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18 *Attorneys for Defendant/Counterclaimant  
 19 Midwest Industrial Supply, Inc.*

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

22 SOILWORKS, LLC, an Arizona  
 23 corporation,  
 24  
 25 Plaintiff / Counterdefendant /  
 26 Counterclaimant,  
 27  
 28 v.  
 29 MIDWEST INDUSTRIAL SUPPLY,  
 30 INC., an Ohio corporation authorized to do  
 31 business in Arizona,  
 32  
 33 Defendant / Counterclaimant /  
 34 Counterdefendant.

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

**MIDWEST INDUSTRIAL SUPPLY,  
 INC.'S MOTION *IN LIMINE* TO  
 BAR EVIDENCE CONCERNING  
 SOILWORKS, LLC'S COSTS**

**I. INTRODUCTION**

Defendant Midwest Industrial Supply, Inc. (“Midwest”) moves this Court *in limine* to preclude Plaintiff Soilworks, LLC (“Plaintiff”) from presenting any evidence regarding Plaintiff’s costs for producing and marketing its products.

1 **II. ARGUMENT**

2 As part of its First Requests for Production of Documents and Things, Midwest asked  
3 Plaintiff to produce documents which would evidence its costs:

4 21. [Provide] [a]nnual, quarterly, and monthly documents, things, and  
5 electronically stored information from which the following may be determined  
6 for all of Plaintiff's Products: the amount of product sold, sales figures, gross  
7 receipts, production costs, manufacturing costs, material costs, and/or labor  
8 costs.

9 31. All documents, things, and electronically stored information regarding  
10 impressions, purchasing of keywords, Keywords and "costs per click" from all  
11 search engines Plaintiff advertises upon related to Plaintiffs Products.

12 (Soilworks, LLC's Responses to Midwests Industrial Supply, Inc.'s First Request for  
13 Production of Documents and Things ("Plaintiff's Response"), Requests 21 and 31, relevant  
14 pages attached as Exhibit A). Plaintiff did not initially provide any documents in response to  
15 these requests, and further, it failed to supplement its responses to provide responsive  
16 documents. Plaintiff, thus, is precluded pursuant to Fed. Civ. R. 37(c) from introducing any  
17 evidence at trial of its costs for producing and marketing its products.

18 Rule 26(e) of the Federal Rules of Civil Procedure requires that "[a] party who has ...  
19 responded to ... [a] request for production ... must supplement or correct its disclosure or  
20 response." Rule 37(c) of the Federal Rules of Civil Procedure provides that a party which  
21 fails to supplement its answers with new information – if its failure is not substantially  
22 justified or harmless – is "not allowed to use that information." *See Zhang v. American*  
23 *Gem Seafoods, Inc.*, 339 F.3d 1020, 1028 (9th Cir. 2003) (holding that non-disclosed manual  
24 was excluded pursuant to Fed.Civ.R. 37(c)); *see also Yeti by Molly, Ltd. v. Deckers Outdoor*  
25 *Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2007); *International Flora Technologies, Ltd. v.*  
26 *Clarins U.S.A., Inc.*, Case No. 06-1372-PHX-ROS, 2008 WL 4174894 (D.Ariz. 2008)

1 (holding that a non-disclosed patent claim was excluded pursuant to Fed. Civ. 37(c)(1)).

2 In response to Midwest's Request for Production 21, Plaintiff answered that it would  
3 "make responsive documents available" after the Court entered a Protective Order.  
4 (Plaintiff's Response, 21, Ex. A). Again, Plaintiff failed to supplement its response to  
5 provide any responsive documents. Thus, Plaintiff is precluded, pursuant to Fed.Civ.R.  
6 37(c), from introducing any evidence at trial concerning its production costs, manufacturing  
7 costs, material costs, and/or labor costs.  
8

9  
10 In response to Midwest's Request for Production 31, Plaintiff summarily objected and  
11 did not provide any responsive documents. (Plaintiff's Response, 31, Ex. A). Furthermore,  
12 Plaintiff completely failed to provide *any* documents in response to this request. Plaintiff,  
13 thus, is likewise precluded from introducing any evidence at trial concerning its purchasing  
14 of keywords and its costs for its other internet-based advertising.  
15

### 16 **III. CONCLUSION**

17 For the foregoing reasons, Midwest respectfully submits that the Court should enter  
18 an order precluding Plaintiff from presenting any evidence regarding Plaintiff's costs for  
19 producing and marketing its products.  
20

21  
22 Respectfully Submitted,

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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 CONCERNIG SOILWORKS, LLC’S COSTS** 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 A. Bautista  
Jill A. Bautista

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