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

Soilworks, LLC, an Arizona corporation,)
Plaintiff/Counterdefendant/)
Counterclaimant,)
vs.)
Midwest Industrial Supply, Inc., an Ohio)
corporation authorized to do business in)
Arizona,)
Defendant/Counterclaimant/)
Counterdefendant.)

No. CV-06-2141-PHX-DGC
ORDER SETTING TRIAL

A Final Pretrial Conference was held on October 9, 2008. Counsel appeared on behalf of Plaintiff and Defendant. On the basis of the parties' written submissions and the hearing,

IT IS HEREBY ORDERED:

1. Trial in this matter shall begin on **January 20, 2009, at 8:30 a.m.**
2. The trial shall last **4** days (January 20-23, 2009). Plaintiffs shall be allotted **9** hours of trial time and Defendants shall be allotted **9** hours of trial time. The Court will keep track of each side's time. Opening and closing statements, direct examination, and cross-examination shall be counted against the parties' allotted time.
3. A final conference shall be held on **January 15, 2009, at 4:00 p.m.** in Courtroom 603, Sandra Day O'Connor Federal Courthouse, 401 West Washington Street, Phoenix, Arizona 85003. Out-of-state counsel may participate by telephone.

1 4. The parties' proposed final pretrial order was approved by the Court as the
2 final pretrial order in this case. The order shall govern the presentation of evidence and other
3 trial issues, and, pursuant to Rule 16(e) of the Federal Rules of Civil Procedure, shall be
4 modified only to prevent manifest injustice. Evidence, objections, legal arguments, and relief
5 not requested or identified in the order shall not be available at trial, except to prevent
6 manifest injustice.

7 5. The Court considered Soilworks' motion in limine to exclude evidence of its
8 sales of Durasoil. Dkt. #108. For reasons stated on the record, the Court **denied** this motion.
9 The Court views this as a second motion for summary judgment that is not permitted under
10 the Court's case management schedule.

11 6. The Court considered Soilworks' motion in limine to exclude evidence of sales
12 of Soiltac and Gorilla Snot. Dkt. #109. For reasons stated on the record, the Court **denied**
13 the motion. Willful trademark infringement can include deliberate infringement, bad faith,
14 and an attempt to gain value of a competitor's established trademarks. *Lindy Pen Co., Inc.*
15 *v. Bic Pen Corp*, 982 F.2d 1400, 1406 (9th Cir. 1993). Midwest need not necessarily prove
16 an intent to deceive.

17 7. The Court considered Midwest's motion in limine to limit Soilworks' false
18 advertising evidence to four documents. Dkt. #101. For reasons stated on the record, the
19 Court **granted** this motion. Counsel for Soilworks stated that Soilworks' false advertising
20 claim is predicated on the four documents and no others. The four documents include two
21 letters written to an Alaskan customer, a press release, and a chart that appeared on
22 Midwest's website.

23 8. The Court considered Midwest's motion in limine to exclude certain evidence
24 of Soilworks' false advertising claim. The Court **granted** the motion with respect to the
25 issue of damages. Counsel for Soilworks indicated that they presently have no evidence of
26 damage from Midwest's false advertising, although they will seek injunctive relief. The
27 Court **denied** the motion with respect to other categories of evidence because it found
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1 Midwest's written discovery requests for that evidence to be too vague to justify an exclusion
2 of evidence.

3 9. The Court considered Midwest's motion in limine to bar evidence of
4 Soilworks' production costs. Dkt. #103. For reasons stated on the record, the Court **granted**
5 the motion. Soilworks will not be permitted to use any documents that were not produced
6 during the course of discovery. Soilworks' counsel indicated that they did not intend to do
7 so.

8 10. The Court considered Midwest's motion in limine to bar testimony and
9 evidence regarding the validity or construction of Midwest's patents. Dkt. #104. For reasons
10 stated on the record, the Court **granted** the motion. Soilworks will not be permitted to use
11 documentary evidence other than the patents themselves and Soilworks' July 2007 claim
12 chart. In addition, the Court found Midwest's patents to be valid in its summary judgment
13 ruling.

14 The Court and parties engaged in a discussion about this patent case. Counsel for
15 Soilworks stated that they do not know how Midwest claims that the Soilworks products
16 violate the patents. Nor do they know what claims are at issue. Moreover, both sides agreed
17 that there has not been a request for claims construction in this case. Because no side has
18 sought claims construction, Midwest will bear the risk of any ambiguity arising from patent
19 claims during the trial. If the jury cannot find infringement because the meaning of the
20 claims is not clear, Midwest will not prevail on its infringement claims. The discussion also
21 made clear that both sides intend to present patent infringement evidence through lay
22 witnesses and documents. The Court is concerned that this could prove quite confusing to
23 the jury, particularly when no claims have been construed, but the time for summary
24 judgment motions or *Markman* hearings has passed. Evidentiary objections and requests for
25 judgment may be made during the course of trial.

26 11. The Court considered Midwest's motion in limine regarding the advice-of-
27 counsel defense. Dkt. #105. The Court **denied** this motion as moot. Soilworks does not
28 assert such a defense.

1 12. The Court considered Midwest's motion in limine to bar testimony and
2 evidence regarding the composition of Durasoil. Dkt. #106. The Court **granted** the motion.
3 Soilworks' evidence concerning the components of Durasoil will be limited to the three-
4 ingredient list produced during discovery and the Material Safety Data Sheets produced
5 during discovery. Soilworks agreed that it does not intend to produce additional
6 documentary evidence.

7 13. The Court considered Midwest's motion in limine to bar testimony regarding
8 liability insurance. Dkt. #107. For reasons stated on the record, the Court **granted** the
9 motion. Soilworks does not intend to present such evidence.

10 14. The Court considered Midwest's motion in limine regarding innocent
11 trademark infringement. Dkt. #110. For reasons stated on the record, the Court **denied** the
12 motion. The Court's summary judgment ruling did not conclude that Soilworks' trademark
13 infringement has been willful. That issue will be decided at trial.

14 15. The Court distributed proposed voir dire and preliminary jury instructions to
15 the parties. These will be addressed at the final conference on **January 15, 2009**.

16 16. The parties shall engage in a face-to-face settlement conference, assisted by a
17 Magistrate Judge or paid mediator, on or before **December 15, 2008**. Clients are required
18 to attend. The parties shall promptly notify the Court if a settlement is reached.

19 DATED this 16th day of October, 2008.

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David G. Campbell
United States District Judge