

## **Exhibit 2**

**COURT REPORTERS**  
OF AKRON CANTON AND CLEVELAND

Transcript of the Testimony of  
**Robert W. Vitale**

**Taken On:** February 19, 2008  
**Case Number:** 2:06-CV-2141-DGC

**Case:** Soilworks, LLC, vs. Midwest Industrial Supply, Inc.,

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<p>1</p> <p style="text-align: center;">UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT OF ARIZONA</p> <p>SOILWORKS, LLC, an Arizona ) corporation, ) Plaintiff, )</p> <p style="text-align: center;">vs. )</p> <p>MIDWEST INDUSTRIAL SUPPLY, ) CASE NO. INC., an Ohio corporation ) 2:06-CV-2141-DGC authorized to do business ) ATTORNEYS' EYES in Arizona, ) ONLY PORTIONS Defendant. ) CONTAINED WITHIN</p> <p style="text-align: center;">- - -</p> <p>Deposition of ROBERT W. VITALE, a witness herein, called by the Plaintiff for Examination pursuant to the Federal Rules of Civil Procedure, taken before me, the undersigned, Binnie Purser Martino, a Registered Diplomat Reporter, Certified Realtime Reporter and Notary Public in and for the State of Ohio, pursuant to Notice and agreement of counsel at the law offices of Vorys, Sater, Seymour and Pease, LLP, First National Tower, 106 South Main Street, Suite 1100, Akron, Ohio, on Tuesday, the 19th day of February, 2008, commencing at 9:50</p>	<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>3</p> <p style="text-align: center;">INDEX</p> <p>EXAMINATION (By Mr. Dosek) 4</p> <p>Plaintiff's Exhibit 1 4</p> <p>Plaintiff's Exhibits 2 and 3 70</p> <p>Plaintiff's Exhibit 4 77</p> <p>Plaintiff's Exhibit 5 84</p> <p>Plaintiff's Exhibit 6 85</p> <p>Plaintiff's Exhibit 7 87</p>
<p>2</p> <p>1 o'clock a.m.</p> <p>2 ---</p> <p>3</p> <p>4 <b>APPEARANCES:</b></p> <p>5</p> <p>6 On Behalf of the Plaintiff:</p> <p>7 KUTAK ROCK LLP</p> <p>8 BY: E. Scott Dosek, Attorney at Law</p> <p>9 Suite 300</p> <p>10 8601 North Scottsdale Road</p> <p>11 Scottsdale, Arizona 85253-2742</p> <p>12 480/429-5000</p> <p>13</p> <p>14 On Behalf of the Defendant:</p> <p>15 BROUSE McDOWELL</p> <p>16 BY: John M. Skeriotis Attorney at Law</p> <p>17 388 South Main Street, Suite 500</p> <p>18 Akron, Ohio 44311-4407</p> <p>19 330/535-9999</p> <p>20 ---</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>4</p> <p>1 (Thereupon, Plaintiff's Exhibit 1 of</p> <p>2 the R. W. Vitale deposition was marked</p> <p>3 for purposes of identification.)</p> <p>4 ROBERT W. VITALE</p> <p>5 of lawful age, a witness herein, having been</p> <p>6 first duly sworn, as hereinafter certified,</p> <p>7 deposed and said as follows:</p> <p>8 EXAMINATION</p> <p>9 <b>BY MR. DOSEK:</b></p> <p>10 Q. State your full name, please.</p> <p>11 A. Robert William Vitale.</p> <p>12 Q. You are not related to Dick, are you?</p> <p>13 A. No.</p> <p>14 Q. You have probably never been asked that</p> <p>15 before, have you?</p> <p>16 A. No.</p> <p>17 Q. Sir, what is your date of birth?</p> <p>18 A. August 31st, '42.</p> <p>19 Q. Have you ever had a deposition taken</p> <p>20 before?</p> <p>21 A. I have.</p> <p>22 Q. How many times?</p> <p>23 A. Five.</p> <p>24 Q. When is the last time?</p> <p>25 A. About, I think, three years ago.</p>	

