

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

SOILWORKS, LLC, an Arizona corporation,

Plaintiff / Counterdefendant / Counterclaimant,

v.

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

Defendant / Counterclaimant / Counterdefendant.

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

STIPULATED PROTECTIVE ORDER

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted. Accordingly, the Court enters the following Protective Order. This order does not confer blanket protections on all disclosures or responses to discovery and the file protection it affords extends only to the limited information or items that are entitled under the applicable legal principles to treatment as confidential. As set forth in Section 10, below, this Protective Order creates no entitlement to file confidential information under seal; the Local rules of this Court set forth the procedures that must be followed and reflect the standards that will be applied when a party seeks permission from the court to file material

1 under seal.

2 **2. DEFINITIONS**

3 2.1 Party. Any party to this action, including all of its officers, directors,
4 employees, consultants, retained experts, and outside counsel (and their support staff).

5 2.2 Disclosure or Discovery Material. All items or information, regardless of the
6 medium or manner generated, stored, or maintained (including, among other things,
7 testimony, transcripts or tangible things) that are produced or generated in disclosures or
8 responses to discovery in this matter.

9 2.3 “CONFIDENTIAL” Information or Items. Information (regardless of how
10 generated, stored or maintained) or tangible things that qualify for protection under standards
11 developed under F.R.Civ.P.26(c).

12 2.4 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or
13 Items. Extremely sensitive “Confidential Information or Items” of a proprietary business or
14 technical nature, that would be of value to a competitor, potential competitor, customer
15 and/or potential customer of the Party or non-party holding the proprietary rights thereto, and
16 whose disclosure to another Party or non-party would create a substantial risk of serious
17 injury that could not be avoided by less restrictive means.

18 2.5 Receiving Party. A Party that receives Disclosure or Discovery Material from
19 a Producing Party.

20 2.6 Producing Party. A Party or non-party that produces Disclosure or Discovery
21 Material in this action.

22 2.7 Designating Party. A Party or non-party that designates information or items
23 that it produces in disclosures or in responses to discovery as “CONFIDENTIAL” or
24 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

25 2.8 Protected Material. Any Disclosure or Discovery Material that is designated as
26 “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

27 2.9 Outside Counsel. Attorneys who are not employees of a Party but who are
28 retained to represent or advise a Party in this action.

1 2.10 House Counsel. Attorneys who are employees of a Party.

2 2.11 Counsel (without qualifier). Outside Counsel and House Counsel (as well as
3 their support staffs).

4 2.12 Expert. A person with specialized knowledge or experience in a matter
5 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert
6 witness or as a consultant in this action and who is not a past or a current employee of a
7 Party or of a competitor of a Party's and who, at the time of retention, is not anticipated to
8 become an employee of a Party or a competitor of a Party's. This definition includes a
9 professional jury or trial consultant retained in connection with this litigation.

10 2.13 Professional Vendors. Persons or entities that provide litigation support
11 services (e.g., photocopying; videotaping; translating; preparing of exhibits or
12 demonstrations; organizing, storing, retrieving data in any form or medium; etc.) and their
13 employees and subcontractors.

14 **3. SCOPE**

15 The protections conferred by this Order cover not only Protected Material (as defined
16 above), but also any information copied or extracted therefrom, as well as all copies,
17 excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations
18 by parties or counsel to or in court or in other settings that might reveal Protected Material.

19 **4. DURATION**

20 Even after the termination of this litigation, the confidentiality obligations imposed by
21 this Order shall remain in effect until a Designating Party agrees otherwise in writing or a
22 court order otherwise directs.

23 **5. DESIGNATING PROTECTED MATERIAL**

24 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each
25 Party or non-party that designates information or items for protection under this Order must
26 take care to limit any such designation to specific material that qualifies under the
27 appropriate standards. A Designating Party must take care to designate for protection only
28 those parts of material, documents, items, or oral or written communications that qualify – so

1 that other portions of the material, documents, items, or communications for which
2 protection is not warranted are not swept unjustifiably within the ambit of this Order.

