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**UNITED STATES DISTRICT COURT
 IN AND FOR THE DISTRICT OF ARIZONA**

18 SOILWORKS, LLC, an Arizona
 19 corporation,
 20
 21 Plaintiff / Counterdefendant /
 22 Counterclaimant,
 23
 24 v.
 25 MIDWEST INDUSTRIAL SUPPLY,
 26 INC., an Ohio corporation authorized to do
 27 business in Arizona,
 28
 29 Defendant / Counterclaimant /
 30 Counterdefendant.

NO.: 2:06-CV-2141-DGC

**MIDWEST INDUSTRIAL SUPPLY,
 INC.’S MOTION IN LIMINE TO
 EXCLUDE TESTIMONY AND
 EVIDENCE OFFERED BY
 SOILWORKS RELATED TO
 CERTAIN ELEMENTS OF
 SOILWORKS’ FALSE
 ADVERTISING CLAIM**

I. INTRODUCTION

Midwest moves the Court for an order, *in limine*, barring Soilworks from introducing any evidence or testimony regarding the following elements of Soilworks’ false advertising claim: (1) that Midwest’s alleged statements deceived or had a tendency to deceive the consumer audience; (2) that the deception was material; (3) that Soilworks

1 was injured as a result; and (4) that Soilworks suffered damages.¹

2 Midwest requested Soilworks to produce any information that it had on these
3 elements of its false advertising claim during discovery. Soilworks produced no such
4 evidence. Rule 37(c) bars Soilworks from now introducing such evidence at trial.
5

6 **II. ARGUMENT**

7 Rule 26(e) of the Federal Rules of Civil Procedure requires a party who has
8 responded to an interrogatory, request for production, or request for admission to
9 supplement or correct its response. Rule 37(c)(1) provides that a party's failure to
10 disclose information required by Rule 26(e), without substantial justification, bars the
11 party from using that information as evidence at trial unless such failure is harmless.
12

13 Midwest requested, but Soilworks failed to produce during discovery, any
14 information related to the above-identified elements of Soilworks' false advertising
15 claim. For example, Midwest's document production requests asked for all documents
16 that supported any and all of Soilworks' claims. In response, Soilworks' produced *no*
17 documents related to any of these elements. (See Soilworks' Response to Production
18 Request No. 27, the relevant pages of which are attached as Exhibit A.)
19
20

21 Midwest also served Soilworks with the following requests for admissions:

22 **Request No. 11:** Admit that the Defendant has not disseminated
23 information and/or documentary materials in a manner likely to cause
24 deception among customers of Plaintiffs' products regarding Plaintiff's
25 conduct and products.

26 **Request No. 16:** Admit that Plaintiff has not been damaged monetarily by
27 any action of Defendant as set forth in the Complaint.

28 ¹ Midwest has filed a separate motion *in limine* to bar Soilworks from attempting to introduce, in support of its false advertising claim, any allegedly false statements by Midwest that were not produced or disclosed by Soilworks during discovery.

1 Soilworks denied these requested admissions. (See Soilworks' Responses to
2 Requests for Admissions Nos. 11 and 16, attached as Exhibit B.) In answering the
3 corresponding interrogatories, which requested Soilworks to set forth each and every
4 reason for the denial of any requested admissions, Soilworks responded as follows:
5

6 11. Request for Admission No. 11 is denied because Defendant has
7 disseminated information in a manner that is likely to cause deception
8 among consumers of Plaintiff's products regarding Plaintiff's conduct and
9 products.

10 16. Request for Admission No. 16 is denied because Plaintiff has most
11 certainly suffered monetary damages as a result of the actions taken by
12 Defendant. The precise amount of said damages has yet to be calculated
13 and continues to amount.

14 (See Soilworks' Responses to Second Set of Interrogatories, attached as Exhibit C.)

15 Soilworks produced no substantive information in response to either of these
16 interrogatories concerning the alleged deception and Soilworks' purported injury and
17 damages. Soilworks did not supplement supplemented its responses. Furthermore,
18 when deposed, Soilworks' corporate representative stated that he did not know what
19 irreparable harm to Soilworks that Midwest has allegedly caused by its statements and he
20 could not estimate the damage that has been caused to Soilworks. (See C. Falkenberg
21 Dep., the relevant pages of which are attached as Exhibit D.) Information requested and
22 not disclosed during discovery cannot be used as trial evidence under Rule 37(c).
23

24 **III. CONCLUSION**

25 The Court should preclude Soilworks from presenting any evidence or testimony
26 regarding the specific elements of Soilworks' false advertising claim identified in Section
27 I above (deception, materiality, injury and damages).
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By: /s/ Jill Bautista
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **MIDWEST INDUSTRIAL SUPPLY, INC.’S MOTION *IN LIMINE* TO BAR TESTIMONY AND EVIDENCE OFFERED BY SOILWORKS RELATED TO CERTAIN ELEMENTS OF ITS FALSE ADVERTISING CLAIM** has been electronically filed on this 17th day of September, 2008. Notice of this filing will be sent to all parties by operation of the Court’s electronic filing system. Parties may access this filing through the Court’s system.

/s/ Jill Bautista
Jill Bautista

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