<p style="text-align: right;">89</p> <p>1 Q. Okay. So I will back up to one of your  2 first answers, the MSDS --  3 A. Right.  4 Q. -- provided you with information that led  5 you to a conclusion that their Durasoil product  6 infringes the '270 patent?  7 MR. SKERIOTIS: Objection.  8 THE WITNESS: That it could  9 infringe, yeah.  10 BY MR. DOSEK:  11 Q. So maybe it does, maybe it does not?  12 MR. SKERIOTIS: Objection.  13 THE WITNESS: That is true, yeah.  14 BY MR. DOSEK:  15 Q. What additional information would you need  16 to have to conclude with certainty one way or  17 another?  18 A. A list of ingredients.  19 Q. Have you seen the list of ingredients for  20 the Durasoil product that was produced by  21 Soilworks in this lawsuit?  22 A. I don't recall, no.  23 Q. Do you recall having seen a list of  24 ingredients in any other context of the Durasoil  25 product?</p>	<p style="text-align: right;">91</p> <p>1 this is interrogatory number 2 of this set, but  2 it is number (16) overall in the lawsuit.  3 A. Oh.  4 Q. We put that in there because the rules  5 include limits to the number of interrogatories  6 that we can ask.  7 In any event, referring to interrogatory  8 number 2, it asks, "Each and every Soilworks  9 product you claim infringes." And your answer  10 there is, "At least the Durasoil product."  11 Correct?  12 A. Correct.  13 Q. Are you aware of any other Soilworks  14 product which you believe infringes the '270  15 patent?  16 A. No.  17 Q. Then interrogatory number 2 goes on to ask  18 the specific reasons why you believe any  19 infringement exists, including the scope of any  20 claimed infringement and the manner in which any  21 such products infringe the patent.  22 And your answer to that question is, "Based  23 upon the publicly available information of  24 Plaintiff's Durasoil product, excluding any  25 alleged 'proprietary ingredients,' the publicly</p>
<p style="text-align: right;">90</p> <p>1 A. No.  2 Q. Okay.  3 A. There have been your responses in one of  4 these documents in which you responded about  5 ingredients.  6 Q. Okay. Well, I guess what I am getting at  7 is, based upon your reading of the Material  8 Safety Data Sheet and Soilworks' description of  9 the ingredients in its Durasoil product, have  10 you been able to conclude one way or another if  11 you believe that the Durasoil product infringes  12 patent '270?  13 MR. SKERIOTIS: Objection.  14 THE WITNESS: If we take the  15 information that was provided us in answer to  16 one of our lists of questions, that would  17 indicate that it does not infringe.  18 BY MR. DOSEK:  19 Q. Okay. Interrogatory number 2, which begins  20 towards the top of page 3 of Exhibit 7, do you  21 see that?  22 A. Yes.  23 Q. And by the way, just for clarification,  24 number (16) in parentheses refers, again, refers  25 back to the first set of interrogatories. So</p>	<p style="text-align: right;">92</p> <p>1 available information is included within the  2 elements of at least one independent claim." Do  3 you see where I am reading there?  4 A. Yes.  5 Q. And I read that correctly, didn't I?  6 A. Correct.  7 Q. The term "independent claim," refers to an  8 independent claim of the '270 patent, correct?  9 A. I don't know. I mean, I don't quite  10 understand the actual meaning of what you have  11 just read.  12 Q. Okay. Turn, please, to page 6 of the  13 exhibit, and I am going to direct your attention  14 to interrogatory number 7. Okay?  15 A. Yes.  16 Q. And it may be necessary for us to dig into  17 Binnie's pile there. Interrogatory number 7  18 asks, "Please state each and every fact upon  19 which you rely in support of your allegation in  20 paragraph 18 of your counterclaims that  21 Soilworks has used and continued to use one or  22 more of Midwest's marks in commerce without  23 Midwest's authorization. Please state which of  24 Midwest's marks are allegedly to be used by  25 Soilworks and how it is alleged that Soilworks</p>