3 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
4 shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to
5 unnecessarily encumber or retard the case development process, or to impose unnecessary
6 expenses and burdens on other parties, expose the Designating Party to sanctions.

7 If it comes to a Party's or a non-party's attention that information or items that it
8 designated for protection do not qualify for protection at all, or do not qualify for the level of
9 protection initially asserted, that Party or non-party must promptly notify all other parties
10 that it is withdrawing the mistaken designation.

11 5.2 Manner and Timing of Designations. Except as otherwise provided in this
12 Order (see, e.g., second paragraph of Section 5.2(a), below), or as otherwise or ordered,
13 material that qualifies for protection under this Order must be clearly so designated before
14 the material is disclosed or produced.

15 Designation in conformity with this Order requires:

16 (a) for information in documentary form (apart from transcripts of depositions or
17 other pretrial or trial proceedings), that the Producing Party affix the legend
18 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" at the
19 top of each page that contains protected material. If only a portion or portions of the material
20 on a page qualifies for protection, the Producing Party also must clearly identify the
21 protected portions(s) (e.g., by making appropriate markings in the margins) and must
22 specify, for each portion, the level of protection being asserted (either "CONFIDENTIAL"
23 or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY").

24 A Party or non-party that makes original documents or materials available for
25 inspection need not designate them for protection until after the inspecting Party has
26 indicated which material it would like copied and produced. During the inspection and
27 before the designation, all of the material made available for inspection shall be deemed
28 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." After the inspecting Party

1 has identified the documents it wants copied and produced, the Producing Party must
2 determine which documents, or portions thereof, qualify for protection under this Order,
3 then, before producing the specified documents, the Producing Party must affix the
4 appropriate legend (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’
5 EYES ONLY”) at the top of each page that contains Protected Material. If only a portion or
6 portions of the material on a page qualifies for protection, the Producing Party also must
7 clearly identify the protected portion(s) (e.g., by making appropriate markings in the
8 margins) and must specify, for each portion, the level of protection being asserted (either
9 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

10 (b) for testimony given in other pretrial or trial proceedings, that the Party or
11 non-party offering or sponsoring the testimony identify on the record, before the close of the
12 hearing, or other proceeding, all protected testimony, and further specify any portions of the
13 testimony that qualify as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”
14 When it is impractical to identify separately each portion of testimony that is entitled to
15 protection, or when it appears that substantial portions of the testimony may qualify for
16 protection, the Party or non-party that sponsors, offers, or gives the testimony may invoke on
17 the record (before the proceeding is concluded) a right to have up to 20 days to identify the
18 specific portions of the testimony as to which protection is sought and to specify the level of
19 protection being asserted (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
20 ATTORNEYS’ EYES ONLY”). Only those portions of the testimony that are appropriately
21 designated for protection within the 20 days shall be covered by the provisions of this
22 Protective Order.

23 Transcript pages containing Protected Material must be separately bound by the court
24 reporter, who must affix to the top of each such page the legend “CONFIDENTIAL” or
25 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” as instructed by the Party or
26 non-party offering or sponsoring the witness or presenting the testimony.

27 (c) for testimony given in a deposition, that the Party or non-party offering or
28

1 sponsoring the testimony may invoke on the record (before the deposition or proceeding is
2 concluded) a right to have up to 20 days to identify the specific portions of the testimony as
3 to which protection is sought and to specify the level of protection being
4 asserted ("CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
5 ONLY"). Only those portions of the testimony that are appropriately designated for
6 protection within the 20 days shall be covered by the provisions of this Protective Order.

7 Transcript pages containing Protected Material must be separately bound by the court
8 reporter, who must affix to the top of each such page the legend "CONFIDENTIAL" or
9 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," as instructed by the Party or
10 non-party offering or sponsoring the witness or presenting the testimony.

