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

13 SOILWORKS, LLC, an Arizona  
14 corporation,

15 Plaintiff / Counterdefendant /  
16 Counterclaimant,

17 v.

18 MIDWEST INDUSTRIAL SUPPLY, INC.,  
19 an Ohio corporation authorized to do  
20 business in Arizona,

21 Defendant / Counterclaimant /  
22 Counterdefendant.

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

**SOILWORKS, LLC'S RESPONSE TO  
MIDWEST INDUSTRIAL SUPPLY,  
INC.'S MOTION *IN LIMINE* (DOC.  
#102) TO EXCLUDE TESTIMONY  
AND EVIDENCE OFFERED BY  
SOILWORKS RELATED TO  
CERTAIN ELEMENTS OF  
SOILWORKS' FALSE  
ADVERTISING CLAIM**

(Before the Honorable David G. Campbell)

23 Careful analysis of Midwest's motion to exclude testimony and evidence related to  
24 "certain elements of Soilworks' false advertising claim" (the "Motion") reveals on the face  
25 of the Motion why it must be denied. Midwest's Motion is based upon Soilworks' responses  
26 to written discovery requests. Those responses are attached to Midwest's Motion at Exhibits  
27 A, B, and C. Exhibit A shows on the face of it that it was served upon Midwest on July 23,  
28 2007. Exhibit B shows on the face of it that it was served upon the Defendant December 31,  
2007. Exhibit C shows on the face of it that it also was served on Defendant on December  
31, 2007.

More than three months later, on April 9, 2008, deposition testimony was elicited  
from Chad Falkenberg, and on April 8, 2008, Midwest took deposition testimony from  
Dorian Falkenberg. Pages from the deposition transcript of Chad Falkenberg are attached to

1 Defendant's Motion at Exhibit D. Exhibit D itself shows why Midwest's Motion should be  
2 denied. On page 116 of Exhibit D, counsel for Midwest states, "Do you know what  
3 irreparable harm is? Answer: "I have an idea." Question: "I will represent to you that when  
4 I use that term I mean harm that can't be repaired monetarily... ."

5 On page 122 of Exhibit D, counsel for Midwest asks the following question, "Do you  
6 know of any damages you have suffered that you can quantify?"

7 At line 9 of page 122 of Exhibit D, Midwest's counsel again asks, "But do you know  
8 of anything that you can quantify?"

9 At line 12 of page 122 of Exhibit D, Midwest's counsel asks, "So I guess again the  
10 question is as you sit here today do you know of any damage that you can quantify as you sit  
11 here today?"

12 Similarly, through the next two pages of Exhibit D to Midwest's Motion, Midwest's  
13 counsel continues to badger Mr. Falkenberg to "quantify" that which Midwest's counsel  
14 acknowledges "...can't be repaired monetarily."

15 Black's Law Dictionary defines "irreparable injury" to be: "An injury that cannot be  
16 adequately measured or compensated by money... ." Difficulty in quantifying damages does  
17 not preclude evidence of their existence, and Soilworks is entitled to offer evidence that  
18 Midwest's conduct has caused it harm.

19 Midwest has had, and has taken advantage of, every opportunity to obtain discovery  
20 on the matters which it now seeks to be precluded. Soilworks is entitled to offer testimony  
21 with regard to the effect that Midwest's false advertising has had on Soilworks' business.

22 Dated this 24<sup>th</sup> day of September, 2008.

23 KUTAK ROCK LLP

24  
25 By \_\_\_\_\_ /s E. Scott Dosek  
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 24, 2008, the foregoing **SOILWORKS, LLC'S RESPONSE TO MIDWEST'S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY AND EVIDENCE OFFERED BY SOILWORKS RELATED TO CERTAIN ELEMENTS OF SOILWORKS' FALSE ADVERTISING CLAIM** was filed electronically. Notice of this filing will be sent to all parties by operations of the Court's electronic filing system. Parties may access this filing through the Court's system.

\_\_\_\_\_  
/s Amy S. Fletcher  
Amy S. Fletcher