales and profits at the expense of BernzOmatic, Worthington has engaged in unlawful price discrimination in violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), including by selling hand torch cylinders to favored purchasers at discriminatory (*i.e.*, lower) prices than those charged to BernzOmatic. Upon information and belief, such sales have been made to one or more of the Thermadyne companies, and perhaps others as well.

85. Worthington's sales of hand torch cylinders to BernzOmatic and its competitors were made in interstate commerce, were made at approximately the same time (and continue to be made), and involved hand torch cylinders of like grade and quality.

86. The effect of Worthington's discriminatory pricing is and has been to reduce or eliminate competition, to the detriment and injury of BernzOmatic.

87. BernzOmatic's injury as a result of Worthington's price discrimination includes, but is not limited to, lost sales and lost profits. BernzOmatic is entitled to trebled compensatory damages, plus reasonable attorneys' fees, pursuant to 15 U.S.C. § 15.

PRAYER FOR RELIEF

WHEREFORE, BernzOmatic and NOC respectfully request that this Court provide the following relief:

- a) enter judgment in favor of BernzOmatic and NOC and against Worthington on all counts hereof;
- b) issue a Preliminary and Permanent Injunction against Worthington, its officers, agents, servants, employees and attorneys, and upon all those persons in active concert or participation with them who receive actual notice of the Injunction by personal service or otherwise, requiring that Worthington cease and desist from making descriptions of fact and false advertising and that it prepare and distribute corrective advertising to correct such false statements;
- c) issue a Preliminary and Permanent Injunction against Worthington, its officers, agents, servants, employees and attorneys, and upon all those persons in active concert or participation with them who receive actual notice of the Injunction by personal service or otherwise, requiring that Worthington cease and desist from interfering with BernzOmatic's business and customer relationships;
- d) issue a Preliminary and Permanent Injunction against Worthington, its officers, agents, servants, employees and attorneys, and upon all those persons in active concert or participation with them who receive actual notice of the Injunction by personal service or otherwise, requiring that Worthington make available to BernzOmatic all of its books and records relevant to the BernzOmatic Royalty Payment, as required by Amendment No. 1 to the Supply Agreement;
- e) order Worthington to pay BernzOmatic damages plus interest, for Worthington's various breaches of the Supply Agreement;
- f) order Worthington to pay BernzOmatic and NOC treble damages plus interest, for Worthington's violations of the Lanham Act;
- g) order Worthington to pay BernzOmatic treble damages plus interest, plus its attorneys' fees, for Worthington's violations of the North Carolina Unfair and Deceptive Trade Practices Act;
- h) order Worthington to pay BernzOmatic damages plus interest, as well as punitive damages, for Worthington's malicious, willful and wanton interference with BernzOmatic's business relationships;
- i) order Worthington to pay BernzOmatic treble damages plus interest, plus its attorneys' fees, for Worthington's unlawful price discrimination;
- j) award BernzOmatic and NOC their costs and expenses of litigation, including reasonable attorneys' fees; and

- k) award Bernzomatic and NOC such other and further relief as this Court deems just, proper, necessary, and appropriate.

JURY DEMAND

Plaintiffs respectfully request a trial by jury as to all issues so triable.

Respectfully Submitted,

/s/

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