11 (d) for information produced in some form other than documentary, and for any
12 other tangible items, that the Producing Party affix in a prominent place on the exterior of the
13 container or containers in which the information or item is stored the legend
14 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." If
15 only portions of the information or item warrant protection, the Producing Party, to the
16 extent practicable, shall identify the protected portions, specifying whether they qualify as
17 "CONFIDENTIAL" or as "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY."

18 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
19 designate qualified information or items as "CONFIDENTIAL" or "HIGHLY
20 CONFIDENTIAL – ATTORNEYS' EYES ONLY" does not, standing alone, waive the
21 Designating Party's right to secure protection under this Order for such material. If material
22 is appropriately designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL –
23 ATTORNEYS' EYES ONLY" after the material was initially produced, the Receiving Party,
24 on timely notification of the designation, must make reasonable efforts to assure that the
25 material is treated in accordance with the provisions of this Order.

26 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

27 6.1 Timing of Challenges. Absent good cause, a challenge to a Designating
28

1 Party's confidentiality designation shall occur by the later of (1) the date set forth in the
2 Court's scheduling order or (2) thirty (30) days from receipt of production.

3 6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating
4 Party's confidentiality designation must do so in good faith and must begin the process by
5 conferring directly (in voice to voice dialogue; other forms of communication are not
6 sufficient) with counsel for the Designating Party. In conferring, the challenging Party must
7 explain the basis for its belief that the confidentiality designation was not proper and must
8 give the Designating Party an opportunity to review the designated material, to reconsider
9 the circumstances, and, if no change in designation is offered, to explain the basis for the
10 chosen designation. A challenging Party may proceed to the next stage of the challenge
11 process only if it has engaged in this meet and confer process first.

12 6.3 Judicial Intervention. A Party that elects to press a challenge to a
13 confidentiality designation after considering the justification offered by the Designating
14 Party may file and serve a motion under this Court's Local Rules that identifies the
15 challenged material and sets forth in detail the basis for the challenge.

16 Until the court rules on the challenge, all parties shall continue to afford the material
17 in question the level of protection to which it is entitled under the Producing Party's
18 designation.

19 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

20 7.1 Basic Principles. A Receiving Party may use Protected Material that is
21 disclosed or produced by another Party or by a non-party in connection with this case only
22 for prosecuting, defending, or attempting to settle this litigation. Such Protected Material
23 may be disclosed only to the categories of persons and under the conditions described in this
24 Order. When the litigation has been terminated, a Receiving Party must comply with the
25 provisions of Section 11, below (FINAL DISPOSITION).

26 Protected Material must be stored and maintained by a Receiving Party at a location
27 and in a secure manner that ensures that access is limited to the persons authorized under this
28 Order.

1 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise
2 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
3 disclose any information or item designated CONFIDENTIAL only to:

4 (a) the Receiving Party’s Outside Counsel of record in this action, as well as
5 employees of said Counsel to whom it is reasonably necessary to disclose the information for
6 this litigation.

7 (b) the officers, director, and employees (including House Counsel) of the
8 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have
9 signed the “Agreement to Be Bound by Protective Order” (Exhibit A);

10 (c) experts (as defined in this Order) of the Receiving Party to whom disclosure is
11 reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by
12 Protective Order” (Exhibit A);

13 (d) the Court and its personnel;

14 (e) court reporters, their staffs, and professional vendors to whom disclosure is
15 reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by
16 Protective Order” (Exhibit A);

17 (f) during their depositions, witnesses in the action to whom disclosure is
18 reasonably necessary and who have signed the “Agreement to Be Bound by Protective
19 Order” (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions that
20 reveal Protected Material must be separately bound by the court reporter and may not be
21 disclosed to anyone except as permitted under this Protective Order.

22 (g) the author of the document or the original source of the information.

