

1 Craig A. Marvinney, 0004951 (OH)  
 2 John M. Skeriotis, 0069263 (OH)  
 3 Jill A. Bautista, 0075560 (OH)  
 4 BROUSE MCDOWELL  
 5 388 S. Main Street, Suite 500  
 6 Akron, Ohio 44311-4407  
 7 Telephone: 330-535-5711  
 8 Facsimile: 330-253-8601  
 9 Email: [cmarvinney@brouse.com](mailto:cmarvinney@brouse.com),  
 10 [jskeriotis@brouse.com](mailto:jskeriotis@brouse.com),  
 11 [jbautista@brouse.com](mailto:jbautista@brouse.com)

12 *Admitted pro hac vice*

13 Donald L. Myles, Jr., 007464(AZ)  
 14 JONES, SKELTON & HOCHULI, P.L.C.  
 15 2901 N. Central Ave., Suite 800  
 16 Phoenix, Arizona 85012  
 17 Telephone: 602-263-1700  
 18 Facsimile: 602-263-1784  
 19 Email: [dmyles@jshfirm.com](mailto:dmyles@jshfirm.com)

20 *Attorneys for Defendant/Counterclaimant*  
 21 *Midwest Industrial Supply, Inc.*

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

24 SOILWORKS, LLC, an Arizona  
 25 corporation,  
 26  
 27 Plaintiff / Counterdefendant /  
 28 Counterclaimant,

v.

29 MIDWEST INDUSTRIAL SUPPLY, INC.,  
 30 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 FOR PARTIAL  
 SUMMARY JUDGMENT**

***ORAL ARGUMENT REQUESTED***

1 Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure and Local Rule 56.1 of  
2 the United States District Court for the District of Arizona, Midwest Industrial Supply, Inc.  
3 (“Midwest”) moves the Court to enter summary judgment in favor of Midwest and against  
4 Soilworks, LLC (“Soilworks”) as follows:  
5

6 (1) a declaration that Midwest’s U.S. Patents Nos. 7,074,266 (“Patent ‘266”) and  
7 7,081,270 (“Patent ‘270”) are valid for purposes of Count III of Midwest’s  
8 Counterclaims (declaratory judgment action for validity and infringement of  
9 Patent ‘270), Midwest’s Counterclaim to Soilworks’ Counterclaim (declaratory  
10 judgment action for validity and infringement of Patent ‘266), Count II of  
11 Soilworks’ Complaint (declaratory judgment action for invalidity and non-  
12 infringement of Patent ‘270), and Soilworks’ Counterclaim (declaratory  
13 judgment action for invalidity and non-infringement of Patent ‘266).  
14  
15

16 (2) a declaration that Soilworks is liable for the claims asserted by Midwest in  
17 Count I (federal trademark infringement, false designation, and unfair  
18 competition under Section 43(a) of the Lanham Act), Count II (false  
19 advertising under Section 43(a) of the Lanham Act), and Count IV (unfair  
20 competition under common law) of Midwest’s Counterclaims;  
21

22 (3) a declaration that Count IV (tortious interference with business relationship  
23 and expectancy under common law) and Count VI (unfair competition under  
24 common law) of Soilworks’ Complaint are preempted by federal patent law  
25 and therefore are dismissed; and  
26

27 (4) a declaration that Midwest is not liable for the claims asserted by Soilworks in  
28

1 Count I (false advertising under Section 43(a) of the Lanham Act), Counts IV  
2 and Count VI of Soilworks Complaint and, therefore, these Counts of the  
3 Complaint are dismissed.  
4

5 As supported by Midwest's accompanying *Statement of Material Facts* and explained  
6 more fully in Midwest's accompanying *Memorandum in Support of Motion for Summary*  
7 *Judgment*, there are no genuine issues of material fact relevant to any of these issues and the  
8 record evidence establishes that Midwest is entitled to declaratory judgment as a matter of  
9 law with respect to each of these issues.<sup>1</sup>  
10

11 By: /s/ Jill Bautista  
12 Craig A. Marvinney, 0004951 (OH)  
13 John M. Skeriotis, 0069263 (OH)  
14 Jill A. Bautista, 0075560 (OH)  
15 BROUSE MCDOWELL  
16 388 S. Main Street, Suite 500  
17 Akron, Ohio 44311-4407  
18 Telephone: 330-535-5711  
19 Facsimile: 330-253-8601  
20 Email: [cmarvinney@brouse.com](mailto:cmarvinney@brouse.com),  
21 [jskeriotis@brouse.com](mailto:jskeriotis@brouse.com),  
22 [jbautista@brouse.com](mailto:jbautista@brouse.com)

23 *Admitted pro hac vice*

24 Donald L. Myles, Jr., 007464 (AZ)  
25 JONES, SKELTON & HOCHULI, P.L.C.  
26 2901 N. Central Ave., Suite 800  
27 Phoenix, Arizona 85012  
28 Telephone: 602-263-1700

---

24 <sup>1</sup> For clarification, Midwest is not presently moving for a summary judgment  
25 determination on Soilworks' infringement of Midwest's Patent '266 and Patent '270 or on  
26 Soilworks' liability for Count V of Midwest's Counterclaim (unjust enrichment). Issues of  
27 damages and other appropriate relief as related to Counts I, II, and IV of Midwest's  
28 Counterclaims are also reserved by Midwest for trial or other dispositive procedure.  
Additionally, there is not a Count V set forth in Soilworks' Complaint and the Court  
previously ruled Count III of Soilworks' Complaint would be construed as part of Soilworks'  
Lanham Act claim (*see* March 5, 2007 Order Denying Motion to Dismiss, ECF #10).

Facsimile: 602-263-1784  
Email: [dmyles@jshfirm.com](mailto:dmyles@jshfirm.com)

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

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **MIDWEST INDUSTRIAL SUPPLY, INC.’S MOTION FOR PARTIAL SUMMARY JUDGMENT** has been electronically filed on this 9th day of May, 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. Bautisa  
Jill A. Bautista

Doc. No. 715138.2