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

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

NO.: 2:06-CV-2141-DGC  
**JOINT PROPOSED PRELIMINARY  
 JURY INSTRUCTION**

1           The plaintiff and the defendant are competitors and both market dust control and soil  
2 stabilization products. Each party alleges that the other party is liable for problems they each  
3 believe arise from how they compete in that industry. You will be charged with determining  
4 whether either party is liable and any damages involved based on the evidence, testimony,  
5 and the law as I instruct you at the end of this trial.  
6

7           First, as to the plaintiff's, Soilworks LLC's, claim against the defendant, Midwest  
8 Industrial Supply, Inc, Soilworks claims that Midwest made false statements about  
9 Soilworks' products, and about the scope of patents issued to Midwest. Soilworks' claim is  
10 based on two letters sent by Midwest to one of Soilworks' distributor in Alaska, along with a  
11 comparison chart on Midwest's website and a press release written by Midwest. You must  
12 determine whether the statements made by Midwest were false. Also, that Midwest made  
13 these statements in bad faith. I will explain the meaning of these terms as this trial draws to  
14 a close.  
15

16           Second, as to Midwest's claims against Soilworks, Midwest alleges that Soilworks has  
17 falsely stated that it is a manufacturer. For this claim, you must determine whether the  
18 statement made by Soilworks was false, was a statement of fact, was deceptive, influenced  
19 the purchasing decision of consumers, and has injured Midwest by costing Midwest potential  
20 sales.  
21

22           Next, Midwest claims that Soilworks willfully infringed on one of Midwest's  
23 registered trademarks, a trademark called Soil-Sement® where the word "Sement" is spelled  
24 with an "S." This Court has already determined that Soilworks infringed on Midwest's  
25 trademark for Soil-Sement®. You must determine whether Soilworks' infringement was  
26  
27  
28

1 willful. If you find willful infringement, you must then determine the amount of monetary  
2 relief to which Midwest is entitled due to Soilworks' willful trademark infringement.

3  
4 Midwest also alleges that Soilworks' Durasoil product infringes two of Midwest's  
5 registered patents. If Midwest proves that Soilworks infringed its patents, you must  
6 determine the amount of monetary relief to which Midwest is entitled due to Soilworks'  
7 patent infringement.

8  
9 Finally, Midwest claims that Soilworks has been unjustly enriched by its competitive  
10 practices, in essence, by the use of Midwest's Soil-Sement trademark and the infringement  
11 of Midwest's patents. You must determine whether Soilworks was enriched to Midwest's  
12 detriment. If you determine that Soilworks was unjustly enriched, you must then determine  
13 the amount of the unjust enrichment as monetary damage to Midwest.  
14

15 Dated this 9<sup>th</sup> day of January, 2009.

16 KUTAK ROCK LLP

17  
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 9, 2009, the foregoing **JOINT PROPOSED PRELIMINARY JURY INSTRUCTION** 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.

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/s Amy S. Fletcher

Amy S. Fletcher

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