23 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
24 Information or Items. Unless otherwise ordered by the court or permitted in writing by the
25 Designating Party, a Receiving Party may disclose any information or item designated
26 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

27 (a) the Receiving Party’s Outside Counsel of record in this action, as well as
28 employees of said Counsel to whom it is reasonably necessary to disclose the information for

1 this litigation;

2 (b) Experts (as defined in this Order) (1) to whom disclosure is reasonably
3 necessary for this litigation, (2) who have signed the “Agreement to Be Bound by Protective
4 Order” (Exhibit A), and (3) as to whom the procedures set forth in paragraph 7.4, below,
5 have been followed;

6 (c) the Court and its personnel;

7 (d) court reporters, their staffs, and professional vendors to whom disclosure is
8 reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by
9 Protective Order” (Exhibit A); and

10 (e) the author of the document or the original source of the information.

11 7.4 Procedures for Approving Disclosure of “HIGHLY CONFIDENTIAL –
12 ATTORNEYS’ EYES ONLY” Information or Items to “Experts”

13 (a) Unless otherwise ordered by the court or agreed in writing by the Designating
14 Party, a Party that seeks to disclose to an “Expert” (as defined in this Order) any information
15 or item that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
16 ONLY” first must make a written disclosure to the Designating Party that (1) sets forth the
17 full name of the Expert and the city and state of his or her primary residence, (2) attaches a
18 copy of the Expert’s current resume, (3) identifies the Expert’s current employer(s),
19 (4) identifies each person or entity from whom the Expert has received compensation for
20 work in his or her areas of expertise or to whom the expert has provided professional
21 services at any time during the preceding five years, and (5) identifies (by name and number
22 of the case, filing date, and location of court) any litigation in connection with which the
23 Expert has provided any professional services during the preceding five years.

24 (b) A Party that makes a request and provides the information specified in the
25 preceding paragraph may disclose the subject Protected Material to the identified Expert
26 unless, within seven court days of delivering the request, the Party receives a written
27 objection from the Designating Party. Any such objection must set forth in detail the
28 grounds on which it is based.

1 (c) A Party that makes a timely written objection must meet and confer with the
2 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by
3 agreement. If no agreement is reached, the Party seeking to make the disclosure to the
4 Expert may file a motion seeking permission from the court to do so.

5 **8. PROTECTED MATERIAL SUBPOENAED OR ORDERED**
6 **PRODUCED IN OTHER LITIGATION**

7 If a Receiving Party is served with a subpoena or an order issued in other litigation
8 that would compel disclosure of any information or items designated in this action as
9 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” the
10 Receiving Party must so notify the Designating Party, in writing (by fax, if possible)
11 immediately and in no event more than three court days after receiving the subpoena or
12 order. Such notification must include a copy of the subpoena or court order.

13 The Receiving Party also must immediately inform in writing the Party who caused
14 the subpoena or order to issue in the other litigation that some or all the material covered by
15 the subpoena or order is the subject of this Protective Order. In addition, the Receiving Party
16 must deliver a copy of this Protective Order promptly to the Party in the other action that
17 caused the subpoena or order to issue.

18 The purpose of imposing these duties is to alert the interested parties to the existence
19 of this Protective Order and to afford the Designating Party in this case an opportunity to try
20 to protect its confidentiality interests in the court from which the subpoena or order issued.
21 The Designating Party shall bear the burdens and the expenses of seeking protection in that
22 court of its confidential material – and nothing in these provisions should be construed as
23 authorizing or encouraging a Receiving Party in this action to disobey a lawful directive
24 from another court.

25 **9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

26 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
27 Protected Material to any person or in any circumstance not authorized under this Protective
28 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of

1 the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected
2 Material, (c) inform the person or persons to whom unauthorized disclosures were made of
3 all the terms of this Order, and (d) request such person or persons to execute the
4 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

5 **10. FILING PROTECTED MATERIAL**

6 If a party intends to submit a pleading or motion that contains documents or
7 information of another party that has been designated “HIGHLY CONFIDENTIAL –
8 ATTORNEYS’ EYES ONLY,” the submitting party must file its pleading or motion under
9 seal, seek leave to file the aforementioned documents or information under seal, or
10 provide the other party with 24 hour notice of the intention to submit “HIGHLY
11 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information with the pleading or
12 motion. Such notice will expressly identify the specific “HIGHLY CONFIDENTIAL –
13 ATTORNEYS’ EYES ONLY” documents or information that will be submitted with the
14 pleading or motion. The purpose of this notice is to enable the parties to (1) meet-and-confer
15 regarding whether “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
16 documents or information will be filed under seal and (2) provide the party who designated
17 the documents or information “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
18 ONLY” with the opportunity to file a motion to file the documents or information under seal
19 in the event that the party submitting the pleading or motion declines to file a motion to file
20 the designated information or documents under seal. Absent a Court Order or agreement
21 from the Designating Party the filing party may not file the aforementioned documents with
22 the Court

23 **11. MOTIONS TO FILE DOCUMENTS UNDER SEAL**

24 Any motion to seal or otherwise restrict public access shall describe, at a minimum,
25 (a) the nature of the materials or proceedings at issue, (b) the legitimate private or public
26 interests which warrant the relief sought, (c) the clearly defined and serious injury that would
27 result if the relief sought is not granted, and (d) why a less restrictive alternative to the relief
28 sought is not available.

1 **12. FINAL DISPOSITION**

2 Unless otherwise ordered or agreed in writing by the Producing Party, within sixty
3 (60) days after the final termination of this action, each Receiving Party must return all
4 Protected Material to the Producing Party. As used in this subdivision, “all Protected
5 Material” includes all copies, abstracts, compilations, summaries or any other form of
6 reproducing or capturing any of the Protected Material, but not attorney work product. With
7 permission in writing from the Designating Party, the Receiving Party may destroy some or
8 all of the Protected Material instead of returning it. Whether the Protected Material is
9 returned or destroyed, the Receiving Party must submit a written certification to the
10 Producing Party (and, if not the same person or entity, to the Designating Party) by the sixty
11 (60) day deadline that identifies (by category, where appropriate) all the Protected Material
12 that was returned or destroyed and that affirms that the Receiving Party has not retained any
13 copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of
14 the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an
15 archival copy of all pleadings, motion papers, transcripts, legal memoranda, correspondence
16 or attorney work product, even if such materials contain Protected Material. Any such
17 archival copies that contain or constitute Protected Material remain subject to this Protective
18 Order as set forth in Section 4 (DURATION), above.

19 **13. MISCELLANEOUS**

20 13.1 Right to Further Relief. Nothing in this Order abridges the right of any person
21 to seek its modification by the Court in the future.

22 13.2 Right to Assert Other Objections. Each Party retains any right it has to object
23 to disclosing or producing any information or item on any ground not addressed in this
24 Protective Order. Similarly, each Party retains any right to object on any ground to use in
25 evidence of any of the material covered by this Protective Order.
26
27
28

1 STIPULATED AND AGREED:
2
3

4 /s/E. Scott Dosek
5 E. SCOTT DOSEK #012114
6 JOHN P. PASSARELLI #16018
7 KUTAK ROCK LLP
8 Suite 300
9 8601 North Scottsdale Road
10 Scottsdale, AZ 85253-2742
11 *Counsel for Plaintiff, Soilworks, LLC*

12 /s/ John M. Skeriotis
13 JOHN M. SKERIOTIS
14 BROUSE MCDOWELL
15 388 S. Main St.
16 Suite 500
17 Akron, OH 44311-4407
18 *Counsel for Defendant, Midwest*
19 *Industrial Supply, Inc.*

20 SO ORDERED:

21 Dated this 28th day of August, 2007.

22
23
24
25
26
27
28


David G. Campbell
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Protective Order that was issued by the United States District Court for the District of Arizona on _____ [date] in the case of Soilworks, LLC v. Midwest Industrial Supply, Inc., 2:06-CV-02141-DGC. I agree to comply with and to be bound by all the terms of this Protective Order and I understand and acknowledge that failure to comply could expose me to sanctions and punishment in the nature of contempt. I will not disclose in any manner any information or item that is subject to this Protective Order to any person or entity except in strict compliance with the provisions of this Order.

Date: _____

Printed Name: _____

Signature: _____